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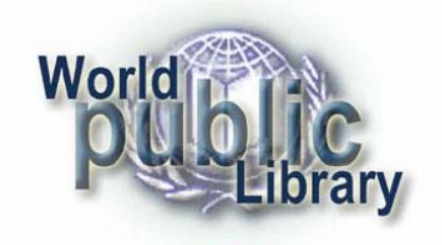

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A

DIGEST OF INDIAN LAW CASES

CONTAINING

HIGH COURT REPORTS, 1862—1909;

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, 1836—1909,

WITH AN INDEX OF CASES,

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

B. D. BOSE,

OF THE INNER TEMPLE, BARRISTER-AT-LAW; ADVOCATE OF THE HIGH COURT, CALCUTTA; AND EDITOR OF THE INDIAN LAW REPORTS, CALCUTTA SERIES.

IN SIX VOLUMES.

VOLUME II: D—I.

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A DIGEST

OF

THE HIGH COURT REPORTS,

1862-1909,

AND OF

THE PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA,

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See CHARGE—ALTERATION OR AMENDMENT OF CHARGE. **I. L. R. 17 Bom. 369**

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1. ——— Definition of—*Plunder.* The definition of dacoity in the Penal Code is so wide as to extend to what would have been treated as cases of plunder under the old law. QUEEN *v.* KHOYRAT ALLY BEG . . **3 W. R. Cr. 60**

2. ——— *Elements of offence.* In a case of dacoity, the Judge should direct the jury to convict only if they find that all the prisoners had the intention of causing wrongful loss to the prosecutor or wrongful gain to themselves. QUEEN *v.* BONOMALY GHOSE
W. R. 1864. Cr. 8

3. ——— House-breaking by night. Five men armed were discovered committing an act of house-breaking by night. One of the party was

engaged in cutting a hole through the wall, while the others stood on guard. When the alarm was given the neighbours ran up, and one of the robbers cut down one of the villagers. *Held*, that the crime of which they were guilty was house-breaking by night, and not dacoity. QUEEN *v.* REWAT RAJWAR . . . **W. R. 1864, Cr. 39**

4. ——— Participators in dacoity—*Persons found in possession of property.* When persons are found within six hours of the commission of a dacoity with portions of the plundered property in their possession, the presumption of law is that they are participators in the dacoity, and not merely receivers. QUEEN *v.* CASSY MULL
3 W. R. Cr. 10

QUEEN *v.* MOTEE JOLAHA . **5 W. R. Cr. 66**

5. ——— Taking away produce in good faith under colour of right. Where the offence that was alleged to have been committed consisted of acts done under a claim of right in good faith entertained by the accused, however erroneously, a criminal charge cannot be sustained. Where, pending a dispute between the accused and another person concerning the melwaram of a village, she removed, or caused her servants to remove, the produce, a charge of dacoity could not be sustained. *Ex parte* KARAKAR NACHIER
3 Mad. 254

6. ——— Robbery with violence—*Penal Code, s. 395—Causing fear of hurt.* When a body of men attack and plunder a house, the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced an entrance does not take that offence out of the purview of s. 395 of the Penal Code. It is sufficient, for the application of the section, that the robbers cause or attempt to cause the fear of

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DACOITY—*contd.*

instant hurt or of instant wrongful restraint. QUEEN *v.* KISSOREE PATER . **7 W. R. Cr. 35**

7. ——— Assembly for purpose of committing dacoity—*Admission.* Case of an unlawful assembly, the members of which were held guilty of an offence under s. 402 of the Penal Code, on their own admission that they not only knew that the assembly was an assembly for the purpose of committing dacoity, but also that all the persons (including themselves) constituting the assembly lived on the proceeds of dacoity, and had no other means of living. QUEEN *v.* KENDRA KAMAR **7 W. R. Cr. 97**

8. ——— Gang of dacoits—*Penal Code, s. 400.* It is necessary, in order to establish a charge under s. 400, Penal Code, that the prosecution should make out that there existed at the time specified a gang of persons associated together for the purpose of habitually committing dacoity, and that the accused was one of the gang. QUEEN *v.* MOOKTARAM SIRDAR . . **23 W. R. Cr. 18**

9. ——— Habitual commission of dacoity and robbery—*Penal Code, s. 400.* To support a conviction under s. 400 of the Penal Code, evidence must be given of the existence of a gang of persons, of their association, and association for the purpose of habitually committing dacoity and robbery. EMPRESS *v.* NABA KUMAR PATNAIK **1 C. W. N. 146**

See MANKURA PASI *v.* QUEEN-EMPRESS **I. L. R. 27 Calc. 139**

10. ——— Forcible removal of cows by Hindus from the possession of Mahomedans—*Penal Code, s. 395—Rioting.* Where a large body of Hindus, acting in concert and apparently under the influence of religious feeling, attacked certain Mahomedans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such cattle to their lawful owners:—*Held*, that the offence of which the Hindus were guilty was dacoity under s. 395 of the Indian Penal Code, and not merely riot. QUEEN-EMPRESS *v.* RAM BARAN . . **I. L. R. 15 All. 299**

11. ——— Dacoity with murder—*Penal Code (Act XLV of 1860), ss. 395 and 396—Facts necessary to constitute the offence.* In order to support a conviction under s. 396 of the Penal Code, it is necessary to establish, not only that the person accused under that section was committing dacoity conjointly with others, but it must be shown that the murder was committed in his presence. Hence where certain persons were shown to have been concerned in a dacoity in the course of which murder was committed, but it was not shown that they were in the house in which the dacoity was committed at the time the murder took place, and the evidence, if anything, pointed to a contrary conclusion, it was *held*, that the accused could not properly be convicted under s. 396, but only under s. 395, of the Penal Code. QUEEN-EMPRESS *v.* UMRAO SINGH **I. L. R. 16 All. 437**

12. ——— *Dacoity with murder—Penal Code (Act XLV of 1860), ss. 395, 396—Ingredients necessary to constitute the offence—Causing of death or hurt, etc., not for the purpose of committing theft.* The first essence of an offence under s. 396 of the Penal Code is that the dacoity is the joint act of the persons concerned, and the second essence of the offence is that the murder is committed in the course of the commission of the dacoity in question. The essence of the offence of robbery involved in the offences under ss. 395 and 396 is that the offender for the end of committing theft or carrying away or attempting to carry away properties obtained by theft, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. When several persons are found to have attacked and assaulted some other person or persons, not for the purpose of carrying out the object of looting property, but quite independently of it, the main element which constitutes the offence under s. 395, read with s. 396, Indian Penal Code, is wanting, and there can be no conviction of the accused for that offence. KING-EMPEROR *v.* MATHURA THAKUR (1901) **6 C. W. N. 72**

13. ——— Dacoity in the course of which murder is committed—*Penal Code (Act XLV of 1860), s. 396—Facts necessary to establish the offence.* When in the commission of a dacoity murder is committed, it matters not whether the particular dacoit charged under s. 396 of Act XLV of 1860 was inside the house where the dacoity is committed or outside the house, or whether the murder was committed inside or outside the house so long only as the murder was committed in the commission of that dacoity. *Queen-Empress* v. *Umrao Singh, I. L. R. 16 All. 437*, distinguished. QUEEN-EMPRESS *v.* TEJA . . **I. L. R. 17 All. 86**

14. ——— Using deadly weapon in dacoity or robbery—*Penal Code (Act XLV of 1860), s. 397.* A conviction, under s. 397 of the Penal Code, of using a deadly weapon whilst engaged in the commission of robbery or dacoity is equally good, whether the number of thieves be five or under. QUEEN *v.* DWARKA AHEER **2 W. R. Cr. 49**

15. ——— Commission of grievous hurt in the course of a dacoity—*Penal Code (Act XLV of 1860), ss. 397, 34—Person liable under s. 34, liable also under s. 397. Held*, that the words "such offender" in s. 397 of the Indian Penal Code include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34 of the Code. QUEEN-EMPRESS *v.* MAHABIR TIWARI **I. L. R. 21 All. 263**

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DACOITY—*concld.*

16. ——— **Attempt**—*Penal Code (Act XLV of 1860), ss. 397, 511—Attempt to commit dacoity—Use of arms in endeavouring to effect escape—Conviction under what section to be recorded.* Where several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested: *Held*, that they could not properly be convicted under s. 397, read with s. 511, of the Indian Penal Code. *Queen* v. *Koonee, 7 W. R. Cr. 48*, referred to. QUEEN-EMPRESS *v.* BENI (1900) . . . **I. L. R. 23 All. 78**

17. ——— ——— *Penal Code (Act XLV of 1860), s. 402—Assembling for the purpose of committing dacoity—Evidence.* Several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. *Held*, that these persons were rightly convicted under s. 402 of the Indian Penal Code of assembling together with intent to commit dacoity. *The Deputy Legal Remembrancer* v. *Karuna Baistobi, I. L. R. 22 Calc. 164; Balmakand Ram* v. *Ghansam Ram, I. L. R. 22 Calc. 391;* and *Queen-Empress v. Papa Sani, I. L. R. 23 Mad. 159*, referred to. QUEEN-EMPRESS *v.* BHOLU (1900) **I. L. R. 23 All. 124**

18. ——— **Possession of stolen property**—*Penal Code (Act XLV of 1860), ss. 395, 411—Charges of dacoity and receiving stolen property—Charge to jury—Possession of stolen property—Misdirection.* On the trial of an accused before a Judge and jury at a Court of Session, for dacoity and receiving stolen property, the Judge, in his charge to the jury, directed them that the fact of a stolen shirt having been found in possession of the accused two months after the dacoity, was sufficient to justify them in convicting the accused of the dacoity. *Held*, on appeal, that this was a misdirection. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury, and should not have been put to them in the positive way which the Judge adopted. GUZZALA HANUMAN *v.* EMPEROR (1902) **I. L. R. 26 Mad. 467**

DAMAGE.

——— **special**—

See JURISDICTION OF CIVIL COURT—PUBLIC WAYS, OBSTRUCTION OF.

See RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY.

——— **threatened**—

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY . **I. L. R. 24 Calc. 260**

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See BENGAL TENANCY ACT, s. 68. **9 C. W. N. 122**

See CARRIERS AND CARRIERS ACT, s. 6.

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I. L. R. 29 All. 228

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I. L. R. 32 Calc. 429

1. SUITS FOR DAMAGES.

(*a*) BREACH OF CONTRACT.

1. **——— Breach of contract to put lessee in possession.** A suit will lie for damages sustained by a lessee by his lessor's breach of contract to put him in possession of a portion of the property of which he granted the lease. FIREENGEE SINGH *v.* AHMED HOSSEIN . **7 W. R. 22**

2. ——— *Liability to repay consideration-money—Cause of action.* Defendants for a consideration granted to plaintiffs a lease of certain churs, which were an accretion to a zamindari, and had been in possession of Government, but were at the time under temporary settlement with the defendants. Subsequently defendants sold their zamindari to a third party, reserving to themselves the chur. Ultimately it was ordered by the Commissioner of Revenue that the churs should be settled, not with defendants, but with the purchasers (the third party), as appertaining to the zamindari. Defendants, having thus become unable to give plaintiffs possession, were sued for a refund of the premium or consideration-money

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

Held, that it was the duty of the defendants to take steps to call in question the decision of the Commissioner, and that their manager's admission of their liability to repay the premium with interest put an end to any claim for damages for the original breach of contract, and constituted a fresh cause of action from which limitation ran. BROJO NATH PAUL CHOWDHRY *v.* BIMOLA SOONDUREE DOSSIA . . . . . **15 W. R. 298**

3. ——— **Suit by partner of lessee for illegal ejectment where he was not a party to the contract of lease.** Where a person becomes surety for the due performance by the lessee of the obligations contained in a lease for a term of years, and afterwards became a partner with the lessee, and the lessor ejected the lessee before the expiration of the lease:—*Held*, that a suit would lie by the surety for damages arising from the illegal ejectment, although the surety was not a party to the original contract with the lessor. BURRODA KANT ROY *v.* RAM TUNNOO BOSE **7 W. R. P. C. 51**

S.C. BURDAKANTH ROY *v.* ALUK MUNJOOREE DASSIAH . . . **4 Moo. I. A. 321**

4. ——— **Tenant's right to compensation for eviction**—*Acquisition of land.* Government took for public purposes a quantity of land, which included four cottahs leased by *M* to plaintiff as the site of an iron foundry. Proceedings with a view to compensation were duly laid, pursuant to Act VI of 1857, and the arbitrators awarded a sum for the whole land and premises, of which sum they gave plaintiff a small part, and the rest to *M*. Plaintiff, who did not appear before the arbitrators, brought a suit to reimburse himself for loss sustained by having been turned out of his holding, and deprived of the machinery, etc., of his foundry. *Held*, that *M* as lessor was not answerable for plaintiff's eviction, or for damages on any other ground. MINTO *v.* KALEE CHURN DOSS . **8 W. R. 327**

5. ——— **Neglect of tenants to pay road cess or public works cess**—*Beng. Act X of 1871, s. 25—Beng. Act VIII of 1869, s. 44.* Tenants are liable in damages for neglect to pay road and public works cesses. SARODA PROSAD GANGOOLY *v.* PROSUNNO COOMAR SANDIAL **I. L. R. 8 Calc. 290 : 10 C. L. R. 223**

6. ——— **Breach of contract in completing purchase**—*Earnest-money, right to recover.* *D* contracted to sell to *P* a piece of land for R4,500, of which he received R700 as earnest-money. A contract was drawn up, by which *D* agreed to execute and register a bill of sale, and deposit a part (R1,800) of the price, and *P* was to execute a bond for R2,000, to bear interest conditioned for the payment of that sum by a fixed date, the transaction to be completed within a specified period. *D* was ready and willing to perform his part of the contract by the time named, but finding that *P* would not complete the purchase, but demanded back the earnest-money, he sold the property to a third party for R3,800. *P* then sued to recover the earnest-money and damages. *Held*, that *P* was bound to show that the circumstances were such as to give him an equitable right to have back the earnest-money, and that, had it not been deposited, *D* could have justly sued for damages to the extent of the loss incurred by the second sale, and therefore *P* was not entitled to recover the R700. RAJCOOMAR ROY CHOWDHRY *v.* DEBENDRONARAIN ROY **15 W. R. 41**

7. ——— **Contract for sale of immoveable property**—*Breach of such contract—Damages—Costs of suit—Title to be made by vendor.* On the 8th October 1884, the defendant, who was executrix of one *M*, contracted to sell to the plaintiff a house in Bombay for R5,351; the contract to be completed within two months. The plaintiff paid R500 as earnest-money at the date of the contract, and the remainder of the purchase-money was to be paid on the execution of the conveyance. In October, November, and December, the plaintiff's solicitors applied to the defendant for the title-deeds, in order that the conveyance might be prepared; and on the 6th December, the defendant through her solicitors replied that she was ready and willing to execute the conveyance, but could not find the title-deeds. The plaintiff's solicitor then requested to be furnished with an abstract of title, or a statement of the defendant's title to the house, and then they would consider what could be done. No reply to this letter being received, they wrote again on the 10th December 1884, stating that the time for completing the contract had expired; and giving formal notice that, if the defendant did not send the abstract or statement of title within two days, proceedings would be taken to compel specific performance and to recover damages. In reply to this letter, the defendant's solicitors wrote on the 11th December 1884, stating that the defendant had searched for the title-deeds, but had been unable to find them, but that, as soon as they were found, they would be handed over. In the meantime, they were instructed to state that the property was mortgaged to *M* (of whose will the defendant was executrix) and one *K*; that *K* had agreed to convey the property in question to the defendant; and that the deed of conveyance was being prepared. They further stated that, if the plaintiff wished to accept a conveyance without the old title-deeds, the defendant was willing to indemnify him against all claims to the property; but if he was not prepared to do so, the defendant was willing to pay back the earnest-money to him and to rescind the contract. On the 13th December 1884, the plaintiff's solicitors wrote that they could not advise the plaintiff

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

to take the mere conveyance offered, but if the defendant would deposit the purchase-money in a bank in the joint names of the plaintiff and defendant until the title-deeds were found, the plaintiff would complete the purchase at once. They further stated that the plaintiff declined to rescind the contract, and would hold the defendant responsible for loss and costs incurred by the delay. Further correspondence ensued, and a suit was filed on the 20th February 1885 praying for specific performance and R500 damages, or that the defendant should pay to the plaintiff the sum of R2,500 damages, and refund the R500 earnest-money. It subsequently transpired that the title-deeds were with *K*, the co-mortgagee, and they were set forth in the defendant's affidavit of documents filed in July 1885. The defendant, after the suit was filed, sold the property to one *J*, and *K*, the co-mortgagee, joined in the conveyance to him. *Held*, that the case was governed by *Flureau* v. *Thornhill, 2 W. Bl. 1070*, and *Bain* v. *Fothergill, 7 Eng. & Ir. Ap. 268*, and that the plaintiff could not recover damages for the loss of his bargain. The defendant had offered to do all that lay in her power to carry out her contract, and the case of *Engell* v. *Fitch, L. R. 4 Q. B. 659*, did not apply. PITAMBER SUNDARJI *v.* CASSIBAI **I. L. R. 11 Bom. 272**

8. ——— Rights of renter of abkari farm—*Madras Abkari Act (Madras Act III of 1864), s. 6—Right of Collector to close shops included in the renter's contract—Collector's orders modified by Board of Revenue.* The plaintiff rented from Government an abkari farm, on terms which reserved certain powers of control to the Collector, and obtained a license under the Abkari Act. He did not manage the shops in the contract area himself, nor obtain separate licenses for their management by others. The Collector made orders which were subsequently modified by the Board of Revenue, directing the closing of certain shops which the plaintiff had sublet and directing that others should not be opened. It was found that the Collector's orders were not in excess of the powers reserved to him under the contract, and that they had not been issued arbitrarily or otherwise than in good faith. In a suit for breach of contract and for damages occasioned to the plaintiff by these orders:—*Held* the plaintiff was not entitled to recover SECRETARY OF STATE FOR INDIA *v.* CHOYI . . **I. L. R. 14 Mad. 82**

9. ——— Breach of covenants for title—*Voluntary settlement—Consideration.* Though, under the English law, damages may be recovered for breach of covenants for title contained in a voluntary settlement of such a character as to be ineffectual without the assistance of a Court of equity, and which assistance a Court of equity would refuse to a volunteer, yet this depending on the principle of English law, that a document sealed and delivered imports consideration, which principle does not hold as between Hindus, it is open to a defendant to show that the plaintiff is suing on a contract for which there was no consideration other than natural love and affection, which cannot be made the ground of a suit for damages. RAJU BALU *v.* KRISHNARAV RAMCHANDRA . . . **I. L. R. 2 Bom. 273**

10. ——— Refusal to deliver up child under order of Court—*Civil Procedure Code, 1859, s. 192.* S. 192, Act VIII of 1859, only applied to suits for damages for breach of contract, and did not authorize damages for refusal of a mother to comply with an order of Court to deliver up her daughter. RAJ BEGUM *v.* REZA HOSSEIN **[2 W. R. 76**

11. ——— Omission to sue on bond pledged as security. *Held*, that a suit will not lie for damages against the holder of a bond pledged as security for his omission to sue on that bond within the period of limitation. MAKUND LALL *v.* RAGHOPUT DOSS . . . **2 Agra 83**

12. ——— Breach of contract not to sell to stranger—*Co-sharers—Specific penalty.* When one of two co-sharers in a property violates a secret engagement between them by selling to a stranger, the other cannot claim a specific penalty, but has his remedy in an action for damages. TOSODOOK HOSSEIN *v.* MEAJAN **W. R. 1864, 337**

13. ——— Sale of estate on default of some co-sharers in payment of revenue—*Suit by co-sharer for damages by sale at inadequate price.* A suit will not lie between joint owners of an undivided estate for damages sustained by the plaintiff, by the sale of the estate at an inadequate price, in consequence of the default of the defendants in paying their share of the Government revenue. ODOIT ROY *v.* RADHA PANDEY **7 W. R. 72**

14. ——— *Joint undivided proprietor—Co-sharer.* No suit for damages as between joint owners on undivided estates will lie in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue. LALLAH RAMESSHUR SINGH *v.* LALLAH BISSEN DOYAL **I. L. R. 1 Calc. 406 : 25 W. R. 150**

15. ——— False representation—*Breach of contract—Husband signing bond for wife without authority—Cause of action.* Where a husband writes and signs a bond in the name of his wife, there is a tacit or implied contract by him that he had authority to do so. If he had not authority, his conduct amounts to misrepresentation, and the obligee may sue for damages for breach of contract or for false representation. ANONYMOUS . . . . **18 W. R. 249**

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

16. ——— Non-attendance at feast after accepting invitation—*Suit for price of unconsumed food.* Persons accepting an invitation to an entertainment at their neighbour's house and afterwards failing to attend cannot be held liable to a suit for damages for the price of the food unconsumed on account of their absence. KALAI HALDAR *v.* KYAMUDDI . . . **23 W. R. 417**

17. ——— Suit after criminal prosecution—*Cheating—Return of money by Criminal Court as compensation.* Defendant, having contracted to sell two boats to plaintiff for R64, received the consideration-money, but did not deliver the boats to the plaintiff, who prosecuted him for cheating in the Criminal Court. The Magistrate convicted him of cheating, and ordered the money which had been obtained by it to be returned to plaintiff. Plaintiff then sued in the Small Cause Court for the value of the boats and for damages for non-delivery of the boats. *Held*, that the suit would not lie. PROHLAD TEWAR MANJEE *v.* DEB NARAIN GHOSE . . . **18 W. R. 247**

18. ——— Agreement to purchase—*Notice—Agreement to purchase—Failure to do so.* In an agreement made by the defendant with the plaintiffs, it was expressly and unconditionally provided that, on his failure to pay the consideration-money and complete the purchase by the date fixed, it should be open to the plaintiffs to sell the property to a third person. The defendant having failed to perform the agreement, plaintiffs sold the property to a third person, and sued the defendant for recovery of damages, calculated on the difference between the price at which he had agreed to purchase and the price at which they ultimately sold. *Held*, that the suit was maintainable, without a notice to the defendant calling upon him to fulfil his part of the contract and intimating that on his failing to do so they would sell the property. TUKUN SINGH *v.* HONUMAN DAS (1902) . **7 C. W. N. 108**

19. ——— Executory contract—*Municipality—Bombay District Municipal Act Amendment Act (Bom. Act II of 1884), s. 30—Breach of executory contract—Binding character.* In a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff. AHMEDABAD MUNICIPALITY *v.* SULEMANJI ISMALJI (1903) . . . **I. L. R. 27 Bom. 618**

20. ——— Proof—*Proof of inferiority of quality—Examination of samples from portions of bulk—Method of ascertaining damages—Method established and recognized in the trade.* In a suit for damages by a purchaser of goods on the ground of their being below the guaranteed standard of quality, if it is clear from the evidence that such is not the usage, it is not necessary for the plaintiff to prove the alleged inferiority in quality by an examination of the entire bulk : an examination of a fair number of samples taken from different portions of the bulk is sufficient for the purpose. In a case of this class, if the method of ascertaining damages appears to be established and recognized in the trade, the plaintiff need not show how he has dealt with the goods delivered to him, and whether he has suffered any and what loss by reason of the goods not being up to the warranted standard. BOISOGOMOFF *v.* NAHAPIET JUTE COMPANY (1902)

I. L. R. 29 Calc. 323 ; s.c. 6 C. W. N. 495

21. ——— Continuous cause of action—*Agreement—Restraint of trade—Contract Act (IX of 1872), ss. 23 and 27—Transfer of business to a limited Company—Effect. Held*, that whether or not a High Court in India could award damages in respect of a continuing cause of action, up to the date of its decree, subsequent successive accruals of an obligation to contribute to a fund could not be treated as falling within that description, and could not be awarded in a suit where they had accrued due subsequently to its institution. FRASER AND COMPANY *v.* THE BOMBAY ICE MANUFACTURING COMPANY (1905)

I. L. R. 29 Bom. 107

22. ——— License to work in forest—*Damages, suit for—Breach of contract—Construction of contract—Verbal agreement, contemporaneous—Evidence Act (I of 1872), ss. 91 and 92, proviso (2).* One of two defendants in consideration of advances made to him by the plaintiff for the purpose of paying the cost of obtaining the lease of a forest in the name of his son, the other defendant, made an agreement with the plaintiff that "when my son returns I will make him to arrange for you in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained." The son was not a party to the agreement. *Held*, in a suit for damages for breach of contract in not giving the working of the forest to the plaintiffs, that on its true construction the agreement contemplated the making of a contract for working the forest only on the return of the son and left all terms to be then arranged ; and the plaintiff was entitled only to recovery of the advances with interest. An alleged contemporaneous verbal arrangement as to the rates the plaintiff was to pay for working the forest was *held* not to be proved ; and *quære*, whether, if proved, evidence of it would have been admissible with reference to s. 91 of the Evidence Act. MAUNG SHWE OH *v.* MAUNG TUN GYAW (1903)

I. L. R. 32 Calc. 96
s.c. 9 C. W. N. 147
L. R. 31 I.A. 188

23. ——— Carriers—*Contract to carry partly by river and partly by land—Liability of carriers—Damages—Divisible contract—Carriers Act (III of 1865), ss. 3 to 5, 8—Railways*

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*concld.*

Act (IX) of 1890, s. 75—Excepted articles—Misdescription of goods. In a suit for damages for loss of goods carried partly in steamers of one company and partly by trains of another, the plaintiff failed to declare the value and description of the goods as required under the provisions of the Carriers Act and the Railways Act:—*Held*, that so far as the journey is by river, the Steamer Company is entitled, as regards the acts of its agents and servants, to the protection afforded by the provisions of the Carriers Act, and so far as the journey is by rail, it is similarly entitled to claim the protection afforded by the Railways Act. *Le Conteur* v. *The London and South-Western Railway Company, L. R. 1 Q. B. 54*, and *Baxendale* v. *The Great Eastern Railway Company, 38 L. J. Q. B. 137*, referred to. NARANG RAI AGARWALLA *v.* RIVERS STEAM NAVIGATION COMPANY, LD. (1907) **I. L. R. 34 Calc. 419**

24. ——— Wrongful dismissal—*Damages, suit for—Calcutta Municipal Act (Beng. III of 1899), ss. 15, 63 to 65—Chairman, power of, to appoint officers on salaries below R200—General Committee, annual sanction by—Ultra vires.* The provisions of s. 15 of the Calcutta Municipal Act do not apply to the appointment of municipal officers and servants whose appointments are expressly provided for by Chapter VI of the Act. Under s. 65 of the Act the Chairman may appoint officers and servants on a salary below R200 a month, but such appointment is subject to an annual sanction by the General Committee; any appointment made outside the terms authorised by the section is *ultra vires*. KEDAR NATH BHANDARY *v.* THE CORPORATION OF CALCUTTA (1907) **I. L. R. 34 Calc. 863**

(*b*) TORT.

25. ——— Damage by wrongful act—*Malice—Injury to legal right.* In the case of damage occasioned by a wrongful act,—*i.e.*, an act which the law esteems an injury,—the same remedy by action lies against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by the order of Government. Malice is not a necessary ingredient to the maintenance of the action. It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some legal right: merely that it will, however directly, do him harm in his interests, is not enough. ROGERS *v.* RAJENDRO DUTT **2 W. R. P. C. 51: 8 Moo. I. A. 103**

26. ——— Abetment of tort—*Damages for wrongful taking of moveable property.* In actions of wrong, those who abet the tortious acts are equally liable with those who commit the wrong. Regard being had to the constitution of the Courts of this country, which are Courts of justice, equity, and good conscience, a decree-holder should be reimbursed damages for the time during which he is kept out of possession by the wrongful act of another party, whether his claim for subsequent damages be made in the execution of the first decree or in a regular suit. Where a decree is for the delivery of moveable property and states the amount to be paid as an alternative if delivery cannot be had, the goods must be delivered if capable of delivery, but if not capable of delivery, then assessed damages should be paid. KASHEE NATH KOOER *v.* DEB KRISTO RAMANOOJ DASS . . . . **16 W. R. 240**

27. ——— Suit for damages after decree declaring act wrongful. A suit will not lie for damages apart from the cause of action out of which the damages arises. MAHOMED ABOO *v.* LALLA BISSESSUR DYAL . **21 W. R. 154**

28. ——— Suit brought without reasonable or probable cause—*Taking up suit after its institution.* In the case of a suit brought without any reasonable or probable cause, where a third party came into the suit and carried it on from the very first,—that it to say, while an application to sue *in forma pauperis* was pending,—the intervenor's conduct was held to amount to causing the suit to be instituted as well as to carrying it on, and he was held liable to damages for its institution. GOLAB CHAND NOWLUCKHA *v.* JEEBUN COOMAREE BIBEE . . . . . **24 W. R. 437**

29. ——— Order made by Magistrate without jurisdiction on bonâ fide application—*Liability for damages.* No man, acting with good faith, and believing that he has a ground for doing so, should be held liable because, upon his application, a Magistrate makes an order which, it afterwards turns out, ought not to have been made. Where certain inhabitants of a village which was flooded applied to the Magistrate to open a bund and let out the water, and the Magistrate without jurisdiction made an order that the bund should be cut, and the bund was cut by police officers: *Held*, that the applicants were not liable for damages. PUREEAG SINGH *v.* JOGESSUR SUHAYE **8 W. R. 111**

30. ——— Order of Magistrate as to nuisance—*Injury caused by order—Criminal Procedure Code (Act XXV of 1861), s. 308.* Where a Magistrate has made an order under s. 308 of Act XXV of 1861, the party aggrieved thereby cannot sue the parties who instituted the proceedings before the Magistrate for damages, unless he can show that, in taking such proceedings, they were actuated by malicious motives against him, or intended wrongfully to injure him. CHINTAMONI BAPOOLEE *v.* DIGAMBER MITTER **2 B. L. R. S. N. 15 s.c. 10 W. R. 409**

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

HARAPRASAD ROY CHOWDHRY *v.* DIGAMBER MITTER . . . . **2 B. L. R. S. N. 15**

31. ——— Damages caused by civil action—*Costs—Malicious suit.* No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause: nor will an action lie to recover costs awarded by a Civil Court. SHIVSHANKAR *v.* GOVINDLAL PARBHUDAS **I. L. R. 1 Bom. 467**

32. ——— Wrongful distraint of cattle—*Cattle Trespass Act, III of 1857, s. 14—Suit where remedy under Act is barred.* Where a person whose cattle have been illegally distrained fails to take advantage of the remedy provided by s. 14, Act III of 1857, he is not thereby prohibited from bringing an action for damages in a Civil Court. NOMAZ MOLLAH *v.* LALL MOHUN TAGADGEER **15 W. R. 279**

33. ——— Suit for compensation for wrongful seizure of cattle—*Cattle Trespass Act (I of 1871)—Jurisdiction of Civil Court.* A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit. *Nomaz Mollah* v. *Lall Mohun Tagadgeer, 15 W. R. 279,* approved of. *Aslem* v. *Kalla Durzi, 2 C. L. R. 344,* dissented from. SHUTTRUGHON DAS COOMAR *v.* HOKNA SHOWTAL . . **I. L. R. 16 Calc. 159**

34. ——— Secretion of estate papers by one of joint owners. A joint owner who secretes the estate paper, and thereby deprives his joint owners of the means of collecting the rents and other debts due to them, is liable to be sued for damages. PITTUMBER DOSS *v.* RUTTON BULLUB DOSS . . . . . **W. R. 1864, 213**

35. ——— Refusal to allow pleader to appear. A pleader cannot sue for damages against the Magistrate for not allowing him to appear for a complainant at an enquiry under s. 180, Criminal Procedure Code, 1861, as he has no right to appear at such an enquiry. BINDACHARI *v.* DRACUP. **8 Bom. A. C. 202**

36. ——— Refusal of master of ship to sign bills of lading. The refusal of a master of a ship to sign bills of lading otherwise than with an endorsement as to the damage claimed is a wrong that may be fully compensated for in damages. GRASEMANN *v.* LITTLEPAGE **3 W. R. Rec. Ref. 1**

37. ——— Fraudulent transfer of property—*Sale without authority.* Where the plaintiff's property had been fraudulently transferred:—*Held,* that he was entitled to recover the damage or loss which he sustained on account of such fraudulent transfer from the actual transferor, and from the person who was found to have been the prime mover and instigator in the transaction, as well as from his own agent who consented to such transfer, and the purchaser who, being aware of circumstances sufficient to create suspicion, dealt with the persons who had no authority to sell. WHARTON *v.* MOONA LALL . . . **1 Agra 96**

38. ——— Persuading wife to absent herself from her husband—*Mahomedan law.* A suit for damages is maintainable by a Mussulman against persons who, without lawful excuse, have persuaded and procured his wife to remain absent from him and live separately. A Mussulman lawfully married to a girl who has attained puberty can maintain a suit for damages against the father of the girl, and against an alleged husband of the girl for wrongfully persuading her to remain absent from the plaintiff's society and for detaining her away from him. MUHAMMAD IBRAHIM *v.* GULAM AHMED . . . . . **1 Bom. 326**

39. ——— Defamation of character—*Dismissal of mooktear, ground for.* In an action to recover damages for defamation of character brought by the late mooktear and manager of a parda-nashin Mahomedan lady who had in a petition to the Munsif represented that she had discharged the plaintiff from her service, because he had not managed her properties honestly, and had been guilty of misappropriation, it appeared that the plaintiff had rendered no accounts, and had allowed a year to pass before resenting the libel:—*Held,* by KEMP, *J.* (GLOVER, *J.*, dissenting), that the defendant had reasonable grounds for making the statement, and that, in the absence of evidence of malice, the suit was rightly dismissed. AMEENOODDEEN AHMED *v.* KHYROONISSA **20 W. R. 60**

EKBAL BAHADOOR *v.* SOLANO . **2 W. R. 164**

40. ——— Destruction of indigo plants in execution of award—*Costs.* A suit will not lie for damages sustained in consequence of the destruction of indigo plants in execution of an award under s. 15, Act XIV of 1859; nor for damages in the shape of the value of *kolai* crop, recovered by the decree of a competent Court; nor for costs awarded by a competent Court in a possessory suit under the same action. KENNY *v.* KOLUM MUNDLE . **5 W. R. S. C. C. Ref. 1**

41. ——— Injury caused in execution of decree—*Omission to act legally by decree-holder.* If a decree-holder has omitted to do what he is legally bound to do, and has thereby caused injury, the party injured may claim damages. RUZNUDEEN HOSSEIN *v.* FUZALUN . **3 W. R. 120**

42. ——— *Execution of decree without jurisdiction—Liability of applicant for execution.* Where a Court attempts to execute a decree without having jurisdiction to do so, the person applying for that execution would be liable to be sued for damages. DOYLE *v.* DWARKANATH CHATTERJEE . . . . . **8 W. R. 89**

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

See JOYKALEE DOSSEE *v.* CHAND MALLA **19 W. R. 133**

43. ——— Refusal to deliver idol for worship—*Right to turn of worship of idol—Cause of action.* A refusal to deliver up an idol whereby the person demanding it was prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages. DEBENDRO NATH MULLICK *v.* ODITACHURN MULLICK . . **I. L. R. 3 Calc. 390**

44. ——— Intrusion on office—*Suit for fees by vatandar joshi against intruder.* The vatandar joshi of a village has the right to recover pecuniary damages from a person who has intruded upon his office and received fees properly payable to him. RAJA VALAD SHIVAPA *v.* KRISHNABHAT **I. L. R. 3 Bom. 232**

45. ——— Sale of minor's property—*Fraud and collusion between vendors and purchasers—Suit by purchasers against vendors when sale is set aside.* It is not for the public benefit that, where two parties knowingly deal with the sale and purchase of property of infants who have not by law the power of sale, one of the parties (the purchasers) who obtain possession of the property in a manner calculated to injure the infants should be able to sue the other party (the vendors) for damages. The Privy Council even refused to give costs to either party, considering them both *in pari delicto.* BHOOPNARAIN CHOWBEY *v.* RUGHUNATH GOBIND ROY . . . **18 W. R. 230**

46. ——— Leaving boats in such a position that they are useless until river rises. A party who wrongfully takes possession of another's boats and places them in such a position that without any neglect on the part of the owner they become unserviceable until the ensuing rainy season, is responsible for the consequences of his own act, and is not in any way discharged because the police make over the boats to the owner at a time when there is no water in the river and the boats cannot be moved. NUDIAR CHAND SHAHA *v.* PRANNATH SHAHA . . . **21 W. R. 8**

47. ——— Legal ejectment of tenant after he has sown crops—*Trespass—Right to possession.* *F* accepted a lease from *N* of certain land and sowed it with indigo. *B* then sued *F* and *N*, claiming to be maintained in possession of the land and the cancelment of the lease, and obtained a decree on the 10th of January 1873, and subsequently to that date entered upon the land and brought a portion of it into cultivation. *F*, alleging that he was still in possession, sued to recover damages for trespass and injury to the indigo sown by him which was standing on the ground. It was held that *B* was at liberty to enter upon the land and to cultivate, notwithstanding he had not taken out execution of his decree, and that, if injury occurred to *F* by *B*'s occupation of the land under his decree, he had no claim on the latter for damages. BASUNT KAWAL *v.* FORTH **7 N. W. 47**

48. ——— Suit for damages for removal of crop—*Defendant entitled to possession under decree of a competent Court of revenue—Plaintiff in actual possession under an illegal decree of a Civil Court—Trespass.* *A* held a decree of a competent Court of revenue for possession of certain land as against *B*, and obtained under that decree formal possession of that land. *B*, however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. *B* removed his crop, and thereafter sued in a Civil Court for a declaration that he was *A*'s tenant of the land in question holding occupancy rights. *A* did not defend the suit, and the Civil Court passed a declaratory decree in favour of the plaintiff, and further proceeded to execute that declaratory decree by putting *B* in possession. Subsequently *B* sued *A* for damages in respect of the alleged removal by *A* of a second crop, which he asserted that he (*B*) had sown upon the said land. *Held*, that *B* had no cause of action, and that, even if in fact he had sown the crop in respect of which damages were claimed, he did so at his own peril and as a trespasser. UDIT NARAIN SINGH *v.* SHIB RAI . . . . **I. L. R. 20 All. 198**

49. ——— Injury done by raising embankment—*Trespass—No proof of specific loss.* Where plaintiffs sought to recover damages for some injury done to their property by an embankment raised by defendants, and pleaded that on a former occasion, on which they had sued for damages against the same defendants for the same trespass, they had obtained a decree, and that the renewal of the offence was a continuance of trespass, it was found that the plaintiffs, on whom the burden of proof of injury lay, had failed to sustain it by proving specific loss. *Held*, that they were, therefore, not entitled to a decree. *Held*, also, that the precedents quoted, in which decrees for substantial damages had been given on proof of malicious trespass, although specific injury had not been established, were inapplicable to suits like the present, in which the essence of the plaint was a demand for compensation for losses actually incurred, and in which no hint was thrown out of any malice in the alleged act of trespass. JUGGUT LALL CHOWDHRY *v.* TASUDDUCK ALI **25 W. R. 548**

50. ——— Omission of witness to appear—*Suit for damages against defaulting witness.* Before a plaintiff is entitled to recover any damages from a defaulting witness in a former suit, he must prove that he was endamaged by the omission of the defendant to appear. The mere failure of the defendant to appear as a witness is not, *per*

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

se, a sufficient proof of his liablity to damages. DWARKANATH KOOREE *v.* ANUNDO CHUNDER SANNEL . . . **5 W. R. S. C. C. Ref. 18**

51. ——— **Cause of action**—*Suit for damages caused by false statement of witness in a suit.* No action will lie against a witness for making a false statement in the course of a judicial proceeding. CHIDAMBARA *v.* THIRUMANI **I. L. R. 10 Mad. 87**

52. ——— **Infringement of right**—*Damnum sine injuriâ.* A plaintiff whose right has been invaded is entitled to some remedy, whether damage has accrued to him or not. RAMPHUL SAHOO *v.* MISREE LALL . . . **24 W. R. 97**

53. ——— *Actual loss, proof of.* Proof of infringement of a right, without proof of actual loss, does not necessarily entitle a plaintiff in this country to a verdict for nominal damages. NABAKRISHNA MOOKERJEE *v.* COLLECTOR OF HOOGHLY . . **2 B. L. R. A. C. 276**

54. ——— *Proof of consequent injury.* In order to maintain an action for damages for the infringement of a right, it is not necessary to show that there has been any subsequent injury consequent on such infringement. RAM CHAND CHUCKERBUTTY *v.* NUDDIAR CHAND GHOSE . . . . . **23 W. R. 230**

55. ——— *Failure to prove injury.* Where defendants infringed plaintiff's legal right, and the lower Court dismissed the suit with costs, on the ground that plaintiff had given no evidence that he had sustained substantial damage:—*Held*, that the plaintiff was entitled at least to a decree without damages and costs. KALLIAPPA KAUNDAN *v.* VAYAPURI KAUNDAN **2 Mad. 442**

56. ——— *Infringement of right—Exclusive right to perform ceremony.* Where the plaintiff enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a particular part of the temple of Shri Vithoba and Tukaram at Dehu, it was held that the defendants breaking their own curd-pot on that day in any part of that temple was a violation of that right entitling the plaintiff to damages. NARAYAN SADANAND BAVA *v.* BALKRISHNA SHIDESHVAR . . . **9 Bom. 413**

57. ——— **Erection of embankment**—*Interest in land—Right of suit.* *A* erected an embankment across river, in consequence of which lands let by *B* to raiyats were overflowed, and the crops lost. The raiyats paid rent to *B* only when crops were reaped from the lands. *Held*, that *B* had such an interest as to entitle him to sue *A* for damages. RAM CHANDRA JANA *v.* JIBAN CHANDRA JANA **1 B. L. R. A. C. 203**

58. ——— **Erection of buildings**—*Right to such buildings.* Parties are at liberty to build what structures they please on their own lands, but if by doing so they interfere with the free enjoyment of their neighbours' property, they are liable to damages. KASSIM ALI KHAN *v.* BIRJ KISSORE . . . . . **2 N. W. 182**

RAM ROOCH CHOWDREE *v.* DEOKEE NUNDUN **7 W. R. 169**

KADER BUKSH BISWAS *v.* RAM NAG CHOWDHRY **7 W. R. 448**

59. ——— *Trespass—Building on plaintiff's land—Mandatory injunction—Suit for further damages for alleged disobedience of mandatory injunction—Cause of action—Right of suit—Execution of decree—Suit to enforce decree.* The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass and an injunction, and a decree was passed for damages and for a mandatory injunction, directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition. Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobedience of the mandatory injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate was likely to fall. There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit. *Held*, that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution. *Mitchell* v. *Darley Main Colliery Company, L. R. 11 Ap. Cas. 127*, distinguished. JAWITRI *v.* EMILE **I. L. R. 13 All. 98**

60. ——— **Suit for injury done to land by former proprietor.** An action for damages will not lie against a present proprietor for injury done to the land during the time of the former proprietor. COLLECTOR OF 24-PERGUNNAHS *v.* JOYNARAIN BOSE **W. R. F. B. 17 : 1 Ind. Jur. O. S. 101**

61. ——— **Cutting timber.** Where one acquires, by license, an exclusive right to cut, and to authorize others to cut, timber in a forest, such right does not vest in him the timber in the forest. He might thereby have a right to recover damages against any person who, by cutting timber, should interfere with his exclusive right, but that would not vest in him the timber so cut by others. SNADDEN *v.* MAHWINE **2 B. L. R. A. C. 292**

62. ——— **Light and air**—*Obstruction to free use of light and air.* A person is entitled to

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

the free use of his ancient light and air. When any person wilfully and intentionally obstructs that light and air, he is liable for the removal of the obstruction. Money damages will be no compensation for the injury. MAHOMED HOSSEIN *v.* JAFAR ALI . . . . . **4 W. R. 23**

PURAN MUDDUCK *v.* OODAY CHAND MULLICK **3 W. R. 29**

63. ——— Injury to land by bursting of bund. Suit for damages caused to the plaintiff's land by the bursting of the defendant's bund. *Held*, that the plaintiff was not entitled to damages if the bund was made in a lawful manner, and if the breach was owing to no fault of the defendant. GOOROO CHURN MULLICK *v.* RAM DUTT **2 W. R. 43**

64. ——— Stoppage of flow of water —*Prescriptive right.* A suit will lie to establish a prescriptive claim to irrigate from a running stream, and for damages caused by the stoppage of the water by the proprietors higher up the stream erecting dams on their own lands. BUDDUN THAKOOR *v.* SUNKER DOSS . **W. R. 1864, 106**

65. ——— Obstruction in exercise of right over water—*Question to decide at trial of suit—Civil Procedure Code, 1859, s. 197.* A suit may lie for damages for obstruction in the exercise of a right of *usucapio* over water, etc., although no property in the tank, etc., be asserted. And s. 197 of the Code of Civil Procedure does not apply to suits for damages of this nature, and consequently the question of the amount of damages must be determined at the trial and cannot be reserved for determination in execution of the decree. RAMTUHUL LALL *v.* SHEO NATH SINGH **1 N. W. 24 : Ed. 1873, 24**

66. ——— *Cause of action—Right to use of water.* In a suit for damages for the demolition of a singha or embankment intended to keep in surface water, if the embankment was situated on the defendant's land, such demolition could only be a cause of action where it not only infringed a definite right, but caused actual damage. SEETA RAM *v.* KUMMEER ALI . **15 W. R. 250**

67. ——— *Damage to crops from interference with right of water.* In a suit to recover damages for loss caused during the years 1862, 1863, and 1864 by defendant's interference with plaintiff's right to the flow of water from a canal :—*Held*, with regard to the loss sustained in 1864, that plaintiff's right to recover depended upon whether or not the special damage claimed had accrued at the time of the bringing of the suit. VISWAMBARA RAJENDRA DEVEE GARU *v.* SARADHI CHARANA SAMANTARAYA GARU . **3 Mad. 111**

68. ——— *Use of water-rights—Injury to neighbouring land.* The defendant closed up the outlets of a bank upon his own land, whereby the surface drainage water had immemorially flowed from the plaintiff's land into and over the defendant's land, and so escaped. By reason of the closing of these outlets, the water was unable to escape, and the plaintiff's land became flooded and the crops therein damaged. *Held*, that the plaintiff was entitled to maintain a suit to recover from the defendant the amount of damages he had sustained by reason of the ancient flow of the water from his land being thus impeded. *Held*, also, that in a suit for damages sustained by such an act done on the defendant's own land, actual damage to the plaintiff must be shown in order to sustain an action ; and that the liability of the plaintiff to remit the rents of raiyats whose crops were spoiled was sufficient damage. ANUNDMOYE DASSEE *v.* HAMEEDONISSA **Marsh. 85 : 1 Hay 152**

HAMEEDONISSA *v.* ANUNDMOYEE DOSSEE **W. R. F. B. 22**

69. ——— *Use of water-rights—Injury to neighbouring land.* A suit for damages will lie against a proprietor who pens back the water of a stream by erecting a bund upon his own land, so as to inundate the land of his neighbour, without his license and consent. BECHARAM CHOWDHRY *v.* PHUBNATH JHA **2 B. L. R. Ap. 53**

70. ——— Abuse or threatening words—*Special damage.* Damages cannot be claimed for mere abuse or threatening language. PHOOLBASSEE KOER *v.* PARJUN SINGH **12 W. R. 339**

CHUNDURNATH DHUR *v.* ISSURREE DOSSEE **18 W. R. 531**

71. ——— Abuse and defamation—*Malice—Estimation of damages.* If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained. Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness, and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered, and in the former to a sum sufficient to establish his innocence of the charges made. PARVATHI *v.* MANNAR **I. L. R. 8 Mad. 175**

For further authorities on this point,—

See CASES UNDER JURISDICTION OF CIVIL COURT—ABUSE, DEFAMATION, AND SLANDER.

See CASES UNDER SLANDER.

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

72. ——— **Injury to reputation**—*Malicious prosecution.* Damages may be recovered for injury to one's reputation. RAMJEEBUN MOOKERJEE *v.* WOOMA CHURN HAJRAH . **7 W. R. 117**

73. ——— *False charge.* Where a false charge led to a party being prevented going to his house until he had furnished bail, he was held to have suffered inconvenience and loss of reputation, for which an award of R20 as damages was not unreasonable. MADHUB CHUNDER SIRCAR *v.* BANEE MADHUB ROY . . **15 W. R. 85**

74. ——— *Difficulty of assessing damages—Injury short of loss of caste.* The difficulty of assessing the amount of the damages, or the risk of numerous actions of the kind in the Civil Courts, forms no ground for dismissing a suit for damages for injury done to a plaintiff's social position and estimation, if a legal ground of action is shown. A plaintiff may be entitled to substantial damages for being beaten with a shoe, notwithstanding that he may not have lost his caste, or sustained a pecuniary loss or physical injury by the act complained of. BHYRAU PERSHAUD *v.* ISHARRE . . . **3 N. W. 313**

75. ——— *Public exhibition of effigy of person—Suit for damages for defamation of character.* Making and publicly exhibiting an effigy of a person, calling it by the person's name, and beating it with shoes, are acts amounting to defamation of character for which a suit for recovery of damages will lie. PITUMBAR DASS *v.* DWARKA PERSHAD . **2 W. R. 435**

76. ——— *Injury to personal honour and character.* A party whose conviction before a Criminal Court is reversed on appeal, and he himself released from confinement, cannot maintain a suit against the complainant for damages to his personal honour, unless he can prove that the complainant had no reasonable and probable cause for making the complaint and charge. KOIBATOOLLAH *v.* MOTEE PESHAKUR **13 W. R. 276**

77. ——— **Wrongful attachment**—*Trespass—Bonâ fides.* A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly. DAMODHAR TULJARAM *v.* LALLU KHUSALDAS **8 Bom. A. C. 177**

78. ——— *Liability of decree-holder for wrongful execution.* Without proof of *mala fides*, the judgment-creditor is responsible in damages to any person whose property he wrongfully causes to be attached in execution of his decree. RUGNOR *v.* SUNJHEER SINGH . **5 N. W. 211**

KANAI PROSAD BOSE *v.* HIRA CHAND MANU **5 B. L. R. Ap. 71**

DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

SUBJAN BIBEE *v.* SARIUTULLA **3 B. L. R. A. C. 413**

79. ——— *Cases reviewed.* Cases which decide that a person whose property has been wrongfully seized by the Court, or wrongfully seized and sold at a Court's sale as that of the judgment-debtor, is entitled to recover damages from the execution-creditor at whose instigation the property has been so seized or so seized and sold, reviewed. KALU BIN VISAJI *v.* DAMODHAR GOVIND . . . . . **9 Bom. 92**

80. ——— *Attachment of property of third person—Liability of execution-creditor for wrongful seizure in execution of decree.* There is not any universal rule that a judgment-creditor is, or that he is not, liable in suit for a wrongful seizure or for injury to the goods while under seizure. His liability must depend upon the circumstances of the case, *i.e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct; for instance, if the judgment-creditor personally or his authorized agent (*e.g.* his pleader) apply, under s. 214 of the Civil Procedure Code, for the attachment of property which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute the warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for that wrongful seizure, and the officer of the Court could justify under the warrant, and would not be liable so long as he kept within the duty expressly prescribed for him by it. But if the application of the judgment-creditor were for a general attachment under s. 218 of the Code, and the Court took no such security from him as it might take under that section, and if the Court granted a general warrant for the attachment of the moveable property of the judgment-debtor, and the officer of the Court, without any suggestion to that effect from the judgment-creditor or his agent, beyond a general direction to execute the warrant were to seize property not belonging to the judgment-debtor, the judgment-creditor would not be responsible. *Quære:* Whether, under such circumstances as those last mentioned, the officer of the Court would be responsible. VANA JAGANNATHJI *v.* HATA DIPAJI . . . . **11 Bom. 46**

81. ——— *Penalty—Compensation—Proof of malice.* Certain hundees, which *V A & Co.* had discounted for *P*, having been dishonoured by the drawers, *V A & Co.* sued *P* for the value of the bills, and applied, under s. 81, Code of Criminal Procedure, to have certain property attached before judgment as belonging to *P*. An attachment having been ordered, *M* and *J* objected by petition that the property belonging to them, and not to *P*, upon which *V A & Co.* applied to have them made co-defendants in the regular

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

suit which had been brought against *P*, on the ground that they (*M* and *J*) and *P* were partners in trade. The decision in the suit released the property on the ground that there was no such partnership, and that the property belonged exclusively to *M* and *J*. *M* and *J* then sued *V A & Co.* to recover damages sustained by their goods under the above attachment and profits foregone during the stoppage of their trade by the tortious acts of the defendants. *Held*, that, as *V A & Co.* had made the attachment most carelessly and recklessly, and without sufficient or reasonable ground for assuming *M* and *J* to be partners of *P*, they were rightly amerced in damages. *Held*, also, that their act, having been one done without a probable cause, was such as to evince a malicious motive on their part, and that damages in such a case should be in the nature of a penalty as well as of a compensation. *Held*, further, that plaintiffs were not bound to release their property, and it was no defence to their claim for damages to say that they might have done so by giving security, nor could their declining to do so shift the responsibility of the illegal acts of the defendants. VALAET ALI KHAN *v.* MATADEEN RAM . . . **13 W. R. 3**

82. ——————— *Attachment before judgment without sufficient cause.* Where a Court orders attachment of a defendant's property after it is satisfied that he is about to remove or dispose of it with intent to obstruct or delay the execution of the decree, it must be presumed that there was good and sufficient cause for the plaintiff having moved the Court to do so, even though the suits resulted unsuccessfully; and unless the contrary can be established, damages cannot be claimed. DHURMO NARAIN SAHU *v.* SREEMUTTY DASSEE **18 W. R. 440**

83. ——————— *Attachment made contrary to order.* When a proper application for process has been made and a proper order granted, the officer of Court cannot be considered to be the agent of the person for whose benefit the process of the Court has issued. Nor is such person responsible for the mistake or misconduct of the officer, unless he or his servants have personally interfered and directed the action of the officer. Where, in a suit for damages for wrongful attachment, it appeared that the defendant, in execution of a decree against a boat-owner, had obtained an order for attachment, by prohibitory order under s. 234 of Act VIII of 1859, of certain boats which had been hired by the plaintiff to take a cargo to Calcutta, and they were wrongly attached under s. 233 by actual seizure and detention, during which one of them sank and was lost:—*Held*, that, unless it could be shown that the defendant or his servants personally interfered and caused the officer of Court to attach the boats by actual seizure, he was not liable for damages. DOOLAR CHAND SAHOO *v.* RAM SAHOY BHUGGUT **24 W. R. 139**

DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

84. ——————— *Attachment of property of third person under general warrant of execution.* Where *A* seizes property in attachment of a decree which had been obtained by his own judgment-debtor, and there is nothing to show that that decree was sold to *B*, and *A* is not proved to have acted maliciously or without probable cause, *A* is not liable to *B* in a suit for damages. The seizure, moreover, having been made under the order of the Court, the defendant was not liable for what was done under the Court's order. *Semble*: Whether, if a judgment-creditor applies for a general warrant of attachment of all the defendant's property under s. 214, and under it causes property of a third person to be seized as property of the defendant, he is not liable to such third person. JOYKALEE DASSEE *v.* CHANDMALLA . **9 W. R. 133**

85. ——————— *Warrant of execution.* A party is not liable to damages in respect of an attachment under a warrant issued by a Court. RAJBULLUB GOPE *v.* ISHAN CHANDRA HAZRAH **7 W. R. 355**

86. ——————— *Permission to use property attached—Principles in action of tort.* The proposition that a man whose possession was unlawfully invaded by a wrongful attachment ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own store-house, is untenable; and though the plaintiff might have received permission to use his own property, he was neither bound to accept the permission so accorded to him, nor, if he had accepted it, would he have lost his right of action, and he was entitled, at the very least, to a judgment for nominal damages. The principle ordinarily applicable to actions of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. *Le Breton* v. *Ennis*, *4 Moo. P. C. 323* (as to the assessment of damages), followed. MODUN MOHUN DOSS *v.* GOKUL DOSS . . . . . **5 W. R. P. C. 91**
10 Moo. I. A. 563
1 Ind. Jur. N. S. 269

87. ——————— *Omission to claim compensation under Civil Procedure Code, 1859, s. 88.* The omission to apply for compensation under s. 88, Act VIII of 1859 (assuming that section to be applicable to the present case), does not bar a regular suit for compensation for illegal attachment; and the fact that security was not given, by which release of the property might have been obtained, does not affect the right of suit for the improper attachment. Further, that, under the circumstances, the attachment being needless and unjustifiable and without due authority of law, the award of damages was fair and unquestionable. DANIEL *v.* MOHUN BIBEE . . **1 Agra 104**

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

88. _____ **Transfer of decree**—*Subsequent attachment in execution against transferor—Right to compensation.* *A* transferred a decree to *B*, who recovered part of the amount due under it, and was prevented from recovering the rest by an attachment of the decree in execution proceedings against *A*. *Held*, that *A* was liable to pay compensation to *B*. PUTHIANDI MAMMED *v.* AVALIL MOIDIN . . . **I. L. R. 20 Mad. 157**

89. _____ **Wrongful injunction**—*Civil Procedure Code, 1859, s. 96 (1877-82, s. 497)—Compensation for Injunction.* S. 96 of the Civil Procedure Code, 1859 (s. 497 of 1877-82), allowed the power of bringing a suit for damages, leaving that remedy to those who did not wish to take advantage of the remedy provided by that section. WILSON *v.* KANHYA SAHOO . . **11 W. R. 143**

90. _____ *Civil Procedure Code, 1859, ss. 92, 96—Compensation for Injunction—Cause of action.* *A*, having brought a suit against *B*, obtained and issued, on the 24th July 1868, an injunction against him under s. 92, Act VIII of 1859. The suit was, on the 18th of August 1868, dismissed ; but no compensation was awarded to *B*, under s. 96 of Act VIII of 1859, in respect of the injunction which had been issued against him. *A* and *B* both appealed, the former against the decision dismissing his suit, the latter for compensation. Both appeals were dismissed on the 23rd November 1869 ; *B*'s because it was engrossed on a stamp paper of the value of eight annas only. *B*, on the 16th December 1869, then instituted a suit against *A* in the Small Cause Court for damages in consequence of the injunction which *A* had caused to issue against him in his suit. *Held*, that *B* was not debarred, by s. 96 of Act VIII of 1859, from instituting a suit against *A* for damages, there not having been an award of compensation under that section. The cause of action accrued from the time at which the plaintiff was first damaged by the wrongful injunction, continued as long as the injunction remained in force, and limitation began to run as soon as the injunction was at an end. NANDA KUMAR SHAHA *v.* GAUR SANKAR . **5 B. L. R. Ap. 4 : 13 W. R. 305**

91. _____ **Assault**—*Cause of action—Assault on provocation—Right of suit.* An assault, which the defendant had committed on the plaintiff upon some provocation, was found to have been of a very gross character and not altogether justified. *Held*, that an action for damages lay against the defendant, and that the fact that the defendant had been fined by a Criminal Court was no bar to it. AKHIL CHANDRA BISWAS *v.* AKHIL CHANDRA DEY (1902) . **6 C. W. N. 915**

92. _____ **Trenches for foundation**—*Percolation of rain-water through the trenches—Injury to the neighbouring house.* The defendant dug a trench on his land for the foundation of a superstructure on his land. This trench was close to, and in a line with, the back wall of the plaintiff's house. The rain-water collected in the trench and percolating into the foundations of the plaintiff's house, caused the back wall of the plaintiff's house to subside and caused other damage. The plaintiff brought a suit to recover damages. *Held*, (i) that the defendant had a right to build on his land and for the purpose of building to make ditches for foundations ; (ii) that the effective cause of the damage being the percolation of the rain-water, which collected in the trenches and caused the shrinkage of the house, the defendant was not liable. Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable. MOHOLAL *v.* BAI JIVKORE (1904) **I. L. R. 28 Bom. 472**

93. _____ **Slander**—*Suit for damages, maintainability of, in the Civil Court—Words spoken not defamatory to the person bringing the action.* A suit for damages for an alleged slander will not lie in the Civil Court at the instance of any person, when the words complained of are neither defamatory of him nor have they caused him any injury. *Per* HARINGTON, *J.*—A witness is not entitled to claim privilege for a slanderous statement wantonly made, which is neither an answer to any question addressed to him in examination or cross-examination, nor has any connection at all with the case under trial. GIRWAR SINGH *v.* SIRAMAN SINGH (1905) **I. L. R. 32 Calc. 1069**

94. _____ **Malicious prosecution**—*Commencement of prosecution bonâ fide—Continuance malo animo—Reasonable and probable cause—Question of fact.* The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against 5 defendants, namely, (i) the Municipality of Jambusar, (ii) and (iii) the members of its Managing Committee, (iv) its Secretary, and (v) its Daroga. The first Court dismissed the suit. The lower Appellate Court passed a decree against defendants Nos. 1, 4 and 5 and awarded R55 as damages against them. On appeal to the High Court :—*Held*, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being " to

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DAMAGES—*contd.*

1. SUIT FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax," that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way. *Quære:* Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary. *Held*, further, that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact. *Held*, as to the *Daroga*, that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuation of proceedings, it was not shown that the *Daroga* took any active step after the payment, or that he preserved *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused. *Fitzjohn* v. *Mackinder, 30 L. J. (C. P.) 257, 264*, followed. MUNICIPALITY OF JAMBUSAR *v.* GIRJASHANKER (1905)

I. L. R. 30 Bom. 37

95. ———— **False imprisonment**—*Suit for damages—Cause of Action—Defendant not the actual prosecutor—Suit not maintainable.* *A* having been badly beaten was carried to a police station, where he named *X* and others as the persons who had attacked him. The police, after making the usual investigation, arrested the persons named by *A* and sent them before a Magistrate, who committed them all to the Court of Session. The result of the trial was that the accused were all acquitted. *Held*, that no suit for damages for false imprisonment would under these circumstances lie against *A*. *Narasinga Row* v. *Muthaya Pillai, I. L. R. 26 Mad. 362*, followed. BALBHADDAR PANDE *v.* BASDEO PANDE (1906)

I. L. R. 29 All. 44

96. ———— **Defaming wife**—*Damages for loss of reputation caused by defaming a wife—Suit for slander brought by a husband whether maintainable—Special damages—Cause of action.* *A* instituted a suit against *B* for defamation. The words used alleged unchastity on the part of *A*'s wife. *A* alleged (*a*) special damage, (*b*) that the words were defamatory in themselves, (*c*) that he himself was defamed and was therefore entitled to sue. *Held*, that the words used defamed *A* as well as his wife and therefore *A* could maintain an action. *Held*, further, that the words used by *B* were defamatory in themselves and did not amount to mere verbal abuse and that therefore *A* was entitled to damages without proving special damage. *Girish Chunder Mitter* v. *Jhatadhari Sadukhan, I. L. R. 26 Calc. 653*, distinguished. *Ibin Hosein* v. *Haidar, I. L. R. 12 Calc. 109; Trailokha Nath Ghose* v. *Chundra Nath Dutt, I. L. R. 12 Calc. 424; Jogeswar Sarma* v. *Dinaram Sarma, 3 C. L. J. 140*; and *Parvathi*

DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*contd.*

(*b*) TORT—*contd.*

v. *Mannar, I. L. R. 8 Mad. 175*, referred to. *Held*, also, that the cause of action having arisen in the mofussil the suit was not governed by the rule laid down in *Bhooni Moni Dossi* v. *Natobar Biswas, I. L. R. 28 Calc. 452*. SUKKAN TELI *v.* BIPAD TELI (1906) . . . **I. L. R. 34 Calc. 48**

97. ———— **Detention of goods**—*Collector of Customs, powers of—Counterfeit trade mark—False trade-description—Sea Customs Act (VII of 1878), ss. 18, 19A—Merchandise Marks Act (IV of 1889), ss. 10, 11—Indian Penal Code (Act XLV of 1860), ss. 28, 480.* It is the duty of the Collector of Customs as representing the Government to stop from being brought into British India, goods coming within the specification mentioned in s. 18 of the Sea Customs Act, 1878, as amended by the Merchandise Marks Act, 1889, *inter alia*, goods having applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889. The Collector has power to detain such goods although no regulations have been framed by the Governor General in Council under s. 19A (2) of the Sea Customs Act, 1878, as amended by the Merchandise Marks Act, 1889. NEMI CHAND *v.* SECRETARY OF STATE FOR INDIA (1907) **I. L. R. 34 Calc. 511**

98. ———— **Injuries on railway**—*Damages for injuries on railway—Negligence—Accident.* The plaintiff sued the defendants, a Railway Company, for damages for injuries sustained by him when alighting from a carriage which overshot the platform of a station at night, and the evidence on the question of what light there was, either natural or artificial, on the night in question being conflicting, it was suggested during the hearing of the case on appeal and agreed to by the counsel for the parties that the Judges should visit the scene of the accident under conditions approximating as nearly as possible to those which prevailed when the plaintiff met with his injuries. This was done, the Judges and the legal advisers of the parties went to the station where a presentation of the scene and events of the accident was gone through by which the Judges were enabled to make a thorough investigation of the material conditions accompanying the accident. They formed their own opinion on the question of the sufficiency or otherwise of the light, and gave judgment in accordance with them, reversing the decision of the Court which tried the case. *Held*, that such procedure was illegal. The result of it was that the appeal was decided not on the testimony given at the trial as to what took place on the night of the accident, but by the Judges' observation of what they saw on another night altogether; and the decision based on it was set aside, the judgment of the first Court being restored. KESSOWJI ISSUR *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY (1907)

I. L. R. 31 Bom. 381; L. R. 34 I. A. 115

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DAMAGES—*contd.*

1. SUITS FOR DAMAGES—*concld.*

(*b*) TORT—*concld.*

99. ———— Injury by dogs—*Dogs likely to bite without provocation—Injury by Dogs at a public Recreation-ground—Liability of Owner of Dogs—Scienter.* The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground. The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely :—*Held*, that the defendant was liable in damages to the plaintiff. *Barnes* v. *Lucile, Ltd., 23 T. L. R. 389,* distinguished. PRAKASH KUMAR MUKERJI *v.* HARVEY (1909)
I. L. R. 36 Calc. 1021

2. MEASURE AND ASSESSMENT OF DAMAGES.

(*a*) BREACH OF CONTRACT.

1. ———— Suit for non-delivery of goods. In a suit for the non-delivery of goods agreed to be sold by the defendant to the plaintiff in a case where no money has passed, the measure of damages is in general the difference (if any) between the agreed price and the market value on the day when the goods ought to have been delivered. SHARMAN *v.* GOUR SHAH BANGALLY **Marsh. 542**

2. ———— ———— *Omission to specify time.* In an action by a vendee against a vendor for non-performance of a contract to deliver goods which specifies no time for delivery, the measure of damages is the difference between the contract price and that which goods of a like description bore on the lapse of a reasonable time for delivery. MANSUK DASS *v.* RANGAYYA CHETTI
1 Mad. 162

3. ———— *Reasonable time for delivery.* In an action by the vendee against the vendor for breach of a contract to deliver goods "in two or three days," the measure of damages is the difference between the contract price and the price which similar goods bore on the lapse of a reasonable time for delivery, not less than three days from the date of the contract. RAM MADAUJI *v.* RANGA CHETTI . . . . **1 Mad. 168**

4. ———— *Delay in delivery of goods by carrier.* The damages claimable in a suit against a carrier on account of delay in delivering goods are the excess which is found by comparing the price of the goods on the day they ought to have been delivered with the price on the day when they were delivered. BULDEO DASS NATHOO MULL . . . . **2 Agra 132**

5. ———— *Forbearance of buyer at seller's request.* The defendants, by bought and sold notes, contracted, in February 1877, to sell to the plaintiffs 200 tons of wheat, delivery under

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

the contract to be given during all April on 15 days' notice from the buyers. Notice was given on the 9th of April, but the defendants were unable to give delivery within the agreed time, and the plaintiffs, on the 11th May, instructed their attorneys to demand immediate payment of the difference between the contract price, and the then market price, treating the contract as rescinded. Subsequently, the defendants being prepared to give delivery of 350 bags, the plaintiffs agreed to take delivery without "prejudice to their right of claim against the sellers on account of the remaining 175 tons still undelivered." This and several other parcels, making altogether 113 out of the 200 tons, were delivered during the latter part of May ; but on the 31st of May plaintiffs refused to take further deliveries, alleging that the quality of the wheat offered was inferior, and brought a suit for damages for the non-delivery under the contract of the remaining 87 tons. *Held*, that there was no binding agreement on the part of the plaintiffs to give time for the fulfilment of the contract after April, but merely a forbearance on their part to pursue their rights, and that the plaintiffs were entitled to the full measure of damages. *Ogle* v. *Vane, L. R. 2 Q. B. 275,* and *Freith* v. *Burr, L. R. 9 C. P. 208,* followed. GLADSTONE *v.* SEWBUX **4 C. L. R. 106**

6. ———— Action for breach of collateral contract—*Non-acceptance of goods.* The defendant entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, of which the defendant was to take delivery at certain stated times. On failure by the defendant to take delivery, the plaintiffs brought a suit for breach of the contract, estimating the damages at the difference between the contract price and the market prices on the days when the defendant ought to have taken delivery. It was proved that the plaintiffs never had the goods in their possession, but that they could have obtained them under a contract they had with a third person, and it was found that the plaintiffs were ready and willing to deliver them at the time contracted for. The lower Court held that the measure of damages was the difference between the contract price of the bags and the amount which it cost the plaintiffs under their collateral contract to procure and deliver them. *Held*, reversing the decision of the Court below, that the proper measure of damages was the difference between the contract price and the market prices at the dates of failure by the defendant to take delivery. COHEN *v.* CASSIM NANA
I. L. R. 1 Calc. 264 : 25 W. R. 273

7. ———— Failure to deliver timber—*Place of delivery.* The plaintiff brought a suit at Tonghoo in British Burma to recover possession of certain timber, which he alleged the defendants had, wrongfully and in collusion with the Burmese

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

Governor of Ningham, taken out of his possession in foreign territory and removed to Tonghoo. The defendants stated that they had acquired the timber from the Governor of Ninghan in terms of an agreement between them and the Burmese Government. It appeared that the Governor of Ninghan had confiscated the plaintiff's timber in contravention of a royal mandate. After the institution of the suit, the defendants removed the timber from Tonghoo to Rangoon. The Court below having fixed the price of the timber at Rangoon as the alternative damages in case of non-delivery, the High Court refused to interfere with such award. BOMBAY-BURMAH TRADING CORPORATION *v.* MAHOMED ALI SHERAGEE . **10 B. L. R. 345: 19 W. R. 123**

8. ——— Failure to supply wood when required—*Omission to make requisition.* In a suit for damages for breach of contract to supply wood which defendant had engaged to supply for the construction of a house, where the intention was found to have been that the plaintiff should from time to time give defendant notice of the different articles of wood-work required :—*Held*, that the defendant was only liable for damages to the extent of the wood which he did not supply according to the order given to him, not for the wood for which requisition had not been made. RADHA GOBIND SHAHA *v.* INAM BUKSH OSTAGUR **15 W. R. 217**

9. ——— Bailment—*Misappropriation of Government promissory notes—Negligence of Treasury Officer.* The agent of the plaintiff delivered to the Treasury Officer at Meerut nine Government promissory notes, aggregating R48,000 in value, in order that such notes might be transmitted to the Public Debt Office at Calcutta for cancellation and consolidation into a single note for R48,000, having previously indorsed the plaintiff's name on such notes at the request of a subordinate of the Treasury Officer, and received a receipt for such notes under the hand of the Treasury Officer. Owing partly to such indorsements and partly to the negligence of the Treasury Officer, such subordinate was enabled to misappropriate and negotiate two of such notes, aggregating R12,000 in value. The remaining seven of such notes were despatched to Calcutta, and a consolidated note for R31,200 was returned and delivered to the plaintiff, when the misappropriation of the two notes was discovered. The plaintiff sued Government, claiming "that it might be directed to make restitution of the two notes or deliver two other notes of equal value or their value in cash" with interest. On behalf of Government it was contended that it was not liable to the plaintiff's claim, inasmuch as the plaintiff, by his agent, had contributed to the loss of the two notes, and a master was not liable in damages

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

for loss or injury sustained through the fraud or dishonesty of his servant without the scope of his employment. *Held*, that the two notes not having been deliverd to the Treasury Officer as a bailee, but having been surrendered, the receipt given by that officer must be regarded as an undertaking on the part of Government to deliver a consolidated note for R48,000 in due course, and the plaintiff's suit was in reality one for damages on account of the refusal of Government to discharge its obligation, the measure of those damages being the amount by which the note for R31,200 fell short of R48,000 with interest, and such being the suit, the contention of Government was not any answer to it. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SHEO SINGH RAI . . **I. L. R. 2 All. 746**

10. ——— Failure to deliver steamer according to contract—*Loss of freight—Charter-party.* The plaintiff entered into a contract of charter-party with the defendants, whereby it was agreed between them and defendants "acting for the owners" that "the steamer *Atholl*, now on her passage to Calcutta, being tight, staunch, and strong, etc., shall receive on board from the charterers a complete cargo of merchandise, to consist of 700 tons dead weight, etc., and being so laden shall therewith proceed to London, with liberty to call for any legal purpose at any intermediate port or ports, etc., freight to be paid on the above cargo on right delivery of the same at and after the rate of £4 2*s.* 6*d.* per ton. Charterers to have the option of cancelling the charter-party, if the steamer has not arrived in Calcutta on the 15th April 1871." The defendants signed the charter-party as "agent of steamer *Atholl.*" The steamer was not, at the time the charter-party was entered into, on her way to Calcutta, being then in the port of London, and she did not start for some days after the date of the charter-party. She touched at Madras and Colombo on her way and did not arrive in Calcutta until 11th April. Rates of freight having declined since the middle of March, at which time, it was alleged, the steamer ought to have arrived, the plaintiffs sued the defendants for damages. *Held*, that the defendants were liable. The measure of damages was the difference between the value the steamer would have been to the plaintiffs as an instrument for earning freight at market prices, if she had been put at their disposal at the time when she ought to have been under the contract, *i.e.*, a fortnight or three weeks earlier, and what she was worth to them in the same view at the time when she actually was delivered. SCHILLER *v.* FINLAY **8 B. L. R. 544**

11. ——— Failure to ship goods according to contract—*Freight—Expenses of carriage—Sub-charterers.* Where the defendant agreed to ship goods for a certain port, in a ship of which the plaintiffs were the sub-charterers, but

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

failed to ship any portion of the goods, and the plaintiffs were unable to obtain any freight :—*Held*, in an action to recover the whole amount of the freight which would have been payable to the plaintiffs if the contract had been carried out, that the plaintiffs were entitled to recover as damages a sum equivalent to the entire freight agreed to be paid by the defendant for the goods in question, after deducting therefrom a proportionate part of the expenses of carriage which had been saved by reason of the service not having been rendered. *Held*, also, that the sum payable by the plaintiffs to the original charterers of the vessel for the intended voyage ought not to be deducted from the sum payable by the defendant, as the damages payable by the defendant must depend upon his own contract with the plaintiffs, and not upon the terms of the bargain between the plaintiffs and the original charterers. DE ANGLIS & CO. *v.* MAYAPPA SETTY **I. L. R. 5 Calc. 578 ; 5 C. L. R. 57**

12. ——— Breach of warranty—*Sale of special machine.* The plaintiff applied to the defendant to sell him an ice-making machine capable of turning out 100 seers of pure ice per hour. The defendant supplied a machine which he represented as capable of turning out the required amount of ice. It was in evidence that the machine was to be set up at Allahabad ; that the defendants had undertaken not to sell another machine of the same sort to any one at Allahabad, so that practically the plaintiff would have had a monopoly, or nearly so, as an ice purveyor at that station. The ice machine turned out eventually a quantity much less than 100 seers a day. *Held*, that the plaintiff was entitled as damages to the amount paid for the machine, the expenses of ascertaining whether it would turn out 100 seers a day, and reasonable interest on the whole ; the defendants to be at liberty to take back the machine. LAMOUROUX *v.* EVILLE **1 Ind. Jur. N. S. 274**

13. ——— Suit for breach of contract to admit into partnership—*Partnership for specified time.* In a suit brought for damages for breach of a contract to admit the plaintiff into partnership :—*Held*, that the damages to be awarded, although they should be estimated with reference to the profits which the plaintiff might ultimately have derived from the partnership, ought not to have been assessed at such a sum as would place the plaintiff in the position which he might have held at the conclusion of the partnership. Where the partnership was to endure for two years :—*Held*, that one year's profits would be a fair award of damages. LEWIN *v.* MORRISON **2 Agra Pt. II, 151**

14. ——— Failure to pay calls on shares—*Agreement to forfeit shares.* Where a party takes shares in a trading company, agreeing to forfeit his shares if he does not pay calls upon them at certain stated intervals, the penalty of forfeiture should be enforced against him if the calls are not paid according to agreement. The damages should not be measured by the amount of the call. ACHUMBIT SHAHA *v.* ROHIMOONISSA *alias* BIBEE NOOR JAN . . **24 W. R. 358**

15. ——— Breach of contract to register document—*Nature of suit.* A pottah granting an ijara and a kabuliat in similar terms having been executed respectively by and exchanged between the plaintiffs and the defendant, when the parties went to register the pottah the defendant refused to allow it to be registered alleging that the plaintiffs had not performed certain conditions which were incumbent on them before they were entitled to the ijara. In a suit for a refund of the deposit money and for damages :—*Held*, that the suit was brought, not on the pottah and kabuliat, but on an implied contract by the defendant to do what which was necessary to give effect to his own pottah, *viz.*, to allow it to be registered, and that the real question was whether the plaintiffs had done all that they were required to do to entitle them to the assent of the defendant to registration. As the pottah had been executed and handed over, if it specified no pre-requisite conditions, the natural presumption was that no such conditions existed although that presumption might be rebutted by sufficient evidence. Damages for a breach of contract of this kind, though not necessarily the same as for keeping a person out of possession, would yet be the loss occasioned to the plaintiff by the contract not having been performed. *Held*, further, that, although the amount the refund of which was sued for was in fact in deposit for the rents of the old lease which had not yet expired, yet, as the defendant had abandoned that lease and entered into a new arrangement as regarded the deposit, he could not now fall back on the old contract once abandoned, nor could he retain the money under the new contract which he had wrongfully refused to carry out. MONOMOTHONATH DEY *v.* SREENATH GHOSE . . . **20 W. R. 107**

16. ——— Breach of contract to convey immoveable property. Where a vendor, having agreed to convey, without any reasonable excuse conveys the property to a third party in order to obtain a higher price, the vendee is entitled by way of damages to the additional price obtained by the sale. TRILOKHYA NATH BISWAS *v.* JOY KALI CHOWDHRAIN . . **11 C. L. R. 454**

17. ——— Refusal to execute lease as agreed—*Amount of rent agreed on.* Under an indenture of lease, *A* and *B* covenanted to give *C* and *D* possession of premises comprised therein. The lease was executed by *A*, *C*, and *D*, and *B*'s assent was comprised therein, but he refused to execute

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

on breach by *A*, in an action for damages against *A* and *B* :—*Held B* was not liable ; but as against *A*, there being no allegation of special damage, the measure of damages would be the difference between the rack rent and the rent that was agreed to be paid. GOBERDHONE DASS *v.* NITTANUND MULLICK . . . **1 Ind. Jur. N. S. 41**

18. ——— Refusal to give lease as agreed—*Nominal damages.* A party who took from certain proprietors of an estate a lease of their interest therein without advance or premium, not having been put in possession and finding another party in possession with an adverse title, commenced a suit against him, which was unsuccessful. He then sued the lessors and their representatives for damages to recover the expenses of the litigation, and the whole of the profits he had expected from the lease. *Held*, that the plaintiff had no right to recover from the lessors the expenses of the litigation, and as it was not contended that the lessors had wilfully misrepresented things, he was entitled only to nominal damages. MAHOMED ESA KHAN *v.* KESHUB LAL **14 W. R. 382**

19. ——— Breach of clause in lease—*Rent suit—Substantial damage—Nominal damage.* *B* obtained a lease of certain lands from *A*, agreeing thereunder to pay to *A* a certain rental for the land, and also a sum of R183-6-3 yearly to *A*'s superior landlord, obtaining a receipt therefor. *A* sued *B* for the rent due to himself and for the sum due to his superior landlord. *Held*, that *A* was entitled to recover the sum due to his superior landlord as damages for breach of the contract, and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which *A* might become liable to his superior landlord. RUTNESSUR BISWAS *v.* HURISH CHUNDER BOSE **I. L. R. 11 Calc. 221**

See BASANTA KUMARI DEBYA *v.* ASHUTOSH CHUCKERBUTTY. **I. L. R. 27 Calc. 67 : 4 C. W. N. 3**

20. ——— Contract assigning mortgage rights—*Interest—Guarantee of loss.* Defendants assigned their mortgage rights under two deeds to plaintiff, stipulating to make good any loss which the latter might sustain by reason of the opposition or resistance of the mortgagors. Plaintiff, in a suit against the mortgagors, failing to establish one of the mortgages, sued the original mortgagees to recover damages with interest and costs incurred by him in a suit against the mortgagors. *Held*, that the measure of damages or loss to which the plaintiff was entitled was not the sum paid by him as consideration, but the value of the thing which he had been deprived of ; and that the suit being in its nature a suit for unliquidated damages, plaintiff was not entitled to the interest on the sum awarded as damages. PARBUTTI *v.* MISSER CHIMMUN LALL . **1 Agra 82**

21. ——— Suit for damages for being kept out of indigo factory—*Calculation of damages.* Suit for damages sustained by plaintiff during the period she was out of possession of an indigo factory with appurtenances. *Held*, that the lower Court was right in taking, as the basis of its calculation of damages, a *bonâ fide* agreeement entered into between the plaintiff and her lessees, showing the amount of rent which she would have received yearly but for the illegal act of the defendant ; that, as the indigo land was an appurtenance to the factory, by ousting the plaintiff from the factory all benefit derivable from chur lands fit only for indigo was lost by her, and that the sum which represented that loss had been rightly included in the calculation of damages to which plaintiff was entitled. HURISH CHUNDER KOONDOO *v.* BAMA KALEE DEBIA **5 W. R. 194**

22. ——— Breach of contract to cultivate Indigo—*Agreement to deliver indigo—Risk of loss in manufacture.* Where a raiyat took advances from a planter for the cultivation of indigo, stipulating to deliver a certain number of bundles of the plant, and further stipulating that if he failed to do so by neglecting to cultivate or cut, he would pay as damages the price of manufactured indigo for the bundles ascertained to be due :—*Held*, that, if the raiyat's failure to supply to bundles stipulated for arose through his neglect to cultivate, he was bound to pay as damages the profit which the planter would have derived from converting the indigo plant, which ought to have been delivered, into indigo, and selling that indigo at a fair price, the risk of failure in the course of manufacture to be reckoned in estimating the damages. HILLS *v.* BUDU KHAN **12 W. R. 533**

23. ——— ——— *Mode of performance—First failure to sow.* In a suit for damages for breach of contract to cultivate indigo :—*Held* (i) that, if the raiyats sowed at any time in the sowing season within three years of the institution of the suit, they could not be deemed to have committed a breach of contract, and that, therefore, the cause of action on such breach of contract could not commence before the close of the sowing season. (ii) That only one set of damages for one breach of contract alone could be recovered, and not a separate set of damages for each breach of failure to do each of all the various acts specified. (iii) That such stipulated damages should be for one year only, *i.e.*, that the first breach involved a liability to pay once, and once only, the stipulated damages, and that the contract

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

ceased and determined therewith. (SHUMBOO NATH PUNDIT, *J.*, dissenting.) MOTEE SAHOO *v.* FORBES . . . . **6 W. R. 278**

24. ——— *Bengal Regulation VI of 1823, s. 5, cl. 2. Held*, that the limit of damages recoverable under cl. 4, Regulation VI of 1823, was three times the sum advanced, and that the amount of advance itself could not be included or considered, except as the mode of measuring the damages. ZYN-OOD-DEEN *v.* WRIGHT **3 Agra 77**

25. ——— *Bengal Regulation VI of 1823, s. 5, cl. 4.* When a breach of contract to sow indigo arises, not from accident, but presumably from dishonesty, the case no longer falls within cl. 4, s. 5, Regulation VI of 1823, which limited the amount of penalty to three times the sum advanced, but the plaintiffs were entitled to recover an amount of damages not exceeding the sum which the defendant stipulated to pay on failure by him to perform his contract. LAL MAHOMED BISWAS *v.* WATSON **4 W. R. 62 : 1 Ind. Jur. N. S. 3**

26. ——— *Bengal Regulation VI of 1823—Fraud.* It is not imperative on the Courts, in cases of breach of contract for the supply of indigo plant, according to the provisions of Regulation VI of 1823, to award three times the amount of the advance. Where the breach is not fraudulent, the penalty should be adjudged with reference to the extent of the injury sustained, but not exceed three times the sum advanced. Where the breach is fraudulent, the extent of the injury sustained is, without any restriction whatever, the standard for regulating the amount awardable. DALEEP SINGH *v.* SEITH ROSHUM LALL **1 Agra 691**

27. ——— *Liquidated damages.* By a contract for the cultivation of indigo, the defendants agreed, in consideration of certain payments, to prepare the land, sow the seeds that should be supplied, and reap the crops ; and it was stipulated that in case the defendant should neglect to cultivate the lands, the amlah of the factory might cultivate them, and deduct the expense from the money payable to the defendant, and that, if the lands were not prepared for the seed at the time of the full moon in the month of Magh, "in consequence of the loss of indigo and its profits, the defendant should pay compensation at the rate of twelve sicca rupees per bigha." *Held*, that the stipulation for the payment by the defendant of twelve sicca rupees per bigha, in the event of the land not being prepared for seed by the time mentioned, was a reservation in the nature of liquidated damages ; and that the plaintiff was not entitled to recover more than that sum in respect of the breach of that stipulation, although loss to a greater extent may have been sustained. MACRAE *v.* JHOOMUCK MISSER **Marsh. 386 : 2 Hay 391**

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

28. ——— *Measure of damages.* In estimating the measure of damages to be paid for breach of contract to cultivate indigo, the period of the breach should be taken as the time for estimating the damages. Generally, the natural and immediate consequence of the breach of contract should alone be looked to, and not some possible remote result. Supposed profits ought not to be given as part of the damages, unless under special and extraordinary circumstances. ZEENUTTUNISSA *v.* TOMBS . . **W. R. 1864, 251**

29. ——— *Act X of 1836, s. 3.* When there has been a breach ofcontract to sow and cultivate indigo, both liquidated damages and the amount advanced to the cultivators cannot be recovered under s. 3, Act X of 1836. MAHOMED KASEM CHOWDHRY *v.* FORBES. **5 W. R. 277**

MAHOMED KASEM *v.* FORBES . **8 W. R. 257**

30. ——— Suit on breach of contract to cultivate and deliver indigo for recovery of the amount specified in the contract. *Held*, that, unless it was clear that the intention of the parties to the agreement was to treat the sum mentioned not as a penalty, but as liquidated damages, behind which the Court should not look, the Court could not award damages beyond the amount of injury actually sustained. DOYLE *v.* MUNDAREE MUNDUL . **5 W. R. S. C. C. Ref. 10**

HINGUN SOWDAGAR *v.* BOISTUM CHURN OJAH **6 W. R. Cir. Ref. 5**

31. ——— *Liquidated damages.* In a suit to recover damages under a kabuliat, in which defendant had engaged to sow and cultivate indigo, and in case of failure to pay as damages a specified sum for every year :—*Held*, that the amount agreed to be paid should be treated as liquidated damages, and not as a penalty. LEDLIE *v.* BHADOO PORAMANICK **11 W. R. 558**

32. ——— The sum agreed to be paid by a raiyat as damages for breach of contract in respect to the sowing of certain lands with indigo must be regarded as liquidated damages, and not as a penalty. TALIM MUNDUL *v.* WATSON & CO. . . . . **17 W. R. 94**

33. ——— **Compensation for breach of contract**—*Contract Act, s. 74.* Where a kobala is not executed within the stipulated date, an intending purchaser is not entitled to compensation under the Contract Act, s. 74, unless he can show that he tendered the purchase-money and the bond, together with a draft of the kobala, to the opposite party, who then refused to execute. FUKEER AHMED *v.* ISSUR CHUNDER DAS **20 W. R. 481**

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

34. ——— *Sum agreed on by parties.* Where the contracting parties have agreed at what sum the amount of damages for breach of a contract shall be estimated, it is not necessary to prove the amount of loss sustained. PALMER *v.* SECRETARY OF STATE FOR INDIA **2 Agra 194**

35. ——— **Liquidated damages**—*Penalty—Pleading.* Where the parties to a contract stipulate for the payment of a specified sum for any breach of it, and the damages resulting from any such breach are uncertain and incapable of accurate valuation, the sum agreed to be paid will be treated as liquidated damages, and not as penalty. In a suit for breach of contract it is open to the defendant to plead in that suit (without being obliged to bring a fresh suit) that the plaintiff, being the first to break the agreement, cannot now sue for damages for something subsequently done by the defendant in contravention of it. ASHRUFUNISSA BEGUM *v.* STEWART **7 W. R. 303**

36. ——— *Breach of contract in selling fish—Liquidated damages.* In a suit for damages on the ground that the defendants, after executing an agreemet by which they stipulated to sell fish every day in the plaintiff's bazar, and to pay a fee per diem, and bound themselves to pay damages to a specified extent in the event of their leaving his bazar and resorting to another bazar, had left his bazar where they were selling fish :—*Held*, that the sum stipulated to be paid was merely a penalty, and that plaintiff was not entitled to recover as damages anything beyond the damages he had actually sustained. MADHUB CHUNDER ROY *v.* LUCKEE JELANEE . **9 W. R. 212**

37. ——— *Liquidated damages—Penalty—Measure of damages—Act IX of 1872 (Contract Act), s. 74.* Under s. 74 of the Contract Act, 1872, the Court are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum. As a general principle, compensation must be commensurate with the injury sustained. Acting upon the principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantages as he might reasonably be expected to have derived from the contract had the breach not occurred. *Held*, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question, and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract. *Srigopal Pal Chowdhry* v. *Bengal Indigo Company, W. R. 1864, p. 354,* is presumably overruled by the cases under the Contract Act, s. 74. NAIT RAM *v.* SHIB DAT **I. L. R. 5 All. 238**

38. ——— *Breach of a contract to pay various sums—Agreement to pay enhanced rent in event of breach—Liquidated damages—Penalty—Contract Act, s. 74.* By the terms of a deed, a tenant was liable to pay rent to the plaintiff at an enhanced rate if he failed to pay, at a time specified, Government revenue, interest on a mortgage, and the rent agreed upon. The interest and the rent having fallen into arrears, and a suit having been brought to recover rent at the enhanced rate :—*Held*, that plaintiff was entitled to recover the additional amount as liquidated damages. BALKURAYA *v.* SANKAMMA **I. L. R. 22 Mad. 453**

39. ——— *Contract Act, ss. 73, 74—Interest—Agreement to lend money—Damages recoverable by lender for breach of such agreement.* The plaintiff, a money-lender, by a written agreement agreed to lend the defendant the sum of R20,000 at 7½ per cent. per annum for three years on the security of certain lands. From the evidence it appeared that the loan was to have been advanced on the 1st March 1887, and that the plaintiff's attorneys had prepared necessary deeds, which were ready on that day for execution by the defendant. The plaintiff had on that day withdrawn R20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 per cent. per annum, and his *munim* took it to the attorney's office for payment to the defendant. The defendant, however, did not attend, and on the following day the money was paid in again to the plaintiff's bankers at the same rate of interest as before. The defendant failed to take the loan, and the plaintiff sued him for breach of the agreement. He claimed as damages interest on the R20,000 at 1½ per cent. per annum for the three years for which under the agreement the loan was to be made. *Held*, that he was not entitled to interest for three years, but only to interest for such period as might reasonably be required to find another borrower of the R20,000 at the rate of interest agreed upon between him and the defendant. The Court accordingly awarded him interest at 1½ per cent. per annum (*i.e.*, the differ-

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

ence between the banker's rate of interest and the contract rate) on R20,000 for four months together with the expense of preparing the deeds required for the purpose of the loan. DATUBHAI EBRAHIM *v.* ABUBAKER MOLEDINA **I. L. R. 12 Bom. 242**

40. ——— *Contract which had become impossible to perform —Further and other relief—Damages—Contract Act (IX of 1872), s. 56—Novation.* Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender, of land which, however, had then already been attached under a decree, and had been taken under the Collector's management under s. 326 of the Code of Civil Procedure. To perform the contract by delivery of possession of the land having thus become impossible: *Held*, that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him. SETH JAIDAYAL *v.* RAM SAHAE . **I. L. R. 17 Calc. 432**

41. ——— *Contract Act (IX of 1872), s. 74—Penalty—Liquidated damages —Stipulation to pay sum named in case of breach—Reasonable compensation for breach.* Plaintiff and defendant, who were jointly interested in a *sal* forest, entered into an agreement by which they bound themselves not to cut down any tree in the forest for the next ten years and in case of any breach committed by any one of them to pay a penalty of R500. The principal defendant having cut down certain trees in violation of the agreement, the plaintiff brought this suit for the recovery of compensation for the trees so cut down and also his share of R500, the stipulated penalty for the breach of the agreement. The lower Court gave a decree only for the value of the trees which they would have ten years hence if they had not been cut down. *Held*, that s. 74 of the Contract Act has done away with the distinction between penalty and liquidated damages, and has left it to the Court, in cases where a sum is named to be paid in case of breach, to award a reasonable compensation not exceeding the sum named. That in this case the value of the trees cut down cannot be regarded as a measure for assessing the damages. The lower Court should have fixed some reasonable sum, not exceeding R500, the amount stipulated, as would be likely to prevent any future breach. *Nait Ram* v. *Shib Dat, I. L. R. 5 All. 238*, distinguished. *Brahmaputra Tea Co.* v. *Scarth, I. L. R. 11 Calc. 545*, referred to. DILBAR SARKAR *v.* JOYSRI KURMI . . . **3 C. W. N. 43**

42. ——— **Breach of covenant for title**—*Vendor and purchaser—Mortgagor and mortgagee—Value of prospective profits.* A purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of the eviction. Though in ordinary cases a mortgagee, when deprived of his security, can only recover his mortgage-money as the damages for breach of the covenant for quiet enjoyment yet, where the mortgage-deed contains a covenant on the part of the mortgagor not to pay off the mortgage for a term of years, the mortgagee is entitled to damages for being deprived of a favourable and long-enduring investment. For the purpose of estimating such damages, the Court will value the prospective profits as a jury would. NAGARDAS SAUBHAGYADAS *v.* AHMEDKHAN . . **I. L. R. 21 Bom. 175**

43. ——— **Appropriation by vendor** —*Passing of property—Power of re-sale—Contract Act (IX of 1872), s. 107—Changing shape of claim—Amendment of plaint.* The plaintiffs under several contracts with the defendant produced by manufacture goods answering to the description of the contracts and appropriated them to the several contracts. On notice of the production of the goods being given to the defendant, he directed the goods so appropriated to be marked and despatched for shipment according to certain instructions. The plaintiffs carried out these instructions, but the goods could not be shipped, as the vessels in which they were to be shipped were not available at their usual place. *Held*, that the ownership in the goods was transferred to the defendant, and the plaintiffs became entitled under s. 107 of the Contract Act, after due notice to resell them on the defendant's refusal to take delivery and to recover as damages the difference between the contract price of the goods and the price at which they were resold. *Semble:* The proper course to be adopted, when it is sought to shape a claim for damages differently from what appears in the plaint, is to amend the plaint and add a claim for damages on the basis of that amendment. Then at the trial evidence may be given in support of the amended statement. But that course ought not to be allowed to be adopted after the plaintiffs have once closed their case and the defendants have been called on to meet the claim as originally framed in the plaint. *Yule & Co.* v. *Mahomed Hossain, I. L. R. 24 Calc. 124*, followed. CLIVE JUTE MILLS CO. *v.* EBRAHIM ARAB **I. L. R. 24 Calc. 177**

YULE & CO. *v.* MAHOMED HOSSAIN **I. L. R. 24 Calc. 124**
1 C. W. N. 71

44. ——— **Measure of damages on breach of contract by purchaser**—*Power of re-sale—Contract Act (IX of 1872), s. 107—*

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

Right of re-sale to be exercised within a reasonable time of the breach of contract—Measure of damages. In the case of a sale, if the purchaser does not perform his part of the contract he is liable in damages to the seller, the measure of damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of contract. If a vendor, on breach of contract by non-payment of the purchase-money, elects to exercise the right of re-sale given to him by s. 107 of the Indian Contract Act, 1872, not only is the vendor bound to wait a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach. PRAG NARAIN *v.* MUL CHAND **I. L. R. 19 All. 535**

45. ——— Principal and agent—*Consignment of goods for sale—Unauthorized sale by agent below limit.* The measure of damages, in a case where an agent has in breach of his duty sold goods of his principal below the limit placed upon them by the principal, is the loss which the principal has sustained, and if he has sustained no loss, he can only ask for nominal damages. MANCHUBHAI NAVALCHAND *v.* TOD **I. L. R. 20 Bom. 633**

46. ——— Sale of unascertained goods—*Breach of contract—Power of re-sale—Contract Act (IX of 1872), s. 107.* The plaintiffs sold to the defendant under an "Indent" contract ten cases of tobacco at an agreed price. On arrival, the defendant refused to pay for and take delivery of the goods, on the ground that they were not the goods contracted for. After notice to the defendant, the plaintiffs re-sold the goods and sued to recover the expenses of the re-sale and the difference between the price realized and the contract price with interest. *Held*, that cl. 1 of the Indent Contract gave the plaintiffs a right to re-sell the goods, and sue for the damages mentioned therein. S. 107 of the Contract Act had no bearing on the case. *Yule & Co.* v. *Mahomed Hossain, I. L. R. 24 Calc. 124,* dissented from. MOLL SCHUTTE & CO. *v.* LUCHMI CHAND **I. L. R. 25 Calc. 505**

47. ——— Re-sale—*Breach of contract by purchaser—Contract Act, s. 107.* The plaintiff sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of, or pay for, the rest. The plaintiff re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. *Held*, that the proper measure of damages was the difference between the contract price of the goods which the defendant had refused to accept and the price realized by the plaintiff on the re-sale. *Moll Schutte & Co.* v. *Luchmi Chand, I. L. R. 25 Calc. 505,* followed. *Yule & Co.* v. *Mahomed Hossain, I. L. R. 24 Calc. 124,* dissented from. BASDEO *v.* SMIDT . . . **L. R. 22 All. 55**

48. ——— Contract consisting of distinct contracts with separate parties—*Misjoinder of parties as defendants—Grant of relief not prayed for—Liquidated rate of damages applicable to certain specified breaches of contract only—Form of decree—Costs.* Seven salt manufacturers, the defendants, contracted with *A* to manufacture and store in the factory in the name of, and for the benefit of *A*, such quantities of salt as he might require them to manufacture each season for seven years, in consideration of *A*'s paying them at the rate of R11-8-0 per garce of salt, four months' credit after each delivery being allowed to *A*, and of his paying Government taxes and dues, and executing all but petty repairs in the defendants' factory. *B* was a party with *A* to the contract, though he was not expressly mentioned therein. *A* assigned his share in the contract to *C*. *B*, as first plaintiff, and *C*, as second plaintiff, brought a suit against the defendants alleging that the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886), and praying (i) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886; (ii) that defendants 2, 4, and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt. The Court of first instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own pans only, decreed (i) that the seven defendants should pay damages at the rate of R5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree; (ii) that the defendants should pay the plaintiffs' costs. On appeal, the District Judge modified the decree by fixing the rate of damages at R45-10-0 for each garce of salt. *Held*, on appeal, that the suit was bad for misjoinder since the case of each defendant as a party to a distinct contract should be decided on its own merits; that the decrees of the lower Courts were bad in making all the defendants jointly and severally liable for costs and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant; that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the lower Appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty. NAMASIVAYA GURUKAL *v.* KADIR AMMAL . . **I. L. R. 17 Mad. 168**

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

49. ——— Agreement to discharge a debt due by debtor to a third party— *No time fixed for performance—Failure to perform within a reasonable time—Cause of action.* Defendant agreed to discharge a debt due by plaintiff to a third party secured by a mortgage of a village which was held by plaintiff on lease and which had been sub-let by him to defendant after the mortgage to the third party had been granted. The agreement provided that if the defendant failed to discharge the debt he should be liable to plaintiff for any damage which the latter might sustain. No time was fixed for the performance by the defendant of this obligation, and he, in fact, failed to perform it for a period of nearly three years, whereupon this suit was brought. *Held*, that the agreement was not a mere contract to indemnify; that defendant was bound to discharge the debt within a reasonable time, and that his failure to do so during three years was a breach of the contract, notwithstanding the fact that the third party had not enforced his claim against the plaintiff. The measure of damages payable in consequence of such breach would be the amount of the debt which defendant had undertaken to discharge. DORASINGA TEVAR *v.* ARUNACHALAM CHETTI

I. L. R. 23 Mad. 441

50. ——— Assessment of damages *—Contract—Breach of contract to deliver goods —Market price at due date—Suit in High Court cognizable by Small Cause Court—Decree in such suit, for less than R1,000—Costs—Small Cause Courts Act (XV of 1882), s. 20, as amended by s. 11 of Act I of 1895.* Where for purposes of assessing damages, it is necessary to ascertain the market rate on a certain day, and evidence of alleged actual dealings on that day is given, the Court must be satisfied that such dealings were contracts made in relation to the true prices of the day, and not made merely with a view to influence the prices and, therefore, affording no clue to the real price at that date. *Per* JENKINS, *C.J.*—Obviously, value created for special purposes is irrelevant, and it is for this reason that the prices made by Bulls and Bears are of no use. If the market value is uncertain, then we must have recourse to such surrounding circumstances as affect the probabilities, and, among them, to real prices proved about the time of due date. The plaintiffs sued the defendants for damages for non-delivery of cotton, the question between them being the market rate on the 25th May, 1900, the date on which delivery should have been made. The 24th May was a holiday, and it was proved beyond dispute that on the 23rd the rate was R225 per *khandi*. The plaintiffs alleged that on the 25th the price was R240 per *khandi*: the defendant alleged that it was R217 per *khandi*, and counter-claimed accordingly. The plaintiffs adduced evidence of five

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

cases of alleged actual dealings at R220 per *khandi* on the 25th May. The lower Court, however, was not satisfied that the contracts were made in relation to the true price of the day, and the Court of Appeal could not say that it had misappreciated the evidence on the point. The defendant called (among others) the Chairman of the Cotton Trade Association, by which the rate of R217 had been fixed for the 25th May. He, however, knew of no transactions at that rate. The lower Court found the rate on the 25th May, 1900, to have been R217 per *khandi*, and passed a decree for the defendant on the counter-claim against the plaintiffs. On appeal by the plaintiffs: *Held*, that there was no satisfactory direct evidence of the actual market rate on the 25th May, 1900, but that, as the evidence showed that the rate on the 23rd was R225 per *khandi* and that the market was on the rise, the conclusion might be drawn that the real rate on the 25th May was not less than R225. How much more it was, the evidence did not establish, so that the only conclusion was that the plaintiff had proved that on the due date the rate was not less than R225 per *khandi*, which therefore (and not R217) was the basis on which damages should be assessed. The Court of Appeal accordingly varied the decree of the Court below, and passed judgment for the plaintiffs. The question then arose whether, having regard to s. 20 of the Small Cause Courts Act (XV of 1882), as amended by s. 11 of Act I of 1895, the plaintiffs were entitled to the costs, the decree in their favour being for less than R1,000. *Held*, that no costs could be given. The mere fact that the plaintiffs claimed a sum in excess of the Small Cause Court jurisdiction was not enough to take the case out of the operation of s. 20. The result of the suit showed that the true amount or value of the subject matter was not above the Small Cause Court's limit. The Court of Appeal ordered that the defendant should get the costs in the lower Court of his counter-claim, and no more, but none of the general costs of suit or the costs incurred in connection with the plaintiff's claim. No costs of the appeal. SHRIDHAN GOPINATH *v.* GORDHANDAS GOKULDAS (1901)

I. L. R. 26 Bom. 235

51. ——— *Mode of assessing damages where no proof of market price.* On 21st October, 1899, defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of Powell Duffryn coal, January to May shipments, 200 tons to be supplied each month. The first shipment was due in middle of February. Defendant failed to deliver any of the coal, and the plaintiff did not purchase any coal against defendant's contract. The plaintiff now sued for damages for breach of the contract. The only question was as to the mode of assessing damages. There was practically no coal in Bombay of the description contracted for

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*concld.*

at the dates at which delivery should have been given, and consequently no market rate could be proved. At the hearing plaintiff produced a statement showing the rates at which he had, during the contract period, settled certain contracts for Powell Duffryn coal which he had with the Bombay Company, Limited. *Held*, that, under the special circumstances of the case, and in the absence of any evidence as to a market rate, the figures given in this statement might properly be received in evidence for the purpose of fixing the actual value of the coal at the dates of breach, thus affording a measure of the damages suffered. JUGMOHANDAS VURJIWANDAS *v.* NUSSERWANJI JEHANGIR KHAMBATTA (1902) **I. L. R. 26 Bom. 744**

52. ——— Contract for forward monthly deliveries—*Construction of Contract —Breach before the time for complete Performance —Market Rate, where no Market in India, how to be determined.* The defendant contracted to sell to the plaintiff 5,000 tons of manganese ore of a certain quality to be delivered into waggons at Kamptee, B. N. Ry., "500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month, if practicable, the whole 5,000 tons to be completed not later than 15th February 1907." In October 1906 the defendant tendered, in part-fulfilment of the contract, certain Domree ore which the plaintiffs refused to accept on the ground of inferiority in quality. Thereupon the defendant on the 5th November 1906 wrote cancelling the contract, and on the 17th January 1907 finally repudiated all liability under the contract. On the 5th March 1907, the plaintiffs instituted an action for damages for non-delivery. It was established in evidence that ordinarily there was no market rate for manganese ore in India, but that there was a free market in England, and that the plaintiffs intended to ship the ore to England :— *Held*, that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract. *Josling* v. *Irvine, 6 H. & N. 512, Brown* v. *Muller, L. R. 7 Ex. 319, Roper* v. *Johnson, L. R. 8 C. P. 167*, followed. Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damage for those breaches was the value to the plaintiffs of the portions that ought to have been delivered on those dates at the prices procurable in England less the cost of getting them there. *Borris* v. *Hutchison, 18 C. B. N. S. 445*, followed. COOVERJEE BHOJA *v.* RAJENDRA NATH MUKERJEE 1909) . . . . **I. L. R. 36 Calc. 617**

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT.

53. ——— Assessment of damages, practice as to. In a suit for recovery of damages, the Court which tries the case must, before passing final decree, assess the damages, and not leave them to be assessed in execution of the decree. The practice on the original side of the Court as to assessing the amount of the damages discussed. MANIRAM *v.* BIBI MASHIHUN . **4 B. L. R. Ap. 66**

KRISTO MOHUN MOOKERJEE *v.* JUGGURNATH ROY JOOGEE . . . . **11 W. R. 236**

BINDA BIBI *v.* LALA RAMSARAN SINGH **1 B. L. R. S. N. 23**

BINDA BIBI *v.* LALA RAMSARAN SINGH AND BHENUCK SINGH *v.* JUGGER SINGH **10 W. R. 199**

54. ——— Wrongful act—*Injury done —Punishment.* In assessing damages caused by a wrongful act, the injury sustained should alone be considered, not the punishment to be indicated. BOLOBHUDDUR SINGH *v.* SOLANO . **5 W. R. 107**

55. ——— Nominal damages —*Obligation of Court to award nominal damages. Semble :* When the Court is of opinion that the plaintiff is not entitled to any substantial damages, it is not bound to award him nominal damages. FUTEEK PAROOEE *v.* MOHENDER NATH MOZOOMDAR **I. L. R. 1 Calc. 385**

56. ——— Right to damages—*Establishment of cause of action—Assignment at too large a sum.* Where a cause of action is established, the plaintiff is entitled to some damages. His claim ought not to be dismissed altogether by the lower Appellate Court because the first Court assessed the damages at too large a sum. PARUSNATH SHAHA *v.* BROJOLAL GOSSAIN **8 W. R. 44**

57. ——— *Plaintiff exaggerating his claim.* A plaintiff who comes into Court with a monstrously exaggerated statement of injury sustained is only rightly served if the Court dismiss his claim *in toto*, although some injury was found to have been sustained by him. THAKOOR LULEET NARAIN DEO *v.* JUGGURNATH MISSER **8 W. R. 476**

58. ——— *Plaintiffs exaggerating his claim.* A Judge in appeal was held to have done wrong in dismissing a plaintiff's case *in toto* with all costs, on the ground that he had monstrously exaggerated his claim in the first instance, when there was a ground, although small, for the plaintiff's contention. RAMCHUNDER CHUCKERBUTTY *v.* MARIOTT . . . **15 W. R. 465**

59. ——— *Failure to prove special damage.* Where special damage is the gist of a plaintiff's case, and he fails to prove such damage, he is precluded from recovering ordinary damages. WILSON *v.* KANHYA SAHOO **11W. R. 143**

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

60. ——— Responsibility of each member of common assembly—*Compensation—Duress. Held,* that in a suit for compensation for damage done to property each and every one of the persons was equally responsible to make compensation for the loss sustained, when he happened to be a part of the common assembly and executed a common purpose, and that each one was not liable only in proportion to his share of the plunder received or of the damage done by him. Coercion to form a member of the assembly, or bear a part in the damage, is no excuse from responsibility in a civil suit for compensation. GANESH SINGH *v.* RAM RAJA **3 B. L. R. P. C. 44 : 12 W. R. P. C. 38**

61. ——— Mental anxiety—*Damage arising from tort.* Damages are not usually awardable under the express head of "mental anxiety," but in all cases in which damage arises from a tort, as distinguished from a breach of contract, the Courts in awarding damages are not compelled to estimate the damage too precisely, but are at liberty to give damages which may effectually protect the injured party from a repetition of the wrong. FUROOKH HOSSEIN *v.* FUZUL HOSSEIN **1 N. W. 209 : Ed. 1873, 292**

62. ——— Abuse and assault—*Position in life of plaintiff.* In a suit for damages occasioned by abuse and assault, the plaintiff's position should be considered for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted, but not for giving a decree against the defendant beyond any possibility of his ever satisfying it, simply because the plaintiff is a man of a somewhat high position in life. JOYPAL ROY *v.* MUKHOOND ROY **17 W. R. 280**

63. ——— Assault without provocation. In a suit for damages for an assault made without provocation, the damages given should be commensurate to the injury and annoyance caused, even though there has been no serious personal injury sustained. RAMJOY MUZOOMDAR *v.* RUSSELL . . . . **W. R. 1864, 370**

64. ——— Injury done by cattle trespassing—*Striking average.* Striking an average on the amounts stated by several witnesses is not a proper mode of assessing the amount of damages sustained by the plaintiff in respect of injury done to his crops by the defendant's cattle. SURIUTOLLAH CHOWDHRY *v.* MADUR BUX CHOWDHRY **W. R. 1864, 363**

65. ——— Loss of cultivation by cutting embankment. In a suit for damages for loss of cultivation by the cutting of a bank, the plaintiff is entitled not merely to the rent of the land but also to the profits of cultivation. PUNNUN SINGH *v.* MEHER ALI **W. R. 1864, 365**

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

66. ——— Defamation—*Conviction and fine by Criminal Court.* A Civil Court is not bound to give damages for defamation after the defendant has been convicted and fined for the offence in the Criminal Court where plaintiff has suffered no actual damage. OOMA CHURN *alias* GOPAL CHUNDER ROY MOZOOMDAR *v.* GIRISH CHUNDER BANERJEE . . . . . **25 W. R. 22**

67. ——— Compensation for land taken by Railway Company under Act VI of 1857—*Compensation—Probable damages to adjoining lands.* When land is taken up for a railway company under Act VI of 1857, the owner should claim for all damages likely to be caused to his adjoining lands by the works of the company ; and no suit will lie for damages so caused if they could reasonably have been foreseen at the time of the fixing of compensation. Whether such damages could reasonably have been foreseen or not is a question of fact to be determined by the lower Court. TAPIDAS GOBINDBHAI *v.* B., B. AND C. I. RAILWAY COMPANY. B., B. AND C. I. RAILWAY CO. *v.* TAPIDAS GOBINDBHAI . . . **6 Bom. A. C. 116**

68. ——— Malicious prosecution—*Injury to feelings.* In estimating damages for a malicious prosecution, a Civil Court is not necessarily wrong in taking into consideration the plaintiff's feelings. HURO LALL BISWAS *v.* HURO CHUNDER ROY . . **12 W. R. 89**

69. ——— ——— *Compensation.* In a suit for malicious prosecution on a false charge of dacoity, a Civil Court in awarding damages is not limited to the amount mentioned in s. 270 of the Code of Criminal Procedure. SHAMACHURN HALDER *v.* BEHARI LALL KOILAY . **14 W. R. 443**

70. ——— ——— *Injury to feelings—Reimbursement of legitimate expenses.* In a suit for damages for malicious prosecution, damages are given on two grounds—*first,* on the ground of a solatium for injury to the feelings of the party prosecuted ; *secondly,* as a reimbursement for legitimate expenses incurred by him in his defence. Ordinarily speaking, the plaintiff, in a successful action for malicious prosecution, is entitled to recover all costs necessarily incurred by him in his defence in the previous prosecution, but each case must be governed by its own circumstances. *Hicks* v. *Faulkner, L. R. 8 Q. B. D. 167, Mitchell* v. *Jenkins, 5 B. & Ad. 595,* referred to. RAI JUNG BAHADUR *v.* RAI GUDOR SAHOY **1 C. W. N. 537**

71. ——— Wrongful distraint—*Actual loss.* In a suit for damages for excessive distress, the Judge awarded to the plaintiff damages equivalent only to the actual loss sustained. *Held,* that he had a discretion with respect to the amount of the damages, and that there was no ground for interfering with his assessment. TEEKARAM KYBUTT *v.* RAJKISHEN ROY . . **Marsh. 495**

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

72. ——— **Wrongful act**—*Suit for possession of property—Prospective loss.* Damages should be awarded according to the loss caused to plaintiff by the wrongful act of the defendant; and, where such act renders it probable that plaintiff will be a loser in future time, the award should embrace prospective loss. KOOMAREE DASSEE *v.* BAMA SOONDEREE DASSEE . **10 W. R. 202**

73. ——— **Suit for negligence**—*Mode of assessment—Practice—Fresh issues—Civil Procedure Code (Act X of 1877), s. 566.* In a suit for negligence, where it is possible that the Court may take one or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the amount of damages according to whichever view the Court may adopt, and if the evidence produced is applicable to one view only, the Court cannot give the plaintiff a re-trial and allow him to remodel his case with fresh evidence under s. 566 of the Civil Procedure Code. That section is intended to provide for cases where some point has come to light in the Appellate Court which has not been raised, or the importance of which has not occurred to the parties or to the Judge in the Court below. ANUNDO LALL DASS *v.* BOYCAUNT RAM ROY **I. L. R. 5 Calc. 283 : 4 C. L. R. 473**

74. ——— **Wrongful conversion**—*Detention of ornaments pledged.* In an action for damages for the detention of ornaments pledged with the defendant which the defendant has wrongfully converted to his own use, the measure of damages is the value of ornaments, less the sum for which they have been pledged. HASAM KASAM *v.* GOMA JADAVJI . . **5 Bom. O. C. 140**

75. ——— *Conveyance of timber—Price at place of destination.* In an action for the wrongful conversion of certain timber, the plaintiff claimed to recover as damages the market value of the timber at the town of Rangoon, to which it was being conveyed at the time of the conversion. *Held,* that the cost of carriage to Rangoon from the place where the wrongful conversion occurred must be deducted. BOMBAY-BURMAH TRADING CORPORATION *v.* MAHOMED ALLY . . . . **I. L. R. 4 Calc. 116**

76. ——— *Moveable property—Non-existent moveables—Contract to assign after acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion. Held,* upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized, and was enforcible against a transferee of such produce with notice of the obligee's equitable interest. *Collyer* v. *Isaacs, L. R. 19 Ch. D. 342,* and *Holroyd* v. *Marshall, L. R. 10 H. L. 191,* referred to. *Held,* also, that such an interest would not avail against a transferee without notice. *Joseph* v. *Lyons, L. R. 15 Q. B. D. 280,* and *Hallas* v. *Robinson, L. R. 15 Q. B. D. 288,* referred to. In a suit against such a transferee with notice, who had sold the produce, for damages for wrongful conversion of the security:—*Held,* that the measure of damages under ordinary circumstances, and where a fair price had been obtained, would be the amount which the defendant had realized by the sale. *Misri Lal* v. *Mozhar Hossain, I. L. R. 13 Calc. 262,* referred to. BANSIDHAR *v.* SANT LALL . **I. L. R. 10 All. 133**

77. ——— **Injury to indigo crop**—*Gross negligence.* In a suit in which it is proved that defendants maliciously and from gross negligence allowed their cows to trespass on plaintiff's lands and to destroy the indigo plants thereon, knowing the value of the crops to the plaintiff: *Held,* that the case was one of tort, in which the wrong being deliberate and malicious, the plaintiff was entitled by way of damages, not to the mere value of the growing plants destroyed as the actual loss sustained, but to substantial damages sufficient to compensate the plaintiff for the loss of profits which would have been obtained from the indigo plant. SREEHUREE ROY *v.* HILL . **9 W. R. 156**

78. ——— **Suit for value of trees cut down**—*Person with some claim of right.* Suit for damages in respect of the value of trees cut down by the defendant, not as a wrong-doer, but as one having some claim of right to justify him. *Held,* that the computation of damages in such a case is not a matter of exact calculation, but must be left to the discretion of the Judge who hears the evidence. FORBES *v.* MEER MAHOMED KASSEEM **1 W. R. 238**

79. ——— **Suit for illegal ejectment**—*Surety of lessee.* Explanation of the principle of assessing damages in a suit by a surety of the lessee who has afterwards become his partner for damages for illegal ejectment of the lessee before the expiration of the lease. BURRODA KANT ROY *v.* RAM TUNNOO BOSE . **7 W. R. P. C. 51**

S.C. BURDAKANTH ROY *v.* ALUK MUNJOOREE DASSIAH . . . . **4 Moo. I. A. 321**

80. ——— **False representation**—*Cause of action—Recurring damages.* Where plaintiff had in a former suit, brought to recover a part of the consideration-money together with the excess rent paid by him on a patni settlement which defendant had induced him to take on a false representation regarding the lots included in it, obtained consequential damages:—*Held,* that he could not succeed in a second suit to get back so-called excess

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

of rent paid by him in terms of the patni pottah since the institution of the first suit. When once the cause of action is matured, the subsequent occurrence of further damage, after or before adjudication of the original matter, does not originate a fresh cause of suit. NILMONEE SINGH DEO *v.* ISSURCHUNDER GHOSAL . **9 W. R. 121**

81. ——— Actions for compensation for destruction of life—*Act XIII of 1855.* Mode of estimating damages in actions brought under Act XIII of 1855 discussed. VINAYAK RAGHUNATH *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY . . . **7 Bom. O. C. 113**

LYELL *v.* GANGA DAI . **I. L. R. 1 All. 60**

SORABJI RATANJI *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY . **7 Bom. O. C. 119 note**

RATANBAI *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY . **7 Bom. O. C. 120 note**

And, on appeal, RATANBAI *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY **8 Bom. O. C. 130**

82. ——— Suit against Collector for acting illegally at sale. In a suit against the Collector personally for damages on account of loss sustained by illegally selling to the second highest bidder, the difference between the two bids is the proper measure of the plaintiff's loss, and not the actual or probable value of the estate. CORNELL *v.* OODY TARA CHOWDHRAIN . **8 W. R. 372**

83. ——— Action of trespass—*Damage to property by alteration of neighbouring house—Injunction.* Plaintiff and defendants, occupants of neighbouring houses, were joint tenants of the party-wall. Defendants unroofed their house, raised the wall, and placed beams on it to rebuild their house. The lower Appellate Court found that, in consequence of this alteration, the rain from defendants' house descended upon plaintiff's verandah and caused damage to plaintiff, and decreed that defendants should restore the wall to its former height, and remove the beams placed on it. *Held*, on special appeal, that taking the finding to be that the alteration created "stillicidium," where it did not exist before, or that it rendered more burdensome an existent "servitus stillicidii," it would be very dangerous to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess; that in the present case the damages should be assessed and awarded, and the injunction to remove the roof of the house and reduce the wall be made conditional upon the defendants not removing the cause of the nuisance. In such a case, the measure of damages is the amount which will induce the defendants to abate the nuisance. AKILANDAMMAL *v.* VENKATA CHALA MUDALI . . . . . **6 Mad. 112**

DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

84. ——— *Trespass to immoveable property—Quarrying stone without leave.* Where the defendants without leave quarried on the land of the plaintiff and removed a large quantity of stone therefrom: *Held*, that the plaintiff was entitled to recover by way of damages the value of the stone after it was quarried, and that the defendants were not entitled to a deduction therefrom of the cost they had incurred in quarrying the stone. DALJIBA ANANDRAV *v.* BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY **6 Bom. A. C. 235**

85. ——— Infringement of trade-mark—*Damage caused to plaintiffs by way of enhancement of loss, and not by loss of profit.* Where the infringement of the plaintiffs' trade-mark by the defendants caused a loss of profit to the plaintiffs, not by diminishing the amount of goods sold by the plaintiffs, by taking away their customers or ousting them from their usual market, but by causing the goods actually sold by the plaintiffs to be sold at a diminished price:—*Held*, that the defendants were liable for the loss sustained by the plaintiffs; and that the amount of the reduction in the price of the goods sold was the measure of damages. The plaintiffs sued the defendants for the infringement of a trade-mark used by the plaintiffs upon bundles of yarn sold by them, and known as "No. 20 red tie" yarn. They alleged that the defendants introduced into the Madras market a quantity of yarn bearing similar marks to those upon the plaintiffs' yarn, but of very inferior quality; and that, in consequence of this action of the defendants, the selling price of the plaintiff's yarn was, during the months of April and May 1885, depreciated beyond the amount of depreciation attributable to the natural fall of market prices in those months; and they contended that such depreciation was the natural and reasonable result of the defendants' wrongful act. The plaintiffs calculated the damages sustained by them at R6,000. It appeared that during the months in question the plaintiffs' mill was not working at a profit, and would have made no profits even if the plaintiffs had obtained for their yarn the ruling market price. The damage, therefore (if any), caused to the plaintiffs by the action of the defendants was not in form of profits, but in the form of enhancement of loss. *Held*, upon the evidence, that the extra fall in the price of the plaintiffs' yarn beyond the general market depression was due, not simply to the introduction of the defendants' yarn into the Madras market, but to its introduction with the trade-mark similar to that of the plaintiffs. The Court found that the said wrongful act of the defendants prejudicially affected the sale of the plaintiffs' yarn to the extent of about two annas per bundle; that the damage thus sustained by the plaintiffs was the reasonable

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

and probable result of the defendants' action; and that the plaintiffs were entitled to recover such damage from the defendants. MANOCKJI PETIT MANUFACTURING COMPANY *v.* MAHALAXMI SPINNING AND WEAVING COMPANY

I. L. R. 10 Bom. 617

86. ——— Wrongful execution of decree—*Execution of decree after sale of decree.* The defendant, being the holder of a decree, whereby a certain sum as declared due as a lien on two mouzahs therein mentioned, sold his decree to the plaintiff in the present suit, who had purchased the proprietary right in the mouzahs subject to the lien. Subsequently the defendant, who retained possession of the decree, sued out execution and realized the amount due under it, together with subsequent interest thereon. *Held*, that the plaintiff was entitled to recover back the money paid by him as the consideration for the sale, together with damages proportionate to the loss sustained by reason of the subsequent improper execution of the decree, *viz.*, the amount of subsequent interest. GOOR SAHAI *v.* HUR SAHAI . **3 Agra 202**

87. ——— Wrongful attachment—*Death of cattle seized.* In execution of a decree against his judgment-debtor, the defendant caused the cattle of the plaintiff, a stranger, to be seized and taken. The plaintiff filed his claim under s. 246, Act VIII of 1859, which was allowed. Subsequently to the admission of the claim, but before the order for release of the cattle, three of the bullocks died. The plaintiff sued for damages consequent on the seizure of the cattle, and for the value of the three bullocks which had died during the time they were in the custody of the officer of the Court. *Held*, that the defendant was liable to the plaintiff for damages sustained by him in consequence of the seizure and detention of the cattle,—*i.e.*, for a sum sufficient to cover what would have been plaintiff's expenses for hiring bullocks to cultivate his land. SUBJAN BIBI *v.* SARIATULLA

3 B. L. R. A. C. 413 : 12 W. R. 329

88. ——— *Liability of execution-creditor in damages for wrongful seizure —Attachment of stranger's property.* Certain unthreshed rice belonging to the plaintiff was wrongfully attached by the defendants under a money-decree obtained by them against a third party. The attachment had been made under a warrant which specified the rice in question, and which had been issued upon a darkhast presented by the defendants, in which they prayed for the attachment of this particular rice as their judgment-debtor's property. The rice, while in the custody of a bailiff of the Court nazir in the place where it had been attached, was clandestinely threshed and carried off by thieves, who left the straw. In a suit brought by the plaintiff to recover the value of the unthreshed rice from the defendants:—*Held*, the measure of damages should be the value of the rice as it stood at the time of the wrongful attachment made at the instance of the defendants. If, however, the plaintiff accepted the straw left by the thieves, the value of the straw as it stood at the time of such acceptance should be deducted from the value of the straw and rice when unsevered from each other. GOMA MAHAD PATIL GOKALDAS KHIMJI

I. L. R. 3 Bom. 74

89. ——— *Loss of timber on attached estate.* This suit was brought to cancel a decision of the Magistracy (A), dated 11th December 1869, whereby first defendant was put in possession of the Choladi forest, to establish plaintiff's jeum right thereon, and to recover the same with R14,000 value of timber. The facts, as they appeared, were that there was a coffee estate called Choladi, carved out of the same jungle as that in which the Choladi forest was, but not adjoining it in a different taluk. The cultivation of that estate was begun in 1862 by *G*, who in 1865 transferred his interest to *B*, who in 1867 was succeeded by first defendant. In the following year the first defendant proceeded to lay claim to the land in dispute, and in 1868 he prosecuted some hill-men for trespass and had their crops attached. In June 1869 he procured an order from the Deputy Magistrate whereby the Gudalur Sub-Magistrate was ordered to attach certain lands (no boundaries being specified). The land and timber thereon were accordingly attached and an order of attachment served on plaintiff. The case then came before the Assistant Magistrate, who, after holding an enquiry as to possession, passed the order (A), cancellation whereof was prayed in the plaint. The District Judge found that down to the interference of the Magistrate in 1868 plaintiff was in possession as owner, and he further decreed that defendant should pay plaintiff R14,000 on account of the timber which had been carried off, by whom it did not appear. On appeal, the High Court confirmed the decision of the District Judge on the question of title, but reversed it as to the value of the timber carried off, because there was no causal connection between its loss and a wrongful act of the defendant which was needed to justify the award of that sum as damages. There was no evidence of the mode of the loss. The occasion for it was given by an order of a Magistrate, and the mere preferring of the complaint which gave birth to that order did not render the defendant responsible in the circumstances of the case. IRVINE *v.* THACHARAKAVIL MANA VIKRAVAN TIRAMELPAD OF NILUMBUR . . . **7 Mad. 235**

90. ——— Wrongful detention of property. The proper measure of damages for

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DAMAGES—*contd.*

2. MEASURE AND ASSESSMENT OF DAMAGES—*contd.*

(*b*) TORT—*contd.*

wrongful detention of property is the difference between the value of the property when seized and its value when restored. NUNDEERAM SINGH *v.* INDERCHUND DOGARE . . **Cor. 89**

S.C. in Court below. INDERCHUND DOGARE *v.* NUNDEERAM SINGH . . . **Cor. 3**

91. ———— *Interest on value of goods.* In a suit for damages for detention of property, interest at the bazar rate on the value of the goods awarded and recovered may not be an adequate measure of damages. The Judge should take into consideration all the circumstances of each case presumably within the knowledge of the defendant at the time he committed the act which forms the cause of action, and allow for their natural and immediate consequences. PUNJU *v.* OODOY **18 W. R. 337**

92. ———— **Suit for damages for taking and detaining coffee estate and properties and for destruction of crop**—*Profits of estate.* The plaintiff brought a suit against the defendant to recover damages for the wrongful taking and detention by the defendant of a coffee estate and certain moveable property belonging to the plaintiff, and for the loss sustained, partly by the destruction of the growing "supplemental crop" and partly by neglect of the proper cultivation of the estate. The possession of the estate had been in the first instance given in right of the defendant's claim as mortgagee, and afterwards retained mistakenly in the same right. The Civil Judge awarded the plaintiff R20,000 as compensation for the injury, privation, and suffering resulting to the plaintiff from the defendant's wrongful acts in obtaining and withholding possession of the estate. *Held*, that the defendant should not have been adjudged to pay more than the value of the profits of the estate, and of any property removed from the estate, and compensation for any injury caused to the estate by the acts or neglect of the defendant or his agents. MCIVOR *v.* STAINBANK . . . . . **5 Mad. 70**

93. ———— **Suit for plundered property**—*Misappropriation—Presumption.* In a suit to recover the value of plundered property, when a question arose as to the amount of the property misappropriated, it was ruled that, unless the defendant produced the property and showed it not to be of the value stated by plaintiff, the strongest presumption should be made against him, and the highest value assumed. SOONDUR MONEE CHOWDHRAIN *v.* BHOOBUN MOHUN CHOWDRY . . . . **11 W. R. 536**

94. ———— **Injury to Ferry**—*Compensation—Land Acquisition Act (I of 1894), ss. 9, 12 and 18—Notice—Irregularity in the notice, effect of—Valid award, requirements of—Railways Act (IX of 1890), s. 10, sub-s. (2)—Limitation Act (XV of 1877), Sch. II, Art. 120—Damages, measure of.* Where notice under s. 9 of the Land Acquisition Act does not contain the material facts, which would enable the landowner to identify the land intended to be taken up, and where the land to be acquired is affected with a franchise, the franchise is not described, and the notice fixes less than the prescribed time to prefer claims, there being irregularities, a suit for damages for permanent injury to a ferry caused by acquisition under the Land Acquisition Act, is maintainable in the Civil Court, notwithstanding an award has been made by the Deputy Collector, not allowing any compensation for the ferry, as it was not claimed even after a special notice. Sub-s. (*2*) of s. 10 of the Railways Act does not bar a suit for compensation in the Civil Court, when the Collector refuses to adjudicate upon the claim put forward by the owner. A suit will lie in the Civil Court in respect of claim for damages, which could not be foreseen at the time of the acquisition proceedings. A suit to recover compensation for land acquired, instituted on the refusal of the Collector to award any compensation under the Land Acquisition Act, is governed by Art. 120 of Schedule II of the Limitation Act, the right to sue accruing either from the date of the acquisition or the refusal by the Collector to award compensation. The mere construction of a railway bridge across a river, whereby the profits of the ferry are reduced, does not entitle the owner to claim damages; but where lands and both banks of the river, which were used as landing places for the ferry, were acquired for the purpose of the railway bridge, and the access to the river and with it the exercise of the franchise was destroyed, the owner was entitled to compensation. The value of a ferry ought not to be determined by ascertaining the average profits at the date of the acquisition by regarding it as an invariable quantity and by taking a number of years' purchase. The damages ought to be calculated on the basis of the average profits from the ferry. RAMESWAR SINGH *v.* SECRETARY OF STATE FOR INDIA (1907). **I. L. R. 34 Calc. 470**

3. REMOTENESS OF DAMAGES.

1. ———— **Suit for trespass**—*Expenses of criminal proceedings—Loss of income.* The plaintiffs, describing themselves as the agent and gomastah of the hereditary *durmakurtah* of the Trivellore Pagoda, brought a suit for damages against the defendant, the committee of the district, appointed by virtue of Act XX of 1863, and their servants, for a trespass by the defendants in forcibly dispossessing them of the pagoda and the property therein, and for the wrongful removal and retention of the property. The plaint stated

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DAMAGES—*contd.*

3. REMOTENESS OF DAMAGES—*contd.*

that the defendants were punished criminally for the trespass by the Magistrate, who, after enquiry under ss. 318 and 319 of the Criminal Procedure Code, restored the possession of the pagoda to the plaintiffs. The damages claimed were the value of jewels, cash, records, and accounts not restored; the expense incurred by the *durmakurtah* in the purification of the pagoda; the amount of counsel's and vakil's fees in the criminal proceedings; and the amount of income received by the defendants during their possession during a festival held at the pagoda. *Held*, that the plaint was brought by the plaintiff personally, and not on behalf of the plaintiffs by the *durmakurtah* through his recognized agents; that the plaintiffs were entitled to recover a moderate amount of damages for the wrong done to them in ejecting them from the pagoda; that the expenses incurred in the criminal proceedings instituted by the plaintiffs were not recoverable as damages, such damages not being directly traceable to the wrong and its natural and necessary consequences; that the amount of income received by the defendants during the festival was a loss sustained by the *durmakurtah* and not by the plaintiff personally; and that the plaintiff had failed to make out the loss of property alleged. VENKATASA NAIKER *v.* SRINIVASSA CHARYAR . . . . . **4 Mad. 410**

2. ——— **Invasion of right of private ferry**—*Damages for trespass to lands.* In a suit to maintain the old boundaries of a ferry, the plaintiffs did not assert that they enjoyed a right of private ferry which had been invaded by an order of the Magistrate extending the boundaries of a public ferry, but only that they had theretofore, without charging toll, transported, in their own boats, or in boats hired by them, their labourers and cultivators and implements of husbandry; and that, in the exercise of this right, the order of the Magistrate was injurious to them. *Held*, that such damage was much too remote to entitle them to relief. *Held*, also, that the damage done to the plaintiffs by passengers and carriers trespassing on their lands on their way to the ferry was too remote to entitle them to maintain the suit. RAM GOVIND SINGH *v.* MAGISTRATE OF GHAZEEPORE **4 N. W. 146**

3. ——— **Expected custody of idols**—*Uncertain damages—Anticipated profits.* A claim for damages for being prevented from receiving certain sums which the plaintiffs might have received if they had had the custody of certain idols retained by the defendants was not allowed. RAMESSUR MOOKERJEE *v.* ISHAN CHUNDER MOOKERJEE . . . . **10 W. R. 457**

4. ——— **Anticipated profits from turn of worship**—*Right of suit—A suit for wasilat in respect of profits derived from a turn of worship, whether maintainable.* A suit for wasilat, in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable. *Ramessur Mookerjee* v. *Ishan Chunder Mookerjee, 10 W. R. 457*, followed. KASHI CHANDRA CHUCKERBUTTY *v.* KAILASH CHANDRA BANDOPADHYA **I. L. R. 26 Calc. 356 3 C. W. N. 279**

See DINO NATH CHUCKERBUTTY *v.* PROTAP CHANDRA GOSWAMI . **I. L. R. 27 Calc. 30 4 C. W. N. 79**

5. ——— **Charter-party**—*Unseaworthiness of ship—Expense of renewing bills—Delay—Loss by exchange.* The plaintiffs chartered a ship of the defendant, and by the charter-party it was stipulated that the said ship, being tight, staunch, and strong, should receive from the plaintiffs a full cargo of rice or grain, and being so loaded should therewith proceed to St. Denis, the freight to be paid there on right delivery of cargo. The penalty for non-performance of the charter-party was to be the estimated amount of freight. The plaintiffs began to load on May 3rd, and continued doing so until June 10th, having then shipped very nearly the full cargo; they then stopped loading in consequence of a notice from the defendant that the ship was leaking. In consequence of the leakage the cargo had to be shifted, and a portion of it found to be damaged had to be replaced after the leak was stopped. The charges of shifting the cargo and the cost of the cargo substituted were paid by the defendant. Considerable delay occurred in consequence of the leak, and the loading was not completed until the end of July. On May 28th, when the plaintiffs had loaded a portion of the cargo and had obtained bills of lading, they drew a bill of exchange at sixty days for the value of the cargo covered by the bills of lading on their agent at St. Denis, which they sold to the Comptoir d'Escompte de Paris, hypothecating the cargo for the amount of their draft. Other similar drafts were subsequently drawn and sold. When the plaintiffs received notice of the leakage, they, in anticipation of the delay which would occur in consequence, arranged with the Comptoir'd Escompte that the bills should not be forwarded forthwith, but should be held by the Comptoir d'Escompte, and renewed by the plaintiffs on the completion of the loading, the plaintiffs paying interest on the bills in the meantime at 9 per cent. per annum. On renewing the bills, the plaintiffs, in consequence of the difference in the rate of exchange, were out of pocket R400. In an action against the owner for breach of the charter-party in not supplying a ship tight, staunch, and strong, as stipulated, the plaintiffs sought to recover, as damages arising out of such breach of the charter-party, the interest paid by them on the drafts in pursuance of their arrangement with the Comptoir d'Escompte, the sum they had to pay on renewing the bills, a further sum for interest on bills they could not negotiate in consequence of not being able to obtain bills of lading from the defendant, and the value of the

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DAMAGES—*contd.*

3. REMOTENESS OF DAMAGES—*contd.*

stamps on the bills, which had been cancelled in pursuance of the plaintiffs' arrangement with the Comptoir d'Escompte. *Held*, that such damages were too remote. ROBERT AND CHARRIOL *v.* ISAAC **6 B. L. R. Ap. 20**

6. ——— Breach of covenant in not giving lessee possession—*Expenses of litigation for possession.* In a lease for a period of nine years, without payment of salami, entered into between *A* and *B*, *A* bound himself by the following covenant: "In the event of *B* not being put in possession of the leased premises, *A* will have to make good anything in the shape of *khisara* or *nuksan* (loss) to which *B* may be put in consequence." On *A* failing to put *B* in possession of the premises mentioned in the lease, *B* brought a suit against the party in possession, but failed to recover possession. In a suit by *B* against *A* for recovery of damages for breach of contract measuring the amount of damages at the expenses he had to incur in the suit for possession, and also the whole of the profits which he excepted to derive from the lease:—*Held*, that the plaintiff was entitled to recover only nominal damages. MAHOMED ISA KHAN *v.* KISHO LAL. **6 B. L. R. Ap. 44**

7. ——— Suit for damages against lessor, including costs—*Costs of litigation—Cause of action.* In 1883, *A*, the trustee of a certain charity, executed in favour of *X* and *Y* an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist, and it contained no express covenant for quiet enjoyment. In 1867 default was made in payment of the rent and kist. *A* thereupon cancelled the lease, and sued *X* and *Y*, and obtained a decree for the arrears. In a suit by *X* for damages for breach of contract against *A*, the plaintiff alleged that certain raiyats setting up a false claim had evicted *X* from the lands demised at the instigation of *A*, who had subsequently sought unsuccessfully to obtain further advantages for himself. *Held*, that the plaint disclosed a good cause of action against the lessor; and that, even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him. *Mahomed Isa Khan* v. *Kisto Lal, 6 B. L. R. Ap. 44*, referred to. VITHILINGA PADAYACHI *v.* VITHILINGA MUDALI **I. L. R. 15 Mad. 111**

8. ——— Loss of profits from non-cultivation—*Magistrate's order as to possession—Disputed possession—Non-cultivation—Criminal Procedure Code, 1872, s. 531.* A dispute having arisen regarding the possession of certain land, an order was passed under s. 531 of the Code of Criminal Procedure, forbidding both plaintiff and defendant to interfere with the land until either established his title in a Civil Court. The land, in consequence of this order, was not cultivated in the following year. The plaintiff sued for damages for the loss of profits resulting from non-cultivation of the land. *Held*, that the damages were not the probable result of the defendant's act, being the consequence of the order of the Magistrate. AMMANI AMMAL *v.* SELLAYI AMMAL **I. L. R. 6 Mad. 426**

9. ——— Breach of condition in lease—*Speculative damages.* Where it was stipulated in a lease that, if the tenant did not cultivate, the landlord might enter and cultivate a portion of the land demised:—*Held*, that, on breach of the condition by the tenant, the landlord might be entitled to recover any damage directly consequent on the breach of contract, but he was not entitled to claim speculative profits which he might have derived from the most hazardous crop. ABDOOL GHUNNEE *v.* GOODREE RAI **2 Agra, Pt. II, 192**

4. RENT SUITS, DAMAGES IN.

1. ——— Bengal Rent Act VIII of 1869, s. 44—Beng. Act VI of 1862, s. 2—*Additional damages—Discretion of Court.* The award of additional damages under s. 2, Bengal Act VI of 1862, was discretionary and not imperative. Before awarding such damages, the Court, in the exercise of its discretion, had to look to the condition of the parties and the particular hardship inflicted on the landlord by the omission of the undertenant to pay his rents. RAMBUDDUN SINGH *v.* SREE KOONWAR . **W. R. 1864, Act X, 22**

DHEERAJ MAHTAB CHUND *v.* DEBENDER NATH THAKOOR . . . **W. R. 1864, Act X, 68**

GOPAL LAL THAKOOR *v.* MAHOMED KADIR **W. R. 1864, Act X, 73**

BOYLECHAND DUTT *v.* PUNCHANUN CHOBAY **W. R. 1864, Act X, 64**

ZAMEEROODINNISSA KHANUM *v.* PHILLIPE **1 W. R. 290**

2. ——— Beng. Act VI of 1862, s. 2—*Additional damages—Interest under s. 20, Act XI of 1859—Construction of statute.* Damages under s. 2, Bengal Act VI of 1862, were awardable in addition only to rent and costs, and were to be regarded as in substitution for, not in addition to, the interest awardable under s. 20, Act XI of 1859. Retrospective effect was not to be given to the penal provision of s. 2, Bengal Act VI of 1862. NOBOKANTH DEY *v.* BORADAKUNTH ROY . **1 W. R. 100**

3. ——— *Facts justifying award of damages.* Before awarding damages for arrears of rent under s. 2, Act VI of 1862, the Court should find whether, when the rent was demanded, it was withheld without just reason or not. MOHANUND CHOWDHRY *v.* EGLINTON **1 W. R. 343**

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DAMAGES—*concld.*

4. RENT SUITS, DAMAGES IN—*concld.*

4. ——— *Damages when not awardable.* Damages were not awardable under s. 2, Bengal Act VI of 1862, in a suit for rent in which the plaintiff's allegations as to the rate of rent had been disbelieved and a decree given him at the rates admitted by the defendant. BECKWITH *v.* NOORJUMMA . . **2 W. R., Act X, 11**

5. ——— **Bengal Rent Act, 1869, s. 44**—*Beng. Act X of 1871, s. 25.* Tenants are liable in damages for neglect to pay road and public works cesses. SARODA PROSAD GANGOOLY *v.* PROSONNO COOMAR SANDIAL **I. L. R. 8 Calc. 290**

6. ——— **Withholding receipt on payment of rent**—*Act X of 1859, s. 10—Injuria sine damno.* Where money is actually paid as rent and the necessary receipt is withheld, the case is not one of *injuria sine damno*, but one in which the law (s. 10, Act X of 1859) gives the Court discretion to award any sum as damages not exceeding double the amount for which the receipt is withheld. JOHEEROODDEEN MAHOMED *v.* DABEE PERSHAD SINGH . . . **13 W. R. 391**

DAMDUPAT, RULE OF.

See HINDU LAW—USURY. **I. L. R. 26 Mad. 662**
I. L. R. 26 All. 354

See INTEREST . . **10 C. W. N. 884**

See REGULATION II OF 1877.

1. ——— *Hindu Law—Interest—Interest accrued due not affected by the rule of damdupat.* Plaintiff advanced R714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover R33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest. *Held*, that the claim should be allowed, since the rule of *damdupat* had no application to a right that has already accrued. The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights. A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off. NUSSERWANJI *v.* LAXMAN (1906) **I. L. R. 30 Bom. 452**

2. ——— *Practice—Civil Procedure Code (Act XIV of 1882), ss. 351 and 352—Proof of claim in insolvency proceedings, effect of.* An order admitting a creditor's claim made in insolvency proceedings, amounts to a decree and the rule of *damdupat* is not applicable to a claim so admitted. The rule of *damdupat* applies only during the existence of the relation of debtor and creditor, and ceases to apply when the

DAMDUPAT, RULE OF—*concld.*

contractual relation has come to an end by reason of a decree. HARI LAL MULLICK, *In the matter of* (1906) . . . **I. L. R. 33 Calc. 1269**

DANCING GIRLS.

See CONTRACT ACT, S. 23—ILLEGAL CONTRACTS—GENERALLY. **I. L. R. 13 Bom. 150**

See HINDU LAW—CUSTOM—ADOPTION. **I. L. R. 12 Mad. 214**
I. L. R. 19 Mad. 127
I. L. R. 21 Mad. 229

See HINDU LAW—CUSTOM—ENDOWMENTS . . **I. L. R. 14 Bom. 90**

See HINDU LAW—CUSTOM—IMMORAL CUSTOMS . **I. L. R. 1 Mad. 168. 356**
I. L. R. 4 Bom. 545

See HINDU LAW—CUSTOM—INHERITANCE AND SUCCESSION. **I. L. R. 14 Mad. 163**

See HINDU LAW—INHERITANCE—DANCING GIRLS . **I. L. R. 13 Mad. 133**
I. L. R. 14 Mad. 163

See PENAL CODE, S. 372. **I. L. R. 12 Mad. 273**
I. L. R. 15 Mad. 41, 323
I. L. R. 16 Bom. 737

See PENAL CODE, S. 373. **I. L. R. 23 Mad. 159**

DANGEROUS CONDITION.

See BOMBAY MUNICIPAL ACT. **I. L. R. 33 Bom. 334**

DARBHANGA RAJ.

——— **Babuana grant.**

See HINDU LAW . **I. L. R 33 Calc. 1158**
12 C. W. N. 958, 966
12 C. W. N. 118

——— **custom of—**

See HINDU LAW—MAINTENANCE. **I. L. R. 36 Calc. 943**

DARKHAST RULES, GRANT OF LAND UNDER.

1. ——— *Grant by competent authority not to be set aside because not made in the manner prescribed.* A grant of land on darkhast, by an authority competent to make such grant, cannot, where no fraud has been practised in obtaining such grant, be set aside on the ground that it was not made in the manner prescribed by the Board's Standing Order. *Collector of Salem* v. *Rungappa, I. L. R. 12 Mad. 404, 406*, followed. SECRETARY OF STATE FOR INDIA *v.* BUNDEPPA OF KONAKONDIA (1908) **I. L. R. 32 Mad. 300**

2. ——— *Nature of grant—Power of Civil Courts to interfere where grant set*

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DARKHAST RULES, GRANT OF LAND UNDER—*contd.*

aside by appellate authority on the ground of irregularity of procedure. *A* applied to the Tahsildar under rule IV of the Darkhast rules for a grant of land. The Tahsildar made the grant under rule VII on the 10th May 1897 and the grant stated that it was subject to the result of any appeal that might be preferred. On the 15th July 1897 and on the 2nd November 1897, two appeals were preferred to the Deputy Collector against the grant. On the 15th June 1898, the Deputy Collector issued a pottah to *A* in pursuance of the grant. The appeals were heard on the 28th June 1899, after notice to *A* and the grant by the Tahsildar was set aside on the ground that the notice under rule V was not duly published. *A* appealed to the Collector and to the Board of Revenue and his appeals were dismissed. The present suit was instituted *by A* for a declaration that the lands had become his property and that the Deputy Collector's order cancelling the grant was null and void or in the alternative for a decree directing the defendant to pay the kist paid by *A* and the cost of the improvements effected by him. The Court of first instance granted the declaration prayed for. On appeal the Subordinate Judge, holding that it was not open to the Civil Courts to question the propriety of the cancellation by the Deputy Collector, modified the decree by granting the alternative relief claimed in respect of kist and improvements. On appeal to the High Court: *Held, per* SIR ARNOLD WHITE, *C.J.*, that it is not open to a Civil Court to cancel a pottah because some of the formalities of the Darkhast rules have not been observed. It may, however, set aside an order of an Appellate Revenue Tribunal, which allows on appeal against a grant by a Revenue officer on the ground of irregularity of procedure, if it is of opinion that there is no evidence of irregularity, although it will not be open to the Civil Court to interfere, if the Tahsildar declined to make the grant on the ground of irregularity of procedure. In the former case there is a conditional contract, but in the latter there is no contract at all. *Per* BENSON, *J.*—Under the rules the Tahsildar has power only to make a conditional grant and the issue of a pottah does not alter the conditional nature of the grant. A pottah is in the nature of a mere bill and is not a grant or conveyance. It is not open to the Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities, whether original or appellate, grant or refuse to grant Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules. *The Secretary of State for India* v. *Kusturi Reddi, I. L. R. 26 Mad. 268*, referred to and approved. *Sappani Asari* v. *The Collector of Coimbatore, I. L. R. 26 Mad. 742*, referred to and approved. MUTHU VEERA VANDAYAN *v.* SECRETARY OF STATE FOR INDIA (1906) . **I. L. R. 29 Mad. 461**

3. ——————————— *Darkhast Rule 14—Jurisdiction of Civil Courts—Registry under rule 14 only conditional—Civil Courts can interfere only when public servant acts outside his authority.* Under rule 14 of the Darkhast rules, the registry by the Tahsildar and the original grant are subject to the result of any appeal that might be admitted by the Deputy Collector. Civil Courts have no jurisdiction to question the validity of acts done by Government officers when they act within the scope of their authority. The propriety of a decision by a Darkhast authority, original or appellate, acting within the scope of its powers cannot be a subject of investigation by the Civil Courts. MUTHUVEERA VANDAYAN *v.* THE SECRETARY OF STATE FOR INDIA (1906)
I. L. R. 30 Mad. 270

4. ——————————— *Grant good if made by competent authority, unless set aside on appeal—Omission to consult one, whose opinion is not binding, does not vitiate the grant.* A grant of land purporting to have been made under the darkhast rules by the officer empowered by the rules to make the grant is binding on the Crown, unless it is revoked by an officer of a higher grade on appeal. The omission on the part of the officer making the grant to consult an authority, whom he is directed to consult by an order of Government, which, however, does not make the opinion of such authority binding on him, is a mere irregularity, which does not invalidate the grant. HUMMADE BEARI *v.* SECRETARY OF STATE FOR INDIA (1908)
I. L. R. 31 Mad. 264

DARPATNI TENURE.

See LIMITATION . **I. L. R. 34 Calc. 711**

DATE OF HEARING.

See PRACTICE . **I. L. R. 32 Bom. 534**

DAUGHTER.

See HINDU LAW—INHERITANCE—

SPECIAL HEIRS—FEMALES—DAUGHTERS;

DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—UNCHASTITY.
I. L. R. 26 Mad. 509
I. L. R. 22 Calc. 347

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—DAUGHTERS . . **I. L. R. 31 Bom. 495**

See HINDU LAW—

MAINTENANCE—RIGHT TO MAINTENANCE—DAUGHTER;

MARRIAGE—NO OBLIGATION TO GET DAUGHTER MARRIED.
I. L. R. 26 Mad. 505

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DAUGHTER—*concld.*

——— appointment of—

See HINDU LAW—CUSTOM—APPOINTMENT OF DAUGHTER.
15 B. L. R. P. C. 190
L. R. 2 I. A. 163

——— gift to, at dwiragaman ceremony—

See HINDU LAW . 13 C. W. N. 994

——— right to alienate—

See HINDU LAW . I. L. R. 36 Calc. 753

DAUGHTER-IN-LAW.

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—SON'S WIDOW.

DAUGHTER'S SONS.

See HINDU LAW—INHERITANCE—JOINT PROPERTY AND SURVIVORSHIP.
L. R. 29 I. A. 156

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—DAUGHTER'S SON.

See OUDH ESTATES ACT, s. 22.
I. L. R. 3 Calc. 626
I. L. R. 21 Calc. 997
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——— if may be adopted.

See HINDU LAW . 13 C. W. N. 920

DAYABHAGA.

See HINDU LAW—INHERITANCE.
I. L. R. 35 Calc. 721

See HINDU LAW—JOINT FAMILY.
I. L. R. 31 Calc. 214 ; 448
12 C. W. N. 103

See HINDU LAW—PARTITION.
11 C. W. N. 239

See HINDU LAW—SELF ACQUISITION.
I. L. R. 33 Calc. 1119
I. L. R. 36 Calc. 86

See HINDU LAW—STRIDHAN.
12 C. W. N. 924
I. L. R. 32 Calc. 261
I. L. R. 33 Calc. 315

DEADLY WEAPON.

See PENAL CODE, s. 148.
I. L. R. 15 All. 19

See UNLAWFUL ASSEMBLY.
7 C. W. N. 512

DEAF AND DUMB PERSON.

See CRIMINAL PROCEDURE CODE, ss. 340, 341 (1872, s. 186) . 7 N. W. 131
19 W. R. Cr. 37
22 W. R. Cr. 35, 72
I. L. R. 27 Calc. 368
4 C. W. N. 421

DEAF AND DUMB PERSON—*concld.*

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 18 Calc. 341

See HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—DEAFNESS AND DUMBNESS.

See PARTIES—DISABILITY TO SUE.
2 N. W. 414

DEATH.

——— of appellant—

See ABATEMENT OF SUIT—APPEALS.
I. L. R. 26 Bom. 597

See PARTIES—SUBSTITUTION OF PARTIES—APPELLANTS I. L. R. 26 Bom. 317

——— of defendant—

See DEFENDANT, DEATH OF.

——— of donor—

See REGISTRATION ACT, 1877, s. 17.
I. L. R. 25 Mad. 672

——— of executant—

See REGISTRATION ACT, s. 49.
13 C. W. N. 722

——— of intending plaintiff—

See CIVIL PROCEDURE CODE, 1882, s. 424.
I. L. R. 25 All. 187

——— of joint appellant, pending appeal—

See CIVIL PROCEDURE CODE, 1882, s. 544.
I. L. R. 27 Bom. 284

——— of judgment-debtor—

See CIVIL PROCEDURE CODE, 1882, s. 108.
I. L. R. 29 Calc. 33
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See SURETY—LIABILITY OF SURETY.
I. L. R. 24 Mad. 637

——— of party to civil proceedings—

See ABATEMENT OF SUIT—APPEALS.
I. L. R. 25 All. 27

——— of party criminal proceedings.

See ABATEMENT OF PROSECUTION.
4 Mad. Ap. 55

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION.
2 C. L. R. 264

——— of party to insolvency proceedings

See INSOLVENCY ACT, s. 36.
6 B. L. R. 119
10 Bom. 58

——— of plaintiff—

See PLAINTIFF, DEATH OF.

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DEATH—*contd.*

——— **of respondent**—

See ABATEMENT OF SUIT—APPEALS.
I. L. L. 23 All. 22

——— **presumption of**—

See EVIDENCE ACT, s. 108.
I. L. R. 11 Bom. 433
I. L. R. 35 Calc. 25
11 C. W. N. 833

See HINDU LAW—PRESUMPTION OF DEATH.

See MAHOMEDAN LAW—PRESUMPTION OF DEATH.

——— **sentence of confirmation of**—

See CRIMINAL PROCEDURE CODE, s. 376 (1872, s. 288) . **I. L. R. 1 Bom. 639**
19 W. R. Cr. 57

I. ——— **Presumption of**—*Evidence Act (I of 1872), s. 108—Presumption of death of person not heard of for more than seven years—Time of death, no presumption as to.* The presumption that arise so under s. 108 of the Evidence Act is that a man who has not been heard of for seven years is dead at the time the question is raised and not that he died at some antecedant date. It is incumbent on the party who alleges that a person died on a certain date to prove that fact by evidence. FANI BHUSAN BANERJEE *v.* SURJA KANT ROY CHOWDHURY (1907)
11 C. W. N. 833

2. ——— **Sentence of**—*Age of the accused—Sentence.* Where the accused, a girl of 16, was held guilty of deliberately killing her husband by means of arsenic poison which she mixed up with the food, cooked and served up by herself to the husband: *Held,* that in consideration of her age she should be transported for life instead of suffering the extreme penalty of law. EMPEROR *v.* JASHA BEWA (1907) . **11 C. W. N. 904**

3. ——— **Criminal rashness or negligence**—*Firing at object on the sky-line of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act XLV of 1860), ss. 304A, 336, 337 and 338—Compensation to relative for death by rash or negligent act—Criminal Procedure Code (Act V of 1898), s. 545.* Two persons, one a corporal and the other a private, who had both been in the regiment over four years, went to a plantation at the edge of which there was an eminence on which they set up at the sky-line a small tin case as a target, and fired several shots at it, from a distance of 100 feet, with a quarter inch bore saloon rifle sighted to 100 yards. There was a public road used by the villagers about 150 yards away, and 60 feet below the level of the eminence, but in the direct line of fire. The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any

DEATH—*concld.*

kind were taken to prevent danger to passers-by on the road from such firing. *Held,* that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence against the light (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slightest circumspection with reference to the safety of others. The words "rash or negligent act" in s. 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in ss. 336, 337 and 338. S. 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Ss. 337 and 338 only impose a greater punishment when hurt or grievous hurt is the result of such rashness or negligence. S. 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide. *Reg.* v. *Salmon, L. R. 6 Q. B. D. 79, and Reg.* v. *Nidamarti Nagabhushanam, 7 Mad. H. C. 119.* Section 545 (*1*) (*b*) provides for compensation, in cases where it is recoverable under Act XIII of 1855, to the persons therein indicated, *viz.,* "the wife, husband, parent and child, if any," of the deceased. *Yalla Ganguluv. Mamidi Dali, I. L. R. 21 Mad. 74,* dissented from. EMPEROR *v.* MORGAN (1909)
I. L. R. 36 Calc. 302

DEATH-BED GIFTS.

See MAHOMEDAN LAW.
I. L. R. 35 Calc. 271

DEATH ILLNESS, WHAT CONSTITUTES.

See MAHOMEDAN LAW.
I. L. R. 35 Calc. 271

DEBATE ON BILL IN LEGISLATIVE COUNCIL.

See STATUTE, CONSTRUCTION OF.
I. L. R. 18 Bom. 133

DEBT.

See ACKNOWLEDGMENT OF DEBT.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—DEBTS.

See CERTIFICATE OF ADMINISTRATION—ACTS XXVII OF 1860 AND VII OF 1889 AND GRANT OF CERTIFICATE.

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.

See CIVIL PROCEDURE CODE, 1882, s. 258.
I. L. R. 26 All. 36

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DEBT—*contd.*

See HINDU LAW—

DEBTS ;

FATHER'S LIABILITY—LIMITATION. **13 C. W. N. 9**

IMMORAL DEBT **I. L. R. 33 Calc. 676**

JOINT FAMILY—DEBTS, AND JOINT FAMILY BUSINESS ;

SON'S LIABILITY TO PAY FATHER'S DEBTS. **I. L. R. 33 Bom. 39 ; 284**

PARTITION—EFFECT OF PARTITION. **I. L. R. 24 Mad. 555**

See IMPRISONMENT . **5 C. W. N. 145**

See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—EXECUTION OF DECREE. **I. L. R. 30 Calc. 407**

See INSOLVENCY ACT, S. 39. **I. L. R. 19 Calc. 146**

See JUDGMENT-DEBT.

See LIMITATION ACT, 1877, S. 19. **I. L. R. 31 Calc. 95**
8 C. W. N. 168

See LIMITATION ACT, 1877, S. 20. **I. L. R. 26 All 36**

See MAHOMEDAN LAW—DEBTS.

See SUCCESSION CERTIFICATE ACT. **I. L. R. 28 Bom. 119**
12 C. W. N. 145

——— **acknowledgment of—**

See LIMITATION ACT, S. 19—ACKNOWLEDGMENT OF DEBTS.

——— **assignment of—**

See INSOLVENT DEBTORS ACT, S. 23. **I. L. R. 25 Mad. 406**

——— **barred by limitation.**

See ADMINISTRATION. **I L. R. 2 Bom. 75**

See ADMINISTRATOR-GENERAL. **I. L. R. 1 Mad. 287**

See COLLECTOR . **I. L. R. 19 Mad. 255**

See HINDU LAW—ALIENATION—ALIENATION BY WIDOW—WHAT CONSTITUTES LEGAL NECESSITY **6 Bom. A. C. 270**
I. L. R. 11 Bom. 320
I. L. R. 13 Mad. 189
I. L. R. 21 Calc. 190

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION . **I. L. R. 18 Bom. 755**

——— **dishonestly or fraudulently preventing debt being available for creditors—**

See PENAL CODE, S. 422. **I. L. R. 28 Calc. 314**

DEBT—*contd.*

——— **due to Crown.**

See CROWN DEBTS. **I. L. R. 12 Calc. 445**
5 Bom. O. C. 23

——— **incurred for necessaries binds minor's estate—**

See GUARDIAN AND WARD. **I. L. R. 35 Calc. 320**

——— **joint—**

See CONTRIBUTION, SUIT FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR.

——— **nature of—**

See HINDU LAW—ALIENATION—ALIENATION BY FATHER.

See HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS.

See HINDU LAW—JOINT FAMILY—SALE OF JOINT FAMILY PROPERTY IN EXECUTION, ETC.

——— **part payment of—**

See LIMITATION ACT, 1877, S. 20. **6 C. W. N. 766**

——— **payable by instalments.**

See BOND.

See LIMITATION ACT, 1877, SCH. II, ART. 75.

See LIMITATION ACT, 1877, SCH. II, ART. 179—ORDERS FOR PAYMENT AT SPECIFIED DATE.

——— **recovery of—**

See PROMISSORY NOTES—ASSIGNMENT OF, AND SUITS ON, PROMISSORY NOTES. **5 C. W. N. 56**

——— **transfer of—**

See TRANSFER OF PROPERTY ACT, S. 131.

1. ——————— *Hindu Law—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hand of the son not liable under the decree.* The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter, which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son. *Held*, that the son was not liable under Hindu Law under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any express provision of the law ; but the result of the suit showed that it was wrongful, and for a

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DEBT—*concld.*

liability so incurred the son could not be held answerable, when the estate that had come to his hands had derived no benefit from the act. Under Hindu Law, the son is not to be held liable for debts, which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices. DURBAR KHACHAR *v.* KHACHAR HARSUR (1908) . . . **I. L. R. 32 Bom. 348**

2. ——— *Succession Certificate—Succession Certificate Act (VII of 1889), s. 4.* In the case of a debt existing in the life of the creditor which did not become payable until after his death, his heirs cannot obtain a decree without the production of a certificate under the Succession Certificate Act. *Nemdhari Roy* v. *Bissessari Kumari, 2 C. W. N. 591,* overruled. BANCHHARAM MAJUMDAR *v.* ADYANATH BHATTACHARJEE (1909) **I. L. R. 36 Calc. 936**

DEBTOR.

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE. **I. L. R. 15 Calc. 54**
I. L. R. 19 Calc. 336

See DEBTOR AND CREDITOR.

See EXECUTOR . **7 C. W. N. 476**

See INSOLVENCY.

See JOINT DEBTORS.

See LIMITATION ACT, 1877, SCH. II, ARTS. 12, 49, 115 AND 145. **I. L. R. 31 Calc. 519**

arrest of—

See ARREST—CIVIL ARREST.

See ATTACHMENT—ATTACHMENT OF PERSON.

——— assignment by—

See DEBTOR AND CREDITOR.

See INSOLVENCY—ASSIGNMENT BY DEBTOR . . **I. L. R. 19 All. 223**
I. L. R. 16 Mad. 397, 449
I. L. R. 23 Calc. 592

——— discharge of—

See APPROPRIATION OF PAYMENTS. **I. L. R. 13 Calc 164**
I. L. R. 26 Calc. 39

——— removal of property of, by creditor.

See THEFT **I. L. R. 22 Calc. 669 ; 1017**
I. L. R. 18 All. 88

DEBTOR AND CREDITOR.

See CONTRACT ACT, 1872, s. 16. **I. L. R. 31 All. 386**

See DEBTOR.

DEBTOR AND CREDITOR—*contd.*

See EXECUTION OF DECREE.

See LIMITATION ACT (XV OF 1877), s. 19. **I. L. R. 33 Calc. 1047**

See RECEIVER . **I. L. R. 30 Calc. 937**

See SALE IN EXECUTION OF DECREE—DISTRIBUTION OF SALE PROCEEDS.

——— fraudulent conveyance—

See TRANSFER OF PROPERTY ACT, s. 53. **I. L. R. 25 Bom. 202**

1. ——— **Gift by judgment-debtor.** If a judgment-debtor has sufficient other property to satisfy a decree against him, it cannot be said that in point of law, every gift of any part of his property is void on the ground that the whole was hypothecated for the payment of the decree. KRIPANATH SURMA *v.* NRITOKALEE DABEE **12 W. R. 137**

2. ——— *Voluntary gift by husband to wife.* A voluntary gift by a husband to his wife is not void against the husband's creditors if at the time of the gift the husband was solvent, and the wife was put in possession under the gift, especially if the plaintiff became a creditor of the husband long after the gift. ENAET ALI *v.* RAMPREAH KOONWAR . . . **1 W. R. 21**

3. ——— *Conveyance by husband to wife in fraud of creditors—Voluntary deed.* If a man largely indebted executes a conveyance of property to his wife, as in satisfaction of dower, the conveyance is void as against his creditors, if executed for the fraudulent purpose of keeping the property in his own hands out of the reach of the creditors. So also a conveyance by a man in such circumstances to his wife is fraudulent and void if no dower is due, and the conveyance is voluntary, and not made in satisfaction of any debt due to him. MAHOMED BUSSEEROOLLAH CHOWDHRY *v.* ABEMOONISSA . . . **7 W. R. 513**

4. ——— *Voluntary transfer—Bonâ fide gift—Gift not to defraud creditors.* A voluntary transfer of property by way of gift if made *bonâ fide,* and not with the intention of defrauding creditors, is valid as against creditors. The Hindu and English law on the subject discussed. GANUBHAI *v.* SRINIVASA PILLAI **4 Mad. 84**

5. ——— **Transfer of property by judgment-debtor.** It is not illegal for a judgment-debtor to dispose of all his property before attachment, provided the transaction is an actual conveyance and not merely nominal. DIGUMBUREE DASSEE *v.* BANEY MADHUB GHOSE **15 W. R. 155**

CHUNDER MADHUB DOSS *v.* AMEER ALI **25 W. R. 119**

RAM BURUN SINGH *v.* JANKEE SAHOO **22 W. R. 473**

6. ——— *Sale made pending suit against vendors for debt—Sale to prevent land being taken in execution.* A sale made of immove-

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DEBTOR AND CREDITOR—*contd.*

able property pending a suit against the vendors to recover a debt is valid, although the motive of the vendors may have been to prevent the land being attached and sold in execution. PULLEN CHETTY *v.* RAMALINGA CHETTY . . **5 Mad. 368**

7. ——— *Fraudulent assignment—Suit by creditor to set aside transfer.* When a person being in debt transfers his property, with a view to defeat and defraud any of his creditors, any creditor, after he has established his right as a judgment-creditor, may maintain a suit to set aside the alienation, notwithstanding that the transfer was made before he sued for his debt, or that the debt was unsecured. SUJUN KOONWER *v.* PIRBHOO LALL . . **2 Agra, Pt. II, 211**

8. ——— *Assignment in fraud of creditors—Possession of property sold remaining in vendor.* Where a person purchases for one who is in failing circumstances and has decrees against him in execution, and allows the vendor (being his relative) to remain in possession of the goods sold, as well as the profits thereof, he may perhaps purchase in good faith ; but the Courts are not justified in declaring the validity of such a transfer without there being the clearest proof that the purchaser has bought, and paid the consideration, and some sufficient explanation of the apparently suspicious circumstances attending the purchase. KALLYAN *v.* DOULUTA . **1 Agra 79**

9. ——— **Deed, execution of, by judgment-debtor**—*Deed executed in fraud of creditors.* Where a mortgagor executes a deed of sale for the purpose of defrauding and defeating his creditors, it is void against any of the creditors who may obtain a decree against him, although the deed may have been executed before execution was taken out on the decree. RADHA MOHUN DUTT *v.* BISSESSUR BUNDOPADHAYA . **6 W. R. 90**

10. ——— **Deed executed by judgment-debtor**—*Assignment to defeat creditors—Consideration—Validity of transaction for valuable consideration defeating execution.* Plaintiffs sued for certain lands under an agreement executed to their elder brother, *S*, by defendants in the following terms : "You have this day received a loan of R1,345-4-4 from *D* and from me, *B*, for the purpose of remitting to the Court, in satisfaction of the warrant amount, in the matter of the suit No. 26 of 1835 on the file of the Provincial Court between your father, the late *U*, appellant, and *M*, respondent. You have, owing to the encumbrances consequent on a few more suits against you, caused all the property which you own in Vegayammapetta to be attached for the said (warrant) amount, and caused six puttis of land, houses, backyards, and certain moveable property out of the same, to be knocked down in auction in our names and some other personal property in the names of others ; and have therefore proposed to us to execute a kararnama (to you) engaging (ourselves) to carry and pay the above mentioned (R1,345-4-4) into the Court ; to obtain receipts for the amount and certificates in our names for the real property ; to allow the tiled house, back-yard having fruit trees and moveable property, to be held by you as hitherto ; *V* and myself, *B*, to enjoy the produce of the six puttis of land for twenty years from Saruari to Sittadhri, on account of the said loan and interest thereon ; and to restore the land, together with the certificates (to be) issued by the Court in our names. We have accordingly agreed to your proposal," etc. The Principal Sudder Ameen considered that the agreement was invalid on the ground that it appeared to have been executed with a view to defraud creditors of *S*. *Held*, on appeal, that the real nature of the transaction was that *S* borrowed money from defendants to enable him to buy in his own land ; that defendants purchased only for and on behalf of *S*, taking from him an assignment of part of the property for twenty years, in order to repay themselves the money lent ; that there was, therefore, abundant consideration for the defendants' promise to give up possession at the end of twenty years. *Held*, also, following the English law, that where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution. SANKARAPPA *v.* KAMAYYA . . **3 Mad. 231**

11. ——— **Assignment of property by debtor**—*Stat. 13 Eliz., c. 5.* An assignment made *bonâ fide* and for valuable consideration, before execution put in, and without notice of claim of execution-creditor, held not to be void under the Stat. 13 Eliz., c. 5. TARRUCKNATH PAULIT *v.* GLADSTONE . . . . **1 Hyde 178**

12. ——— *Voluntary assignment—13 Eliz., c. 5 : 27 Eliz., c. 4.* A *bonâ fide* conveyance, though voluntary, is valid as against a subsequent judgment-creditor. *Quære :* Whether 13 Eliz., c. 5, and 27 Eliz., c. 4, relating to voluntary conveyances, are in force in this country. SOODHEEKEENA CHOWDHRAIN *v.* GOPEE MOHUN SEIN . . . . **1 W. R. 41**

13. ——— Assignment set aside as not being *bonâ fide.* BHAWAN LAL *v.* AKEEDUN . . . . **1 W. R. 319**

JOTENDRO MOHUN TAGORE *v.* BROJOSOONDUREE DABEE . . . . . **1 W. R. 462**

14. ——— **Fraudulent assignment**—*Action of trespass—Want of possession—Stat. 13 Eliz., c. 5.* In an action of trespass against the Sheriff, it appearing that the plaintiff had never had possession of the property alleged to be converted, and that the conveyance to the plaintiff of the property seized had been effected with the view of defrauding the creditors of an insolvent, who shortly before such conveyance was the owner of the same :—*Held*, that the plaintiff was not entitled to recover. The doctrine of a fraudulent conveyance being void as against creditors held.

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DEBTOR AND CREDITOR—*contd.*

to be a principle of Hindu as it is of English law. SHAM KISSORE SHAW *v.* COWIE

2 Ind. Jur. O. S. 7

15. ——— *Fraudulent assignment—Stat. 13 Eliz., c. 5—Hibba—Equity and good conscience.* Whether or not the Stat. 13 Eliz., c. 5 (which may or may not extend to or operate in the "mofussil"), is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, its principles, and those of the common law for avoiding fraudulent conveyances, have received effect in the Indian Courts, and have properly guided the decisions of the Courts in administering law according to justice, equity, and good conscience. A hibba having been found on the evidence to have been made not *bonâ fide*, nor on any good consideration, and by it creditors being delayed in their just rights, the maker having intended to protect his property thereby from those who at the time were his creditors :—*Held*, that the hibba was void according to equity and good conscience. ABDUL HYE *v.* MAHOMED MOZAFFAR HOSSEIN

I. L. R. 10 Calc. 616 : L. R. 11 I. A. 10

16. ——— *Fraudulent preference—Stat. 13 Eliz., c. 5—Transfer of property by insolvent in consideration of debt barred by limitation—Fraud—Conveyance in trust for payment of creditors—Hindu widow, duty of, to pay husband's creditors equally—Purchaser from Hindu widow—Contract Act (IX of 1872), ss. 16, 17.* The English Stat. 13 Eliz., c. 5, has not, as such, any operation in the mofussil of India, but it embodies principles of general application on account of their essential equity. An unequal disposition of property by a person in insolvent circumstances, and known to be so by the disponee, will be set aside if impeached by creditors, except where the transferee has simply pressed a valid claim or made a purchase in good faith. The plaintiff *G* obtained a decree against *M* on the 30th September 1878. *M* died in April 1879, leaving *A*, a childless widow, him surviving. At his death, *M* was in insolvent circumstances. On the 7th June 1879, *A* conveyed by a deed of sale (exhibit 98) the whole of his property, consisting of a house and a garden, to the defendants, who were his separated brothers, in consideration of two time-barred debts due to them by her deceased husband. At the same time she executed in their favour a rent-note (exhibit 99) by which she agreed to pay them a nominal rent for her occupation of the house ; but no rent was ever claimed or paid. On the same day the defendants passed an agreement, in writing (exhibit No. 114), to the widow, by which they undertook to settle the claims of the principal creditors of *M* : but they never acted upon this agreement, nor did they communicate it to any of the creditors, and they admitted in their evidence that it did not form any part of the consideration for the sale-deed (exhibit 98). In 1881 the plaintiff *G*, in execution of his decree against *M*, attached the house conveyed by the sale-deed. The attachment was raised at the instance of the defendants, who claimed the house under the sale-deed (exhibit 98). Thereupon the plaintiff *G* brought the present suit to establish his right to attach and sell the house as the property of his judgment-debtor, *M*, in execution of his decree. The defendants relied upon the deed of sale executed by the widow (exhibit 98). *Held*, that the alleged sale to the defendants (exhibit 98) was not a real transaction supported by good consideration, and must be set aside in so far as it interfered with the execution of the plaintiff's decree. The transferees were not purchasers for money, or even creditors diligent in pressing an enforceable right. They were members of the vendor's family, and the consideration they gave consisted of old and barred claims that could not be enforced. Payment of such debts by a transfer of the insolvent's whole estate, to the disappointment of creditors whose claims were not barred, was in itself a fraud. Being made to near relatives acquainted with the facts, it would not be regarded as a real and practical transaction. *Held*, also, that the character of the transaction was not altered by the agreement (exhibit 114) of the defendants to settle the claims of *M's* creditors. That agreement was not communicated to the creditors, and it could be suppressed at any moment by the concurrence of the parties to it. If that agreement was independent of the conveyance (exhibit 98) of the property to the defendants, the latter had no consideration to support it, except merely the moral consideration to pay a barred debt, which could not prevail against the obligation to satisfy a decree about to be executed. If, on the other hand, the agreement (exhibit 114) was connected with the conveyance (exhibit 98), the exclusion of its terms from that document and the secrecy observed about it stamped the transaction with fraud, whether the transfer was real or only fraudulent. There was no honest trust for distribution which could defeat the plaintiff's execution. *M* might have preferred one creditor to another having an equal right, and the fact that the creditor was his brother did not make such a preference improper. But although *M* might have preferred one creditor to another, his widow could not do so. She took her husband's estate as an aggregate, assets and debts together. She was in some degree a trustee and at any rate under a legal obligation to pay her deceased husband's debts, and to pay them as far as she could equally. She was not at liberty to deal capriciously with the estate, which she could alienate at all only for special purposes indicated by the law. She ought not, in performing the duty cast upon her, to prefer one valid claim to another, as her husband might have done. This advantage a creditor might have obtained from her husband by his diligence, but on her no pressure could be exercised except through the estate which she was bound, pressure or no pressure, to distribute among the creditors. A purchaser from a Hindu widow must see that she exercised her power of sale strictly, or at least satisfy himself that a sufficient

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cause for alienation exists. If the defendants told the widow that the claims, in consideration of which she made the conveyance to them, were barred by limitation, then clearly she had joined with them in a scheme for depriving the judgment-creditors of their due. If they did not tell her, they deceived her by their silence when, as near relatives getting an advantage, they were bound, in dealing with an ignorant woman, to put her in possession of all the material facts. CONTRACT ACT (IX of 1872), ss. 15 and 17. RANGILBHAI KALYANDAS *v.* VINAYAK VISHNU **I. L. R. 11 Bom. 666**

17. ——— **Fraudulent conveyance**—*Gift in fraud of creditors—Subsequent sale by creditors in execution of subject-matter of gift—Purchase at execution-sale for inadequate price by means of fraud.* In June 1875, *A*, being in pecuniary difficulties, executed a deed of gift of all his property in favour of his wife and minor sons, the plaintiffs. *B*, one of his then existing creditors, subsequently obtained a decree against him, and in execution sold part of the said property. At the sale, the first defendant, by means of false representation, became the purchaser at an inadequate price. In July 1879, *A* applied to have the sale set aside, on the ground of the fraud of the first defendant, but his application was rejected. In 1884 the plaintiffs by their next friend sued to set aside the sale, contending that at the date of *B's* decree the property was theirs by virtue of the deed of gift of June 1875, and further that the sale was void by reason of the defendant's fraud. *Held*, rejecting the plaintiffs' claim, that the plaintiffs could not be allowed to set up their deed of gift as against the proceedings in execution under which the defendant acquired his title as purchaser. That gift was made to them by *A* when he was in pecuniary difficulties, and included all *A's* property. It was, therefore, void as against his then existing creditors, of whom *B* was one. *B* was, therefore, entitled to sell the property in execution of his decree. HORMUSJI *v.* COWASJI . **I. L. R. 13 Bom. 297**

18. ——— *Sale to creditor for old debt and new advance on debtor's bankruptcy—Intent to delay and defeat creditors—Bonâ fides of purchaser—Fraudulent preference—Stat. 13 Eliz., c. 5.* On the 27th February 1886, the firm of Ranchhod Jamna, a family firm, was on the point of failing, being heavily indebted. On that day, the managing member of the firm executed four sale-deeds, comprising all the property of the firm, in favour of four different creditors of the firm, of whom the plaintiff was one. The deed executed in favour of the plaintiff was in consideration of a then existing long-standing debt and a fresh advance of R3,400 made by him to the firm. The next day the firm stopped payment. The defendant was one of the creditors of the firm, and sought to attach and sell the property conveyed to the plaintiff in execution of a decree which the defendant had obtained against the firm. The plaintiff's objection to the attachment by the defendant having been disallowed, he brought the present suit against the defendant, to establish his right to the property attached under his sale-deed. The defendant contended (*inter alia*) that the sale to the plaintiff, having been effected in order to delay and defeat the creditors and to give undue preference to the plaintiff, was void. *Held* on the evidence that the sale to the plaintiff was, on the part of the plaintiff at least, a *bonâ fide* sale in consideration of a debt still due, and for payment of which the plaintiff had been pressing, and R3,400 in cash; and that there were no circumstances in the case which showed that the plaintiff in entering into it was a party to any scheme to delay the general body of the creditors. That being the case, the sale was not impeachable at the instance of the defendant; although, having regard to the fact of its having been negotiated on the eve of the failure of the firm, it might possibly be regarded as a sale by which the plaintiff obtained an unfair preference, and as such perhaps be impeachable at the suit of the whole body of creditors. *In re Johnson: Golden* v. *Gillam, L. R. 20 Ch. D. 389*, referred to and followed. MOTILAL RAVICHAND *v.* UTAM JAGJIVANDAS . **I. L. R. 13 Bom. 434**

19. ——— **Mortgage**—*Arrangement between firm and its creditors—Giving time—Mortgage security.* A firm in difficulty executed a mortgage, securing debts due to creditors named in the deed, it being understood that all the creditors should refrain from suing the firm until the expiration of a certain period. Notwithstanding this, two creditors named in the deed immediately sued for their debts, and obtained decrees. Other creditors named in the deed afterwards bringing the present suit to enforce their rights under the mortgage, it appeared that the intention and agreement was that the deed should not take effect unless all the creditors came in and were bound by it. *Held*, that, the suits abovementioned having been brought before the expiration of the period agreed upon, the consideration for the mortgage had failed, and the creditors could not sue the firm on the mortgage-deed. AJUDHIA PRASAD *v.* SIDH GOPAL . . . . **I. L. R. 9 All. 330**

20. ——— **Time fixed for payment of debt**—*Intention of parties.* The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown. BHAGWAT DAS *v.* PARSHAD SINGH . . . **I. L. R. 10 All. 602**

21. ——— **Debtor giving priority to one creditor before attachment.** A debtor may, prior to attachment, give priority to one creditor over another, notwithstanding judgment may have been obtained against him. DOORGA TEWAREE *v.* NAIPAL AHEER . . **2 N. W. 224**

22. ——— **Assignment to one creditor in preference to others**—*Bankruptcy laws.* It is not illegal for a debtor to execute a security or make an assignment in favour of one creditor over

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others. The provisions of the brankrupt laws, made to promote the equal distribution of the trader's assets among all his creditors, are not in force in these provinces. BULDEO DASS *v.* NOONNA LALL . . . **1 N. W. 23 : Ed. 1873, 21**

23. ———— Deposit with creditor by debtor when in insolvent circumstances to protect his property—*Sale in execution under decree by creditor—Purchaser, right of.* A member of a firm of native bankers which had become insolvent, with a view to protect his property from the general body of his creditors, in March 1870, deposited property to the value of R30,000 with the appellants, another firm of bankers, to whom he owed R1,500. In April 1871, the appellants brought an action against him for R500, the balance of that debt, and obtained a decree, in execution of which the property was put up for sale and purchased by the respondent. *Held*, by the Privy Council (affirming the decision of the High Court of the North-Western Provinces), that the respondent was entitled to the property. DWARKA DASS *v.* RAI SITA RAM . **5 C. L. R. 430**

24. ———— Equitable assignment prior to attachment of debt—*Assignee for value without notice.* A creditor, who attaches a debt due to his judgment-debtor, is not in the same position as an assignee for value of such debt without notice of a prior assignment but in respect to prior assignments stands in no better position than his judgment-debtor. An assignment prior to attachment that is good against the judgment-debtor is also, as a general rule, good against his attaching creditor. Notice to the holder of funds is not necessary to complete, as against the assignor, an equitable assignment of such funds. In August 1870, *R J* signed and gave to *F S & Co.* a letter addressed to *E L & Co.*, by which he "requested them to pay over to *F S & Co.* any surplus proceeds of his consignment of one hundred bales per *Aurora*, after recovery from the underwriters of the amount due under a policy of insurance" (which had been effected on the hundred bales), after making certain deductions. This letter was given to *F S & Co.* in consideration of a pre-existing debt. On the 8th of August 1870, *F S & Co.* sent the letter to *E L & Co.* with a request that they should act upon it. The surplus proceeds of the insurance of the one hundred bales reached *E L & Co.* on the 26th of June 1871, and were attached in their hands by a judgment-creditor of *R J* before they were paid over to *F S & Co.* *Held*, that *R J* had validly assigned the surplus proceeds of the hundred bales to *F S & Co.*, and that such assignment was valid as against subsequent attaching creditors. *Semble :* That an attachment upon such surplus proceeds, before they reached the hands of *E L & Co.* from the underwriters, would have been invalid. MEGJI HANSRAJ *v.* RAMJI JOITA **8 Bom. O. C. 169**

25. ———— Assignment made with intention of defeating creditors. *D* executed a razinama in favour of plaintiff on the 20th August 1868, transferring certain lands to the latter. Plaintiff, after passing the usual kabuliat to the Collector, was put in possession of the lands in question. On the 7th April 1869, *T* obtained a money-decree against *D*, and on the 3rd July 1869 attached the lands as belonging to *D.* *Held*, that, if the razinama were a real transaction made for a valuable consideration, although entered into with the intention of defeating the execution of the money-decree, the title of plaintiff under that razinama would prevail. A sale or mortgage, if real, though made for the purpose of defeating an intended or probable execution, is valid against the execution-creditor. But if it be only a colourable transaction, not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a nominal owner in lieu of the real owner (the judgment-debtor), with the object of saving the property from execution, the vendee or mortgagee is a mere trustee, and the judgment-creditor is entitled to attach and sell the property. TILLAKCHAND HINDUMAL *v.* JITAMAL SUDARAM **10 Bom. 206**

26. ———— Fraudulent transfer—*Burden of proof—Mahomedan law—Sale of immoveable property by Mahomedan in satisfaction of wife's dower—Consideration—Deferred debt.* A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. *Wood* v. *Dixie, 7 Q. B. 892, Chowne* v. *Baylis, 31 L. J. Ch. 757*, and the authorities collected in the notes to *Twyne's Case, 1 Smith's L. C. 12*, referred to. Pending a suit for recovery of a debt, the defendant, who was a Mahomedan, executed a deed of sale, dated in June 1882, of a four-annas zamindari share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money-decree against the defendant, and in execution thereof attached the four-annas share. The vendee objected to the attachment on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right, and to set aside the attachment order. *Held*, that, if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four-annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a

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present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed,—the four-annas still remaining the property of the vendor, and as such liable to the attachment. *Held*, applying the general principles of the Mahomedan law as to deferred debts, that there was good consideration for the sale of June 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit. SUBA BIBI *v.* BALGOBIND DASS

I. L. R. 8 All. 178

27. ——— Assignment in fraud of creditors—*Deed of trust—Voluntary conveyance.* *A* by a deed of trust charged real estate to secure, among other things, a debt alleged to be due by him to his grandfather's estate on account of sums received by him from a debtor to that estate. *A* at that time was in a state of indebtedness which occasioned his afterwards becoming an insolvent. Such deed in the circumstances held, so far as related to *A's* alleged debt, fraudulent and void as against his creditors. TAREENY CHURN BONNERJEE *v.* MAITLAND . . . **11 Moo. I. A. 317**

28. ——— Assignment to trustees for benefit of creditors—*Power of insolvent debtor—Insolvency—Retirement of trustees.* *P*, a trader in insolvent circumstances, on the 1st December 1866, executed two deeds conveying his moveable and immoveable property to trustees to hold on certain trusts in favour of such of his creditors as should assent to the said deeds within three calendar months. The deeds contained powers directing the trustees, after dividing the trust-moneys rateably among the assenting creditors, to pay "the residue, if any, after answering the several purposes aforesaid and also the debts or dividends upon the debts of all such creditors as shall decline to come in and execute or assent" to the said *P*; powers authorizing them to return to the debtor or permit him to retain such part of his household furniture, linen, and china as they might think fit; and powers authorizing them to carry on the debtor's business and employ him therein and in winding up his affairs. *Held*, in the lower Court (TURNER, *J.*), that an insolvent debtor in the mofussil may assign all his property to trustees for the benefit of the creditors who may assent to the conditions of the assignment; and such an assignment will be valid, although it may operate to defeat an expected execution, if it be the intention of the assignor to confer on the assenting creditors a substantial interest in the property assigned, and not merely to defeat or hinder a judgment-creditor. Such an assignment may be made to trustees, but it is not requisite that it should be made to trustees; and it is not requisite that it should be made directly to the assenting creditors. It will confer on the trustees a title to the property assigned superior to that of a judgment-creditor, who has obtained an order for attachment subsequently to the assignment. It is not invalid if made subject to a condition requiring assenting creditors to execute a release of the debtor, nor is it invalid if it declares a resulting trust in favour of the debtor; but *semble:* that the Court might order such resulting trust to be executed for the benefit of judgment-creditors who decline to assent to the assignment. Nor is it invalid if it empowers the trustees to permit the debtor to retain such portion of his furniture, linen, etc., as they may think fit; but this power should be exercised only when the other assets are insufficient to discharge the primary objects of the trust. Nor is it invalid if it contain a power for the trustees to continue the business, if the power so given is ancillary to winding up the business and realizing the assets of the estate; nor is it invalid if executed only by the minority of the creditors. Nor can it be invalidated by subsequent negligence on the part of trustees. The question as to the intention of the debtor in executing such an assignment, is a question of fact rather than of law; and in determining this question the conditions and trust subject to which the assignment is made may be considered. *Held*, on appeal (*per* ROBERTS and PEARSON, *JJ.*, MORGAN, *C. J.*, dissenting), that the deeds were good deeds. A trader in the mofussil in failing circumstances may, in the absence of any statutory provision and of a brankrupt law, make a valid assignment of his property, before liens have attached upon it, or afterwards subject to such liens, to trustees simply for the purpose of having it distributed fairly among all his creditors, although it may defeat particular decree-holders and deprive them of their execution. *Semble:* Such a trust does not become inoperative by reason of the retirement of two out of three trustees and of the inability of the third to charge his duties properly. STEPHENSON *v.* BAUMGARTNER. BAUMGARTNER *v.* STEPHENSON

3 Agra 104, 321

29. ——— *Trust-deed to liquidate debts—Non-communication of trust-deed to creditors—Limitation Act (XV of 1877), s. 10.* *D S* executed a trust-deed, whereby he made over his property to trustees to manage his affairs and liquidate his debts in manner therein directed. The deed contained this provision: "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts; and they shall not admit any debt without rokur, hath-chitta, or hundi bearing the signature of myself or my monib gomastas, or without decree. *Held*, in the absence of evidence, that this deed was communicated to the creditors, that it did not create a trust in favour of the creditors, but enured only for the benefit of the executant; that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it; and that it did not create a trust in favour so as to take out

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of the operation of the Limitation Act a claim that otherwise fell within it. FINK *v.* MOHARAJ BAHADUR SINGH . . . **I. L. R. 25 Calc 642 2 C. W. N. 469**

30. ——— *Assignment of all his property by debtor to trustees for payment of creditors—Creditors' trust deed—Right of suit by creditor who had signed as creditor and trustee to recover his debt notwithstanding the deed.* On the 30th March 1894, the plaintiff sued the defendant, who traded under the name of *V J*, to recover R7,705 due on an adjusted account. On the 17th April following, the suit was on the board for hearing, but by consent of parties was adjourned for three months. Later on the same day, the defendant executed a deed, whereby he assigned all his property to the plaintiff and three other persons as trustees in trust for the payment of his creditors. The deed was executed by the plaintiff and the other trustees both as trustees and as creditors. It contained no release and no agreement by the creditors to take less than the full amount of their debts. It conveyed all the defendant's property to the trustees, who were to collect the estate and divide it rateably among the creditors "without prejudice to the rights of the several creditors to recover" the balance (if any) which might remain due to them after receiving such rateable distribution, and it declared that the said agreement for the payment of the debts was accepted by the creditors, and that, "upon payment to the sale creditors, respectively, of the full or whole amount of their respective claims, these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due from the said debtor, or the said firm of *V J* to the said creditors, respectively, and may be pleaded in bar to any claim in respect of such debts; and each of them, the said creditors, for himself, his heirs, executors, and administrators, doth hereby covenant with the said debtor, his heirs, executors, and administrators, that he or they will not, if the said debtor shall pay the said full amount of the debts due by him or his said firm of *V J* to the said creditors, bring any action, suit, or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm of *V J* to the said creditors respectively." On the execution of this deed, the trustees took possession of defendant's books of accounts, and proceeded to recover the defendant's estate. The three months for which, as above mentioned, the suit was adjourned in April 1894, having now expired, it came on for hearing. The defendant pleaded the deed, and contended that the plaintiff, having accepted the trust and signed the deed, was not entitled to continue the suit against him. *Held*, that it would be inequitable that the defendant, having handed over all his property to four of his creditors as trustees with a view to the payment of his debts in full, should be harassed by one of those creditors who had accepted the trust. The conduct of the plaintiff had been such as to deprive him of the right to present payment of his debt except by the assignment made to him and the other trustees. There had been a concluded agreement, which precluded him from proceeding with his suit, and to allow him to proceed would be a fraud on the creditors. Under the circumstances, there was an implied condition that the creditors should not sue until their remedy under the assignment was exhausted. The creditors should get what they could under the assignment, and then proceed for the rest. GOKULDAS MUCCANJI *v.* VASSANJI JAIRAM . . . **I. L. R. 19 Bom. 12**

31. ——— **Composition-deed between debtors and creditors**—*Managing member of a firm appointed as trustee—Right of suit after dissolution of the firm.* Certain traders having been adjudicated bankrupts in the Court of Mauritius, the creditors agreed to a composition-deed, which was sanctioned by the Court, whereby the present plaintiff, therein described as the managing member of the firm of *S & Co.* was appointed trustee, and his firm guaranteed the payment of a dividend of 50 per cent. The firm was subsequently dissolved, and its assets were assigned to a third party. The plaintiff now sued to recover costs decreed to him in his capacity as trustee in various suits in Mauritius, and it was objected that he was precluded from suing by the dissolution of his firm and the assignment away of its assets. *Held*, that the plaintiff was entitled to maintain the suit. *Subbaraya* v. *Vythilinga, I. L. R. 16 Mad. 85*, referred to. SUBBARAYA PILLAI *v* VAITHILINGAM **I. L. R. 20 Mad. 91**

32. ——— **Private settlement**—*Bond given after personal discharge in respect of debt incurred before insolvency—Private settlement with creditor without notice to official assignee and creditors—Agreement by creditor not to oppose final discharge—Admissibility of evidence—Untrue recital in bond.* An agreement, by which an insolvent who has obtained his personal, but not his final, discharge, without notice to the official assignee or his other creditors, settles the claim of one creditor, and by which that creditor agrees not to oppose his final discharge, is void as in fraud of creditors and as inconsistent with the policy of the Insolvent Debtor's Act. In a suit on a bond containing such an agreement, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors have been settled with, was untrue. Though no creditor is bound to oppose the final discharge of an insolvent, yet a private agreement by a creditor with the insolvent, by which, in consideration of a money payment, the creditor binds himself not to oppose, is void as opposed to the policy of the Insolvent Debtor's Act and as in fraud of creditors. NAOROJI NUSSERWANJI THOONTHI *v.* SIDICK MIRZA . **I. L. R. 20 Bom. 636**

33. ——— **Bond**—*Order giving mesne profits not awarded by decree—Bond, construction of—Condition in a bond unfulfilled—Admission of debt—*

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Abandonment of non-existent claim on compromise. An order assumed to be made by a Court in execution, that decree-holders, should have mesne profits which they had not been awarded in their decree, was without jurisdiction and could not be regarded as taking effect. This order was afterwards reversed as having been made without jurisdiction, but was standing when the bond in suit was executed by the decree-holders, now defendants, admitting money to be due to the plaintiff, and, as to a particular sum, promising payment out of the mesne profits when realized by them. The decree-holders, afterwards compromising with their judgment-debtor, abandoned the claim to mesne profits. This, however, was no real concession, because the right to mesne profits had no existence. Although the unqualified admission of a debt implies a promise to pay it, yet this implication does not necessarily follow where there is an express promise to pay in a particular manner, and on a certain event happening. *Held*, on the construction of the bond, that here the admission was referable to the particular obligation agreed to be discharged only in the manner stipulated; and that therefore the payment was to be contingent on there being mesne profits. *Held*, also, that it had not been established that the non-occurrence of the condition had been occasioned by the conduct or default of the defendants, and that, therefore, the objection to pay the sum in question never took effect or became enforceable. KALKA SINGH *v.* PARAS RAM **I. L. R 22 Calc. 434 L. R. 22 I. A. 68**

34. ——— **Mortgage**—*Contract Act (IX of 1872), ss. 38, 42, 43, and 45—Joint promise—Joint creditors—Discharge of mortgage by one of two joint mortgagees.* The sum due upon a mortgage was paid to one of the two mortgagees, and he gave an acquittance without the knowledge of the other mortgagee, who now brought this suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors, and that the mortgagee who received payment was not the agent of the plaintiff in that behalf. *Held*, that the mortgage had been discharged, and the plaintiff was not entitled to sue. *Wallace* v. *Kelsall, 7 M. & W. 264*, referred to. BARBER MARAN *v.* RAMANA GOUNDAN . . . **I. L. R. 20 Mad. 461**

35. ——— **Collusive discharge by one of two creditors**—*Estoppel—Fraud.* In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold, *inter alia*, the hypothecated property to defendants Nos. 2 to 4, and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the plaintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation-bond. The latter brought a suit in 1885 upon the hypothecation-bond and obtained a personal decree against the present plaintiff, which was *ex parte*, the amount of the decree being declared to be charged on the land in the possession of defendants Nos. 2 to 4. Meanwhile, defendant No. 1 who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last-mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of first instance passed a decree for the amount claimed, and declared it to be charged on the land. Defendant No. 1 preferred an appeal, in which defendants Nos. 2 to 4 were joined by the Court of first appeal, which dismissed the suit. *Held*, that plaintiff, having allowed a decree to be passed against him *ex parte* in the suit of the holder of the hypothecation-bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants. KANAGAPPA *v.* SOKKALINGA . . **I. L. R. 15 Mad. 362**

36. ——— **Deed of settlement**—*Attachment of settled property by creditors of settlor—Summons to remove attachment—Order dismissing summons, effect of—Civil Procedure Code (XIV of 1882), ss. 280-283—Sale of settled property in execution against settlor—Purchaser, right of—Right to set aside deed—Suit by creditors to set aside deed on ground of fraud—Limitation Act (XV of 1877), Art. 95.* On the 7th April 1877, one *N*, executed a trust-deed, whereby certain immoveable property belonging to him was conveyed to trustees in trust for himself for life or until he became insolvent or attempted to alienate, assign, or incumber the same, and then for his wife and children. At the date of the deed, *N* was largely indebted, and two or three months prior to the date of the deed he had deposited the bulk of his moveable property with a friend, who endeavoured to compromise with his (*N's*) creditors, and who applied the said property in paying off a portion of his debts. About a fortnight after the trust-deed was executed, *N* filed a suit against one *H* and others. That suit was dismissed, and *N* was ordered to pay *H's* costs. In execution of that decree for costs, *H*, in July 1882, attached a house which was part of the property settled by the trust-deed of April 1877. Thereupon the trustee of the deed claimed to have the attachment removed, alleging that he was in possession as trustee. He took out a summons for that purpose which was dismissed on the 19th December 1882, without prejudice to the rights of the parties to file a suit in respect of the subject-matter thereof. No suit, however, was filed by any of the parties, and the house was sold in execution. *H*, the execution-creditor, bought it at the sale, and was put into possession, which he retained until his death in December 1888. After his death, his executors took possession-

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They desired to sell it, but were unable to do so, in consequence of the claim put forward by *N's* wife and children (defendants Nos. 1, 3, and 4) under the trust-deed of 1877. They accordingly filed this suit against *N's* wife and children (defendants Nos. 1, 3, and 4) and the surviving trustee of the trust (defendant No. 2), praying for a declaration that the defendants had no right or interest, present or future or contingent, in the said property that they (the plaintiffs), as executors of *H*, were absolutely entitled to it, and that the trust-deed was fraudulent and void against the plaintiffs and other creditors of *N*. It was contended that the suit was barred under Art. 95 of Sch. II of the Limitation Act, XV of 1877, having been filed more than three years after 1882, at which date the fraud was alleged by *H* himself and relied on by him in the attachment proceedings. *Held*, that the suit did not fall within Art. 95, and was not barred. The substantial prayer of the plaint was a declaration that the plaintiffs were absolute owners of the property in suit, and the basis on which that prayer was rested was the sale to *H* in 1883. The "relief" asked for was the declaration of the plaintiffs' absolute title: the "ground" of the relief was the acquisition of that title by virtue of the certificate of sale, coupled with a denial of it by the defendants. Such a case did not come within the purview of Art. 95. It was further contended that the effect of the order in December 1882, dismissing the summons which had been taken out by the trustees to having the attachment removed, was to declare the trust settlement invalid, and that, as no steps had been taken by the trustee against whom that order was made to establish the validity of the trust within a year from the date of that order, the defendants could not now rely on their rights as *sestuis que trust* under that deed. It was argued that the Judge, in dismissing the summons, must have intended to pronounce the whole settlement invalid, having regard to s. 280 of the Civil Procedure Code (Act XIV of 1882), because otherwise he ought, according to that section, to have ordered, in express terms, the removal of the attachment from the reversionary estate of wife and children. *Held*, that the portion of s. 280 relied on only applies where the property is in the possession of the judgment-debtor "partly on his own account and partly on account of some other person." Here the property was at the time of the attachment, and had been for some months previously, in the sole possession of the trustee, and neither wholly nor partly in the possession of the judgment-debtor. The conditions under which the latter part of s. 280 becomes applicable were not present in the present case, and the Judge, in dealing with the summons, was not, therefore, called on to make any declaration as to the precise limits of the interest in the property upon which he held the attachment to be maintainable. *Held*, that there was no such order passed against the interests represented by the first, third, and fourth defendants as to come under the terms of s. 283 of the

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Civil Procedure Code. *Held*, on the evidence, that the deed of settlement was fraudulent and void as against creditors. It was proved that at or before the date of the settlement *N* was largely indebted. Nearly the whole of his moveable property had been deposited with a friend in order that the creditors might be compromised with and a portion of his debts paid off, and under those circumstances he made a settlement of this immoveable property, which was all that could really be said to have then belonged to him on the eve of the litigation which was about to commence. But *held*, also, dismissing the suit, that the plaintiffs were only entitled to an estate for the life of *N*. They were the representatives of *H*, and his claim, upon which this suit was founded, arose by virtue of his having purchased the right, title, and interest of *N*, the settlor, and the right so purchased did not include the right to set aside his own deed. *Held*, also, that the plaintiffs were not entitled to succeed, inasmuch as this suit was not filed by them on behalf of, and for benefit of, all the creditors of *N*. *Semble:* A claim to set aside a deed of settlement as fraudulent and void as against creditors can only be made by creditors whose claims are not barred by limitation. *Quære:* Whether the existence of creditors who were creditors at the date of the deed of settlement is necessary. BURJORJI DORABJI PATEL *v.* DHUNBAI **I. L. R. 16 Bom. 1**

37. ——— **Account**—*Burden of proof—Presumption—Principal and agent—Restriction of principal's liability to debts proved to be just.* Fraud and undue influence having been found, with the result that a decree cancelled transfers executed in favour of a creditors by a talukdar whose manager had received in his name money forming the consideration for the transfers, an account was directed to be taken of the sums actually due and payable by the principal. Directions were given for the payment, not of all the money received from the creditor by the manager, but only of sums (*a*) shown to have been lent by the creditor to the principal himself personally, and of those (*b*) received by the manager on behalf of the principal in the course of a prudent management. The burden of proof lay on the creditor of showing that any particular advance fell within the class (*b*); and where the advance, having been received by the manager, had been partly used in payment of Government revenue due on the estate managed by him:—*Held*, that the Court below had rightly presumed that the rents should have covered the revenue due; and this presumption having to be met, it was for the creditor to bring proof to overcome it. PARTAB BAHADUR SINGH *v.* CHITPAL SINGH . . . **I. L. R. 19 Calc. 174 L. R. 19 I. A. 33**

38. ——— **Bankruptcy in Mauritius**—*Right of suit by trustee under foreign composition-deed in British India—Judgment of foreign Court—Insolvency—Stamp Act (I of 1879), s. 31—Registration Act (III of 1877), s. 17 (e).* A debtor

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and the firm of which he was a member were adjudicated bankrupts in Mauritius, and a receiver was appointed by the Court. Subsequently the creditors met and resolved that, if the adjudication was annulled, a composition, payable by instalments, be accepted in full satisfaction of their debts, and that the security of the plaintiff's firm be accepted for payment of such composition, and that the bankrupts' estate be assigned to that firm, and that the plaintiff be appointed trustee to carry out such arrangement. An instrument was executed to give effect to these resolutions, and was concurred in by the receiver and approved by the Court, which annulled the adjudication, and ordered that the bankrupts' estate in Mauritius and India vest in the plaintiff, who was appointed trustee to carry out the said composition with full powers of realization. The plaintiff now sued to recover the moveable and immoveable property of the bankrupts in India. *Held*, (i) that the above instrument was valid as a composition-deed, and did not require to be stamped and registered as a conveyance; and that any surplus that might remain after payment to the creditors did not belong to the plaintiff's firm, but was subject to a trust for the bankrupts; (ii) that the plaintiff was entitled to a decree for the amount expended by him in payment of the creditors, together with such costs as were incurred by him in recovering debts due to the estate and could not be recovered from the debtors, and the costs of certain sales and a mortgage incurred in realization of the estate; (iii) that plaintiff was entitled to a decree for possession of the immoveable property until the sum due was paid to him by the defendants or was satisfied out of the rents and profits of the property. No order made by the Court at Mauritius can operate to transfer the ownership of immoveable property in British India. So *held*, without deciding that the Court cannot compel the bankrupt when within its jurisdiction to execute in favour of the trustee such a deed as will, in accordance with the formalities of the local law, rendered the order of the Court effectual. SUBBARAYA *v.* VYTHILINGA . **I. L. R. 16 Mad. 85**

39. ——— **Protection of assets.** The assignment in a trust deed by which a person assigns all his property to trustees for the benefit of his creditors protects the assets so assigned from all creditors. BAPUJI AUDITRAM *v.* UMEDBHAI HATHESING . . . **8 Bom. A. C. 245**

40. ——— **Attachment.** A *bonâ fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor, until the trusts of the deed of assignment have been carried out. BAMANJI MANIKJI *v.* NAORAJI PALANJI . **1 Bom. 233**

41. ——— **Voluntary conveyance**—*Construction—Trustee for creditors—Circuity of actions—Administration suit.* *K*, who was a relation of the plaintiff, executed a deed of conveyance by which he conveyed all his estate to the plaintiff, in consideration of his undertaking to pay all *K's* debts. The deed stated that it was *K's* desire that the estate should remain in his family. After *K's* death the plaintiff sued for an account and for redemption of some of *K's* land which had been originally mortgaged by *K* to the defendant. It was contended in defence that the deed created a trust for the payment of *K's* debts, and that the defendant was entitled to tack on to the mortgage debt a simple contract which *K* owed to him. It was found that the defendant was the only unpaid creditor, and that the property was more than sufficient to pay the debt. *Held*, that the deed did not create a trust for *K's* creditors, the object, on the contrary, being the preservation of the family property. *Held*, further, that due effect could not be given to the whole of the instrument, unless construed as a conveyance to the plaintiff, charged as between himself and *K* with the payment of *K's* debts. *Held*, also, that during *K's* life his creditors could not claim to be paid under this instrument, in the absence of any communication between them and the plaintiff, capable of being construed as an admission by him that he held the property as trustee for them, although they might possibly impeach it. On *K's* death, however, his creditors would be entitled in an administration suit to have the charge of his debts enforced in their favour. RAGHO GOVIND *v.* BALVANT AMRIT . . **I. L. R. 7 Bom. 101**

42. ——— **Arrangements made between creditor and debtor**—*Proof of advances—Razinamas not made decrees of Court, effect of.* Razinama arrangements not made decrees of Court, but irregularly acted upon as if they had been so made, do not substantiate advances alleged to have been made by creditors. PUREYASAMI *alias* KOTTAI TEVAR *v.* SALUCKAI TEVAR *alias* OYYA TEVAR . . . **8 Mad. 157**

KOSALA RAMA PILLAI *v.* SALUCKI TEVAR *alias* OYYA TEVAR . . . . **8 Mad. 198**

See VENKATURAMANA HODAI *v.* BAPANNA RAI **7 Mad. 103**

43. ——— **Drawing hundi**—*Right to credit item in account.* The drawing of a hundi on one's own factory and the delivery of it to another, may be evidence of indebtedness to the amount of the hundi, but it is not an item for which the drawer of a hundi is entitled to credit. SHIB RAM MUNDUL *v.* MAKHUN LALL BISWAS **7 W. R. 179**

44. ——— **Sale of goods**—*Arrangement to pay for goods sold.* Where a debtor sells goods to his creditor and requests that a portion only of the price should be appropriated to part payment of existing debts, and the remainder held against the price of goods to be afterwards purchased by the debtor from the creditor, such request is not binding on the creditor without his consent. AGUILAR *v.* WOOMESH CHUNDER SHAW **22 W. R. 209**

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45. ——— **Assignment of debt**—*Release of debtor—Failure to prove assignment against third parties.* When a creditor accepts the assignment of a debt due by third parties to his debtor, and releases the latter, he has no action against him. BISHEN CHUNDER SAELAH *v.* GOKOOL CHUNDER LAHATA . . . . . **5 W. R. 171**

46. ——— **Release, construction of deed of.** Construction of document holding that it could not have been intended by the parties to be a general release. MALICK BAPOO MEYAN *v.* HARI WALUB NAGURDAS . . **5 W. R. P. C. 112**

47. ——— **Arrangement between decree-holder and one of several judgment-debtors**—*Effect of, as against co-debtors. Held,* that no arrangement between the decree-holder and one of the judgment-debtors would affect the interest of a co-judgment-debtor unless by express consent. BHAIRABCHANDRA MADAK *v.* NADYAR CHAND PAL . . **3 B. L. R. A. C. 357**
12 W. R. 291

48. ——— **Adjustment of claims**—*Composition payment.* The plaintiff, a creditor of the late Rajah Chatpal Singh, accepted, from the Collector in charge of the estate, a composition payment in adjustment of his claims. *Held,* that he could not sue the Ranis, nor the infant son of the Rajah, on a contract or bond for payment of the balance. JAYRAM GIR *v.* SHIURAJ KOER
2 B. L. R. P. C. 98
11 W. R. P. C. 41

49. ——— **Co-contractors**—*Liability of the others on death of one.* The defendants entered into a contract with the plaintiff by which, in consideration of the trouble taken and money advanced by the plaintiff on behalf of the defendants, the defendants promised to pay to the plaintiff from generation to generation R100 a year out of a specified fund. *Held,* that, on the death of one of the co-contractors, the whole liability to the plaintiff attached to the surviving co-contractors. CHETUR NARAYANA PILLAY *v.* AYAMPERUMAL AMBALOM
4 Mad. 447

50. **Substitution of liability.** The defendant being indebted to the plaintiff in the sum of R574-5-0, the amount of the plaintiff's bill against the ship *Campta,* of which the defendant was master, they both went to the office of the ship's dubash in Bombay, where the defendant signed the bill as correct, and ordered the dubash to pay the amount. The dubash gave the plaintiff R500 in cash, saying he would pay the balance next day. The plaintiff said he would prefer a receipt for his bill, and returned the R500. An acknowledgment was then given to him, by which the dubash promised to pay the bill for R574-5-0 immediately on the money being received from Mr. *S.* On the day following the plaintiff took out a summons in the Small Cause Court against the defendant, whom he arrested, on making an affidavit that he was about to leave Bombay; and the Court held that "there was no valid substitution of the liability of any person or fund in place of the original liability of the defendant," and gave judgment for the plaintiff for R574-5-0 and costs, which judgment, as to the principal sum, was affirmed by the High Court, but costs on the sum of R500, originally paid to and returned by the plaintiff, were disallowed. ALLARAKIA ALI *v.* GEACH
3 Bom. O. C. 150

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51. ——— **Arbitration**—*Award not signed by all the creditors—Suit by signing creditor for his debt—Act IX of 1872, s. 65.* *K,* on the one part, and his creditors, including *C,* on the other part, agreed in writing to refer to arbitration the differences between them regarding the payment of his debts by *K.* The award compounded *K's* debts and assigned his property to his creditors, and directed that *K* should dispose of such property for their benefit, and that, if he misappropriated any of the property, he should be personally liable for the loss sustained by the creditors on account of such misappropriation. *C* signed the award amongst other creditors, but the award was not signed by all the creditors. *C* received a dividend under the award. *Held,* in a suit by *C* against *K* to recover a debt which had been compounded under the award, in which suit *C* alleged that several creditors had not signed the award, that some of them had sued *K* and recovered debts in spite of the award; that *K* had misappropriated some of the property; and that, if the plaintiff did not sue, there would be no assets left to satisfy his debt, and that such suit was not maintainable. LHETA MAL *v.* CHUNI LAL . . . . **I. L. R. 2 All. 173**

52. ——— **Agreement by creditors to give time**—*Failure of consideration—Mortgage to creditors as security for payment of debts—Construction of instrument—Suit by creditor before expiration of time—Separate suits by creditors.* A certain firm gave its creditors jointly, and not severally, a mortgage on certain immoveable property as security for the payment of the debts due to them by the firm, the consideration for such mortgage being a promise by all the creditors not to sue the firm for their debts for a certain time. Before the expiration of such time, several of the creditors sued for their debts. Subsequently several of the creditors brought separate suits against the firm to enforce the mortgage in respect of their debts. *Held,* that the consideration for the contract of mortgage, *viz.,* the forbearance of all the creditors not to sue for their debts for a fixed time, having failed, the firm was discharged from liability on the mortgage. *Held,* also, that, had the contract of mortgage remained in force, it would not have been competent for individual creditors to come into Court and enforce the contract in respect of their separate debts. SIDH GOPAL *v.* AJUDHIA PRASAD . **I. L. R. 5 All. 392**

53. ——— **Sale to defeat execution of decree**—*Creditor without specific lien.* A creditor without a specific lien (*e.g.,* a mortgage or other direct charge or incumbrance) has not any

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à priori right to debar his debtor from parting with his immoveable property until it is attached in due course of law. RAJAN HARJI *v.* ARDESHIR HORMASJI WADIA . . **I. L. R. 4 Bom. 70**

MOONA *v.* CHAND MONEE GOSSAIN **7 W. R. 206**

54. ———— **Fraudulent assignment**—*Suit by creditor to set aside—Suit by creditor on his own behalf and also on behalf of all creditors—Civil Procedure Code (XIV of 1882), s. 30—Misjoinder—Practice—Notice of assignment—Mahomedan law—Mushaa—Assignment of undivided share.* On the 25th July, 1898, the plaintiff obtained a decree against the second defendant, and in execution attached (as belonging to the said defendant No. 2) a one-third share of the interest accruing upon certain moneys in the hands of the Accountant General of Bombay. The said one-third share was thereupon claimed by the first defendant (wife of defendant No. 2), who alleged that it had been assigned to her by her husband (defendant No. 2) by a deed of assignment executed by him on the 15th October, 1886. The plaintiff now sued to have that assignment set aside, contending that it was a sham and colourable transaction ; and that the share had remained the property of defendant No. 2 and was liable to attachment as such. The suit was brought by the plaintiff in his own right and also on behalf of all the other creditors of defendant No. 2. It was objected on behalf of the defendants that this was a misjoinder of causes of action ; and that in his own right the plaintiff sued to have the deed set aside as void, while on behalf of the other creditors he sued for a declaration that it was voidable. *Held*, that there was no misjoinder. The plaintiff and the creditors had one cause of action, *viz.*, the right to treat the deed as one which would not affect their rights. It was further contended that the assignment was not valid, because no notice of it was given to the Accountant General, who had possession of the money assigned. *Held*, that the omission to give notice of assignment to the Accountant General did not invalidate the assignment. It was lastly contended that the parties were Suni Mahomedans, and that according to the Suni law an assignment of an undivided share (*mushaa*) of property was invalid. *Held*, that the rule did not apply, inasmuch as the assignment was of a definite share of the money in the hands of the Accountant General. On the merits the plaintiff's claim was dismissed. EBRAHIMBHAI RAHIMBHAI *v.* FULBAI (1902) **I. L. R. 26 Bom. 577**

55. ———— **Tender, validity of**—*Bond, suit on—Deposit in Court before due date.* A deposit in Court, before due date, of money due upon a bond, is not a valid tender of the debt. ESHAHUQ MOLLA *v.* ABDUL BARI HALDAR (1904). **I. L. R. 31 Calc. 183**

DEBUTTER PROPERTY.

See CIVIL PROCEDURE CODE, 1882, s. 244. **11 C. W. N. 145**, **12 C. W. N. 739**

See CONTRACT ACT. **I. L. R. 32 Calc. 582**

See EVIDENCE ACT (I OF 1872), s. 9. **I. L. R. 33 Calc. 571**

See HINDU LAW—ENDOWMENT. **I. L. R. 33 Calc. 507**, **I. L. R. 36 Calc. 1003**

See HINDU LAW—LIMITATION. **I. L. R. 33 Calc. 511**, **13 C. W. N. 805**

See LIMITATION ACT, 1877, s. 22. **9 C. W. N. 421**

See PARTIES . **I. L. R. 32 Calc. 582**

See RECEIVER . . **11 C. W. N. 489**

See SHEBAIT . **I. L. R. 35 Calc. 691**

1. ———— *Dedication—Precatory trust—Alienation of trust property—Mokurrari—Purchaser for value with notice of debutter—Character of property—Adverse possession—Limitation Act (XV of 1877), s. 10, and Sch. II, Arts. 134 and 144—Evidence Act (I of 1872), s. 90—Proper custody—Minerals.* In the terms of a *sanad* granted in favour of the Mohunt of a Thakur, there was nothing to show that the properties, the subject-matter of the *sanad*, were dedicated to a God or Gods or that the income of the properties was to be applied in any other way than the personal enjoyment of the grantee : *Held*, that the mere fact that the document described itself as a *debutter* pottah and was addressed to the Mohunt did not suffice to constitute a valid dedication to the God, on whom the Mohunt attended. An expectation by the grantor that the profits of the property would, after satisfying the personal wants of the grantee, be devoted to the service of the God, whom he attended, would not constitute a valid dedication. *Ram Kanai Ghose* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546*, referred to. The grant of a permanent *mokurrari* lease of *debutter* property is an alienation of proprietary interest *pro tanto*, and being beyond the competence of the trustee, possession under it becomes adverse to the lessor, as from the date of the lease and a suit to recover possession by a successor of the trustee would be *primâ facie* governed by Art. 144 of Sch. II, Limitation Act, and would be barred, if not instituted within twelve years. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram, 4 C. W. N. 329 ; s.c. I. L. R. 23 Mad. 271*, followed. *The President and Governors of the Magdalen Hospital* v. *Knotts, L. R. 4 App. Cas. 324*, and *Attorney-General* v. *Davey, 4 De Gex & Jones 136*, referred to. The effect of s. 10 read with Art. 134 of Sch. II of the Limitation Act is that time is no bar to an action against the trustee himself, his represent-

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atives or assigns except an assign for valuable consideration, but as regards the latter the period of 12 years from the date of the purchase is to be the period within which the suit must be brought. A person who takes a permanent *mokurrari* lease of *debutter* property for its full values, but with notice of its *debutter* character, is not precluded by the provisions of s. 10 and Art. 134 of Sch. II of the Limitation Act from pleading 12 years' limitation in a suit brought to recover it. *Radha Nath Das* v. *Gisborne & Co., 15 W. R. (P. C.) 24,* and *Ram Churn Tewary* v. *Protap Chandra Dutta Jha, 2 C. L. J. 449,* referred to. *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546,* approved. SHAMA CHARAN NANDI *v.* ABHIRAM GOSWAMI (1906) . **I. L. R. 33 Calc. 511 s.c. 10 C. W. N. 738**

2. ——— **Transferability**—*Shebait, trespass by—Decree for ejectment—Mesne profits—Liability of trust estate—Construction of decree—Execution—Joint decree-holders—Application by one when maintainable.* Where one of several joint decree-holders made an application for the execution of the whole decree and alleged that the other decree-holders had assigned to him the interest of them all, and the latter also made an application intimating that they have no objection to the execution of the decree at the instance of their assignee, the applicant. *Held,* that the application was maintainable. *Per* RAMPINI, *J.*—A *debutter* property according to Hindu law is not absolutely inalienable, it can be alienated for legal necessity, and, therefore, when a *shebait* as such trespasses on the property of another and so commits a tort and he is sued for and cast in damages, the *debutter* property can be sold in execution of such a decree. *Per* WOODROFFE, *J.*—As the decree in question appeared to have bound the trust estate the *debutter* property was liable. KRISHNA KISSORE CHAKRAVARTI *v.* SUKHA SINDHU SANYAL (1906) **10 C. W. N. 1000**

3. ——— *Power of a shebait to bind the estate by compromise—Benefit of the estate.* Although it is not competent for a *shebait* to alienate endowed property by way of mortgage or sale, yet he is authorised to deal with the endowed property for its benefit and preservation and especially for the purpose of preventing it from hostile litigious attacks. *Juggessur Buttobyal* v. *Rajah Roodra Narain Roy, 12 W. R. 299; Prosunno Kumari Debya* v. *Golab Chand Baboo, L. R. 2 I. A. 145; Konwur Doorga Nath Roy* v. *Ram Chunder Sen, L. R. 4 I. A. 52; Sheo Shankur Gir* v. *Ram Shewak Chowdhri, I. L. R. 24 Calc. 77;* and *Parsotam Gir* v. *Dat Gir, I. L. R. 25 All. 296,* referred to. HOSSEIN ALI KHAN *v.* MAHANTA BHAGBAN DAS (1906) . **I. L. R. 34 Calc. 249**

4. ——— **Conversion**—*Debutter—Idol—Secular Property.* Properties dedicated to a family idol may be converted into secural property by the consensus of the family. *Held,* that in this case the properties, if orignally debutter, have been so converted with common consent. In dealing with a question as to whether properties alleged to be debutter are really debutter or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point for consideration. Release by Government is not conclusive evidence of property being debutter. *Nemaye Churn Pooteetundee* v. *Jogendra Nath Banerjee, 21 W. R. 365,* followed. *Shebait* right cannot be transferred even to a co-shebait or to one who is next in succession. *Raja Vurma Valia* v. *Ravi Vurma Mutha, L. R. 4 I. A. 76; Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 271, Sri Raman Lalji Maharaj* v. *Sri Gopal, I. L. R. 19 All. 428; Prasanno Kumar Audhicary* v. *Saroda Prosanno, I. L. R. 22 Calc. 989,* referred to. *Mancharam* v. *Pransankar, I. L. R. 6 Bom. 298,* not followed. *Quære:* Whether an idol, which has been broken, is capable of holding property. GOVINDA KUMAR ROY CHOWDHURY *v.* DEBENDRA KUMAR ROY CHOWDHURY (1907) . . **12 C. W. N. 98**

5. ——— **Permanent lease by shebait**—*Adverse possession—Acceptance of rent, effect of.* A permanent lease of debutter property is void, if not executed for legal necessity. Plaintiff's predecessor, who had a *karsha* lease, obtained a permanent lease from the *shebait* of an idol, the predecessor of defendant No. 2, on payment of a bonus, and the latter, who is the present *shebait,* continued to receive rent from plaintiff. Subsequently defendant No. 2 determined plaintiff's lease and took possession. In a suit for possession by the plaintiff: *Held,* that plaintiff's possession under the permanent lease, which was found to have been executed without legal necessity and therefore held to be void, cannot be regarded as adverse to defendant No. 2, nor can the latter's acceptance of rent from the plaintiff either operate as an admission of the plaintiff's having a permanent right in the land or cause an extinction of his own previous title. NITYA GOPAL SEN PODDAR *v.* MANI CHANDRA CHAKRABUTTY (1907) . . . . **12 C. W. N. 63**

6. ——— **Mourasi Lease**—*Limitation Act (XV of 1877), s. 7, and Sch. II, Art. 134—Hindu Law—Endowment—Alienation of endowed property—Shebaits—Adverse possession—Possession continued under a void lease—Trespasser—Bonâ fide purchaser for value—Family idol, if perpetual infant—Relief as between co-defendants—Notice of debutter—Legal necessity for alienation of debutter property — Pleadings — Tenant who sets up adverse title if may fall back on tenancy as a defence in ejectment suit.* A *mourasi* lease of a *debutter* property was granted whereby the *shebaits* purported to relinquish all future increment in the value of the property for a little more than seven years' purchase of rents arising therefrom, reserving to them almost the same rent that was being raised before such *mourasi.* Two of the three *shebaits* concerned subsequently parted with their interest as lessors to the lessee. No evidence was adduced as to what happened to the money raised

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DEBUTTER PROPERTY—*concld.*

by such transactions: *Held*, that this was not justifiable in the interest of the endowment. *Nawab Sir Syed Hossein Ali Khan* v. *Mohant Bhagwan Das, 11 C. W. N. 261*, distinguished. The lease granting the above *mourasi* recited that the necessity for such a demise was that the *shebaits* might be called on to fill up a tank on the property which they could not afford the means to do: *Held*, that such necessity was illusory and the mere advisability of filling up a tank did not constitute a necessity to justify alienation of the trust property. In an ejectment suit, the defendant pleaded exclusive possession and denied the title of plaintiffs as landlords of certain premises claimed by the latter as appertaining to a *debutter* of which they were present *shebaits*. The plaintiffs contended that it was not open to the defendant to fall back upon the title under a *mourasi* lease purported to have been granted by previous *shebaits* to the defendant's predecessors in title: *Held*, that the effect of the defendant's plea was merely to put the plaintiffs to the proof of a title which would justify their prayer for ejectment and did not prevent the defendant from relying on the *mourasi* lease. Where a defendant claims to be in possession of endowed property as a tenant under a *mourasi* lease granted by previous *shebaits* and the successors of the latter seek to recover possession on the ground that the lease was invalid: *Held*, that if the grant of such a lease constituted an alienation which it was beyond the power of the lessors to make, then, the lessee is to be taken as a trespasser and his possession as adverse to the title of the lessors from the date of the grant of the *mourasi* and limitation would begin to run from that date. *Shama Charan Nandi* v. *Abhiram Goswami, 10 C. W. N. 738*; s. c. *I. L. R. 33 Calc. 511 · 3 C. L. J. 306, Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546*. *Held*, on the evidence, that the *mourasi* lease granted to the defendant's predecessors in title created a new holding and that the principle laid down in *Nitya Gopal Sen Poddar* v. *Mani Chanda Chakrabutty, 12 C. W. N. 63*, did not apply to this case and the suit was barred by Art. 134 of the Second Schedule of the Indian Limitation Act. *Radha Nath Das* v. *Gisborne & Co., 15 W. R. (P. C.) 24*: s c. *14 Moo. I. A. 1*, referred to. Possession of *debutter* property which is adverse against some of the *shebaits* of an *idol*, is necessarily adverse against all of them. An idol cannot be regarded as a perpetual infant and the *shebait*, his manager, for the purposes of s. 7 of the Limitation Act. *Konwar Doorganath Roy* v. *Ram Chunder Sen, L. R. 2 I. A. 52*: s. c. *I. L. R. 2 Calc. 341*, referred to. JNANANJAN BANERJEE *v.* ADOREMONEY DASSEE (1909) . **13 C. W. N. 805**

7. ———— **Transfer of.** A transfer of *debutter* land by a *shebait* to another member of the family to which be belonged for the purpose of carrying on the worship of the idol, is valid. BARODA CHARAN DUTT *v.* HEMLATA DASSEE (1908) **13 C. W. N. 242**

DECEASED DECREE-HOLDER.

———— **application for substitution of—**

See LIMITATION ACT, 1877, SCH. II, ART. 180 . . **I. L. R. 36 Calc. 543**

DECEASED PERSON.

———— **statements of—**

See EVIDENCE ACT, s. 32. **I. L. R. 25 All. 143; 236**
See HINDU LAW . **I. L. R. 36 Calc. 590**

DECEASED WIFE'S SISTER.

See MARRIAGE . **I. L. R. 35 Calc. 381**

DECEIT.

———— **action for—**

See COMPANY—POWERS, DUTIES. AND LIABILITIES OF DIRECTORS. **I. L. R. 18 All. 56**

DECEPTION.

See CHEATING . **I. L. R. 33 Calc. 50**
See TRADE-MARK **I. L. R. 35 Calc. 311**

DECLARATION.

See DISTRICT MUNICIPAL ACT. **I. L. R. 30 Bom. 409**

See DYING DECLARATION.

See MORTGAGE . **13 C. W. N. 350; 357**

———— **suits for—**

See SUITS VALUATION ACT. **I. L. R. 33 Bom. 307**

DECLARATION OF OWNERSHIP.

———— **suit for—**

———— *Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.* Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff, and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land. *Held*, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title. *Runjeet Ram Panday* v. *Goburdhun Ram Panday, 20 W. R. 25 (Civ. Rul.)*, and *Agency Company* v. *Short, 13 App. Cas. 793*, followed. *Framji Cursetji* v. *Goculdas Madhowji, I. L. R. 16 Bom. 338*, referred to. GANPATI *v.* RAGHUNATH (1909) **I. L. R. 33 Bom. 712**

DECLARATION OF ALE OF ENTIRE ESTATE.

See SALE FOR ARREARS OF REVENUE. **I. L. R. 34 Calc. 381**

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DECLARATORY DECREE.

See CIVIL PROCEDURE CODE (V OF 1908), s. 9 . . I. L. R. 33 Bom. 387

See DECLARATORY DECREE, SUIT FOR.

See EXECUTION OF DECREE—MODE OF EXECUTION—DECLARATORY DECREES.

See POSSESSION . I. L. R. 35 Calc. 189

See RES JUDICATA—ESTOPPEL BY JUDGMENT . I. L. R. 13 Mad. 313

See SPECIFIC RELIEF ACT, I OF 1877, s. 42. I. L. R. 31 All. 271

1. ——————— *Not to be given when suit is for cancellation and when no consequential relief prayed.* A suit for cancellation of a mortgage deed on the ground of fraud must be dismissed in the absence of evidence of fraud and a decree declaring plaintiff's right to a smaller amount cannot be made when at the date of the plaint the plaintiff was entitled to consequential relief which he failed to claim. CHAKKA SUBBIAH *v.* MADDALI LAKSHMINARAYANA (1905) . I. L. R. 29 Mad. 298

2. ——————— *Suit for declaration of right to receive fees as "Chowdhris" of certain bazars—Suit not maintainable.* The plaintiffs sued for a declaration that they were the "chowdhris" of the bazars in the villages Muhammadabad Ghona, Khairabad and Behna, and that the defendants were not the "chowdhris" of the said bazars and were not entitled to take chowdhris' dues. *Held*, that such a suit was not maintainable. *Bhinuk Chowdhree* v. *The Collector of Jaunpur*, (*1867*) *All. H. C. 271*; *Beharee Lall* v. *Baboo*, (*1867*) *All. H. C. 80*; and *Ram Deehul* v. *Chukhoo*, (*1869*) *All. H. C. 291*, followed. BARSATI *v.* CHAMRU (1907). I. L. R. 29 All. 683

3. ——————— *Power of Court to make declaratory decree—Suit for possession by alleged next reversioners on ground that their mother, who held a woman's estate in immoveable property, was dead—Failure to prove mother's death—Dismissal of suit so far as possession was concerned, and declaratory decree made as to plaintiff's title.* The plaintiffs brought a suit for certain immoveable property as the next reversionary heirs of a deceased Hindu, and the only relief they claimed was possession on the allegation that their mother, who had succeeded to a woman's estate in the property, was dead. *Held*, that on the finding by the Court that the evidence failed to establish the fact of the mother's death, the suit should have been wholly dismissed. Other allegations made in the plaint that alienations made by the alleged mother were not justified by legal necessity, and that the plaintiffs were really her sons, which were both denied, were merely argumentative steps towards the only decree sought, namely, possession: and under the circumstances the Court was not entitled to make a declaratory decree in the plaintiffs' favour on those allegations

DECLARATORY DECREE—*concld.*

after the failure of the sole cause of action. WALIHAN *v.* JOGESHWAR NARAYAN (1907) I. L. R. 35 Calc. 189
s.c. L. R. 35 I. A. 38
12 C. W. N. 227

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DECLARATORY DECREE, SUIT FOR— *contd.*

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See CIVIL PROCEDURE CODE, 1882, s. 244—PARTIES TO SUIT.

I. L. R. 28 Calc. 492

1. REQUISITES FOR EXISTENCE OF RIGHT.

1. **Existence of relief which can be granted**—*Civil Procedure Code, 1859, s. 15.* No declaration of right can be made in a suit under s. 15, Act VIII of 1859, unless the plaintiff can show that there is some relief which the Court can give. BAIJ NATH CHATTERJEE *v.* LAKHI MANI DEBI **5 B. L. R. 514 note**

S.C. BEEJOY NATH CHATTERJEE *v.* LUKHI MONI DEBIA . . . . . **12 W. R. 248**

2. ——— **Existence of right to consequential relief**—*Declaration of right for relief in other suit.* A declaratory decree ought not to be made unless there is shown to be a right to some consequential relief which, if asked for, might have been given by the Court, or unless a declaration of right is required as a step to relief in some other Court. *Kattama Natchiar* v. *Dorasinga Taver, 15 B. L. R. 83,* approved. SHEO SINGH RAI *v.* DAKHO **I. L. R. 1 All. 68**

ZAIBUNNISSA *v.* ELAHEE BEGUM **19 W. R. 268**

3. ——— **Hostility of defendant**—*Suit for declaration of title. Held* by JACKSON, *J.*, that in a suit for declaration of title defendants must have given a cause of action by impugning it antecedently to plaint filed, even though their written statement be hostile. COLVIN COWIE *v.* ELIAS **2 B. L. R. A. C. 212 : 11 W. R. 40**

4. ——— A party is not entitled to ask for a declaration of right except as against a defendant in some degree hostile to him in respect of that right. PROMOTHO NATH GHOSE *v.* JODOO NATH SEN . **1 Ind. Jur. N. S. 293**

5. ——— **Suits for declarations of abstract rights**—*Civil Procedure Code, 1859, s. 15.* S. 15 of Act VIII of 1859 refers to declarations which are binding relatively to the parties before the Court, not to declarations of abstract right or bare declaration of trust, exclusive of any practical equity. MUZHUR HOSSEIN *v.* DINOBUNDOO SEN **Bourke O. C. 8 : Cor. 94**

6. ——— **Right to consequential relief**—*Question relating to third persons not parties to suit.* The question proposed for adjudication in the suit, in which a declaratory decree was sought, being in effect one not between the plaintiff and the defendant, but between the plaintiff and third persons not parties to the suit, the suit was dismissed in reference to the ruling of the Privy Council in *Vijia Ragunadah Rani Kolandapuri*

DECLARATORY DECREE, SUIT FOR— *contd.*

1. REQUISITES FOR EXISTENCE OF RIGHT —*contd.*

Natchiar v. *Dorasinga Taver, 15 B. L. R. 83,* dated the 10th of February 1875, that a declaratory decree is not to be made unless there is a right to consequential relief which, although not asked for, might, if asked for, have been given. RAM BHAROSE LAL *v.* GOPI BIBI **7 N. W. 300**

7. ——— **Hostile act entitling plaintiff to substantial remedy.** A hostile act which would justify a declaration of right under Act VIII of 1859, s. 15, must be such an act as would entitle the plaintiff to some substantial remedy in the way of injunction or otherwise. RAM KHELAWAN SINGH *v.* OUDH KOOER . . . . **21 W. R. 101**

8. ——— **Intricate questions of law**—*Principles on which Court grants relief.* The Court will not, in a declaratory suit, decide intricate questions of law, where no immediate effect, and possibly no future effect, can be given to its decision, and when the postponement of the decision to a time when there may be before the Court some person entitled to immediate relief will not prejudice a plaintiff's right in any way HUNSBUTTI KERAIN *v.* ISHRI DUTT KOER **I. L. R. 5 Calc. 512 : 4 C. L. R. 511**

9. ——— **Remand entailing delay and expense**—*Further enquiry.* Since a declaratory decree is a matter of discretion, a claim for a declaration ought not to be remanded by an Appellate Court for further enquiry which is likely to entail delay and expense, where the plaintiff's claim is contingent on his surviving the defendant, and where the declaration will not be binding on parties with possibly preferential titles who have not been joined in the suit. DOORGA PERSHAD SINGH *v.* DOORGA KOONWARI **I. L. R. 4 Calc. 190 : 3 C. L. R. 31**

10. ——— **Suit before Specific Relief Act, 1877.** A declaratory suit instituted before the Specific Relief Act came into force must, in regard to the right to a declaration, be governed by the law as laid down by the Privy Council in *Dorasinga Taver's* case, *15 B. L. R. 83.* PURASARA BHATTAR *v.* RANGA BHATTAR **I. L. R. 2 Mad. 202**

11. ——— **Consequential relief**—*Specific Relief Act (I of 1877), s. 42. Per Curiam.* The restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit, and not to be extended to the case of all third parties who may possibly support some of the contentions of the defendants. SUBRAMANYAN *v.* PARAMASWARAN **I. L. R. 11 Mad. 116**

12. ——— **Suit to declare alienation by Hindu widow invalid**—*Specific Relief Act, s. 42—Amendment of plaint—Death of widow pending appeal by plaintiff—Right of appellant*

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DECLARATORY DECREE, SUIT FOR—*contd.*

1. REQUISITES FOR EXISTENCE OF RIGHT—*concld.*

to proceed with appeal—Plaint not to be amended by claim for possession. The proviso to s. 42 of the Specific Relief Act, that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so," refers to the position of plaintiff at the date of suit. Where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and, pending appeal by the plaintiff, the widow died :—*Held*, (i) that the plaintiff was entitled to proceed with his appeal ; (ii) that plaintiff could not be permitted to amend his plaint and claim possession. GOVINDA *v.* PERUMDEVI

I. L. R. 12 Mad. 136

2. SUITS CONCERNING DOCUMENTS.

1. ——— Hostile document affecting title—*Right to sue to have it declared invalid.* When a person in possession finds that a document has been set up and registered which affects his title, and which every day's delay is likely to render him less able to disprove, he is justified in coming before the Court and asking that such a deed may be declared inoperative. NUFISA BANOO *v.* MAHOMED SUFDAR . . . **24 W. R. 336**

2. ——— Suit to set aside mortgage—*Civil Procedure Code, 1859, s. 15—Injury not admitting specific relief.* Act VIII of 1859, s. 15, did not give power to the Court to give a declaratory decree, unless the position of the parties is one of hostility to one another. The plaintiff must come into Court with some definite complaint against the defendant, which is such as admits of specific relief being afforded by the Court with regard to it. He cannot, irrespective of all behaviour on the part of the person whom he makes defendant, bring that person into Court merely for the purpose of getting the Court to clear up difficulties, whether of fact or law, which may have arisen between himself and the defendant. He must generally allege and rely upon some cause of action against the defendant, except in that class of cases in which the Court gives its aids towards the fulfilment of trusts, and this principle is not affected by s. 15 of Act VIII of 1859. Therefore where a plaintiff bought, at a sale in execution of a decree, the right, title, and interest of one defendant, a judgment-debtor, in a ship, and by his plaint sought to discover the *bonâ fides* of certain transactions by way of mortgage between the judgment-debtor and the other defendants, and asked a declaration that he, as purchaser, was entitled to the right, title, and interest of the judgment-debtor ; or in case it should appear that, at the time of the attachment in execution, the ship was the property of the judgment-debtor, subject to any

DECLARATORY DECREE, SUIT FOR—*contd.*

2. SUITS CONCERNING DOCUMENTS—*contd.*

valid lien or charge in the hands of the other defendants or either of them affecting the same, then the amount of such lien or charge might be ascertained, and the plaintiff as such purchaser might be declared entitled to redeem the same. *Held*, that the plaint was bad upon the face of it. But as it appeared, taking the plaint and evidence together, that there was some substantial dispute between the parties relative to the defendant's mortgage, the Court, to prevent further litigation, construed the plaint as having asked that the alleged mortgage might be set aside. LALLAH BHUGWAN DOSS *v.* AKBAR **1 Ind. Jur. N. S. 390**

3. ——— Suit to set aside, effect of recital in bond—*Nature of consideration.* A declaratory decree will not be given to show that a bond was not executed as recited in the bond, for money borrowed by the widow for the performance of the husband's sradh, such recital being no evidence against the heirs of the husband in a suit to charge the estate. SUNKER LALL *v.* JUDOOBUNS SUHAYE . . . . . **9 W. R. 285**

4. ——— Suit by son to have deeds by father declared void—*Unauthorized alienation.* A son may sue to obtain a declaration that sales by his father, without his consent, are, as against him, void and inoperative to pass or to affect any rights possessed by him in the property, and also that property still in his father's hands is ancestral, and cannot be alienated except under circumstances recognized by the Mitakshara law as justifying alienation, and with the consent of those whose consent is by that law requisite. KANTH NARAIN SINGH *v.* PREM LALL PAUREY

3 W. R. 102

5. ——— Suit to declare deed valid—*Failure to prove case—Form of decree.* When a plaintiff sues to declare that a deed is valid, and to confirm his possession under it, and fails to show sufficient cause for the Court's interference under s. 15, Act VIII of 1859, the Court ought simply to declare to that effect, and not to determine that the plaintiff has no right, and that the deed is void. PHOOLCHUNDER LALL *v.* SHEORANEE KOONWAR

9 W. R. 104

6. ——— Suit to declare deed forged—*Unused documents.* In a suit to obtain a declaration that two pottahs and a chitta which had been put forward in a butwarra were forgeries, it was held that, as no action had been taken on the documents in question, and plaintiff's rights were in no way prejudiced, the Court could not make any binding declaration of right. SHEO LALL CHOWDHUR *v.* CHUNDER BENODE OOPADHYA

9 W. R. 586

7. ——— ——— *Registered deed—Cause of action.* A suit will lie to set aside a registered deed on the mere allegation that it is a forgery. FAKIR CHAND *v.* THAKUR SINGH

7 B. L. R. 614 : 15 W. R. 421

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DECLARATORY DECREE, SUIT FOR—*contd.*

2. SUITS CONCERNING DOCUMENTS—*contd.*

8. ——— *Lease set up by intervenor in rent suit.* The defendant had unsuccessfully intervened in a suit between landlord and tenant, setting up a lease as middleman. *Held*, that the landlord was entitled to sue in the Civil Court to have such lease declared fictitious. RAGHUBAR CHOWDRY *v.* BHAIKDHARI SINGH

3 B. L. R. Ap. 48 : 11 W. R. 455

9. ——— *Cause of action—Guardian, suit by, for minor.* In a suit for a declaratory decree that certain pottahs put forward by the defendants in a suit for enhancement were forged, and calculated to injure the interests of a minor, whom the plaintiff as guardian represented. *Held* there was no cause of action. OOMAR SALMIA BIBI *v.* LAKHI PRYA DEBI

7 B. L R. 617 note : 10 W. R. 47

10. ——— **Suit to have will set aside** *—Consequential relief—Obstruction to title—Nuncupative will.* A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree. *Semble :* Where a defendant sets up a nuncupative will as entitling him to property in respect of which the plaintiff asks for a declaration of his right, a right to have such will declared null and void arises in cases where property legally passes by a will of that nature, since a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. SHEO SINGH RAI *v.* DAKHO . **I. L. R. 1 All. 688**

2 C. L. R. 193 : L. R. 5 I. A. 87

11. ——— **Suit to set aside lease**—*Consequential relief—Act VIII of 1859, s. 15—Jurisdiction of Civil Courts.* *A* granted a lease of his entire property to the plaintiff for a term of years, with power to enhance the rents and make settlements. Immediately after, *A* executed a pottah in favour of *B*, covering a portion of the same estate, whereby *B*'s rent was to remain unchanged for a period conterminous with the plaintiff's lease. In a suit by the plaintiff against *B* and *A*'s representative to have the pottah set aside, it was objected that inasmuch as the deed had not been as yet set up against the plaintiff, nor any injury shown to have been occasioned to him thereby, he had no cause of action. *Held*, that the suit was maintainable. In laying down the rule that "a declaratory decree cannot be made, unless there be a right to consequential relief," the Privy Council did not intend to deny to the Courts of this country the power to grant decrees in any case in which, independently of the provisions of Act VIII of 1859, s. 15, they had the power to grant a decree. This power is generally the same as that of the Court of Chancery in England. RAM NEEDHEE KOONDOO *v.* RUGHOO NATH NARAIN MULLO

I. L. R. 1 Calc. 456 : 25 W. R. 516

DECLARATORY DECREE, SUIT FOR—*contd.*

2. SUITS CONCERNING DOCUMENTS—*contd.*

12. ——— *Cause of action—Suit to cancel pottah.* Plaintiff sued in a Civil Court to cancel a pottah which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a Revenue Court : a copy of the pottah had been affixed to plaintiff's house. *Held*, that the plaintiff had no cause of action cognizable by a Civil Court. NURDIN *v.* ALAVUDIN

I. L. R. 12 Mad. 134

13. ——— **Suit to declare registered document forged**—*Jurisdiction of Civil Court.* Under s. 84 of Act XX of 1866, the District Judge ordered, without taking evidence, the registration of a document which had been opposed on the ground that the execution of it had been obtained fraudulently and by putting the executant under duress. The executant brought a civil suit against the party in favour of whom the document had been drawn for a declaration that the document was not genuine, and was invalid and inoperative. *Held*, that the Civil Court had jurisdiction to try the genuineness of a registered document, that the registration of a document, the execution of which was obtained by improper means affecting the property of the executant, is a good cause of action on which to ask for a declaratory decree. PRASANNA KUMAR SANDYAL *v.* MATHURANATH BANERJI

8 B. L. R. Ap. 26 : 15 W. R. 487

14. ——— **Suit to contest the genuineness and validity of a registered document** *—Registration Act (III of 1877), ss. 74, 75—Specific Relief Act (I of 1877), s. 39.* Under the special procedure provided in the Registration Act (III of 1877), the defendant, in whose favour a document was said to have been executed, succeeded in obtaining an order from the District Registrar for the registration of the same, although the plaintiff, who was alleged to have executed it, appeared before the Sub-Registrar, and subsequently before the Registrar, and denied executing it, and alleged it to be a forgery. In a suit brought under the above circumstances to have the document declared void and to have it cancelled: —*Held*, that the proceedings of the Registrar, when he enquired whether the document had been duly executed or not, were in no sense those of a "competent Court," but only those of an executive officer invested with *quasi*-judicial functions, and that, consequently, such a suit was maintainable. *Held*, also, that the Specific Relief Act (I of 1877) applied, s. 39 evidently contemplating and providing for such a suit. *Ram Chundra Pal* v. *Becharam Dey, 8 B. L. R. Ap. 28 : 10 W. R. 329*, dissented from. *Prasanna Kumar Sandyal* v. *Mathuranath Banerji, 8 B. L. R. Ap. 26*, followed. MOHIMA CHUNDER DHUR *v.* JUGUL KISHORE BHUTTACHARJI

I. L. R. 7 Calc. 736 : 9 C. L. R. 471

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DECLARATORY DECREE, SUIT FOR— *contd.*

2. SUITS CONCERNING DOCUMENTS—*contd.*

15. ——— Suit to cancel a void or voidable instrument—*Specific Relief Act (I of 1877), s. 39—Reasonable apprehension of serious injury.* Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury." Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled. *Iyyappa* v. *Ramalakshmamma, I. L. R. 13 Mad. 549,* referred to. KOTRABASSAPPAYA *v.* CHENVIRAPPAYA . . . **I. L. R. 23 Bom. 375**

16. ——— Suit to set aside fraudulent deeds—*Absence of any attempt to disturb possession.* In a suit for declaration of right of possession to certain lands and to set aside alleged fraudulent pottahs, which the plaintiff alleged had been executed by the defendant with a view to put an obstacle in the way of his attaining his right, but it was not shown that they had made any actual attempt to disturb the right of occupancy which it was found the plaintiff had :—*Held,* that the plaint did not disclose a sufficient cause of action to enable the Court to make a declaratory decree in favour of the plaintiff. UDAI CHANDRA MANDAL *v.* AHMEDULLA . . . **7 B. L. R. 616 note**

S.C. WOODOY CHUNDUR MUNDUL *v.* AHMEDOOLLA . . . . . **12 W. R. 467**

17. ——— *No use of deed to plaintiff's injury.* Where a petition was presented by *A* under s. 84, Act X of 1866, for registration of a deed, and the deed was duly registered, a plaint filed against *A* in which the plaintiff simply complained that *A* had executed the deed fraudulently, and obtained registration of it, was *held* to show no cause of action, no act of *A* having been shown to use the deed to the plaintiff's injury. RAM CHANDRA PAL *v.* BECHARAM DEY **8 B. L. R. Ap. 28 note : 10 W. R. 329**

18. ——— Suit for declaration that document is forged—*Apprehension of injury—Cancellation of document.* Where a void or a voidable document cannot legally be used for the purpose which is apprehended, there is no such reasonable apprehension that such document, if left outstanding, will cause injury as will entitle the person claiming the cancellation of such document to relief. SHIB LAL *v.* HIRA LAL **I. L. R. 1 All. 622**

19. ——— Suit in Civil Court to enforce exchange of pottah and muchalka—*Madras Rent Recovery Act (VIII of 1865)—Civil Procedure Code, s. 53—Amendment of plaint.* A suit in the Court of a District Munsif to enforce acceptance of a pottah and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title was dismissed as not being maintainable. *Held,* that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title ; and that the Court then would have had jurisdiction to grant, by way of consequential relief, the relief originally sought. NARASIMMA *v.* SURYANARAYANA **I. L. R. 12 Mad. 481**

20. ——— Consequential relief—*Specific Relief Act (I of 1877), s. 42.* Plaintiff, being in possession of certain land as an incumbrancer under a registered instrument, agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others, who took the conveyance, which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for a specific performance of the oral agreement. *Held,* that the suit was not bad for want of a prayer for delivery up, and cancellation of, the conveyance. KANNAN *v.* KRISHNAN . **I. L. R. 13 Mad. 324**

21. ——— *Suit for cancellation of document and for possession—Withdrawing portion of claim—Specific Relief Act, s. 42.* Plaintiffs, members of a Malabar tarwad, sued (i) for the cancellation of a deed of gift of certain immoveable property alleged to belong to their tarwad ; (ii) for restoration of the property, the subject of gift, either to plaintiff No. 1 or defendant No. 1 the present karnavan, on behalf of the tarwad. The Munsif dismissed plaintiff's suit on the merits. On appeal, the Subordinate Judge allowed plaintiffs, who were unable to pay the Court-fees for recovery of the property, to withdraw that portion of the claim, and decreed for plaintiff as to the remaining portion, *viz.,* for cancellation of the document. On second appeal : *Held,* reversing the decree below, that the prayer for restoration of the property being in the circumstances of the case maintainable, it was not competent to plaintiffs to restrict themselves to the other kind of relief sought, and that the maintenance of the suit in its maimed form would be an evasion of s. 42 of the Specific Relief Act. BIKUTTI *v.* KALENDAN **I. L. R. 14 Mad. 267**

22. ——— *Consequential relief—Specific Relief Act (I of 1877), s. 42—Suit by a member of a tarwad for a decree declaratory of the invalidity of a kanom granted to other members by the karnavan of the tarwad—Attornment of tenants—Possession, transfer of.* Where a kanom of tarwad property is granted by the karnavan to members of the tarwad, and the property in question remans in the possession of the karnavan on behalf of the tarwad, all that is necessary for a junior member to do in order to prevent the possession becoming adverse to the tarward is to obtain a declaration that the

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DECLARATORY DECREE, SUIT FOR—*contd.*

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kanom which is relied on as the cause of adverse possession is invalid. But if the kanom is granted to a stranger to the family, who is in possession, possession must then be sought for as relief consequent on the declaration. An attornment of tenants to the kanomdars does not operate as a transfer of possession from the tarwad to the kanomdars. *Subramanyan* v. *Paramaswaran, I. L. R. 11 Mad. 116,* followed, and *Bikutti* v. *Kalendan, I. L. R. 14 Mad. 267, Abdulkadar* v. *Mahomed, I. L. R. 15 Mad. 15,* and *Narayana* v. *Shankunni, I. L. R. 15 Mad. 255,* distinguished. PADAMMAH *v.* THEMANA AMMAH . **I. L. R. 17 Mad. 232**

23. ——————— *Oudh Rent Act (XXII of 1886)—Jurisdiction of Civil Court—Specific Relief Act, 1877, ss. 39, 42—Limitation Act, Sch. II, Arts. 91, 120—Contract Act, 1872, s. 229—Transfer of Property Act, 1882, s. 3.* In a suit on June 4, 1894, for possession of a village, or, alternatively, for a declaration that the defendant had no right therein and was liable to be ejected by an ordinary notice of ejectment, it was admitted that under the Oudh Rent Act of 1886 the Civil Court had no jurisdiction to grant either relief. *Held,* that, as it appeared that the substantial object of the suit was to cancel an instrument of lease relied on by the defendant, with a view to an order of ejectment in the Revenue Court, it was competent, under either s. 39 or s. 42 of the Specific Relief Act, 1877. Two Courts having found as a fact that the plaintiff only came to know of the said lease on June 24, 1891, it was not excess of jurisdiction in second appeal to apply thereto the well-known rule of law that notice to an agent binds the principal, and consequently, as notice of the lease had been obtained in 1883, the suit was barred, whether under Art. 91 or Art. 120 of Sch. II to the Limitation Act. RAMPAL SINGH *v.* BALBHADDAR SINGH (1902) . . . **I. L. R. 25 All. 1**
s.c. L. R. 29 I. A. 203 ; 6 C. W. N. 849

24. ——————— *Practice—Procedure—Pending suit—Another suit based on the defence in the first suit—Specific Relief Act (I of 1877), s. 39—Cancellation of instrument.* On the 16th March, 1899, the firm of Chhaganlal Haribhai brought suit No. 96 of 1899 against Dhondu and Baba to recover a sum due on a bond passed by them to the firm. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. While this suit was pending, on the 13th June, 1899, Dhondu (one of the defendants in the suit) brought suit No. 167 of 1899 to have the above-mentioned bond cancelled and delivered up to him under s. 39 of the Specific Relief Act (I of 1877). The Subordinate Judge decided both the suits together ; he dismissed the first suit and allowed plaintiff's claim in the second. *Held,* that the form of specific relief provided for by s. 39 of the Specific Relief Act (I of 1877) was founded upon the administration of protective

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justice for fear (*quia timet*) ; and that there could be no fear, in the second suit, that the plaintiff would suffer serious injury if he did not bring the suit, for the plea which was the foundation of the second suit was raised by him in the defence to the previous suit. CHHAGANLAL HARIBHAI *v.* DHONDU CHUDAMAN RANGRI (1903)
I. L. R. 27 Bom. 607

3. ADOPTIONS.

1. **Suit to set aside deeds giving and receiving in adoption**—*Cause of action.* A declaratory decree cannot be made, unless the plaintiff would be entitled to consequential relief if he asked for it. It is discretionary with a Court to grant a declaratory decree, and the Courts in India ought to be most careful in exercising such discretion. *A*, widow of a Hindu, sued *B* as father and guardian of *C* to have it declared that the deeds executed by *A* and *B*, one of giving *C* in adoption, the other of receiving him in adoption, were null and void, on the ground that they were agreements to give and take in adoption, and that *B* did not give his son according to agreement. *Held* (reversing the decision of the Courts below) that such suit was not maintainable. SREENARAIN MITTER *v.* KISHEN SOONDERY DASSEE
11 B. L. R. 171 : L. R. I. A Sup. Vol. 149

s.c. NUGGENDRO CHUNDRO MITTER *v.* KISHEN SOONDERY DASSEE . . **19 W. R. 133**

Reversing decision of High Court.
2 B. L. R. A. C. 279 : 11 W. R. 196

2. ——————— **Suit to have adoption declared void**—*Declaratory decree not obtainable by absolute right—Discretion of Court.* It is discretionary with a Court to grant or to refuse a declaratory decree with regard to the circumstances—*Sreenarain Mitter* v. *Kishen Soondery Dassee, 11 B. L. R. 171 : L. R. I. A. Sup. Vol. 149,* referred to and followed. A talukhdar died leaving a widow ; also a son, who having succeeded as talukhdar, died childless. This son's widow, being in possession, sued for a declaration that an adoption by the father's widow, to the father, was void and ineffectual. The ground of suit was that, at some time or other after the death of the plaintiff, the person alleging himself to have been adopted might obtain the talukhdari, unless his adoption should now be negatived. With regard to all the circumstances, the refusal of such a declaration was approved by their Lordships. If the person alleged to have been adopted should sue hereafter, the question would be decided whether he was validly adopted or not. PIRTHI PAL KUNWAR *v.* GUMAN KUNWAR
I. L. R. 17 Calc. 933
L. R. 17 I. A. 107

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DECLARATORY DECREE, SUIT FOR— *contd.*

3. ADOPTIONS —*contd.*

3. ——— Suit by reversioner to have forged letter giving power to adopt set aside and to restrain adoption—*Specific Relief Act, s. 42.* Under Act VIII of 1859, s. 15, a suit will not lie at the instance of the reversionary heir for a declaration that a certain letter purporting to have been written by the husband of the defendant empowering his widow to adopt a son is a forgery, and to have the same cancelled ; and for an injunction restraining the adoption of a child under the letter. *Raj Coomary Dassee* v. *Nobo Coomar Mullick, 1 Bom. 137,* followed. RUN BAHADOOR SINGH *v.* LUCHO COOWAR **4 C. L. R. 270**

4. ——— Suit to set aside invalid adoption—*Cause of action.* A suit having been brought by a Hindu reversioner for a declaration that an adoption alleged to have been made by the mother of *K*, the owner of the estate after the estate had vested in the widow of *K*, was invalid :—*Held*, that the alleged adoption afforded a cause of action for a declaratory suit. THAYAMMAL *v.* VENKATARAMA . . **I. L. R. 7 Mad. 401**

5. ——— Suit to set aside adoption—*Civil Procedure Code, 1859, s. 15—Right to declaratory decree.* In a suit brought on the ground of an existing right of inheritance, for immediate possession and mesne profits, by setting aside an adoption, the Court will not allow the form of action to be changed, and proceed to decide whether (the claim for possession on the ground of an existing right being abandoned) a declaratory order may not issue for setting aside the adoption, but will, on failure of right to immediate possession, dismiss the suit. According to s. 15, Act VIII of 1859, declaratory orders can be issued only in suits brought to obtain such orders. RAJESSUREE KOONWAR *v.* INDERJEET KOONWAR . **6 W. R. 1**

6. ——— *Suit to have adoption set aside—Onus of proof.* A stranger, having no interest in the matter, has no right, even with the consent of presumptive reversionary heirs, to sue for an order declaring an adoption to be valid. A plaintiff suing for a declaration that an adoption is invalid is bound to prove the invalidity. BROJO KISSHOREE DOSSEE *v.* SREENATH BOSE **9 W. R. 463**

7. ——— *Suit to have adoption declared invalid—Adoption by widow 35 years after death of her husband.* The plaintiff was a son of a mother of the deceased husband of the first defendant. The first defendant adopted a son 35 years after the death of her husband, in pursuance, as she alleged, of an authority to adopt given by her husband. The suit was brought by the plaintiff to have the adoption declared invalid upon the ground that the adoption was made without the husband's authority. *Held* a fit case for a declaratory decree. KOTAMARTI SITARAMMAYYA *v.* KOTAMARTI VARDHANAMMA . . . . **7 Mad. 351**

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8. ——— *Suit to set aside adoption—Court Fees Act. Sch. II, Art. 17, cl. 2—Limitation Act, IX of 1871, Sch. II, Art. 129.* *B* died, leaving him surviving two widows, *K* and *R*. Some time after *B*'s death, *P*, a son, was born to *R* on 15th September 1848. Some time before *P*'s birth, a portion of *B*'s watan lands had been made over to *K* by the revenue authorities. The remaining portion of *B*'s watan lands was placed by Government under sequestration, which was not removed until 1865. Shortly after *P*'s birth, *R* petitioned the revenue authorities, claiming the watan lands of *B* for *P* as *B*'s son. On 15th February 1849, the revenue authorities on enquiry held that *P* was not the son of *B*, and decided that *K* was entitled to retain the watan lands of *B*. On 16th March 1872, *K* adopted a son *B A*. In a suit brought by *P* on 4th December 1872 for a declaration that *P* was the son of *B*, and for setting aside the adoption of *B A* by *K* :—*Held*, that under the circumstances, a suit for a declaratory decree would lie ; for the plaintiff, even if his claim to the property were barred as against *K*, would yet be entitled to obtain an injunction against any intervention of *B A* in performing the sradh or other ceremonies for the benefit of *B* or assuming the status of *B*'s adopted son, and, moreover, the Legislature has in Act VII of 1870 and Act IX of 1871, recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property. KALOWA KOM BHUJANGRAV *v.* PADAPA VALAD BHUJANGRAV **I. L. R. 1 Bom. 248**

9. ——— *Guardians and Wards Act (VIII of 1890), s. 48.* S. 48 of the Guardians and Wards Act does not prevent a widow, who has been appointed by the District Judge under that Act to be guardian of a minor as her husband's adopted son, from maintaining a suit for a declaration that the minor was not the adopted son of her husband. RAKHAL MONI DASSI *v.* ADWYTA PROSAD ROY (1903) **I. L. R. 30 Calc. 613 ; s.c. 7 C. W. N. 419**

10. Suit by reversioner in lifetime of widow to set aside invalid adoption. In a suit by the reversionary heir in the lifetime of the widow to have an alleged invalid adoption made by her set aside, and his right to certain property declared, the Court refused to make such a declaratory decree. BROMOMOYEE *v.* ANNAND LALL ROY **13 B. L. R. 225 note : 19 W. R. 419**

JODOO NUNDUN PERSHAD SINGH *v.* NUNDO KOOER . . . . . **1 W. R. 219**

JEONATH BHUGGUT *v.* ROOPA KOONWUR **2 W. R. 273 note**

11. ——— Suit to restrain widow from adopting. Where *B* sued for a decree to declare that he should be heir to the property of the defendant, a Hindu widow, after her death, and

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for an injunction to restrain her from adopting any other than a member of his family, he being the nearest relative of her husband and the fittest subject for adoption according to the Hindu law: *Held*, that the suit would not lie, as in the former case the right was contingent and defeasible by adoption, and in the latter the adoption of a stranger was not illegal. BABAJI JIVAJI *v.* BHAJIRTHIBAI **6 Bom. A. C. 70**

4. REVERSIONERS.

1. ——— **Suit against tenant for life alleging waste**—*Consequential relief—Civil Procedure Code, 1859, s. 15.* The words of s. 15, Act VIII of 1859, must be construed upon the principles and by the light of the decisions of the English Courts of equity upon the 60th section of 15 & 16 Vict., c. 86, which is in similar terms. The effect of these decisions, taken in conjunction with the decisions of the Privy Council, in construing the provisions of the Indian Act, is that a declaratory decree is not to be made unless there is a right on the part of the plaintiff to consequential relief, which, although not asked for, might, if asked for, have been given, or unless the declaration of right may be made the foundation of relief to be had in another Court. The plaintiff, purporting to be the next heir, brought a suit against the life-tenant of a zamindari, and made another claimant to the succession to the zamindari a defendant in the suit. The plaint prayed for a decree declaratory of the plaintiff's right to succeed on the death of the zamindar, and made allegations of waste in respect of which he asked relief. *Held*, that even if the plaintiff had proved the alleged acts of waste, which he had not done, there was not a right to consequential relief which would entitle him to a declaratory decree. STRIMATHOO MOOTHOO VIGIYA RAGHOONADAH RANEE KOLANDAPUREE NATCHIAR *alias* KATTAMA NATCHIAR *v.* DORASINGA TAVER **15 B. L. R. 83**
23 W. R. 314: L. R. 2 I. A. 169

Reversing the decision of the Court below in **6 Mad. 310**

2. ——— **Alienation of property in possession of widow by parties having no right to it.** Where property to the immediate possession of which a Hindu widow is entitled is conveyed away by parties having no right to it,—*Quære:* Have not the reversionary heirs a right to ask for a declaratory decree to the effect that, as against ultimate heirs, the possession of the trespassers and others should be considered as the possession of the widow? JOY MOORUTH KOOER *v.* BALDEO SINGH . . **21 W. R. 444**

3. ——— **Fraudulent transfer by widow**—*Right of reversioner.* Where a transfer is made by a widow in fraud of the rights of the presumptive reversioner:—*Held*, that he is entitled

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to a declaratory decree that the widow's act is null and void, as it may affect the interests of the reversioner and for provision, if necessary, to prevent any waste of the estate by the appointment of a receiver, but not to a more extensive remedy. His reversionary interest is not accelerated by the transfer. JWALA NATH *v.* KULLO
3 Agra 55: s.c. Agra F. B., Ed. 1874, 138

SHIBO KOEREE *v.* JOOGUN SINGH and BOOLEE SINGH *v.* BASUNT KOEREE . **8 W. R. 155**

4. ——— **Contingent right**—*Suit to declare right to succeed—Civil Procedure Code, 1859, s. 15.* A person cannot sue for a declaration of his right unless he has an existing right. A mere contingent right which may never have existence is not sufficient to ground an action under s. 15 of Act VIII of 1859. Consequently a suit by a reversionary heir for the declaration of his right to succeed after the death of the tenant for life will not lie. PRANPUTTEE KOOER *v.* LALLA FUTTEH BAHADUR SINGH . . . . **2 Hay 608**

BRINDA DABEE CHOWDRAIN *v.* PEARY LALL CHOWDHRY . . . . **9 W. R. 460**

5. ——— *Suit to declare right to succeed—Civil Procedure Code, 1859, s. 15—Consequential relief.* It was held, where the plaintiff sought a decree establishing his reversionary right to property in the possession of his deceased brother's widow as her husband's heir, the alleged cause of action, as regards the defendants being that in a former suit, in which he claimed to recover the property from the widow on the ground that she had no more than a right of maintenance, they asserted that he was entitled only to one-third of the property; that there was not a sufficient cause for bringing the suit before the widow's death; and that, if the plaintiff's sole right as reversioner were allowed, as he had not at the time any right to consequential relief of any kind, the Court was bound to dismiss the suit, under the ruling of the Privy Council in *Strimathu Muthu Vijia Ragunadah Rani Kolandapuri Natchiar* v. *Dorrasinga Taver, 15 B. L. R. 83*, dated the 10th of February 1875, that a declaratory decree is not to be made unless there is a right to consequential relief, which, though not asked for, might, if asked for, have been given. SITALPARSHAD *v.* JAGDAT MISSER . . . **7 N. W. 254**

6. ——— **Suit by reversioner to set aside alienation.** Where the defendant alienated property in which he had merely a life-interest:—*Held*, that the alienation was invalid as against the plaintiff, who was entitled as reversioner. *Held*, also, that the plaintiff was entitled to a decree declaratory of his title under s. 15 of Act VIII of 1859. Although the words of that section are nearly identical with those of s. 50 of the English Chancery Amendment Act, it does not follow that, in every case in which the latter section is held to be inapplicable by the Courts of Chancery in England, the

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former will be held to be equally inapplicable in India. The application of s. 15 of Act VIII of 1859 must be viewed in connection with the system of procedure to which it belongs. TIRUMALATHAMAL *v.* VENKATARAMANAIYAN . . **2 Mad. 378**

See PERIYA GAUNDAN *v.* TIRUMALA GUANDAN . . **1 Mad. 206**

7. ——————— *Alienation by Hindu widow—Rights in widow's lifetime.* Though a reversioner cannot obtain possession during the lifetime of a Hindu widow, yet he may be entitled to a declaration whether the alienations made by the widow are or are not valid and binding on the absolute heir. If the reversioner can prove that wilful default is about to take place, he will be entitled to such relief from the Court as will prevent the apprehended occurrence of a sale for arrears. SHURUT CHUNDRA SEIN *v.* MUTHOORA NATH PUDATICK . . . **7 W. R. 303**

8. ——————— *Alienation by Hindu widow—Reversioner.* A suit lies by a reversioner to declare that an alienation by a Hindu widow will not be binding upon him after her death. A suit is not to be dismissed on the ground that the plaintiff seeks to set aside such alienation, but the Court will grant him such relief as he is entitled to. SHEWAK RAM ROY *v.* MOHAMMED SHAMSUL HODA **3 B. L. R. A. C. 196 : 12 W. R. 26**

OODOY CHAND JHA *v.* DHUN MONEE DEBIA **3 W. R. 183**

HARADHUN NAG *v.* ISSUR CHUNDER BOSE **6 W. R. 222**

BYKUNT NATH ROY *v.* GRISH CHUNDER MOOKERJEE . . . . . **15 W. R. 96**

9. ——————— *Cause of action.* *A* brought a suit against *C* and *D*, alleging that he was an heir-expectant upon the death of *B*, a Hindu widow in possession of an estate, and as such sought for a declaration of title, and to have certain conveyance of this estate, said to have been executed by *C* in favour of *D*, set aside affecting *A*'s future interest, without charging any act of waste or injury to the property which might affect his rights as reversioner. *Held*, that *A* had disclosed no cause of action against *C* and *D*. SURAJ BANSI KUNWAR *v.* MAHIPAT SINGH **7 B. L. R. 669 : 16 W. R. 18**

10. ——————— **Suit by reversioner for declaration of right**—*Cause of action.* *A*, a Hindu infant, disappeared and had not since been heard of. In a suit brought within twelve years from the date of his disappearance by the next kin for a declaration of right, and alleging waste by those in possession, and an apprehension that, if the infant should not return within twelve years, he, the plaintiff, would be barred by limitation:—*Held*, there was no cause of action. GURU DAS NAG *v.* MATILAL NAG **6 B. L. R. Ap. 16 : 14 W. R. 468**

DECLARATORY DECREE, SUIT FOR— *contd.*

4. REVERSIONERS—*contd.*

11. ——————— **Waste by Hindu widow**—*Declaratory suit, ground of—Adverse possession.* It is open to a Hindu widow to give over possession to a stranger to the extent of her interest in the estate; but actually to favour the claims of the latter and allow him to enter his name in the landlord's sherista would have the effect of setting up an adverse title as against the reversionary heirs, upon which a declaratory suit would lie. RAM PERSHAD CHOWDHRY *v.* JOKHOO ROY **I. L. R. 10 Calc. 1003**

12. ——————— **Suit by reversioner in lifetime of Hindu widow**—*Civil Procedure Code, 1859, s. 15.* A suit brought during the life of a Hindu widow by the presumptive heir, entitled on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life, is among the exceptions to the general rule established by decision upon Act VIII of 1859, s. 15, *viz.*, that, except in certain cases, a declaratory decree is not to be made unless the plaintiff shows a title to, though he does not ask for, consequential relief. *Kattama Natchiar* v. *Dorasinga Taver, L. R. 2 I. A. 169 : s.c. 15 B. L. R. 83. Held*, that, although to grant a declaratory decree under the above section was discretionary with a Court, yet in a suit of this class, known to the law, and in many cases the only practical mode of enforcing the presumptive heir's right to interfere with the widow's alienation, the grounds for the discretionary refusal of the decree should be strong. In this case, the difficulty of the question raised and the expense of the litigation, which had been referred to as grounds for refusing it, were insufficient reasons. ISRI DUT KOER *v.* HANSBUTTI KOERAIN **I. L. R. 10 Calc. 324 : 13 C. L. R. 418 L. R. 10 I. A. 150**

13. ——————— *Hindu law—Alienation by Hindu widow—Parties—Vested and contingent interest—Specific Relief Act (I of 1877), s. 42.* The plaintiff, claiming to be entitled in reversion to certain property on the death of his grandfather's widow, sued for a declaration that certain alienations made by the widow were void as against him. To this suit the widow and her alienee were defendants. The defence was, that the plaintiff was not the reversioner, and certain parties, who claimed to be the real reversioners, intervened, and were made defendants by order of the Court. The plaintiff obtained a declaration of his reversionary right, and the deeds of sale were, on certain conditions, declared void as against him. The intervenors appealed to the High Court. *Held* on appeal, that, notwithstanding the provisions of s. 42 of the Specific Relief Act (I of 1877), the plaintiff was not entitled to the relief sought, and that the defendants, who claimed as reversioners, should not have been made parties to the suit. S. 42 of the Specific Relief Act refers only to existing and vested rights, and not to

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DECLARATORY DECREE, SUIT FOR—*contd.*

4. REVERSIONERS—*contd.*

contingent rights. GREEMAN SINGH *v.* WAHARI LALL SINGH

I. L. R. 8 Calc. 12 : 9 C. L. R. 249

14. ——— *Joinder of plaintiffs—Suit by daughter and daughter's son against widow to declare alienations invalid.* The palayam of *C* was granted during the Mahomedan rule to a Hindu on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under permanent settlement under the provisions of Reg. XXV of 1802. The last male holder died in 1860, leaving him surviving a widow *K* and a daughter *C*. In 1865 the Government discontinued the service, and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inam pottah was issued to *K* by the Inam Commissioner, by which her title to the estate was acknowledged by the Government of Madras, and the estate was confirmed to her as her absolute property subject to the quit-rent. In 1882 *C* and her minor son *A* sued *K* and others to whom *K* had alienated portions of the estate, for a declaration that they were the reversionary heirs of *K*, and that the alienations made by *K* were good only during the lifetime of *K*. The District Judge held that, there being no collusion between *C* and the defendants, *A* was not entitled to join in the suit. *Held*, that *A* was entitled to join *C* as co-plaintiff. NARAYANA *v.* CHENGALAMMA . . **I. L. R. 10 Mad. 1**

15. ——— **Suit by reversioner on death of Hindu widow**—*Right to sue—Cause of action—Specific Relief Act, 1877, s. 42.* On the death of *P*, a Hindu widow who had been in possession of the estate of her deceased husband, *D*'s daughter *B* was entitled to succeed to the estate if it were *D*'s separate property. *S*, however, alleging that the estate was ancestral property, to which he was entitled to succeed, took possession of it. Thereupon the sons of another daughter of *D*, alleging that the estate of *D* was his separate property, that *B* was entitled to succeed to it, that they were the next reversioners, and that *B* was acquiescing in a possession on the part of *S* which was adverse to her and to them as next reversioners, sued *B* and *S* for a declaration of their reversionary right, and for possession of *D*'s estate or such relief in this respect as the Court might think fit to give. *Held*, that the plaint disclosed a right to sue on the part of the plaintiffs and a cause of action. *Nobin Chunder Chuckerbutty* v. *Guru Pershad Doss, B. L. R. Sup. Vol. 1008, Radha Mohun Dhar* v. *Ram Das Dey, 3 B. L. R. A. C. 362, Gunesh Dutt* v. *Lall Muttee Kooer, 17 W. R. 11,* and s. 42 of the Specific Relief Act referred to. It being decided that *B* was entitled to the estate of *D* and that she should be in possession of it, the Court, having regard to *B*'s conduct gave the plaintiffs a declaration of their reversionary right to *D*'s estate, and directed that possession of it should be given to *B*, and if she declined to accept possession, then that *A*, one of the plaintiffs, should be put in possession for her as manager on her behalf, and he should act under the orders and directions of the lower Court, filing accounts in, and paying the income to her through, such Court, whose receipts should be a sufficient discharge. ADI DEO NARAIN SINGH *v.* DUKHARAN SINGH . **I. L. R. 5 All. 532.**

16. ——— *Specific Relief Act, s. 42.* The plaintiffs, uncle's sons of *R*, a, deceased Hindu, brought a suit as reversioners of *R* for a declaration that certain alienations made by *M*, the widow of *R*, were not binding beyond the lifetime of *M*. The District Judge held on the strength of *Greeman Singh* v. *Wahari Lall Singh I. L. R. 8 Calc. 12*, that the suit would not lie under s. 42 of the Specific Relief Acts. *Held*, that the suit would lie. GANGAYYA *v.* MAHALAKSHMI.

I. L. R. 10 Mad. 90

17. ——— *Suit by reversioner to establish his title to property sold in execution of decree obtained against a widow as representative of her deceased husband's estate—Fraud—Collusion—Right of reversioner to possession.* The plaintiff, as the nearest heir of one *O T* who died intestate in 1873, sued to set aside a sale of certain immoveable property belonging to the estate of the deceased, which had been sold on the 3rd November 1875, in execution of a money-decree obtained by the defendant *J* against *B V*, the widow of *O T*. *B V* had married a second time in 1876, and her second husband was the brother of the purchaser at the execution-sale. The plaintiff alleged that the decree had been fraudulently and collusively obtained on a bond in *O T*'s name, which had been forged by *J*. The suit was brought on the 28th January 1878, and the plaintiff prayed that the sale might be cancelled, having been made in order to defeat his rights; that he might be declared the heir of *O T*; and that possession of the property with mesne profits might be awarded to him. *Held*, on the evidence, that the suit against *B V* was collusive, and that the sale in execution was in fraud of the plaintiff's right. He was, therefore, entitled to a decree declaring that he was not bound by the sale of the 3rd November 1875, in the suit brought by *J* against *B V* as representative of her deceased husband *O T*. Whether the plaintiff was entitled also to immediate possession of the property in the suit, depended on the question whether *B V*'s life-estate was defeasible on her re-marriage. She belonged to a caste in which re-marriage was permitted. The following issue was accordingly sent to the lower Court for trial: "Whether, by the usage of the country, the rights and interests of *B V* by inheritance in her deceased husband's property, the subject of this suit ceased and determined on re-marriage in 1876 as if she had then died." PAREKH RANCHOR *v.* BAI VAKHAT

I. L. R. 11 Bom. 119.

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DECLARATORY DECREE, SUIT FOR— *contd.*

4. REVERSIONERS—*contd.*

18. ———————— *Alienation by widow to her married daughter—Act I of 1877 (Specific Relief Act), s. 42.* The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter is merely to accelerate the latter's succession and put her by anticipation in possession of her life-estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift. *Per* MAHMOOD, *J.*, that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son, who would be the next reversioner to the full ownership of the estate of the donor's deceased husband. *Indar Kuar* v. *Lalla Prasad Singh, I. L. R. 4 All. 532,* and *Udhar Singh* v. *Ranee Koonwur, 1 Agra 234,* referred to BHUPAL RAM *v.* LACHMA KUAR **I. L. R. 11 All. 253**

19. ———— **Suit by reversioners to declare purchase by ancestor benami**—*Ground for declaratory decree.* In a suit by reversionary heirs to declare that the property standing in the name of defendant had been purchased by the ancestor in his name benami, it was held that there was no ground for a declaratory decree. RAJBUNSEE LALL *v.* JUDOOBUNS SUHAYE **9 W. R. 285**

20. ———— **Suit for declaration of right to succeed**—*Alienation by Hindu widow.* The plaintiff's mother was entitled to certain property for her life under an award, under which the plaintiff was entitled to succeed to the property after her mother's death. The plaintiff sued her mother and the holder of a decree in execution of which the property had been sold, praying for a declaration of her right to succeed to the property, and that the said decree and sale might be declared void against her, alleging that the decree had been obtained and executed by collusion between the defendants. *Held,* that the suit could be maintained under the exception in the judgment of the Privy Council in *Kattama Natchiar* v. *Dorasinga Tevar, 15 B. L. R. 83.* JAGESRI KUAR *v.* RAM NATH BHAGAT **I. L. R. 1 All. 371**

21. ———————— *Suit by daughter in lifetime of mother. Held,* that a daughter can claim a declaration of her rights in paternal estates during the lifetime of her mother. JEEWAN RAM *v.* ROONTA . . . . . **1 Agra 240**

22. ———— **Suit by remote reversioner**—*Specific Relief Act, 1877, s. 42.* An Oudh talukhdar, deceased, before annexation, provided by his will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny and a sanad granted to her as talukhdar with full power of alienation, and her name was afterwards entered in the lists prepared under s. 8 of the Oudh Estates Act, 1869. Certain of her acts were not explicable except on the understanding that she was abiding by the will. *Held,* in a suit by the remainder man for a declaration of the invalidity of a deed of gift made by the widow as against him, that, although declaratory relief might have been, at the Court's discretion, refused to him, on the ground of his remoteness in remainder and the identity of the object of his suit with that of the other, yet he was entitled on this appeal to the decree which he sought, because his suit had been wrongly decided against him on the merits. RAMANAND KUAR *v.* RAGHUNATH KUAR. ANANT BAHADUR SINGH *v.* RAGHUNATH KUAR . **I. L. R. 8 Calc. 769 : 11 C. L. R. 149 L. R. 9 I. A. 41**

23. ———————— *Specific Relief Act (I of 1877), s. 42.* The intervention of two life estates does not preclude a reversioner from obtaining a declaration of his interest as to land under the Specific Relief Act, s. 42. KANDASAMI *v.* AKKAMAL . . . **I. L. R. 13 Mad. 195.**

24. ———————— *Suit for declaration that defendant not the adopted son—Consequential relief—Specific Relief Act (I of 1877), s. 42.* A suit by persons who are merely distant relations and not reversionary heirs, for a declaration that the defendant is not the adopted son, is not maintainable under s. 42 of the Specific Relief Act (I of 1877). Every declaratory decree must be ancillary to some consequential relief obtainable thereby, and no such relief is possible in the case of distant and contingent, and not presumptive, reversionary heirs. ANYABA *v.* DAJI **I. L. R. 20 Bom. 202.**

25. ———— **Suit to set aside will for invalidity**—*Hostile will.* A party who, subject to the life-interest of his mother, has a real and vested interest in remainder such as a Hindu has the power of creating, has a right to sue to obtain a declaration of the invalidity of a will set up to his prejudice, which purports to take away altogether his future right and interest in the property. ANUND MOHUN MULLICK *v.* INDRO MONEE CHOWDRAIN . . . . . **16 W. R. 214.**

26. ———— **Suit to avoid effect of nuncupative will**—*Cause of action—Hindu widow—Testamentary declaration.* A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that *S*, the person entitled to succeed her, had no right to the property. *Held,* that such statement, as it was intended to operate, and would have operated, as a will in respect of the property, gave *S* a right to sue for a declaration that it should not have any effect as against him. KALIAN SINGH *v.* SANWAL SINGH . **I. L. R. 7 All. 163.**

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DECLARATORY DECREE, SUIT FOR—*contd.*

4. REVERSIONERS—*contd.*

27. ——— Suit by reversioner to set aside deed. A Hindu died, leaving a widow, two daughters *R* and *P*, and a grandson *B* by his daughter *R*. The widow took possession of the estate and executed an ikrarnama, wherein, after reciting that she was in possession "without the co-parcenary of any one," she declared that "*B*, the grandson of me, the declarant, is the heir of my late husband and of me, the declarant," and that all the property was "the right of *B* as aforesaid," and continued :—"During the life of me, the declarant, I am in possession without the co-shareship of any one, and will continue to be so ; after my death, *B* will get possession of the whole of the moveable and immoveable properties appertaining to the estate of my late husband. No one else has the right or demand to the same ; therefore, these words have been written and given as an ikrarnama, that it may be of use when occasion arises." Under the ikrarnama, proceedings were completed for mutation of names in favour of *B*. Subsequently to the execution of the ikrarnama, *P* gave birth to the plaintiff, and shortly afterwards died. The plaintiff, on attaining his majority and during the life of the widow and *R*, brought a suit against *B* to have the ikrarnama set aside and declared void as against him, and for a declaration of his right to a moiety of the estate of his grandfather on the death of the widow. *Held*, that he had no cause of action. BEHARY LALL MOHURWAR *v.* MADHO LALL SHIR GYAWAL **13 B. L. R. 222 : 21 W. R. 430**

28. ——— *Discretion of Court to grant declaratory decree.* A suit by a reversioner to set aside a zur-i-peshgi lease executed more than nine years previously having failed by reason of the inability of the plaintiff to establish the claim set up in it, the High Court was asked to continue it by remanding it to the lower Court in order that a declaratory decree might finally be passed. *Held*, that it was not a case in which it would be right for the Court to exercise its discretion. DOOLHUN JANKEE KOOER *v.* LALL BEHAREE ROY . . . . . **19 W. R. 32**

29. ——— Mortgage by Hindu widow in possession of property in lieu of maintenance—*Specific Relief Act, s. 42—Hindu widow.* The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit, in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond. *Held*, that, if the widow's possession were only a possession by the plaintiff's consent entitling her merely to receive the profits for her maintenance, the plaintiffs might eject her from the property, and that, before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate. *Held*, also, that, inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and upon its face mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate. BHOLAI *v.* KALI . . . . . **I. L. R. 8 All. 70**

30. ——— Suit by reversioner for possession—*Specific Relief Act (I of 1877), s. 42—Civil Procedure Code, s. 578.* A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R*'s brothers, *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After *K*'s death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently *S*, *M*'s son, who had been born after *K*'s compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that the family being a divided one, he was entitled, under the Hindu law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession, and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that his mother being still alive, he was entitled to possession after her death only, and, upon these findings, gave him a decree declaring his right to possession on *M*'s death. The lower Appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiffs' claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit. *Held*, that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given. Also that it could not be said that a daughter's son was

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not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right. Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and, entering into the merits of the case, arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion, under s. 42 of the Specific Relief Act, has no higher footing than that of an error, defect, or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code. This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. *Ram Kanaye Chuckerbutty* v. *Prosunno Coomar Sein, 13 W. R. 175, Sadut Ali Khan* v. *Khajeh Abdul Gunnee, 11 B. L. R. 203, Sheo Singh Rai* v. *Dakho, I. L. R. 1 All. 688 : L. R. 6 I. A. 87,* and *Damoodur Surmah* v. *Mohee Kant Surmah, 21 W. R. 54,* referred to. SANT KUMAR *v.* DEO SARAN **I. L. R. 8 All. 365**

31. ——— Decree against widow— *Fraud—Reversioner.* Upon the death of *R*, a Hindu who was separate from his brother *S*, his widow *G* became life-tenant of his estate, and his daughter *B* became entitled to succeed after *G's* death. In 1882 a suit was brought by *S* and *G* against *V* to recover the value of a branch of a mangoe tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that *R* was not the owner of the grove, nor was *G* the owner. In 1885 *B* brought a suit against *G*, *S*, *V*, and *A*, to whom *V* had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in collusion between *S* and *G* on the one hand and *V* on the other, for the purpose of improperly preventing her from asserting her rights. *Held*, also, that, if it should turn out that there was fraud and collusion in the proceedings of 1882 and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant; and that such relief could be given upon

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this form of plaint. *Katama Natchiar's Case, 9 Moo. I. A., 543, Adi Deo Narain Singh* v. *Dukharam Singh, I. L. R. 5 All. 532,* and *Sant Kumar* v. *Deo Saran, I. L. R. 8 All. 365,* referred to. SACHIT *v.* BUDHUA KUAR . **I. L. R. 8 All. 429**

5. DECLARATION OF TITLE.

1. ——— Intention to interfere with rights. To entitle a plaintiff to a declaratory decree, he must show some cause of suit, something more than a wish to interfere with his rights. Intention to interfere with such rights should be held to constitute a cause of action, if at all, only when it is clearly shown. JESMANEE KOOER *v.* DEBEE DYAL RAE . . . . . **3 N. W. 137**

2. ——— Obligation to show title— *Discretion of Court.* In a suit for a declaration of right, a plaintiff ought on the face of his plaint to show not merely that he has a title, but that circumstances exist which necessitate his application to the Court for a declaratory decree. It is discretionary with the Court to make a declaratory decree. KHADIM ALI *v.* NAZIR BEGUM **3 N. W. 262**

3. ——— Hostile act—*Invasion of right.* In order to entitle a plaintiff to a bare declaration of right under s. 15, Act VIII of 1859, he must make out, to the satisfaction of the Court, some act done by the defendant which is hostile to and invades that right, and which would justify an injunction or a decree for damages, or a decree for delivery of possession being passed against the defendant, if the Court had so thought fit to exercise its discretion. KENARAM CHUCKERBUTTY *v.* DENO NATH PANDA . . . . . **9 W. R. 325**

GOBINDONATH ROY CHOWDHRY *v.* KISHEN KANT ROY . . . . . **10 W. R. 254**

4. ——— Inability to make binding decree—*One-sided cases.* Declaratory orders ought not, as a general rule, to be made in cases which are wholly one-sided, and in which the decrees would not be binding upon the parties really interested, if the defendant should succeed in establishing his right. BROJO KISHOREE DASSEE *v.* SREENATH BOSE . . . . . **9 W. R. 463**

5. ——— Probable and inevitable injury. A declaratory decree ought only to be passed where some injury appears so probable as to lead to the conclusion that, unless stayed by the declaratory decree, the inchoate or threatened injury is inevitable. PUREEJAN KHATOON *v.* BYKUNT CHUNDER CHUCKERBUTTY . . . **7 W. R. 96**

6. ——— Prospective injury—*Suit to declare user.* In a suit to establish plaintiff's right to the reasonable use, for the purpose of irrigation, of water, the flow of which had been impeded by a bund erected by defendants:—*Held*, that, even though plaintiffs had not yet been endamaged by the acts of the defendants, it was in the discretion

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of the Court, if they proved their right, to give them a declaratory decree recognizing that right, seeing that serious consequences might otherwise result. WUZEEROODDEEN *v.* SHEO BUND LALL **11 W. R. 285**

7. ——— Anticipation of injury— *Annoyance.* Courts cannot by anticipation grant a decree prohibiting a defendant from annoying a plaintiff. It must be shown that some substantial annoyance or injury which the Court can recognize has been actually committed before the Courts will interfere. KASIM ALI KHAN *v.* BIRJ KISHORE **2 N. W. 182**

8. ——— *Cause of action.* A suit was brought against the plaintiff by his tenants for an illegal distress in attaching crops raised by them on the land let to them by him. The present defendant, in the course of that suit, presented a petition to the Court, in which he stated that he was the owner of the land on which the crops attached had been raised. The plaintiff brought the present suit for a declaration of his title and confirmation of possession, alleging that the defendants' statement affected his (plaintiff's) title by throwing a cloud over it. *Held*, that there was no cause of action. *Per* PAUL, *J.*—A suit merely in anticipation of a threatened ejectment will not lie. There must be something in the case either in the nature of an invasion of some right, or in the shape of an impediment or obstacle in the way of full enjoyment of proprietary right, to found a claim to a declaratory relief; but a mere allegation, or a mere threat without action taken or founded upon it, will not be sufficient to entitle a party to a declaration of his title. JAN ALI *v.* KHONDKAR ABDUR KHUMA **6 B. L. R. 154 : 14 W. R. 420**

9. ——— Allegation injurious to plaintiff—*Consequential relief.* The words of s. 15, Act VIII of 1859, are to be interpreted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief if relief had been prayed for. A suit by a party in possession for a declaration of title and to set aside, not any deed nor any act of the defendant, but a mere allegation on his part that he holds under a certain tenure, is not maintainable. NILMONY SINGH DEO *v.* KALEE CHURN BHUTTACHARJEE . . . . **14 B. L. R. 382 23 W. R. 150 : L. R. 2 I. A. 83**

10. ——— Suit by person in possession—*Unnecessary suit.* A suit ought not to be entertained, where the plaintiff, who merely seeks for a declaration of title is in possession of all his alleged rights, and is not in a position to bring an action. PADAGALIGUM PILLAI *v.* SHANMUGHAM PILLAI . . . . . **2 Mad. 333**

BACHUN ALI *v.* DEWAN ALI . **11 W. R. 376**

11. ——— *Confirmation of title.* Where the plaintiff in a suit for confirmation of his title being (though illegally) in possession, it was held that his not suing for possession was no bar to his obtaining a decree declaratory of his title. SHIBOO SOONDUREE DABI *v.* BECKWITH **9 W. R. 580**

12. ——— Order under Land Registration Act (Beng. Act VII of 1876), s. 59—*Specific Relief Act, 1877, s. 42—Possession.* The effect of an order under s. 59 of the Land Registration Act being to "settle the actual possession," the person against whom such an order is made is precluded by s. 42 of the Specific Relief Act from bringing a suit merely for a declaration of his title without seeking to recover possession also. RAM MUNDUR *v.* JANKI PERSHAD . **12 C. L. R. 139**

13. ——— *Land not properly described—Land Registration Act (Bengal Act VII of 1876), ss. 59, 62—Specific Relief Act (I of 1877), s. 42—Subsequent suit for possession.* A person is not debarred from bringing a suit for declaration of title on the ground that the land in question is not properly described. *Kazem Sheik* v. *Danesh Sheik, 1 C. W. N. 574, Dwarkanath Roy* v. *Jannobee Chowdhrain, 19 W. R. 81, Darbaree Sayal* v. *Fatu Dhalee, 23 W. R. 285, Mahomed Ismail* v. *Lalla Dhundur Kishore Narain, 25 W. R. 39, Ajodhia Lall* v. *Gumani Lall, 2 C. L. R. 134,* distinguished; but if an order under s. 59 of the Land Registration Act is made against him, he is precluded by s. 42 of the Specific Relief Act from bringing a suit merely for declaration of his title without seeking to recover possession, although he may be in physical possession, the effect of such an order being to "settle the actual possession." *Ram Mundur* v. *Janki Pershad, 12 C. L. R. 139, Omrunissa Bibee* v. *Dilawar Ally Khan, I. L. R. 10 Calc. 350,* and *Krishnabhupati Devi* v. *Ramamurti Pantulu, I. L. R. 18 Mad. 405,* referred to and followed. RAJ NARAIN DAS *v.* SHAMA NANDO DAS CHOWDHRY . . **I. L. R. 26 Calc. 845 4 C. W. N. 162**

14. ——— Declaration of title as owners. Parties not proving possession, and not entitled to consequential relief, may yet under s. 15, Code of Civil Procedure, obtain a decree declaring them rightful owners. THAKOORDEEN TEWAREE *v.* ALI HOSSEIN KHAN . . **8 W. R. 341**

On appeal to the Privy Council, however, it was found that the plaintiffs had asked for and were entitled to consequential relief.

See s. c. **13 B. L. R. 427 : 21 W. R. 340 L. R. 1 I. A. 192**

15. ——— Right ceasing to exist pending suit—*Declaratory decree where right to possession is barred.* In a suit for declaration of right which existed at the time the suit was commenced, but which had ceased to exist pending the suit before decree, plaintiff is not entitled to a decree, and a declaratory decree of title will not be given when the plaintiff's claim would have been barred by

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DECLARATORY DECREE, SUIT FOR—*contd.*

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limitation had he sued for possession. NOBOKISHORE DEY *v.* RAMKISHEN . . **9 W. R. 131**

16. ——— Suit by person out of possession—*Omission to ask for possession—Refusal to recognize proprietary right.* In a suit in which the plaintiffs stated that they had already obtained a decree for possession of certain land, and had received formal possession, and stated their cause of action to be "the defendant's act of not recognizing us as their landlords and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding payment of rent" praying for a decree establishing their proprietary right and declaring the defendants to be their tenants :—*Held*, that the declaratory decree prayed for could be made notwithstanding the plaintiffs might have asked for possession of the lands. LOKENATH SURMA *v.* KESHAB RAM DOSS . **I. L. R. 13 Calc. 147**

17. ——— Denial of title without injurious act—*Annoyance.* In suits for a declaration of title to a divided share of ancestral property, the ground alleged in each case for seeking the declaration was that the representatives of the brothers of the plaintiff's father had refused to be parties to the registering of the property in plaintiff's name, and had executed a deed of sale of it to a third party (third defendant), and registered him as the purchaser. The Court of first instance in each case decreed for the plaintiff. The Appellate Court, following *Padagaligum Pillai* v. *Shanmugham Pillai*, 2 *Mad. 333*, dismissed the suits on the ground that the plaintiffs were not in a position to maintain them. On special appeal :—*Held*, that the suits should be remanded for a declaration of the plaintiff's title, if established. To maintain a suit for a declaration of title, some adverse act, intended and calculated to be prejudicial to the title which the plaintiff seeks a declaration of, must appear to have been done by the defendant. The mere denial of the title, or doing an act which causes annoyance, cannot imperil the plaintiff's title, nor have any serious effect on the quiet enjoyment of his proprietary right, and is not sufficient to support such a suit. The principle upon which the decision in *Padagaligum Pillai* v. *Shanmugham Pillai* proceeds, is inapplicable to suits under s. 15 of the Civil Procedure Code. KARYAN *v.* PERIA SIDDEN. KARYAN *v.* LINGA GAUNDAN. KARYAN *v.* DODDALI **6 Mad. 307**

18. ——— Failure of previous suit for possession of land—*Res judicata, plea of.* Suit brought by plaintiff against the first three defendants as his tenants on kanam, and the fourth, the representative of a rival jenmi, to obtain a declaration of title as jenmi. Plaintiff had previously sued the first three defendants to establish the relation of jenmi and kanamkar and to recover the land. He failed and then brought the present suit. *Held*, that this was a case of the employment of the device of a suit for a declaration of title in order to get back land by a crooked and not legal process, after failure to recover by proper legal means, the intention being to cut off the defendants (the tenants) from the plea of *res judicata.* The Court, which had a discretion as to whether such a suit should be permitted, ought at once to have said that it should not. Where there are no interests to be protected, there is no foundation for a suit for a declaratory decree. SHUNGUNY MENON *v.* KALAMPULLY VALIA NAIR **6 Mad. 117**

19. ——— Injury or hostile act giving cause of action—*Fraud.* In a suit for a declaration of the plaintiff's title to, and confirmation of his possession of, certain lands which he alleged had first been sold to him by one of the defendants and then sold by his vendor to the other defendant : *Held*, that, in the absence of proof of fraud in the later sale, there was no cause of action. ABDOOL AZIM CHOWDHRY *v.* MAHOMED KABEE **11 W. R. 281**

20. ——— Suit for ejectment—*Intention to evade stamp laws.* The provision as to declaratory suits requires great care and circumspection in its application. A declaratory decree should not be made where the object of the plaintiff is to evade the stamp laws or to eject under colour of a mere declaration of title. CHOKALINGAPESHANA NAIKER *v.* ACHIYAR . . . **I. L. R. 1 Mad. 40**

See GANPUTGIR BHOLAGIR *v.* GANPATGIR **I. L. R. 3. Bom. 230**

21. ——— Improper execution of decree by ameen—*Omission to give possession of land correctly.* In a suit for declaration of right and confirmation of possession by setting aside certain improper chittahs prepared by a Civil Court ameen while deputed to deliver possession in execution of a decree : *Held*, that, when in execution the ameen measured a portion of plaintiff's land as covered by defendant's decree, and delivered over possession to defendant, taking receipts and issuing proclamations as required by s. 324, Act VIII of 1859, a cause of action arose to plaintiff under the circumstances against defendant, and the suit would lie. GOUR PERSHAD DOSS *v.* SOOKDEB RAM DEB . . . . . **12 W. R. 279**

22. ——— Tenant setting up larger interest than he is entitled to—*Specific Relief Act (I of 1877), s. 42—Discretion of Court to give a declaratory decree—Landlord and tenant—Notice to quit.* A plaintiff admitting a defendant's right to a kursa-jumma tenure in certain lands, but denying a permanent malguzari tenure set up by him, sought to eject the defendant from the kursa-jumma holding, and for a declaration that the defendant was not entitled to the permanent malguz-

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DECLARATORY DECREE, SUIT FOR— *contd.*

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ari tenure. *Held* that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment. A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing. KALI KISHEN TAGORE *v.* GOLAM ALI **I. L. R. 13 Calc. 3**

23. ——— Third person compelling payment of rent to him—*Cause of action.* When a person obliges the tenants of an estate to pay rent to him, his act may be treated as a dispossession of the party wronged, sufficient to entitle the latter to sue for declaration of title. RADHA MADHUB PANDA *v.* JUGGERNATH DOOAB **14 W. R. 183**

See HOYMOBUTTY DASSEE *v.* SREEKISSEN NUNDEE . . **14 W. R. 58**

24. ——— Unsuccessful intervention in rent suit—*Cause of action.* Unsuccessful intervention in a suit for rents against raiyats, followed by no result operating injuriously on plaintiff's title or possession, can afford him no cause of action in a suit for declaration of right and confirmation of possession. JUGGUT CHUNDER ROY *v.* MOHIMA CHUNDER PAUL . **11 W. R. 331**

25. ——— Slander of title—*Civil Procedure Code, 1859, s. 15.* The issuing of proclamations and orders by *B* to the raiyats of an estate to pay rent to him as rightful owner of the estate, application by him to the Collector to be registered as the owner, and other like acts of pretension to the title, and threats on *B*'s part are not in themselves sufficient to entitle *A*, who is in possession and enjoyment of the estate as rightful owner, to a decree declaring him to be the rightful owner. THIRUVENGADATHIENGAR *v.* SANGILIVEERAPPA PANDYA CHINNATHUMBIAR . **I. L. R. 1 Mad. 65**

26. ——— Suit for ejectment of one defendant and declaration against others—*Suit before Act VIII of 1859.* Before the enactment of Act VIII of 1859, s. 15, a suit could not have been brought for a mere declaration of title without consequential relief. A suit cannot be brought against several defendants to eject one, and to obtain a declaration of title against the rest. NAAN MANI *v.* GODA SHANGARA . **1 Mad. 252**

27. ——— Suit for confirmation of title by purchaser at sale in execution—*Confirmation of possession.* The purchaser of property from a judgment-debtor, whose right, title, and interest have been subsequently sold to another party who desires to take possession, has a right to sue for a declaration of title and confirmation of possession for the purpose of clearing his title from the suspicion of its being founded on a collusive sale. GOBURDHUN DASS *v.* MUNNOO LALL **15 W. R. 95**

DECLARATORY DECREE, SUIT FOR— *contd.*

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28. ——— Suit by first mortgagee against subsequent mortgagee as purchaser affecting his title—*R* having executed two mortgages of the same share, his mortgagees obtained against him separate decrees, in each of which the property was declared liable to sale in satisfaction of the debt. Plaintiff first purchased under the decree obtained on the earlier mortgage, and defendant (who was the second mortgagee) himself purchased the same right, title, and interest at the second sale. The suit was brought for confirmation of plaintiff's possession of the estate, on the ground that his title was affected by the subsequent purchase of the defendant. *Held*, that plaintiff had no cause of action, as his rights had not been disturbed by any act of the defendant. BUDDRENATH JHA *v.* AMRIT SAHOO . **10 W. R. 126**

29. ——— Suit for declaration of title as mortgagee—*Rejection of claim to attached property.* On attachment of certain property in execution of a decree, *A* preferred his claim under s. 246, Act VIII of 1859, on the ground that he held a mortgage thereof from the judgment-debtor. Thereupon an order was passed for sale of the property subject to the mortgage. *B* afterwards claimed the same property as his absolute estate, and his claim was allowed, and the property released from attachment. *A* was not a party to these proceedings. *Held*, that *A* could maintain a suit against *B* for a declaration of his title as mortgagee. GABIND PRASAD TEWARI *v.* UDAI CHAND RANA . . . . **6 B. L. R. 320**

30. ——— Interference with plaintiff's right—*Cause of action.* A Government ijaradar's covenant with Government that he will not object to the use of the tanks, roads, cow-path, etc., within his ijara, does not prevent him from making settlements for those tanks, roads, etc.; and the mere fact of his giving a lease to one party cannot interfere with another party's right to use such road, or the waters of such tank, or give that other party cause to sue for a declaration of title. WOOSUM ALI *v.* JAN ALI **11 W. R 394**

31. ——— Suit to declare estate forfeited—*Specific Relief Act (I of 1877), s. 42.* Certain trusts of a house were declared in favour of *A* and *B* for life, subject to forfeiture upon the happening of particular events; and further trusts in favour of the issue of *A* and *B* were also declared. The settler died, leaving a will under which *C* took an estate for his life with remainder to the settler's son *E* absolutely. *E* assigned his interest in the trust premises to the plaintiff, who now sued the *cestuis que trustent*, and *C*, praying that, in the events which had happened, it might be declared that the life estates of *A* and *B* had been forfeited. He also asked for various declarations as to his rights. *Held*, that no declaratory decree could be made. BHUJENDRO BHUSAN CHATTERJEE *v.* TRIGUNANATH MOOKERJEE . **I. L. R. 8 Calc. 761**

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DECLARATORY DECREE, SUIT FOR— *contd.*

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32. ——— Suit by landlord during continuance of tendency—*Specific Relief Act, s. 42.* It is open to a landlord, where his title is in jeopardy from the aggressions of neighbouring zamindar, and where his title may be damaged by a denial of his rights over his land, to bring a suit for the purpose of having his rights declared as against such wrong-doers and for the purpose of being put into possession of the land as against them. *Woomesh Chunder Goopto* v. *Raj Narain Roy, 10 W. R. 15*, explained. BISSESSURI DABEEA *v.* BARODA KANTA ROY CHOWDHRY **I. L. R. 10 Calc. 1076**

33. ——— Suit to establish title to property on the ground of trespass by defendant to particular part of it—*Decree confined to that portion.* He who seeks a declaration of matters not necessary to the immediate relief sought must sustain the burden of making out the abstract proposition which he has volunteered to support, and it will even then be a matter for the discretion of the Court, not to be lightly exercised, whether it will undertake the solution of the problem. Suit brought for a declaration of title to a considerable tract of country on account of a trespass committed by defendant on a particular hill. *Held*, that, as to that particular hill, the plaintiff's claim was sustainable, and that disposed of the only question which it was necessary to decide. KALLAVETTI KURUJAL KUMHOLEN KUTTY *v.* NILAMBUR THACKAVAKAVIL MANA VIKARAMEN *alias* THIRUMULPAD . . . **8 Mad. 17**

34. ——— Suit for declaration of title after defendant has obtained order for certificate under Act XXVII of 1860. A suit may be maintained for a declaration of title which may be used as a means for the withdrawal of a certificate under Act XXVII of 1860, though a suit will not lie to set it aside. RUSSICK CHUNDER *v.* RAM LALL SHAHA . . . **22 W. R. 301**

35. ——— Suit against holder of certificate under Act XXVII of 1860. Where a certificate had been granted to the personal representative of a deceased shebait of debutter property, who set up no claim to the property, and the manager of the debutter property on behalf of the surviving shebait brought a suit against the certificate-holder for a declaration under Act VIII of 1859, s. 15, the District Judge was held to have done right in refusing the declaration. RUGHOOBUR DYAL SINGH *v.* RAM NARAIN KOLYA **22 W. R. 312**

36. ——— Refusal to register—*Suit for declaration of title under unregistered deed—Specific performance.* *A* brought a suit in the Munsif's Court against *B* and *C*, alleging that they had sold outright to him by saf-kobala certain landed property for R300, which was duly paid when the kobala was executed; that possession was given to him; that *B* and *C* set up before the Deputy Registrar fraudulent objections to the effect that a stipulation to return the property to the vendors on the repayment by them of the consideration-money had not been embodied in the deed, and that part of the consideration-money had not been paid; that therefore the Registrar refused to register the deed; that in fact there was no such stipulation as alleged by *B* and *C*, and that the whole of the purchase-money was paid. It was stated in the plaint that the suit was brought to set aside the fraudulent objections and to establish the full title of *A* as purchaser. *Held* (MITTER, *J.*, dissenting), that the suit would not lie, the unregistered deed could not be admitted in evidence, nor parol evidence given of the contract under which *A* alleged he acquired his title. RAHMATULLA *v.* SARIATULLA KAGCHI **1 B. L. R. F. B. 58 : 10 W. R. F. B. 51**

SEPAHEE SINGH *v.* CHUNDUN **2 N. W. 160 : Agra F. B. Ed. 1874, 213**

37. ——— Suit to ascertain shares in family property—*Overt act of injury.* Where there is a dispute as to the shares of the several members of a family in a family property, the possession of which is undisturbed, a suit will lie to ascertain the shares of the different members. In a suit for a declaratory decree, it is not necessary to allege any overt act which may give rise to relief in the shape of damages or a decree for possession. BHAGWAN SINGH *v.* MITARJIT SINGH **8 B. L. R. 382 : 17 W. R. 169**

38. ——— Suit by one member of joint Hindu family for declaration of right to receive share—*Partition.* A Joint Hindu family, consisting of three brothers, enjoyed an undivided one-third share of certain lands. One member sued the others for partition of the family property, claiming to have his right declared to receive one-third of the share of the family in the profits of the said lands. *Held*, that the Court was not debarred from granting the relief prayed for by the provisions of s. 42 of the Specific Relief Act. PANCHANADAYYAN *v.* NILAKANDAYYAN **I. L. R. 7 Mad. 191**

39. ——— Invasion of right—*Cause of action.* In a suit for establishment of lakhiraj title to, and confirmation of possession in, land which was alleged to have been brought to sale and purchased in execution by the principal defendant, who had then sued some of the plaintiffs for a kabuliat: *Held*, that there had been no invasion of plaintiff's title even if they had a lakhiraj title, and that, therefore, they had no cause of action. RAMGOPAUL TEWAREE *v.* GORA CHUND PORYAL **15 W. R. 28**

40. ——— Dismissal of former suit for enhanced rent—*Cause of action.* A former suit in the Revenue Court for arrears of rent at enhanced rates, to which defendant set up a plea of lakhiraj, was dismissed on the ground that the

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kabuliat propounded by plaintiff was not proved. *Held*, that plaintiff was entitled to sue for a declaration of his title to the disputed lands as part and parcel of the mal lands of his zamindari. ISSUR CHUNDER ROY *v.* JUGGESSUR GHOSE **17 W. R. 184**

41. ———— Suit by person in possession of land to establish title—*Civil Procedure Code, 1859, s. 15—Defendant claiming under decree of Small Cause Court.* The plaintiff, in a suit to establish her lakhiraj right to lakhiraj land, stated in her plaint that she was in possession of certain land by virtue of the will of her husband; that while in possession of the land, a suit was brought against her in the Small Cause Court for rent by the defendants, who obtained a decree; and that, there being no appeal against the decision, the lakhiraj rights in respect of the lands were consequently injured; she, therefore, brought the present suit. *Held*, that such a suit was not maintainable, as the claim which the defendants set up was no longer in the condition of a mere assertion or a claim for right, but had passed into a decree. *Held*, further, that in this case the plaintiff was not without a remedy, for if a further suit for rent be brought, she might file a suit and apply for an injunction to prevent the other party from proceeding so long as her suit was not disposed of and an absolute relief given her. PORAN SHOOKH CHUNDER *v.* PARBUTTY DOSSEE **I. L. R. 3 Calc. 612 : 1 C. L. R. 404**

42. ———— Suit to declare land lakhiraj—*Resumption decree declaring lands mal—Specific Relief Act (I of 1877), s. 42—Title by possession—Limitation Act (XV of 1877), s. 28, Sch. II, Art. 130.* In a suit instituted in 1877, *A* prayed for a declaration that he had a lakhiraj title to certain lands; the defendant stated that the lands for a declaration of a title to which *A* now sued formed part of certain lands which had been the subject of resumption proceedings, which were terminated in 1863 by a decree declaring that the lands which were the subject of that suit, including the lands now claimed by *A*, were not lakhiraj. It being found as a fact that *A* had neither been a party to, nor been presented in, the resumption-proceedings, that he had been in quiet and undisturbed possession of the lands which he now claimed for more than twelve years before the institution of his suit, and that proceedings had been taken by the defendant calculated to disturb such possession: *Held*, that *A* was entitled under s. 42 of Act I of 1877, to the declaration prayed for. ABHOY CHURN PAL *v.* KALLY PERSAD CHATTERJEE **I. L. R. 5 Calc. 949 : 6 C. L. R. 260**

43. ———— Suit to declare proprietary right—*Previous suit for rent dismissed—Consequential relief—Specific Relief Act (Act I of 1877), s. 42.* *S* sued *B* in a Court of Small Causes for arrears of ground-rent of a house. The latter denied *S*'s proprietary right to the land and his liability to pay ground-rent, and *S*'s suit was in consequence dismissed. Thereupon *S* sued *B* in the Civil Court for a declaration of proprietary right to the land and of his right to receive ground-rent. *Held*, that the suit was not barred by the proviso to s. 42 of the Specific Relief Act, because it did not include a claim for arrears of ground-rent; and that the suit was one in which the specific relief claimed might properly be granted. The principle laid down in *Sadut Ali Khan* v. *Khajeh Abdool Gunnee, 11 B. L. R. 203*, applied. SOMKALI *v.* BHAIRO . . . . **I. L. R. 5 All. 55**

44. ———— Suit to declare rights under benami mortgages—*Omission of prayer for possession—Specific Relief Act (I of 1877), s. 42.* In 1880 *A* and *B* jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of *B*. In 1884 *A* alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of *B*. *A* died leaving three sons, of whom the plaintiffs were two. The plaintiffs, having become divided from their brother, now brought suits in 1894 against *B* and the mortgagors for a declaration of their rights to the mortgages and for possession of the documents and for rent of the land which had been collected by *B*. It appeared that there had been no denial of the plaintiffs' rights before 1889, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to *B*. *Held*, that the suits were not barred by Specific Relief Act, s. 42, for want of a prayer for possession; that the suits were not barred by limitation save as to the claim for rent; that the transactions having been proved to be benami in character, the plaintiffs were entitled to a declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880; and that the plaintiffs were entitled to possession of the mortgage documents of 1884 and the other documents connected therewith, but not the others. MAHABALA BHATTA *v.* KUNHANNA BHATTA **I. L. R. 21 Mad. 373**

45. ———— Obstruction to alleged highway—*Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act X of 1882), ss. 133, 137—Parties.* An owner of land has a right to bring a suit under s. 42 of the Specific Relief Act against any one of the public who formally claims to use such lands as a public road, and who thereby has endangered the title of the owner. To such a suit it is unnecessary to make the Secretary of State a party. Such a suit is not barred by an order of a Criminal Court under s. 137 of the Criminal Procedure Code. *Khodabux Mundul* v. *Monglai Mundul, I. L. R. 14 Calc. 60*, overruled. CHUNI LALL *v.* RAM KISHEN SAHU . **I. L. R. 15 Calc. 460**

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DECLARATORY DECREE, SUIT FOR— *contd.*

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46. ——— Sale in execution of decree of property not belonging to judgment-debtor—*Right of owner to bring suit to establish title and not wait for dispossession.* In execution of a decree on a mortgage, certain property was sold which the plaintiff in this suit claimed as his own under a sale to himself by the sons of the judgment-debtor. He applied to the Court to have the sale set aside, but failing in his application he sued both the decree-holder and the auction-purchaser for a declaration of his title to the property in question. The Assistant Judge held on appeal that the suit was not maintainable on the grounds that a separate suit could not be brought, as the question of title was one for decision in the execution-proceedings, and that, even if the point could be raised in a separate suit, the present suit was premature, as the plaintiff should have waited till he was dispossessed by the auction-purchaser. *Held*, that the suit was not premature. A person, whose property is sold in execution of a decree against a third party, is not bound to wait till he is dispossessed by the auction purchaser. As soon as his title is denied, he is entitled to bring his suit. SHIVRAM CHINTAMAN *v.* JIVU **I. L. R. 13 Bom. 34**

47. ——— Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—*Specific Relief Act (I of 1877), s. 42.* Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share. *Held*, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, that the suit must be dismissed under Specific Relief Act, s. 42. KOMBI *v.* AUNDI . **I. L. R. 13 Mad. 75**

48. ——— Consequential relief—*Specific Relief Act (I of 1877), s. 42.* In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property. *Held*, that if, as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie. *Chandu* v. *Chathu Nambiar, I. L. R. 1 Mad. 381*, distinguished. MUTTAKKE *v.* THIMMAPPA **I. L. R. 15 Mad. 186**

DECLARATORY DECREE, SUIT FOR— *contd.*

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49. ——— Suit for declaration of right to possession of lands as member of joint family—*Specific Relief Act (I of 1877), s. 42.* A plaintiff brought his suit in a Civil Court, asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates or in the alternative for possession, alleging that the lands were the property of a joint Hindu family of which he was a member, that the family still remained joint, and that he was entitled, as a member of such joint Hindu family, to a one-third undivided share in this ancestral property. *Held*, that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third undivided share; further that s. 42 of the Specific Relief Act would not apply to the suit, inasmuch as the Civil Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates. BRIJ BHUKHAN *v.* DURGA DAT . **I. L. R. 20 All. 258**

50. ——— Illegitimate son of a Sudra—*Specific Relief Act (I of 1877), s. 42—Hindu law—Inheritance—Further relief.* The widows of a shrotriemdar, who was a sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriemdar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth. *Held*, that the suit was not precluded by Specific Relief Act, s. 42. CHINNAMMAL *v.* VARADARAJULU . . **I. L. R. 15 Mad. 307**

51. ——— Refusal of declaratory decree, the case made for it being defective—*Specific Relief Act, s. 42.* Under the Specific Relief Act, s. 42, a suit was brought for a decree declaratory of the plaintiffs' title to be mutwalis and managers of property from ancient times connected with religious observances, *viz.*, a ghat upon the Jumna with temples adjoining; of their title also to receive a portion of the offerings; and they also claimed to have the proceeds of a decree obtained by the defendants against a third party spent upon repairs. *Held*, that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had, nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to

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have, relating to the property. MAINA *v.* BRIJMOHAN . . . **I. L. R. 12 All. 587**
L. R. 17 I. A. 187

52. ———— Consequential relief—*Specific Relief Act, s. 42.* Where a suit was brought in which the defendants being admittedly the tenants of the plaintiffs, the plaintiffs prayed for a declaration that certain entries of the defendants in the revenue records as occupancy-tenants, and certain orders of the Revenue Courts maintaining those entries, be set aside, and for a declaration that the defendants were shikmis and not occupancy tenants, and that the land in question was the plaintiff's *sir* land; and it was held that such a suit could not be brought within the Civil Court's jurisdiction by dropping all the reliefs claimed except the last-mentioned declaration, that being merely of importance as incidental to the previous ones, and as a round-about mode of obtaining a declaration that the defendants were not the plaintiff's occupancy-tenants:—*Held per* EDGE, *C. J.*, and MAHMOOD *J. Quære:* Whether the last-mentioned prayer is one which could be brought under s. 42 of the Specific Relief Act. MAHESH RAI *v.* CHANDER RAI. **I. L. R. 13 All. 17**

53. ———— Suit for declaration of title by an objector in execution-proceedings—*Specific Relief Act (I of 1877), s. 42—Consequential Relief—Civil Procedure Code, s. 283.* In a suit under Civil Procedure Code, s. 283, for a declaration that the sale to defendant No. 2 of certain land in execution of a decree was invalid, it appeared that the land had been attached in execution of a decree obtained by defendant No. 2 against defendant No. 1, who held it as the plaintiff's tenants, that the plaintiff had intervened unsuccessfully in the execution-proceedings and had been referred to a regular suit, and that the land had been brought to sale and purchased by defendant No. 2 who was now in possession. *Held*, that the suit was not maintainable for want of a prayer for possession. KUNHIAMMA *v.* KUNHUNNI . **I. L. R. 16 Mad. 140**

54. ———— Mere possession on the one side and unjustifiable dispossession on the other—*Specific Relief Act (I of 1877), s. 42—Right of the possessor dispossessed by a wrong-doer, as against the latter—Injunction—Wakf.* Lawful possession of land is sufficient evidence of right as owner as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree and an injunction restraining the wrong-doer. In such a suit the defence was that the land was wakf, and the defendant mutwalli of it. Both Courts found that the plaintiff was in possession as purchaser from some of those who were entitled to sell. But the first Court did not find a fact which the Appellate Court found, *viz.*, that the property had been constituted wakf. Both Courts, however, concurred in the finding that the defendant, at all events, was not the mutwalli, and had no title. *Held*, that the plaintiff was entitled to a declaratory decree against this defendant as to his right and an injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the wakf as to the validity of the endowment, no decision being needed. This could not be decided either way in this suit, as parties interested were not before the Court. ISMAIL ARIFF *v.* MAHOMED GHOUSE
I. L. R. 20 Calc. 834 : L. R. 20 I. A. 99

55. ———— Suit by person in possession for declaration of title—*Burden of proof—Failure of plaintiff or defendant to prove title—Effect of plaintiff's possession—Specific Relief Act (I of 1877), s. 42.* The plaintiff, who was in possession of certain land, sued for a declaration that the defendant had no title to it, and that it belonged to him. The plaint also contained a prayer for general relief. At the trial, both plaintiff and defendant failed to prove any title to the land, but the plaintiff proved that he had been for ten years in possession and had built a shed on it. *Held*, that no declaration of the plaintiff's title could be made; but *held*, on the authority of *Ismail Ariff* v. *Mohomed Ghouse, I. L. R. 20 Calc. 834; L. R. 20 I. A. 99*, that the plaintiff was lawfully entitled to the land and to the shed thereon. GANGARAM CHIMNA PATEL *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 20 Bom. 798

56. ———— Objection that consequential relief is available—*Specific Relief Act (I of 1877), s. 42—Objection raised for first time on appeal.* The plaintiff, as heir to her husband brought a suit, in which Government was not represented, for a declaration of the title to a quarter share of the jenmi value of land taken up under the Land Acquisition Act. *Held*, that the suit for a declaration only was maintainable. Even assuming that the plaintiff was able and called upon in this case to ask for further relief, *held*, following the decision in *Limba bin Krishna* v. *Rama bin Pimplu, I. L. R. 13 Bom. 548*, that the suit should not be dismissed on this ground, the objection not having been raised in either of the lower Courts. CHOMU *v.* UMMA . . **I. L. R. 14 Mad. 46**

57. ———— Consequential relief—*Specific Relief Act (I of 1877), ss. 42, 56—Amendment of plaint on appeal—Raising fresh issue on appeal.* The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's

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right to the office, and for further and other relief. It appeared on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of the Specific Relief Act, s. 42. *Held* (on appeal by the defendant) that the Court of first instance should take evidence and try an issue specifically directed to this question. It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments, *held*, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration. The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession. ABDULKADAR *v.* MAHOMED **I. L. R. 15 Mad. 15**

58. ——— *Specific Relief Act (I of 1877), s. 42—Civil Procedure Code, s. 53—Amendment of plaint on appeal.* A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan; part of the property of the plaintiff's branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3. The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations. *Held*, (i) that the suit was not maintainable for want of a prayer for possession of the lands under demise; (ii) that the plaintiffs should not be permitted to amend the plaint on appeal by the addition of such a prayer. NARAYANA *v.* SHANKUNNI **I. L. R. 15 Mad. 255**

59. ——— *Suit for a mere declaration of title without consequential relief—Specific Relief Act (I of 1877), s. 42—Injunction—Amendment of plaint.* The plaintiff sued for a declaration that he was entitled to succeed, on his father's death, to a talukhdari estate, to the exclusion of defendant No. 1, who, he alleged, was a supposititious child set up by his step-mother to defeat the plaintiff's right of inheritance. It appeared that defendant No. 1 had obtained a decree against the plaintiff's father, establishing his legitimacy and declaring him entitled to receive maintenance out of the estate in question. In accordance with this decree, the talukhdari settlement officer (defendant No. 2), who was in management of the estate under Act XXI of 1881, paid defendant No. 1 an allowance of R200 a month on account of his maintenance. The plaintiff alleged that the payment to defendant No. 1 was illegal and wrongful, but he did not ask for an injunction restraining him from receiving the allowance. The defendants contended that the suit was not maintainable because the plaintiff had sued for a mere declaration of title without asking for consequential relief. *Held* (CANDY, *J.*, doubting), that the suit was barred under s. 42 of the Specific Relief Act, as the plaintiff had omitted to seek the relief of an injunction against defendant No. 1, restraining him from receiving future payment of maintenance. *Held*, further, that plaintiff was at liberty to amend his plaint by praying for an injunction as against both defendants. SARDARSINGJI *v.* GANAPATSINGJI . **I. L. R. 14 Bom. 395**

60. ——— **Executor or administrator of a shareholder, rights of**—*Specific Relief Act (I of 1877), s. 42— "Holding a share," Meaning of—Agreement, Construction of—Objection taken for first time in appeal.* Prior to the year 1863, *W W* carried on an extensive timber trade in Burma. In that year the defendant company was formed for the purpose of taking over the business from him together with the capital and assets engaged therein. The nominal capital of the company was R25,00,000, divided into one thousand shares of R2,500 each. On the 22nd July 1864, an agreement carrying out the above object was executed between *W W* and the defendant company. This agreement set forth the assets and property to be transferred, and classified them as (*a*) "fixed assets," which consisted of immoveable property, buildings, etc., valued at R2,76,000 or thereabouts; and (*b*) assets other than fixed assets which consisted of what was called "forest operations," and of valuable contracts, rights, and concessions from the King of Burma, etc. The agreement further specified the consideration to be paid to *W W* for each of these classes of assets. For the "fixed assets" he was (under the 12th clause of the agreement) to receive one hundred fully paid-up shares of the Company. That clause contained certain provisions as to the payment of the ordinary dividend upon those shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognise as valid any assignment made by *W W*, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company. For the remaining assets it was provided by the 13th clause of the agreement that *W W*, his executors or administrators, should be entitled, so long as he or they should hold the hundred shares, to an extra preferential dividend, payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent. on all the shares of the company, including the said hundred shares, and after setting apart an amount (left to the discretion of the directors) for the reserve fund. The said extra or preferential dividend was to be one-third of such surplus net profits. The said 13th clause also provided that,

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if *W W* died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding they might continue to hold the said shares. Subsequently to the execution of this agreement, the business and assets were transferred to the company by *W W*, and one hundred fully paid-up shares were duly allotted to him under cl. 12, and his name was entered on the register of shareholders. In 1888, *W W*, then domiciled in England, died. By his will he appointed his three brothers—*R W*, *L A W*, and *A F W*—his executors, and he directed that his executors should hold the said shares and all his interest therein and attached to the holding thereof upon trust for such of his said brothers as might survive him, if more than one, as joint tenants. *R W* died in the testator's lifetime, and only *A F W* proved the will. On the 27th September 1888, letters of administration, with the will annexed, were granted by the High Court of Bombay to the plaintiff in this suit (*F Y S*) as attorney for the said executor *A F W*. On the 29th September 1889, the said letters of administration were produced to, and registered with, the defendant company. The hundred shares continued to stand in the testator's name in the register of shareholders. In a parallel column in the register, under the heading "Remarks," the following entry was made :—"Administration in India to the estate of *W W* has been granted to Mr. *F Y S* as attorney for *A F W*." Save for this entry, the register remained unaltered after the testator's death. The plaintiff now sued to have it declared that cl. 13 of the agreement was still in operation, and that, as such administrator as aforesaid, he was entitled to the extra or preferential dividend payable on the said one hundred shares if and when there should be sufficient net profits to allow payments thereof under the said clause. The company disputed the plaintiff's claim. They contended that *A F W*, the proving executor of the testator's will, had ceased to hold the shares as executor, and was holding them as trustee under the specific bequest in the will, and that he was only entitled to the preferential dividends if, at the time when such dividends were declared, he was holding the shares in the capacity of executor and as an undistributed part of the testator's estate. They insisted that the plaintiff should prove that he so held the shares before he could be entitled to the declaration sought for. The executor was examined in England on commission. He deposed that the estate had been got in, and the debts paid ; that the estate had not been divided, because it would not be in accordance with the private wishes of the testator which they (*i.e.*, he and his brother *L A W*) were aware of ; that apart from these private wishes, there was no reason why the estate should not be divided between his brother and himself. *Held*, by FARRAN, *J.*, and by the Court of appeal,

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5. DECLARATION OF TITLE—*contd.*

that the plaintiff was entitled to the declaration sought for. The executor or his attorney (the plaintiff) was still the registered holder of the shares, and under cl. 13 of the agreement it was intended that *W. W*, his executors or administrators, should be entitled to the extra dividend so long as he or they should be registered holder or holders of the shares, without reference to the beneficial interest therein. There was nothing to be found in the agreement, express or implied, showing the intention of the parties to regard anything but the legal holding, and to go beyond that holding would virtually be to add a new term to the agreement. On appeal, the defendants contended that the Court would not make a declaratory decree with regard to a right which (as in the present case) was future and contingent, there being no fund actually in existence, when the suit was brought, from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund. *Held* by the Court of appeal, that the present case was one in which, in the interests of both parties, the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. The right was existent, and although the exercise of it was undoubtedly contingent on there being a balance of profits as contemplated by cl. 13 of the agreement, the very nature of the agreement assumed that there might, and probably would, be such a balance, and a large sum had been already applied towards the dividend in question. Further, it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund, upon which the balance of profit available for the preferential dividend depended. It was therefore, from the very nature of the case, important that the directors should know for certain whether the right to a preferential dividend was still in existence as contended by the plaintiff, or had come to an end. The circumstance, moreover, that the objection had been taken for the first time on appeal would by itself be fatal to it. BOMBAY-BURMAH TRADING CORPORATION *v.* SMITH

I. L. R. 17 Bom. 197.

61. ——— Constructive possession— *Specific Relief Act (I of 1877), s. 42—Civil Procedure Code, 1882, s. 319.* In a suit for declaration of the plaintiff's title to certain land, no prayer for possession was contained in the plaint. It appeared that the land in question had been given to the plaintiff by his father, and had subsequently been attached and brought to sale in execution of a decree against the plaintiff's father, and had been purchased by the defendants who were put into constructive possession under the Civil Procedure Code, s. 319, the land being in the actual possession of tenants. *Held*, that the suit for a declaration merely was not maintainable under the Specific Relief Act, s. 42. KRISHNABHUPATI DEVU *v.* RAMAMURTI PANTULU . **I. L. R. 18 Mad. 405**

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DECLARATORY DECREE, SUIT FOR— *contd.*

5. DECLARATION OF TITLE—*contd.*

62. ——— Consequential relief—*Specific Relief Act (I of 1877), s. 42.* At a sale in execution of a decree against the plaintiffs, the pleader who had acted for the plaintiffs purchased their property with his own money, but in the name of his mohurrir, and for a very inadequate sum. The plaintiffs thereupon brought a suit against the defendants (the pleader and his mohurrir) for a declaration that the pleader-defendant, in so purchasing, was a trustee on their behalf, for an order directing the defendants to reconvey the property to the plaintiffs, and for other relief. At the time of filing the suit, possession of the land sold had not been given to any body. *Held*, that s. 42 of the Specific Relief Act (I of 1877) was no bar to the suit, as being one merely for a declaratory decree without consequential relief. AGHORE NATH CHACKERBUTTY *v.* RAM CHURN CHACKERBUTTY
I. L. R. 23 Calc. 805

63. ——— Suit for a declaration that plantiffs' interests are not affected by sale in execution of decree—*Specific Relief Act (I of 1877), s. 42—Further relief.* The plaintiffs were purchasers at a sale held in execution of a decree for money, and had obtained possession. Before that decree had been executed, the property in question was mortgaged to two other persons. After the purchase by the plaintiffs, the mortgagees with knowledge of the auction-purchasers' rights brought a suit for sale upon their mortgage without making the former auction-purchasers parties. They obtained a decree, and brought the mortgaged property to sale, and it was purchased by *N S* and another. The former auction-purchasers thereupon sued the purchasers under the decree upon the mortgage for a declaration that they and their interests were not affected by the suit for sale and by the decree for sale and the sale in execution of that decree. *Held*, that the plaintiffs in that suit were not bound either to tender the mortgage-money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so did not deprive them of their right to a declaration. *Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537*, referred to. NATHU SINGH *v.* GUMANI SINGH . . . **I. L. R. 18 All. 320**

64. ——— Right to sue for declaration—*Specific Relief Act (I of 1877), s. 42—Mortgage—Code of Civil Procedure, 1882, s. 287.* *D* mortgaged certain property to plaintiff. After *D*'s death, plaintiff obtained a decree for recovery of his debt by sale of the mortgaged property. Before the property was advertised for sale, the defendants, who were *D*'s brothers, objected under s. 287 of the Code of Civil Procedure Act (XIV of 1882), alleging that *D* was not the sole owner of the property; that they were joint owners with him; that they had set aside the property for religious purposes; and that *D* had no right to mortgage it. The Court executing the decree thereupon ordered that the applicants' (defendants') claim should be notified in the proclamation of sale. Plaintiff then filed a suit against the defendants, praying for a declaration that the property belonged to *D* exclusively, and the defendants had no right or interest in it. *Held*, that, under s. 42 of the Specific Relief Act (I of 1877), the plaintiff was entitled to the declaration prayed for. Plaintiff having himself purchased the property after this claim for declaration had been allowed by the Subordinate Judge, it was contended that he was not entitled any longer to a declaratory decree. *Held*, that the change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him. *Govinda* v. *Perumdevi, I. L. R. 12 Mad. 136*, referred to. WAMANRAO DAMODAR *v.* RUSTOMJI EDALJI
I. L. R. 21 Bom. 701

DECLARATORY DECREE, SUIT FOR— *concld.*

5. DECLARATION OF TITLE—*concld.*

6. ENDOWMENTS.

1. ——— Suit to eject one claiming to be the jheer of a muth—*Specific Relief Act (I of 1877), s. 42—Consequential relief.* Three disciples of a muth brought a suit, alleging that the defendant was in possession of the muth under a false claim of title as the successor to the late jheer. and praying that it be declared that he was not the duly appointed successor to the late jheer, and that an appointment to the vacant office of jheer be made by the Court, but no consequential relief was asked for. *Held*, that the suit was not maintainable for the reason that relief consequential on the declaration sought under s. 42 of the Specific Relief Act was not asked for. STRINIVASA AYYANGAR *v.* STRINIVASA SWAMI
I. L. R. 16 Mad. 31

2. ——— Suit by trustees for a declaration that an appointment to the office of pattamali was invalid—*Specific Relief Act (I of 1877), s. 42—Omission to ask for consequential relief—Custody by pattamali of articles belonging to temple—Possession by trustees not divested where pattamali was acting in the capacity of a mere servant—Maintainability of suit without prayer for consequential relief.* Some of the trustees of a temple having sued others for a declaration that an appointment by the latter of a person to the office of pattamali was invalid it was objected by the defendants that, even if the allegation were true, the suit must fail, as the pattamali (who was also impleaded as a defendant) had taken charge of documents and jewels belonging to the temple, and consequential relief should have been prayed for. The plaint was accordingly amended, but the District Court, whilst holding that the appointment of the pattamali was invalid, dismissed the suit on the ground that the amendment had been made after the lapse of the period of limitation. *Held*,

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6. ENDOWMENTS—*concld.*

that the suit for a declaration would lie without consequential relief being prayed for, inasmuch as its object was not to establish any legal character or any right to any property in the plaintiffs, but was in effect to have an act done by the other trustees in contravention of duty declared null and void. Even if s. 42 of the Specific Relief Act applied to such a decree, which was doubtful, no further relief than the declaration was necessary, as the custody of the documents and jewels by the pattamali was merely that of a servant under the trustees, with whom the possession in fact and in law remained. There was therefore nothing of which delivery could be sought from the possession of the pattamali and no question of limitation arose. JANARDANA SHETTI GOVINDARAJAN *v.* BADAVA SHETTI GIRI . . **I. L. R. 23 Mad. 385**

3. ——— *Civil Procedure Code (Act XIV of 1882), s. 539—Suit for declaration that the defendants were not dharmakartas of certain temples, and for the appointment of trustees —No claim for temple property—Specific Relief Act (I of 1877), s. 42—Maintainability.* A suit for the appointment of new trustees to a temple, on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant, is a suit under s. 539 (*a*) of the Code of Civil Procedure, being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust." *Bishen Chand Esawut* v. *Syed Nadir Hossein, L. R. 15 I. A. 10,* relied on. Such a suit is not invalid under s. 42 of the Specific Relief Act, by reason of the fact that no consequential relief is claimed even if there be temple properties in the possession of the defendants as *dharmakartas.* Where a suit is maintainable under s. 539 of the Code of Civil Procedure, and the plaint seeks the relief specified in that section, s. 42 of the Specific Relief Act does not apply. *Strinivasa Ayyangar* v. *Strinivasa Swami, I. L. R. 16 Mad. 31,* distinguished. New trustees appointed under cl. (*a*) of s. 539 of the Code of Civil Procedure will be entitled to demand possession of the temple properties from the defendants in the suit whose title to administer the trust has been negatived by the decree, and, if such possession be not given, will be entitled to bring a suit to eject them from the temple and its endowments. NETI RAMA JOGIAH *v.* VENKATA CHARULU (1902) . . . . **I. L. R. 26 Mad. 450**

7. ERRORS IN DEMARCATION AND SURVEY OF LANDS.

1. ——— **Alteration of boundary line**—*Civil Procedure Code, 1859, s. 15—Discretion of Court.* Under s. 15 of Act VIII of 1859, it is discretionary with the Court whether it will make a declaratory decree or not. In a suit brought for confirmation of possession by a declaration of right and determination of boundaries in respect of certain land of which the plaintiff was in possession, by setting aside a new thakbust map, prepared by the Deputy Collector, and a proceeding before that officer to which the plaintiff was no party, the plaintiff not having gone before the Deputy Collector and pointed out to him the grounds upon which he contended the map was not correct: *Held,* that the plaintiff ought not to have a declaratory decree. MOTEE LALL *v.* BHOOP SINGH BAHADOOR **2 Ind. Jur. N. S. 245 : 8 W. R. 64**

DECLARATORY DECREE, SUIT FOR—*contd.*

7. ERRORS IN DEMARCATION AND SURVEY OF LANDS—*contd.*

2. ——— *Discretion of Court—Hostile acts.* In suits for declaratory decrees under s. 15, Act VIII of 1859, it is entirely in the discretion of the Court to grant or to withhold relief, and each case must be judged by its own particular circumstances. Where parties in possession of certain lands sued for a declaration of title, not only on the allegation that defendant had caused a demarcation to be made behind their back, annexing a slice of their lands to defendant's estate, but had also, under colour of this proceeding, sued plaintiff's tenants for rent under Act X, and proceeded against them to enforce a measurement under Act VI (Bengal) of 1862, it was *held* that acts had been done hostile and obviously injurious to the plaintiffs, and that the suit would lie. PUREE JAN KHATOON *v.* BYKUNT CHUNDER CHUCKERBUTTY . . . **9 W. R. 380**

3. ——— *Suit to declare boundary line arbitrary—Prohibition by Government of zamindari rights.* *Held* by PHEAR, *J.*, that where Government wrongfully draws a boundary line cutting off a portion of an estate settled with a zamindar's ancestors, and forbids his enjoyment of zamindari rights beyond such line, a cause of action is constituted upon which the zamindar can sue for a declaration of right under s. 15, Act VIII of 1859. GOVERNMENT *v.* RAJKISHEN SINGH **9 W. R. 426**

4. ——— **Fraudulent and collusive Survey proceedings**—*Cause of action.* The plaint in this case having disclosed that certain thakbust proceedings were carried on by defendants in collusion with their co-sharer, and in fraud of the plaintiff: *Held,* that the plaintiff had made out a sufficient cause of action for a declaratory decree under s. 15 Act VIII of 1859. BROMMO MOYEE DEBIA CHOWDHRAIN *v.* KOOMODINEE KANT BANERJEE. BURODA KANT BANERJEE *v.* KOOMODINEE KANT BANERJEE . . . **17 W. R. 467**

5. ——— **Allegation of error in Survey map**—*Cause of action—Suit to set aside survey proceedings.* Plaintiff having sued as the shebait of certain lands in defendant's talukh, alleging that they belonged to his lakhiraj debutter, and asking to have a thak demarcation amended and his right declared, it was held that, as plaintiff had been present at the survey proceedings which were his own act, he had no cause of action.

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DECLARATORY DECREE, SUIT FOR— *contd.*

7. ERRORS IN DEMARCATION AND SURVEY OF LANDS—*concld.*

SOODUKHINA CHOWDHRAIN *v.* ISSUR CHUNDER MOJOOMDAR . . . . **12 W. R. 25**

6. _____ *Suit for lands wrongly marked on survey map.* A suit will lie for a declaration of title to certain lands which have been erroneously marked on the survey map as belonging to the defendant. SHIB JATON ROY *v.* PANCHANAN BOSE **3 B. L. R. Ap. 55 : 11 W. R. 466**

7. _____ *Thakbust map —Omission of allegation of injury or loss.* Where a plaint in a suit for declaration of title merely alleged that a certain thakbust map was erroneous, and did not state that any injury had occurred to the plaintiff in consequence of the error, the plaint was held to disclose no cause of action. PRAN BANDHU CHATTERJEE *v.* MADHUSUDAN PATRA **13 B. L. R. Ap. 12**

S.C. RAM BUNDHOO CHATTERJEE *v.* MUDHOO SOODUN PATRA . . . **21 W. R. 134**

8. _____ **Alteration in Survey map** *—Cause of action.* A suit for a declaration of title to certain lands which the defendants had caused to be demarcated in the survey maps as a part of their talukhs without the knowledge and in fraud of the plaintiff, was held to disclose a sufficient cause of action. PROMOTHONATH ROY *v.* POORNO CHUNDER BANERJEE . . . . . **11 W. R. 543**

9. _____ *Causing alteration in maps—Hostile act—Cause of action.* Where, on the occasion of the batwarra of a zamindari, the proprietors of an outside talukh interfered and caused the Collector to exclude certain land of an *ousut* talukh from the maps and records then made, without opposition from the *shikmi* talukhdars, it was held that their conduct amounted to making evidence which might eventually be used adversely to the rights of the *ousut* talukhdars, who, therefore, had a cause of action against them justifying a suit for a declaratory title. OBHOYA CHURN SIMLYE *v.* MOHESH CHUNDER DASS **23 W. R. 22**

10. _____ *Suit to declare survey maps incorrect—Alteration by misrepresentation of defendant.* In a suit for a decree declaring certain survey maps to be incorrect on the ground of their having been altered on an incorrect representation by the defendants of their boundaries, where it was found that plaintiff had always been in possession, and no infringement of her right had taken place : *Held*, that there was no cause of action. JARDINE, SKINNER & CO. *v.* SHURNO MOYEE . . . **24 W. R. 215**

8. REGISTRATION OF NAMES BY COLLECTOR.

1. _____ **Joint property standing in one name in Collector's register**—*Cause of action.* The fact of joint property standing on the Collector's register in the name of the elder brother is no slur on the younger, and no ground for a suit on the part of the latter for declaration of title. GOPEE LALL *v.* BHUGWAN DOSS . **12 W. R. 7**

2. _____ **Decision of Collector declaring right in partition proceedings—** *Cause of action.* A Collector's declaration of the title of a party to an entire share of an estate and his action in dividing the share for such party are an injury to, and a slur upon, another party claiming a fraction of the share, and give him a sufficient cause of action. SHEO PERSHAD SOOKOOL *v.* SHUNKUR SAHOY . . . **16 W. R. 190**

3. _____ *Estates with same name—Cause of action.* Defendant having obtained from the Collector an order for a batwara of his share in a mouzah in the vicinity of plaintiff's estate, the latter, after applying in vain to the revenue authorities for a declaration that his own estate (Sheopore) had nothing to do with defendant's mouzah, which was found to be recorded on the towzi with an *alias* of Sheopore, brought a civil suit for a declaration of his own right to Sheopore. *Held*, that, as the two estates were separately recorded in the towzi with distinct areas and sudder jummas, and as plaintiff's ownership of Sheopore was not disputed, and there was no allegation of his lands being incorporated by the partition in the defendant's estate, plaintiff had no cause of action. FOOLBASHEE KOWAR *v.* ARZUN SAHOO **12 W. R. 134**

4. _____ **Obtaining hostile registration of name**—*Suit for declaration of title and to have name registered.* Immediately before the British entered Bhootan, the Soobah of Mynagorie gave plaintiff a mourasi pottah of some jotes of land, and shortly after ran away. After the British entered, the defendants gave him kabuliats and paid him rent. The British authorities also recognized his rights and received rents from him. Subsequently the defendants disputed plaintiff's rights, and applied to the Collector to have their own names registered as jotedars. Their applications having been successful, plaintiff sued for a declaration of his title under the pottah. *Held*, that, as plaintiff's title had been acknowledged by the defendants and recognized by the British authorities, he was entitled to the declaration sought. SREE KANT SHAHA *v.* KALTOO DOSS **10 W. R. 135**

5. _____ **Successful opposition to entry of names in Collector's register—** *Cause of action.* Where parties relying on their title to certain property apply to have their names put into the Collectorate books, and their application is successfully opposed by other parties claiming the same property on the ground of a conveyance

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DECLARATORY DECREE, SUIT FOR—*contd.*

8. REGISTRATION OF NAMES BY COLLECTOR—*contd.*

made to themselves, such opposition constitutes a good cause of action to the parties first mentioned if they have the right alleged. REWAL MAHTON *v.* PENAM MUNDAR . . . **22 W. R. 9**

6. ——— **Co-sharer recorded as entitled to larger share than he was entitled to**—*Act XI of 1859, s. 11—Suit to declare rights.* In a suit for a declaration of plaintiff's title on the allegation that defendant, one of the sharers with him in a joint estate, had been recorded under Act XI of 1859, s. 11, separately in respect of a larger share than that to which he was entitled, it was pleaded that the suit would not lie, because plaintiff had not appeared before the Collector and objected to defendant's being registered. *Held*, that by such omission plaintiff had not forfeited his right to the share of which he was in possession, and that the suit was one in which it would be proper to make a declaratory decree. GOLUCK CHUNDER *v.* RAM HUREE . **23 W. R. 104**

7. ——— **Injury to title—Causing wrongful entry of name as proprietor**—*Cause of action.* In 1832 *B* and *M* granted a zur-i-peshgi lease of a mouzah to *T*. Subsequently *M* mortgaged his share to *D*, *L*, and *S*. After this (in 1855), the defendant's wife purchased *M*'s rights and interests under a decree of Court. A suit for foreclosure was then brought by the three mortgagees who obtained a decree in 1856. Prior to the decree, one *J S*, who had purchased the interest of *S*, was made a party to the suit, and he sold his interest to the plaintiff's father in 1861. The defendant, having failed in a suit to recover possession of *M*'s share on the strength of his wife's auction purchase, obtained an ikrarnamah from *M*'s sons relinquishing in his favour the rights they had inherited from their father. He then applied to the Collector, and, in spite of the plaintiff's objection, had his name recorded in the towzi as proprietor in succession to *M*. To cancel the effect of this proceeding the plaintiff sued for a declaration of title and confirmation of possession. *Held*, that, as the plaintiff was in possession and had been so from the time of the conveyance by *J S*, there was no necessity for his taking out execution of the foreclosure decree, the expiry of which, therefore, could not deprive him of his title to the declaratary decree now sought, the defendant's conduct in the mutation proceeding being sufficient cause of action. ABLAK RAM *v.* MOHENDRO PERSHAD TEWAREE . **20 W. R. 365**

8. ——— **Suit for declaration of title to land and to have the revenue register transferred to plaintiff's name.** Suit to obtain a declaration that the lands mentioned in the plaint formed the common property of the tarwad of which the plaintiff was karnavan, and to have the revenue register of those lands transferred to the plaintiff's name. The plaint alleged that the lands

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in question where the private acquisitions of three of the deceased members of the tarwad, of whom the last, in whose name the lands were last assessed, on becoming karnavan of the tarwad, applied to the Collector to have the registry of those lands transferred to the names of his own nephews, the first and second defendants; that plaintiff protested, and was referred to a civil suit to obtain a declaration that the registry could not be so transferred. *Held*, on special appeal affirming the decree of the lower Appellate Court, that the plaintiff was entitled to the declaration sued for, as it would enable him to go to the Collector for substantial relief in the shape of the transfer of registry to his name, but that the relief sought for could not be granted by the Court, as the revenue authority was not a party to the suit. CHANDU *v.* CHATHU NAMBIAR **I. L. R. 1 Mad. 381**

9. ENFORCING OR REMOVING LIEN OR ATTACHMENT.

1. ——— **Mortgage lien not enforced**—*Civil Procedure Code, 1859, s. 15—Suit to avoid lien.* *B* mortgaged by deed certain premises to *J D*, and at the same time delivered to him title deeds comprising the said premises and also other immoveable property of *B*. *B* subsequently became embarrassed and assigned all his immoveable estate to trustees for his creditors. In a suit by the trustees against *J D*, alleging that he had refused to permit the sale by them of the immoveable property, including the mortgaged premises (they offering to apply the proceeds of the latter in satisfaction of his claim), and to hand over to them the said title deeds, and praying for a declaration that the immoveable property other than the mortgaged premises was vested in them free of any lien of the defendant: *Held*, that, *J D* not having made any attempt or taken any active measures to enforce his lien, and no foundation having been laid by the plaintiffs upon which any consequential relief could be granted by the Court, the plaintiffs were not, under s. 15 of the Civil Procedure Code, 1859, entitled to a declaratory decree. BEATTIE *v.* JETHA DUNGARSI **5 Bom. O. C. 152**

2. ——— **Claim to attached property**—*Suit for declaration of rights in attached property.* An unsuccessful claimant to property about to be sold in execution of decree is entitled, in a suit brought for the purpose, to a declaratory decree to the extent of his rights and interest in the property, notwithstanding it may be joint family property, and that he asks for more than he is entitled to. GOLAM MAHOMED SHAHA *v.* MOOKTA KESHEE DEBEE . . . **7 W. R. 161**

3. ——— *Suit for declaration of right in attached property—Consequential*

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DECLARATORY DECREE, SUIT FOR—*contd.*

9. ENFORCING OR REMOVING LIEN OR ATTACHMENT—*contd.*

relief. The plaint in a suit for a declaration that the plaintiff had a right of property and possession in a certain house under attachment, having for its object the relief of the house from attachment, does seek consequential relief. MOTICHAND JAICHAND *v.* DADABHAI PESTANJI . **11 Bom. 186**

4. ——— *Suit for declaration that property is not liable to attachment—Consequential relief.* Where a claimant to property attached in execution of a decree intervenes, but fails to get the order of attachment set aside and is compelled to bring a suit to establish his right, the discharge of the order of attachment cannot properly be asked for in such suit. The intervenor having established his title by declaratory decree or otherwise, should then carry the decree to the Court by which the order of attachment was issued, and such Court is bound to recognize the adjudication and govern itself accordingly. *Narayanrav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre, I. L. R. 4 Bom. 529,* followed. KOLASHERRI ILLATH NARAINAN *v.* KOLASHERRI ILLATH NILAKANDAN NAMBUDRI . **I. L. R. 4 Mad. 131**

5. ——— *Consequential relief—Specific Relief Act (I of 1877), s. 42—Court Fees Act (VII of 1870), s. 7, cl. viii.* The defendant obtained a decree against *D*, father of the plaintiffs, for satisfaction of his debt by the sale of a moiety of a village mortgaged to him by *D*. In execution of it, *B* attached the mortgaged property, the attachment being made under s. 274 of the Civil Procedure Code (Act X of 1877), by an order prohibiting *D* from transferring or charging the property in any way, and all persons from receiving it from him by purchase, gift, or otherwise. The plaintiffs thereupon applied for the removal of the attachment, but their application was rejected. They then sued for a declaration of their right to two-thirds of the property. The District Judge who tried the suit rejected it on the ground that it was barred by s. 42 of the Specific Relief Act (I of 1877), because the plaintiffs might have sought further relief than a mere declaration of title, and omitted to do so. He was of opinion that the attachment constituted a dispossession, and that the plaintiffs might have asked to be replaced in possession, or, at any rate, for the removal of the attachment. *Held* by the High Court on appeal, that the plaint was not open to objection on the ground that it only asked for a declaratory decree without any consequential relief. *Held,* that the prohibitory order to *D* did not constitute a dispossession of *D* and still less of the plaintiffs, and that they could not have properly asked for removal of the attachment by a cancellation of the prohibitory order to *D* so long as they admitted that *D* had an interest in the attached property. *Held,* also, that the plaintiffs could not have properly asked for any consequential relief in their suit, but that, when they instituted it, they were entitled, and indeed bound, to ask for a declaration of their right, if only to prevent a purchaser at the sale, under the defendants' decree against *D*, from afterwards alleging that he had purchased without notice of the plaintiffs' claim. NARAYANRAV DAMODAR *v.* BALKRISHNA MAHADEV . **I. L. R. 4 Bom. 529**

6. ——— *Specific Relief Act (I of 1877), s. 42—Suit for release of goods wrongfully seized.* A suit for the release of goods wrongfully seized is not a declaratory suit under s. 42 of the Specific Relief Act (I of 1877). In substance the suit was a suit for goods, though as a matter of form the decree might contain a declaration. RAGHUNATH MUKUND *v.* SAROSH KAMA **I. L. R. 23 Bom. 266**

7. ——— *Assignment of interest of judgment-debtor in surplus proceeds of sale—Attachment by creditor of judgment-debtor—Suit for declaration of assignee's title—Civil Procedure Code, s. 266 (k)—Contingent interest.* In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor *X*. After the date of sale but before the whole of the purchase-money had been paid into Court, *X* applied to the Court by petition, praying that the amount due to him might be paid to *A*, to whom, he alleged, he had assigned it. Before any order was made on this petition *B, C, D,* and *E*, in execution of separate decrees against *X*, attached the sum in Court. The District Munsif ordered that *B, C, D,* and *E* should be paid before *A*. *A* brought a suit against *B, C, D* and *E* in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. *B, C, D,* and *E* appealed against this decree, and the District Court passed a decree dismissing *A*'s suit. *Held,* on second appeal by *A*, that he was entitled to a decree, declaring his title to the amount claimed. CHATHU *v.* KUNHAMED . . . **I. L. R. 11 Mad. 280**

8. ——— *Specific Relief Act (I of 1877), s. 42—Civil Procedure Code, 1882, s. 283—Suit to declare attachment subsisted, and that there had been no termination of attachment by abandonment.* The plaintiff had an attachment against certain property. Owing to his not filing a necessary affidavit, the execution-petition was struck off. Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue. The defendant then came forward and alleged that he had purchased the property prior to the second attachment, and he obtained an order in his favour. *Held,* in a suit brought under s. 283 of the Civil Procedure Code

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DECLARATORY DECREE, SUIT FOR—*contd.*

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to enforce the first attachment and to have it declared that it was subsisting at the time of the defendant's purchase, that the suit for a declaratory decree was maintainable, and that the facts did not amount to an abandonment of the first attachment by the plaintiff. SRINIVASA SASTRIAL *v.* SAMI RAU . . . **I. L. R. 17 Mad. 180**

9 ——— *Execution of decree —Rights of attaching creditor—Suit by one attaching creditor for declaration that property cannot be attached by another creditor on the ground that the second creditor's decree was bad in law—Cause of action.* The plaintiffs, as judgment-creditors who had attached under a decree for money certain immoveable property of their judgment-debtors, sued another judgment-creditor who attached the same property, asking for a declaration that the property attached was not saleable in execution of the second judgment-creditor's decree. The suit was based upon the allegation that the decree held by the second judgment-creditor was a decree which, as a matter of law, the Court ought not to have passed, although it was otherwise within the Court's jurisdiction. It was found that the decree impugned had not been obtained by means of fraud. *Held,* that the plaintiffs as attaching creditors had no cause of action. The decree assailed might have been a bad decree in law, but it was the decree of a Court which had jurisdiction, and it was not tainted with fraud. *Moti Lal* v. *Karrabuldin , I. L. R. 25 Calc. 1,* and *Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337,* referred to. LACHMI DAYAL *v.* HAR DANNI LAL (1903) **I. L. R. 25 All. 347**

10. RENT AND ENHANCEMENT OF RENT.

1. ——— **Decree as to rate of rent—** *Consequential relief—Decree before rent is due. Per* PEACOCK, *C. J.* A decree that the defendant is liable to pay rent at a certain rate before any rent is due being a mere declaratory decree without any consequential relief, ought not to be made. BOYDONATH *v.* RAMJOY DEY . **9 W. R. 292**

2. ——— **Right to enhance on future service of notice—***Enhancement of rent—Reg. V of 1812—Notice.* A decree declaratory of the plaintiff's general right to enhance on future service of notice may be passed in a suit under Regulation V of 1812 where the plaint was for enhancement at a certain specified rate, and in which service of notice was held to be not proved. ISHUR CHUNDER MUNDUL *v.* SHAM CHUNDER DOSS **W. R. 1864, 312**

3. ——— **Suit for enhancement without notice—***Declaration of right.* Plaintiff sued for arrears of rent at enhanced rates without notice. *Held,* that the plaintiff was not entitled

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10. RENT AND ENHANCEMENT OF RENT —*contd.*

to recover rent at the enhanced rate, but the question as to the liability of tenure having been fully tried, he was entitled to a decree declaratory of his right to enhancement. The Court had no power in this suit to try the validity of the lakhiraj tenure set up by defendant as to some of the land ; plaintiff should have proved that it was his mal land, and that the defendant had paid rent for it. He had failed to do so, and the Court refused, therefore, to declare his right to enhance the rent of such land. GUMANI KAZI *v.* HARIHAR MOOKERJEE **B. L. R. Sup. Vol. 15 : Marsh. 523 W. R. F. B. 115**

4. ——— *Declaration of right.* The plaintiff filed a suit for rent at an enhanced rate under Act X of 1859. The Court of first instance dismissed the case on the ground that the defendants had shown that the tenure was not liable to enhancement. On appeal to the Judge, the plaintiff's suit was dismissed on the ground that he had not proved service of notice, but a declaratory decree was given that the tenure was liable to enhancement. *Held,* that the Judge should simply have dismissed the suit ; Act X of 1859 gives him no power to make such a declaratory decree. NARAKANT MUZAMDAR *v.* BARADAKANT ROY **3 B. L. R. Ap. 31**

ANUNDMOYEE CHOWDHRAIN *v.* CHUNDER MONEE DOSSIA . . . . **3 W. R., Act X, 139**

KRISTOMONEE DEBIA *v.* FAKEER CHAND KHAN **3 W. R., Act X, 140**

RADHAMONEE DOSSIA *v.* SHIBESSUREE DEBIA **6 W. R. Act X, 25**

NILMONEE SINGH DEO *v.* HEERA LALL CHOWDHRY . . . . . **23 W. R. 442**

5. ——— **Suit for declaration of title to land with a view to enhance the rent—** *—Discretion of Court.* A declaratory decree may be made only where the declaration of right may be the foundation of relief to be got somewhere. Thus a suit to establish a title to land, with a view to taking proceedings in the Collector's Court under Act X of 1859 to enhance the rent, is one in which a declaratory decree may be made. The Judicial Committee will not on light grounds interfere with the exercise by a High Court of its discretion in granting a declaratory decree, the suit being one in which a declaratory decree may be made. SADUT ALI KHAN *v.* ABDOOL GUNNEY and ABDOOL GUNNEY *v.* ZAMOORUDOONISSA KHANUM . **11 B. L. R. 203 : 19 W. R. 171 L. R. I. A. Sup. Vol. 165**

BIPIN BEHAREE ROY *v.* ISSUR CHUNDER SEN **24 W. R. 13**

6. ——— **Failure to prove notice of enhancement—***Discretion of Court.* If, in a suit

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DECLARATORY DECREE, SUIT FOR— *contd.*

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for enhancement, the plaintiff fails to prove that he has served the defendant with a proper notice, the Court is not bound to make a declaratory decree, but whether it shall do so or not lies entirely in its discretion. GUNNES CHUNDER HAZRA *v.* RAMPRIA DEBEA . **I. L. R. 5 Calc. 53**

7. ——— Arrears of rent—*Declaratory decree—"Further relief"—Specific Relief Act (I of 1877), s. 42.* In a suit for a declaratory decree in respect of plaintiff's right to certain land where it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one, and where such rent was not claimed: *Held*, that the "further relief" referred to in the proviso to s. 42 of the Specific Relief Act is further relief in relation to "the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying," and does not include a claim for arrears of rent. FAKIR CHAND AUDHIKARI *v.* ANUNDA CHUNDER BHUTTACHARJI **I. L. R. 14 Calc. 586**

11. ORDERS OF CRIMINAL COURT.

1. ——— Order convicting of mischief —*Civil Procedure Code, 1859, s. 15—Suit after criminal proceedings under ss. 430, 432, Penal Code.* Certain criminal proceedings having been successfully taken against the plaintiff's tenants for mischief done in respect to a *nullah*, coming under either s. 430 or 432 (injury or obstruction to flow of water) of the Penal Code, the plaintiff brought a suit in the Civil Court for a declaration that the *nullah* was his own exclusive property, and therefore not such a stream as could come under either of those sections. *Held*, that it was within the discretion of the Court under s. 15 of the Civil Procedure Code to allow such a suit to be brought. KARTICK PARAMANICK *v.* KISHEN MOHUN MITTER . . . **22 W. R. 329**

2. ——— Order as to nuisance—*Suit to set aside order of Magistrate under Act XXV of 1861, ss. 308 to 315—Jurisdiction of Civil Court.* The plaintiff built a bridge over a certain khal (canal), which was removed by order of the Magistrate under Ch. XX of the Criminal Procedure Code; the defendant, it was alleged, set the Magistrate in motion. The plaintiff now sued the defendant for a declaration of his right to erect the bridge in question, and to have the order of the Magistrate set aside. *Held*, that no such suit would lie. The Judge in the Court below held that the suit would lie to try the plaintiff's right to erect a bridge over the khal. *Held*, on appeal, the suit ought to have been dismissed. MADHAB CHANDRA GUHO *v.* KAMALA KANT CHUCKERBUTTY **6 B. L. R. 643 : 15 W. R. 293**

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11. ORDERS OF CRIMINAL COURT—*contd.*

3. ——— Order on dispute as to possession—*Suit to set aside Magistrate's order under s. 321, Criminal Procedure Code, 1861—Order not put in force.* Plaintiff's right to a declaratory decree as to the erroneousness of the Magistrate's order, passed under s. 321, Code of Criminal Procedure, permitting defendant to erect a drain-pipe to take water from plaintiff's reservoir, was *held* to be not affected by the fact that the Magistrate's order had not been put in force. MEGHRAJ SINGH *v.* RASHDHAREE SINGH **17 W. R. 281**

4. ——— Trespass to land—*Order under Ch. XL, Criminal Procedure Code—Right to suit for declaratory decree.* A person whose right to land has been disputed, and who has obtained an order under Ch. XL of the Code of Criminal Procedure, 1872, from a Magistrate declaring him entitled to retain possession, is entitled to sue for a declaration of his right to the land. NARASIMMA CHARYA *v.* ROGHUPATTY CHARYA **I. L. R. 6 Mad. 176**

5. ——— Order as to rival hâts—*Cause of action—Consequential relief.* When a plaintiff alleged that he had held a hât on his own land for many years on Tuesdays and Fridays; that the defendant had set up a rival hât on these days and prevented persons from attending the plaintiff's hât; that this led to disturbance which ended in an order being made by the Magistrate prohibiting the plaintiff from holding his hât on the said days, and that the plaintiff suffered loss and damage in consequence: *Held*, that, assuming these facts to be true, the plaintiff was entitled to a decree, declaring, as against the defendant, that the plaintiff had a right to hold his hât on Tuesdays and Fridays. GOPI MOHUN MULLICK *v.* TARAMONY CHOWDHRANI **I. L. R. 5 Calc. 7 : 4 C. L. R. 309**

6. ——— Declaration of title to land —*Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act X of 1882), s. 133, order under, for removal of an obstruction standing upon certain land—Ownership of such land—Public roads—Bombay Land Revenue Act (Bombay Act V of 1879), s. 37.* A Magistrate made an order against the plaintiff under s. 133 of the Criminal Procedure Code (Act X of 1882) for the removal of a certain *otta* standing in front of the plaintiff's shop as an obstruction to the public way. The plaintiff thereupon brought this suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood was his property, and not that of the Government. *Held*, that, the public roads being vested by s. 37 of the Land Revenue Code (Bombay Act V of 1879) in the Government of Bombay, they were "interested to deny" the plaintiff's title to the land, and, therefore, under s. 42 of the Specific

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DECLARATORY DECREE, SUIT FOR— *contd.*

11. ORDERS OF CRIMINAL COURT—*concld.*

Relief Act (I of 1877), the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land, and the plaintiff was not called upon to wait until the Government had taken possession of the land. It was contended that the jurisdiction of the Court to make the declaration prayed for was taken away by the last clause of s. 133, which provides that, "no order made by a Magistrate under this section shall be called in question in any Civil Court." *Held*, that the Magistrate's order under this section is not a conclusive determination of the question of title. SECRETARY OF STATE FOR INDIA *v.* JETHABHAI KALIDAS **I. L. R. 17 Bom. 293**

12. MISCELLANEOUS SUITS.

1. ——— **Suit to have status as tenure-holder declared**—*Civil Procedure Code, 1859, s. 15—Consequential relief.* A suit in which the plaintiff prayed for a decree declaring that the defendant was not, as had been fraudulently recorded in the revenue registers, a perpetual lessee, but only tenant-at-will of certain villages, of which the plaintiff was proprietor, held to be maintainable. MAHOMED *v.* KANIZUK FATIMA **6 N. W. 231**

2. ——— **Suit for declaration of right as vadil**—*Consequential relief—Act XI of 1843.* A suit to be declared vadil, or elder, among the holders of a patilkiwatan will not lie, as upon such declaration no consequential relief can be given. See Act XI of 1843. YESAJI APAJI PATIL *v.* YESAJI RHALOJI . . . . **8 Bom. A. C. 35**

3. ——— **Denial of plaintiff's right as audhikari**—*Cause of action.* In a suit for declaration or confirmation of the plaintiff's title to the office of the audhikari of the Difloo Sastur, alleged to be situate at Nowgong, where the defendant in his written statement claimed to be the audhikari, and alleged that the headship was situated elsewhere, the defendant was held to be asserting a title adverse to the plaintiff sufficient to justify a declaratory decree. KOONDO NATH SURMA GOSSAMEE *v.* DHEER CHUNDER SURMA AUDHIKARI GOSSAMEE . **20 W. R. 345**

4. ——— **Suit for declaration on low stamp duty to obtain relief for which a higher stamp is chargeable**—*Specific Relief Act (I of 1877), s. 42.* The defendant was in possession of the estate of a deceased gosavi as his shishya (spiritual son). The plaintiff sued upon a stamp of R10 for a declaration that he was the true shishya of the said gosavi by a previous adoption, his real object being to establish a title to the estate in the hands of the defendant. *Held*, that, under the circumstances, the Court would not exercise, in the plaintiff's favour, the discretionary power to grant a declaratory decree vested in it by s. 42 of the Specific Relief Act (I of 1877), inasmuch as to do so would enable the plaintiff to obtain a relief on a stamp of R10 which the Legislature intended should be chargeable with a higher fee, and thus would have the effect of giving countenance to an evasion of the stamp law. GANPATGIR BHOLAGIR *v.* GANPATGIR . . **I. L. R. 3 Bom. 230**

5. ——— **Suit to declare illegal proceedings removing person from office**—*Want of actual ouster—Specific Relief Act, s. 42.* Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal. Defendants pleaded that the suit would not lie, because further relief might have been sought. *Held*, that, unless there had been an actual ouster from office, a declaratory suit would lie. RAMANUJA *v.* DEVANAYAKA **I. L. R. 8 Mad. 361**

6. ——— **Right to appoint ghatwal**—*Infringement of right of Government.* In a suit by the Government in which the plaint claimed the right "to reinstate a ghatwal in possession of a certain estate as being a ghatwali tenure liable to be appropriated to the use of the ghatwal for the time being, by setting aside a patni talukh collusively created by the defendants," it was found that no right of the Government had been infringed by the creation of such patni talukh, which the defendant had a right to make, and the Government was held not to be entitled to a bare declaration of right. ANAND KUMARI *v.* GOVERNMENT **9 B. L. R. 16 note : 11 W. R. 180**

7. ——— **Suit for declaration of right to damages.** *Quære :* Whether claim for declaration of right to damages is one that is maintainable. KESHAREE LALL *v.* GOBINDRAM . **4 N. W. 70**

8. ——— **Suit for declaration of right to flow of water**—*Omission to specify damages.* A suit for a declaration of prescriptive right to the use and enjoyment of the water of a watercourse can be maintained without the specification of any particular amount of damage sustained by the plaintiff. The general rule of law in a case of this description is that, although proprietors of an estate through which a watercourse passes have the right to make use of the water for irrigating purposes, they must do so only to such extent as will not interfere with similar rights possessed by parties holding land lower down on the same watercourse. SARDAWAN *v.* HURBUNS SINGH **11 W. R. 254**

9. ——— **Suit for declaration of right to maintenance**—*Raising issues not raised by pleadings.* In a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate, which had been mortgaged to the defendant by the heir, the plaint prayed "that the rights of the plaintiff over the estate of her husband by way of maintenance, and for the ex-

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DECLARATORY DECREE, SUIT FOR— *contd.*

12. MISCELLANEOUS SUITS—*contd.*

penses attendant on the marriage of her daughters, might be ascertained and declared; that it might be declared that the defendant took the mortgage subject to the plaintiff's right to maintenance and right to such expenses as aforesaid; that for such purpose all proper accounts might be taken for an injunction and such further or other relief as might be necessary. No specific sum was asked for maintenance, nor was it stated on what portion of the estate the maintenance was sought to be charged, nor that the defendant took notice of the plaintiff's assertion of her rights. The lower Court held that the suit ought to be dismissed as praying only for a declaration of right. No alteration in the form of the suit or in the issues in this respect was proposed for the plaintiff. *Held*, on appeal, that the Judge ought not to have dismissed the suit, but to have framed issues for the purpose of determining what should be allowed for the maintenance of the plaintiff and the expenses of the marriages, if the plaintiff should be found entitled to them. NISTARINI DASI *v.* MAKHANLAL DUTT . . **9 B. L. R. 11: 17 W. R. 422**

10. ——— **Suit for declaration that decree is fraudulent and collusive**—*Specific Relief Act, 1877, s. 42—Suit to set aside a decree on the ground of fraud.* Subsequently to a decree for partition of an ancestral estate, the creditors of one of the parties thereto, who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor, and obtained a decree for the moneys due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiffs') interests, fraudulent and collusive, and of no effect. *Held*, that the suit was not maintainable. RAM SARUP *v.* RUKMIN KUAR . . . **I. L. R. 7 All. 884**

11. ——— **Suit for declaration of right to an account**—*Specific Relief Act, s. 42.* Where it is open to the plaintiff to ask for an account, against the defendant, of moneys received by him under a certificate of heirship, and for payment of moneys not properly accounted for, he is precluded by s. 42 of the Specific Relief Act, I of 1877, from asking for a mere declaratory decree. BAI ANOPE *v.* MULCHAND GIRDHAR **I. L. R. 9 Bom. 355**

12. ——— **Suit by landholder for declaration of right to take land from occupancy-tenant for cultivation of indigo**—*Wajib-ul-arz—Specific Relief Act (Act I of 1877), s. 42.* The zamindars of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in the wajib-ul-urz—"when necessary, one or two bighas out of the tenants' lands are taken with their consent (ba khushi) for sowing indigo." Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year for the purpose of cultivating indigo. *Held*, by the Full Bench, that the word "khushi" used in the wajib-ul-urz indicated that the land was only to be taken with the occupancy-tenant's consent, and the document created no right of the nature alleged, namely, to take the land despite the tenant. *Per* TYRRELL, *J.* That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877). SHEOBARN *v.* BHAIRO PRASAD **I. L. R. 7 All. 880**

13. ——— **Suit for declaration that property is wuqf**—*Act XX of 1863, ss. 14, 15, 18—Civil Procedure Code, s. 539—Specific Relief Act (Act I of 1877), s. 42.* A Mahomedan brought a suit against a person in possession of certain property for a declaration that the property was wuqf. He did not allege himself to be interested in the property, further or otherwise than as being a Mahomedan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement, in which he denied that the property now in question was wuqf. *Held*, that the suit was not maintainable under the provisions of s. 42 of Act I of 1877 (Specific Relief Act). *Held*, further, that the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes, it would not be proper to make the declaration prayed for by the plaintiff, even if the suit was maintainable. WAJID ALI SHAH *v.* DIANAT-ULLA BEG . **I. L. R. 8 All. 31**

14. ——— **Suit for declaration that decree is fraudulent**—*Specific Relief Act (I of 1877), s. 42—Injunction.* Suit for a declaration that a decree of a subordinate Court was passed fraudulently, the Judge having been bribed by the decree-holder, the present defendant. *Held*, that the suit did not lie. The remedy would appear to be by way of injunction to restrain the decree-holder from executing the decree. KUNHAMED *v.* KUTTI . . **I. L. R. 14 Mad. 167**

15. ——— **Suit for declaration that the defendant is a mere benamidar for plaintiff**—*Specific Relief Act (I of 1877), s. 42.* In a suit by *A* to obtain a declaration that a decree originally obtained by *B* against *C* and another, which had been purchased in the name of *D*, had really been purchased by the plaintiff for his own benefit: *Held*, that, inasmuch as it was not necessary to ask for an injunction, the suit was not barred by the proviso to s. 42 of the Specific Relief Act. GOUR MOHUN GOULI *v.* DINONATH KARMOKAR . . . . **I. L. R. 25 Calc. 49 2 C. W. N. 76**

16. ——— **Consequential relief**—*Court-fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii),*

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DECLARATORY DECREE, SUIT FOR— *contd.*

12. MISCELLANEOUS SUITS—*contd.*

and s. 7, cl. iv (c). A suit in which the only prayer is to have it declared that a certain decree is ineffectual and inoperative against the plaintiffs, is a suit for a declaratory decree without consequential relief, and falls within Sch. II, Art. 17, cl. (3), and not under s. 7, cl. 4 (c), of the Court-fees Act (VII of 1870). *Shrimant Sagajirao* v. *Smith, I. L. R. 20 Bom. 736,* relied upon. ZINNATUNNESSA KHATUN *v.* GIRINDRA NATH MUKERJEE (1903) **I. L. R. 30 Calc. 788**

17. ——— **Membership of tarwad—** *Civil Procedure Code (Act XIV of 1882), s. 13—Res judicata—Suit in Subordinate Court—Previous suit in Munsif's Court—Valuation of a suit for declaration as to membership of tarwad—Specific Relief Act (I of 1877), s. 42.* A suit was brought in the Court of a Subordinate Judge for a declaration that the plaintiffs and defendants therein had no community of interest and were not members of a *tarwad* having joint property. The property of the *tarwad* was valued by plaintiffs at R3,000 and this was held to be a true valuation, but it appeared that the value of the plaintiff's interest in it was R2,000 only. In a previous suit between the parties, which had been brought in the Court of a District Munsif, it had been held that the parties belonged to the same family; and this finding had been upheld on appeal. Plaintiffs did not ask, by way of further relief, for possession of a portion of the property, which was in the enjoyment of the defendants. *Held,* that the suit was barred, both as *res judicata* and by s. 42 of the Specific Relief Act. The value of a suit for a declaration that certain persons are or are not members of a *tarwad* is the value of the share of the *tarwad* property which would be allotted to them if a partition were made by common consent. PANGA *v.* UNNIKUTTI (1900) **I. L. R. 24 Mad. 275**

18. ——— **Mortgage—***Specific Relief Act (Act I of 1877), s. 42—Burden of proof—Usufructuary mortgagee in possession seeking a declaration that the property is not saleable in execution of a decree on a prior mortgage.* The plaintiff, a usufructuary mortgagee in possession, came into Court seeking a declaration that the mortgaged property was not saleable in execution of a decree for sale obtained by another mortgagee in a suit on a mortgage prior to his own, on the ground that to this suit the prior mortgagee had not made him a party. *Held,* that in such a case the plaintiff had to prove, not only that he had obtained possession as a usufructuary mortgagee and was still in possession, but that his mortgage still subsisted and had not been discharged. CHITTA SINGH *v.* DEBI DIN (1901) **I. L. R. 24 All. 170**

19. ——— **Will—***Specific Relief Act (I of 1877), s. 42—Suit for declaration of invalidity of will on ground that it bequeathed family property—No claim for partition—Maintainability—Hindu law—Existence of leases over family property no bar to partition* Plaintiff sued his brother, his sister, and his brother's son for a declaration of invalidity of a will, which purported to have been executed by his late father, and by which certain property had been bequeathed to one of the defendants. Plaintiff claimed that the property was ancestral; that he was entitled to his share in it by right of survivorship, and that the testator had no power to bequeath it. No claim was made in the plaint for partition of the property, which was stated to be in the possession of tenants under leases granted by plaintiff and first defendants. *Held,* that the suit was barred by the proviso to s. 42 of the Specific Relief Act, inasmuch as plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Even though the land were in the possession of tenants entitled to continue in occupation under subsisting leases, that would be no bar to a partition of the property among the members of the family. SURYA NARAYANAMURTI *v.* TAMMANNA (1901) . **I. L. R. 25 Mad. 504**

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——— transfer of—

See PRACTICE . I. L. R. 31 Bom. 5

——— transfer of, for execution—

See BENGAL ACT III OF 1870.

See CIVIL PROCEDURE CODE, 1882, s. 232. I. L. R. 29 Calc. 235

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION, ETC.

See SET-OFF—CROSS-DECREES. I. L. R. 26 Mad. 428

——— validity of—

See EXECUTION OF DECREE. I. L. R. 30 Mad. 26

——— variation of, on appeal by some of joint appellants—

See CIVIL PROCEDURE CODE, 1882, s. 544. I. L. R. 25 Bom. 699

1. FORM OF DECREE.

(a) GENERAL CASES.

1. ——— Necessity for a decree—*N.-W. P. Land Revenue Act (XIX of 1873), ss. 113, 114, 115—Omission to frame decree in case in which a question of title is decided—Second appeal.* It is essential that in a suit under the Civil Procedure Code a decree should be drawn up. *Held*, therefore, that in a proceeding under s. 113 of the North-West Provinces Land Revenue Act, where the rights of the parties are decided, a decree should be drawn

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*a*) GENERAL CASES—*contd.*

up giving effect to the decision. An Assistant Collector passed a decision under s. 113 declaring the rights of the parties, but did not draw up a decree giving effect to such decision. There was an appeal to the District Court from such decision, which made a decree affirming it. *Held*, by STUART, *C.J.*, on second appeal, that the defect arising from the want of a decree on the record of the Court of first instance was a bar to the hearing of the second appeal, and the proceedings of the District Court should be set aside, and the case should be sent back to the Assistant Collector in order that he might frame a decree. *Held* by STRAIGHT, *J.*, that the decree of the District Court was appealable, such defect notwithstanding, and the appeal should be decreed, and the decree of the District Court reversed, and the case be sent back to the Assistant Collector for the purpose aforesaid. Observations by STUART, *C.J.*, on the absence in the Code of Civil Procedure of any mandatory provisions in reference to the framing of decrees. RANJIT SINGH *v.* ILAHI BAKHSH . . . **I. L. R. 5 All. 520**

2. ——— *N.-W. P. Land Revenue Act (XIX of 1873), ss. 113 and 114—Partition, Application for—Order on objection as to title raised in course of partition-proceedings.* A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N.-W. P. Land Revenue Act (XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order or decision on such point. NIAZ BEGAM *v.* ABDUL KARIM KHAN **I. L. R. 14 All. 500**

3. ——— **Drawing up decrees**—*Duty of Judge.* The duty of Judges in seeing that decrees are properly drawn up pointed out. RUSTOM ALLY *v.* AMEER ALLY SAUDAGUR **10 W. R. 487**

4. ——— **Insufficient payment of Court-fees**—*Procedure to be adopted on—Appellate Court, power of.* In a suit for specific performance of a contract for the sale of land and for possession, the plaintiff did not pay the full Court-fees, but the Munsif heard the suit and dismissed it. An appeal by the plaintiff was entertained by the Subordinate Judge, who passed a decree for specific performance, and decreed that, if the deficient Court-fees were paid, possession should be given to the plaintiff, but that, on failure to pay the Court-fees, the claim for possession should be dismissed. *Held*, that, the plaintiff not having in the first instance paid the full Court-fees, he should have been called upon by the Munsif to do so. As this was not done, the Court of first appeal was not in error in entertaining the appeal which was preferred by the plaintiff; but he should have passed no decree until the fees due had been paid, and if they were not paid, the decree should have been for the dismissal of the whole suit. KRISHNASAMI *v.* SUNDARAPPAYYAR **I. L. R. 18 Mad. 415**

5. ——— **Contents of decree.** Decrees of Court should be drawn up by the Judge in such a way as to make them self-contained and capable of execution without referring to any other document. JOYTARA DASSEE *v.* MAHOMED MOBARUCK **I. L. R. 8 Calc. 975 : 11 C. L. R. 399**

DWARKANATH HALDAR *v.* KAMALA KANTH HALDAR . . . . **3 B. L. R. Ap. 129**
12 W. R. 98

6. ——— *Duty of judgment-debtor and decree-holder.* It is the duty of the judgment-debtor, as well as the decree-holder, to see that the decree is properly drawn up; and if he does not do so, the Court will execute it according to its terms. KRISHTOKISHORE DUTT *v.* ROOPLALL DASS . **I. L. R. 8 Calc. 687 : 10 C. L. R. 609**

7. ——— *Distinctness and consistency with judgment requisite.* The decree should not be vague, but explicit in its terms as well as in accordance with the judgment. CHUNDER MONEE DOSSEE *v.* DHURONEEDHUR LAHORY **7 W. R. 2**

NUNDO KISHORE SINGH *v.* LALLA BURJUN LALL **15 W. R. 154**

NUTHOO SINGH *v.* RAM BUKSH SINGH **18 W. R. 34**

8. ——— *Omission to specify boundaries in decree for land—Vague decree—Civil Procedure Code, 1859, s. 190.* A decree which was passed for a specified quantity of land contiguous to the plaintiff's estate, but which gave no boundaries of such land, was held, with reference to s. 190, Act VIII of 1859, to be indefinite and incapable of execution. DWARKANATH ROY *v.* JANNOBEE CHOWDHRAIN . . . **19 W. R. 81**

DARBAREE SAYAL *v.* FATU DHALEE **23 W. R. 285**

The remedy is to apply to have the decree rectified. DARBAREE SAYAL *v.* FATU DHALEE **23 W. R. 285**

SRISTEEDHUR BHUTTACHARJEE *v.* KALEE DOSS DEY . . . . . **24 W. R. 479**

9. ——— *Omission to specify boundaries in decree for land—Specific statement of relief granted by decree.* *A* claimed certain lands, claiming one portion of such lands under one title and the remainder under another and separate title. In the schedule to his plaint he gave the boundaries of the entire lands claimed by him, but did not give any boundary between the lands claimed by him under one title and the lands claimed by him under the other title. The lower

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*a*) GENERAL CASES—*contd.*

Court decreed the whole of the plaintiff's claim. The lower Appellate Court confirmed so much of the decree of the Court of first instance as declared the plaintiff's right to the first portion of the land, and dismissed his suit as to the remainder, and, there being no evidence to show what lands in particular out of the whole claim were comprised in the first portion for which it gave him a decree, directed them to be ascertained in execution. *Held*, that the decree was bad, as it should have specified the particular lands decreed. KANGAL CHANDRA RUJ *v.* KANYE LALL RUJ . **I. L. R. 4 Calc. 69**

10. ——————— *Anticipated difficulty of executing decree.* The Court will not be deterred from making a decree by the difficulties to be expected in carrying it out. PURAPPANVANALINGAM CHETTI *v.* NALLASIVAN CHETTI **1 Mad. 415**

11. ——————— *Decree not specifying relief granted—Decree on appeal.* A decree of an Appellate Court not specifying the relief granted but merely repeating the judgment "that the appeal be decreed," is not a sufficient compliance with the requirements of the law. HURSARUN SINGH *v.* PURSHUN SINGH . . **2 N. W. 415**

12. ——— **Refund of purchase-money**—*Decree on appeal.* In reversing a decree on appeal, the Court should state the relief which they consider the appellant entitled to. *A* purchased a Government revenue-paying estate from *B*, but on going to take possession he found *C*, who claimed under a patni grant, also from *B*, in possession. A case was, therefore, instituted by *B* under Act IV of 1840, but it was ordered that *C* should be retained in possession. *A* then brought a suit against *B* and *C* to recover his purchase-money. No relief was asked against *C*, nor had *C* anything to do with the sale from *B* to *A*. The suit was dismissed. On appeal it was ordered merely "that the decree be reversed and the appeal decreed with costs." Nothing was asked against *C* in the grounds of appeal. In execution of this decree, *C*'s property was seized and sold. *C* petitioned the Principal Sudder Ameen, who held that he was not liable, but on appeal the Judge held that he was liable for the purchase-money, and his property had been rightly sold in execution for it. *Held*, on special appeal, that *C* was not liable to refund the purchase-money. BELL *v.* GURUDAS ROY **1 B. L. R. A. C. 50**

13. ——— **Decree on appeal.** Distinction pointed out between a decree of an Appellate Court simply reversing the decree of the lower Court and a decree which, reversing that decree, goes on to record judgment for the other party. HUREEKISHORE ROY *v.* KALEEKISHORE SEN . . . . . **8 W. R. 114**

14. ——————— *Decree of High Court affirming decree of mofussil Court.* The ruling in *Chowdhry Wahid Ali* v. *Mullick Inyet Ali, 6 B. L. R. 52*, that, whether the decree of the Lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, not dissented from, except that it was suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree. *Quære :* Can the ruling in *Anandmayi Dasi* v. *Purno Chandra Roy, B. L. R. Sup. Vol. 506*, be supported ? KISTOKINKER GHOSE ROY *v.* BURRODACAUNT SINGH ROY **10 B. L. R. 101 : 17 W. R. 292 14 Moo. I. A. 465**

s. c. in lower Court. KISHEN KISHORE GHOSE *v.* BURODA KANT ROY . . **8 W. R. 470**

JOY NARAIN GIREE *v.* GOLUCK CHUNDER MYTEE **22 W. R. 102.**

15. ——————— *Reversal of order under which land is taken in execution—Mesne profits.* For the restoration of possession with mesne profits of lands made over in execution of a decree subsequently reversed on appeal, a specific order is not necessary to be inserted in the decree of the Appellate Court. GOOROOCHURN BOSE *v.* BYKUNTNATH ACHARJEE **5 W. R. Mis. 38**

16. ——— **Decree to have a future operation.** In a suit by a landlord to recover possession where defendant, who was a tenant-at-will, had received no notice to determine his tenancy, plaintiff obtained a decree to come into operation at the beginning of the next Amli year. *Held*, that there was nothing in the Civil Procedure Code to prevent a decree of this nature being passed. RAM NARAIN MANJHEE *v.* FUTEMA SOGRA **23 W. R. 399**

17. ——————— *Decree to have a future operation.* A decree to have future operation was held not allowable, *e.g.*, to declare that the costs of a suit should be borne by the unsuccessful party in a suit to be hereafter brought. KASHEE CHUND DEY *v.* BUNGSHEE BUDDUN DEY **23 W. R. 89**

So a prospective decree for contingent arrears of maintenance is irregular. JULEBIA CHITTA KOOER *v.* BHAGEE KOOER . . **6 N. W. 41**

18. ——— **Allegation of fraud**—*Decree dealing only partly with case.* The plaint alleged fraud in the defendants in that they represented themselves as agents, when in fact they were principals, in fifty-eight instances in which they had made contracts with the plaintiffs. The prayer of the plaint was "that the defendants may either be held personally responsible on the

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*a*) GENERAL CASES—*concld.*

several said contracts as purchasers thereunder, or otherwise that they may be held personally liable for damages, for fraudulently representing that they were authorized to effect the contracts aforesaid," and further asked for an account and for damages. It appeared clear to the Judge below, on the evidence, that the defendants acted as principals, and he treated the case on the issue of fraud alone. Ten cases only of the fifty-eight were selected by the plaintiffs, on which they gave evidence of the fraud; and the Judge found in their favour as to three, and held that the plaint charging fraud, the plaintiffs could not succeed on any cause of action incidentally disclosed. The decree was drawn up with reference only to the three cases on which the fraud was found, so far as finally to dispose of them, but ordered an enquiry as to the fraud in all the rest. *Held*, that the case was appealable, and that the decision of the Court below was right. GHASSERAM MISSER *v.* WILLIAMSON . . . **2 Ind. Jur. N. S. 205**

19. ———— Decree for larger amount than that claimed—*Consent of parties—Compromise of suit awarding plaintiff more than amount claimed—Execution of decree limited to amount claimed—Suit for larger amount awarded in compromise.* By consent of parties and the leave of the Court, a suit may be amended to cover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land that that originally asked for. MOHIBULLAH *v.* IMAMI . **I. L. R. 9 All. 229**

20. ———— Agreement out of Court, to pay rent-decree by instalments on hypothecation of property—*Suit to enforce such agreement, if maintainable.* A suit lies to enforce an agreement embodied in an instalment-bond executed, without the sanction of the Court, in favour of the decree-holder, hypothecating certain property for payment of a decretal amount. *Lalji Singh* v. *Gava Singh, I. L. R. 25 All. 317*, referred to. *Held*, further, that the provision as to giving time to execute the decree is not illegal, though it may be incapable of enforcement as the agreement was not made with the sanction of the Court. *Juji Kamti* v. *Annai Bhatta, I. L. R. 17 Mad. 382*, referred to. BELCHAMBERS *v.* SARAT CHANDRA GHOSH (1908) . **I. L. R. 35 Calc. 870**

21. ———— Suit set down for hearing before the date fixed in the summons—*Civil Procedure Code (Act XIV of 1882), ss. 68, 69, 96, 100, 101, 112 and 112—High Court Rules, Nos. 111 and 112—Practice.* It is not open to a plaintiff to obtain an *ex parte* decree before the returnable date mentioned in the summons. DHIRAJLAL *v.* HORMUSJI (1908) . **I. L. R. 32 Bom. 534**

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*b*) ACCOUNT.

22. ———— Account, suit for—*Principal and agent—Duty of Court as to decree.* Where a plaint alleged a continued agency in the defendant and prayed for relief on the ground that there was a specific balance against him, and prayed for the recovery of such sum or any larger sum that might be proved to be payable: *Held*, that such suit was essentially one for an account, and that the Court following the general rule ought not to make a final decree at the hearing, but should order an account to be taken of such agent's dealings with the plaintiff's money. HURRONATH ROY *v.* KRISHNA COOMAR BUKSHEE
I. L. R. 14 Calc. 147 : L. R. 13 I. A. 123

23. ———— *Decree for account of dissolved partnership—Civil Procedure Code, 1882, s. 215—Procedure—Onus of proof—Taking of accounts.* In a suit for an account of a dissolved partnership, a decree should be passed under the Civil Procedure Code, s. 215, in accordance with form No. 132 in sch. IV; and it should direct an account to be taken of the dealings and transactions between the parties, and of the credits, property, and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. Observations on the procedure to be adopted and the burden of proof on the taking of the account. THIRUKUMARESAN CHETTI *v.* SUBBARAYA CHETTI
I. L. R. 20 Mad. 313

(*c*) AGENT.

24. ———— Agent, suit in name of, for Principal—*Description of plaintiff on decree.* Where a plaintiff sues by his recognized agent and obtains a decree, the decree should stand in the name of the agent, not as for himself alone, but as agent and on behalf of the plaintiff. GOLAM JELANEE CHOWDHRY *v.* NULEET CHUNDER SINGH . . . . **11 W. R. 503**

(*d*) ARBITRATION.

25. ———— Arbitration, reference to—*Prohibition to proceed with award.* The Court of first instance in its decree "prohibited the arbitrators from giving an award." As they were not parties to the suit in substitution of that order, it was ordered that the defendants be enjoined from proceeding in the award before the arbitrators and from collecting certain debts released in their favour from attachment. PARMESHAR DAT *v.* HARI NAIK . . . **7 N. W. 357**

62. ———— Arbitration, reference to, when one party declines to consent—*Suit for share of land.* In a suit in which plaintiffs claimed a 6-anna share of certain land belonging to a mouzah, it was found on measurement that 262

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DECREE——*contd.*

1. FORM OF DECREE—*contd.*

(*d*) ARBITRATION—*concld.*

bighas of the land claimed belonged to that talukh. Pending the suit, all the defendants except one (*O*) agreed to a reference to arbitration, upon which it was found that 44 bighas, in addition to the 262, belonged to the plaintiffs. *Held*, that the proper decree was that the plaintiffs were entitled to recover, as against all the defendants, including *O*, a 6-anna share in 262 bighas; and as against all except *O*, a 6-anna share in the 44 bighas awarded by the arbitrators. DOORGACHURN THAKOOR *v.* KALLY DOSS HAZRAH . **10 W. R. 463**

27. ——— **Award**—*Order setting aside award under s. 521 can be questioned on appeal against the final decree.* Where a Court sets aside an award of arbitrators on application under s. 521 of the Civil Procedure Code, and decides on the merits, the Court of appeal can, on appeal from the final decree, inquire into the propriety or otherwise of the order setting aside the award. *Ganga Persad* v. *Kura, I. L. R. 28 All. 408*, not followed. ACHUTHAYYA *v.* THIMMAYYA (1908). **I. L. R. 31 Mad. 345**

28. ——— *Appeal against decree on fresh award made after order of remittal under s. 520 of the Civil Procedure Code.* Where the Court remits an award under s. 520 of the Code of Civil Procedure and the arbitrators submit a fresh award and the Court passes a decree in accordance with such revised award under s. 522 of the Code of Civil Procedure, no appeal lies against such decree on the ground that the order of remittal under s. 520 was wrong and that the original award ought to have been accepted and acted upon. SUBBIAH IYER *v.* SUBRAMANIA AIYAR (1908). **I. L. R. 31 Mad. 479**

(*e*) BILL OF EXCHANGE.

29. ——— **Suit on bill of exchange**—*Civil Procedure Code (Act XIV of 1882), ss. 532, 538—Negotiable Instruments Act (XXVI of 1881), s. 35.* A plaintiff suing on a bill of exchange, the drawer, acceptor, and endorser where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal. BANK OF BENGAL *v.* KARTICK CHUNDER ROY **I. L. R. 16 Calc. 804**

(*f*) CONSENT DECREE.

30. ——— **Decree by consent against minor**—*Duty of Court.* A Court ought not to make a decree by consent against an infant without ascertaining that it is for the benefit of the infant that such a decree should be pronounced. RAM CHURN RAHA BUKSHEE *v.* MUNGUL SIRCAR **16 W. R. 232**

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*f*) CONSENT DECREE—*concld.*

(*g*) CONTRIBUTION.

31. ——— **Contribution, suit for**—*Specification of separate sums due.* In a suit for contribution, a decree cannot pass jointly against all the defaulters. It should specify the particular sums to be paid by each. BAMA SOONDUREE DEBIA *v.* ANUNDMOYEE DEBIA . **3 W. R. 170**

PITAMBUR CHUCKERBUTTY *v.* BHYRUBNATH PALEET . . . . **15 W. R. 52**

MOHADEO MISSER *v.* LAHOREE MISSER **24 W. R. 250**

32. ——— *Order for separate payment of share of debt.* The decree in a suit by a debtor against his co-debtors for contribution, if in favour of plaintiff, should order payment separately by each defendant of the amount only of his just proportion of the debt. TAVASI TALAVAR *v.* PALANIANDI TALAVAR . . **3 Mad. 187**

RUJAPUT RAI *v.* MAHOMED ALI KHAN **5 N. W. 215**

OTIOOLLA *v.* ASEERUN . . **7 W. R. 194**

KRISTO COOMAR CHOWDHRY *v.* ANUND MOYEE CHOWDHRAIN . . . . **7 W. R. 300**

MOHESSUR BUKSH SINGH *v.* MUTHOORA PERSHAD **8 W. R. 515**

NOBIN MOHUN GHOSSAL *v.* GOPAL CHUNDER MOOKERJEE . . . . **11 W. R. 538**

RASH MUNJOOREE CHOWDHRAIN *v.* RADHA SOONDUREE DOSSEE . . **23 W. R. 283**

BHURUT PANDEY *v.* MUNTHOORA KOER **23 W. R. 421**

33. ——— *Suit against co-tenants to recover rent paid on their behalf—Order for separate payments.* In a suit against co-tenants to recover rent paid by plaintiff on their behalf, a joint decree declaring the defendants collectively liable ought not to be passed. The Court should determine what portion of the whole rent ought to be repaid by each one of the defendants, and whether each defendant is under any liability to pay the plaintiff at all. KRISTO MONEE DEBIA *v.* BURODA DOSSIA CHOWDHRAIN . . **14 W. R. 143**

34. ——— *Proportionate liability of co-sharers.* Parties liable for contribution held to be liable according to their respective shares in a property and not simply *per capita*. MURDAN ALI *v.* TUFUSSAL HOSSEIN **16 W. R. 78**

35. ——— *Principle in assessing share of co-sharer of revenue.* Principle considered fair in assessing a co-sharer's share of the

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*g*) CONTRIBUTION—*concld.*

Government revenue paid for the whole estate to save it from sale. JUGGOBUNDOO ROY *v.* FYEZ BUKSH CHOWDHRY . . . **8 W. R. 166**

36. ——— *Suit for contribution in respect of money deposited by the plaintiffs to save the property, of which they were co-sharers, from being sold for arrears of revenue—Personal liability.* In a suit for contribution by the plaintiffs against the defendants, the Court of first instance gave the plaintiffs a decree against one defendant and exonerated the others. On an appeal by the defendant against whom the decree was passed, the Appellate Court directed the defendants exonerated by the first Court to be added as respondents, set aside the decree against the appealing defendant, and passed a decree against the defendants, who were added as respondents, as representatives of one *S*, and ordered the amount so decreed to be recovered from the estate of her (*S*'s) husband. On appeal to the High Court by the defendants, who were thus made liable, on the ground that the liability to contribution being the personal liability of *S*, they not being heirs to her stridhan, they were not liable for the plaintiff's claim. *Held*, that, inasmuch as a claim for contribution creates only a personal liability against the co-sharers on account of whose share the payement has been made, and does not create a charge on the estate, the persons liable would not be the reversionary heirs to *S*'s husband's estates, but those who would inherit her stridhan. UPENDRA LAL MUKERJEE *v.* GIRINDRA NATH MUKERJEE **I. L. R. 25 Calc. 565 2 C. W. N. 425**

(*h*) COSTS.

37. ——— **Annexing amount of costs to decree**—*Civil Procedure Code, 1859, s. 360—Practice.* It is a convenient practice for a Court to annex to every decree the costs incurred by both parties. NOBO KRISTO MOOKERJEE *v.* PARBUTTY CHURN BHUTTACHARJEE . **13 W. R. 23**

38. ——— **Specification of costs without allotment of responsibility**—*Civil Procedure Code, 1859, s. 189—Decree for costs.* The mere specification of costs in a decree without an allotment of responsibility is not a sufficient compliance with s. 189, Act VIII of 1859. JANOKEE NATH MOOKERJEE *v.* JOYKISHEN MOOKERJEE . . . . **15 W. R. 4**

39. ——— **Copy of judgment with schedule of costs annexed**—*Civil Procedure Code, 1859, s. 189.* A copy of the judgment, with the schedule of costs appended, does not constitute a proper decree such as is required under s. 189, Code of Civil Procedure. PURMESSUREE DUTT JHA *v.* JOYNAUTH THAKOOR . **15 W. R. 326**

40. ——— **Decree of Appellate Court**—*Civil Procedure Code, 1859, s. 360. Semble:*

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*h*) COSTS—*concld.*

When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree. MAHOMED BUSSEEROOLLAH CHOWDRY *v.* RAM KANT CHOWDRY . . . . . **16 W. R. 266**

41. ——— *Omission to specify costs—Civil Procedure Code, 1859, s. 360.* S. 360, Act VIII of 1859, only requires the Judge of an Appellate Court to state in his decision by what parties (and in what proportions if necessary) the costs of the original suit, which he must take for granted, are to be paid; but not to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court. MOTHOORA MOHUN ROY *v.* HUREE KISHORE ROY . **18 W. R. 286**

Reversing on review s. c. HUREE KISHORE ROY *v.* MUTHOORA MOHUN ROY . **17 W. R. 445**

42. ——— *Specification of proportionate share of costs—Civil Procedure Code, 1859, s. 360.* Where a decree of the High Court awards costs, the order is not bad in law simply because it does not specify the exact amount to be paid as costs of the lower Court. Such specification is not rendered incumbent by Act VIII of 1859, s. 360, which only requires a Court of appeal to declare the proportions in which the costs are to be paid, where more parties than one are made liable. RAJ KRISHNA SINGH *v.* PRONODA DABEE RAJ COOMAREE . . . . **21 W. R. 74**

43. ——— *Specification of liability for costs.* An Appellate Court finally determining a suit is bound to decide by which of the parties before it the costs shall be borne; it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought. KASHEE CHUNDER DEY *v.* BUNGSHEE BUDDUN DEY . . . . **23 W. R. 89**

(*i*) DAMAGES.

44. ——— **Damages, suit for**—*Plaintiffs with separate interests—Apportionment of damages.* Where plaintiffs with separate interests sue for and obtain damages, the decree should not be a joint one for a lump sum, but should apportion the damages. TRILOKENATH JHA *v.* HUR DUTT KHURHUREE . . . **9 W. R. 299**

45. ——— *Assessment of damages.* A decree for damages must assess them, and not leave them to be ascertained in execution of the decree. MUNEERUN *v.* MUSEEHUN **13 W. R. 139**

(*j*) DECLARATORY SUIT.

46. ——— **Declaratory decree, suit for**—*Suit by one of several brothers for declaratory*

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

DECLARATORY SUIT—*concld.*

decree as to mal land. Where property in dispute was found by the lower Court to be debutter land belonging to plaintiff, one of four brothers of a joint family, and not *mal* land included in defendant's patni: *Held*, that plaintiff was entitled to a declaration that the whole land was *mal* land, and that he was entitled to a fourth share. GUNGA GOBIND SINGH *v.* JOY GOPAL PANDA
10 W. R. 105

47. ——— *Suit for declaration of title and confirmation of possession.* Plaintiff prayed for a declaration of title to, and confirmation of his possession of, 17 bighas which he claimed through *J* and five others. The lower Court found that of these persons, *J* only ever had any interest in the 17 bighas, and gave plaintiff a decree declaring that he had purchased the rights and interests of *J*, whatever they might be. *Held*, that such a decree was bad, as not in any way declaring what interest the plaintiff had in the 17 bighas, or whether he had any right, and that the Court ought to have decided what *J*'s precise rights were which had passed to the plaintiff. RAM PHUL AHIR *v.* BHUGWAN DUTT PAUREY
12 W. R. 326

(*k*) DEED, SUIT TO SET ASIDE.

48. ——— **Suit to set aside deed of sale**—*Legal necessity as to part of consideration-money. Quære*: Where it has been found that, as to a certain portion of the consideration-money of a deed of sale of joint ancestral property, there was a legal necessity, is it a correct principle to uphold the deed as to that portion of the land which bears the same proportion to the whole quantity conveyed, as the money borrowed for the discharge of the legal necessity bore to the whole amount of the consideration-money? RAJARAM TEWARI *v.* LUCHMUN PERSAD
4 B. L. R. A. C. 118 : 12 W. R. 478

49. ——— **Parda-nashin, suit by, to set aside deed**—*Declaration of title.* In a suit by the heirs of a Mahomedan *parda-nashin* lady to set aside a deed of sale executed by her, whilst living apart from her relations, in the house of the purchaser, who had occasionally acted as her mukhtar: *Held*, that, where the substantial relief prayed for is that the deeds should be set aside, the Court is not justified in substituting therefor a mere declaration of the plaintiff's title. THAKOOR DEEN TEWARRY *v.* ALI HOSSEIN KHAN
13 B. L. R. P. C. 427 : 21 W. R. 340
L. R. 1 I. A. 192
s.c. in lower Court . . **8 W. R. 341**

(*l*) EJECTMENT.

50. ——— **Suit for arrears of rent**—*Order in default of payment.* In suits for arrears of rent the decree ought not to direct in what mode execution should issue. SHYAM CHURN CHUCKERBUTTY *v.* HEERACHAND MOZOOMDAR
Marsh. 48 : 1 Hay 113

51. ——— *Decree for ejectment.* A decree for ejectment ought not in a suit for arrears of rent to be passed against the holder of a permanent transferable tenure. SREENIBASH LAEK *v.* PROSUNNO COOMAR MITTER
25 W. R. 218

52. ——— *Cancelment of tenure—Act X of 1859, s. 78.* The decretal order in a suit by a plaintiff, who, having given a lease on a zur-i-peshgi advance to the defendant, has been declared entitled to sue for the balance of rents after giving the defendant credit for the amount of his advance, should after pronouncing the tenure liable on cancelment, go on to say, according to s. 78, Act X of 1859, that it will be cancelled if the arrear be not paid within fifteen days. GIREE DHAREE SAHOO *v.* BUKSUN . . . **1 W. R. 361**

53. ——— *Execution of decree for ejectment for arrears of rent—Extension of time for payment—Bengal Tenancy Act (VIII of 1885), s. 66, cls. 2 and 3. Per* PRINSEP and BANERJEE, *JJ.*—The extension of time authorized by s. 66, cl. 3 of the Bengal Tenancy Act can be granted by the Court after the decree, and not only when framing the decree under cl. 2 of that section. *Per* RAMPINI, *J.* (*contra*). *Per* PRINSEP and BANERJEE, *JJ.*—The decree for ejectment passed under s. 66, cl. 2 of the Bengal Tenancy Act, need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution. *Per* PRINSEP, *J.*—The application for such extension of time may, therefore, be made by the judgment-debtor on a mere petition, and not in the form of an application for review of judgment. BODH NARAIN *v.* MAHOMED MOOSA . **I. L. R. 26 Calc. 639**
3 C. W. N. 628

54. ——— **Decree for unconditional re-entry**—*Farmer—Act X of 1859, ss. 22, 78.* With reference to ss. 22 and 78 of Act X of 1859, a decree for an unconditional re-entry cannot be given against a farmer. BUKSH ALI *v.* RAMTONOO GUN
6 W. R., Act X, 64

(*m*) ENDOWMENT.

55. ——— **Suit to set aside sale of property belonging to religious endowment**—*Re-payment of money.* In a suit to set aside the sale of property belonging to a religious endowment, the Munsif gave the plaintiff a decree in favour of his reversionary rights, declaring that the conveyance should not operate adversely to him to the extent of such portion as was sold to meet pressing

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*m*) ENDOWMENT—*concld.*

debts and necessities of the *muth*. *Held* that such a decree was erroneous, as the transaction of sale was one and indivisible. If the sale was valid, the plaintiff was not entitled to have it set aside to any extent; but if the conveyance was not operative against the plaintiff, it should have been set aside in its entirety, either absolutely or upon condition that the plaintiff should repay such portion of the consideration money as had been rightly advanced. JOY LALL TEWAREE *v.* GOSSAIN BHOOBUN GEER . . **21 W. R. 334**

56. ———— **Charitable trust**—*Scheme for management of account—Matters to be considered in framing scheme.* The plaintiffs sued as persons interested in the maintenance of a religious and charitable institution, and prayed that the defendants, as recipients of the offerings at the idol's shrine, should be made accountable as trustees for the right disposal of the property thus acquired. They also prayed for an account, a receiver, for the removal of the shevaks, the defendants, from their office, and for the settlement of a scheme for future management. The High Court directed the District Judge (i) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (ii) to take an account of the property and of the receipts and disbursements of the temple; (iii) to make the requisite orders for recovering property appropriated by the shevaks; and (iv) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the shevaks and of other persons connected with it. *Held*, that the decree was right, no further direction being necessary, and the first thing to be done being to take an account of the trust property. CHOTALAL LAKHIRAM *v.* MANOHAR GANESH TAMBEKAR **I. L. R. 24 Bom. 50 4 C. W. N. 23**

Affirming the decree of the High Court in MANOHAR GANESH TAMBEKAR *v.* LAKHMIRAM GOVINDRAM . . **I. L. R. 12 Bom. 247**

(*n*) ENHANCEMENT OF RENT.

57. ———— **Enhancement, suit for**—*Enhancement, grounds for—Suit for enhancement on several grounds.* In decreeing enhanced rent, it is necessary to specify distinctly on which of the grounds stated in the plaint enhancement is allowed. GANGA NARAYAN DAS *v.* SARODA MOHUN ROY CHOWDHRY **3 B. L. R. A. C. 230 : 12 W. R. 30**

58. ———— *Act X of 1859, s. 13—Defective decree.* In a suit for a kabuliat at enhanced rates to correspond with the terms of a pottah which had been tendered at some date preceding the suit, where the lower Court decreed the plaintiff's appeal: *Held*, that the decree was

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*n*) ENHANCEMENT OF RENT—*concld.*

defective, inasmuch as it did not declare what the kabuliat was to which the plaintiff was entitled, and that the claim of the plaintiff could not succeed, inasmuch as it demanded a higher rate for a period which had already elapsed when the suit was instituted, a right forbidden by s. 13, Act X of 1859, without giving such notice as therein prescribed, which notice the plaintiff had failed to give in this case. ZINNUT BIBEE *v.* JAFFUR ALI **14 W. R. 172**

59. ———— *Parties, non-joinder of—Suit barred as to added parties.* In a suit for the recovery of rent at an enhanced rate, brought by two of four brothers, joint and undivided owners of the tenure, the other two brothers, on an objection taken by the defendant that they ought to have been parties to the suit, presented a petition signifying their assent to the institution of the suit, and were thereupon treated as parties to the suit. This application was, however, made after the period of limitation prescribed for such a suit had expired. *Held*, by MARKBY, *J.*, that although the rights of such added parties were absolutely barred, yet the Court could proceed to adjudicate upon, and declare the rights of, the remaining plaintiffs who had originally filed the suit, and that, as the claim for rent was indivisible, the decree in their favour should be for the whole amount. BOIDONATH BAG *v.* GRISH CHUNDER ROY . . **I. L. R. 3 Calc. 26**

(*o*) GOODS.

60. ———— **Goods**—*Suit to recover specific goods in hands of third parties—Alternative claim for value as compensation—Specific Relief Act (I of 1877), ss. 10, 11.* In execution of a decree obtained by the defendants against one *M* in the Court of Small Causes, certain goods were attached, to which plaintiff preferred a claim. That claim being disallowed, plaintiff filed, in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for the recovery of the goods or their value as compensation:" *Held*, that, the goods not being in the possession or under the control of the defendants, plaintiff was not entitled to a decree for their recovery in specie; and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants. MURUGESA MUDALI *v.* JOTHARAM DAVAY **I. L. R. 22 Mad. 478**

(*p*) HEIRS.

61. ———— **Heirs, suit against**—*Joint decree.* In a suit against heirs inheriting equally, a

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*p*) HEIRS—*concld.*

joint decree may be passed without determining the liability of each. BROJO MOHUN MOZOOMDAR *v.* ROODRANATH SURMAH . . **15 W. R. 192**

62. ———— Heir of deceased obligor, suit on bond against—*Specification of mode of realization.* A decree in a suit upon a bond, against the heir of the deceased obligor, awarded to the plaintiff the amount of the bond from the property of the obligor, and directed that "the defendant be released from the claim in this suit." An order for execution of the decree was set aside by the Principal Sudder Ameen, on the ground that the decree did not warrant the issue of an attachment, since it was not against any person. *Held*, that the decree was informal in not expressing that the debt was to be realized out of the assets of the deceased in the hands of the heir, or that should come to the hands of the heir, but that the Principal Sudder Ameen had jurisdiction to amend and ought to have amended the decree in this respect. ANUND ROY *v.* MUNORUT SINGH . . **Marsh. 611**

(*q*) HINDU WIDOW.

63. ———— Hindu widow, decree against—*Specification of nature of decree.* In a decree against a Hindu widow it should be stated whether the decree is a personal decree or one against her as representing her deceased husband. RAM KISHORE CHUCKERBUTTY *v.* KALLY KANT CHUCKERBUTTY . **I. L. R. 6 Calc. 479 : 8 C. L. R. 1**

64. ———— Hindu widow, suit against—*Suit by reversioner to set aside sale.* In a suit by a reversioner to set aside a sale of property made by a Hindu widow, the Court cannot direct possession to be given to the reversioner, but can only declare the sale to be invalid, and leave the widow or her vendees as her tenants in possession. GOLUCK CHUNDER DASS *v.* GOPAL KISHEN SEN **W. R. 1864, 250**

(*r*) IDOL.

65. ———— Suit respecting idol whose temple has been destroyed—*Turn of worship*—*Removal and re-conveyance of idol.* In a suit respecting an idol which had been set up by the common ancestor of the parties, but whose temple had been destroyed by the erosion of the river, the plaintiffs asked for a declaration of their right to remove the idol to their own house and to keep it there for the period of their turn of worship. *Held*, that in giving the plaintiffs a declaratory decree the Court should define the precise period for which the plaintiffs were entitled to worship the idol deducting any period for which the defendants had a joint claim, and should also make provision in the decree for the re-conveyance of the idol to the place where it was, at the plaintiff's expense and before the expiration of their turn of worship, so as to allow the other parties the full benefit of their turns. RAM SOONDAR THAKOOR *v.* TARUCK CHUNDER TURKORUTTUN . . . . . **19 W. R. 28**

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*r*) IDOL—*concld.*

(*s*) IMPROVEMENTS.

66. ———— Improvements, value of—*Suit for possession.* In a suit for the recovery of immoveable property inquiries as to the value of improvements must be held before decree, and cannot legally be reserved, with or without the consent of the parties, for determination in the execution department. NELLAYA VARIYATH SILAPANI *v.* VADIKAPAT MANAKAEL ASHTAMURTI NAMBUDRI **I. L. R. 3 Mad. 382**

(*t*) MAHOMEDAN WIDOW.

67. ———— Widow in possession of estate as security for dower—*Suit by heir for possession.* Where a woman is in possession of her husband's estate as security for unpaid dower, the proper decree in a suit against her for possession by the heir is a decree for possession subject to the amount due with a direction for an account as to mesne profits received by her. MAHOMED AMEER-OODEEN KHAN *v.* MOZUFFER HOSSEIN KHAN **5 B. L. R. 570 : 14 W. R. P. C. 5**

(*u*) MAINTENANCE.

68. ———— Suit by Hindu widow for administration—*Maintenance, Right to decree for.* In a suit by a Hindu widow for administration under the will of her deceased husband, the Court will not give a decree for her general right to maintenance. BIZJIE BEBEE *v.* MONOHUR DOSS **2 Ind. Jur. N. S. 118**

69. ———— Suit for recovery of possession of property on which Hindu widow has a claim for maintenance—*Order as to maintenance.* Where the nearest relative of a Hindu widow sued for recovery of property in her possession, and the lower Appellate Court awarded the claim without fixing the amount of maintenance to be given to the widow, the High Court remanded the suit in order that the amount of maintenance might be fixed, notwithstanding that the widow claimed maintenance in that Court for the first time. RAZABAI KOM RANGOJI *v.* SADUBIN BHAVANI **8 Bom. A. C. 98**

70. ———— Decree for contingent arrears of maintenance—*Non-payment of arrears.* A prospective decree for contingent arrears of maintenance is quite irregular. The non-payment of any arrear due would be a fresh cause of action constituting a basis for a suit. JULEBIA CHITTA KOOER *v.* BHAGEE KOER . . **6 N. W. 41**

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*u*) MAINTENANCE—*contd.*

71. ——— Decree declaring right to maintenance, and directing payment of arrears—*Order for future payments.* Where the Civil Court, upon the suit of a Hindu widow for maintenance, makes a decree containing an order in express terms to the defendant to pay to the plaintiff the amount claimed by her for maintenance during a past period, but as to the future merely declares her right to receive maintenance at an annual rate from the defendant, the proper way of enforcing the right thus declared is not by executing the decree, but by bringing a fresh suit. Decrees declaring a right to maintenance and directing payment of arrears should contain an order directing payment of future maintenance. VISHNU SHAMBHOG *v.* MANJAMMA . . . **I. L. R. 9 Bom. 108**

72. ——— Cash allowance—*Decree for future payment of share.* The plaintiff in this suit sought to recover eleven years' arrears of his share in a certain Government allowance received by the defendants, and also prayed for an order directing the defendants to pay him and his heirs his proper share in future. The Court passed a decree for the plaintiff for the amount claimed, and also directed that the defendants should pay to the plaintiff and his heirs for the future his share in the allowance. *Held*, also, that the order in the decree as to payment in future was bad. It could not be executed, as the amount of the allowance was variable, and the defendants were not liable until they obtained payment of the allowance from Government. CHAMANLAL *v.* BAPUBHAI . **I. L. R. 22 Bom. 669**

73. ——— Declaration of mother's right to maintenance where whole estate goes to adopted son—*Suit to establish adoption and recover property.* The High Court, being impressed with the propriety of not allowing the adopted son to recover the whole property from the widow, his adoptive mother, until proper provision had been made for her maintenance, added a declaration to the decree made in his favour that he do take the property awarded to him, subject to the obligation to provide a sufficient maintenance for the widow, and directed that the Court executing the decree should determine what was a proper and sufficient maintenance for the widow, and should secure the same, either by directing an investment of a sufficient part of the estate in trust for that purpose or by such other means as it might deem sufficient. JAMNABAI *v.* RAYCHAND NAHALCHAND **I. L. R. 7 Bom. 225**

74. ——— Suit by heir to recover family property from widow—*Provision for widow.* The Court will not allow the heir to recover family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her. *Jamnabai* v. *Raychand Nahalchand, I. L. R. 7 Bom. 225,* followed. YEILAWA *v.* BHIMANGAVDA . . **I. L. R. 18 Bom. 452**

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*u*) MAINTENANCE—*contd.*

75. ——— Maintenance, mother's right to—*Right to possession in virtue of claim to maintenance—Mortgagee's right to possession, subject to mother's claim to maintenance.* After the death of *S*, who had mortgaged certain land belonging to him, his widow (defendant No. 2) mortgaged it again in consideration of the existing mortgage debt and a further advance. The mortgage was afterwards assigned to the plaintiff, who sued the widow (defendant No. 2) and the mother (defendant No. 1) of *S* for possession. The mother (defendant No. 1) contended that any right the widow (defendant No. 2) had to mortgage the property was subject to her (the first defendant's) right to maintenance out of it, and, as her maintenance, she claimed to remain in possession. The lower Court held that the property should not be given to the plaintiff until a proper arrangement had been made by him for the maintenance of defendant No. 1, but stated that it imposed that condition on the supposition that there was no other family property out of which she could be maintained. *Held*, that the decree was wrong in making the right of the first defendant to remain in possession dependent on there being no other property. Further that, as the mortgagees lent their money with full knowledge of the first defendant's possession in virtue of her claim to maintenance, the first defendant ought not to be compelled to accept from the plaintiff maintenance in some other form. RACHAWA *v.* SHIVAYOGAPPA . . . **I. L. R. 18 Bom. 679**

76. ——— Reduction of maintenance—*Suit for altering the rate of maintenance fixed by a decree.* A suit will lie to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances, such as a permanent deterioration in the value of the family property. But where such deterioration is due to the plaintiff's own default in not keeping the property in a proper state of repair, he has no right to ask for a reduction. *Per* PARSONS, *J.*—Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved. GOPIKABAI *v.* DATTATRAYA **I. L. R. 24 Bom. 386**

77. ——— Decree for maintenance where it is charged on property—*Receiver. Appointment of, in case of default—Transfer of Property Act (IV of 1882), ss. 67, 99, 100.* To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments, a receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same and out of the sale-proceeds to pay the

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*u*) MAINTENANCE—*concld.*

allowance for maintenance. HEMANGINEE DASSEE *v.* KUMODE CHANDER DASS **I. L. R. 26 Calc. 441 3 C. W. N. 139**

78. ——— Maintenance of mother and marriageable daughters—*Provision for maintenance of daughter ceasing on marriage.* A Hindu widow, with her two daughters as co-plaintiffs, sued the son of her deceased husband by another wife, alleging that he was in possession of his father's property, for maintenance and for the marriage expenses of the daughters, both of whom were of marriageable age. The Court of first instance gave the plaintiffs a decree for a monthly allowance and R540 to the widow as arrears of maintenance and R1,000 for the marriage expenses of the daughters. *Held*, that the Court of first instance should have separated the maintenance to which it considered the three plaintiffs respectively entitled, and that, as to the two minor plaintiffs, it should have declared that such maintenance should cease upon their marriage. TULSHA *v.* GOPAL RAI **I. L. R. 6 All. 632**

(*v*) MESNE PROFITS.

79. ——— Mesne profits, conditional decree for. A decree awarding immediate mesne profits at the rate admitted by defendants, and larger mesne profits contingently on a higher rate being proved at the time of execution, is altogether irregular. LOTFOOLLAH *v.* NUSSEEBUN **10 W. R. 24**

80. ——— Mesne profits, decree for, after partition of zamindari. A question of the partibility of a zamindari disputed in a family of six brothers having been decided in favour of three who sued for their shares: *Held*, that the decree should be that the plaintiffs were entitled to recover one-half of the zamindari, together with the mesne profits thereon, from the time of their dispossession; provided that they should recover such mesne profits for a period of no more than three years next before the commencement of the suit, subject to an allowance to the defendants for all or any portion of such mesne profits which the latter might prove to have been duly applied for the benefit of the joint family. APPA RAO *v.* COURT OF WARDS **I. L. R. 5 Mad. 236 L. R. 9 I. A. 125**

(*w*) MORTGAGE.

81. ——— Suit on money-bond—*Charge on land—Specification of property from which money may be realized.* In decreeing a claim founded on a simple money-bond, a Court has no authority to direct the realization of the money out of any named property, and thus make it a charge upon such property. In such a case, if the decree does this, and the property is sold before attachment, the title conveyed by the sale is not affected (as there is no charge upon this property before it is attached) and the decree-holder's remedy lies against the judgment-debtor. OMRITO LALL SIRCAR *v.* RAMDHUN CHAKEE . . **18 W. R. 503**

82. ——— Decree against mortgagor—*Mode of execution.* Where a decree is against the mortgagor generally, coupled with a declaration of the lien, the decree-holder may proceed either against the person and his property or against the mortgaged property, though whether such a course will be allowed in any particular case is a matter for the discretion of the Court executing the decree. LUCHMI DAI KOORI *v.* ASMAN SING **I. L. R. 2 Calc. 213 : 25 W. R. 421**

83. ——— *Money-decree in suit for foreclosure or sale.* A mortgagee sued for foreclosure or sale in the usual form. The suit was undefended. The plaintiff elected to take a simple money-decree against the mortgagor. The following words were appended to the decree: "*Note.*—The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree." After ineffectual attempts to realize his debt, the plaintiff applied to the Court for liberty to sell the mortgaged premises. *Held*, that the Court had a discretionary power to grant or refuse the sale. The note at the end of the decree did not amount to an absolute prohibition against the sale, but was merely meant as a guide to the Court which should have to execute the decree, and to show that execution should not issue against the equity of redemption, except by special leave of the Court. The Court made an order as if there had been a decree for sale in the first instance, except that the account was to be treated as a final account at the date of the decree. NEERUNJUN MUKERJEE *v.* OOPENDRO NARAIN DEB . **10 B. L. R. 57**

84. Foreclosure, suit for—*Mortgage in English form.* Form of decree in a suit for foreclosure or sale in the mofussil, where the mortgage is in the English form, and all parties concerned are English. MANLY *v.* PATTERSON **I. L. R. 7 Calc. 394**

85. ——— Suit by purchaser at sale in execution of decree on mortgage against assignee of mortgagor. Form of decree discussed where a person who at a sale in execution of a mortgage-decree has purchased a portion of the mortgaged property brings a suit for that portion against the assignee in possession as a mortgagor. BEPIN BEHARI BUNDOPADHYA *v.* BROJO NATH MOOKHOPADHYA . . **I. L. R. 8 Calc. 357**

86. ——— Suit by mortgagee against the mogtgagor and purchasers of the mortgaged property. In execution of a decree, the right, title and interest in two parcels of property

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*w*) MORTGAGE—*contd.*

of a judgment-debtor, who had previous to the attachment executed a simple mortgage thereof to *A*, was sold; and *B* and *C* respectively purchased them at different prices. *A* sued the mortgagor and the purchasers *B* and *C* for enforcing his lien on the two parcels of property. The suit was dismissed by the first Court, but on appeal the order was "appeal decreed." *A* entered into a compromise with *B*, and entered satisfaction of a moiety of the decree. He afterwards issued execution of the other moiety against *C*, and compelled him to pay. *C* now sued *B* for recovery of the proportion of the amount paid by him to *A*, but which, according to the valuation of the respective properties, should have fallen into the share of *B*. *Held*, that the proper decree in the suit of *A* against the mortgagor and *B* and *C* would have been a money-decree against the mortgagor only, with a declaration that the two properties were liable to be sold, clear of subsequent incumbrances, in satisfaction of the mortgage-bond debt. BHAIRAB CHANDRA MADAK *v.* NADYAR CHAND PAL

3 B. L. R. A. C. 357 : 12 W. R. 291

87. ——— **Suit for declaration of right to redeem**—*Decree for redemption. Quære:* Whether the Court can pass a decree for redemption when the plaint seeks only a declaration of the right to redeem. PERUMAL *v.* KAVERI

I. L. R. 16 Mad. 121

88. ——— **Redemption, suit for**—*Sub-mortgage—Accounts taken between mortgagee and sub-mortgagee.* In a suit for the redemption of land which has been sub-mortgaged by the mortgagee, in which suit the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of the sub-mortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee, both shall reconvey to the mortgagor. NARAYAN VITHAL MAVAL *v.* GANOJI

I. L. R. 15 Bom. 692

89. ——— *Rights and liabilities of prior and subsequent mortgagees—Suit by second mortgagee—Right of redemption.* *S* mortgaged a house and site to *R* on the 4th January 1870, and on the 21st February 1870 he (*S*) mortgaged the same property to *D*. On the 3rd January 1874 *R* brought a suit against *S* on the mortgage and obtained a decree, which directed the satisfaction of the mortgage-debt by the sale of the mortgaged property. *R* did not make *D* a party to that suit. The property was sold by the Court and purchased by *N* in his own name, but as trustee for *R*. At the Court sale, *D*, the puisne mortgagee, gave notice of his claim to *R* and *N*. *D* sued *N*, *R*, and *S* for the amount due on his mortgage. In his evidence *R* admitted that he, subsequently to the sale to *N*, pulled down the house and sold portion of the materials. The lower Courts dismissed the suit, holding that *N* (defendant No. 1), the purchaser at the auction sale, was not liable for the plaintiff's claim. On appeal to the High Court: *Held*, that *D*, being puisne mortgagee and as such representing the equity of redemption to the extent of his mortgage, should have had an opportunity of redeeming the mortgaged premises from *R*'s mortgage, and should have been made a party to *R*'s suit. He could not be deprived of his right by proceedings to which he was not a party, and was, therefore, entitled to a decree framed on the basis of such right of redemption. DAMODAR DEVCHAND *v.* NARO MAHADEV . . . **I. L. R. 7 Bom. 11**

90. ——— *First and second mortgages—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Transfer of Property Act (IV of 1882), s. 85—Notice.* Certain immoveable property was mortgaged in 1865 to *H*, in 1871 to *G*, and in 1873 again to *H*. In 1883 the property was purchased by *M*, the representative of *G*, in execution of a decree obtained in 1877 by *G* in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885 *M* sued the representatives of *H* for redemption of the mortgage of 1865. One of the defendants pleaded that, as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court. *Held*, with reference to the terms of s. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence, and should, therefore, have made him a party; and that, under the circumstances, he should be placed in the same position as he would have held if the decree of 1877 had never been passed. *Held*, also, that although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet the defendant having pleaded that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*w*) MORTGAGE—*contd.*

a matter, where the defendant had the undoubted right now asserted by him, and where the result of not recognizing such right would be to extinguish his security. The Court, therefore, passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree for redemption on payment of the amount due on the mortgage of 1865 would stand. MUHAMMAD SAMIUDDIN *v.* MAN SINGH
I. L. R. 9 All. 125

91. ——— *Unnecessary declaration—Costs.* A mortgagee holding two mortgages of the same property sold, under the second mortgage, to the plaintiff, and subsequently under the first mortgage to his son, benami for himself. *Held*, in a suit against the mortgagee and the benamidars, that the plaintiff was entitled to set aside this second sale and to redeem, but that the mortgagor not being a party, the Court was wrong in introducing into the decree a declaration to the effect that the plaintiff was entitled "as second mortgagee," and had not acquired the equity of redemption belonging to the mortgagor. Such a declaration should in appeal be struck out as embarrassing to the plaintiff's title at the expense of the respondent who resisted. CHOORAMUN SINGH *v.* MAHOMED ALI . . **L. R. 9 I. A. 21**

92. ——— *Condition in decree.* In a suit for redemption of a mortgage: *Held* with reference to the last paragraph of s. 51 of the Transfer of Property Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut. DEO DAT *v.* RAM AUTAR . **I. L. R. 8 All. 502**

93. ——— *Redemption of usufructuary mortgage—Conditional decree for possession.* In a suit to recover possession of certain lands founded on the allegation that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees, and that the mortgage debt had been satisfied from the usufruct of the lands, the lower Court, although it found that the mortgage-debt had not been satisfied as alleged, gave the plaintiffs a decree for possession conditional on the payment of the balance of the mortgage-debt. *Held*, that, inasmuch as the defendants never rendered any accounts, and inasmuch as no agreement had been made between the parties as to the amount at which the profits of the land should be estimated, it was impossible for the plaintiffs to have ascertained before suit what sum, if any, was due by them, and seeing that, whether such decree was altered or not, the plaintiffs might immediately pay the balance of the mortgage-debt and demand possession, it was unnecessary to interfere with such decree. ZADAH *v.* PARMESHAR DAS
I. L. R. 1 All. 524

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*w*) MORTGAGE—*contd.*

94. ——— *Conditional decree for redemption.* A conditional decree fixing a period for payment of money found to be due on mortgage-bonds entitling the mortgagor to redemption, though not claimable as of right by the mortgagor, who ordinarily should be ready at once with his money, is a proper and judicious order passed by an Appellate Court, where the Court of first instance determined the amount payable under the mortgage, but failed to fix any time in its decree for the payment of such amount. BARDA KANT RAI *v.* BHAGWAN DAS . . . . **I. L. R. 1 All. 344**

95. ——— *Decree for redemption allowed in suit for ejectment—Discretion of Court.* A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. *Nilakant Banerjee* v. *Suresh Chunder Mullick, I. L. R. 12 Calc. 414 : L. R. 12 I. A. 171*, referred to and followed. PARSHOTAM BHAISHANKAR *v.* RUMAL ZUNJAR
I. L. R. 20 Bom. 196

96. ——— *Suit for sale of mortgaged property without redeeming prior mortgage—Transfer of Property Act (IV of 1882), s. 96.* In a suit on a mortgage by a subsequent mortgagee who made prior mortgagees parties thereto, and in which the plaintiff prayed that the amount due to him might be realized by sale of the mortgaged property, the lower Court decreed the suit, but required the plaintiff, before bringing the property to sale, to redeem certain prior mortgages. *Held*, on appeal, that although, on the authority of the case of *Kantiram* v. *Kutubuddin Mahomed, I. L. R. 22 Calc. 33*, the plaintiff would be entitled to a decree giving him leave to sell the property subject to the prior incumbrances, yet, having regard to the difficulty and complication that would arise under such decree by reason of the fact that one of the defendants, who had purchased the equity of redemption and certain prior mortgages, had obtained upon two of them decrees against the plaintiff, the decree passed by the lower Court was equitable and proper. BENI MADHUB MOHAPATRA *v.* SOURENDRA MOHUN TAGORE
I. L. R. 23 Calc. 795

97. ——— **Unregistered Mortgage—** *Mortgage (sued on) inadmissible in evidence for want of registration—Secondary evidence—Mortgage effecting consolidation of prior mortgages—Decree to redeem prior mortgages.* In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered, it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively. *Held*, that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid. ARUMUGAM PILLAI *v.* PERIASAMI . . **I. L. R. 19 Mad. 160**

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*w*) MORTGAGE—*contd.*

See KRISHNA PALLAI *v.* RANGASAMI PILLAI **I. L. R. 18 Mad. 462**

98. ——— **Money decree**—*Mortgage being invalid, whether a money decree can be made upon the covenant in the bond.* When a suit is brought upon a mortgage-bond, although the mortgage is held to be invalid on the ground that the requirements of s. 59 of the Transfer of Property Act were not satisfied, the plaintiff is entitled to recover upon the covenant money which the defendant covenanted to pay. TOFALUDDI PEADA *v.* MAHARALI SHAHA . . . **I. L. R. 26 Calc. 78**

99. ——— **Interest**—*Transfer of Property Act (IV of 1882), ss. 86, 88—Decree for sale—Provision for interest at contract rate until six months from date of decree.* Defendants promised to pay plaintiffs a sum of money for value received, with interest thereon from the date of the promise until demand at the rate of 8 per cent. per annum, and after demand at the rate of 15 per cent. per annum until payment in full, and as further security for such re-payment deposited with plaintiffs the title-deeds of certain immoveable property. Demand was made, but was not complied with, whereupon plaintiffs informed defendants by letter that their account carried interest at the higher rate provided for in the promissory note. Plaintiffs now sued for the amount due in respect of principal and interest at the rate of 15 per cent. per annum from the date of their letter till payment, and asked that, in default of payment on a day to be fixed by the Court, the property might be sold. A decree having been passed in plaintiffs' favour, provision was made therein ordering defendants to pay the amount of principal and interest due at the date of the decree, with interest thereon at the rate of 15 per cent. per annum from that date to a date six months thereafter. Objection having been taken to the form of this decree on the ground that payment of interest at the contract rate was only provided for up to the termination of six months from the date of decree, instead of till payment: *Held*, that the decree was correctly drawn. In principle there is no difference between a mortgage decree which has become absolute and ordinary decree for money. After the day fixed for payment, or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than in the other. *Rameswar Koer* v. *Syed Nawab Mehdi Hossein Khan, L. R. 25 I. A. 179 : I. L. R. 26 Calc. 39*, and *Bakar Sajjad* v. *Udit Narain Singh, I. L. R. 21 All. 361*, referred to. COMMERCIAL BANK OF INDIA *v.* ATEENDRULAYYA . . . **I. L. R. 23 Mad. 637**

100. ——— **Usufructuary mortgage**—*Transfer of Property Act (IV of 1882), ss. 1, 67, 86-89—Usufructuary mortgage, dated 20th April 1882, sued on in 1884.* In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgage property. *Held* (*semble* under the Transfer of Property Act) that the decree for sale was the right decree. VENKATASAMI *v.* SUBRAMANYA **I. L. R. 11 Mad. 88**

101. ——— **Construction of mortgage-bond**—*Liability of property other than that mortgaged.* Under a mortgage-bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor. *Held*, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties. *Narotam Dass* v. *Sheopargash Singh, I. L. R. 10 Calc. 740*, referred to. BUNSEEDHUR *v.* SUJAAT ALI **I. L. R. 16 Calc. 540**

102. ——— **Second mortgagee**—*First and second mortgages—Suit by second mortgagee for sale—Plaint denying or ignoring title of first mortgagee.* Where a second mortgagee, coming into Court and denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee. *Roghunath Prasad* v. *Jurawan Rai, I. L. R. 8 All. 105*, referred to. SALIG RAM *v.* HAR CHARAN LAL **I. L. R. 12 All. 548**

103. ——— *Suit by second mortgagee against purchaser of equity of redemption who had paid off a prior mortgage—Suit ignoring lien of purchaser of equity of redemption.* One *A S* purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagees under the second mortgage sued to bring the mortgage property to sale, making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. *Held*, that such omission was not a valid reason for dismissing the plaintiff's suit altogether. *Salig Ram* v. *Haracharan Lal, I. L. R. 12 All. 448*, distinguished. KALI CHARAN *v.* AHMAD SHAH KHAN **I. L. R. 17 All. 48**

104. ——— *Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage.* Where, in a suit to bring certain immoveable property to sale under a mortgage, it was found that the predecessor in interest of one of the defendants

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*w*) MORTGAGE—*contd.*

had advanced money upon a mortgage of the same immoveable property in order to save a portion thereof from sale under two prior mortgages : *Held*, that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs ; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance ; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged. TULSA *v.* KHUB CHAND **I. L. R. 18 All. 581**

105. ——— *Purchaser of mortgaged property paying off prior incumbrances —Suit by puisne mortgagee without offer to redeem prior mortgage.* The purchaser of a portion of certain mortgaged property paid off certain prior mortgages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given an opportunity of redeeming the defendant's prior mortgages. *Salig Ram* v. *Har Charan Lal, I. L. R. 12 All. 548*, distinguished. *Kali Charan* v. *Ahmad Shah Khan, I. L. R. 17 All. 48*, followed. MUHAMMAD NIAMAT ALI KHAN *v.* GHAFFAR MUHAMMAD KHAN **I. L. R. 21 All. 272**

106. ——— **Suit by puisne incumbrancer**—*Decree for sale.* In March 1881, *A* purchased certain land, and in the same month mortgaged it to *B*. In June, the land was attached in execution of a decree. In August, *A* discharged the judgment-debt with money borrowed from *C*, and he hypothecated the land to him to secure repayment of the loan. In 1882, *B* brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him : *C* was not a party to this suit. In 1886, *B* sold the land to *D* under an instrument, which recited that out of the purchase-money R760 were retained by the purchaser for payment of prior incumbrances, and the finding was that the purchaser undertook to pay the debt owing to *C*. *C* now sued *A* and *D* to enforce his hypothecation. *Held*, that *C* was entitled to a decree for sale. NARAYANASAMI NAIDU *v.* NARAYANA RAU **I. L. R. 17 Mad. 62**

107. ——— **Suit on mortgage for an account and for sale**—*Practice—Decree where puisne mortgagee is a party defendant and asks for an account on the footing of his mortgage—Application to vary decree.* In a suit on a mortgage, for an account and for sale of the mortgaged property, where a puisne mortgagee who is made a defendant appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount found due to him out of the sale-proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage, to make a decree directing an account on the footing of each of the mortgages, and fixing one period of redemption for all the defendants. *Auhindro Bhoosun Chatterjee* v. *Chunnoo Lall Johurry, I. L. R. 5 Calc. 101*, referred to. An application made by the purchaser of the equity of redemption, who had been made a defendant in such a suit and had been served with a summons, but had failed to appear, that the decree which had been made in accordance with the above practice should be varied by limiting it to a decree in favour of the plaintiff alone, on the ground that the Court had no jurisdiction in such a suit to make a decree between co-defendants, was dismissed. KISSORY MOHUN ROY *v.* KALLY CHURN GHOSE . **I. L. R. 22 Calc. 100**

108. ——— **Sub-mortgagee**—*Mortgage by mortgagee of his rights as such, but without assignment—Rights of sub-mortgagee as against original mortgagee.* *R* and others mortgaged certain immoveable property to *N K*. *N K* made a sub-mortgage to *C L* purporting to mortgage to him his rights as mortgagee, but without assigning his mortgage to *C L*. Upon this title *C L* sued for sale of the property mortgaged by *R* and others to *N K*. *Held* that *C L* was not entitled to bring the property mortgaged to *N K* to sale, but at most to obtain a decree for money against *N K*, in execution of which he might possibly have attached, if it had not been paid off, the mortgage held by *N K*. GANGA PRASAD *v.* CHUNNI LAL . **I. L. R. 18 All. 113**

109. ——— *Transfer of Property Act (IV of 1882) s. 86—Suit by sub-mortgagee—Decree for sale.* A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. MUTHU VIJIA RAGHUNATHA RAMCHANDRA VACHA MAHALI THURAI *v.* VENKATACHELLAM CHETTI **I. L. R. 20 Mad. 35**

110. ——— **Prior and subsequent incumbrancers**—*Right of subsequent mortgagee to redeem prior mortgage—Manner in which subsequent mortgagee's right of redemption is effected by partial destruction of the prior mortgage—Transfer of Property Act (IV of 1882), s. 74.* One *M R* was a co-mortgagee under mortgages of the years 1867, 1868, and 1870, of a village called Ahak and shares in certain other villages, Surajpur, Raipur, Bamoti,

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*w*) MORTGAGE—*contd.*[1]

and Khera Buzurg. *K D*, the plaintiff, was the representative of a subsequent mortgagee of the share in Khera Buzurg. *K D* in 1874 brought the share comprised in his mortgage to sale, and purchased it himself; but without making *M R* or his representatives parties to his suit for sale. Subsequently, in 1879, *M R* sued for a decree for sale of all the property mentioned above, but the decree which he obtained was limited to the village Ahak and the share in Khera Buzurg. *K D* was not made a party to this suit. In 1882, one *M M A* purchased the share in Surajpur, which had been subject to the mortgage sued upon by *M R* in 1879, but had been exempted from the decree obtained by *M R* in 1879. In 1892 *K D* sued for redemption of *M R*'s prior mortgage of 1867 and for a declaration of his right upon such redemption to bring to sale the property comprised in the mortgage. *Held*, that, inasmuch as *M R*'s interest in the mortgaged property had been limited by the decree of 1879 to the village of Ahak and the share in Khera Buzurg, the plaintiff was not entitled to a decree for the sale of the share purchased by *M M A* in Surajpur. MUHAMMAD MAHMUD ALI *v.* KALYAN DAS . **I. L. R. 18 All. 189**

111. ——— *Decree on first mortgage, a puisne not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Right of puisne mortgagee—Interest.* *A* mortgaged land to *B* and then to *C*. *B* sued on his mortgage, and obtained a decree for sale without joining as defendant *C*, of whose mortgage he had notice; *D*, the son of the decree-holder, became the purchaser in execution and improved the land at a considerable cost. *C* now sued the sons and representatives of *A* and *B* (both deceased) on his mortgage, and sought a decree for sale. *Held*, that (i) the plaintiff was entitled to a decree for sale subject to the right of the representatives of *B*, if the purchaser did not elect to redeem; (ii) that the purchaser was not entitled to allowances for improvements; (iii) that the plaintiff was entitled to interest at the agreed rate to the date of decree. RANGAYYA CHETTIAR *v.* PARTHASARATHI NAICKAR **I. L. R. 20 Mad. 120**

112. ——— **Gujarat Talukhdars Act (Bombay Act VI of 1888), ss. 31 and 32** *—Mortgage of talukhdari estate—Validity of mortgage before the Act—Decree upon the mortgage for sale of talukhdari estate—Sanction of Government to sale.* A talukhdar of the Ahmedabad district mortgaged his talukhdari property in 1886. In 1892, the mortgagee sued to enforce his lien by sale of the mortgaged property. The Court passed a decree against the talukhdar personally, holding that it had no power under ss. 31 and 32 of the Gujarat Talukhdars Act to direct a sale of the talukhdari estate. *Held*, reversing the decree, that the mortgage, having been effected prior to the coming into force of the Gujarat Talukhdars Act, was not invalidated by cl. 1 of s. 31 of the Act, and that the Court was bound to pass a decree for sale in default of payment of the mortgage-debt. *Quære:* Whether the property could be sold without the sanction of the Governor in Council, regard being had to the provisions of cl. 2 of s. 31 of the Act. *Nagar Pragi* v. *Jivabai, I. L. R. 19 Bom. 80*, doubted. DOSHI FULCHAND *v.* MALEK DAJIRAJ **I. L. R. 20 Bom. 565**

113. ——— **Mistake in decree**—*Right of suit—Suit to rectify mistake in mortgage decree.* A suit lies in a Civil Court to rectify a mistake in a decree. The present plaintiff's predecessor, who was a defendant in a previous mortgage suit, claimed a certain property which was described in the plaint in that suit as property No. 4, but which was by mistake stated in the written statement as property No. 3. The property, which was released, was stated in the judgment and the decree in that suit as property No. 3. The plaintiff brought the present suit to rectify the mistake. *Held*, that the suit was maintainable. JOGESWAR ATHA *v.* GANGA BISHNU GHATTACK (1904) . **8 C. W. N. 473**

(*x*) NON-SUIT.

114. ——— **Suit dismissed as brought with liberty to bring a fresh suit**—*Civil Procedure Code, s. 373.* Where a suit for enforcement of hypothecation against immoveable property was dismissed "in the form in which it was brought," and "with permission to bring a fresh suit" on the ground that the plaintiff, by purchasing a part, had put it out of his power to sue for relief against the whole of the hypothecated property: *Held*, that the decree being in effect one of non-suit, which no Court in India had power to make, and not being made under s. 373 of the Civil Procedure Code, and the plaint not having been returned or rejected under Ch. V of the Code, the decision must be set aside. *Watson* v. *Collector of Rajshahye, 13 B. L. R. P. C. 48: 13 Moo. I. A. 160*, and *Kudrat* v. *Dinu, I. L. R. 9 All. 155*, referred to. BANWARI DAS *v.* MUHAMMAD MASHIAT **I. L. R. 9 All. 690**

(*y*) PAPERS AND ACCOUNTS, SUITS FOR.

115. ——— **Suit for delivery of papers** *—Specific decree.* In decreeing a suit for the delivering up of certain nekasi papers, it is not sufficient for the Court to order that the claim be allowed. The decree ought to contain a specific order upon the defendant to deliver up the papers. RAM COOMAR SIRCAR *v.* KALEE COOMAR DUTT . **10 W. R. 279**

116. ——— **Suit to recover accounts and papers**—*Inquiry in execution.* In a suit to recover accounts and papers, instead of giving plaintiff a decree with a direction that it should be ascertained in execution what accounts and papers,

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*y*) PAPERS AND ACCOUNTS, SUITS FOR—*concld.*

if any, were in the hands of the defendant, the lower Appellate Court ought to have remanded the case to the first Court with instructions to frame a new issue to try what papers and accounts, if any, were in the hands of the defendant, and whether he had wrongfully refused or omitted to deliver them to plaintiff, and, if so, decide the case accordingly. JUGGER NATH PANEE *v.* CHUTTUR NARAIN DEB . . . . . **17 W. R. 410**

(*z*) PARTITION.

117. ——— **Partition, suit for**—*Objection to list of moveable property.* Objection was taken to the accuracy of a list of moveable property of which the plaintiff claimed partition. The lower Appellate Court, without determining whether the list was correct or not, gave the plaintiff a decree for the whole of the articles mentioned in the list, declaring that particular excuses with regard to individual articles might fitly be determined in execution of decree. The lower Appellate Court was bound to have ascertained whether any, and, if any, which of the articles were liable to partition before it pronounced a decree. SHEO GOBIND *v.* SHAM NARAIN SINGH . . . **7 N. W. 75**

118. ——— *Decree for moveables in suit for partition of land.* Where the claim in a suit was for the partition of certain immoveable property, and for the profits of the property, and defendant in his account took credit for a sum expended in certain jewels, etc., it was held that the things so purchased, being charged against the plaintiff, belonged to the plaintiff, and a decree declaring his right to obtain them might be supported, although the claim did not refer to moveables. BULDEO SEHAI *v.* CHADEE LALL **2 N. W. 95**

119. ——— *Suit for possession by partition of nij-jote land and for mesne profits.* Where a suit for possession by partition of kamut (nij-jote) lands and for wasilat is decreed, it is the duty of the Judge, in drawing up the final decree after the Ameen's report, to state the boundaries of the shares of the parties, the interest of each share, and the exact amount due as wasilat. CHOWDRY IMDAD ALI *v.* BOONYAD ALI **14 W. R. 92**

120. ——— *Death of one of sharers pending appeal—Alteration of decree on appeal—Death of a co-parcener pendente lite.* The plaintiff obtained a decree in a partition suit in the Subordinate Judge's Court for his share in certain joint family property in the possession of the defendants (his co-parceners). The decree was affirmed on appeal. The defendants filed a second appeal in the High Court; but, before it was decided one of the defendants died. The plaintiff at the hearing of the second appeal claimed a larger share in the family property than he had been awarded by the decree of the Courts below. *Held*, that he (plaintiff) was entitled to a share in that of the co-parcener who died *pendente lite*, and that the decree appealed from ought to be varied accordingly. SAKHARAM MAHADEV DANGE *v.* HARI KRISHNA DANGE . . . . **I. L. R. 6 Bom. 113**

121. ——— *Deshgat vatan held by desai.* Where the defendant in a suit for the partition of a deshgat vatan held the hereditary office of desai, and the vatan was property appertaining to the office, the decree for partition was accompanied by a declaration that it was made without prejudice to the right of the desai to any income, payable out of it for the performance of his duties, to which he might be entitled under any law in force. ADRISHAPPA *v.* GURUSHIDAPPA . . . . **I. L. R. 4 Bom. 494**

122. ——— *Suit for partition by a purchaser from a co-sharer—Decree in such suit need not be for a general partition of the entire estate.* When a purchaser from a co-sharer in a joint family estate sues to have his share severed and given to him, the Court is not bound to force the members of the family into a partition of the whole estate. It is, no doubt, open for each and every co-sharer to ask to have his share divided off and allotted to him (in which case he would have to pay court-fees according to his share). But, in the absence of such a request, the Court is not bound to determine what is the share of each of the co-sharers, and to compel him to take that share by making a general partition. In such a case the High Court refused, in second appeal, to accede to the prayer of some of the co-sharers, who had not appeared in the Court of first instance, to have their shares divided off and allotted to them. MURARRAO *v.* SITARAM **I. L. R. 23 Bom. 184**

See ABDU KADAR *v.* BAPUBHAI **I. L. R. 23 Bom. 188**

123. ——— *Provisional decree in suit for partition—Right of appeal.* In a suit for partition of family property, a decree was passed declaring the share to which the plaintiff and some of the defendants were entitled in the family property, but reserving all other questions involved in the suit. *Held*, that the decree was a provisional decree and was subject to appeal, but that it was irregular in form in that it should have contained declarations as to all the rights and liabilities which had been adjudicated on, and directions as to the accounts and enquiries remaining to be taken and made. KRISHNASAMI AYYANGAR *v.* RAJAGOPALA AYYANGAR . . . **I. L. R. 18 Mad. 73**

124. ——— *Talukhdari estate—Decree of Privy Council.* In a suit commenced in 1865 by a member of a joint family for the declaration of his rights in a talukhdari estate, partition

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*z*) PARTITION—*concld.*

not being claimed, the order of Her Majesty in Council (1879) directed that the talukhdar should cause and allow the villages forming the talukhdari estate and the proceeds thereof to be managed and applied according to the trust declared in favour of the family. The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, s. 56 ; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukhdari. The latter alleged, among other defences, that the talukhdari estate was impartible, and brought a cross-suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits. *Held*, that, in regard to the order of Her Majesty above mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukhdari estate could not be declared to be impartible ; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under-proprietor under the talukhdar, could not be allowed to stand. PIRTHI PAL *v.* JOWAHIR SINGH **I. L. R. 14 Calc. 493 L. R. 14 I. A. 37**

See SHANKAR BAKSH *v.* HARDEO BAKSH **I. L. R. 16 Calc. 397 L. R. 16 I. A. 71**

(*aa*) PARTNERSHIP.

125. ——— Suit for dissolution of partnership. In a suit of the nature of one for dissolution of partnership, it is incorrect to make an absolute decree for a specific sum of outstanding balances without anything to guide the Court in fixing that amount. No amount ought to be decreed without satisfactory proof of its having been realized and misappropriated. MUN MOHINEE DASSEE *v.* ICHAMOYE DASSEE . **15 W. R. 352**

(*bb*) POSSESSION.

126. ——— Possession, suit for—*Declaration of proprietary right.* In a suit for recovery of possession of land, it was declared that the plaintiff was entitled to possession as owner, and ordered that the defendants should deliver to him possession as such. *Held*, on appeal, that the decree should have simply declared that the plaintiff was entitled to possession without any declaration of right as owner. RADHAKRISHNA SETT *v.* HARAKRISHNA DAS . . . . **1 B. L. R. O. C. 1**

127. ——— *Co-sharers—Intervenors added as parties.* In a suit to recover possession of a certain mouzah, claimed by the plaintiff as a portion of his dar-patni talukh, which was brought against several defendants, four other persons applied to be made defendants, on the ground that they were co-sharers with the defendants, on the record in the property in dispute. The application was granted ; the added defendants were found to be possessed of the share which they claimed ; and on the proofs which they adduced, the plaintiff's claim was dismissed. The plaintiff's claim as against the original defendants, who made no opposition, was decreed in special appeal, on the ground that they should not have been made defendants, and that the plaintiff was not bound to prove his case against anybody else but the person against whom he had brought the suit. *Held*, that, upon the one issue common to all the defendants, *viz.*, whether the property claimed was in the plaintiff's talukh or in that of the defendants, the Court could only come to one consistent finding ; and that on the finding of the facts in the Court below the suit should be dismissed against all the defendants. KALIPRASAD SINGH *v.* JAINARAYAN ROY . **3 B. L. R. A. C. 24 : 11 W. R. 361**

128. ——— *Suit by tenant for possession of julkurs—Expiry of lease before decree.* Where a plaintiff sued, while his lease was still running, to recover possession of certain julkurs, and the lease expired after action brought, but before decree : *Held*, that the decree, instead of directing actual possession to be given, should have merely declared his right to possession up to the date on which his lease expired. UMANUND ROY *v.* SREEKISHEN BANERJEE . . . **7 W. R. 248**

129. ——— Decree in suit for possession after void sale for arrears of revenue—*Act XI of 1859, s. 34.* Where the original owner sues to recover possession when a sale for arrears of revenue is found to be null and void, and obtains a decree, the decree is sufficient for the purposes of s. 34, Act XI of 1859, without any special declaration that the sale is annulled : and the order for refund of the purchase-money should be made in execution of the decree. SREEMUNT LALL GHOSE *v.* SHAMA SOONDUREE DOSSEE . **12 W. R. 276**

130. ——— Suit for possession of share where co-sharer is not collusion with other defendants. In a suit to recover possession of a specified share of land, the plaintiff charged the defendant No. 1, who was jointly interested with him in the land, with being in collusion with the other defendant, and complained that they had ousted him from his share, and asked for partition of the land and possession of his share. It having been found that the plaintiff was entitled to a small portion only of the share he claimed : *Held*, that he was not entitled in this suit to have a partition at all, but that, as his co-sharer was in collusion with the other defendant, the plaintiff was entitled to relief, by a decree awarding him joint possession

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*bb*) POSSESSION—*contd.*

with defendant No. 1 of the portion to which they were entitled. RUSTUM ALLY *v.* AMEER ALLY SOUDAGUR . . . . . **10 W. R. 487**

131. ——— Suit for possession under purchase which turns out to be tainted with fraud on the part of one vendor. Where a plaintiff sued for recovery of possession of property which he said he purchased from two defendants, and it was found as a fact that one of the defendants did not sell, but that the other used fraud in effecting the sale: *Held*, that the decision below which gave plaintiff a decree for the entire property against the defendant who acted fraudulently was erroneous, and that the decree should have absolved from liability the share of the defendant who did not join in or know anything of the sale. KALEEDASS MOZOOMDAR *v.* MEHEROONISSA KHATOON **8 W. R. 482**

132. ——— Suit by purchaser to have sale in execution of decree confirmed and for possession—*Right to possession.* After a sale in execution of decree, the sale was set aside. In a suit to have the order set aside to have the sale confirmed and for possession of the property, the lower Court having made a decree awarding possession of the property, as well as a declaration of right to have the sale confirmed, the High Court set aside so much of that decree as awarded possession of the property. SANGAM RAM *v.* SHEOBART BHAGAT **I. L. R. 3 All. 112**

133. ——— Suit by purchaser for possession of share of ancestral estate. In a suit for possession of lands under purchase of a share in an ancestral estate, the Judge, in pronouncing a decree for the plaintiff, ought to declare specifically whether the plaintiff is entitled to recover the share in an undivided estate, or specific lands as representing that share. RAMLOCHAN DAS *v.* MANSUR ALI . **1 B. L. R. A. C. 65 : 10 W. R. 96**

134. ——— Purchaser from one of several divided co-sharers—*Suit for joint possession—Partition when unnecessary.* The property in dispute (consisting of 12 thikans or plots of land) was originally held by *A* and *B* as tenants-in-common, and they divided the income according to their respective shares. After *A*'s death, his widow adopted *C* on condition that she was to remain in absolute possession and enjoyment for her life, and that *C* was to succeed to the estate after her death. The widow mortgaged 9 out of the 12 thikans, sold one, and granted a perpetual lease of another to the defendant. The defendant also purchased *B*'s share in the thikans in dispute. The plaintiff purchased *C*'s rights, and on the widow's death sued to set aside her alienations and to obtain joint possession with the defendant of all the thikans. The defendant pleaded, *inter alia*, that the widow's alienations were valid and binding on the plaintiff, and that the plaintiff's remedy was

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*bb*) POSSESSION—*contd.*

a partition suit. *Held*, that the plaintiff was entitled to be put into joint possession with the defendant. Both were outside strangers who had purchased the several shares of the separated owners of the thikans in dispute. A partition suit was not, therefore, necessary. ANTAJI *v.* DATTAJI **I. L. R. 19 Bom. 36**

135. ——— Suit by purchaser of share in undivided property—*Right to possession.* A purchaser at a Court-sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only. KALLAPA *v.* VENKATESH VINAYAK **I. L. R. 2 Bom. 676**

136. ——— *Sale in execution of decree of joint family property—Right of purchaser—Suit to cancel sale.* *G*, the brother of the plaintiff, executed a mortgage to the defendant during the plaintiff's minority. The deed recited that the money was borrowed to pay off a family debt, and to defray family expenses. The defendant sued *G* on the mortgage, and obtained a decree. A house, which was part of the family property, was sold in execution, and was purchased by the defendant himself. The plaintiff sued to have the sale set aside and to recover his half share in the house. *Held*, that the plaintiff was entitled to be put into possession of the whole house, the defendant being left to his remedy by a suit for partition. The plaintiff, however, having claimed only the restoration of his half share, the decree was limited accordingly. *Held*, also, that it was not competent for the Court in this suit to go into the question whether the mortgage by *G* was binding on the minor plaintiff. MARUTI NARAYAN *v.* LILACHAND . . **I. L. R. 6 Bom. 564**

137. ——— Suit by purchaser for share of undivided property—*Sale of joint family property in execution of decree.* A judgment-creditor attached in execution and caused to be sold the judgment-debtor's alleged one-twelfth share as a member of an undivided Hindu family, in seven parcels of land of which the applicant was in possession as manager. At the sale *Y* became the purchaser; and subsequently, and without having himself entered into possession, *Y* assigned his interest in the purchase to *G*. *G* claimed to be put into possession, and obtained a Court's order, directing that possession should be given to him. The applicant, however, obstructed the execution of the said order, and applied to the High Court to declare *G* not entitled to the possession he sought. No division of the property in question, by metes or bounds or otherwise, between the members of the undivided family had ever been made, nor had the judgment-debtor ever had separate occupancy of any definite share of the same. *Held*, that *G*'s proper remedy was by a suit for partition, and that he could not claim to be put into joint possession

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*bb*) POSSESSION—*contd.*

with the applicant and the other members of the undivided Hindu family, of the family property. BALAJI ANANT RAJADIKSHA *v.* GANESH JANARDAN KAMATI . . . **I. L. R. 5 Bom. 499**

(*Contra*) INDRASA *v.* SADU **I. L. R. 5 Bom. 505 note**

138. ——— Suit to set aside sale in execution of decree on a mortgage to secure two debts—*One debt only binding on tarwad—Declaration of right to possession.* In a suit by members of a Malabar tarwad to set aside a sale in execution of a decree, passed on a mortgage which had been executed by their karnavan and senior anandravans in consolidation of two prior mortgages executed, respectively, to secure two debts, it appeared that one of these debts was binding and the other not binding on the tarwad. *Held,* that the Court should declare the plaintiffs entitled to the property sold notwithstanding the sale, but subject to the charge created to secure the binding debt. KUNHI MANNAN *v.* CHALI VADUVATH **I. L. R. 14 Mad. 494**

139. ——— Suit for possession of family property alienated for unjustifiable purposes—*Alienation by life-tenant.* *A* and *B* sued *D* and *E* for the estate of a relative, *C*, the deceased husband of *D*, on the ground that the family to which *A*, *B*, and *C* belonged was undivided. *D* (who was a Hindu widow without surviving issue) and *E* pleaded division, and that *D* had sold and assigned the estate to *E*. This alienation was not shown to have been made for purposes recognized by Hindu law. *Held,* that the District Munsif, in disallowing the plaintiff's claim to immediate possession, should not have provided for the re-assignment of the estate from *E* to *D* for *D*'s life, but that he was right in declaring that after *D*'s death the property should revert to the plaintiffs as heirs of *C*. PERIYA GAUNDAN *v.* TIRUMALA GAUNDAN . . . **1 Mad. 206**

140. ——— Suit by member of undivided family against manager—*Decree on partition.* A member of an undivided family brought a suit for partition against his father, the managing member, and eight others, of whom the second, third, and fourth defendants were plaintiff's infant brothers, and obtained a decree. The Judge proceeded to ascertain the amount of the plaintiff's share in the following manner. He assessed what he considered to be the sum received by the first defendant from the estate, deducted from that sum what he considered should have been the gross expenditure of the defendant, and decreed delivery by the defendant of one-fifth of the remainder. *Held,* that such a decree was erroneous. TARA CHAND *v.* REEB RAM . . . . **3 Mad. 177**

141. ——— Suit by son to set aside sale by father of ancestral property—*Right of purchaser.* Where ancestral property is sold by the father, the son is entitled to sue for cancelment of such sale, and the decree should not be that the property is ancestral and will pass to the father's heirs on his death, but a decree cancelling the sale so far as it obstructs him in asserting his right and in effect declaring the sale to be invalid, without interfering with actual possession, that may have been obtained by the purchaser. BABOO RAM *v.* GAJADHUR SINGH **Agra F. B. 86 : Ed. 1874, 65**

142. ——— Suit by member of undivided Hindu family for declaration of his right to a portion of the joint estate sold in execution of decree against another member. In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate which had been sold by the Civil Court in execution of a decree against his co-parcener alone : *Held,* that the plaintiff should have a decree declaring that he was entitled to joint possession along with the execution purchaser as tenant in common. But that, if a division in specie were desired, a suit should be brought for that purpose, *Mahabalay* v. *Timaya, 12 Bom. Rep. 138,* followed. BABAJI LAKSHMAN *v.* VASUDEB VINAYAK **I. L. R. 1 Bom. 95**

143. ——— Suit by member of joint undivided Hindu family to recover possession of property alienated by another member—*Position of purchaser from one member of family.* *A* obtained a decree in a suit against *B*, and executed it by the sale of certain plots of land which *B* alleged belonged to him—*A* himself becoming the purchaser thereof. *A* entered into possession of the plots of land under his purchase, and remained in possession thereof for a considerable time. As a matter of fact, the plots of land belonged—part absolutely and part as to mortgagees in possession—not to *B* solely, but jointly to him and his father *C* and others, the members of an undivided Hindu family. A suit having been brought by *C* to recover possession of the said plots of land from *A* and for mesne profits, and for payment over of a sum of R800 paid to *A* by the mortgagor of the mortgaged property in redemption of his mortgage: *Held,* that *A* was entitled to stand in *B*'s place and to retain possession in respect of *B*'s share in the said land, but no further ; and that he held the mesne profits and the said sum of R800 as trustee for the other members of the said undivided family to the extent of their shares in the family property. DUGAPPA SHETI *v.* VENKATRAMNAYA **I. L. R. 5 Bom. 493**

See, also, KRISHNAJI LAKSHMAN RAJVADE *v.* SITARAM MURARRAV JAKHI **I. L. R. 5 Bom. 496**

144. ——— Suit by co-sharers for recovery of possession—*Sale in execution of decree of share of one co-sharer in undivided property.* *K* and *R*, two out of five undivided Hindu brothers, sued *V* (a purchaser at an execution-sale of

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*bb*) POSSESSION—*contd.*

the interest of one of the brothers, other than *K* and *R*) for the recovery of certain land of which *V* had obtained possession under s. 269 of Act VIII of 1859. The lower Courts awarded two-fifths of the land to *K* and *R* as being the amount of their share in the land. *Held*, by the High Court, that the decree could not be maintained, as *K* and *R*, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or for a decree declaring them entitled to joint possession with *V*. KALLAPA BIN GIRMALLAPA *v.* VENKATESH VINAYAK **I. L. R. 2 Bom. 676**

145. ——— Suit for ejectment of trespassers—*Co-sharers.* Where a tenant has been put into possession of ijmali property with the consent of all the co-sharers, no one or more of the co-sharers can turn the tenant out without the consent of the others; but no person has a right to intrude upon ijmali property against the will of the co-sharers or any of them; if he does so, he may be ejected without notice, either altogether, if all the co-sharers join in the suit, or partially, if only some wish to eject him; and the legal means by which such a partial ejectment is effected is by giving the plaintiffs possession of their shares jointly with the intruder, as explained in the case of *Hulodhur Sen* v. *Gooroodoss Roy, 20 W. R. 126.* RADHA PROSHAD WASTI *v.* ESUF **I. L. R. 7 Calc. 414 : 9 C. L. R. 76**

KAMAL KUMARI CHOWDHURANI *v.* KIRAN CHANDRA ROY . . . . **2 C. W. N. 229**

146. ——— Suit on agreement making sharers severally liable—*Decree causing joint liability.* If a plaintiff sues upon an ikrar, he is not entitled to a decree contrary to its terms. Thus, if the ikrar makes each of several sharers severally liable, all the co-sharers cannot be made jointly liable. MIRZA NAWAB *v.* BAHADOOR ALI. SHAM LAL *v.* BAHADOOR ALI . . **7 W. R. 156**

147. ——— Joint ownership—*Decree against joint owner where suit is barred against his co-sharers—Limitation.* The interest of *V* as co-sharer in certain land was sold in execution of a decree against him. It was purchased by *S*, who sold it to the plaintiff. The plaintiff sued for possession, and the other co-sharers were made party defendants to the suit, which, however, was held, as against them, to be barred by limitation. *Held*, that the plaintiff was entitled to be put into joint possession of the land with them, although the suit as against them was barred. KRISHNAJI BIN MALJI *v.* VITHU . . **I. L. R. 18 Bom. 505**

148. ——— Co-parcener's right to joint possession of the whole or any part of the joint estate without necessity for partition—*Joint Hindu family.* A co-parcener in a joint Hindu family is entitled to claim joint possession of a portion, and need not sue for a partition. Where it appeared that the parties to the suit each held parcels of the undivided family property in exclusive possession, and the plaintiff asked for joint possession with the defendants: *Held*, that he was entitled to a decree for joint possession. A co-parcener is entitled to a joint benefit in every part of the undivided estate. RAMCHANDRA KASHI PATKAR *v.* DAMODHAR TRIMBAK PATKAR . **I. L. R. 20 Bom. 467**

149. ——— Suit for possession by owners of adjoining estates.—*Right of parties to equal moieties of property decreed, although each had claimed the exclusive title—Decrees dismissing their suits reversed, the evidence being sufficient as to the former, but not the latter right.* In cross-suits between the owners of adjoining estates, each claimed, against the other, to be entitled to, and to be put into possession of, property situate on the boundary between their estates. The High Court dismissed both claims on the ground that the evidence of the exclusive right of either party was insufficient. *Held*, that, although this might be so, there was, nevertheless, sufficient evidence of possession having been held by both the one and the other, and of the title of both, to support the conclusion that each had a claim to an equal moiety, to which each should be declared entitled. Each should be put into possession of the moiety which was opposite to and adjoined his estate. KHAGENDRA NARAIN CHOWDRY *v.* MATANGINI DEBI **I. L. R. 17 Calc. 814 L. R. 17 I. A. 62**

150. ——— Suit for exclusive possession of property—*Finding that parties have equal right to possession—Decree for joint possession.* Where the plaintiff claimed exclusive possession of immoveable property to which the defendant also claimed to be exclusively entitled: *Held*, that the Court was competent, upon the finding that the property belonged to the parties jointly, to give the plaintiff a decree for joint possession. *Waliullah Khan* v. *Muhammad Israrullah Khan, I. L. R. 10 All. 627*, distinguished. WAHID ALAM *v.* SAFAT ALAM **I. L. R. 12 All. 556**

151. ——— Suit for exclusive possession—*Decree for joint possession, circumstances under which such decree will be granted.* Although under certain circumstances in a suit for exclusive possession of immoveable property a decree for joint possession may be given, nevertheless such a decree should not be given unless the plaintiff asks for it, and the evidence shows that he is entitled to it. ANTU SINGH *v.* MANDIL SINGH **I. L. R. 15 All. 412**

152. ——— *Joint ownership proved at hearing—Procedure.* Exclusive possession can only be awarded on proof of exclusive title. PARASHRAM *v.* MIRAJI . **I. L. R. 10 Bom. 569**

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*bb*) POSSESSION—*contd.*

153. ——— *Suit by co-owner for exclusive possession—Procedure.* The plaintiff sued for possession of certain land. The lower Court held that the land was the joint property of the plaintiff and defendant, but, finding that the plaintiff had been in exclusive possession, allowed his claim and gave him a decree. On second appeal: *Held*, that exclusive possession could not be awarded unless exclusive title was proved. On plaintiff's application, which was not opposed by the defendant, the decree of the lower Court was varied, and the plaintiff was awarded joint possession of the property in suit. NANA *v.* APPA
I. L. R. 20 Bom. 627

154. ——— **Suit for possession of land sold in execution as property of third parties.** The plaintiffs sued in 1893 to recover possession of land of which their family had been in possession till 1884. The land had been sold to the defendant in 1881 in execution of a decree against the plaintiffs' cousins, but the sale had not been confirmed. A decree was passed as prayed in respect of a moiety of the land which represented the plaintiffs' share. *Held*, that the decree was right. NARASIMHA NAIDU *v.* RAMASAMI
I. L. R. 18 Mad. 478

155. ——— **Suit by zur-i-peshgi lessee for possession in a Civil Court**—*Landlord and tenant—Zur-i-peshgi lease—Sub-lease by zur-i-peshgi lessee—Default by sub-lessee, who lets into possession the original lessor and denies the zur-i-peshgi lessee's title—Jurisdiction of Civil Court—Execution of decree—Civil Procedure Code, ss. 263 and 264.* Two occupancy tenants granted a zur-i-peshgi lease of their occupancy holding to one *R L* for a term of sixteen years. *R L* sublet the holding for a term slightly less than his own. The sub-lessees made default in payment of rent. *R L* distrained their crops. Thereupon the original lessors intervened, claiming the crops as theirs. The question of the distraint having been decided by the Court of revenue against him, *R L* then brought a suit in a Civil Court asking for ejectment of both his lessors and his lessees and to be put into actual possession himself. *Held*, that the plaintiff was precluded by reason of the lease granted by him, the term of which had not expired from obtaining actual possession, unless the sub-lessees were ejected, which could only be done through the Court of revenue. But the plaintiff was entitled to a decree declaring his title as zur-i-peshgi lessee and putting him into possession of the rents and profits of the holding as zur-i-peshgi lessee; the decree for possession to be executed under s. 264 of the Code of Civil Procedure. SITA RAM *v.* RAM LAL
I. L. R. 18 All. 440

156. ——— **Decree for possession under mokurari lease**—*Condition as to payment of rent.* After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a mokurari lease, as an incumbrance under s. 54, upon the share in the hands of the purchaser. The mokurari lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid. *Held*, that this condition should have been omitted, the amount of rent being determinable by a future proceeding if necessary. IMAMBANDI BEGUM *v.* KAMLESWARI PERSHAD
I. L. R. 14 Calc. 109
L. R. 13 I. A. 160

157. ——— **Suit for possession and mesne profits**—*Direction for inquiry as to mesne profits—Civil Procedure Code, s. 212.* Where, under s. 212 of the Code of Civil Procedure, a Court in a suit for possession of immoveable property and mesne profits passes a decree for the property and directs an inquiry into the amount of mesne profits, the direction as to the inquiry into the amount of mesne profits need not necessarily be contained in the decree. *Puran Chand* v. *Roy Radha Kishen, I. L. R. 19 Calc. 132*, referred to. FATIMA BIBI *v.* ABDUL MAJID . . **I. L. R. 14 All. 531**

(*cc*) PRE-EMPTION.

158. ——— **Pre-emption, suit for**—*Decree, conditional, on payment in specified time.* In decreeing a right of pre-emption a Civil Court has no power to make the decree-holder's right depend on payment of the purchase-money within a specified time. AHSAN ALY *v.* SABOKHEE BIBEE
10 W. R. 53

(*Contra*) EWAZ *v.* MOKUNA BIBI
I. L. R. 1 All. 132

where it was held the Court was competent to make such a condition, and that, if the decree-holder fails to comply with such condition, he loses the benefit of the decree.

159. ——— *Rival suits to enforce the right of pre-emption—Civil Procedure Code, s. 214.* *K* and *R*, two co-sharers of a village instituted separate suits in which each claimed to enforce the right of pre-emption, based on the wajib-ul-urz, in respect of the same sale of a share in a village, to a stranger. The Court of first instance made the plaintiff in one suit a defendant in the other. The suits were tried together, and *R* being held to have a better right under the terms of the wajib-ul-urz than *K*, his suit was decreed, contingent upon payment by him of the purchase-money within one month from the date of the decree. *K's* suit was dismissed absolutely. *Held*, that decrees in cases where two rival pre-emptors of the same decree seek to enforce pre-emption, as each necessarily must do, in respect of the whole property conveyed by one transfer, are defective if they

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DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*cc*) PRE-EMPTION—*contd.*

dismiss the suit for any proportion of the property without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him. *A fortiori*, where the rival decree-holders possess different degrees of pre-emption, the decree, in at least one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right. The question what should be the form of the decree in such cases can be dealt with only by exercising the vast and fixible jurisdiction possessed by the Courts of equity in adapting their decrees to the exigencies of each case, so as to grant the actual relief required by the parties. *Held*, applying the principles of equity to the present case, that the Court of first instance acted rightly in adding the name of each rival pre-emptor as party defendant in the suit of the other, and in decreeing the claim of the superior pre-emptor, but that the decree in *K*'s suit was defective and inequitable, inasmuch as it dismissed the suit *in toto*, disallowing his pre-emptive claim wholly irrespective of the contingency of *R*'s omission to enforce the pre-emption decreed to him by depositing the purchase-money within time. As *K* admittedly had pre-emptive right as against the vendee, his suit should have been decreed against the latter in the terms of s. 214 of the Civil Procedure Code ; subject, however, to the condition that the decree should not take effect, so far as the enforcement of pre-emption was concerned, in the event of *R*'s enforcing the superior pre-emptive right decreed to him. KASHI NATH *v.* MUKHTA PRASAD

I. L. R. 6 All. 370

See HULASI *v.* SHEO PROSAD

I. L. R. 6 All. 455

160. ——— Deposit of purchase-money—*Power of Court.* A pre-emptor obtained a decree which provided a certain time within which the sum ascertained to be the purchase-money was to be deposited. He appealed against the amount fixed, but failed in his appeal, and during his appeal the time fixed for the deposit expired, and the Judge refused to fix any further time. *Held*, that the plaintiff, in appealing from the original decree, could not escape from the obligation which it imposed, and the lower Appellate Court was not bound by law to insert in its decree any special direction concerning such deposit, unless occasion called for it, although it was competent to have done so. SHEO PERSHAD LALL *v.* THAKOOR RAI

3 Agra 254 : s. c. Agra F. B. Ed. 1874, 153

161. ——— *Deposit of purchase-money—Appellate Court, Powers of—Civil Procedure Code, 1877, s. 214.* The decree of the Court of first instance, in a suit to enforce a right of pre-emption, directed that the sum which that Court had ascertained to be the purchase-money should be

DECREE—*contd.*

1. FORM OF DECREE—*contd.*

(*cc*) PRE-EMPTION—*concld.*

deposited within one month from the date of the decree. The plaintiff appealed, contending that such sum was not the purchase-money. While the appeal was pending, the time fixed by the decree of the Court of first instance expired without any deposit having been made. The Appellate Court dismissed the appeal, fixing by its decree, of its own motion, a further time for the deposit. *Held*, following *Sheo Pershad Lall* v. *Thakoor Rai, 3 Agra 254*, that the Appellate Court was competent to extend the time for making the deposit, and its action and order did not contravene the provisions of s. 214 of Act X of 1877. PARSHADI LAL *v.* RAM DIAL . . . . **I. L. R. 2 All. 744**

162. ——— Conditional decree. Where a share in a certain patti was sold by the holder of the share to a stranger, and three persons, holding equal shares in the patti, were equally entitled under the village administration paper to the right of pre-emption of the share, the decree of the High Court in the suit specified a time within which each party to the suit should pay into Court a proportion of the purchase-money and declared that, if either failed to pay such proportion within time, the other of them making the further deposit within time should be entitled to the share of the defaulter. MAHABIR PARSHAD *v.* DEBI DIAL

I. L. R. 1 All. 291

163. ——— *Allegation by plaintiff that a certain sum is the actual price—Omission to allege readiness and willingness to pay actual price—Discretionary power of Court to grant decree.* The Court of first instance dismissed a suit to enforce a right of pre-emption, although it found that the plaintiff had such right, on the ground that the actual price of the property was a larger amount than the amount which the plaintiff alleged it in his plaint to be, and the plaintiff had not in his plaint expressed his readiness and willingness to pay any amount which the Court might find to be the actual price. On appeal by the plaintiff, the lower Appellate Court gave him a decree conditional on the payment of such larger amount within a fixed time. *Held*, that it was not necessary to interfere with the exercise of the lower Appellate Court's discretion in the matter, particularly as the defendant had not objected to such exercise in his memorandum of second appeal. *Durga Prasad* v. *Nawazish Ali, I. L. R. 1 All. 591*, distinguished. NAUBATH SINGH *v.* KISHAN SINGH

I. L. R. 3 All. 753

(*dd*) TRESPASSER.

164. ——— *Trespasser, suit against—Decree for damages and not for account.* A trespasser is not liable to account, but is liable for damages. Where the lower Appellate Court passed a preliminary decree for an account against

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DECREE—*contd.*

1. FORM OF DECREE—*concld.*

(*dd*) TRESPASSER—*concld.*

the defendants who were trespassers by reason of their intermeddling with the plaintiff's estate: *Held*, that the defendants were not liable to account, but were liable for damages, and the proper course for the lower Court was to enquire what damages the plaintiff had sustained by reason of the trespasses complained of by the plaintiff. SRINIBASH ADAK *v.* NOGENDRA NATH DAS **4 C. W. N. 105**

2. CONSTRUCTION OF DECREE.

(*a*) GENERAL CASES.

1. ——— **Mode of construction**—*Execution of decree.* In execution, a decree must be construed by its own terms, and not by the plaint. NUBO KISHORE MOJOOMDAR *v.* ANUND MOHUN MOJOOMDAR . . . . . **17 W. R. 19**

2. ——— *Decree how construed for purposes of execution.* A decree cannot be extended in execution beyond the real meaning of its terms. BUDAN *v.* RAMCHANDRA BHUNJGAYA **I. L. R. 11 Bom. 537**

3. ——— **Uncertainty in decree**—*Execution of decree—Power of Court to take evidence to explain it.* Where the terms of a decree are uncertain, it is not competent to the Court of execution to make any enquiries, by taking oral or documentary evidence, to ascertain the meaning of such terms. NUDDYAR CHAND SHAHA *v.* GOBIND CHUNDER GUHA . . . . **I. L. R. 10 Calc. 1092**

See DWARKANATH HALDAR *v.* KAMALA KANTH HALDAR . **3 B. L. R. Ap. 128 : 12 W. R. 99** and KALEE DEBEE *v.* MUDOO SOODUN CHOWDHRY **16 W. R. 171**

4. ——— **Ambiguous decree**—*Reference to pleadings in the suit to ascertain meaning of the decree.* Where a decree is in its terms ambiguous, it is competent to the Court executing it to refer to the pleadings in the suit in which such decree was passed to ascertain its precise meaning. *Muhammad Sulaiman* v. *Muhammad Yar, I. L. R. 6 All. 30*, distinguished. *Jawahir Mal* v. *Kistur Chand, I. L. R. 13 All. 343*, and *Robinson* v. *Duleep Singh, L. R. 11 Ch. D. 798*, referred to. LACHMI NARAIN *v.* JWALA NATH . . **I. L. R. 18 All. 344**

5. ——— In construing a decree, the terms of which are ambiguous, such construction must, if possible, be adopted as will make the decree a decree in accordance with law, and not a decree such as the Court making it had no power to pass. AMOLAK RAM *v.* LACHMI NARAIN **I. L. R. 19 All. 174**

6. ——— *Duties of executing Court—Transfer of Property Act (IV of 1882), s. 88—Decree for sale on a mortgage wrongly allowing interest after date fixed for payment.* Where a decree for sale under the Transfer of Property Act as

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*a*) GENERAL CASES—*contd.*

framed is ambiguous, the Court executing it must put its own construction on it, and, if possible, will construe it as a decree properly framed according to law; but where there is no ambiguity in the decree, the executing Court is bound to execute it according to its terms, whether the decree be right or wrong. *Amolak Ram* v. *Lachmi Narain, I. L. R. 19 All. 174*, and *Badshah Begum* v. *Hardai, All. W. N. (1898) 17*, referred to. PIRBHU NARAIN SINGH *v.* RUP SINGH . **I. L. R. 20. All. 397**

7. ——— A Court executing a decree, the terms of which are ambiguous, should, where it is possible, put such a construction upon the decree as would make it in accordance with law. *Amolak Ram* v. *Lachmi Narain, I. L. R. 19 All. 174, Pirbu Narain Singh* v. *Rup Singh, I. L. R. 20 All. 397*, and *Maharaja of Bhartpur* v. *Kanno Dei, All. W. N. (1898) 164, quoad hoc*, approved. BAKAR SAJJAD *v.* UDIT NARAIN SINGH . . . . **I. L. R. 21 All. 361**

8. ——— *Ambiguous decree—Recital to decree—Judgment.* Where a case was "decreed with costs and damages," the decree not indicating what damages were to be paid or who were the persons made liable, the first Court was held to have dealt reasonably in construing it with the recital which preceded those words, and a portion of the judgment which was set out in the decree. CHUNDER MOHUN THAKOOR *v.* AMRITO CHUNDER THAKOOR . . . **19 W. R. 343**

9. ——— **Difference between heading and body of decree**—*Description of person.* Where a person was described in the heading as the purchaser of the decree-holder's right and interests, but the ordering portion of the decree gave him nothing, he was held to have acquired no right under the decree. ZOYNUL ADBEEN *v.* PHOOLASH CHUNDER BOTHRAH . . **15 W. R. 126**

10. ——— **Decree making further enquiry necessary**—*Court executing decree.* Where a decree shows clearly the intention of the Court which makes it, but leaves something undetermined until further enquiry, such enquiry must be held as intended to be made by the Court to which the decree is sent to be carried into effect. HURUCK CHAND GOLECHA *v.* TILOCK CHAND SINGH . . . . . **18 W. R. 512**

11. ——— **Evidence to explain decree**—*Registrar's note of judgment.* A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the usual way, the Court refused to allow the respondent to show, by reference to such a note, that what the decree meant was that he was to be credited, and his partners

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*a*) GENERAL CASES—*contd.*

debited, with certain payments *in toto*, and not with their respective shares only. SUMAR AHMED *v.* HAJI ISMAIL HAJI HABIB . **I. L. R. 1 Bom. 158**

12. ——— **Discrepancy between decree and judgment**—*Limitation of, by judgment.* Where a decree of the Sudder Court was in general terms, *viz.*, "that the appeal be decreed with costs," though the judgment indicated a different intention : *Held*, that the decree ought not to have been used to obtain execution for the whole of the claim, but restricted to that which it was the manifest intention of the Court to grant. MEHDEE BEY *v.* ZELLAL THAKOOR . . **15 W. R. 530**

13. ——— **Decree of Appellate Court reversing summary order.** The reversal of a decree by an Appellate Court implies an order setting aside all that has been done under orders contradictory of the final order in the suit ; but where a summary order, made in the course of execution-proceedings, has been set aside in a separate suit brought for that purpose, it cannot be necessarily implied that the intention of the Court was to cancel everything that had been done in the course of the summary proceedings. TOYBOON *v.* MAHOMED WAJID . . . . . **2 C. L. R. 504**

14. ——— **Statement of claim in the decree of Appeal Court not a part of decree**—*Civil Procedure Code (Act XIV of 1882), ss. 579 and 587—Practice.* On a second appeal, the High Court decreed the plaintiff's claim with costs throughout ; but the claim, as stated in the paper book of appeal, differed from the claim as it had been stated in the plaint. *Held*, that the decree was to be understood as referring to the claim as stated in the plaint, and not as described in the paper book. Ss. 579 and 587 of the Civil Procedure Code (Act XIV of 1882) do not require the claim to be stated in the decree, so as to make such statement a part of the decree itself. SOUDE SHRINIVASAPA *v.* KRISHNAPA HEGDE . **I. L. R. 11 Bom. 177**

15. ——— **Decree specifying a certain time for execution**—*Construction—Condition—Precedent—Limitation.* The plaintiff obtained a decree on the 26th July 1882, which directed that he should give the defendant possession of certain parcels of land at the end of next Margashirsha (*i.e.*, 9th January 1883), and that, on his doing so, the defendant should remove certain hedges and sheds, and restore the land in suit to the plaintiff. On the 9th December 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree. *Held*, that the application was not time-barred. The specification of the end of Margashirsha had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution. The mention of a term when a particular right is to become enforceable is not a condition precedent, whether the enforcement be otherwise subject to a condition or not. NARAYAN CHITKO JUVEKAR *v.* VITHUL PARSHOTAM **I. L. R. 12 Bom. 23**

16. ——— **Construction in execution of an order in Council**—*Possession.* An order of Her Majesty in Council was that a decree-holder should recover what was demarcated by "the thakbust map and proceedings of 1839." *Held*, on the construction of the order, that the latter words meant the proceedings relating to the thakbust map, and did not include a survey map which differed from it. RADHA PERSHAD SINGH *v.* TORAB ALI . . **I. L. R. 18 Calc. 108**

17. ——— **Adjustment**—*Agreement discharging one of several defendants on adjustment must be certified.* Where, after a decree is passed against several defendants, the decree-holder enters into an agreement with some of the defendants, by which the latter are discharged from liability under the decree, such agreement is an adjustment in part, of the decree and must be certified to the Court under s. 258 of the Civil Procedure Code. MAHOMED KHAN BAHADUR *v.* MAHOMED MUNAWAR SAHIB (1908) . . **I. L. R. 31 Mad. 467**

18. ——— *Agreement discharging one of several defendants on adjustment must be certified.* Where after a decree is passed against several defendants, the decree-holder enters into an agreement with some of the defendants, by which the latter are discharged from liability under the decree, such agreement is an adjustment in part of the decree and must be certified to the Court under s. 258 of the Civil Procedure Code. MAHOMED KHAN BAHADUR *v.* MAHOMED MUNAWAR SAHIB (1908) . . . . **I. L. R. 31 Mad. 467**

19. ——— **Decree for delivery of possession of immoveable property**—*Obstruction to delivery by the third party in good faith—His remedy.* S. 331 of the Civil Procedure Code contemplates an application by the decree-holder ; and a third party resisting the delivery of possession of property to a decree-holder cannot apply for the investigation of his claim under this section, but may do so under s. 332 of the Code, after he has been dispossessed. SUKHAN SINGH *v.* BAIJ NATH GOENKA (1907) . . . **12 C. W. N. 115**

20. ——— **Interpleader suit**—*Decree—Order—Appeal—Held*, that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under s. 540 of the Code of Civil Procedure, and not under s. 588 of the Code. MAHARAJ SINGH *v.* CHITTAR MAL (1907) . . . **I. L. R. 30 All. 22**

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*a*) GENERAL CASES—*concld.*

21. ——— Decree in appeal—*Appeal by some of the parties to a decree—Execution—Civil Procedure Code (Act XIV of 1882), ss. 234, 244, 252—Limitation Act (XV of 1877), Sch. II, Art. 179.* Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties. SHIVRAM *v.* SAKHARAM (1908)
I. L. R. 33 Bom. 39

(*b*) ACCOUNT, DECREE FOR.

22. ——— Decree for account, nature of—*Rights of parties insufficiently defined—Parties.* A decree for an account is not a mere direction to enquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights only, leaving it to be enquired into how much is due to him from the party accounting. A decree for an account of dealings and transactions of a deceased partner in a Hindu family bank and for a dissolution of the partnership was in this case reversed on the ground that the respective rights of the parties were not sufficiently defined and declared, and that the proper parties were not before the Court. JANOKEY DOSS *v.* BINDABUN DOSS . . **3 Moo. I. A. 175**

23. ——— Decree for account—*Amendment of clerical error in decree by Appellate Court.* The decree of the Court of first instance directed the commissioner to take an account of the moneys paid by the plaintiff, during the period between 24th January 1865 and the date of the filing of the plaint, for the use and at the request of the defendants, and to allow credit to the defendants for the sums for which the plaintiff had given credit in his particulars of demand, and for all other sums for which the defendants should prove themselves entitled to credit, wherever the same might have become payable. The defendants, in their surcharge to the plaintiff's account, claimed credit for various payments made by them to the plaintiff between 25th January 1865 and 5th July 1865. The plaintiff claimed to appropriate these payments in satisfaction of his claim against the defendants prior to 24th January 1865. The commissioner by his construction of the terms of the decree held the plaintiff entitled to make such appropriation. The Judge in the Court of first instance explained his decree to mean that the whole account, prior to 24th January 1865, was wiped out, and directed the commissioner that the plaintiff was not entitled to make the appropriation he claimed. *Held*, that the construction put by the commissioner on the decree was right. Where the Court of first instance puts upon its own decree a construction which to the Appellate Court appears to render the decree erroneous, and the decree, on the face of it, admits of another construction, which to the Appellate Court appears to render the decree correct, the Appellate Court will adopt the latter construction. HIRJI JINA *v.* NARAN MULJI
I. L. R. 1 Bom. 1

(*c*) BUILDINGS, ERECTION OR REMOVAL OF.

24. ——— Suit for removal of obstruction—*Decree for plaintiff qualified by declaring that parties retain rights exercised prior to obstruction.* In a suit for the removal of a building which the defendants had erected, and which was an obstruction to the plaintiff's right to use a courtyard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the mohulla had from time immemorial exercised a right of way over it to and from their houses. It also appeared that on a part of the same land there had formerly stood a thatched building used as a "sitting place" by the residents of the mohulla. The lower Appellate Court, while decreeing the claim, observed that the defendants, if they liked, could construct and use a shed "according to the old state of things" and "without offering obstruction to" the right of the plaintiffs to "use it as a sitting place when necessary." *Held*, that this was not a declaration of a right in the defendants to build, but merely a statement that the decree would not operate as an interference with the rights of the parties to have a similar thatched building set up as had existed in former times. *Official Trustee of Bengal* v. *Krishna Chunder Mozoomdar, I. L. R. 12 Calc. 239 ; L. R. 12 I. A. 166*, distinguished. FATEHYAB KHAN *v.* MUHAMMAD YUSUFF. MUHAMMAD YSUFF *v.* FATEHYAB KHAN
I. L. R. 9 All. 434

25. ——— Execution—*Court—Joint decrees—Execution of and liability under—Application by one joint decree-holder for execution—Protection of interest of absent decree-holder—Notice—Civil Procedure Code (Act XIV of 1882), ss. 231, 260—Injunction.* It is not obligatory upon the Court to issue a notice before making an order for execution under s. 231 of the Civil Procedure Code on the application of one of several joint decree-holders. Where, in a contested suit, a decree was made granting a perpetual injunction restraining a party from erecting a *pucca* building on a parcel of land and he in defiance of it erected a *pucca* building thereon : *Held*, that it was competent to the Court to make an order of attachment under s. 260 of the Civil Procedure Code against the judgment-debtor without previous service of notice upon him calling upon him to comply with the order contained in the decree. Whether notice should be issued before an order, under s. 231 or s. 260 of the Civil Procedure Code, is made must be left to be determined by the Court in consideration of the circumstances of each case.

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*c*) BUILDINGS, ERECTION OR REMOVAL OF—*concld.*

Protap Chunder Dass v. *Peary Chowdhrain, I. L. R. 8 Calc. 174*, explained : *Held*, also, that the Lower Court had rightly allowed the decree-holder to execute the decree by attachment, although he had applied for the demolition of the building. *Saka Lal* v. *Bai Parvati Bai, I. L. R. 26 Bom. 283*, referred to. *Per* MOOKERJEE, *J.*—When a judgment-debtor who has had an opportunity of obeying an injunction, has wilfully failed to obey it, he is in substance guilty of a contempt of Court, and in such an event, the judgment may be enforced by imprisonment or attachment, but it is not necessary to give the judgment-debtor an opportunity to clear or purge his contempt. The practice to be followed in cases under s. 260 of the Civil Procedure Code discussed. DURGA DAS NANDI *v.* DEWRAJ AGARWALA (1905) . . **I. L. R. 33 Calc. 306**

(*d*) CONSENT DECREE.

26. ———— *Breach of contract by decree-holder.* By a consent decree on a mortgage it was provided that, if the decree-holder received a fixed sum by a fixed date, the whole amount of the decretal money should be considered as satisfied, and the unpaid balance remitted. It was further provided that, if the judgment-debtors from time to time sold or leased the plots of mortgaged property, which were numerous and not contiguous, the decree-holder should within thirty days of receiving particulars appraise the same, and, if he approved the transaction and received the price, execute a deed of consent. *Held*, that it was a breach of contract by the decree-holder to refuse to appraise until the whole of the money was procured and an appraisement could be made of all the properties together. By so doing he rendered it impossible for the judgment-debtors to find the fixed sum by the fixed date, and accordingly could only recover that sum without interest, being in the same position as if he had refused a tender thereof. HARENDRA LAL ROY CHOWDHRY *v.* MAHARANI DASI (1901) . . **I. L. R. 28 Calc. 557**
s. c. 5 C. W. N. 536
L. R. 28 I. A. 89

(*e*) COSTS.

27. ———— **Decree for costs.** A decree which ordered the defendants, speaking of them collectively, to be paid their costs by the plaintiff, held to mean that each defendant who appeared in the suit as a separate party was to be paid his separate costs, estimated not by the actual expenditure which the parties had been put to, but a sum in lieu thereof calculated in a certain proportion to the value of the suit. GUNESH DUTT SINGH *v.* MUNGAY RAM CHOWDHRY . . **21 W. R. 288**

28. ———— *Separate defences.* Where a decree of the High Court directed that the

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*e*) COSTS—*contd.*

respondent (the plaintiff) should pay to the appellants (the defendants) the costs incurred by them in the lower Court : *Held*, that the costs referred to were those which were specified in the decree appealed against as the costs incurred by the defendants. If several defendants have served in their defence and the lower Court has specified the costs incurred by each of them, the costs payable under the above directions will be their several costs. If they have joined in their defence, or, though they have severed their defence, but the lower Court has specified a single set of costs as the only costs which it will allow or treat as costs in the suit, then the costs payable will be the single set of costs. RAM CHUNDER SEN *v.* DOORGA NATH ROY **2 C. L. R. 152**

29. ———— **Decree for usual costs and interest**—*Costs of previous suit set aside.* Where a decree was passed awarding the plaintiff's claim "with usual costs and interest" without any specification of the costs intended save the mention of some items in the schedule, and without mentioning the rate of the interest or the date from which it should run, it was held that the decree was meant to give all the costs which the successful party had incurred in the prosecution of the suit from the commencement until the date of the final decree, including costs incurred in the abortive part of the proceedings, *i.e.*, in trials set aside, and that the interest was to be at twelve per cent. on the amount of money actually decreed. BROUGHTON *v.* PERHLAD SEN . . . . . **19 W. R. 152**

30. ———— **Decree in favour of appellant with costs to the respondent**—*Deduction from amount due.* When a decree in favour of an appellant describes a set of costs as due by the appellant to the respondent, it means not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and that the remainder only should be recovered under the decree. ISSUR CHUNDER MOOKERJEE *v.* MUNMOHUN CHOWDHRY . . . . . **12 W. R. 308**

31. ———— **Decree for costs and for redemption**—*Alternative remedy—Right to execute.* Where a decree, after awarding costs, went on to provide for the redemption of the mortgaged property in dispute, or on the mortgagor's failure to pay, for its sale and for the costs being added to the mortgage-debt as a charge on the property : *Held*, that the latter provision was an alternative remedy which did not deprive the decree-holder of the right which the first part of the decree gave him of executing the order for costs in the same manner as any other money-decree. ADJIN MULLAH MOODEEN *v.* CRUIKSHANK . . . . **21 W. R. 299**

32. ———— **Decree on mortgage bond**—*Execution of decree—Costs against judgment-debtors personally.* Certain plaintiffs were the holders of the following decree obtained on a mort-

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*e*) COSTS—*contd.*

gage bond: "It is ordered that the defendants shall pay to the plaintiffs the sum of R2,550 and costs R312, total R2,862, within two months from the date of the signing of the decree; interest will run on the said amount at the rate of 6 per cent. per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs." On the judgment-debtors making default, the decree-holders applied for execution: the Subordinate Judge directed execution to issue, but held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal. *Held*, that the decree-holders were entitled to their costs of the suit from the judgment-debtors personally, or from properties belonging to the judgment-debtors other than those mortgaged. RUTNESSUR SEIN *v.* JUSODA . . **I. L. R. 14 Calc. 185**

33. ——— Decree on mortgage—*Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220.* A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs. *Held*, that the costs awarded could not be considered part of the money due upon the mortgage, and as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein* v. *Jusoda, I. L. R. 14 Calc. 185*, referred to. DAMODAR DAS *v.* BUDH KUAR . . **I. L. R. 10 All. 179**

34. ——— Decree under s. 88 of Transfer of Property Act (IV of 1882)—*Civil Procedure Code, 1882, ss. 219, 220—Decree apparently awarding costs twice over.* A decree drawn up under s. 88 of the Transfer of Property Act, 1882, was properly framed in accordance with the requirements of that section, but, in addition to the prescribed contents of such a decree, contained a clause to the following effect:—"It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of R876-8-0, the amount of costs incurred by them in this Court." *Held*, that this latter clause was merely a formal compliance with the provisions of the Code of Civil Procedure, and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. *Chiranji* v. *Moti Ram, All. W. N. (1898) 33*, on this point overruled. MAQBUL FATIMA *v.* LALTA PRASAD . . . **I. L. R. 20 All. 523**

35. ——— Order for costs in remand order directing "costs to abide result"—*Execution for such costs when same not specified in Court below—Materials necessary for ascertaining result of remand for purpose of giving costs.* Where an Appellate Court, after setting aside the decree of the lower Court, remanded the case, and the order as to costs provided "cost will abide the result:" *Held*, that, if the result of the remand was entirely in favour of the successful party, he was entitled, as a matter of course, to the costs in question, even if the decree of the lower Court after remand did not contain any such direction. That the only materials that should be placed before the Court to determine the result of the remand, are the judgment and the decree made in the case. FANI BHUSAN ROY CHOWDHRY *v.* BAMA SUNDARI DEBI **4 C. W. N. 343**

36. ——— Decree for costs in suit against minor—*Liability of guardian.* In a suit against a minor, if the Court considers that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order. Where the guardian is simply declared liable for them as the defendant in the case, the liability must be taken to refer to him as the representative of the minor and representing his estate. KOMUL CHUNDER SEN *v.* SURBESSUR DOSS GOOPTO **21 W. R. 298**

BRIJESSUREE DOSSIA *v.* KISHORE DOSS **25 W. R. 316**

37. ——— Rejection of suit in formâ pauperis by guardian on behalf of minor—*Personal liability for costs of suit.* Where a guardian obtains permission to sue *in formâ pauperis* on behalf of a minor, the rejection of the suit supplies no ground for throwing the costs of the suit on the guardian; and where the terms of a decree do not make any such distinct order as to costs, no expression of opinion in a judgment can import any such liability for costs into the decree. BRIJESSUREE DOSSIA *v.* KISHORE DOSS . **25 W. R. 316**

(*f*) DEED, EXECUTION OF.

38. ——— Decree directing execution of conveyance—*Consent decree—Effect of such decree where directions not carried out.* In September 1893, *R* executed a mortgage in favour of the plaintiff of certain properties of which he was in possession and which stood in his name, and handed over the title-deeds to the plaintiff. *R* died in December 1893, leaving two sons. In February 1895 it came to the knowledge of the plaintiff that the properties had been the subject of a suit in this Court in 1884 between *R* and his nephews, the defendants 1, 2, 3, 4, and 5, and a consent decree had been passed therein whereby *R* was directed to convey it to his nephews and reserving to *R* a life-interest in the said property. The plaintiff now brought this suit to establish his position. It was found on the evidence that no conveyance in pursuance of the decree had actually been executed

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*f*) DEED, EXECUTION OF—*concld.*

by *R*, and the decree itself had not been registered. *Held*, that the decree merely vested in the defendants, 1, 2, 3, 4, and 5 the immediate right to have a conveyance of the property executed, but such right was merely inchoate which it was within their power to complete. The plaintiff's right, therefore, overrides the interest of the defendants, 1, 2, 3, 4, and 5. ATUL KRISTO MITTER *v.* MUTTY LAL MUKERJEE . . . . . **3 C. W. N. 30**

(*g*) EJECTMENT.

39. ——— Suit for arrears of rent— *Ejectment in default of payment—Act X of 1859, s. 78.* Where a plaintiff sued for arrears of rent, praying that, if they were not paid, defendant should be ejected, and the Deputy Collector gave him a decree setting forth that the prayer was a proceeding under s. 78, Act X of 1859, and ordering that there should be such a proceeding to execute, the order was held to be an order for ejectment. GUNEE MAHOMED *v.* BAHAROOLLAH . **13 W. R. 240**

(*h*) ENDOWMENT.

40. ——— Construction of a decree as to the appointment of a manager of the property of a religious institution. A decree of the High Court declared its holder entitled, as the pandara sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the tambirans who had received initiation at that institution, was appointed to fill the then vacant office of tambiran, managing certain maths. The decree directed that the pandara should name a tambiran of his adhinam for the office, whom, after inquiry as to his fitness, the subordinate Court should appoint. If that Court found him unfit, it was to appoint a tambiran of that adhinam upon its own selection. In execution, the pandara named a tambiran for the office, but died before the inquiry as to his fitness. His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another tambiran. The subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first-named tambiran, appointed him to the office. The High Court, on the pandara's appeal, decided that the first nomination had been competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first-named was not fit. *Held*, that, on the construction of the decree, the first nomination could not be withdrawn and a second one substituted before the inquiry, and that the person first named was entitled to the Court's decision as to his fitness. On the facts, the finding of the High Court that the first-named tambiran was unfit was not affirmed, and the order of the Subordinate Judge was maintained. PON-

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*h*) ENDOWMENT—*concld.*

NAMBALA TAMBIRAN *v.* SIVAGNANA DESIKA GNANA SAMBANDHA PANDARA SANNADHI
I. L. R. 17 Mad. 343
L. R. 21 I. A. 71

41. ——— Jujmani right. The phrase "jujmani right" in a decree was construed to mean the right to participate in the offerings made to the idol, and not the offerings or presents which were made to the priest himself. JADUB CHUNDER CHUCKERBUTTY *v.* BHUBO SOONDUREE DABEE
20 W. R. 331

42. ——— Decree against shebait— *Civil Procedure Code (Act XIV of 1882), ss. 244 and 278—Decree personal against shebait—Claim to attached property on behalf of idol, if may be tried in execution proceedings.* When immoveable property is attached in execution of a decree passed against a *shebait* personally, the latter can object to the attachment on the ground of the property being *debutter* and the claim is triable under s. 244, of the Civil Procedure Code. *Punchanon Bandopadhya* v. *Rabia Bibi, I. L. R. 17 Calc. 711*, followed in principle. JOGENDRA NATH SIRKAR *v.* GOBINDA CHANDRA DUTTA (1908) . **12 C. W. N. 310**
s. c. I. L. R. 35 Calc. 364

43. ——— *Civil Procedure Code (Act XIV of 1882), ss. 244 and 278—Personal decree against shebait—Execution against* debutter *property—Suit to declare property* debutter, *if maintainable—Right of suit.* A suit instituted by the *shebait* of an idol to have it declared that property sought to be sold in execution of a personal decree against the plaintiff is the endowed property of the idol is maintainable. *Ram Krishna Mahapatra* v. *Mohant Padma Charan Deb, 6 C. W. N. 663*, followed. AMAR CHAND KUNDU *v.* NANI GOPAL MOOKERJEE (1907) . . **12 C. W. N. 308**

(*i*) EXECUTION.

44. ——— Execution of decree—*Uncertified payment out of Court—Subsequent execution by decree-holder—Suit to recover sum paid out of Court.* A judgment-debtor made a part payment of what was due under the decree against him to the decree-holder, but such payment was not certified in the manner required by s. 258 of the Code of Civil Procedure, and the decree-holder in consequence was able to take out execution and get the amount paid twice over. *Held*, that a suit by the judgment-debtor to recover the amount paid out of Court to the decree-holder was not barred either by s. 244 or by s. 258 of the Code. *Shadi* v. *Ganga Sahai, I. L. R. 3 All. 538*, and *Periatambi Udayan* v. *Vellaya Goundan, I. L. R. 21 Mad. 409*, followed. GENDO *v.* NIHAL KUNWAR (1908) . . . **I. L. R. 30 All. 464**

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*i*) EXECUTION—*contd.*

45. ——— *Practice—Notice—Application for transmission of decree—Execution—Court which should issue notice—Code of Civil Procedure (Act XIV of 1882), ss. 223 and 248.* The notice under s. 248 of the Code of Civil Procedure may be served by the Court to which the decree is transmitted for execution and not necessarily by the Court which passed it and to which an application is made for transmission under s. 223 of the Court. The Court has a discretion whether or not it will issue a notice before ordering transmission. Ordinarily, in a case like the present, it should be left to the Court, to which the decree is to be transmitted, to issue the notice. SREENATH ROY *v.* ROMESH CHANDRA ACHARYYA CHAUDHURI (1908) . . . . . **12 C. W. N. 897**

46. ——— *Execution—Civil Procedure Code (Act XIV of 1882), ss. 223 and 649—"Court, which passed the decree"—Civil Courts Act (XII of 1887), s. 13.* After a decree was obtained in the Court of the Subordinate Judge of Muzaffurpore the Local Government by notification formed Darbhanga, which was included in the Muzaffurpore district, into a separate district. Afterwards the assignee of the decree applied to the Subordinate Judge of Darbhanga for substitution of his name and execution of the decree. The suit, if it had been instituted at the time of the application, would have had to have been instituted at the Darbhanga Court. *Held,* that under the provisions of *s.* 649 of the Civil Procedure Code the Court at Darbhanga had jurisdiction to entertain the application. *Latchman Pande* v. *Madan Muhun Shye, I. L. R. 6 Calc. 513,* and *Jahar* v. *Kamini Debi, I. L. R. 28 Calc 238,* followed. *Kalipado Mukerjee* v. *Dina Nath Mukerjee, I. L. R. 25 Calc. 315,* and *Panduranga Mudaliar* v. *Vythilinga Reddi, I. L. R. 30 Mad. 537,* distinguished. UDIT NARAIN CHAUDHURI *v.* MATHURA PRASAD (1908)
I. L. R. 35 Calc. 974
s.c. 12 C. W. N. 859

47. ——— *Question relating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction-purchaser pendente lite.* One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in the zamindari and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for mutation of names in her favour, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held,* that such a suit was not obnoxious to the prohibition contained in s. 244 of the Code of Civil Procedure. *Gulzari Lal* v. *Madho Ram, I. L. R. 26 All. 444,* distinguished. *Jajan Nath* v. *Milap Chand, I. L. R. 28 All. 722,* and *Kino* v. *Rudkin, L. R. 6 Ch. D. 160,* referred to. WILAYATI BEGAM *v.* NAND KISHORE (1908)
I. L. R. 30 All. 231

48. ——— *Decree—Mistake—Step in aid of execution—Limitation Act (XV of 1877), Art. 179—Application against a dead person—Bonâ fide mistake.* If an application for execution of a decree be made under the influence of a *bonâ fide* mistake against a dead person, though that application cannot be acted upon, still it is an application in aid of execution within the meaning of Art. 179, cl. 4 of the Limitation Act (XV of 1877), which saves the execution of the decree from being time barred. *Samia Pillai* v. *Chockalinga Chettiar, I. L. R. 17 Mad. 76,* and *Balkishen Das* v. *Bedmati Koer, I. L. R. 20 Calc. 388,* followed. *Madho Prasad* v. *Kesho Prasad, I. L. R. 19 All. 337,* dissented from. BIPIN BEHARI MITTER *v.* BIBI ZOHRA (1908)
I. L. R. 35 Calc. 1047

49. ——— *Civil Procedure Code (Act XIV of 1882), ss. 258, 244—Satisfaction of decree not certified owing to decree-holder's fraud—Application after time to have certified.* S. 258 of the Civil Procedure Code prevents an executing Court from taking cognizance of an uncertified adjustment of a decree. *Dinobandhu Nundy* v. *Harimati Dassee, 8 C. W. N. 395; s. c. I. L. R. 31 Calc. 480,* explained. *Ramdoyal* v. *Ram Hari, I. L. R. 20 Calc. 32,* and *Bair-gulu* v. *Bapanna, I. L. R. 15 Mad. 302,* followed. Where, however, the judgment-debtors complained that the decree-holder had by fraud kept them in ignorance till within a month of their application of the fact that the satisfaction of the decree had not been certified. *Held,* that the matter could be investigated under s. 244 of the Civil Procedure Code. *Prasanna Kumar Sanyal* v. *Kali Dass Sanyal, I. L. R. 19 Calc. 683,* followed. GADADHAR PANDA *v.* SHYAM CHURN NAIK (1908) . . **12 C. W. N. 485**

50. ——— *Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by auction-purchaser for difference of price on resale.* Certain immoveable property was put up to auction in execution of a decree and purchased by *A. B.,* but the purchaser did not at once make the deposit required by s. 306 of the Code of Civil Procedure, and the property was subsequently—but not "forthwith"—put up again to auction and sold for a considerably less sum to the decree-holder. *Held,* that the first sale was not merely irregular, but no sale at all, and that the decree-holder was not entitled to claim against the first purchaser under s. 293 of the Code, compensation for the loss resulting

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*i*) EXECUTION—*contd.*

on the second sale. *Intizam Ali Khan* v. *Narain Singh, I. L. R. 5 All. 316*, followed. AMIR BEGAM v. BANK OF UPPER INDIA (1908)
I. L. R. 30 All. 273

51. ——— *Execution of decree—Decree-holder bidding for property with permission—Right to set-off amount due to decree-holder against purchase-money.* The first paragraph of s. 294 of the Civil Procedure Code (Act XIV of 1882) requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which the permission to bid is granted that there should not be this right of set-off. In such a case no set-off can be directed. HAZARIMAL v. NAMDEV (1908) . **I. L. R. 32 Bom. 379**

52. ——— *Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction-purchaser representative of judgment-debtor, not of decree-holder.* A purchaser at an auction sale in execution of a decree is the representative of the judgment-debtor, not of the decree-holder. *Manickka Odayan* v. *Rajagopala Pillai, I. L. R. 30 Mad. 507*, dissented from. Where therefore a judgment-debtor's application under s. 310A of the Code of Civil Procedure had been allowed, it was *held*, that no appeal by the auction-purchaser would lie, inasmuch as no appeal was given by s. 588, nor did the case fall within the purview of s. 244 of the Code. *Bashir-ud-din* v. *Jhora Singh, I. L. R. 19 All. 140*, followed. *Kuber Singh* v. *Sahib Lal, I. L. R. 27 All. 263; Gulzari Lal* v. *Madho Ram, I. L. R. 26 All. 447; Maganlal Mulji* v. *Doshi Mulji, I. L. R. 25 Bom. 631, and Raynor* v. *The Mussoorie Bank, Limited, I. L. R. 7 All. 681*, referred to. *Imtiazi Begam* v. *Dhuman Begam, I. L. R. 29 All. 275*, dissented from. ANANDI KUNWARI v. AJUDHIA NATH (1908)
I. L. R. 30 All. 379

53. ——— *Decree for possession of immoveable property—Sale of property decreed—Right to execute decree.* If a decree-holder holding a decree for possession of immoveable property sells a portion of such property, the sale does not, without express provision to that effect, give the purchaser any right to execute the decree himself. *Ram Sahai* v. *Gaya, I. L. R. 7 All. 107*, referred to. HANSRAJ PAL v. MUKHRAJI KUNWAR (1908) . . . . **I. L. R. 30 All. 28**

54. ——— *Execution of decree—Attachment—Right to attach profits not yet due. Held*, that a mere right to receive profits, the profits in question not having yet accrued due, is not susceptible of attachment in execution of a decree. *Hari Dass Acharjia Chowdhry* v. *Baroda Kishore Acharjia Chowdhry, I. L. R. 27 Calc. 38; Udoy Kumari Ghatwalin* v. *Hari Ram Shah, I. L. R. 28 Calc. 483; Syud Taffazzool Hossein Khan* v. *Raghoonath Pershad, 14 Moo. I. A. 40; Jones* v. *Thompson, 27 L. J. Q. B. D. 234;* and *Webb* v. *Stenton, 11 Q. B. D. 518*, referred to. SHER SINGH v. SRI RAM (1908)
I. L. R. 30 All. 246

55. ——— *Limitation Act (XV of 1877), Sch. II, Art. 178—Execution of decree—Limitation—Terminus a quo.* Although the grant of a certificate is a necessary preliminary to an application under s. 318 of the Code of Civil Procedure, such application will be barred under Art. 178 of the second schedule to the Limitation Act, 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. *Basapa* v. *Marya, I. L. R. 3 Bom. 433*, and *Kashinath Trimbuk Joshi* v. *Duming Zuran, I. L. R. 17 Bom. 228*, dissented from. *Petition of Kissen Singh, All. W. N. (1883) 262*, referred to. RANJIT SINGH v. BALDEO SINGH (1908) . **I. L. R. 30 All. 390**

56. ——— *Execution of decree—Limitation Act (XV of 1877), Sch. II, Art. 179 (5)—Date of issuing notice. Held*, that the expression "the date of issuing notice under the Code of Civil Procedure, s. 248," as used in Art. 179 (5) of the second schedule to the Limitation Act, 1877, means the date upon which the Court passes an order for issue of a notice under s. 248, not the date upon which such notice actually issues. JUMAI KANJAR v. ABDUL KARIM KHAN (1908)
I. L. R. 30 All. 536

57. ——— *Receiver—Appointment of receiver to realize amounts of decree.* Where a decree-holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties: *Held*, that s. 503 of the Code of Civil Procedure gave power to the Court to appoint a receiver to realize the amounts of the attached decrees, where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected. PARTAB SINGH v. DELHI AND LONDON BANK (1908).
I. L. R. 30 All. 393

58. ——— *Sale proclamation—Service, it should be in every part of the property—Value, statement of, if material—"Property."* The statement in the sale proclamation of a value which proves to be inadequate is an irregularity, but not a material irregularity. Such statements are made wthout much consideration and it is well known that purchasers do not take serious notice of any statement in the sale proclamation as to the value of the property to be sold. S. 274 of the Civil Procedure Code does not require that the sale proclamation should be served in each of the villages comprised in the property to be sold. The word "property" in that section evidently refers to each "lot" to be sold separate-

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*i*) EXECUTION—*contd.*

ly from the rest. Though it is a sound rule to follow, *viz.*, to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to a person interested in the one of what is publicly done in the other, the fact that the processes were not served in each does not necessarily constitute an infringement of the provisions of s. 274 of the Civil Procedure Code. *Tripura Sundari* v. *Durga Churn Pal, I. L. R. 11 Calc. 74,* referred to. *Pedro Antonio* v. *Jalbhoy Adeshir, I. L. R. 12 Bom. 368,* commented on. ABDUL KASHEM *v.* BENODE LAL DHONE (1907)
12 C. W. N. 757

59. ——— *Execution of decree—Purchase at auction sale by decree-holder—Suit by decree-holder to obtain possession of property so purchased.* Where the decree-holder himself purchases property at an auction sale in execution of his own decree, but fails to obtain possession, his remedy is by application under s. 244 of the Code of Civil Procedure: he cannot bring a separate suit for possession. *Seru Mohan Bania* v. *Bhagoban Din Pande, I. L. R. 6 Calc. 602,* and *Kishore Mohun Roy Chowdhry* v. *Chunder Nath Pal, I. L. R. 14 Calc. 644,* distinguished. *Madhusudan Das* v. *Gobinda Pria Chowdhurani, I. L. R. 27 Calc. 34, Kattayat Pathumayi* v. *Raman Menon, I. L. R. 26 Mad. 740,* and *Kalian Singh* v. *Thakur Das, All. W. N. (1906) 87,* followed. *Prosunno Coomar Sanyal* v. *Kali Das Sanyal, L. R. 19 I. A. 169,* referred to. SHEO NARAIN *v.* NUR MUHAMMAD (1908) . . . . **I. L. R. 30 All. 72**

60. ——— *Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.* On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount R19,041. The decree was set aside on the 9th July 1904. The s it was retried, and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for R17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (R1,804) between the sum realised by the plaintiffs and the sum finally decreed. *Held,* (i) that the plaintiffs were at liberty to proceed either by application or by suit. *Shaman Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery, 10 Moo. I. A. 203; Collector of Meerut* v. *Kalka Prasad, I. L. R. 28 All. 665,* and *Shiam Sundar Lal* v. *Kaisar Zamani Begam, I. L. R. 29 All. 143,* referred to; and (ii) that the application was not barred by limitation. *Harish Chandra Shaha* v. *Chandra Mohan Das, I. L. R. 28 Calc. 113,* distinguished. BITHAL DAS *v.* JAMNA PRASAD (1908) . . **I. L. R. 30 All. 476**

61. ——— *Application for execution—Service of notice on the judgment-debtor after the Decree was barred—Limitation. Held,* that a mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution, merely because the judgment-debtor did not come in and oppose it. *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R. 8 Calc. 51,* and *Norendra Nath Pahari* v. *Bhopendra Narain Roy, I. L. R. 23 Calc. 374,* distinguished, *Bisseshur Mallick* v. *Maharajah Mahtab Chundra Bahadoor, 10 W. R. (F. B.) 8,* referred to. UMED ALI *v.* ABDUL KARIM CHAPRASHI (1908)
I. L. R. 35 Calc. 1060

62. ——— *Shebaits—Claims to attached property by* shebaits—*Civil Procedure Code (Act XIV of 1882), ss. 244, 278.* Judgment-debtors, in their capacity as *shebaits,* can maintain an application under s. 244 of the Code of Civil Procedure and get an adjudication of the question raised by them. Where judgment-debtors make applications both under s. 244 and s. 278, they do not lose any rights *quo* their application under s. 244 because of their mistake in applying under s. 278 of the Code of Civil Procedure. *Punchanun Bundopadhya* v. *Rabia Ribi, I. L. R. 17 Calc. 711,* referred to. JOGENDRA NATH SARKAR *v.* GOBINDA CHANDRA DUTT (1908) . **I. L. R. 35 Calc. 364**
s.c. 12 C. W. N. 310

63. ——— *Civil Procedure Code (Act XIV of 1882), ss. 244 and 583—Reversal of decree on appeal, effect of—Separate suit, maintainability of.* S. 244 of the Civil Procedure Code does not apply in its entirety to proceedings had under s. 583 of the Code for restitution of property taken in execution of a decree, which is reversed in appeal. *Shama Purshad Roy Chowdhury* v. *Hurro Purshad Roy Chowdhury, 10 Moo. I. A. 203; Hurro Chunder Roy Chowdhury* v. *Shoorodhonee Debia, 9 W. R. 402; Shurnomoyee* v. *Pattarri Sirkar, I. L. R. 4 Calc. 625; Jamini Nath Roy* v. *Dharma Das Sur, I. L. R. 33 Calc. 857,* referred to. MATIRAM MARWARI *v.* RAMKUMAR MARWARI (1907)
I. L. R. 35 Calc. 265

64. ——— *Limitation—Application in continuation of previous proceedings in execution.* On the 7th December 1903, the sale of certain immoveable property, which had been attached, was ordered. On the 30th January 1904 the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder, and he was allowed time till the 10th February to pay in fees

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*i*) EXECUTION—*concld.*

for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906, the decree-holder again applied asking that the property, which was still under attachment, might be sold. *Held*, that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Jogendra Chandra Sen, 5 C. W. N. 347*, distinguished. *Rahim Ali Khan* v. *Phul Chand, I. L. R. 18 All. 482*, referred to. MUAJIB-ULLAH *v.* UMED BIBI (1908) **I. L. R. 30 All. 499**

65. ———— *Execution—Civil Procedure Code (Act XIV of 1882), s. 244—Transfer of Property Act (IV of 1882), s. 93.* An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution. Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree. *Ajudhia Pershad* v. *Baldeo Singh, I. L. R. 21 Calc. 818*, and *Nandram* v. *Babaji, I. L. R. 22 Bom. 771*, followed. JEHANGIR COWASJI *v.* THE HOPE MILLS, LIMITED (1908) . . **I. L. R. 33 Bom. 273**

(*j*) FORFEITURE.

66. ———— **Stipulation involving forfeiture**—*Penalty—Consent decree.* A consent decree provided that the defendant should retain possession of certain land in perpetuity on payment of a fixed annual rent to the plaintiff, but that the plaintiff might re-enter in case the defendant failed to pay the rent. The rent was not paid, and the transferee of the plaintiff's interest under the decree sued for possession. The defendant contended that the above clause in the decree was a penal stipulation which the Court would not enforce. *Held*, that the doctrine of penalties was not applicable to stipulations contained in decrees, and that the plaintiff was entitled to recover. SHIREKULI TIMAPA HEGDA *v.* MAHABLYA . . . **I. L. R. 10 Bom. 435**

(*k*) HEIR.

67. ———— **Liability of heir of mortgagor from assets**—*Assets of estate.* A decree declaring the heir of a mortgagor liable to pay the mortgage-debt out of such assets as he had received

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*k*) HEIRS—*concld.*

from the estate of his father (the mortgagor) was held not to include assets which came to him after passing through the hands of another heir (his brother) in right of inheritance from that brother. HAJEE ALI *v.* ALI NUKEE (./.. . **12 W. R. 240**

(*l*) HINDU WIDOW.

68. ———— **Hindu widow**—*Construction of order made by Settlement Officer awarding estate to a Hindu widow—Transfer by widow, effect of.* The plaintiffs obtained a declaratory decree that they were the reversioners and heirs apparent, expectant on the future death of a widow who, at the time of suit, had survived two co-widows, and that they, the plaintiffs, would be entitled to inherit at her death the estate that had belonged to the deceased husband. All parties had proceeded, as far as to the present appeal, on the view that the surviving widow had the widow's estate only. But an order made in the course of the settlement operations in 1865 had conferred the estate of the deceased on the three widows as well as on his mother, in equal shares of one-fourth each. *Held*, that there was nothing in this order to show an intention to give to the mother and widows anything more than an interest, such as that which a Hindu widow takes; and that the inheritance would devolve in due course of law, an alienation which the widow had made operating only for her lifetime. MUNNALAL CHAODRI *v.* GAJRAJ SINGH . . **I. L. R. 17 Calc. 246**

(*m*) INJUNCTION.

69. ———— *Decree for an injunction to protect land—Sale of the land—Subsequent suit by the purchaser for an injunction—Execution of the former decree cannot lie.* *A* obtained an injunction against *B* restraining him from obstructing *A* in the exercise of his right of way to his (*A*'s land) over *B*'s land. *A* subsequently sold his land to *C*. *B* similarly obstructed *C*. *C* then brought a suit against *B* for an injunction in terms similar to that formerly obtained by *A*. *B* contended that *C*'s remedy, if any, was by way of execution of the decree obtained by *A*. *Held*, that as the injunction did not run with the land there was in the circumstances of the case no bar to the plaintiff's suit. JAMSETJI MANEKJI *v.* HARI DAYAL (1907) . . **I. L. R. 32 Bom. 181**

(*n*) INSTALMENTS.

70. ———— **Money payable by instalments**—*Provisions for default in payment.* A decree, of which the terms had been arranged by solehnamah between the parties, for payment of money by instalments with interest at six per cent.,

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*n*) INSTALMENTS—*concld.*

was construed to provide also for three contingencies, *viz.*, non-payment at due date (*a*) of the first instalment, two consecutive instalments being in arrear at the same time ; (*b*) of instalments other than the first ; (*c*) of the first instalment simply. Upon the occurrence of (*a*) or of (*b*), execution might issue for the whole decretal money, with interest thereon at twelve per cent. Upon the occurrence of (*c*), execution might issue for that instalment with interest at twelve per cent. from the date of the decree. The decree-holder having accepted payment of the first instalment on the footing of (*c*) :—*Held*, that he had not, by any admission or settlement, precluded himself from insisting on the above construction as to (*b*). BALKISHEN DAS *v.* RUN BAHADUR SINGH

I. L. R. 10 Calc. 305 : 13 C. L. R. 418
L. R. 10 I. A. 162

71. ——— *Construction of decree for money payable by instalments—Term making the entire sum payable on default in payment of some of the instalments at certain dates.* A decree for money payable by yearly instalments made the full amount payable on both the first instalment being unpaid on the due date and two consecutive instalments being in default and unpaid at the same time. Defaults were made, and questions as to the rate of interest, on what amounts and for what periods, by reason of the debtor's delay, interest was payable, were dealt with in an order of Her Majesty in Council, which made declarations as to the allowances of interest to which the decree-holder would be entitled on the adjustment of accounts between the parties. The accounts having been taken in the Court executing the order, the decree-holder applied for execution to the full amount. *Held*, that the instalments having been paid, though not at due date, and applied in payment of interest, he was not entitled to such execution because the contingency on the happening of which he would have been entitled thereto had not happened. SHAM KISHEN DAS *v.* RUN BAHADUR SINGH

I. L. R. 15 Calc. 751

(*o*) INTEREST.

72. ——— **Modification of decree on appeal**—*Omission to give interest.* Where the lower Court gave a decree for R911 with interest and the Sudder Court modified that decree by giving R1,353 :—*Held*, that the Sudder Court must have meant to give that sum with interest also. ROSSOOL MAHOMED v. BASSOO BEWA . . **8 W. R. 163**

73. ——— **Decree for sum covered by bond**—*Bond providing for interest.* Where a bond provided for the payment of interest from the date of the bond on failure of payment of the principal on a certain date, and the decree awarded "the entire sum of money covered by the bond" :—*Held*, that the decree meant something more than the principal, and could only mean the principal together with the interest accruing thereon. ALEH AHMED SHAHAZADANUSHEEN *v.* BANY SINGH

18 W. R. 277

74. ——— **Mortgage-decree directing accounts, etc., to be taken and report given**—*Tender of principal and interest before report—Refusal to accept tender and subsequent charge of interest.* A decree directed accounts to be taken of what was due for principal and interest under a mortgage, such interest to be allowed "up to the time of payment hereinafter mentioned, or until six months from the date of the decree," whichever first should happen, and further directed the plaintiff to pay what should be reported due for principal and interest up to the date of payment, and costs with interest at six per cent. from the date of taxation until payment, within six months after the Registrar should make his report. The plaintiff tendered a sum sufficient to cover the principal and interest due, but insufficient to cover costs at a time prior to the drawing up of the Registrar's report. *Held*, that the payment of principal and interest "hereinafter mentioned" referred to a time after the Registrar had made his report, because the sum to be paid was a sum reported to be due by the Registrar, and that, therefore, a tender, made before the Registrar's report was given, was not a sufficient tender to stop interest from the date of the tender. ADMINISTRATOR GENERAL OF BENGAL *v.* AHMED BEGG

I. L. R. 9 Calc. 33

75. ——— *Execution—Claim of interest not provided by the decree—Acquiescence.* A mortgage decree ordered payment of R1,415-10-6 before March 1886, but contained no provision as to interest. In execution of this decree, the defendant presented several applications (*darkhasts*), the last of which was in 1898, whereby he sought to recover R2,570-4-5 as principal and interest and in default to have the amount realized by sale of the property. On the 2nd March, and again on the 7th August 1900, the judgment-debtor got the sale postponed saying that he would satisfy the decree. On the 12th October 1900 the plaintiff again asked for extension of time to enable him to pay the debt and interest also. On the 29th July and the 17th August the plaintiff obtained further extensions, but was not able to satisfy the decree. At last, on the 20th September 1902, he (plaintiff) for the first time disputed the right of the defendant to claim interest on the ground that the decree did not award any. *Per Curiam.*—The plaintiff's application of the 12th October 1900 contained a distinct promise to pay interest . . . rightly or wrongly he represented to the Court that he was liable to pay interest as claimed in the

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*o*) INTEREST—*contd.*

darkhast, promised to pay it, and on the strength of that representation and promise he obtained from the Court adjournments from time to time. He must . . . be treated as having contracted an obligation to pay interest on the decretal amount from the 12th October 1900. NARAYAN *v.* RAOJI (1904) **I. L. R. 28 Bom. 393**

76. ——— *Mortgage Bond—Undue influence—Decree on mortgage bonds in the form provided by ss. 86 and 88 of the Transfer of Property Act (IV of 1882)—Stipulations in bonds amount to penalties—Compound interest—Increased interest on default—Compensation for breach of contract—Interest after date fixed for payment, power to give—Interest at contract rate after such date.* Compound interest at a rate exceeding the rate of interest on the principal money, being in excess of and outside the ordinary and usual stipulation, may be regarded as in the nature of a penalty. Where a stipulation in a mortgage bond for increased interest on default is retrospective, and the increased interest runs from the date of the bond, and not merely from the date of the default, it is always to be construed as a penalty, because an additional money payment becomes in that case immediately payable by the mortgagor. But the increased interest is not therefore to be disallowed altogether ; for by s. 74 of the Contract Act reasonable compensation not exceeding the amount of the penalty is to be received by the party complaining of the breach of the contract. Where two mortgage bonds were executed each providing for interest, compound interest, and on default increased interest from the respective dates of the execution of the bonds, and on the date of the execution of the second bond the amount due on the first bond with interest was included in the principal of the second bond ; the High Court in a decree on the bonds held that the increased interest by way of compensation on the first bond should run only from the date of execution of the second bond, and that on the second bond should run only from the date of default on that bond, and allowed compound interest at the same rate only as that at which simple interest was stipulated for in the bond, and the Judicial Committee affirmed that decree. *Held*, also, that the decree of the High Court which was in the form provided by ss. 86 and 88 of the Transfer of Property Act (IV of 1882) was right in allowing interest after the time fixed for payment, until realization, at the Court rate of interest and not at the mortgage rate. The scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of the bond, but on the directions in the decree. Neither of the cases *Rameswar Koer* v. *Mehdi Hossein Khan, L. R. 25 I. A. 179 : I. L. R. 26 Calc. 39* ; and *Maharaja of Bharatpur* v. *Kanno Dei, L. R. 28 I. A. 35 ; I. L. R. 23 All. 181*, is an authority for the contention that interest at the mortgage rate can be given after the date fixed for payment, until realization. In the former case the question was not raised, and in the latter case, although interest after the fixed date was given, it was not at the mortgage rate, but at the Court rate of interest. Ss. 86 and 88 of the Transfer of Property Act contain no directions for interest beyond the date to be fixed by the Court up to which the account is directed to be taken ; but it has long been the uniform practice of the Calcutta High Court to give such interest, and the power to do so, whatever the source of it and that is immaterial since the decision in *Maharaja of Bharatpur* v. *Kanno Dei, L. R. 28 I. A. 35 : I. L. R. 23 All. 181*, must be considered as established. SUNDAR KOER *v.* RAI SHAM KISHEN (1906) **I. L. R. 34 Calc. 150 : L. R. 34 I. A. 9**

(*p*) MAINTENANCE.

77. ——— **Maintenance, decree for—** *Arrears of maintenance—Prospective decree for contingent arrears.* Where a decree gave a certain sum per mensem to the plaintiff, and declared that the decree-holder should realize that amount monthly from the judgment-debtor :—*Held*, that the decree merely recognized and declared the decree-holder to be entitled to the certain monthly allowance, but did not authorize her in execution of the decree to claim and obtain any arrears that might at any time fall due. JULEBIA CHITTA KOER *v.* BHAGEE KOER . . **6 N. W. 41**

(*q*) MESNE PROFITS.

78. ——— **Mesne profits, decree for—** *Indefinite decree—Mesne profits after institution of suit.* Where a plaintiff clearly asked in his claim for mesne profits subsequent to the institution of the suit, a decree in effect (though obscurely worded) for his full claim will extend to such profits. SKINNER *v.* ALDWELL . . **2 N. W. 3**

79. ——— *Civil Procedure Code, 1859, ss. 196, 197.* Where the words of a decree could be completely interpreted under s. 197, Civil Procedure Code, and could only be brought under s. 196 by a reference to certain words in the plaint omitted in the decree, the Court held itself bound to regard the decree as only one for the

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*q*) MESNE PROFITS—*contd.*

mesne profits claimed. TOONDUN SINGH *v.* POKLEE NARAIN SINGH . . . **20 W. R. 54**

80. ——— *Ascertainment, date of—Interest on mesne profits.* A decree for interest upon mesne profits from the date on which they are ascertained was held to mean from the date they are ascertained by the Court, and not by an ameen. DOORGA SOONDERI DEBIA *v.* SIBESSUREE DABIA . . . . **10 W. R. 391**

81. ——— *Execution of decree—Interest on mesne profits.* A decree stated that mesne profits were to be recovered "with interest from the date of their ascertainment." *Held,* that the Court executing this decree had no authority to allow interest year by year upon the collections which ought to have been received. HURRO DURGA CHOWDHRAIN *v.* SURUT SUNDARI DEBI . . . . **I. L. R. 8 Calc. 332**

82. ——— **Decree for possession and mesne profits**—*Local enquiry.* A decree declared the plaintiff entitled to the possession of land with wasilat from a date named, directing "the amount thereof to be ascertained on local enquiry," and to bear interest from the date of its ascertainment until payment, without saying more. *Held,* that the decree-holder was entitled to wasilat until the date of delivery of possession to him. *Semble:* It was not necessary for the judicial officer who made the enquiry to hold a Court on the spot. FAKHARUDDIN MAHOMED ASHAN *v.* OFFICIAL TRUSTEE OF BENGAL . **I. L. R. 8 Calc. 178**
10 C. L. R. 176
L. R. 8 I. A. 197

83. ——— *Liability for mesne profits—Intervenor.* In a suit for possession and wasilat, *N* was originally the answering defendant; but when the suit had to be determined, *U* intervened of her own accord, and her name was, at her own request, substituted in the decree for that of *N*. *Held,* that, on the wording of the decree, *U* was the person responsible for mesne profits and costs under the decree. UMBIKA DASSIA *v.* CHIRUNJEEB PERSHAD BOSE . . **13 W. R. 81**

84. ——— **Decree of Privy Council reversing decree declaratory of title**—*Mesne profits realized before reversal of decree.* Objections having been successfully raised under s. 246, Act VIII of 1869, against a decree-holder's attachment of a tenure, as the property of his judgment-debtor, he brought a regular suit, and obtained a declaratory decree that the property belonged to his debtor. He then took out execution attached, sold, and himself purchased the property in question. The objector in the meantime appealed to the Privy Council, and, having obtained a decree reversing the declaratory decree, took out execution against the opposite party for costs and wasilat. The opposite party objected, but the

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*q*) MESNE PROFITS—*contd.*

Judge allowed the execution to proceed, and deputed an ameen to ascertain the amount of mesne profits collected. *Held,* that the decree of the Privy Council could not be held to include restitution of everything that the decree holder would have enjoyed had the property not been sold in execution. GOPAL CHUNDER CHUCKERBUTTY *v.* OODOY LALL DEY . . . **12 W. R. 411**

85. ——— **Declaratory decree**—*Separate suit—Mesne profits, meaning of—Decree awarding mesne profits.* In 1878 the plaintiff obtained a decree declaring that he was entitled to receive, every year, from the defendant 12 per cent. of the rents and profits of a certain inam village. The decree also awarded mesne profits from the date of the institution of the suit. In 1884 the plaintiff sought, in execution of this decree, to recover his share of the profits of the village for the years 1882-83 and 1883-84. *Held,* that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum.* The very word "mesne" implied a terminus *ad quem* as well as *a quo,* and, in the absence of a special order, the terminus was the date of the decree. VINAYAK AMRIT DESHPANDE *v.* ABAJI HAIBTARAV **I. L. R. 12 Bom. 416**

86. ——— **Interpretation of decree awarding "future mesne profits"**—*Civil Procedure Code, 1882, s. 211.* A decree for possession of immoveable property was passed by the District Judge of Mirzapur on the 12th of November 1887 in favour of a plaintiff declaring that "the plaintiff is also entitled to mesne profits." That decree was affirmed by an order of Her Majesty in Council, dated the 11th of May 1895, without variation in respect of the order as to mesne profits. Possession of the immoveable property to which the decree related was obtained by the decree-holder on the 30th of November 1895. *Held,* that the decree of the Privy Council was to be construed as a decree awarding mesne profits up to the date when possession was obtained and from the date of the institution of the suit. *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal, I. L. R. 8 Calc. 178 : L. R. 8 I. A. 197,* and *Paran Chand* v. *Roy Radha Kishen, I. L. R. 19 Calc. 132,* referred to. BIJAI BAHADUR SINGH *v.* BHUP INDAR BAHADUR **I. L. R. 19 All. 296**

Held, by the Privy Council on appeal, that mesne profits were recoverable up to 11th May 1895 and (see s. 211 of the Civil Procedure Code, 1882) for a further period not exceeding three years until

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*q*) MESNE PROFITS—*concld.*

recovery of possession. BHUP INDAR BAHADUR SINGH *v.* BIJAI BAHADUR SINGH **L. R. 27 I. A. 209**

87. ——— Decree for mesne profits— *Decree silent as to the time down to which mesne profits were given—Construction of such decree—Civil Procedure Code (Act X of 1877), s. 211.* A decree, dated 3rd July 1878, awarded possession of certain land with mesne profits to be ascertained in execution, but specified no time down to which the mesne profits were to be computed. *Held,* that, under s. 211 of the Code of Civil Procedure (Act X of 1877), the decree could not be construed as giving mesne profits for a period longer than three years from the date of the decree. UTTAMRAM *v.* KISHORDAS . **I. L. R. 24 Bom. 149**

NARAYAN GOVIND MANIK *v.* SONO SADASHIV **I. L. R. 24 Bom. 345**

(*r*) MONEY.

88. ——— Decree for money—*Civil Procedure Code, 1875, s. 320—Rules prescribed by the Local Government under s. 320—Meaning of "decrees for the recovery of money."* *Held,* that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land, is a decree for money within the meaning of the rules prescribed by the Local Government under s. 320 of Act X of 1877. BIRCH *v.* RATI RAM . . . **I. L. R. 4 All. 115**

(*s*) MORTGAGE.

89. ——— Decree on bond pledging immoveable property—*Right to execute.* Where a decree for a bond-debt contained a clause to the effect that, if the money due was not paid, the property pledged in the bond might be sold, the clause was construed to mean that the property was liable for the debt decreed. *Held,* also, that the decree-holder could get at the property only in execution of the decree, in which case he would be in the position of any other judgment-creditor, and be bound by the provisions of the Civil Procedure Code, and the judgment-creditor would be entitled to the benefit of s. 243. RAM RUCHA DASS *v.* DOORGA DUTT MISSER . **13 W. R. 453**

90. ——— *Civil Procedure Code, 1877, s. 206.* The plaintiff sued on a bond in which real property was hypothecated. In his claim the property hypothecated was detailed, and the property itself was impleaded as a defendant, and he obtained a decree in the following terms: "Decree for plaintiff in favour of his claim and costs against defendant" *Held,* that the decree was to be regarded as simply for money and not for enforcement of lien. THAMMAN SINGH *v.* GANGA RAM . . . **I. L. R. 2 All. 342**

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*s*) MORTGAGE—*contd.*

91. ——— Suit for money and for lien on immoveable property—*Civil Procedure Code, 1877, s. 206.* Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought" without any specification in it as to the relief he sought by charging the property hypothecated:—*Held,* that such a decree was a decree for money only, and did not enforce the charge on the property. *Muluk Fukeer Bukhsh* v. *Manohur Das, 2 N. W. 79,* followed. HARSUKH *v* MEGHRAJ . . **I. L. R. 2 All. 345**

92. ——— Decree enforcing hypothecation—*Money-decree.* A suit on a bond in which immoveable property was hypothecated was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale. The Court made a decree ordering the defendant to pay the plaintiff the amount claimed and costs, with interest, "in accordance with" such agreement. *Held* (TURNER, *J.*, and OLDFIELD, *J.*, dissenting), that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property. JANKI PRASAD *v.* BALDEO NARAIN **I. L. R. 3 All. 216**

93. ——— *Money-decree.* The obligee of a bond for the payment of money, in which immoveable property was hypothecated as collateral security, sued the obligor upon such bond claiming to recover the moneys due thereunder from the obligor personally and by the sale of the hypothecated property. He obtained a decree in such suit in these terms. "That the claim of the plaintiff, with cost of the suit and future interest at eight annas per cent. per mensem, be decreed." *Held,* by the majority of the Full Bench, that such decree was not merely a money-decree, but was also one for the enforcement of a lien. *Janki Prasad* v. *Baldeo Narain, I. L. R. 3 All. 216,* distinguished by STUART, *C. J.* *Per* SPANKIE, *J.*, and STRAIGHT, *J.* That such decree was a mere money-decree. *Muluq Fuqeer Buksh* v. *Lala Manohur Doss, 2 N. W. 79,* and *Thamman Singh* v. *Ganga Ram, I. L. R. 2 All. 342*, followed. DEBI CHARAN *v.* PIRBHU DIN RAM **I. L. R. 3 All. 388**

94. ——— *Money-decree.* A decree was signed by the Court which made it in two places,—at the top of the first page and at the bottom of the third page. The second signature followed these words: "Ordered that a decree be given for the plaintiff for the full amount claimed, being principal together with costs and interest at six per cent. per annum." The fourth page contained the following order: "The claim for R10,614-

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*s*) MORTGAGE—*contd.*

11-0 be decreed by enforcement of hypothecation and auction-sale of talukh *M*; it is further decreed that the defendants do pay the plaintiff R1,002-0-6 costs of the suit." *Per* OLDFIELD, *J.* (STUART, *C. J.*, dissenting), on the construction of such decree, that the order contained in the fourth page was part of such decree, notwithstanding that such page did not bear the Court's signature, as the Court's signature at the top of the page covered the whole document, and such decree was not a mere money-decree, but one enforcing the hypothecation of immoveable property. *Per* STUART, *C. J.*—That, construing such decree with reference to the plaint and judgment in the suit in which it was made, and not with reference to the Court's signatures, such decree was not a mere money-decree, but one enforcing the hypothecation of immoveable property. RAM PRASAD RAM *v.* RAGHUNANDAN RAM **I. L. R. 3 All. 239**

95. ——— Decree on mortgage-bond —*Right to execution against property of judgment-debtor other than that mortgaged.* In a suit upon a bond under which certain lands were mortgaged, the decree ordered "that the amount claimed together with costs be caused to be paid by the defendants to the plaintiffs in this way, that the property pledged under the bond be held bound by the decree, and that the decree be realized by the sale of the pledged property," no provision being made for realization from the other estate of the judgment-debtor in the event of the proceeds of the pledged property failing to satisfy the decree. *Held*, that, under the circumstances, it must be presumed that the Court meant to limit the right of the plaintiff to recover to the mortgaged property, and to that alone, and that the judgment-creditor could not in execution of his decree, proceed against the other estate of the judgment-debtor. SOLANO *v.* MORAN & CO. . . . . **4 C. L. R. 11**

96. ——— Mortgage-decree—*Right of debtor to pay off mortgage-debt at once so as to avoid payment of high rate of interest.* Where a plaintiff sued upon a mortgage, bearing interest at R2-8 per cent. per mensem, it was directed that the usual mortgage-decree should be made. *Held*, that the defendant was entitled, at any time before the expiration of the usual six months ordinarily allowed by such decree, to satisfy the decree by payment of the principal and interest. CHOTOOLALL *v.* MILLER . . . . . **7 C. L. R. 267**

See MOONZOORAD DOWLAH *v.* MEHIDI BEGUM . . . **7 C. L. R. 206**

97. ——— *Practice—Decree for redemption directing payment of mortgage-debt within a specified time—Computation of time allowed for payment when the decree is affirmed on appeal.* Where a decree of a lower Court is confirmed on appeal, and that decree directs something to be done within a specified time, time is to be counted from the date of the appellate decree. Where, therefore, in a suit by a mortgagee on a mortgage, the decree of the Court of first instance directed payment of the mortgage-debt within two months from the date of the decree from which the defendants appealed, but which was confirmed by the Appellate Court:—*Held*, under the circumstances of the case, that it was the intention of the Appellate Court that the term of two months allowed for payment should be counted from the date of its own decision, and not from the date of the original decree. DAULAT JAGJIVAN *v.* BHUKANDAS MANEKCHAND . **I. L. R. 11 Bom. 172.**

98. ——— Consent decree—*Decree in foreclosure suit—Redemption, extension of time for—Appeal, consent decree on—Interest—Transfer of Property Act (IV of 1882), ss. 86, 87.* The plaintiffs obtained a decree for foreclosure. On appeal, the lower Appellate Court made a decree in terms of s. 86 of the Transfer of Property Act, ordering the defendant to pay the amount due with interest and costs calculated up to the 28th February 1890, or in default to be foreclosed his right to redeem. Upon second appeal on the 30th January 1891, it was "ordered and decreed with consent of the parties that the defendants be allowed one month's time to redeem," and in other respects the appeal was dismissed. On the 28th February 1891 the defendant deposited in Court a sum calculated so as to include interest up to that date, but subsequently objected to pay interest after the 28th February 1890. *Held* by PETHERAM, *C.J.*, and BEVERLEY, *J.* (MACPHERSON, *J.*, dissenting), that the effect of the consent decree was to extend the time for redemption to the 28th February 1891, and that interest should be allowed to that date. RAFIKUNNESSA BIBI *v.* TARINI CHURN SARKAR . . **I. L. R. 20 Calc. 279**

99. ——— Decree absolute for foreclosure—*Transfer of Property Act (IV of 1882), ss. 87 and 88—Whether time to redeem would run from the date of the preliminary decree or from the date of the decree of the Appellate Court, when it simply confirms the decree of the first Court.* Where in a suit on a mortgage, the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court. BHOLA NATH BHUTTACHARJEE *v.* KANTI CHUNDRA BHUTTACHARJEE **I. L. R. 25 Calc. 311 1 C. W. N. 671**

100. ——— Decree for possession after expiry of period of grace—*Transfer of Property Act (IV of 1882), s. 58—Right of redemption.* On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*s*) MORTGAGE—*contd.*

had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace. That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, s. 58). In this suit brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits :—*Held*, that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having only been as mortgagee, and having involved liability to account to the mortgagor. PAPAMMA RAO *v.* VIRA PRATAPA H. V. RAMACHANDRA RAZU . . **I. L. R. 19 Mad. 249 L. R. 23 I. A. 32**

101. ——— **Decree for sale**—*Transfer of Property Act (IV of 1882), ss. 88 and 99.* In November 1882, a decree was passed on a hypothecation-bond for the payment of the secured debt, and it contained the following words :—"The property hypothecated in the bond being also held liable for the whole amount thus awarded." *Held*, that the decree was in reality a decree for sale, and could be executed as such. ANNA PILLAI *v.* THANGATHAMMAL . **I. L. R. 20 Mad. 78**

102. ——— *Decree on mortgage—Interest up to date of payment—Transfer of Property Act (IV of 1882), ss. 88 and 97—Civil Procedure Code (Act XIV of 1882), Sch. IV, Form 109—Construction of decree—Ambiguity.* Where there is no ambiguity in a decree, the duty of the executing Court is to carry the orders of the decree into effect, as being conclusive between the parties, whether it may or may not be disputable in point of law. It is competent for a Court passing a mortgage decree to give interest beyond the date fixed for payment and up to the date of realisation. Having regard to the universality of the long established practice to grant such interest, its continuance for years after the Transfer of Property Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting the practice, the conformity with it of s. 97, which is *pari materia* with s. 888, the presumption that s. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by Form No. 109 of Sch. IV, Civil Procedure Code, s. 88 of the Transfer of Property Act should not be so construed as to limit the power of the Court to grant interest only up to the date fixed for payment. *Amolak Ram* v. *Lachmi Narain, I. L. R. 19 All. 174*, overruled. *Achalabala Bose* v. *Surenora Nath Dey, 1 C. W. N. 550 ; Subbaraya* v. *Ponnusami, I. L. R. 21 Mad. 364 ;* and *Bakar Sajjad Ali* v. *Udit Narain Singh, I. L. R. 21 All. 361*, approved. *Rameswar Koer* v. *Syed Mahomed Mehdi Hossain Khan, 2 C. W. N. 633*, referred to. MAHARAJAH OF BHARATPUR *v.* RANI KANNO DEI (1900) **I. L. R. 23 All. 181 : 5 C. W. N. 137 : s.c. L. R 28 I. A. 35**

103. ——— ——— *Execution—Mortgage—Mitakshara family—Civil Procedure Code (Act XIV of 1882), s. 248, notice under—Order for substitution of the heirs of the deceased judgment-debtor—Sale proclamation—Order of sale—Postponement—Estoppel Res judicata.* *Held*, that a legal representative of a deceased judgment-debtor, who was the managing member of a family governed by the Mitakshara system of Hindu Law, having allowed execution to proceed actively for nearly a year without the slightest objection, having twice successfully obtained stay of sale from Court on the plea that he would satisfy the decree, if time were allowed, and having approbated the execution proceedings, by paying the decree-holder a part of the debt and thus inducing him to consent to time being granted for payment of the balance, cannot be permitted by the ordinary principle of estoppel to say that the decree is incapable of execution against him. *Sadasiva Pillai* v. *Ramalinga Pillai, L. R. 2 I. A. 219 : 15 B. L. R. 383 : 24 W. R. 143*, referred to. *Held*, further, on the principle of *res judicata*, that the orders of the Court directing the issue of processes of attachment and sale proclamation were binding on the said legal representative, and that he was precluded from questioning the validity of the said orders. *Mungal Pershad Dichit* v. *Grija Kant Lahiri, L. R. 8 I. A. 123 : I. L. R. 8 Calc. 51 ; 11 C. L. R. 113 ; Lakshmanan Chetti* v. *Kuttayan Chetti, I. L. R. 24 Mad. 669 ; Bhola Nath Dass* v. *Prafulla Nath Kundu Chowdhry, I L. R. 28 Calc. 122 ;* and *Sheoraj Singh* v. *Kameshar Nath, I. L. R. 24 All. 282.* COVENTRY *v.* TULSHI PERSHAD NARAYAN SINGH (1904) **I. L. R. 31 Calc. 822**

104. ——— **Ex parte decree**—*Mortgage—Personal decree—Inherent power of Court to set aside ex parte decree—Transfer of Property Act (IV of 1882), s. 90—Succession Certificate Act (VII of 1889), s. 4.* A decree under s. 90 of the Transfer of Property Act having been made *ex parte* : *Held*, that there is inherent jurisdiction of the Court to set it aside. *Bibi Tasliman* v. *Harihar, I. L. R. 32 Calc. 253*, followed. *Held*, further, that, if the decree be a personal decree for a large sum, it ought not to have been made *ex parte*. A decree can only be passed under s. 90 against a defendant, from whom the balance is legally recoverable. Having regard to s. 4 of the Succession Certificate Act, the Court cannot pass any decree under s. 90 in favour of the representative of the mortgagee, if no certificate has been granted to him, and a grant of the certificate subsequent to the passing of the decree under s. 90 is not sufficient to get rid of the difficulty in his

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*s*) MORTGAGE—*concld.*

path. ABDUL SATTAR *v.* SATYA BHUSAN DASS (1908) . . . . **I. L. R. 35 Calc. 767**

105. ———— Estoppel by conduct—*Sale—Execution—Right of purchaser—Mortgage.* In execution of a money-decree certain property was purchased. The said property was subject to a mortgage, but not a mortgage executed by the judgment-debtor, although the judgment-debtor would himself have been estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction. *Held,* that the purchaser was equally bound as the judgment-debtor inasmuch as the right, title and interest of the judgment-debtor had passed to the purchaser, and his purchase was therefore subject to the mortgage. *Poresh Nath Mukerji* v. *Anath Nath Deb, I. L. R. 9 Calc. 265 ; Mahomed Muzuffer Hossein* v. *Keshori Mohun Roy, I. L. R. 22 Calc. 909 ; Ram Coomar Koondu* v. *Macqueen, L. R. I. A. Sup. 40, 11 B. L. R. 46 ; Sarat Chunder Dey* v. *Gopal Chunder Laha, I. L. R. 20 Calc. 296, L. R. 19 I. A. 203 ; Porter* v. *Incell, 10 C. W. N. 313,* referred to. PRAYAG RAJ *v.* SIDHU PRASAD TEWARI (1908) . . **I. L. R. 35 Calc. 877**

106. ———— Future interest—*Construction of decree on mortgage—Decree under ss. 86, 88, Transfer of Property Act (IV of 1882)—"Future interest"—Power to give interest after date fixed for payment—Interest to date of realization of mortgage debt.* In a suit for foreclosure a conditional decree was made under ss. 86 and 88 of the Transfer of Property Act (IV of 1882) for the sum due for principal and interest on the mortgage, and for costs, for redemption on payment of the amount so due, "with future interest at 7 annas per cent. per mensem from the date of suit, on or before the 18th March 1897," and for sale on default of payment : and the decree was made absolute on 25th June 1898. *Held,* on the construction of the decree, that on such default the plaintiffs were entitled in execution to "future interest at 7 annas per cent. per mensem," after the date fixed for redemption, and up to the date of realization of the entire amount. *Maharajah of Bharatpur* v. *Kanno Dei, I. L. R. 23 All. 181, L. R. 28 I. A. 35,* and *Sundar Koer* v. *Rai Sham Krishen, I. L. R. 34 Calc. 150, L. R. 34 I. A. 9,* followed. GOKULDAS *v.* GHASIRAM (1907) . . **I. L. R. 35 Calc. 221 s.c. L. R. 35 I. A. 28**

(*t*) PAYMENT INTO COURT.

107. ———— Payment of money, decree for, "in accordance with written statement"—*Interest.* A decree for money directed that its amount should be payable "according to the terms of the judgment-debtor's written statement." In his written statement the judgment-debtor had promised to pay interest on the judgment-debt if the same were not discharged by a certain day. *Held,* having regard to the decision of the Full Bench in *Debi Charan* v. *Pirbhu Din, I. L. R. 3 All. 388,* that the judgment-debtor having failed to discharge the judgment-debt by such day, he was bound by the terms of the decree to pay interest on its amount. RAM NANDAN RAI *v.* LAL DHAR RAI . . **I. L. R. 3 All. 775**

108. ———— Payment of money into Court, decree for—*Performance of order—Departmental rules directing all moneys to be paid into the treasury—Rule No. 9, High Court Rules, and Circular No. 4, 1881, p. 37—Bengal Act VIII of 1869, s. 52.* Where a decree directs the payment of money into Court within a limited time, it is a sufficient compliance with such decree if the judgment-debtor bring the money into Court within that time, and diligently take the necessary steps required by the Departmental Rules for its actual payment into the treasury. GUJADHUR PAUREE *v.* NAIK PAUREE . **I. L. R. 8 Calc. 528**

109. ———— *Deposit of decretal amount—Time fixed ending on a holiday—Payment on opening day—Decree at variance with compromise petition—Interpretation—Execution.* If the law or a Court directs a thing to be done within a period fixed by it and it is impossible of performance on the last day fixed for no fault of the party required or directed to do the act it will be recognised as properly done, if it is done on the next day it is possible of performance. A suit was compromised on the terms that the "defendant No. 1 will pay to the plaintiff's pleader the amount of R2,250 on the 8th day of October" or on any day before that date or "she will deposit the same in Court and on her paying or depositing the same in the manner aforesaid the plaintiff's claim to the 2 annas share shall be dismissed," and that in default of such payment or deposit "plaintiff's claim to be paid a 2 annas share will be decreed." In the decree drawn up the word "plaintiff" was inserted instead of "to the plaintiff's pleader or into Court." The defendant paid to the plaintiff's pleader R250 before the 8th October and the balance R2,000 was deposited in Court on the 10th of November, the Court was closed from the 8th October to the 9th of November. *Held,* that the Court could not vary the terms of compromise without the parties' consent and the word "plaintiff" in the decree must therefore be held to mean "his pleader or the Court." That the defendant had the option either of paying it to the plaintiff's pleader or of depositing it into Court to the credit of the plaintiff. That the deposit on the 10th of November was valid as the Court was closed between the 8th of October to the 9th of November. SURENDRA NARAYAN MUSTAFI *v.* SOURAJINI DASI (1906) **10 C. W. N. 535**

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*u*) POSSESSION.

110. ——— **Decree for possession**—*Modification on review of decree charging estate with payment of debt—Conditional possession.* The plaintiff had brought a suit to obtain possession of one-third of the property of a deceased person, and on appeal to the High Court obtained a decree. After a review of its judgment, the High Court decreed that the plaintiff should hold possession of the one-third share, subject however, as owner thereof, to the payment of a proportionate share of the debts of the deceased person. *Held*, that the plaintiff was not deprived of the possession which had been adjudged to him by the original decree by non-fulfilment of the terms of the decree passed on review of judgment. ALI HOSSEIN KHAN *v.* DWARKA DASS . **5 N. W. 134**

111. ——— *Imperfect decree—Omission to ascertain amount of rent.* Where the final decree upon a suit for possession declared that the defendant had a right of occupancy on payment of a proper rent, and was liable for rent from the date of suit, without defining the rate of rent:—*Held*, that the decree was imperfect, and that the rent could not be ascertained in execution, and that another suit was necessary for the determination of the proper rent,—*i.e.*, to carry out the decree. KALEE NARAIN SINGH BUROOA *v.* CHUNDER NARAIN BUKSHEE . . . . **23 W. R. 228**

112. ——— *Civil Procedure Code, 1859, s. 200—Direction to enquire into value of property.* The District Court gave a decree for certain immoveable and moveable property specified in the schedule annexed to the plaint, and made an order that the ameen was to ascertain the extent of the moveable property. In execution, the Court ordered the ameen to give possession to the decree-holder of such of the said moveables as he could find, and to enquire into the nature, amount, and value of such as he could not find. *Held*, that it was not necessary to construe this order as giving in execution what had not been given in the decree,—*i.e.*, alternative damages,—but that the enquiry ordered was obviously necessary in order to guide the Court in the exercise of its discretion under Act VIII of 1859, s. 200, and that the order must be assumed to have been made for lawful purposes and with a view to such further order as might seem just. BHOOBUN MOHINEE DEBIA *v.* GOBIND CHUNDER MOJOOMDAR **19 W. R. 82**

113. ——— *Decree for possession of a village—Right of the holders of such a decree to the possession of village account books and other papers relating to the management of the village—Title-deeds.* The plaintiffs as managers of a temple obtained a decree for the possession of a certain inam village. After taking possession of the village, they called upon the defendants to hand over to them the village account

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*u*) POSSESSION—*concld.*

books and other documents relating to the management of the village. The defendants refused. Thereupon the plaintiffs presented a darkhast in execution, praying (*inter alia*) for the delivery of those books and documents. The Subordinate Judge rejected this application on the ground that it was beyond the terms of the decree. *Held*, on appeal to the High Court, that the plaintiffs were entitled to the possession of the account books and documents in question, as being essential to the proper and effectual enjoyment and management of the village awarded by the decree. Such books and documents were properly to be regarded as accessory to the estate and as claimable by those to whom it had been awarded. The title-deeds of an estate, counterpart leases, and other documents of the like kind, such as kabuliats in India, ought to be regarded as accessory to the estate, and to pass with it whether the transfer is made a conveyance, a decree, or a certificate of sale. BHAVANI DEVI *v.* DEVRAV MADHAVRAV **I. L. R. 11 Bom. 485.**

(*v*) PRE-EMPTION.

114. ——— **Decree for pre-emption**—*Payment of purchase-money—Tender and deposit.* When a person obtained a decree declaring him entitled to the right of pre-emption with regard to certain lands, and ordering the payment of the purchase-money within the period of one month, and he paid the money into Court as a deposit until mutation of names had been effected :—*Held*, that, although the petition with which the money was tendered asked that it might be deposited and paid to the judgment-debtor after mutation of names, yet it could not be said that the tender and deposit were saddled with a condition precluding the payment of the money before such mutation, and that the terms of the decree had been satisfied. AJOODHIA SHOOKOOL *v.* JEWBOODH SHOOKOOL **6 N. W. 46**

115. ——— *Conditional decree—"Final" judgment and decree.* The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree, subject to the payment of the purchase-money, within a fixed period, and if the decree-holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree. When a direction contained in a decree referred to the time at which such decree should become *final* :—*Held* (the case being one in which a special appeal lay), that such decree does not become final on being affirmed by the lower Appellate Court, but on the expiry of the period of special appeal, or where such an appeal was instituted when the decision of the lower Appellate Court was affirmed by the High Court. EWAZ *v.* MOKUNA BIBI **I. L. R. 1 All. 132.**

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DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

(*v*) PRE-EMPTION—*contd.*

116. ——— *Conditional decree—"Finality" of decree—Holiday—Limitation Act, XV of 1877, s. 5.* A decree in a suit to enforce a right of pre-emption directed that the purchase-money should be paid within a certain period from the date the decree became "final." The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. *Held*, that the decree did not become "final" before the day the Court re-opened. *Ewaz* v. *Mokuna Bibi, I. L. R. 1 All. 132*, followed. RAM SAHAI *v.* GAYA . **I. L. R. 7 All. 107**

117. ——— *Conditional decree—"Final" judgment and decree—Execution of decree.* Where the plaintiff in a suit for pre-emption was granted a decree, subject to the payment of the purchase-money, within a fixed period, and failed to comply with the condition imposed on him by the decree :—*Held*, that he had lost the benefit of the same. When a direction contained in a decree referred to the time at which such decree should become *final* :—*Held*, that such decree became final on being affirmed by the lower Appellate Court, where, although a special appeal was preferred by the plaintiff against the decree of the lower Appellate Court, the same was subsequently allowed to be withdrawn. HINGAN KHAN *v.* GANGA PERSHAD . . **I. L. R. 1 All. 293**

118. ——— *Execution of conditional decree.* The decree of the original Court in a suit to enforce a right of pre-emption dated the 18th February 1879, directed that, on the deposit of the purchase-money within one month of the date on which the decree became final, the decree-holder (plaintiff) should obtain possession of the property in suit, and that, if the decree-holder failed to make such deposit within such period, the decree should become null and void. The vendee (defendant) preferred an appeal from this decree, which the Appellate Court, on the vendee's application, struck off on the 18th September 1879. *Held*, that, assuming that the order of the Appellate Court, by reason that it did not award costs to the decree-holder (respondent), might have been made the subject of a second appeal to the High Court, inasmuch as the decree of the 18th February 1879 could not have been affected by the result of such an appeal. That decree became final on the 18th September 1879, when the appeal from it was withdrawn and struck off, and not on the expiry of one month and ninety days from the date of the Appellate Court's order of the 18th September 1879. NARAIN DAS *v.* LACHMAN SINGH **I. L. R. 3 All. 135**

119. ——— *Conditional decree—Civil Procedure Code (Act X of 1877), s. 214—Computation of period specified for payment of purchase-money—Holiday.* The decree in a suit to enforce a right of pre-emption, dated the 12th December 1879, declared that the plaintiff should obtain possession of the property on payment of the purchase-money "within thirty days," but that, if such money was not so paid, the suit should stand dismissed. The period specified in the decree for the payment of the purchase-money, the day on which the decree was made not being computed, expired on the 11th January following. That day was a Sunday : the plaintiff paid the purchase-money into Court on the next day, the 12th January. *Held*, that, inasmuch as the day on which the decree was made should not be taken into account in computing the period specified in the decree for the payment of the purchase-money, nor the last day of that period, that day being a Sunday, the plaintiff had complied with the condition imposed on him by the decree. *Semble* : That if the plaintiff had actually failed to deposit the purchase-money within thirty days as directed by the decree, his suit would have been liable to be dismissed, as he could not have claimed to have such period computed from the date the decree became final. DABI DIN RAI *v.* MUHAMMAD ALI **I. L. R. 3 All. 850**

120. ——— *Decree for pre-emption conditioned on payment within fixed time—Omission to state consequence of non-payment—Limitation.* Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period :—*Held*, that the plaintiff, unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption. *Kodai Singh* v. *Jaisri Singh, I. L. R. 13 All. 376*, referred to. *Bandhu Bhagat* v. *Shah Muhammad Taqi, All. W. N. (1892) 40*, dissented from. JAI KISHEN *v.* BHOLA NATH **I. L. R. 14 All. 529**

3. ALTERATION OR AMENDMENT OF DECREE.

1. ——— **Duty of Court to amend decree**—*Limitation—Civil Procedure Code, 1882, s. 206.* There is no limitation for an application under s. 206 of the Civil Procedure Code to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment, KALU *v.* LATU **I. L. R. 21 Calc. 259**

2. ——— **Power to amend decree**—*Decree differing from judgment.* It is a power which all Courts possess to amend their record when there is anything to amend by. Consequently, when a Judge finds that the decree varies from his judgment, he can set the decree right. TOONA *v.* KUREEMUN . . . . **6 W. R. Mis. 31**

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DECREE—*contd.*

3. ALTERATION OR AMENDMENT OF DECREE—*contd.*

3. ——— *Decree differing from judgment.* Every Court has a right to correct its formal records in such a way, if needed, as will make them represent truly the decision which was intended to be judicially expressed. LUCAS *v.* STEPHEN . . . . . **9 W. R. 301**

PEAREE MOHUN DUTT *v.* GOOROO DASS DUTT **20 W. R. 401**

4. ——— *Civil Procedure Code, 1882, s. 206—Application to bring decree into accordance with the judgment—Decree erroneous, but in accordance with judgment.* Where a decree is in fact in accordance with the judgment on which it is based, such decree, however erroneous it may be, cannot be altered on an application under s. 206 of the Code of Civil Procedure to bring the decree into accordance with the judgment. LAKHO BIBI *v.* SALAMAT ALI . . **I. L. R. 20 All. 337**

5. ——— *Power of Court to recall order.* Every Court has power to recall its own order on being satisfied that the order was obtained through fraud or misrepresentation or suppression of facts. SHEO PURSHUN CHOBEY *v.* COLLECTOR OF SARUN . . **13 W. R. 256**

HAMEEDA BIBI *v.* NOOR BIBEE **9 W. R. 394**

6. ——— *Power of Judge to amend decree proprio motu.* Without an application being made for review, a Judge has no power *proprio motu* to alter or amend his own judgment. PORESH NARAIN MONDUL *v.* KHETTRO MONEE DEBIA . . . . . **20 W. R. 284**

7. ——— *Confirmation of decree by High Court on appeal.* After a decree has been confirmed by the High Court on appeal, the Subordinate Court has no power to make any alteration in it. ONRAET *v.* SANKAR DUTT SINGH **5 B. L. R. Ap. 60 : 14 W R. 26**

BHANUSHANKAR GOPALRAM *v.* RAGHUNATH RAM MANGALRAM . **2 Bom. 106 : 2nd Ed., 101**

8. ——— *Confirmation of decree by High Court on appeal—Mistake.* *A* obtained a decree for costs in a suit brought by *B* against *A*, and the decree was confirmed on appeal to the High Court on 18th June 1869. On 13th December 1871, *A* applied for execution of the decree but it was found that the decree omitted to specify from whom *A* was to obtain his costs, and it was held that no execution could be taken out under the decree. *A* therefore applied to the Judge who passed the original decree to amend the decree, and the decree was amended on 21st August 1872 by inserting *B* as the party who was to pay *A*'s costs, *A* then made a fresh application for execution, which was allowed. *Held*, that the Judge had power to amend the decree, notwithstanding it had been appealed from and confirmed by the High Court, and such order was appealable. CHOWDHRY GOLUCK CHUNDER *v.* CHOWDHRY GANGA NARAIN **11 B. L. R. 363, and 11 B. L. R. 368 note**

DECREE—*contd.*

3. ALTERATION OR AMENDMENT OF DECREE—*contd.*

S.C. GOLUCK CHUNDER MUSSUNT *v.* GUNGA NARAIN MUSSUNT . **20 W. R. 111 : 18 W. R. 111**

ZUHOOR HOSSEIN *v.* SYEDUN **11 B. L. R. 367 note : 11 W. R. 142**

9. ——— **Court to amend decree—** *Confirmation of decree by High Court on appeal.* Where a decree given by the first Court and affirmed by the Court of appeal is found to need amendment with a view to its meaning being made clear, application should be made for that purpose to the lower Appellate Court, and not by way of appeal to the High Court. BUNWAREE CHAND THAKOOR *v.* MUDUN MOHUN CHUTTORAJ . **21 W. R. 41**

10. ——— *Civil Procedure Code, s. 206—Power of lower Court to amend decree affirmed on appeal.* Where a decree for possession of immoveable property passed by a lower Appellate Court, omitted to specify the plots of land to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower Appellate Court subsequently, on the decree-holder's application, amended its decree, under s. 206 of the Civil Procedure Code, by inserting the required specification :—*Held*, that, inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to affect property other than that actually claimed and decreed, the amendment was not contrary to law. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376, Gobardhan Das* v. *Gopal Ram, I. L. R. 7 All. 366, Kisto Kinkur Roy* v. *Burrodacaunt Roy, 14 Moo. I. A. 465,* and *Sundara* v. *Subbana, I. L. R. 9 Mad. 354,* referred to. RAM SARAN *v.* PERSIDHAR RAI . **I. L. R. 10 All. 51**

11. ——— **Civil Procedure Code, 1882, s. 206**—*Jurisdiction of Court to amend its decree after appeal.* Under s. 206 of the Code of Civil Procedure, a Court has power to amend its decree by bringing it into conformity with the judgment after the said decree has been confirmed on appeal. SUNDARA *v.* SUBBANNA . **I. L. R. 9 Mad. 354**

12. ——— *Amendment of decree after confirmation of decree on appeal. Quære :* Whether the rule in *Sundara* v. *Subbanna, I. L. R. 9 Mad. 354,* as to the amendment of decrees, *viz.*, that a Court has power to amend its decree by bringing it into conformity with the judgment after the said decree has been confirmed on appeal, is correct. CHATHAPPAN *v.* PYDEL **I. L. R. 15 Mad. 403**

See PYDEL *v.* CHATHAPPAN **I. L. R. 14 Mad. 150**

13. ——— *Decree for costs—Execution of decree.* In the lower Appeal Court, the plaintiff obtained a decree which directed parties to bear their own costs in proportion in both the Courts, while the judgment directed that the parties should bear each other's costs in proportion in both the Courts. The decree was confirmed by the High

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DECREE—*contd.*

3. ALTERATION OR AMENDMENT OF DECREE—*contd.*

Court in cross second-appeals without writing a judgment. There was no point taken in either of the appeals as to costs. The plaintiff subsequently applied to the High Court for the amendment of the decree under s. 206 of the Civil Procedure Code (Act XIV of 1882). It was contended for the defendant that the application should have been made to the lower Appeal Court. *Held*, that the only decree which existed for the purposes of execution after the High Court confirmed the decree of the Court below was the decree of the High Court into which that of the lower Court became incorporated. The application was, therefore, properly made to the High Court. *Held*, further, that, that being so and there having been no appeal by either party against the order as to costs, the Court might properly look at the judgment of the Court below with a view to making the decree as to costs agree with it. SHIVLAL KALIDAS *v.* JUMAKLAL NATHIJI DESAI . **I. L. R. 18 Bom. 542**

14. ——————— *Power of Court of first instance to amend its decree after appeal.* In a suit for land with mesne profits, the District Munsif delivered judgment for the plaintiff, and recorded therein a finding that he was entitled to mesne profits as from a certain date, it having previously been arranged that the amount, if any, awarded for mesne profits should be determined in execution. In the decree no mention was made of the date from which the mesne profits were to be calculated, but it was stated merely that the amount was to be determined in execution. The case went on appeal before the District Judge, who modified the decree in certain particulars unconnected with mesne profits. With a view to execution, the plaintiff applied to the Court of first instance to bring the decree into conformity with the judgment. The Court having made an order accordingly, it was objected in the High Court on revision that the order was made without jurisdiction. *Held*, that the jurisdiction of the Court of first instance to amend the decree under s. 206 was ousted by the confirmation of his decree on appeal. PICHUVAYYANGAR *v.* SESHAYYANGAR **I. L. R. 18 Mad. 214**

15. ——————— *Power of Court of first instance to amend appeal—Civil Procedure Code, s. 551.* On the hearing of an appeal by a District Court, certain special costs were directed to be paid by the defendant, but, by a clerical error, that direction was omitted from the decree when it was drawn up. Plaintiff applied to the District Judge under s. 206 of the Code of Civil Procedure for rectification of the error in the decree, but the Court refused to amend, it appearing that defendant had appealed to the High Court, which had dismissed his appeal and confirmed the decree of the District Court. The appeal had in fact been dismissed under s. 551 of the Code of Civil Procedure. Plaintiff then petitioned the District Court to review its order refusing to amend. This was

DECREE—*contd.*

3. ALTERATION OR AMENDMENT OF DECREE—*contd.*

rejected, the District Court holding that the decree, of which amendment was asked, was the decree of the High Court, which a District Court had no power to amend. On plaintiff petitioning the High Court to revise this order of the District Court :— *Held*, (i) that the case was governed by the ruling of the Full Bench in *Pichuvayyangar* v. *Seshayyangar, I. L. R. 18 Mad. 214*, where it was held that the jurisdiction of a Court of first instance to amend a decree under s. 206 was ousted by the confirmation of that decree on appeal ; (ii) that the decision referred to applies equally to second appeals dismissed under s. 551 of the Code of Civil Procedure, and to the second appeals tried after notice to the respondent. MUNISAMI NAIDU *v.* MUNISAMI REDDI . **I. L. R. 22 Mad. 293**

16. ——————— *Decree affirmed on appeal—Jurisdiction—Civil Procedure C de, ss. 579, 623, 624—Review of judgment.* The effect of s. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. The only Court which has jurisdiction to amend the appellate decree is the Court of Appeal. So *held* by the Full Bench (MAHMOOD, *J.*, dissenting) *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376*, explained and followed. *Kisto Kinkur Roy* v. *Burrodacaunt Roy, 14 Moo. I. A. 465*, discussed. The insertion of the word "not" in the last line but one of the judgment and also in the head-note in *Shohrat Singh* v. *Bridgman* was a clerical error. *Per* MAHMOOD, *J.*—Where a decree has been simply affirmed on appeal, s. 579 of the Code does not imply t at the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Code ; and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s. 206, even where an application for review of judgment under s. 623 upon the same grounds would be barred by s. 624. A decree awarding the plaintiffs possession of immoveable property did not comply with s. 206 of the Code by containing the particulars of the claim or specifying clearly the relief granted. On appeal by the defendant, the High Court, in general terms, confirmed the decree and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this

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DECREE—*contd.*

3. ALTERATION OR AMENDMENT OF DECREE—*contd.*

objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused; and they then made a similar application to the first Court to amend its original decree, which had been affirmed on appeal. This application was granted by a judge who was not the Judge who had passed the original decree. *Held* by the Full Bench (MAHMOOD, *J.*, dissenting), that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree. *Held* by MAHMOOD *J.* (*contra*) that the Court below had jurisdiction to make such amendment, and could make it any time; that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata;* that the amendment of the original decree under s. 206 was not barred by s. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended. MUHAMMAD SULAIMAN KHAN *v.* MUHAMMAD YAR KHAN **I. L. R. 11 All. 267**

See MUHAMMAD SULAIMAN KHAN *v.* FATIMA . . **I. L. R. 11 All. 314**

17. ——— *Finding in judgment not embodied in decree—Amendment of decree—Appeal against amendment decree—Time how calculated.* In a suit for a declaration of title to land and for possession, which was based upon a will alleged to have been made in plaintiff's favour, the Subordinate Judge, finding the document to be a forgery, dismissed the suit. The fourth defendant had been made a party, inasmuch as he claimed a portion of the land as alienee. Though the case for the plaintiff failed, the Subordinate Judge, on the above finding, dealt in his judgment with an issue which had been framed regarding the validity or otherwise of the alleged alienation to the fourth defendant. He held that it had been made for no consideration, and found the issue against the fourth defendant. The decree dismissing the suit, which bore date the 22nd of June 1896, contained no reference to the finding against the fourth defendant on that issue. The fourth defendant applied for a review of the judgment, complaining that, as the suit had been dismissed, the reference in the judgment to the alleged alienation in his favour was unnecessary, and might, if permitted to stand, operate against him as *res judicata* in any subsequent suit that might be brought, and praying that the finding might be either expunged or modified in his favour. Upon this being refused, fourth defendant applied, under s. 206 of the Code of Civil Procedure, that the decree might be brought into conformity with the judgment, and an order was made on 27th October 1896, adding to the decree a clause to the

DECREE—*contd.*

3. ALTERATION OR AMENDMENT OF DECREE—*contd.*

effect that the issue referred to had been found against the fourth defendant. On 12th December 1896, fourth defendant preferred an appeal against the decree of the Subordinate Judge, but the District Judge rejected it as being out of time. *Held*, that, the decree being in conformity with the judgment, the Subordinate Judge had no power to vary it; and that the words which had been added must be expunged, and the decree restored to its original state. Also that the finding on the issue against the fourth defendant was, in fact, no finding except with regard to the question of consideration. *Per* SUBRAMANIA AYYAR, *J.*—That where a decree which is at variance with the judgment is brought into conformity with the latter under s. 206 of the Code of Civil Procedure, the date of the rectification is immaterial with reference to the calculation of the time in which any appeal may be preferred against such decree. But where a decree is wrongly varied, a party affected by such variation should be entitled to calculate the time during which an appeal may be preferred as commencing from the date of the variation. PARAMESHRAYA *v.* SESHAGIRIAPPA . . **I. L. R. 22 Mad. 864**

18. ——— *Compromise after decree—Power of High Court to amend or review decree—Civil Procedure Code, s. 623—Proceeding in execution barred by time—Limitation Act—Act XV of 1877, Sch. II, Art. 179.* The High Court has no power to alter its own decree, except under the provisions of either s. 206 or s. 623 of the Code of Civil Procedure. The ground of review must have been existing at the time of the decree, the s. 623 not authorizing review of a decree, which was right, on the happening of a subsequent event. After a decree for land against four defendants, a compromise was made between the plaintiff and the third defendant. The first and fourth had acknowledged the plaintiff's right. The second and third had defended the suit, and the decree had been made, and affirmed on appeal to the High Court, jointly and severally against the first three and conditionally against the fourth. An application by the second and third defendants for leave to appeal to Her Majesty was withdrawn, the two parties to the compromise having obtained an order for amendment of the decree in its terms. For the execution of the decree against the three defendants, other than the third, as to the proportionate part of the property sued for, and not the subject of the compromise, the decree-holder afterwards obtained an order. This order was reversed by the High Court. Hence this appeal. *Held*, that the order directing the amendment of the decree in the terms of the compromise was beyond the powers of the High Court, and was without operation either in favour of or against those defendants who had not been parties to the petition for that amendment. *Held*, also, on the decree-holder's petition for execution of the decree, that the period of limit-

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ation commenced from the date of the primary, and not of the amended, decree of the High Court. Execution was, therefore, barred by limitation. Instead of attempting the alteration in the decree, the High Court could properly have made the compromise a rule of Court, and have stayed all proceedings against the defendant, who was a party to it, except for the purpose of enforcing it against him. KOTAGHIRI VENKATA SUBBAMMA RAO *v.* VELLANKI VENKATARAMA RAO
I. L. R. 24 Mad. 1
L. R. 27 I. A. 197
4 C. W. N. 725

19. ——— *Proceedings to set aside decree—Application for review.* The proper course for a party desiring to set aside a decree passed against him by a competent Court, which he alleges to have been obtained by fraud, is to apply to the Court which passed the decree to review and alter it, and not to bring a suit for declaration of his right by setting aside such decree. MEWA LALL THAKUR *v.* BHUJHUN LALL . **13 B. L. R. Ap. 11**

20. ——— *Court passing decree.* A decree should be amended, if necessary, by the Court which passed it. BHUGGOBUTTY CHURN HALDAR *v.* NIROPUNAH DABEE
1 W. R. Mis. 8

BANGSEERAM SHAHA *v.* JUGGERNATH SHAHA
W. R. 1664, Act X, 11

NILKOMUL ROY *v.* ROHINEE DOSSIA
13 W. R. 330

21. ——— *Amendment made by wrong Court.* But where the amendment was made by the Court executing it, the High Court disallowed the error as a ground of appeal, as no injustice had been done by it. BANGSEERAM SHAHA *v.* JUGGURNATH SHAHA . **W. R. 1864, Act X, 11**

22. ——— *Mode of obtaining correction of error—Review.* Any error that may have crept into a decree can be corrected by that Court only which passed the decree. *Semble :* Such a correction should be obtained by a review of judgment. RAO OOMRAO SINGH *v.* SUTUN LALL
1 N. W. Pt. 6, p. 77 : Ed. 1873, 168

BUNSEEDHUR *v.* KUDDEY LALL.
1 N. W. Ed. 1873, 198

DWARKA PERSHAD *v.* BANKUT NURSEYA
2 N. W. 184

RAM NATH *v.* GOWHUR . . **2 W. R. 230**

AKBUR ALI *v.* MULLICK MUKDOOM BUKSH
25 W. R. 63

23. ——— *Court executing decree.* A Court executing the decree of a superior Court has no power to alter the terms of the decree. RAO OOMRAO SINGH *v.* SUTUN LALL
1 N. W. Pt. 6, p. 77 : 1873, 168

SHEO PERSHAD *v.* SHIVA RAM . **2 N. W. 59**

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24. ——— *Appellate Court.* It is not competent to the Appellate Court in a matter arising in execution to add to, or alter, the decree. BECHARAM PAUL *v.* BHUGWAN CHUNDER GHOSE . . . . . **5 C. L. R. 522**

25. ——— *Execution of decree—Mode of payment of decree.* In a case of execution of decree pending in a Munsif's Court, the Judge is not the person to sanction a proposition for a temporary alienation of the judgment-debtor's property to provide for payment of the decree, but the Court which passed the decree. Such an arrangement should provide for the whole amount payable under the decree, including interest. GOOMAN SINGH *v.* MAKHUN SINGH . **2 N. W. 145**

26. ——— **Time for amendment—** *Clerical error in decree.* A clerical error in the decree appealed against was ordered to be rectified at the hearing of the appeal. HIRJI JINA *v.* NARAN MULJI . . . . . **I. L. R. 1 Bom. 1**

27. ——— *Kistbundi—Instalment decree.* A kistbundi is part of, or incidental to, the decree of the Court, and cannot be altered after the decree is finally given unless for the purpose of the correction of errors. LALL MAHOMED *v.* SHONA JOLLA GHAZEE
2 W. R. S. C. C. Ref. 3

28. ——— *Omission to award costs—Clerical error.* An omission to award costs cannot be considered merely as a clerical error, but must be rectified by way of review within the prescribed time. RAM SAHAY SINGH *v.* ROOKHOO SINGH . . . . . **15 W. R. 414**

29. ——— *Decree awarding costs.* A decree which contains a distinct specification of costs, whether rightly or wrongly calculated, cannot be amended in appeal. BIJOY GOBIND NAIK *v.* KALEE PROSSUNNO NAIK . **16 W. R. 294**

30 ——— **Decree of High Court on appeal from Recorder of Rangoon**—*Order for execution of conveyance.* The High Court, on appeal from a judgment of the Recorder of Rangoon, directed that an account should be taken between the parties, and that in default of payment of the amount thereby found to be due from the defendant to the plaintiff within three months, a sale of the mortgaged property should be effected. On the 18th March 1872, an order was passed by the Recorder of Rangoon, which was as follows "By consent the property subject to the equitable mortgage to be given up to the plaintiff in satisfaction of all claims and demands against the defendant under the decree of the High Court." On the 3rd July 1872 the Recorder directed the defendant to execute within six days a conveyance of the mortgaged property to the plaintiff. On the 11th July 1872 the Recorder declared that, if the conveyance was not executed within twenty-four hours by the defendant, the Court would execute

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it, and accordingly on the 12th July 1872 the Court executed the conveyance. *Held*, that the Recorder had no power to pass the order of the 18th March 1872, and that the defendant could not be required to execute the conveyance. AZIMNULLAH MOODEEN *v.* CRUIKSHANK . . **11 B. L. R. 67**

31. ——— **Decree of predecessor**—*Amendment of clerical error.* Where a Judge finds that a decree passed by his predecessor contains something or bears a construction evidently not contemplated by the judgment of that Judge, he is quite competent to alter the decree so as to bring it into conformity with the judgment. The limitation for reviews does not apply to an application for alteration of a clerical error in a decree. MODOOSUDUN GHOSH *v.* ROMANATH GHOSH **12 W. R. 65**

32. ——— **Modification of decree in execution**—*Power of Court to make alteration in directions.* Where a decree, which has been passed on a mortgage bond, is to the effect that the decree-holder is entitled to have his lien satisfied by the sale of the rights and interests of the judgment-debtor in all the properties hypothecated, the High Court cannot modify its terms and direct the Court which is charged with the execution to sell first the judgment-debtor's rights and interests in one portion of the properties pledged, and then, if the proceeds are not sufficient, to proceed against the remaining portion. BEBEE DOSS *v.* LULLIT MOHUN SHAH CHOWDHRY . **23 W. R. 195**

33. ——— **Mode of amendment**—*Notice to parties—Presence of parties.* A decree should not be amended except in the presence of the parties concerned, or after service of notice on them to attend. KISHEN DYAL SINGH *v.* SUNKAR DUTT . . . . . **2 W. R. Mis. 15**

BULORAM DOSS *v.* JOGENDRO NATH MULLIC **19 W. R. 349**

34. ——— **Ex parte decree**—*Absence of party—Recall of ex parte decree.* If a Judge makes an *ex parte* order, unless in cases in which he is expressly empowered to make such an order, the party who has not been heard has a right to apply to the Judge to set it aside; and if the Judge finds that such order was wrong, he is at liberty, on hearing both parties, to recall it. SHEO PROSUNNOO SINGH *v.* BULDHAREE LALL **13 W. R. 232**

35. ——— **Uncertainty in decree**—*Evidence to amend uncertainty in decree.* In the execution of a decree for the possession of land, if it is found that the boundaries described in the plaint are no longer in existence, it is allowable to take the evidence of witnesses to ascertain their former position. KALEE DABEE *v.* MUDOO SOODUN CHOWDHRY **16 W. R. 171**

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36. ——— *Evidence to amend uncertainty in decree—Execution.* Where a decree is so uncertain that it is impossible to ascertain what is decreed, a plaintiff cannot be put into possession of any other thing by execution than that which the decree describes. Evidence cannot be given in the execution department to amend any uncertainty in the decree. The law allows certain matters to be ascertained in execution, but beyond those it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree. The necessity of certainty in decrees discussed. DWARKANATH HALDAR *v.* KAMALA KANTH HALDAR **3 B. L. R. Ap. 128 : S. C. 12 W. R. 99**

37. ——— **Decree for maintenance**—*Charge on estate—Necessity to alter amount of maintenance.* A decree against the proprietor of an estate for a monthly maintenance, so long as it remains, creates a debt payable out of the estate and liable to be met out of any portion passing to the son. If new circumstances arise requiring that the original allowance ought not to be continued, the proper course would be to apply for a review to the Court which made the decree. The propriety of the sum allowed cannot be questioned in execution RAM KULLEE KOER *v.* COURT OF WARDS . . . . . **18 W. R. 474**

38. ——— **Alteration of decree by subsequent agreement.** Petitioner, a decree-holder, attached the defendant's property in execution. Subsequently to the attachment, petitioner's vakil presented a razinama petition to the Court on behalf of his client, praying that the attachment might be removed and execution stayed. An order was made granting the petition and allowing the decreed amount to be paid by instalments. Some months afterwards, the petitioner, charging that the vakil had presented the former petition fraudulently and without authority, applied to have his decree executed. The civil Judge refused to alter the former order or to notice petitioner's allegations against his vakil. On appeal, the High Court directed the Judge to investigate these allegations. The civil Judge found that the vakil was authorized to present the petition, and that his conduct was not fraudulent. *Held*, that such a petition as that presented by the vakil, even if within the scope of his duty, should not be permitted to alter the terms of a final decree. VENKATARAMMANNA *v.* CHAVELA ATCHIYAMMA **6 Mad. 127**

39. ——— **Mistake in decree**—*Discovery of mistake on appeal.* A compromise set up by the defendants in the present suit having been rejected, a decree was given to the plaintiff for the sum of R62,913, awarded in the original suit. That decree was upheld on appeal; but as it was alleged that on the facts stated in the

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plaint in the original suit, the plaintiff's mother's share of the dower was an eighth, and not a third, the Privy Council held that plaintiff ought not to benefit by that mistake, if it was a mistake; and they accordingly left it to the lower Court to enquire into that point, and to let execution go for the eighth or the third share, according as the fact might turn out. ABDOOL ALI *v.* MOZUFFUR HOSSEIN CHOWDHRY . **16 W. R. P. C. 22**

40. ——— Irregular alteration of order in favour of Government. A pauper suit for possession was decreed with mesne profits to be ascertained in execution, costs being also awarded, including the value of stamps due to Government, which was to be paid by plaintiff and defendant in shares proportionate to their ultimate success when the amount of wasilat should be ascertained. As the parties did not choose to go into the enquiry as to mesne profits, the Court, on a motion by Government, called upon the parties to appear, and, on their refusing to do so, altered its original order with respect to the payment of the stamp duty, and declared that it should be realized from both the parties jointly. *Held*, that the Court had no authority to make the second order in favour of Government, and that the proceedings taken in execution thereof were without legal foundation. SHOSTEE CHURN ROY *v.* COLLECTOR OF CHITTAGONG . . . . . **13 W. R. 155**

41. ——— Decree of Special Commissioners under Act IX of 1859—*Revision of, by Government. Held*, that a decree of the Court of special commission under Act IX of 1859, though adjudging a right to the plaintiff other than that sued for, cannot for this reason be treated as a nullity, and as one conferring no right; that the appropriation in satisfaction of the decree once made, a proprietary right in the assigned villages would arise in the plaintiff under the decree, of which she could not afterwards be lawfully deprived on any such allegation as that of incorrect valuation, the Government under the circumstances having no power of revision. KHANZADEE *v.* COLLECTOR OF BOOLUNDSHUHUR . . . . **1 Agra 57**

42. ——— Application to amend by person not party to the suit—*Application by Government to protect revenue—Omission to specify costs in decree in pauper suit. A* instituted a suit *in formâ pauperis* against *B*, to which the Government was not a party. The claim was decreed in the Court of first instance, but this decision was reversed by the High Court in regular appeal, and the plaintiff's suit dismissed. The decree of the High Court did not contain any order as to the payment of the stamp fees, and the Government applied to have the decree amended in that respect. *Held*, that the application must be refused on the ground that the Government, not being a party to the suit, had no right to be heard in the matter. *In the matter of the petition of* SECRETARY OF STATE FOR INDIA IN COUNCIL . **2 C. L. R. 461**

DECREE—*contd.*

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43. ——— Alteration without notice—*Decree in accordance with judgment—Notice to parties.* The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of R1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree and made it for a sum of R1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for R1,282 and had been improperly altered. The Court executing the decree disallowed the objection on the ground that it was not such as could be entertained in the execution department. *Held*, that the decree, as it originally stood, was in accordance with the judgment, and the Court had no power to alter it as it did; and the proceeding was further irregular, in that no notice was given to the opposite party as required by s. 206 of the Code. ABDUL HAYAI KHAN *v.* CHUNIA KUAR **I. L. R. 8 All. 377**

44. ——— Observations by MAHMOOD, *J.*, on the amendment of decrees and s. 206 of the Civil Procedure Code. TARSI RAM *v.* MAN SINGH . . **I. L. R. 8 All. 492**

45. ——— Irregularity—*Suit for possession of immoveable property—List of properties sued for appended to plaint—Omission to specify in decree properties decreed.* The plaintiff in a suit claimed possession of villages said in the plaint to be "detailed-below." No details of the villages were given in the plaint itself, but a separate paper containing a list of villages was filed with the plaint. The plaintiff obtained a decree for possession of "all the villages claimed," but there was no indication in the decree what those villages were. *Held*, that the Court executing the decree was not justified in reading the contents of the list of villages attached to the plaint into the decree, and awarding the decree-holder possession of the villages named in such list. *S. A. No. 310 of 1882, decided on the 11th August 1882*, followed. *Debi Charan* v. *Pirbhu Din Ram, I. L. R. 3 All. 388*, referred to. MUHAMMAD SULAIMAN *v.* MUHAMMAD YAR . . . . **I. L. R. 6 All. 30**

46. ——— Interest—*Amendment of decree—Judgment awarding interest for period prior to suit—Decree directing interest to be paid from date of suit.* The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards. *Held*, that no variance with the judgment, within the meaning of s. 206 of the Civil

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Procedure Code, was involved in the additional order contained in the decree. KOLAI RAM *v.* PALI RAM . . . . . **I. L. R. 7 All. 755**

47. ——— **Separate adjudication**—*Order amending decree.* A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say he accepted the appeal, and that the decree, as it stood, failed to give effect to the judgment. *Held*, on appeal under the Letters Patent, that an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was, therefore, a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismiss" his predecessor had meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206; that he had, therefore, exercised his jurisdiction "illegally and with material irregularity" within the meaning of s. 622 of the Code; and that the High Court was consequently competent to reverse his order. SURTA *v.* GANGA **I. L. R. 7 All. 875**

Reversing judgment of OLDFIELD, *J.* (differing from MAHMOOD, *J.*), in SURTA *v.* GANGA **I. L. R. 7 All. 412**

48. ——— **Order for payment by instalment**—*Civil Procedure Code, 1859, s. 194—Interest—Discretion of Court.* The discretion vested in Courts by s. 194 of Act VIII of 1859 should not be exercised without sufficient reason. MOHESSUR BUKSH SINGH *v.* THUBBOO CHOWDHRY **2 Hay 8**

49. ——— *Civil Procedure Code, 1859, s. 194.* It should not be applied to an action for money due on an instalment bond, the terms of which had been broken. LUCHMENAUTH DOOGUR *v.* HARADHUN MOOKERJEE **2 Hay 95**

50. ——— *Civil Procedure Code, 1859, s. 194. Held*, that, when not ordering the amount of the decree to be paid by instalments has arisen from any error or omission, or it is otherwise requisite for the ends of justice, the Court which passed the decree has power to review it and to make an order for payment by instalments. Otherwise the Court has no power to make such an order subsequent to the decree without the consent of the judgment-creditor. RAVICHAND DALICHAND *v.* MOTILAL NARBHERAM **4 Bom. A. C. 77**

51. ——— *Civil Procedure Code, 1859, s. 104 (1877, s. 210). Quære:* Whether "a decree for the payment of money" means merely what is commonly known as a money-decree, or includes a decree in which a sale is ordered of immoveable property, in pursuance of a contract specifically affecting such property, within the meaning of s. 194 of Act VIII of 1859 and s. 210 of Act X of 1877. Where a Court, on the ground that the defendant was "hard pressed," directed the amount of a decree to be paid by instalments extending over ten years, and allowed only one-half of the usual rate of interest:—*Held*, that there was no "sufficient reason" for directing payment of the amount of the decree by instalments, and that such Court had exercised its discretion injuriously to the plaintiff by the length of the period over which instalments were extended, and by allowing a rate of interest less than the ordinary rate. BINDA PRASAD *v.* MADHO PRASAD . **I. L. R. 2 All. 129**

52. ——— *Civil Procedure Code, 1877, s. 210. Held*, that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the property hypothecated by such bond. In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments. HARDEO DAS *v.* HUKAM SINGH . . . **I. L. R. 2 All. 320**

53. ——— *Civil Procedure Code, 1877, s. 210—Decree for money.* There is nothing in s. 210 of Act X of 1877, or elsewhere in that Act, authorizing a Court to direct that the amount of a decree should be paid within a fixed time from its date. *Semble:* That the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the "nankar" allowance hypothecated by such bond. BACHCHU *v.* MADAD ALI . . . . **I. L. R. 2 All. 649**

See TATA CHARLU *v.* KONADULA RAMACHANDRA REDDI . . . **I. L. R. 7 Mad. 152**

54. ——— *Civil Procedure Code, Act XIV of 1882, s. 210, Decree under—Right to execution.* On the 23rd February 1878, an application was made for execution of a decree, dated the 3rd December 1877, in which the decree-holder stated that the judgment-debtor had agreed to pay the balance then due on the 13th August 1878. The application was then struck off on the 26th June 1878. On the 30th June 1881, the decree-holder again applied for execution, and on the 11th July 1881 the judgment-debtor, with the consent of the decree-holder, applied for time to pay the balance due till the 8th September 1881, and that application was also struck off. On the 1st March 1883, the decree-holder again applied for execution. *Held*, that the application by the judgment-debtor made on the 11th July 1881, alleging that he had come to an arrangement with the decree-holder for the payment of the amount due by instalments, having resulted in its being registered and the proceedings struck off, amounted to a direction that the decretal amount be paid by instalments as stipulated in the petitions; and that,

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this being so, there was a decree passed on that date under the provisions of the second paragraph of s. 210 of the Code of Civil Procedure, of which the decree-holder was entitled to have execution. JHOTI SAHU *v.* BHUGUN GIR

I. L. R. 11 Calc. 143

55. ——— *Limitation Act, 1877, Art. 175—Application for execution of decree —Civil Procedure Code, s. 210.* An application to execute a decree, dated 30th August 1880, was made on 25th May 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following order :—" According to the application of both parties, it is ordered that the case be struck off, and the decree returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the amlahs of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March 1885 :—*Held*, that the order was not one recognizing or sanctioning the arrangement within the meaning of s. 210 of the Civil Procedure Code, inasmuch as the Court, at the time it made the order, had no power to make any order for instalments, any application for that purpose being then barred by Art. 175 of Act XV of 1887. *Jhoti Sahu* v. *Bhubun Gir, I. L. R. 11 Calc. 143,* dissented from. ABDUL RAHMAN SODAGUR *v.* DULLARAM MARWARI . **I. L. R. 14 Calc. 348**

56. ——— **Specific performance—** *Practice—Liberty to apply—Relief after judgment —Damages—Review—Alternative relief.* On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract, or in the alternative for damages ; and, on the 24th November 1886, obtained therein a decree for specific performance with the usual liberty to apply. On the 6th December 1886, the plaintiff discovered that it was out of the defendant's power to specifically perform his contract, and he thereupon, on the 13th April 1887, applied to the Court which had granted the decree for a re-hearing of the suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages, when assessed, might be entered up. *Held*, that he was entitled to ask for such relief. PEARISUNDARI DASSEE *v.* HARI CHARAN MOZUMDAR CHOWDHRY . . . **I. L. R. 15 Calc. 211**

57. ——— *Decree in favour of plaintiff—Rectification of decree on application of defendant—Practice—Objection taken at hearing that application made to Court was not the application of which notice had been given to opposite party—Preliminary point.* The plaintiffs sued in 1877 for specific performance of an agreement, dated 27th September 1871, by which certain landed properties were to be divided, as specified in the agreement between them and the defendants. The case came on for hearing on the 13th September 1878. The defendants did not appear, and a decree *ex parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 27th September 1871 specifically performed, and referred the suit to the commissioner for the preparation of conveyances, etc. The decree was sealed on the 9th October 1878. No further steps were taken by any of the parties for six years, and in September 1884 the matter was first brought before the commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the commissioner refused to make this order, being of opinion that he was not authorized to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November 1884 gave notice to the plaintiffs that they would apply to the Court—(i) " to set aside or vary its order of the 13th September 1878, so far as it related to the lodging of title-deeds, etc ; (ii) to appoint a receiver of certain properties mentioned in the agreement ; (iii) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement ; (iv) to order certain accounts to be taken." This motion was not brought on until the 10th September 1885, on which day it was dismissed with costs ; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under s. 108 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April 1887 that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties and by accounting for the rents thereof, etc., etc. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiffs and defendants respectively. *Held*, that the defendants were entitled to have the decree rectified. The fact that the decree declared that the plaintiffs were entitled to have the agreement of the 27th September 1871 specifically performed implied an order for specific performance of that agreement by all the parties to it. The mandatory words, however, as against the plaintiffs, having been, in the first instance, omitted, might now be inserted in the decree, so as to put the decree into the ordinary and usual form of decree in cases of this nature. The Court has

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inherent power over its own records so long as those records are within its power, and it can set right any mistake in them. Counsel for the plaintiffs contended that the defendants were not entitled, in the present motion, to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised. *Held*, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of counsel for the defendants was concluded, it should be taken that the form of the motion as made to Court was acquiesced in. The objection was then too late. KARIM MAHOMED *v.* RAJOOMA . . **I. L. R. 12 Bom. 174**

58. ——— Decree for redemption within specified time—*Appeal against decree—Power of Court in execution to extend time for redemption allowed by decree—Special ground for enlarging time.* The plaintiffs sued for the redemption of certain mortgaged property. On the 1st March 1886, a decree was passed declaring the plaintiffs entitled to redeem on payment by them to the defendants of R649-11-0 within three months from the date of the decree. Against this decree the defendants (the mortgagees) appealed on the ground that a much larger sum than R649-11-0 was due to them on the mortgage. The plaintiffs also filed objections to this decree under s. 561 of the Civil Procedure Code (XIV of 1882) on the ground that the mortgage-debt had been long ago paid off, and that now a large sum was due to them from the mortgagees, who had been in receipt of the profits of the property. Under these circumstances, the plaintiffs did not pay the R649-11-0 within three months as ordered by the decree. On the 12th October 1886, they presented an application for execution, and paid into Court the R649-11-0. The lower Court granted their application, and ordered possession of the property to be given to them. The defendant appealed to the High Court. *Held*, reversing the order of the Court below, that the Court in executing the decree had no power to alter the language of the decree, which it would virtually do if it enlarged the time mentioned in it by accepting the R649-11-0 paid into Court by the plaintiffs on the 12th October 1886. *Held*, also, that, even if the Court had power to enlarge time in the course of execution, the mere fact that the plaintiff had lodged an appeal would afford no special ground for enlarging the time. ISHWARGAR *v.* CHUDASAMA MANABHAI **I. L. R. 13 Bom. 106**

59. ——— Extending time for payment mentioned in decree—*Decree conditioned on payment of a sum certain within a fixed time—Payment after time specified in decree.* A Court, having framed a decree conditioned on the payment by the plaintiff of a sum certain within a specified time, has no power to extend the time for payment after the period mentioned in the decree has elapsed. *Har Narain Singh* v. *Chaudhrain Bhagwant Kuar,* *I. L. R. 13 All. 300,* referred to. RAM LAL DUBE *v.* HAR NARAIN . **I. L. R. 13 All. 400**

See KODAI SINGH *v.* JAISRI SINGH **I. L. R. 13 All. 376**

60. ——— Time fixed by decree for assumption of character of sannyasi—*Enlargement on appeal of that time.* The plaintiff sued for a declaration of his right as jheer of a muth and for possession of the property of the muth, and obtained a decree, which was, however, made contingent upon his assuming the character of a sannyasi, which he had been directed to do on being nominated as jheer within the period of four months. The defendant preferred an appeal against this decree, and the plaintiff preferred an appeal praying for the enlargement of the period fixed, within which he was to become a sannyasi pending the disposal of the appeal preferred by the defendant. On the plaintiff's appeal :—*Held* the Court had power to extend the time as prayed. RANGACHARIAR *v.* YEGNA DIKSHATUR **I. L. R. 13 Mad. 524**

61. ——— Power of Court to rectify its own mistake in order—*Civil Procedure Code (Act XIV of 1882), s. 370—Insolvency of plaintiff.* On the 3rd of August a case came on for hearing. Prior to that date, the plaintiff in this suit had been adjudicated an insolvent, and did not appear, but the official assignee appeared and applied for a postponement. The Court accordingly made the following order : It is ordered that the suit be dismissed under s. 370 of the Civil Procedure Code, unless the official assignee elects, on or before the fifth day of October next, to continue the suit and give security for the defendants' costs. The time for complying with the order was subsequently extended, and the plaintiff in the meanwhile obtained an order allowing the insolvency proceedings to be withdrawn. The defendant now applied that the suit should be dismissed pursuant to the terms of the above order. The plaintiff objected, as he was now no longer an adjudged insolvent, and was ready to prosecute the suit. *Held*, that the order had been made in an improper form, inasmuch as s. 370 gives the Court no power to order the dismissal of the suit. This part of the order, therefore, was wrong, and the Court could now rectify it by cancelling that portion of the order, and, as a consequence, refusing the defendant's application. LEKHRAJ CHUNILAL *v.* SHAMLAL NARRONDAS . . **I. L. R. 16 Bom. 404**

62. ——— Interest given by amendment in decree which was not given by the judgment—*Civil Procedure Code, ss. 206, 209, 622—Superintendence of High Court.* The plaintiffs sued for recovery of a certain sum of money and interest up to date of suit and for interest during the suit and subsequent to decree until satisfaction thereof. The Court in its judg-

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DECREE—*contd.*

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ment awarded the plaintiffs a specified sum of money, and ordered that the rest of the plaintiff's claim should stand dismissed. Subsequently the Court amended its decree by adding a decretal order for the payment to the plaintiffs by the defendant of interest during the pendency of the suit and after decree until the satisfaction of the debt. *Held*, that it was illegal for the Court to decree the claim for interest by way of amendment of its decree, and that the order so amending the decree was open to revision. HASAN SHAH *v.* SHEO PRASAD . **I. L. R. 15 All. 121**

63. ———— Alteration of decree made by predecessor—*Competency of Judge before taxation to reconsider an order as to costs made by his predecessor in office—Certificate of pleader's fee.* A Subordinate Judge, in granting the application of a plaintiff before him for permission to withdraw with leave to file a fresh suit in the same matter, made an order as to costs in favour of the defendants in the following terms:—"As the case has not been contested to the bitter end, half the pleader's fees are allowed and the process expenses, etc., incurred in the case, except those already refused to the defendants. For travelling and incidental expenses defendants to put in a bill in one week: this to be subject to the decision of the Court after hearing both parties. The application under s. 373 of the Code of Civil Procedure is granted with leave to the plaintiff to bring a fresh suit for the same matter. Costs allowed to defendants as above." The Judge who had made the above order having been transferred before taxation was completed:—*Held*, that it was competent to his successor at taxation and before granting payment of the pleader's fees to consider whether the certificate given by a pleader as to the fee paid to him in the case was according to rule, and to disallow payment of any fee not duly certified as paid. DICK *v.* DICK . . **I. L. R. 15 All. 169**

64. ———— Decree in terms of an award ordering (inter aliâ) delivery of moveable property—*Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—Civil Procedure Code (XIV of 1882), ss. 206-8.* A partition suit brought by a son against his father was referred to arbitration. On the 9th January 1890, the award was published, and on the 27th March 1890 the defendant moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him R1,05,000 in the manner therein stated, *viz.*, R40,000 to be paid forthwith and the balance of R65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the *Nasri* and *Sambuk*." In no event was

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defendant to be required to pay the R65,000 before the 15th November 1890. At the date of the decree the vessel *Sambuk* was at sea on a voyage, and on the 18th June 1890, while still on the voyage, she was lost. On the 15th November 1890, the plaintiff's attorneys demanded payment of the balance of R65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel *Sambuk* had been lost. They offered to pay its value, which they estimated at R1,000. The defendants, however, demanded the delivery of the buglows, which they stated to be worth a very large sum. The defendants having, under the circumstances, refused to pay the R65,000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by stating therein the amount of money to be paid to the defendant as an alternative if delivery of the vessel *Sambuk* could not be made, such delivery having become impossible. *Held*, that the rule must be discharged. The objection was an objection to an award, not to a decree. Possibly it might have been open to the parties to object to the award before it was filed on the ground that it ought to have stated a sum to be paid to the defendant in case some of the property could not be delivered to him. If such an objection had been made the Court might possibly have remitted the award or refused to file it. No such objection, however, was taken and the award was filed and a decree obtained in accordance with the award. The award could not be modified by the Court, nor could the decree, which must be in accordance with the award. AHMED BIN ESSA KHALIFFA *v.* ESSA BIN KHALIFFA **I. L. R. 17 Bom. 657**

65. ———— Rectifying decree—*Practice—Clerical error.* By a written agreement the defendants agreed to purchase from the plaintiff certain land comprising 5,280 square yards or thereabouts at the rate of R1-1-6 per square yard. The sum of R1,000 was paid on the date of the agreement in part payment of the price. The plaintiff sued for specific performance of the agreement. The plaint set forth the facts and the part payment, and prayed that the defendant might be ordered specifically to perform the agreement and to pay to the plaintiff the balance of the purchase-money, *viz.*, the sum of R4,475. On the 9th September 1897, judgment was given for the plaintiff, ordering "specific performance as prayed and costs." The decree was accordingly drawn up in terms of the prayer of the plaint. It was afterwards discovered that the sum mentioned in the prayer (*viz.*, R4,475) and inserted in the decree was incorrect, and ought to have been R4,775, the latter being the real balance due at the rate mentioned in the agreement after deducting the R1,000 paid

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as earnest. On 6th November 1897, the plaintiff gave notice of motion to rectify the decree by altering the figure R4,475 to R4,775. On motion to rectify the decree:—*Held*, that the decree should be rectified. PHEROZSHA PESTONJI RANDERIA *v.* SUN MILLS . . **I. L. R. 22 Bom. 370**

66. ——— **Compromise**—*Civil Procedure Code (Act XIV of 1882), s. 206—"Judgment"—Consent decree—Amendment—Clause not contained in petition of compromise, added in decree—True intention of parties.* Where, the parties to a suit having entered into a compromise, a decree was ordered to be entered up in terms of the petition of compromise, but, owing to some ambiguity in the petition of compromise, a passage, which was not contained in the petition, was inserted in the decree with the knowledge and consent of both parties: *Held*, that the decree gave expression to the true intention of the compromising parties, and ought not to be amended. *Per* MACLEAN, *C.J.* The judgment here (ordering a decree to be entered up in terms of the petition of compromise) was not such a judgment as is contemplated by s. 206, Civil Procedure Code, there being no expression of judicial opinion on the merits of the case. RAMESHWAR PROSAD NARAIN SINGH *v.* CHANDRESHWAR PROSAD NARAIN SINGH (1903) **7 C. W. N. 880**

67. ——— **Limitation**—*Civil Procedure Code (Act XIV of 1882), s. 206—Limitation Act (XV of 1877), Sch. II, Art. 179 (3).* A decree was passed on 31st December, 1892, and no appeal was presented by either party therefrom. Defendant No. 2, however, filed a petition for amendment of the decree in respect of the costs, which was granted on the 6th October, 1893. On 6th July, 1896, defendant No. 2 applied for execution of the decree, and he again applied on 29th April, 1898. On its being contended that the application was barred by limitation: *Held*, that it was not barred. The order passed by the Court determining the amount of costs must be treated as a continuation or completion of the judgment, and the amendment made was therefore substantially made on review of judgment, and Art. 179 (3) of Sch. II to the Limitation Act applied. VENKATA JOGAYYA *v.* VENKATASIMHADRI JAGAPATIRAZU (1900) **I. L. R. 24 Mad. 25**

68. ——— **Omission in judgment**—*Civil Procedure Code (Act XIV of 1882), ss. 206, 622—Omission in judgment—Decree in conformity with judgment—Amendment of decree under s. 206—Remedy by appeal—Inadmissibility of revision petition—Limitation Act (XV of 1877), s. 5.* Defendants in a suit held certain land on lease from plaintiff, who alleged that they had encroached upon his land and by that means held more than the area to which they were entitled. Issued for possession of the excess, and also claimed arrears of rent. Defendants denied the alleged

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encroachment, and pleaded that if it should be proved they were willing to pay increased rent. They also admitted liability in respect of the arrears of rent. The encroachment was proved, and the District Munsif gave judgment declaring defendants liable for increased rent in proportion, a decree being drawn up in similar terms. Both judgment and decree omitted to award the amount admittedly due as arrears of rent. Plaintiff thereupon presented a petition to the District Munsif, who ordered the decree to be amended so as to render defendants liable for the said arrears. This order was passed more than one month from the date of the decree. Upon a petition being preferred by defendants in the High Court against the District Munsif's order of amendment: *Held*, that the petition was not admissible, inasmuch as it was open to the petitioner, under s. 5 of the Limitation Act, to appeal against the decree as amended, notwithstanding that a month had expired from the date of the decree. *Nanda Rai* v. *Raghunandan Singh, I. L. R. 7 All. 282*, considered. VISVANATHAN CHETTI *v.* RAMANATHAN CHETTI (1901) . . **I. L. R. 24 Mad. 646**

69. ——— ——— *Amendment of decree—Limitation Act (XV of 1877), s. 5, and Sch. II, Art. 152—Appeal—Limitation—Sufficient cause for non-presentation of appeal within time.* Where the original decree was signed on the 6th July 1903, and the plaintiffs applied, on the 22nd instant to have the same amended in respect of the name of a party, which had been incorrectly recorded, and of the amount of the claim allowed, which had been entered as R606 instead of R1,600, and the amendment was made on the 22nd August. *Held*, that the period of limitation should be reckoned from the 22nd August as the date when the correct decree was prepared, and that an appeal filed on the 2nd September was within time. *Held*, further, that under s. 5 of the Limitation Act there was sufficient cause for not presenting the appeal within thirty days from the date of the first decree. AMAR CHANDRA KUNDU *v.* ASAD ALI KHAN (1905) **I. L. R. 32 Calc. 908**

4. EFFECT OF DECREE.

1. ——— **Decree made with jurisdiction**—*Estoppel.* A decree made with jurisdiction, until it is set aside, is, as between the parties to it, conclusive both as to the rights of those parties and the character in which they sue. BHAWABAL SINGH *v.* RAJENDRA PRATAP SAHOY **5 B. L. R. 321 : 13 W. R. 157**

2. ——— *Illegal decree—Void decree.* Where a Court has jurisdiction over the subject-matter of a suit its judgment or decree, even though irregular or illegal, cannot be said to be null and void. PHOOL KOOER *v.* SHEOBURUN SINGH . . . **12 W. R. 489**

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DECREE—*contd.*

4. EFFECT OF DECREE—*contd.*

3. ——— **Decree made without jurisdiction.** A decree without jurisdiction is of no effect in creating any charge on immoveable property. LUCHMEENATH SINGH *v.* MADHO DASS SAHOO . . . . . **2 N. W. 70**

4. ——— **Decrees, priority of.** A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforced. GHERAN *v.* KUNJ BEHARI . **I. L. R. 9 All. 413**

5. ——— **Effect of a decree obtained by an attaching creditor in a suit against successful intervenors or claimants**—*Civil Procedure Code (Act VIII of 1859), ss. 240, 270, 271.* In 1872 the plaintiff obtained a money-decree against two brothers, *P* and *K*. In execution of that decree, he attached their one-half share in certain fields in 1874. The attachment was removed at the instance of two claimants, *S* and *B*. In 1875 the plaintiff sued the claimants and obtained a decree in his favour in 1878. Meanwhile, in December 1874, after the plaintiff's attachment had been removed, one *V* obtained a decree against one of the brothers, *P*. In 1867, while the plaintiff's suit against *S* and *B* was pending, *P*'s right, title and interest in the one-half share of the fields belonging to himself and *K* was sold in execution of *V*'s decree and purchased by the defendant. In 1881 the plaintiff again attached the one-half share belonging to the two brothers under his decree of 1872. Thereupon the defendant, relying on his purchase of 1876, applied for the removal of the attachment. It was removed from *P*'s one-fourth share and maintained on *K*'s share, which was in due course sold. The plaintiff now sued to establish his right to sell *P*'s one-fourth share under his decree of 1872. *Held*, also, that, though the effect of the decree obtained by the plaintiff in his suit against the claimants, *S* and *B*, was to efface entirely their obstruction to his attachment of 1874, to reinstate that attachment as in full force *ab initio*, and to restore the state of things that had been disturbed by the order of release, yet the plaintiff could not succeed in the present suit, as the sale to defendant under *V*'s decree was perfectly valid, and *P*'s property, having been sold under that decree, could not be sold again under the plaintiff's decree. The rights of rival decree-holders taking out execution against the same judgment-debtor considered. LALU MULJI THAKAR *v.* KASHIBAI . . . **I. L. R. 10 Bom. 400**

6. ——— **Effect of setting aside a decree on the ground of fraud and collusion.** *A* filed a suit against *B* in which a consent decree was passed. This decree was set aside in a subsequent suit brought by *B* on the ground that it had been obtained by fraud and collusion between *A* and *B*'s agent, who had no authority to consent. Thereupon *A* applied to have his suit restored to the file and re heard on the merits, contending that, the decree having been set aside, the suit remained undecided. *Held*, refusing the application, that *A*'s decree, though set aside, was not reversed. The decree obtained by *B* left *A*'s decree legally complete, and amounted only to a declaration that the decree obtained by *A* "should avail nothing for or against the parties to *B*'s suit who were affected by it." BHIMAJI GOVIND *v.* RAKMABAI **I. L. R. 10 Bom. 338**

7. ——— **Decree determining rights of rival religious sects**—*Decree whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members.* In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs, and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey, the terms of the decree." It appeared that in 1868 the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court. *Held*, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition. SADAGOPACHARI *v.* KRISHNAMACHARI **I. L. R. 12 Mad. 356**

8. ——— **Decree for redemption not providing for payment in fixed time.** A decree for redemption, which does not provide for payment of the mortgage-debt within a fixed time or for foreclosure in case of default, operates of itself as a foreclosure decree if not executed within three years. MALOGI *v.* SAGAJI **I. L. R. 13 Bom. 567**

9. ——— **Decree directing separate amounts with separate sets of proportionate costs to be recovered against defendants**—*Transfer of the decree in writing to one of the defendants—Application by the transferee to recover the amount due by the other defendant.* A decree directed that a certain sum with proportionate costs be recovered against *N* and a certain other sum with proportionate costs be recovered against *A*. Subsequently *A* took a transfer of the decree in writing and applied for execution of the decree against *N* to the extent of the sum decreed against him. The

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application having been rejected under s. 232, cl. (*b*), of the Civil Procedure Code (Act XIV of 1882): *Held*, reversing the order, that s. 232, cl. (*b*), of the Civil Procedure Code (Act XIV of 1882) was not applicable. Though the direction against *N* and the separate direction against *A* were contained on one and the same piece of paper and were passed in the same suit, still for all that they were decrees for separate sums of money and might equally well have been passed in separate suits. The fact of their being on one piece of paper cannot control the matter. ANANT VINAYAK *v.* NAGAPPA SUBRAYA (1907) . . . I. L. R. 32 Bom. 195

5. REVIVAL OF DECREE.

1. ——— **Jurisdiction to revive decree.** In a suit for recovery of a sum of money expended towards improvement of a joint property, the Court passed a decree that, if the defendant would contribute towards payment of the expenses for the improvement, he would be entitled to a proportionate share of the profits. No steps were taken by the plaintiff from 1863 to revive the decree; but on the application of the defendant tendering the amount due from him, and praying to be put in possession, the lower Courts restored the decree and passed an order in his favour. *Held*, that the lower Courts had no jurisdiction to revive a decree at the instance of the judgment-debtor. NILAMBAR SEN *v.* KALI KISHOR SEN
3 B. L. R. Ap. 94 : 12 W. R. 28

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See MORTGAGE . I. L. R. 31 Calc. 737

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I. L. R. 29 Calc. 548

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4 C. W. N. 542

——— **breach of contract by**—

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I. L. R. 28 Calc. 557

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I. L. R. 3 All. 759

——— **liability of**—

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3 B. L. R. A. C. 413
12 B. L. R. 208 note
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——— **liability of**—*concld.*

See SALE IN EXECUTION OF DECREE—WRONGFUL SALES.
5 B. L. R. Ap. 71, 73 note
3 B. L. R. A. C. 413
5 N. W. 211
7 W. R. 355

——— **meaning of**—

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.
I. L. R. 2 Mad. 216
I. L. R. 18 Calc. 639

——— **minor**—

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I. L. R. 28 Calc. 465

——— **purchase by**—

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY—GENERAL CASES.

——— **rival**—

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11 C. W. N. 433

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See LIMITATION ACT, 1877, s. 14 (1871, s 15; 1859, s. 14).

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——— **attestation of**—

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6 C. W. N. 395
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——— **of sale**—

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——— **registration of**—

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See ONUS OF PROOF—DECREES AND DEEDS, SUITS TO ENFORCE OR SET ASIDE.

1. EXECUTION.

1. ——— **Completion of deed of sale**—*Delay in delivery.* A deed of sale is complete on the day when it is signed and attested by the Cazee and consideration is paid for it. Delay in the delivery of the deed does not invalidate it. BHIKUN SINGH *v.* JUMEELA KOONWAR . **W. R. 1864, 62**

2. ——— **Proof of execution**—*Admissibility in evidence.* A deed of conveyance was tendered in evidence which purported to bear the mark of *G* as vendor, and which was duly attested by four witnesses. *G*, however, denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. *Held*, on the authority of *Whitelock* v. *Musgrove, 2 Cr. & M. 511*, that the deed was admissible in evidence, its execution by *G* being sufficiently proved. ABDULLA PARU *v.* GANNIBAI
I. L. R. 11 Bom. 690

3. ——— *Evidence Act (I of 1872), s. 68—Attesting witness—Scribe of a deed—Transfer of Property Act (IV of 1882), s. 59. Held*, that a deed may be legally proved by the evidence of the scribe thereof who has signed his name, but not explicitly, as an attesting witness, on the margin, and has been present when the deed was executed. *Muhammad Ali* v. *Jafar Khan, All. W. N. (1897) 146*, followed. RADHA KISHEN *v.* FATEH ALI RAM . **I. L. R. 20 All. 532**

4. ——— **Proof of execution**—*Evidence Act (I of 1872), s. 68—Transfer of Property Act (IV of 1882), s. 59—Attesting witness—Mortgage—Writer of the deed.* A person who is present and witnesses the execution of a deed, and whose name appears on the document, although he is therein described merely as the writer of the deed, is a competent

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DEED—*contd.*

1. EXECUTION—*contd.*

witness to prove the execution of the deed. He need not be described in the deed as an attesting witness. *Radha Kissen* v. *Fateh All Ram, I. L. R. 20 All. 532,* referred to. RAJ NARAIN GHOSE *v.* ABDUR RAHIM (1901) **5 C. W. N. 454**

5. ———— **Signature**—*Execution of deed —Registration—Admission of Signature before Registrar—Denial of execution—Registrar, jurisdiction of, to register—Certificate of registration.* When the executant of a deed admits his signature to the deed before the Registering Officer, but denies its execution: *Held,* that the Registering Officer can regard this as an admission of the execution, and has jurisdiction to register the deed; *also,* that the Court cannot go behind the certificate in these circumstances. *Semble:* that, where a person signs his name on a blank paper, with an endorsement in his own handwriting that "the mortgage bond or R21,750 on account of *hundis* executed by me is correct," it shows that he gave authority to engross on the paper the deed that is written on it, and the deed is therefore valid. YULE *v.* RAM KHELWAN SAHAI (1901) . **6 C. W. N. 329**

6. ———— **Transfer of Property Act (IV of 1882), s. 59**—*Mortgage-deed signed by the mortgagor attested by one witness and containing an acknowledgment by the Sub-Registrar, whether valid—Indian Succession Act (X of 1865), s. 50 —Mortgage being invalid, whether a money decree can be made upon the covenant in the bond.* The requirements of s. 59 of the Transfer of Property Act are not satisfied when a mortgage-bond is signed by the mortgagor, attested by one witness, and contains the Sub-Registrar's signature to the endorsement, recording the admission of the execution by the executant; therefore such a mortgage is not valid in law. When a suit is brought upon a mortgage-bond, although the mortgage is held to be invalid on the ground that the requirements of s. 59 of the Transfer of Property Act were not satisfied, the plaintiff is entitled to recover, upon the covenant, money which the defendant covenanted to pay. TOFALUDDI PEADA *v.* MAHARALI SHAHA **I. L. R. 26 Calc. 78**

7. ———— *Security-bond attested by only one witness—Signatures of the Sub-Registrar and the identifier on the back of the bond whether sufficient to render mortgage valid.* A security-bond, by which an interest in specific immoveable property has been transferred to another person for the purpose of securing a future debt, is a mortgage-bond within the meaning of s. 58 of the Transfer of Property Act, and in order to create a valid mortgage, it must be signed by the executant and attested by at least two witnesses. Therefore, in a case where the mortgage-bond by which the liability of a surety was created was signed by the mortgagor only on the front page, and not attested by two witnesses, but on the back of the bond it contained the signatures of the Sub-Registrar and of the identifier, a suit is not maintainable, inasmuch as the bond is not a valid one under s. 59 of the Transfer of Property Act. *Nitye Gopal Sircar* v. *Nogendra Nath Mitter, I. L. R. 11 Calc. 429,* distinguished. GIRINDRA NATH MUKERJEE *v.* BEJOY GOPAL MUKERJEE **I. L. R. 26 Calc. 246 3 C. W. N. 84**

DEED—*contd.*

1. EXECUTION—*concld.*

8. ———— *Attestation of mortgage-bond—Meaning of the word "attested"—Evidence Act (I of 1872), s. 70—Admission of execution.* The attestation required by s. 59 of the Transfer of Property Act is an attestation by witnesses of the execution of the document, and not of the admission of execution. The word "admission" in s. 70 of the Evidence Act relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee, I. L. R. 26 Calc. 246,* followed. ABDUL KARIM *v.* SALIMUN . . . **I. L. R. 27 Calc. 190**

9. ———— *Mortgage-deed attested by only one witness.* Where a mortgage-deed was executed, but there was only one attesting witness, it was *held,* not to create any charge on the property, because it was a mortgage within s. 58 of the Transfer of Property Act, and because such a transaction was expressly excluded from the operation of s. 100 of the Act, and that the provisions of s. 59 not having been complied with, the mortgage could not be proved. RAM KUMARI BIBI *v.* SRINATH ROY . . **1 C. W. N. 81**

10. ———— *Evidence Act (I of 1872), s. 68—Attestation of marksman.* The attestation of a marksman to a mortgage-bond is a sufficient attestation within the meaning of s. 59 of the Tr n fer of Property Act and s. 68 of the Evidence Act. PRANKRISHNA TEWARY *v.* JADU NATH TRIVEDY . **2 C. W. N. 603**

2. ATTESTATION.

1. ———— **Attesting witness unable to write**—*Name written or mark added by another person.* Where an attesting witness is unable to write, and either makes a mark or has his name written for him in a deed, the style of execution of the attestation cannot invalidate the deed. AGUM MISRA *v.* PULLUKDHAREE MISRA **W. R. 1864, 187**

2. ———— **Effect of deed on witness attesting it**—*Estoppel.* The attesting of a deed of conveyance of property made with full knowledge of the contents of the deed and of the object of the signature may convey the right of the person signing. SURIATOOLLAH *v.* DASSEE BIBEE **1 W. R. 66**

3. ———— *Reversioner—Consent.* A reversioner attesting a conveyance by

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DEED—*contd.*

2. ATTESTATION—*contd.*

Hindu widow cannot impeach the sale on the ground of waste by such alienation. GOPAUL CHUNDRA MANNA *v.* GOURMONEE DASSEE **6 W. R. 52**

4. ——— *Evidence of assent to deed.* Where a person executes a deed as witness with full knowledge of its contents, such execution may be taken to be evidence of his assent to the statements contained in the deed. NOORUM *v.* KHODA BUKSH . **1 Agra 50**

MATADEEN ROY *v.* MUSSOODUN SINGH. **10 W. R. 293**

5. ——— The attestation of a deed by a relative does not necessarily import his concurrence. RAJLAKHI DEBI *v.* GOKUL CHANDRA CHOWDHRY **3 B. L. R. P. C. 57 : 13 Moo. I. A. 209**

RAM CHUNDER PODDAR *v.* HARI DAS SEN **I. L. R. 9 Calc. 463**

6. ——— *Evidence of concurrence or consent to deed attested.* The true rule deducible from the cases of *Rajlakhi Debia* v. *Gokul Chandra Chowdhry, 3 B. L. R. P. C. 57, Matadeen Roy* v. *Musoodun Singh, 10 W. R. 293,* and *Ram Chunder Poddar* v. *Haridas Sen, I. L. R. 9 Calc. 463,* is that, though the mere attestation of a deed by a relative does not necessarily import concurrence, yet where it is shown by other evidence that, when becoming an attesting witness, he must have fully understood what the transaction was, his attestation may support the inference that he was a consenting party. The question whether attestation of a document should be held to imply assent is a question of fact which has to be determined with reference to the circumstances of each case. CHUNDER DUTT MISSER *v.* BHAGWAT NARAIN . . **3 C. W. N. 207**

7. ——— *Suit for possession—Estoppel.* In a suit for possession, the fact of plaintiff having been a subscribing witness to a pottah which is set up by the defendant is not conclusive against the former. HOSSEINEE KHANUM *v.* TIJUN LALL . **14 W. R. 293**

8. ——— **Necessity of attestation**—*Maurasi pottah.* Documents of the description of a maurasi pottah are not required by law to be attested. GRISH CHUNDER ROY *v.* BHUGWAN CHUNDER ROY . . . **13 W. R. 191**

9. ——— **Sufficiency of attestation**—*Transfer of Property Act (IV of 1882), s. 59—Attestation of mortgage-bond—Meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.* A mortgage-bond was signed by the mortgagor, was attested by three witnesses, and was duly registered. In a suit for the mortgage-debt, it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgagor, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under s. 59 of the Transfer of Property Act (IV of 1882), and that the mortgage was therefore invalid. On appeal to the High Court: *Held,* that the attestation was sufficient. A mortgage-deed is attested within the meaning of s. 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature. *Abdul Karim* v. *Salimun, I. L. R. 27 Calc. 190,* dissented from. RAMJI HARIBHAI *v.* BAI PARVATI (1902) . **I. L. R. 27 Bom. 91**

DEED—*contd.*

2. ATTESTATION—*concld.*

10. ——— **Time of attestation**—*Evidence Act (I of 1872), ss. 70, 114—Transfer of Property Act (IV of 1882), s. 59—Mortgage-deed, proof of—Attesting witness.* Where a mortgage-deed, on the face of it, showed that it was attested by two witnesses, one of whom was the writer, whose denial of execution of the deed by the mortgagee had been found by the Court of Appeal below to be false, and the other witness said that the mortgagee signed in his presence, but he was not able to remember whether the mortgagee signed also in the presence of the writer, and it appeared that the writer's signature preceded that of the other witness: *Held,* that, under the circumstances, it might fairly be presumed that both signed as attesting witnesses after the execution of the document by the defendant. That such a presumption may be raised is supported by s. 114 of the Evidence Act. *Burgoyne* v. *Showler, 1 Rob. Eccl. Rep. 5,* relied on. JOGENDRA NATH MUKHOPADHYA *v.* NITAI CHURN BUNDOPADHYA (1903) . . . . . **C. W. N. 384**

11. ——— **Witness writing name of executant**—*Transfer of Property Act (IV of 1882), s. 59—Mortgage-bond, proof of—Witness writing the name of executant, whether an attesting witness—Practice—Remand.* Where a lady executed a mortgage-deed by putting her finger-mark to the same, and a person who saw her put the finger-mark wrote her name at her request and the words "by the pen of" preceding his name written by himself: *Held,* that he was an attesting witness, and the words "by the pen of" preceding his name were a mere matter of surplusage, and the document was executed by the lady and could not be regarded as having been executed by him on her behalf. "Attestation" means that what is said to be attested happened in the presence of the attesting witnesses. Case where, on objection being taken at a late stage that a mortgage-bond was not attested, as the law required, by two witnesses, the suit, instead of being dismissed, was sent back to enable plaintiff to adduce further evidence to prove that at least two of the persons whose names appeared on the face of the document were attesting witnesses. DINAMOYEE DEBI *v.* BON BEHARI KAPUR (1902) **7 C. W. N. 160**

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DEED—*contd.*

3. CONSTRUCTION.

1. ——— **Danger of deciding case upon a document by construction put on another document in another suit.** The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond. BHAGWANT SINGH *v.* DARYAO SINGH . **I. L. R. 11 All. 416**

2. ——— **Intention of parties**—*Rights at time of execution.* In construing a document the situation of the parties and their rights at the time of the execution must be looked at. DINO NATH MUKERJEE *v.* GOPAL CHUNDRA MOOKERJEE **8 C. L. R. 57**

3. ——— *Evidence of intention.* The intentions of parties in deeds must be taken from the words they use, where those words are plain. RADHA JEEBUN MOSTOFEE *v.* BISSESUR MOSTOOFEE . . . . **2 Hay 178**

4. ——— In construing deeds, where their terms are doubtful, it should be ascertaned in what manner the terms of the deed were understood and acted upon by the parties during the years immediately succeeding the grant. SHUNKER LALL *v.* POORUN MULL **2 Agra 150**

5. ——— **Native documents**—*Mode of construing.* Native deeds and contracts ought to be construed liberally, regard being had to the real meaning of the parties, rather than to the form of expression. In this view a person was held to be a manager, who was in a deed inaccurately and erroneously described as a proprietor or heir. HUNOOMAN PERSHAD PANDEY *v.* BABOOEE MUNDRAJ KOONWEREE **6 Moo. I. A. 393 : 18 W. R. 81 note**

6. ——— **Deed of sale**—*Evidence of price of land.* In construing a deed of sale where the terms are ambiguous, the conduct of the parties immediately after and acting upon the deed is very important, such conduct being sometimes (as in this instance) the only means by which the Court can know how the price of land was fixed. CHEETUN LALL *v.* CHUTTERDHAREE LALL . **19 W. R. 432**

7. ——— **Use of general words in document**—*Limit on implication. Per* MAHMOOD, *J.*—When general words are used in a document, they must be understood in a general sense, unless they are accompanied by any expression limiting or restricting their ordinary meaning, or unless such limitation or restriction arises from necessary implication. SHEORATAN KUAR *v.* MAHIPAL KUAR . . **I. L. R. 7 All. 258**

8. ——— **Circumstances attending execution**—*Conduct of parties after execution.* If, in order properly to apply and understand the provisions of a deed, it be necessary to enquire into the circumstances under which it was executed, a Court may rightly make such enquiry. The conduct of the parties after the making of an instrument affords a clue to their intentions in regard to its effect only where they are voluntary actors in the execution of the conveyance, not where it is made against their will by coercion of a Civil Court. LOOTF ALI *v.* BUDROOL HUQ **21 W. R. 119**

DEED—*contd.*

3. CONSTRUCTION—*contd.*

9. ——— **Construction irreconcileable with other documents.** If a particular construction of a document renders a contract evidence by it inoperative, and another construction renders it operative and is reconcileable with other portions of the documents, the first should give way to the second. DHERAJ MAHTAB CHAND BAHADOOR *v.* HURDEO NARAIN SAHOO **16 W. R. 119**

10. ——— **"Sontan"**—"*Issue*"—*Male issue.* The word "*sontan*" occurring in a deed of agreement between co-sharers, members of a Hindu family, was construed to mean issue generally, and not male issue merely. KRISTO KISHORE BHUTTACHARJEE *v.* SETAMONEE BHUTTACHARJEE **7 W. R. 320**

11. ——— **Absolute conveyance**—*Property in possession and expectancy.* When several persons join in a conveyance and convey "the whole and entire property absolutely," they must be taken to have exercised every power which they possess, and to have parted with their whole interest, whether in possession or expectation. KISHEN GEER *v.* BUSGEET ROY . **14 W. R. 379**

12. ——— **Covenants as to title and quiet possession**—*Protection against dispossession.* In a kobala by which certain landed property was conveyed, the vendor bound herself in the following terms: "If any one objects to my sale and gives you any sort of trouble, I will arrange it, and if I fail to do so, I will restore the purchase money; in default you may realize it by an action." *Held,* that it was intended to provide not only against defect in the power of the vendor as a Hindu widow, but against any disturbance of the purchaser, and to protect him against dispossession. BISSESSUREE DEBIA *v.* GOBIND PERSHAD TEWARI . . . **21 W. R. 398**

Varied on appeal by decision of Privy Council by making more parties liable under the decree. BISSESSURE DEBYA *v.* GOBIND PRASAD TEWAREE **L. R. 3 I. A. 194 : 26 W. R. 32**

13. ——— **Interest passing to purchaser**—*Deed of sale.* It was held that the words "the arrears of past years due by asamis" in a deed of sale did not pass to the purchasers decrees for arrears of rent held by the vendors. BALAM DAS *v.* DWARKA DAS . **7 N. W. 88**

14. ——— **Ikrarnamah, construction of**—*Rent charge.* The defendants' ancestor granted to *A* and *B* an ikrarnamah in the following terms:—"In consideration of R4,952 due by me to you, and in lieu thereof, I do hereby grant and alienate

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DEED—*contd.*

3. CONSTRUCTION—*contd.*

to *A* and *B* out of the whole and entire profits of my proper share in mouzah *X* the sum of R600 per annum, in equal proportion, free from all incumbrances, and constitute them part owners thereof. The said *A* and *B* shall be at liberty to make joint-collection with me, and to receive and enjoy in perpetuity R600; or upon division and partition of as much land as may yield to them R600, to make separate collection as from their own property. If in any way by sale, etc., the said mouzah shall cease to be my property, I agree to set apart, upon partition and division for *A* and *B*, as much land as may yield R600 in another of the mouzahs owned by me exclusively, and to that also the same conditions as above shall be applicable." *A* applied to have his name registered as owner of a share in the mouzah sufficient to yield an income of R300 per annum. *Held*, that, under the ikararnamah, *A* had only a rent charge on the property. MAHOMED ZAHUR ALUM *v.* CHUNDER CUMAR **5 C. L. R. 449**

15. ——— Maxim, expressio unius est exclusio alterius—*Mistake in deed—Suit to reform deed.* The plaintiff sold to the defendant a field containing a well; tax was payable to Government on the field as well as a tax on the well. The deed of sale expressly provided for the payment of the tax on the field by the defendant, but was silent as to the tax on the well. Government recovered the amount of the tax on the well from the plaintiff for 1871, as the well stood entered in the Government books in the plaintiff's name. The plaintiff sued to recover the amount from the defendant. *Held*, that, under the deed of sale, the defendant was not liable to reimburse the plaintiff the amount paid by him to Government. *Held*, also, that, if the omission in the deed of sale to provide for the payment of the tax on the well by the defendant should have arisen from a mistake, his only remedy was a suit for reforming the deed so as to make it in accord with the actual agreement between the parties at the time of the sale. Amount and value of proof required of the plaintiff in such a suit pointed out. GULABHAI MONDAR *v.* DAYABHAI GOVARDHANDAS . **10 Bom. 51**

16 ——— Mistake in boundaries in deed—*Intention of parties.* Where by mistake a part only of the premises intended to be mortgaged is described in the deed, and would alone pass under a bill of sale in execution to the auction-purchaser:—*Held*, that the Court ought to interfere for the rectification of the instrument, and that, regard being had to the intention and subsequent dealings of the agreeing parties, it ought to be construed as if it had expressly and fully mortgaged and conveyed the entire premises in question. PUDDOMONEE DASSEE *v.* DWARKANATH BISWAS **25 W. R. 335**

17. ——— "Fasli year"—"Agricultural year"—*N.-W. P. Land Revenue Act (XIX of 1873), s. 3, cl. 8—Inconsistent clause.*

DEED—*contd.*

3 CONSTRUCTION—*contd.*

The practice, adopted by patwaris in some parts of the North-Western Provinces, of applying the term "fasli year" to the "agricultural year" as defined in Act XIX of 1873, s. 3, cl. 8, is erroneous. Where parties to a deed describe a date as being in such and such a "fasli" year, they must be taken, in absence of evidence of mutual mistake, to refer to the calendar fasli year. In interpreting a document, a clause which is inconsistent in any construction thereof with the remaining provisions of the document must be rejected. *Yad Ram* v. *Amir Singh, W. N. All. (1882) 174,* and *Sheobaran Singh* v. *Bisheshar Dayal Singh, W. N. All. (1892) 236,* referred. to. CHATARBHUJ *v.* DWARKA PRASAD . **I. L. R. 18 All. 388**

18. ——— Construction of razinama disposing of estate with words "naslan bad naslan." In cases decided on the construction of documents, in which the expressions mokurari istemrari, istemrari mokurari, have been considered upon the question whether an absolute interest has been conferred by such documents, or not, it has been taken for certain that, if the words "naslan bad naslan" had been added, an absolute interest would have been clearly conferred. Accordingly, in construing a razinama between parties dividing family estate and expressly declaring that the shares should descend "naslan bad naslan":—*Held*, that the insertion of these words was conclusive in itself; the expressed object of this razinama pointing to the same construction, *viz.*, that the estate taken under it was absolute. HARIHAR BAKSH *v.* UMAN PRASHAD **I. L. R. 14 Calc. 296**
L. R. 14 I. A. 7

19. ——— Malikana—*Heritable charge—Suit for arrears of malikana allowance.* *S* sold a share in immoveable property to *M* by a registered deed of sale which contained the following provisions:—"The said vendee is at liberty either to retain possession himself or to sell it to some one else; and he is to pay R25 of the Queen's coin to me annually (as malikana), which he has agreed to pay." *M* mortgaged the property to *B*, who obtained possession; and after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued *M* and *B* to recover arrears of malikana. *Held*, that the words "as malikana" in the deed of sale could not be rejected as surplusage; that they showed an intention that the payment of the R25 should be an annual charge upon the property and the profits arising therefrom analogous to that of a malikana reserved on a settlement by a Government settlement officer for a zamindar; that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property; and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance. *Heeranand Sahoo* v. *Ozeerun, 9 W. R. 102, Bhoalee Singh* v. *Neemoo Behoo, 10*

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DEED—*contd.*

3. CONSTRUCTION—*contd.*

W. R. 302, Hurmuzi Begum v. *Hirday Narain, I. L. R. 5 Calc. 921, Mahomed Karamatollah* v. *Abdool Majeed, 1 N. W. 205, Kooldeep Narain Singh* v. *Government, 14 Moo. I. A. 247, Tulshi Pershad Singh* v. *Ram Narain Singh, I. L. R. 12 Calc. 117, Gaya* v. *Samjiwan Ram, I. L. R. 8 All. 569,* and *Giyan Singh* v. *Kooer Peetum Singh, 1 N. W. 73,* referred to. CHURAMAN *v.* BALLI **I. L. R. 9 All. 591**

20. ——— Debtor and creditor—*Assignment or appropriation of rent till payment of debt —Intention to appropriate rent as distinguished from the lands—Aivaj (money)—Usufructuary mortgage—Right to take kabuliats from tenants and make recoveries.* Where under an instrument a debtor allotted to his creditor his aivaj on account of deshpande hak and inam recoverable from the villages and undertook not to meddle till the aivaj was paid, and the instrument did not describe the lands mentioned therein by metes and bounds, but only as being in the occupation of certain persons paying so much rent, and contained a clause that the aivaj of R63 (the sum total of rents) had been allotted, and that the creditor might take kabuliats from the occupants and make the recoveries:—*Held,* that the term aivaj, although capable of meaning property generally, must, from the context of the document, mean moneys or sums. *Held,* further, that the language of the instrument showed a clear intention to appropriate rents as distinguished from the lands themselves. *Held,* also, that, even if the transaction were regarded as a mortgage, it could only be a usufructuary mortgage, which would confer no right to have the property sold. HANMANT RAMCHANDRA DESHPANDE *v.* BABAJI ABAJI DESHPANDE . . **I. L. R. 16 Bom 172**

21. ——— Construction of documents of sale and of agreement for re-sale—*Sale, with right reserved of re-purchase within a period, distinguished from mortgage.* A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to re-purchase the property sold, on re-paying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage. *Alderson* v. *White, 2 DeG. & J. 105,* referred to and followed, the law of India and of England being the same on this point. BHAGWAN SAHAI *v.* BHAGWAN DIN **I. L. R. 12 All. 387**
L. R. 17 I. A. 98

22. ——— Sale-deed or deed of gift—*Mahomedan law, gift.* A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—"Hath * * * nawasi apne ki bai katai karke zar-i-saman tamam wo kamal wasul pakar baksh diya aur hiba kardiya." The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was apparently no evidence external to the deed that any consideration has passed between the parties. *Held* by EDGE, *C.J.*, and TYRRELL and KNOX, *JJ.*, that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale. *Per* MAHMOOD, *J., contra.* The lower Appellate Court having found that no consideration had passed, the deed must be considered as a deed of gift, though wearing the appearance of a sale-deed and, possession not having been given, under Mahomedan law the gift was invalid. ANGAN LAL *v.* MUHAMMAD HUSAIN . . . **I. L. R. 13 All. 409**

23. ——— Deeds releasing future and contingent interests—*Agreement excluding a possible question between the parties as to the effect of words in a will, under which they took their rights.* Three brothers, under their father's will, were entitled, each on attaining full age, to the testator's residuary estate in equal shares. When all had attained full age, two having been minors at the testator's death, they effected a separation of their interests derived from the will, and executed to one another instruments of compromise and partition containing words relating to possible claims which they gave up. One of the two younger brothers afterwards died, having taken, under the will of the other younger one, all the estate of the latter who had died without issue before him. The eldest then attempted to raise the question whether, on the one hand, the brothers had taken under their father's will absolute interests, or on the other, interests that were divested, and went over to a surviving brother in the event of death without issue. As to this, the Court below differed, but the Appellate Court decided, and on this appeal the decision was affirmed, that the above instruments relinquished future demands, this claim included, relating to the brothers' estates under their father's will. GREENDER CHUNDER GHOSE *v.* TROYLUCKHO NATH GHOSE **I. L. R. 20 Calc. 373**

24. ——— Title under a will followed by a family arrangement adding to the property devised. The will of a proprietor, who died in 1864, disposed of a zamindari, and of one village within it, as two distinct properties, giving the zamindari to the testator's two widows, and, on the other hand, giving the village in equal shares, in perpetuity, to the two brothers of his junior wife. Neither of the two brothers took possession of their respective moieties on the testator's death, and the whole village was treated for some time as part of the zamindari, the profits of it being received by, or on behalf of, the widows. In 1869 one of the brothers having died, leaving a son, who succeeded to his rights in the village, a family arrangement was made that the entirety of it should be made over to the surviving brother, the present claimant, the son of the other receiving from the widows

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DEED—*contd.*

3. CONSTRUCTION—*contd.*

satisfaction in lieu of his moiety. The junior widow having died, the senior got possession of the village, alleging that the surviving brother had merely been appointed to act as manager of it on behalf of herself and her co-widow. *Held*, that under the will the claimant had been originally entitled to one-half of the village including its rents, from the testator's death ; and that to this half had been added the other, with title, in 1869, in pursuance of the transaction in regard to it. An order given by the widows in that year making over the village was not a revocable one ; and the interest in the additional half conferred upon the claimant was commensurate with what was already his own. No writing was then necessary to vest the other half in him. Such a transaction was good and valid as a family arrangement ; and he had made out his title to the whole village. VELLANKI VENKATA RAMA RAU *v.* PAPAMMA RAU **I. L. R. 21 Mad. 299 L. R. 25 I. A. 84**

25. ———— Trust—Beneficiary—*Proviso for forfeiture of interest in case of insolvency—Insolvency and withdrawal of petition in insolvency.* By a deed of settlement executed by the plaintiff's father, certain property was conveyed to trustees upon trust to recover the income thereof and to pay it to the settlor for life, and after his death to his seven sons, in equal shares, for the maintenance of them and their respective families. The deed provided that, in case any beneficiary became insolvent, "or do or suffer anything whereby his share or any part thereof would through his act or by operation of law" become vested in or payable to other persons, then the share and interest of such person should cease, and for the remainder of his life should be paid for the maintenance and support of the family of such persons. In July 1894, the plaintiff, who was one of the sons of the settlor, filed his petition in insolvency ; but on the 5th December 1894, he withdrew it. *Held*, that the forfeiture clause did not take effect, and that the plaintiff was entitled to be paid by the trustees his share of the income of the trust property. HORMUSJI NOWROJI DAVUR *v.* DADABHOY NOWROJI DAVUR . **I. L. R. 20 Bom. 310**

26. ———— Sale-deed with counter-deed undertaking to re-transfer land in event of payments being made. In a document described as a sale-deed, plaintiff's father professed to give, "in absolute sale," certain lands to the defendant, inasmuch as he was unable to pay a debt owing by him to the defendant. On the same day defendant executed a counter-deed in which he referred to the said sale-deed and undertook to get the said lands transferred to plaintiff's father in the event of the latter paying the said debt within a certain time, together with interest till date of payment : and in that event to cancel the said sale-deed and deliver the same to plaintiff's father. The counter-deed further provided the plaintiff's father should pay the principal and interest of the said debt by instalments, and that, in default of payment of any instalment, plaintiff's father should pay the whole amount due ; and in default of payment in that manner, defendant should credit the land to himself according to the sale-deed, after getting the counter-deed cancelled. *Held*, that on their true construction the documents showed nothing more than an intention to secure repayment of the debt ; that though the provisions for payment by instalments and of the whole amount in default of instalments were contained in the counter-deed signed only by the transferee of the land, they were equivalent to a covenant by the transferor so to repay, because the two documents being parts of one transaction, both parties were bound by or could take advantage of every stipulation, whether contained in one or other of the deeds, as would have been the case if the transaction had been embodied in a single document. *Held*, therefore, that the transferee had a right to recover the debt (with interest) from the transferor personally ; and that the provision entitling the transferee to credit the land to himself in default of payment could not be construed as negativing that right. Two documents relating to the transfer and re-transfer of land which were so connected as to constitute one transaction having been executed in the year 1882, prior to the passing of the Transfer of Property Act :—*Held*, that transaction should be regarded as having been entered into with reference to the law as propounded in the course of Madras decisions commencing in 1858 and referred to in *Thumbusamy Madelly* v. *Hossain Rowthen, L. R. 2 I. A. 241 : I. L. R. 1 Mad. 1*, and that the documents must be construed accordingly. RAMAYYA *v.* KRISHNAMMA . . . **I. L. R. 23 Mad. 114**

27. ———— Absence of reservation—*Deeds of mortgage and sale—Sale certificate—Absence of words of exception or reservation.* Where deeds of mortgage and sale, and a sale certificate, in respect of shares of a *zamindari*, contain no words of exception or reservation, and are otherwise apt for the purpose, they convey all the interest in the *zamindari* which was possessed by the former owners, including profit rentals of bazars built on lands not shown to have been severed therefrom. ASHGAR REZA KHAN *v.* MAHOMED MEHDI HOSSEIN KHAN (1903) **I. L. R. 30 Calc. 556 : L. R. 30 I. A. 71 : s.c. 7 C. W. N. 482**

4. PROOF OF GENUINENESS.

1. ———— Mode of proof—*Evidence as to similarity of handwriting.* When it becomes necessary to establish the genuineness of a writing, the testimony of the writer or of some person who saw the paper or signature written is not, as a matter of law, the only mode of proof. Evidence

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DEED—*contd.*

4. PROOF OF GENUINENESS—*contd.*

as to the similarity of handwriting is just as good in point of admissibility as the testimony of the subscribing witnesses. GRISH CHUNDER ROY *v.* BHUGWAN CHUNDER ROY . . **13 W. R. 191**

2. ——— **Suspicion**—*Unregistered deeds.* Deeds, though unregistered (registration not being compulsory), when proved by all the attesting witnesses and against which there is no evidence on the other side, ought not to be set aside on mere suspicion of perjury and forgery. KALI CHANDRA CHOWDRY *v.* SHIB CHANDRA BHADURI **6 B. L. R. 501 : 15 W. R. P. C. 12**

See BHUGWAN DOSS *v.* HUNNOOMAN PERSHAD SAHOO . . . . . **18 W. R. 184**

3. ——— **Inadequacy of consideration**—*Evidence of want of genuineness in deed—Party wanting deed said to be executed by him declared a forgery.* Where a deed has been proved and attested in due form, a Court is not justified, without any evidence of its fabrication, in finding from such circumstances as inadequacy of the consideration-money that the deed has been fabricated. Where a person asks to have a deed which is said to have been executed by him declared to be a forgery, he ought to present himself for examination. WISE *v.* RADHA GOBIND SHAHA . **20 W. R. 181**

4. ——— **Attestation by Registrar and proof by witnesses**—*Evidence of genuineness.* A finding by a Court that a mortgage-deed has been attested by the Registrar of Deeds and proved by witnesses is a sufficiently distinct finding on the *bonâ fides* of the deed. MOORUL SINGH *v.* MOHUN KOOER . . . . **9 W. R. 167**

5. ——— **Registration of deed**—*Proof of genuineness.* Registration of a deed does not affect the question of *bonâ fides*, nor is a conveyance to be considered *bonâ fide* simply because there is proof of its execution and some statement that money was on the occasion actually paid by the vendee into the hands of the vendor in the presence of witnesses unacquainted with the circumstances of the parties and the relation they bear to each other. BHOOBUN CHUNDER BURRAL *v.* NAGOREE DOSSIA . . . . . **15 W. R. 15**

MUTHOOROOLLAH *v.* TORABOODDEEN **15 W. R. 305**

6. ——— *Registration—Registered document, proof of execution of.* Mere registration of a document is not in itself sufficient proof of its execution. *Kristo Nath Koondoo* v. *Brown, I. L. R. 14 Calc. 176, 180,* dissented from. SALIMATUL FATIMA *alias* BIBI HOSSAINI *v.* KOYLASHPOTI NARAIN SINGH . **I. L. R. 17 Calc. 903**

7. ——— *Kabuliat—Primâ facie proof of genuineness.* A Subordinate Judge having set aside the decision of a Munsif on the ground, *inter alia*, that it was improbable that the defendant would have executed a kabuliat in which his rent was suddenly raised to about three times the rate at which he had formerly paid, the Munsif's order was restored on the ground that the registration of the kabuliat with all the due formalities was *primâ facie* proof of the truth of its contents, and that, as this proof was not rebutted by defendant, the Munsif had been right in acting on it. NITTYANUND KUR *v.* RAJ BULLUBH ADYA **25 W. R. 267**

8. ——— *Proof of execution of.* Although the Court can assume from the certificate of the Registrar that certain persons appeared before him, and that, after satisfying him that they were the persons they represented themselves to be, they admitted execution of a deed presented for registration, yet where the execution of a document is in issue, the circumstance of its having been registered does not dispense with the necessity for independent proof of its genuineness. FUZAL ALI *v.* BIA BIBI CHOWDHRAIN **7 C. L. R. 276**

See KRIPANATH TULLAPATTUR *v.* BHASHAYE MOLLAH . . . . . **6 W. R. 105**

9. ——— **Validity of transfer**—*Benami transactions.* A transfer by registered deed, admitted to have been executed, but alleged to have been benami and merely colourable, was held on the evidence to have been valid and effective in the absence of evidence showing the contrary. UMAN PRASHAD *v.* GANDHARP SINGH **I. L. R. 15 Calc. 20 L. R. 14 I. A. 127**

10. ——— **Deed on two pieces of paper of different dates**—*Suspicion of forgery.* Where the Judge of first instance doubted the authenticity of a deed, it being written on two pieces of stamped paper of different dates : *Held*, under the circumstances, not to be a paper deduction. KURALI PRASAD MISSER *v.* ANANTRAM HAJRA **8 B. L. R. 490 : 16 W. R. P. C. 16**

11. ——— **Evidence of intention with which documents were executed to ascertain their bonâ fides**—*Proceedings against third person.* *A* and *B*, two undivided Hindu brothers, conveyed to their mother, *C*, one-third share in the ancestral property of the family by a deed of sale, dated 29th August 1851. Subsequently, *A* sold his one-third share in the joint ancestral property to *B* by a deed dated the 4th August 1852. In a suit brought by a judgment-creditor of *A* in 1868 to recover *A*'s half share in the joint property from *B* and *C*, the plaintiff gave in evidence proceedings taken by *A* jointly with his brother *B* in 1856 against a third person, relating to the joint property with a view to show that the two documents were illusory, and intended to screen *A*'s share from execution by his creditors. *Held*, that such proceedings were important and relevant evidence, in order to test the *bonâ fides* with which *A* executed the two documents, as it was important to ascertain how *A*

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DEED—*contd.*

4. PROOF OF GENUINENESS—*contd.*

subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents. GIRDHAR NAGJISHET *v.* GANPAT MAROBA . **11 Bom. 129**

12. ——— Deeds not intended to operate according to their tenor—*Nullity of transaction apart from fraud.* Documents, principally a pottah and a kobala, executed between a Mahomedan parda-nashin lady and one of her relations, purported to represent, the one a patni lease from her of her lands, and the other a sale of her house and ground from the date of the execution. That she received the consideration was not proved, but had it passed, it would have been distributed between the two deeds, which formed part of one and the same transaction. From the acts of the parties it was established that her intent was to deprive her heirs, not herself, and that she had no intention to part with the property *in præsenti*, as the deeds represented that she did. *Held*, that, the latter not being intended to operate according to their tenor, the whole transaction was a nullity. JIBUN NISSA *v.* ASGAL ALI **I. L. R. 17 Calc. 937**

13. ——— Deed of sale—*Evidence that a deed is not intended to have the ordinary operation.* When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed. RANGA AYYAR *v.* SRINIVASA AYYANGAR **I. L. R. 21 Mad. 56**

14. ——— Discussion of evidence and its effect—*Evidence of want of genuineness in deed.* Case in which evidence was discussed and its true effect pointed out, and in which it was held, reversing a decree of the High Court, that an ikrarnamah relied on by the respondents was fabricated. It was connected with other documents already found to be forgeries, its contents did not dispel suspicion, it was not established by credible witnesses, nor supported by evidence of possession under it. COOMARI RODESHWAR *v.* MANROOP KOER . . . . . **L. R. 13 I. A. 20**

15. ——— Alterations in documents—*Evidence of want of genuineness.* A person who presents a document as evidence in an altered and suspicious state must explain the existing state of the document, unless there is corroborative proof strong enough to rebut the presumption which arises against an apparent falsifier of evidence. Such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected

DEED—*contd.*

4. PROOF OF GENUINENESS—*contd.*

document. KHOOB KOONWUR *v.* MOODNARAIN SINGH . **1 W. R. P. C. 36 : 9 Moo. I. A. 1**

16. ——— Production when most likely to be challenged—*Evidence of genuineness of deed.* The production of a pottah in the presence of the party most interested in challenging its genuineness is a fact legally of the utmost importance in determining its genuineness. GUNEE BISWAS *v.* SREEGOPAL PAUL CHOWDHRY **8 W. R. 395**

17. ——— Failure to raise objection to deed in former suit—*Evidence of genuineness of deeds.* Where no issue was raised in former suits as regards certain pottahs filed in those suits, the *bonâ fides* of such pottahs cannot be regarded as a *res judicata*; yet (*per* JACKSON, *J.*) where the pottahs (about half a century old) were put forward in suits to which the representatives of the present litigants were parties and no objection was raised then or since, their conduct was held to amount to an admission of, or acquiescence in, the *bonâ fides* of the pottahs. KAILAS CHANDRA ROY *v.* HIRA LAL SEAL. FAKIR CHAND GHOSE *v.* HIRA LAL SEAL **2 B. L. R. A. C. 93 : 10 W. R. 403**

18. ——— Delay in bringing forward—*Evidence of want of genuineness.* In dealing with documents which purport to have been executed many years before they are brought into Court, and of which the fact of execution is denied, the Court will not only require credible and satisfactory testimony as to the actual making, but will look very much at the indications of its having or not having been published contemporaneously with or soon after its preparation, and will regard with strong suspicion a deed which has neither seen the light nor been acted upon until after the lapse of many years from the date it bears. RADHAMADHUB GOSSAIN *v.* RADHABULLUB GOSSAIN **2 Ind. Jur. O. S. 5**

19. ——— Agreement not brought forward in former suit—*Evidence of want of genuineness.* Suit for the recovery of a debt upon an agreement which was not brought forward or alleged to be in existence, when the same demand was successfully disputed in a former suit brought during the infancy of the predecessor of the present appellant, who was the son of the alleged original debtor. The respondent having failed to account satisfactorily for the non-production of the agreement before, and the probabilities of the case being against the genuineness of the agreement, the suit was dismissed. KATCHY KULLYANA RUNGAPPA KALAKA THOLA OODIAR *v.* BALOOSAMY CHETTY **3 W. R. P. C. 50 : 7 Moo. I. A. 224**

20. ——— Lapse of time between production and necessity for proving—*Evidence of bonâ fides—Admission.* *A* sued *B* in 1841 to recover possession of certain villages in Gujrat. *B* produced a deed purporting to be a conveyance by way of mortgage by *A*'s ancestors of their six-sixteenths share in villages to *B*'s ancestors. *A* at

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DEED—*contd.*

4. PROOF OF GENUINENESS—*contd.*

first denied the genuineness of the deed, but the suit of 1841 having been withdrawn by consent with a view to arbitration, took no steps to have the question decided until the deed was again produced (from the records of the Court, where it remained meanwhile) in the present suit brought in 1859 by *A* against *B* to recover the same villages. *Held*, in the absence of evidence to show that the defendants had by their conduct during the interval admitted that the deed was not genuine, or that they did not intend to rely upon it, so as to mislead the plaintiffs, that the time which elapsed must be taken into account, and that they ought not to be required to prove the deed in the same way as they might have been when it was first produced and relied upon by them. *Held*, also, that the High Court sitting in special appeal will not examine the evidence with a view to determine whether such a document be genuine or not; nor will it consider the question whether there is any evidence to connect the plaintiffs with the parties to the deed, when the suit appears to have been conducted in the Courts below as if this was admitted. DEVAJI GOYAJI *v.* GODADBHAI GODEBHAI **2 Bom. 28 : 2nd Ed. 27**

21. ——— Property after execution of deed treated as vendor's—*Deed of sale.* Where it was shown that for twenty years the plaintiff had enjoyed the profits of an estate made over to her by her husband for her maintenance, and subsequently conveyed to her by a deed purporting to be a deed of sale in part payment of dower : *Held*, that the deed of sale or hibba-bil-awaz was not vitiated merely by the fact of the property being managed by the lady's husband or his agents, or that in the mutiny it was attached and released as her husband's property, and was subsequently recorded in his name. LADO BEGUM *v.* ACHPUL *alias* AMEEROOLNISSA . . **2 Agra 153**

22. ——— Custody of deed—*Evidence of genuineness of deed—Ancient deed—Possession.* Where a kobala upwards of thirty years old was produced from proper custody and offered in evidence, but rejected by the lower Appellate Court as not genuine, because evidence had not been given that it had remained in the custody of the parties after the death of their father, and because it had not been filed in any public office, and no mention made of the purchase in the mofussil or at the sudder station : *Held*, that it was erroneous to require such proofs and to overlook the evidence of possession under the kobala. ANUND CHUNDER POOSHALEE *v.* MOOKTA KESHEE DEBIA **21 W. R. 130**

23. ——— Failure to prove payment of consideration—*Evidence of want of bonâ fides of deed—Purchase by pleader.* In a suit to recover possession with mesne profits of property alleged to have been purchased by the plaintiff from *A* where the defendant *U* was a daughter of *A*'s

DEED—*contd.*

4. PROOF OF GENUINENESS—*concld.*

sister, *R*, who claimed the property through her son, *V*, the question was whether the plaintiff had obtained the property by a valid deed of sale. The plaintiff was a pleader, and while a suit was in progress in which on behalf of his step-mother and another client he contended that *V* had no property at all in the mouzah, he obtained a conveyance from *A*, whose sole title was derived from *V*, which conveyance nominally made to *S T* was never asserted by the plaintiff until seven years later, when he commenced the present suit. The evidence for the payment by the plaintiff of the consideration-money was so unsatisfactory that the High Court summoned him and examined him. *Held*, that it was somewhat dangerous to allow the plaintiff, a professional man, who did not give evidence in his own suit in his own behalf, to be called for the purpose of supporting his case which had broken down ; that the plaintiff's evidence as to payment of the consideration-money was very unsatisfactory and at variance with his previous deposition, and that, though the mere *factum* of his deed was proved, it was not a *bonâ fide* conveyance. USHRUFOONISSA BEGUM *v.* GRIDHAREE LALL . **19 W. R. 118**

24. ——— Deed fraudulent against decree-holder—*Deed of sale. Held*, that the circumstances proved justified the Court in holding that a sale-deed relied on by the plaintiff was fraudulent and void as against decree-holders. BEHAREE LALL SAHOO *v.* JUGGERNATH PERSHAD **1 Agra 41**

5. RECTIFICATION.

1. ——— Rectification of instrument—*Specific Relief Act (I of 1877), s. 31.* A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument, but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit under s. 31 of Act I of 1877 (the Specific Relief Act) to have the instrument rectified was held to have been rightly dismissed. AMANAT BIBI *v.* LACHMAN PERSHAD . . . **I. L. R. 14 Calc. 308**
L. R. 14 I. A. 18

6. CANCELLATION.

1 ——— Cancellation of deed for fraud and collusion—*Equitable conditions.* Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee, who had advanced money, and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction : *Held*, that the condition of cancellation should be, not the repayment of all money received by the manager,

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DEED—*con'd.*

6. CANCELLATION—*contd.*

but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager as he would have been justified in borrowing in the course of a prudent management of the estate. AJIT SINGH *v.* BIJAI BAHADUR SINGH **I. L. R. 11 Calc. 61 : L. R. 11 I. A. 211**

2. ——— **Ground for cancellation**—*Mahomedan law—Plea that the deed was inoperative according to the personal law of the parties. Held*, in the case of a deed of gift between Mahomedans, that it was no ground for cancellation of the deed that possession of the property, the subject of the deed, not having been made over to the donee the deed might be, according to the Mahomedan law, inoperative. UMRAO BIBI *v.* JAN ALI SHAH **I. L. R. 20 All. 465**

3. ——— **Voluntary transfer—Undue influence**—*Contract Act (IX of 1872), s. 16.* In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognize. Where a fiduciary or *quasi*-fiduciary relation had existed, Courts of Equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all variety of relations in which dominion may be exercised by one person over another. The plaintiff, who on the death of the widow of his brother became entitled to the estate of the deceased, found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, and found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the Revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favour of defendant's brother for the nominal consideration of R9,500, or half the property he claimed; and again shortly after the mutation case had terminated in his favour, he executed a deed of endowment of the remaining half in favour of a temple founded by the ancestor of the defendant, and in which the defendant was interested and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands. Plaintiff sued for cancellation of the deed of endowment, on the ground

DEED—*concld.*

6. CANCELLATION—*concld.*

that the same had been obtained from him by the exercise of undue influence and by means of fraud and obtained a decree. On appeal by the defendant it was *held* that, looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest *bonâ fide* transaction and one that ought to be upheld. SITAL PRASAD *v.* PARBHU LALL . **I. L. R. 10 All. 535**

DEED OF GIFT UNACCOMPANIED BY DELIVERY OF POSSESSION.

See TRANSFER OF PROPERTY ACT, s. 123. **I. L. R. 34 Calc. 853**

DEFAMATION.

See ABATEMENT OF SUIT—APPEALS. **I. L. R. 26 Bom. 597**

See CHARGE—FORM OF CHARGE—SPECIAL CASES—DEFAMATION . **9 Bom. 451**

See COMPLAINT—INSTITUTION OF COMPLAINT AND NECESSARY PRELIMINARIES. **I. L. R. 10 All. 39**
I. L. R. 14 Mad. 379

See CRIMINAL PROCEDURE CODE, ss. 198, 342 . . . **8 C. W. N. 515**

See DAMAGES—SUITS FOR DAMAGES—TORTS.

See JURISDICTION OF CIVIL COURT—COSTS . **I. L. R. 15 Bom. 599**

See JURISDICTION OF CIVIL COURT—CASTE . . **I. L. R. 26 Bom. 174**

See LIBEL.

See LIMITATION ACT, 1877, ART. 24 (1859, s. 1, CL. 2) . . **2 Agra 47**

See MALICIOUS PROSECUTION. **I. L. R. 19 Bom. 717**

See PENAL CODE, ss. 499-502.

See PENAL CODE . **8 C. W. N. 305**
9 C. W. N. 911
13 C. W. N. 1087

See PRIVILEGED COMMUNICATION. **1 Agra 33**
I. L. R. 7 Mad 36
I. L. R. 12 Mad. 374
I. L. R. 14 Mad. 51
7 C. W. N. 246

See SLANDER.

See RIGHT OF SUIT—WITNESS. **I. L. R. 10 Mad. 87**
I. L. R. 10 All. 425
I. L. R. 15 Calc. 264

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DEFAMATION—*contd.*

See WITNESS—CIVIL CASES—PRIVILEGES OF WITNESSES **I. L. R. 10 All. 425**
I. L. R. 10 Mad. 87
I. L. R. 11 Mad. 477
I. L. R. 15 Calc. 264

——— suit for.

See SECRETARY OF STATE.
I. L. R. 27 Bom. 189

See SPECIAL APPEAL—SMALL CAUSE COURT SUITS—DAMAGES . **4 B. L. R. Ap. 59**
12 W. R. 372

——— trial de novo.

See CRIMINAL PROCEDURE CODE, s. 350.
13 C. W. N. 550

1. ——— Form of defamation—*Written or spoken defamation—Penal Code, s. 499.* The Penal Code makes no distinction between written and spoken defamation. QUEEN *v.* PURSORAM DOSS . . . . . **2 W. R. Cr. 36**

Upheld on review . . **3 W. R. Cr. 45**

2. ——— *Penal Code, s. 499, explanation 4—Words per se defamatory.* Explanation 4 of s. 499 of the Penal Code does not apply where the words used and forming the basis of charge, are *per se* defamatory; though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied. QUEEN EMPRESS *v.* MCCARTHY . **I. L. R. 9 All. 420**

3. ——— Defamation of a deceased person—*Suit by surviving member of family of deceased—Cause of action—Damage to reputation of family of deceased by reason of defamation of deceased.* A suit for defamation can only be brought by the person who has been defamed. The fact that the defamatory statement has caused injury to other persons does not entitle them to sue. A suit brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, but alleged to have caused damage to the plaintiff as a member of the same family, *held* not maintainable. LUCKUMSEY ROWJI *v.* HURBUN NURSEY . . . **I. L. R. 5 Bom. 580**

4. ——— Suit by father in his own right for defamation of daughter. A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then under the provisions of the Civil Procedure Code, by his guardian or next friend. *Dawan Singh* v. *Mahip Singh, I. L. R. 10 All. 425*, and *Parvathi* v. *Mannar, I. L. R. 8 Mad. 175*, distinguished. *Subbaiyar* v. *Kristnaiyar, I. L. R. 1 Mad. 383*, and *Luckumsey Rowji* v. *Hurbun Nursey, I. L. R. 5 Bom. 580*, referred to. DAYA *v.* PARAM SUKH **I. L. R. 11 All. 104**

DEFAMATION—*contd.*

5. ——— Imputation on a wife—Suit by husband—*Right of suit.* In a suit for damages for defamation, it appeared that the words complained of were spoken by the defendant to the plaintiff in the presence of a third party, and were to the effect that the plaintiff's wife had committed adultery with a pariah and that her children had been born to the pariah. *Held*, that the suit was not maintainable by the plaintiff. BRAHMANNA *v.* RAMAKRISHNAMA . . **I. L. R. 18 Mad. 250**

6. ——— Liability for defamation—*Failure to prove bonâ fide charge.* The mere failure of a complainant in proving a *bonâ fide* criminal charge does not make him liable to an action for damages for defamation. BROJONATH ROY *v.* KISHEN LALL ROY . . . **5 W. R. 282**

MOHENDRONATH DUTT *v.* KOYLASH CHUNDER DUTT . . . . . **6 W. R. 245**

7. ——— Malice—*Unprivileged publication.* The law will infer malice where a statement is deliberately false in fact and injurious to the character of another, and the publication is not privileged. PETER *v.* DUFOUR . **6 W. R. 92**

8. ——— Nature of defamation—*Penal Code, s. 499—"Publishing" defamatory matter—Filing petition in Court.* The act of filing in Court a petition containing imputations concerning a person calculated to harm his reputation, with the intention that it should be read by other persons, amounts to making or publishing the imputation within the meaning of s. 499 of the Penal Code. The criminal law of this country with regard to defamation depends on the construction of s. 499 of the Penal Code, and not on what may be the English law on the same subject. GREENE *v.* DELANNEY . . . **14 W. R. Cr. 27**

9. ——— Untrue statement—*Penal Code, s. 499.* The accused, an inspector of police, was sent to enquire if it was true that one Brojonath was a leader of dacoits. He reported that it was false, and that the Banias of the village were trying to get him punished from an ill-feeling. He added: "I learnt from private enquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath." Commitment of the accused for trial for defamation under s. 499 of the Penal Code supported under the circumstances of the case. *In the matter of the petition of* RAJNARAIN SEIN . . **6 B. L. R. Ap. 42**

S.C. RAJNARAIN SEIN *v.* DEEGOBUR PAUL
14 W. R. Cr. 22

10. ——— Expression of suspicion—*Slander by a railway guard—De minimis non curat lex.* A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket, he said to him in the

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DEFAMATION—*contd.*

presence of the other passengers, "I suspect you are travelling with a wrong (or false) ticket," which was the defamation complained of. The guard was held to have spoken the above words *bonâ fide*. *Held*, that the plaintiff was not entitled to a decree for damages. SOUTH INDIAN RAILWAY COMPANY *v.* RAMAKRISTNA . . . **I. L. R. 13 Mad. 34**

11. ——— **Privilege**—*Penal Code, s. 499, excep. 10—Privilege—"Mala fides."* The complainant, a Brahman, who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste; and they after an interval of six months distributed in the bazar to all classes of the public printed papers in which the complainant was described as a *doshi* or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice. *Held*, that the accused had not acted in good faith, and that the publication was not under the circumstances privileged and protected by Penal Code, s. 499, excep. 10, and that the accused were accordingly guilty of defamation. THIAGARAYA *v.* KRISHNASAMI . . **I. L. R. 15 Mad. 214**

12. ——— **Privileged communication**—*Excommunication from caste—Presumption of bonâ fides.* Plaintiff was a Hindu widow of the Modh Wánia caste. Defendant was the head of the caste. He received anonymous letters imputing bad conduct to the plaintiff. He was requested to call a caste meeting to consider the matter; he did so, and placed the letters before the meeting, and it was then resolved to warn the plaintiff. The warning was, however, unheeded. So a second meeting was called by the defendant. Plaintiff sent her brother and sister's husband to the meeting in order that they might defend her. But they offered no explanation on her behalf. Witnesses were then heard and ten persons selected to decide what should be done. Defendant was one of those ten, and he communicated to the general meeting the decision they had come to, namely, that the plaintiff should be excommunicated. The meeting unanimously adopted this decision, and the defendant announced the decision of the caste to the *gor* for him to promulgate. The plaintiff thereupon sued to recover from the defendant R5,249 as damages for defamation. *Held*, that the defendant was not guilty of defamation. He acted in the matter honestly, and as he was bound to act in the interest of the caste, and in discharge of his duties as leader of the caste. *Per* RANADE, *J.*—The defendant's act was privileged. Defendant was the head of the caste, and the caste men assembled were interested in the matter along with the defendant. Anonymous letters were received and the defendant had a duty to perform. The matter was discussed at a properly convened meeting, where the plaintiff's near relations were duly summoned and were in fact present. The occasion was lawful and properly

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exercised to protect mutual interests. The privilege was, therefore, complete, and good faith was to be presumed, unless express malice could be shown. KESHAVLAL *v.* BAI GIRJA . **I. L. R. 24 Bom. 13**

13. ——— **Good faith**—*Privilege—Letter written by guru outcasting member of his caste—Penal Code, s. 499.* *B*, the guru or spiritual guide of the caste to which *K* belonged, issued a letter or ajna patra to *K*'s fellow-villagers to the effect that, as *K*'s wife had been caught with a man of a lower caste, no one of her co-religionists should have any social intercourse with her, and in effect that she should be outcasted. *K* proceeded against *B* for defamation, and *B* pleaded that the statements contained in the letter were privileged, having been made in good faith and for the public good, and that the case came within one of the exceptions to s. 499 of the Penal Code. It was admitted by *K* that *B* had no enmity towards him or his wife, and that it was the custom of the guru to settle such matters as those that had arisen in connection with his wife, and it was proved that the letter was issued after *B* had made an inquiry into the truth of the allegation. The lower Court convicted. *Held*, that the conviction was wrong, it being clear that the statements contained in the letter had been made in good faith for the protection of the social and spiritual interests of the community of which *B* was the guru, and that, so far as they implied a censure on the conduct of *K*'s wife, they were justified by the authority with which *B* was vested as spiritual head of the community, and that therefore the case came within the seventh exception to s. 499. BASUMATI ADHIKARINI *v.* BUDRAM KOLITA . . **I. L. R. 22 Calc. 46**

14. ——— **Publishing order of priest excommunicating person from caste**—*Privileged communication.* The gomashta of a guru or priest was convicted of defamation for having published an order of his master excommunicating the complainant from his caste. The letter publishing the excommunication was a statement that complainant disobeyed some one and treated him with disrespect. *Held*, that the letter contained no expressions defamatory *per se*. If the person so treated was in a position entitling him to demand submission, and to make non-submission an offence, then that position would render the communication privileged; and if not, then the mere statement that the complainant did not obey one, whom he was not bound to obey, was not a defamatory imputation. ANONYMOUS . **6 Mad. Ap. 47**

15. ——— *Publishing order of priest excommunicating person from caste—Penal Code, ss. 500, 503, 508—Injury—Privilege—Unnecessary publication.* *N* having attended a Hindu widow marriage (legalized by Act XV of 1856), *S*, his guru, or spiritual superior, published a notice declaring *N* to be an outcaste, and forbidding the disciples of *S* and the public of the town in which *N* lived to associate with *N*, until he submitted to the prescribed penance and obtained a certificate of

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DEFAMATION—*contd.*

purification from *S*. *S* also sent by post a registered post-card of similar purport to *N*. In consequence of the interdict of *S*, *N* was prevented from performing vows in the temple, lost the society of his relatives, and was otherwise damnified. *N* charged *S* with criminal intimidation, intimidation by attempt to induce a belief that by an act of the offender the person intimidated will become an object of divine displeasure, and defamation. *Held*, that the first two charges were unfounded, but that *S*, by communicating the sentence of excommunication by a registered post-card to *N* was guilty of defamation. QUEEN *v.* SANKARA **I. L. R. 6 Mad. 381**

16. ——— *Illegal declaration that one is outcasted.* According to the usage of certain Nambudris, a caste enquiry is held when a Nambudri woman is suspected of adultery, and if she is found guilty, she and her paramour are put out of caste. An enquiry was held into the conduct of a certain woman so suspected ; she confessed that the plaintiff had had illicit intercourse with her, and thereupon they were both declared outcastes, the plaintiff not having been charged nor having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against those who had declared him an outcaste : *Held*, that the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bonâ fide* in making that declaration, the plaintiff was entitled to recover damages. VALLABHA *v.* MADUSUDANAN . . . **I. L. R. 12 Mad. 495**

17. ——— **Publication**—*Penal Code, s. 499—Communication of defamatory matter to complainant only—"Making."* *Held*, by the Full Bench (DUTHOIT, *J.*, dissenting), that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Civil Procedure Code, containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was not such a making or publishing of the matter complained of as to constitute an offence within the terms of s. 499 of the Penal Code. QUEEN-EMPRESS *v.* TAKI HUSAIN . . **I. L. R. 7 All. 205**

18. ——— *Penal Code (Act XLV of 1860), ss. 499 and 500—Sending a notice, containing defamatory matter to the complainant.* The mere sending a notice to a person, albeit containing matter of a defamatory nature, cannot be held to be equivalent to making or publishing an imputation "intending to harm or knowing or having reason to believe that it will harm the reputation of the person" to whom it is addressed. When the accused sent by post a notice to the complainant, containing certain false imputations, and the complainant thereupon prosecuted the accused on a charge of defamation under s. 500 of the Penal Code : *Held*, that the accused was not guilty of defamation. QUEEN-EMPRESS *v.* SADASHIV ATMARAM . . . **I. L. R. 18 Bom. 205**

DEFAMATION—*contd.*

19. ——— *Privilege—Penal Code, s. 499, exceps. 8 and 10—Letter written to protect religious interests of writer.* A letter written by a Brahman to the Brahman community of the neighbourhood, with a view to obtain their decision on a matter affecting his own religious interests and that of the Brahman community, if written in good faith, falls within exceps. 8 and 10 of s. 499 of the Penal Code. REG. *v.* KASHINATH BACHAJI BAGUL . . . **8 Bom. Cr. 168**

20. ——— **Good faith**—*Penal Code, s. 499, excep. 8—Privileged communication—Justification—Practice—Cross-examination of complainant.* *Held*, on the evidence in this case in which the question was whether a person accused of defamation was protected by the eighth exception to s. 499 of the Penal Code, that the accused had failed to establish that he acted in good faith. *Abdul Hakim* v. *Tej Chandar Mukarji, I. L. R. 3 All. 815*, referred to. Where the accused in a case of defamation intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he was not cross-examined. QUEEN-EMPRESS *v.* DHUM SINGH . . . **I. L. R. 6 All. 220**

21. ——— *Statement in pleading made in good faith—Penal Code, s. 500, excep. (9).* A pleader or mookhtear relying upon the statements of his client, and in good faith introducing into a pleading a defamatory averment, will be protected from liability for defamation by the ninth exception to s. 500 of the Penal Code, but the case is otherwise if the pleading be prepared by a person who has no such employment, and does not act in good faith. QUEEN *v.* CHRESTIEN **2 N. W. 473**

22. *Statement made by an accused person in an application to a Court—Statement made in good faith for the protection of the interests of the person making it.* In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one Umrao Singh in order to prejudice them in their defence in a civil suit which Umrao Singh had caused to be brought against them : *Held*, that this statement did not amount to defamation—not because of the application of any principles of English law, for such principles did not apply to prosecutions for defamation under the Indian Penal Code—but because the statement fell within the ninth exception to s. 499 of the Indian Penal Code. *Queen-Empress* v. *Balkrishna Vithal, I. L. R. 17 Bom. 573* ; *In re Nagarji Trikamji, I. L. R. 19 Bom. 340* ; *Queen* v. *Pursoram Doss, 3 W. R. Cr. 45* ; *Greene* v. *Delanney, 14 W. R. Cr. 27*, and *Abdul Hakim* v. *Tej Chandar*

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DEFAMATION—*contd.*

Mukarji, I. L. R. 3 All. 815, referred to. ISURI PRASAD SINGH *v.* UMRAO SINGH **I. L. R. 22 All. 234**

23. ——— Privilege of counsel or pleader—*Penal Code (Act XLV of 1860), ss. 499 (excep. 9) and 500—Prosecution by witness—Construction of statute.* A pleader, in addressing a mamlatdar on behalf of his client, who was charged under s. 125 of the Bombay Land Revenue Code (Bombay Act V of 1879) with wilfully removing boundary marks, commented on some of the witnesses for the prosecution, and called them loafers. Thereupon one of those witnesses prosecuted the pleader for defamation. The Magistrate held that there was no justification for the offence, and convicted the pleader, and sentenced him to pay a fine of R15 under s. 500 of the Penal Code. *Held,* reversing the conviction and sentence, that in the absence of express malice (which was not to be presumed) the pleader was protected by excep. 9 to s. 499 of the Penal Code. *Held,* also, that, in considering whether there was good faith (*i.e.,* due care and attention), the position of the person making the imputation must be taken into consideration. In the case of an advocate, where express malice is absent, a Court having due regard to public policy would be extremely cautious before depriving him of the protection of excep. 9 to s. 499 of the Penal Code. *Semble:* S. 499 of the Penal Code should be construed without reference to the English law. *In re* NAGARJI TRIKAMJI **I. L. R. 19 Bom. 340**

24. ——— Newspaper libel—*Penal Code, s. 500—Act XXV of 1867, ss. 5, 7—Burden of proof.* On the prosecution of the editor of a newspaper for defamation under s. 500 of the Penal Code by publishing a libel in his paper, an attested copy of a declaration made by the editor under s. 5 of Act XXV of 1867, to the effect that he was the printer and publisher of the newspaper was produced in evidence by the complainant. The editor having been convicted by the Magistrate, the Sessions Court on appeal quashed the conviction on the ground that there was no evidence that the editor was the writer of the libel or permitted its publication. *Held,* that, in the absence of proof to the contrary, the declaration was *primâ facie* proof of publication by the editor. *Held,* also, that it would be a sufficient answer to the charge if the editor proved that the libel was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of the newspaper during his absence to a competent person. RAMASAMI *v.* LOKANADA **I. L. R. 9 Mad. 387**

25. ——— Intention to injure reputation—*Absence of actual injury to good name.* To sustain a charge of defamation, it is not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation alleged; it is sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant. QUEEN *v.* THAKUR DASS **6 N. W. 86**

26. ——— Reason to believe truth of statements—*Penal Code, s. 499—Good faith.* In dealing with the question of good faith, the proper point to be decided is not whether the allegations put forward by the acused in support of the defamation are in substance true, but whether he was informed and had good reason, after due care and attention, to believe that such allegations were true. *In the matter of the petition of* SHIBO PROSAD PANDAH. **I. L. R. 4 Calc. 124: 3 C. L. R. 122**

27. ——— Newspaper criticism on advertisement—*Penal Code, s. 499—Publication—Liability of publisher of newspaper.* *M,* a medical man and editor of a medical journal published monthly, said in such journal of an advertisement published by *H,* another medical man, in which *H* solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed,—"The advertiser is certainly entitled to be congratulated on this marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that the line he has elected to adopt has not met with the approval of his brother officers serving in the same province, and we have no hesitation in pronouncing his proceedings in this matter unprofessional." *Held,* that, inasmuch as such advertisement had the effect of making such hospital a "public question," and of submitting it to the "judgment of the public," and *M* had expressed himself in good faith, *M* was within the third and sixth exceptions, respectively, to s. 499 of the Penal Code. *Held,* also, that *M* came within the ninth exception to that section. The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is a publication of such defamatory matter at Allahabad. See *Queen* v. *Kally Doss Mitter, 5 W. R. Cr. 44.* The publisher of a newspaper is responsible for defamatory matter published in such paper, whether he knows the contents of such paper or not. EMPRESS OF INDIA *v.* MCLEOD . . . **I. L. R. 3 All. 342**

28. ——— Ambiguous expressions—*Intentions—Penal Code, s. 499—Good faith.* *C* was put out of caste by a panchayat of his caste-fellows on the ground that there was an improper intimacy between him and a woman of his caste. Certain persons, members of such panchayat, circulated a letter to the members of their caste generally, in which, stating that *C* and such woman had been put out of caste, and the reason for the same, and requesting the members of the caste not to receive them into their houses or to eat with them, they made certain statements applying equally to *C* or such woman. Such statements were defamatory within the meaning of s. 499 of the Penal Code.

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DEFAMATION—*contd.*

Held, that, if such persons were careless enough to use language which was applicable to *C*, they did so at their peril, and they could not escape the responsibility of having defamed *C* by saying that they intended such language to apply to such woman. *Held*, also, on the question whether such persons had acted in good faith, that, looking to the character of such letter, the circumstances under which it was written, and to the fact that *C* had been put out of caste for the reason alleged, had such person contented themselves with announcing the determination of the panchayat, and the grounds upon which such determination was based, they would have been protected; but, inasmuch as they did not so content themselves, but went further and made false and uncalled-for statements regarding *C*, they had rightly been held not to have acted in good faith. EMPRESS OF INDIA *v.* RAMANAND **I. L. R. 3 All. 664**

29. ——— Investigation by police—*Penal Code (Act XLV of 1860), s. 500—Privilege of witness.* A statement made in answer to a question put by a police-officer under Criminal Procedure Code, s. 161, in the course of investigation made by him, is privileged, and cannot be made the foundation of a charge of defamation. QUEEN EMPRESS *v.* GOVIND PILLAI **I. L. R. 16 Mad. 235**

30. ——— Words used by Judge during case in Court—*Privilege of Judge—Right of suit.* An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court, even though such words are alleged to be false, malicious, and without reasonable cause. RAMAN NAYAR *v.* SUBRAMANYA AYYAN . . . . **I. L. R. 17 Mad. 87**

31. ——— Statements in judicial proceeding—*Good faith—Privileged communication.* The law of defamation which should be applied in suits in India for defamation is that laid down in the Penal Code, and not the English law of libel and slander. *Held*, therefore, that defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding. It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith. ABDUL HAKIM *v.* TEJ CHANDAR MUKARJI . **I. L. R. 3 All. 815**

32. ——— Statement made by accused person in Court not in the ordinary course of proceedings—*Penal Code, s. 499—Privilege of party.* A person who was being defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character. He was now charged with defamation and convicted in the Resident's Court at Bangalore. On an appeal to the High Court: *Held*, that the occasion was not privileged; the words complained of, being used maliciously and not in the ordinary course of the proceedings, were uttered maliciously; and the conviction was right. HAYES *v.* CHRISTIAN **I. L. R. 15 Mad. 414**

33. ——— Statement by witness—*Penal Code, s. 500—Privilege of witness.* *M S* was convicted under s. 500 of the Indian Penal Code of defaming *S S* by making a certain statement when under cross-examination as a witness before a Court of criminal jurisdiction. *Held*, that the conviction was bad. The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation. MANJAYA *v.* SESHA SHETTI . . **I. L. R. 11 Mad. 477**

34. ——— ——— *Penal Code (Act XLV of 1860), s. 500—Privilege.* A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. QUEEN-EMPRESS *v.* BABAJI **I. L. R. 17 Bom. 127**

QUEEN-EMPRESS *v.* BALKRISHNA VITHAL **I. L. R. 17. Bom. 573**

35. ——— True statement but not made in good faith or for the public good—*Penal Code (Act XLV of 1860), s. 499, exceps. 2 and 9.* The accused person, an editor of a newspaper, published an article in which the following passage, admittedly referring to the complainant, occurred: "Has his (the complainant's) character been enquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record?" The Magistrate found that it was literally true that the complainant had been sent to be prosecuted, but that it was also true that the prosecution had, to the accused's knowledge, been ordered to be withdrawn by the District Judge. *Held*, that, although the statement contained only the truth, it was incomplete and misleading; and that, as the accused was well aware that the prosecution referred to had been withdrawn and did not injuriously affect the complainant's character, he could not plead that the imputation made by him on the complainant's character was made in good faith, or for the public good. EMPRESS *v.* KAKDE **I. L. R. 4 Bom. 298**

36. ——— Statements made by persons in the course of their evidence as witnesses in Court of Justice—*Relevancy of statements to issue in case—Penal Code (Act XLV of 1860), s. 500.* Where certain statements alleged to be defamatory were made by certain persons in the course of their evidence as witnesses in a Court of Justice and were relevant to the issue in the case under enquiry: *Held*, that such persons could not

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DEFAMATION—*contd.*

be prosecuted for defamation in respect of those statements. WOOLFUN BIBI *v.* JESARAT SHEIKH
I. L. R. 27 Calc. 262

37. — Defamatory statement made by a person examined in the course of an official or departmental inquiry—*Witness—Privilege—Qualified privilege—Criminal Procedure Code (1882), ss. 191 and 197—Penal Code (XLV of 1860), ss. 211 and 500—Falsely charging a person with an offence.* The complainant was Deputy Collector and first class Magistrate of Bijapur. Certain petitions said to emanate from the accused were received by Government charging the complainant with bribery and corruption. Government thereupon ordered Mr. Monteath, Collector and Magistrate of the district, to enquire into the matter. Mr. Monteath enforced the attendance of the accused by writing to the police, who brought the accused before him. In answer to questions put to him, the accused denied having sent any petition to Government, but stated that he had paid a bribe to the complainant to secure the acquittal of his son, who was then on his trial on a charge of theft before him. Mr. Monteath examined other witnesses, and reported the result of his enquiry to Government. Government permitted the Deputy Collector to prosecute the accused, and he accordingly lodged a complaint against the accused for defamation under s. 500 of the Penal Code in having stated to Mr. Monteath, in the course of the inquiry, that he (the complainant) had accepted a bribe from him. The trying Magistrate was of opinion that the offence fell under s. 211 of the Penal Code. He at first framed charges both under ss. 211 and 500. But subsequently he struck out the charge of defamation under s. 500 and convicted the accused under s. 211 of making a false charge. On appeal the Joint Sessions Judge was of opinion that the charge under s. 211 could not be maintained, as the accused had not made any "false charge" to a Court or officer having jurisdiction to investigate it. As regards the charge of defamation, he was of opinion that the fact of bribery was not proved. But he held that in making the statement to Mr. Monteath, the accused had acted in good faith, and that his case fell under excep. 8 to s. 499 of the Penal Code. He therefore reversed the conviction under s. 211 and acquitted the accused of defamation under s. 500 of the Code. Against this order of acquittal Government appealed to the High Court. *Held*, that the accused was guilty of defamation. *Held*, also, that, in the absence of sanction from Government, the inquiry held by Mr. Monteath, the District Magistrate, was not a "taking cognizance" of the offence. *Held*, further, that, as Mr. Monteath was not sitting as a "Court" when he made the inquiry and examined the accused, the accused was not entitled to claim an absolute protection from a charge of defamation as a witness in a judicial proceeding. The accused was only entitled to a qualified privilege depending on the exceptions to s. 499 of the Penal Code. QUEEN-EMPRESS *v.* KARIGOWDA
I. L. R. 19 Bom. 51

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38. — Imputation made in good faith by a person for the protection of his interest—*Penal Code (Act XLV of 1860), s. 499, excep. 9—Privileged communication.* In order to substantiate a decree under the ninth exception to s. 499 of the Penal Code (Act XLV of 1860), it is sufficient to show that the imputation was made in good faith and for the protection of the interest of the accused. Any one in the transaction of business with another has a right to use language *bonâ fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another. The complainant *P* and his partner *B* were owners of the steam-ship *Tanjore*. The ship was mortgaged to the Bank of Bengal for R50,000. In March 1890, the complainant desired to send the vessel to Jeddah with pilgrims and freight. For this purpose he entered into an agreement with *S*, the agent of the Bank, to pay R5,000 to the Bank as a condition precedent to the vessel being allowed by the mortgagees to go on her intended voyage. The sum was to be paid out of the freight and passage-money collected by the complainant. On the 9th April 1890, on which day the vessel sailed, the complainant promised to pay the sum in the evening. This he did not do. Thereupon *S* wrote to the complainant demanding immediate payment of the amount, and also sent for him five or six times, but the complainant neither called at *S*'s office nor made the payment. On the 12th April *S* wrote to *B*, the complainant's partner, as follows :—"*P* (*i.e.*, the complainant) has misappropriated the R5,000 which were to have been paid to the Bank for allowing the *Tanjore* to go to Jeddah, and is keeping out of the way." Immediately after the receipt of this letter, the complainant tendered the money to the Bank's solicitors. Thereupon *S* wrote to *B* on the 13th April, withdrawing the statement made by him about the complainant in his letter of 12th April. On the 14th April, the complainant filed a complaint against *S* charging him with defamation in his letter of the 12th April 1890. *S* was convicted by the Magistrate under s. 500 of the Penal Code and sentenced to pay a fine of R200. *Held*, reversing the conviction and sentence, that the imputations complained of were made in good faith, and for the protection of interest of the accused, and therefore fell under the ninth exception to s. 499 of the Penal Code. QUEEN-EMPRESS *v.* SLATER **I. L. R. 15 Bom. 351**

39. — Publication—*Penal Code (Act XLV of 1860), s. 500—Publication of defamatory matter in a newspaper—Responsibility of the editor and proprietor of a newspaper.* The editor and proprietor of a newspaper, who prints his paper containing a defamatory article in one city and permits copies of the paper to be sent by the printer to persons in another city, is responsible, in the absence of proof to the contrary, for the publication of the defamatory article in the latter city. QUEEN-EMPRESS *v.* GIRJASHANKAR KASHIRAM
I. L. R. 15 Bom. 286

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DEFAMATION—*contd.*

40. — — — — *Penal Code (Act XLV of 1860), s. 499—Mode of publication defamatory, though the imputation be true.* Under s. 499 of the Penal Code, the person who publishes, and the person who makes, an imputation are alike guilty of defamation. A Court may find that an imputation is true and made for the public good, but on considering the manner of the publication (*e.g.*, in a newspaper) it may hold that the particular publication is not for the public good, and is therefore not privileged. QUEEN-EMPRESS *v.* JANARDHAN DAMODHAR DIKSHIT . **I. L. R. 19 Bom. 703**

41. ——— **Re-publication of defamatory matter already published**—*Penal Code (Act XLV of 1860), s. 499—Dismissal of complaint—Criminal Procedure Code (Act X of 1882), s. 203.* A complaint was filed, under s. 499 of the Indian Penal Code, against the proprietors, editor, and printer of a newspaper for publishing matter alleged to be defamatory. The Magistrate, before whom the complaint was lodged, found that the publication complained of was a mere reproduction or republication of what had been previously printed and published in another newspaper. He was, therefore, of opinion that, unless and until criminal proceedings had been taken in respect of the earlier publication, a charge of defamation could not properly be brought with regard to the later publication. He therefore dismissed the complaint under s. 203 of the Code of Criminal Procedure (Act X of 1882). *Held*, that the order of dismissal was improper. The Penal Code (s. 499) makes no exception in favour of a second or third publication as compared with a first. If the complaint is properly laid in respect of a publication which is *primâ facie* defamatory, the Magistrate is bound no take cognizance of the complaint, and deal with it according to law. *In re* HOWARD **I. L. R. 12 Bom. 167**

42. ——— **Subject of defamation**—*Penal Code (Act XLV of 1860), ss. 500 and 501—Construction of defamatory poem—Opinion of experts—Weight to be attached to by jury—Intention.* In a prosecution for libel under s. 500 of the Indian Penal Code, where the subject-matter of the defamation was contained in a poem published in a newspaper, and purporting to be a contribution, the accused, who was the editor, printer, and publisher of the newspaper, refused to give up the name of his correspondent, and took the plea that the poem was a satire on *ultra purists*, and did not refer to any individual, and that some of the stanzas contained in the poem would be inconsistent, if the poem were read as referring to an individual, and that, therefore, the construction for which the prosecution contended would involve illogicalities, and in support of his plea the accused examined several witnesses as experts, the Court charged the jury to the following effect :—That the jury must look at the whole poem and must take it as a whole, and that they must read the poem as reasonable men and should see whether it was reasonably capable of the construction put by the prosecution. That it was not necessary that the whole world should read it as a libel, but the question was whether those who knew the parties by putting a reasonable construction on the poem, would consider it to refer to the complainant. That the opinion of experts was not binding on the jury, for it is with the jury, and not with those witnesses, that the determination of the case rested. The weight due to the testimony of those witnesses was a matter to be determined by the jury, and that that weight would be proportionate to the soundness of the reasons in its support. That the intention has to be inferred from the act itself. The jury must see whether the natural result of the act was not to harm the reputation of the persons attacked. EMPRESS *v.* KALI PRASANNA KABYABISHARAD **1 C. W. N. 465**

43. ——— **Justification**—*Express malice—Evidence of complainant having previously acted as alleged in the libel—Penal Code (Act XLV of 1860), s. 499.* In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named) "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of except the postscript. At the trial of the case the defendant pleaded not guilty, and also relied on the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice toward the complainant. *Held*, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, *first*, as relating to the question what was the reputation which the defendant was said to have injured, and, *secondly*, because it must be gathered from the document complained of as a whole whether it showed a malicious intention or not. LAIDMAN *v.* HEARSEY **I. L. R. 7 All. 906**

44. — — **Malice, want of**—*Penal Code, s. 499, excep. 9—Good faith—Tampering with witnesses, imputation of.* The accused was watching a civil case on behalf of his partner. During the hearing of the case the accused informed the Subordinate Judge that the complainant was "tampering with the witnesses," and prayed that the complainant might be made to sit in the Court. Accordingly the Subordinate Judge directed the complainant to sit in the Court. The complainant thereupon lodged a complaint against the accused before a First Class Magistrate, charging the accused

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DEFAMATION—*contd.*

with having defamed him. The Magistrate convicted the accused of the offence, and inflicted upon him a fine of R25, or, in default, sentenced him to one month's simple imprisonment. The accused made an application to the Sessions Judge at Thana to call for the record of his case and if he thought proper to make a reference to the High Court. The Sessions Judge, having called for the record and examined it, was of opinion that, as no malice or bad faith appeared on the part of the accused in making the imputation, the case of the accused fell within excep. 9 of s. 499 of the Penal Code, and that the accused had committed no offence. He accordingly referred the case, under s. 438 of the Criminal Procedure Code (Act X of 1882), to the High Court. *Held*, that the view of the Sessions Judge was correct. The conviction and sentence were accordingly set aside. QUEEN-EMPRESS *v.* PURSHOTAM KALA . **I. L. R. 9 Bom. 269**

45. ——— **Onus probandi**—*Act XVIII of 1862, s. 27—Good faith.* S. 27 of Act XVIII of 1862 required proof of the existence of the circumstances relied on as a defence, before good faith could be presumed in a case of defamation. The onus of proving good faith is on the person making the imputation. Before such person can claim the benefit of excep. 9, s. 499 of the Penal Code, he must show that he has exercised due care and caution. SEALY *v.* RAMNARAIN BOSE . **4 W. R. Cr. 22**

46. ——— *Reasonable and probable cause—Malice. Held*, that, in cases of defamation, the onus of proving the statement, or at least of showing that he had reasonable ground for believing it to be true, and was actuated in making such statement not by malicious motives, but by an intelligent zeal for the public interest, lies on the person making the statement. ALTAF HOSSEIN *v.* TASUDDOOK HOSSEIN . . . **2 Agra 87**

47. ——— *Suit for defamation—Police officer's report—Words spoken in judicial proceeding.* A suit for damages for defamation of character is cognizable by a Civil Court, even though the words on which the suit is founded were spoken in a judicial proceeding. In such a suit a police officer's report may be evidence that the words were spoken, but not of malicious intention. The plaintiff must start his case by showing he was not guilty of the offence charged, and it will then be upon the defendant to show that he made the imputation in good faith and for the public good. MOHENDRO CHUNDER CHUCKERBUTTY *v.* SURBO ROKHYA DABIA . . . **11 W. R. 534**

48. ——— *Evidence of falseness of charge.* In a suit for damages for defamation of character, the plaintiff is not required by any absolute rule of law to give affirmative evidence of the falseness of the charge. DHURMO DOSS KOONDOO *v.* KOYLASH KAMINEE DOSSIA **12 W. R. 372**

49. ——— **Answers to Police officer**—*Action for damage—Investigation—Police officer—Witnesses—Privilege.* No action for damages lies against a person for what he states in answer to questions put to him by a Police officer conducting an investigation under the provisions of the Criminal Procedure Code. Public policy requires that an action should not be brought against such a witness as it does in the case of one giving evidence in an ordinary Court of Justice. METHURAM DASS *v.* JAGGANNATH DASS (1901) **I. L. R. 28 Calc. 794 : s.c. 5 C. W. N. 804**

50. ——— **Charge**—*Publication—Malice, omission to apologise no proof of—Penal Code (Act XLV of 1860), ss. 499 and 500—Criminal Procedure Code (Act V of 1898), s. 222.* Where an accused person was convicted of defamation under s. 500 of the Penal Code upon a charge which set out that the defamation was committed on or about the 12th day of April, and afterwards, by describing the complainant as a *Brithial Bania : Held*, that the charge was not a proper charge, inasmuch as it did not set forth the particular occasions on which the defamation was said to have been committed, so as to give the accused person an opportunity of defending himself with reference to each act alleged to have been committed by him. Where the accused, who was the collecting *panchait* of his village, was alleged to have defamed the complainant by giving a *chaukidari* receipt to him, in which he was described by the designation of *Brithial Bania : Held*, that the delivery of such a receipt was not a publication such as would render the accused liable to punishment for defamation, nor could the omission of the accused to apologise to the complainant subsequently, for the use of the caste designation, be taken as indicating that he used it at the time with a malicious intention. BISHWANATH DAS *v.* KESHAB GANDHABANIK (1902) **I. L. R. 30 Calc. 402 : s. c. 7 C. W. N. 74**

51. ——— **Imputation on a wife**—*Criminal Procedure Code (Act V of 1898), s. 4 (h), Chap. XV, Part B, ss. 191, 195, 196, 198, 199, and s. 345—Penal Code (Act XLV of 1860), s. 499, Expl. I—Defamation of wife—Complaint by husband—Aggrieved party. Held* by the Full Bench (RANADE *J.*, dissenting), that, under the provisions of the Criminal Procedure Code (Act V of 1898), a husband is entitled to be complainant where the alleged offence is defamation, imputing unchastity to his wife. CHHOTALAL LALLUBHAI *v.* NATHABHAI BECHAR (1909) . . . **I. L. R. 25 Bom. 151**

52. ——— **Municipal officers**—*Indian Penal Code (Act XLV of 1860), s. 500—Criminal Procedure Code (Act V of 1898), s. 198—Person aggrieved—Defamation of subordinate officers of Municipality—Complaint by President—Maintainability.* A newspaper published articles which, for the purposes of the point of law to be determined, were assumed to be defamatory. These related to the conduct of certain subordinate officers of the Madras Municipal Commission. A complaint was lodged by the President of the Commission in respect of the alleged defamation, it being contended on behalf of the complainant that, inasmuch as, by the Madras Municipal Act, the President is responsible for the efficient discharge of their duties by his subordinate

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DEFAMATION—*contd.*

officers, his conduct and administration had been impunged by the articles. *Held*, that, assuming for the purposes of the question under consideration that the statements complained of were defamatory of the subordinate officers of the Municipal Health Department, they were not defamatory of the complainant; and that the complainant was not a "person aggrieved" within the meaning of s. 198 of the Code of Criminal Procedure. BEAUCHAMP *v.* MOORE (1902) . . **I. L. R. 26 Mad. 43**

53. ——— Proof necessary in charge of defamation—*Penal Code (Act XLV of 1860), ss. 499, 500.* To constitute the offence of defamation, as defined in s. 499 of the Penal Code, it is not necessary that the evidence should show that the complainant has been injuriously affected by such alleged defamation. The law requires merely that there should be an intent that the person who makes or publishes any imputation should do so intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person. GOBINDA PERSHAD PANDEY *v.* GARTH (1900)
I. L. R. 28 Calc. 63: s.c. 5 C. W. N. 819

54. ——— Statement in pleadings—*Penal Code (Act XLV of 1860), ss. 499, 500—Statement made in a plaint—Pleadings, statement of parties in, whether privileged—Parties and witnesses, distinction between statements made by.* Statements made by parties to the suit in the pleadings are not privileged, and a charge for defamation is maintainable in respect of them. *Angoda Ram Shaha* v. *Nemai Chand Shaha, I. L. R. 23 Calc. 867*, followed. *Nathji Muleshvar* v. *Lalbhai Ravidat, I. L. R. 14 Bom. 97*, dissented from. KALI NATH GUPTA *v.* GOBINDA CHANDRA BASU (1900)
5. C. W. N. 293

55. ——— True statements—*Penal Code (Act XLV of 1860), ss. 499, 500—True statement that complainant had been convicted of theft and sent to jail—Conviction—Validity.* An accused, who was the trustee of a temple, was convicted of defamation, the alleged defamatory statement being that the complainant, who performed the worship in a temple, had been convicted and sent to jail for the theft of idols belonging to the temple. At the time when the statement was made, an appointment was in question in connection with the temple. *Held*, on revision, that the accused was justified in making the statement, either in the interest of the temple or because the statement was no more than a publication of the result of proceedings in a Court of Justice. SINGARAJU NAGABHUSHANAM (1902)
I. L. R. 26 Mad. 464

56. ——— Voluntary statement by witness—*Privilege of witness—Malice—False evidence—Penal Code (Act XLV of 1860), s. 500—Evidence Act (I of 1872), s. 132.* A witness, who being actuated by malicious motives makes a voluntary and irrelevant statement not elicited by any question put to him while under examination to injure the reputation of another, commits an offence punishable under s. 500 of the Penal Code. *Moher Sheikh* v. *Queen Empress, I. L. R. 21 Calc. 392*, followed. *Woolfun Bibi* v. *Jesarat Sheikh, I. L. R. 27 Calc. 262*, discussed. HAIDAR ALI *v.* ABRU MIA (1905)
I. L. R. 32 Calc. 756
s.c. 9 C. W. N. 971

57. ——— Statement made to protect one's interests—*Penal Code (Act XLV of 1860), s. 499, Excep. (9), ill. (a)—Statement as to inference—Bonâ fides—Special damage—Civil action, proper remedy by.* *K*, a creditor of *J*, of the firm of J. S. & Co., found his claims against *J* resisted, until he sued and got decree against him. *K* came to know that *V*, a member of *J*'s firm, had presented his petition of insolvency. *K* also knew that *V* at the time of filing his petition had claims against *J*'s firm. *K* thereupon circulated amongst persons, who had dealings with the firm to J. S. & Co., a letter warning them not to make payments to the firm and containing the following statements: (i) That a member of the firm *V* had filed his petition under the Insolvency Acts, "the object being to collect the outstandings and defeat the creditors." (ii) That the other members were not entitled to collect the outstandings and were not in a position to give an effectual discharge to persons making payments. (iii) That *K* was taking steps to have all the other members declared insolvent. It is found that the firm of J. S. & Co., was without capital, and that subsequently to writing the letter *K* did file a petition of insolvency against the other members of the firm, though unsuccessfully. *Held*, on the above circumstances and taking the letter as a whole, that there was no defamation, the case falling under ill. (*a*), Exc. 9 to s. 499 of the Penal Code. That the statement that the object of *V*'s filing the petition of insolvency was to defeat creditors was merely a statement o the reason, which induced *K* to make the request he did to the recipients of the letters and the insertion of this inference alone was not sufficient to take the letter out of the exception. It was observed that a libel of this kind being analogous to an action on a case for special damage (caused, as alleged, by reason of injury inflicted on complainant's business by specific allegations made with respect to that business) can more properly be dealt with in the Civil than in the Criminal Court. CASSEM KURRIM *v.* JONAS HADJEE SEEDICK (1905) **9 C. W. N. 195**

58. ——— Hindu widow—Complaint by brother—"*Person aggrieved*"—*Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 198.* Where the alleged offence was defamation imputing unchastity to a Hindu widow: *Held*, that her brother, with whom she was residing at the time, was a "person aggrieved" by such imputation within the terms of s. 198 of the Criminal Procedure Code, and it was competent to the Court to take cognizance of the offence upon his complaint. THAKUR DAS SAR *v.* ADHAR CHANDRA MISRI (1905)
I. L. R. 32 Calc. 425

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DEFAMATION—*contd.*

59. ——— **Answers to questions put by Court**—*No prosecution lies for, in respect of answers given by a party to questions asked by Court.* It is contrary to public policy that a person bound to state the truth in answer to questions put to him by a Court should be liable to be prosecuted for defamation in respect of answers so given, though untrue and not given in good faith. *Manjaya* v. *Sesha Shetti, I. L. R. 11 Mad. 477,* followed. ALRAJA NAIDU, *In the matter of* (1906) . . . **I. L. R. 30 Mad. 222**

60. ——— **Express malice**—*Penal Code (Act XLV of 1860), s. 500—Privileged communication—Bonâ fides—Social position of accused to be considered—Malice.* Where the accused told his friend *E* and subsequently at the instance of *E* wrote to the superior officer of the complainant to the effect that the complainant and the wife of *E* had been seen behaving on a certain night in such a manner and under such circumstances as to render unavoidable the conclusion that acts of impropriety took place between them, and it was found that the accused honestly believed in the truth of the statements: *Held,* that the accused could not be convicted of an offence under s. 500, Indian Penal Code, unless express malice was proved by the prosecution. That though a person in a higher social position than the accused, would have probably acted differently under the circumstances, it did not follow that the accused was therefore actuated by malice in acting as he did. GRANT *v.* EMPEROR (1906) . . **11 C. W. N. 390**

61. ——— **Fair comment**—*Indian Penal Code (Act XLV of 1860), s. 499, Exceptions 3, 6, 9, ss. 52, 500—Comment—Right of fair comment—Comment should be suggested by and confined to the work under review—Good faith, tests of—Malice, interpretation of the term.* The word "malice" in the legal use of that term is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind which is wrong or faulty (whether evidenced in action by excess or defect) such as would be unjustifiable in the circumstances and incompatible with thoroughly innocent intentions. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment which is the subject of the complaint. For whether fair comment is to be regarded as falling under a branch of the law of privilege or not, it cannot excuse an injury arising, not from the mere act of criticism but from a state of mind in the critic which is in itself unjustifiable and the excuse may be so forfeited either by reason of an evil intent in him, or by reason of mere recklessness in making an unwarrantable assertion. For then the comment would not be fair comment at all. Apart from extrinsic evidence of malice, protection must be withheld even from what purports to be criticism, if it states as a fact to be inferred from the book criticised an imputation for which the book itself contains absolutely no foundation whatever. The right of fair comment involves two essentials, first that the imputation should be comment on the work criticised, and second that it should be "fair"—that is to say, that if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. "Good faith" requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment. The object of Exception 6 to s. 499 of the Indian Penal Code (Act XLV of 1860) is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. Comment otherwise defamatory is justified on this ground alone. The comment must, therefore, make it clear to the public that decision is invited only on such evidence as is supplied by the public performance. It follows that an imputation on an author made by a critic without reference, express or implied, to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his intention was to base his imputation solely on the work reviewed, and that he had in his mind passages therein supporting the imputation. The responsibility of the critic is to be gauged by the effect which his comment is calculated to produce, and not by what he says was his intention. It is not enough that he should intend to form his opinion on the work before him: he is also bound in the words of the exceptions to express his opinion with due care and caution, and to give the public no ground for supposing that he is speaking of anything but the performance submitted to its judgment. EMPEROR *v.* ABDOOL WADOOD (1907) . . **I. L. R. 31 Bom. 293**

62. ——— **Witness, statement by**—*Penal Code (Act XLV of 1860), s. 499—Indian Evidence Act, ss. 105 and 132—How far witness protected when giving evidence.* If a witness whilst giving evidence makes a statement concerning any person which amount to defamation, he may be prosecuted under s. 499 of the Indian Penal Code in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the exceptions to s. 499 of the Code or that he is protected from prosecution by the proviso to s. 132 of the Indian Evidence Act, 1872 So *held*

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DEFAMATION—*contd.*

by KNOX, *Acting C. J.*, and AIKMAN, *J.* (RICHARDS, *J., dissentiente*). *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry, 11 B. L. R. 321,* distinguished. *Bank of England* v. *Vagliano Brothers, [1891] A. C. 107 ; Norendra Nath Sircar* v. *Kamalbasini Dasi, L. R. 23 I. A. 18 ; Robinson* v. *Canadian Pacific Railway Company, [1892] A. C. 481 ; Queen* v. *Pursoram Doss, 3 W. R. Cr. 45 ; Scaly* v. *Ram Narain Bose, 4 W. R. Cr. 22 ; Manjaya* v. *Sesha Shetti, I. L. R. 11 Mad. 477 ; Queen-Empress* v. *Babaji, I. L. R. 17 Bom. 127 ; Queen-Empress* v. *Balkrishna Vithal, I L. R. 17 Bom. 573 ; Bhikumber Singh* v. *Becharam Sircar, I. L. R. 15 Calc. 264 ; Woolfun Bibi* v. *Jesarath Sheikh, I. L. R. 27 Calc. 262 ; Dawan Singh* v. *Mahip Singh, I. L. R. 10 All. 425 ;* and *Queen-Empress* v. *Gajadhur, All. Weekly Notes (1890) 170,* referred to. *Ganesh Dutt Singh* v. *Mugneeram Chowdhry, 11B. L. R. 321,* distinguished. *Green* v. *Delanney, 14 W. R. Cr. 27 ; Queen-Empress* v. *Balkrishna Vithal, I. L. R. 17 Bom. 573 ; In re Nagarji Trikamji, I. L. R. 19 Bom. 340 ; Angada Ram Shaha* v. *Nemai Chand Shaha, I. L. R. 23 Calc. 867 ; Abdul Hakim* v. *Tej Chandra Mukerji, I. L. R. 3 All. 815 ; Bank of England* v. *Vagliano Brothers, [1891] A C. 107 ;* and *Norendra Nath Sircar* v. *Kamalbasini Dasi, L. R. 23 I. A. 18,* referred to by AIKMIN, *J. Per* RICHARDS, *J.*—A prosecution for defamation under s. 499 of the Indian Penal Code will not lie against a witness in respect of any statement made by him in the course of giving evidence, even if such statement may not be relevant to the matter under inquiry. *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry, 11 B. L. R. 321,* followed. *Dawkins* v. *Lord Rokeby, L. R. 7 H. L. 744 ; Abdul Hakim* v. *Tej Chandra Mukerji, I. L. R. 3 All. 815 ;* and *Isuri Prasad Singh* v. *Umrao Singh, I. L. R. 22 All. 234,* referred to. EMPEROR *v.* GANGA PRASAD (1907) **I. L. R. 29 All. 685**

63. ———— Suit by husband—*Damages for loss of reputation caused by defaming a wife —Suit for slander brought by a husband whether maintainable—Special damages—Cause of action.* *A* instituted a suit against *B* for defamation. The words used alleged unchastity on the part of *A*'s wife. *A* alleged (*a*) special damage, (*b*) that the words were defamatory in themselves, (*c*) that he himself was defamed and was therefore entitled to sue. *Held,* that the words used defamed *A* as well as his wife and therefore *A* could maintain an action. *Held,* further, that the words used by *B* were defamatory in themselves and did not amount to mere verbal abuse and that therefore *A* was entitled to damages without proving special damage. *Girish Chunder Mitter* v. *Jatadhari Sadukhan, I. L. R. 26 Calc. 653,* distinguished. *Ibin Hosein* v. *Haidar, I. L. R. 12 Calc. 109 ; Trailokha Nath Ghose* v. *Chundra Nath Dutt, I. L. R. 12 Calc. 424 ; Jogeswar Sarma* v. *Dinaram Sarma, 3 C. L. J. 140,* and *Parvathi* v. *Mannar, I. L. R. 8 Mad. 175,* referred to. *Held,* also, that the cause of action having arisen in the mofussil the suit was not governed by the rule laid

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down in *Bhooni Moni Dossi* v. *Natobar Biswas, I. L. R. 28 Calc. 452.* SUKKAN TELI *v.* BIPAD TELI (1906) . . . **I. L. R. 34 Calc. 48**

64. ———— Pleader, privilege of—*Improper questions in cross-examination based on wrong inference from defective memory—Privilege—Good faith—Absence of express malice—Penal Code (Act XLV of 1860) ss. 52 and 499, Exception (9).* A pleader acting upon his own recollection of the evidence given by a witness two years before, in another case in which he was a pleader, but drawing a wrong inference therefrom that the witness had been disbelieved by a particular Court, and had admitted to having been so disbelieved, and putting questions to him conveying such an imputation, after being warned that his impression was wrong, cannot, in the absence of actual malice, be convicted of defamation. A pleader, especially in the mofussil, where instructions are very commonly inaccurate and misleading, is as much justified in acting on his own recollection as on specific instructions, and the fact that he has drawn a wrong inference does not, in the absence of actual malice, deprive him of the protection of the ninth exception to s. 499 of the Penal Code. When a pleader is charged with defamation, in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose. *In re Nagarki Trikamji, I. L. R. 19 Bom. 340,* and *Emperor* v. *Purshottamdas Ranchhoddas, 9 Bom. L. R. 1287,* followed. UPENDRA NATH BAGCHI *v.* EMPEROR (1909) **I. L. R. 36 Calc. 375**

DEFAULT.

See APPEAL . **I. L. R. 31 Calc. 207**

See DISMISSAL FOR DEFAULT.

See EXECUTION . . **12 C. W. N. 3**

See MORTGAGE . **I. L. R. 31 Calc. 83**

See WAIVER . . **8. C. W. N. 66**

———— in payment of instalments—

See WAIVER . **I. L. R. 36 Calc. 394**

DEFAULTER.

See PREVIOUS HOLDER. **I. L. R. 31 Calc. 901**

See SALE FOR ARREARS OF RENT—DEFAULTERS.

See SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE. **I. L. R. 17 Mad. 247**

DEFAULTING PROPRIETORS.

See SALE FOR ARREARS OF RENT—INCUMBRANCES . **I. L. R. 21 Calc. 702**

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DEFEASANCE.

See HINDU LAW **I. L. R. 33 Calc. 1306**

DEFENCE WITNESSES.

——— **limitation of time for examination of—**

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 35 Calc. 243**

DEFENDANT.

See BENGAL TENANCY ACT (VIII OF 1885). **12 C. W. N. 8**

See CONTRIBUTION, SUIT FOR. **I. L. R. 31 Calc. 643**

See DEFENDANTS.

See LETTERS PATENT, HIGH COURT, CL. 12. **I. L. R. 24 Calc. 190**

See LIMITATION ACT, 1877, s. 3. **I. L. R. 16 Bom. 197**

See PARTIES—ADDING PARTIES TO SUITS —DEFENDANTS.

See PARTIES—STRIKING OFF PARTIES—DEFENDANTS.

See PARTIES—SUBSTITUTION OF PARTIES —DEFENDANTS.

See PLAINT—FORM AND CONTENTS OF PLAINT—DEFENDANTS.

See PRACTICE—CIVIL CASES—OPENING CASE FOR DEFENDANT.

See RES JUDICATA—PARTIES—CO-DEFENDANTS.

——— **conduct of—**

See COSTS—SPECIAL CASES—DEFENDANTS.

See COSTS—SPECIAL CASES—LITIGATION UNNECESSARY. **I. L. R. 21 Calc. 680**

——— **death of—**

See ATTACHMENT—ATTACHMENT BEFORE JUDGMENT . **I. L. R. 17 Mad. 144**

See ABATEMENT OF SUIT. **I. L. R. 25 All. 206**

See CIVIL PROCEDURE CODE, 1882, s. 108. **I. L. R. 29 Calc. 33**

See LEGAL REPRESENTATIVE. **I. L. R. 36 Calc. 418**

See MALICIOUS PROSECUTION. **I. L. R. 26 Mad. 499**

See PARTIES—SUBSTITUTION OF PARTIES —DEFENDANTS.

See REPRESENTATIVE OF DECEASED PERSON.

——— **non-appearance of—**

See APPEAL—DEFAULT IN APPEARANCE.

See CIVIL PROCEDURE CODE, 1882, s. 108.

See SMALL CAUSE COURT, MOFUSIL—PRACTICE AND PROCEDURE—NEW TRIALS. **I. L. R. 4 Calc. 318**

DEFENDANT—*concld.*

——— **out of jurisdiction.**

See FOREIGN COURT, JUDGMENT OF. **I. L. R. 20 Mad. 112**

See LETTERS PATENT, HIGH COURT, CL. 12. **I. L. R. 20 Bom. 767**

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—GENERAL CASES. **I. L. R. 21 Bom. 121**

——— **right of, to appear where summons not served.**

See WITHDRAWAL OF SUIT. **I. L. R. 15 Bom. 160**

——— **time for appearance of, extension of—**

See NEGOTIABLE INSTRUMENTS SUMMARY PROCEDURE ON **1 Ind. Jur. N. S. 395**
3 B. L. R. O. C. 83
9 B. L. R. 441

See PRACTICE—CIVIL CASES—LEAVE TO SUE OR DEFEND **I. L. R. 3 Calc. 539**

See RES JUDICATA PARTIES—CO-DEFENDANTS.

DEFENDANTS.

See DEFENDANT.

——— **appeal between—**

See PRACTICE—CIVIL CASES—APPEAL. **I. L. R. 18 Bom. 520**

——— **pro forma—**

See RES JUDICATA—PARTIES—PRO FORMÂ DEFENDANTS.

——— **separate appearance of—**

See COSTS—SPECIAL CASES—DEFENDANTS.

——— *Privilege—An accused person is privileged in respect of questions put in good faith for the purpose of defending himself—Publication.* The rule of English Law "that no action of libel or slander lies whether against Judge, counsel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any Court, or Tribunal, recognised by law," will also apply to an accused person in respect of questions put by him in good faith for the purpose of defending himself. A party receiving a notice is entitled to reply to the notice and state his reasons, and such reply is privileged so long as it is confined to the matter in hand and is relevant, provided the reply is not published by the person making it. Where such reply is a mere acknowledgment that the party had made the imputations complained of in the notice, relief can be claimed only in respect of the original imputations. PACHAIPERUMAL CHETTIAR *v.* DASI THANGAM (1908) . . . . **I. L. R. 31 Mad. 400**

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DEFINITION.

See PENAL CODE (ACT XLV OF 1860), s. 173 . . I. L. R. 31 All. 603

See PENAL CODE (ACT XLV OF 1860), s. 231 . . I. L. R. 30 All. 93

DEKKHAN AGRICULTURISTS' RELIEF ACTS.

——— **XVII of 1879.**

See APPELLATE COURT—OBJECTIONS TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—JURISDICTION. I. L. R. 13 Bom. 424

See BENAMI TRANSACTION—GENERAL CASES . . I. L. R. 22 Bom. 820

See ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS. I. L. R. 17 Bom. 227

See EVIDENCE ACT. I. L. R. 30 Bom. 426

See HINDU LAW—ALIENATION—ALIENATION BY WIDOW—WHAT CONSTITUTES LEGAL NECESSITY. I. L. R. 11 Bom. 325

See JURISDICTION—QUESTION OF JURISDICTION—WHEN IT MAY BE RAISED. I. L. R. 13 Bom. 424

See JURISDICTION—QUESTION OF JURISDICTION—WRONG EXERCISE OF JURISDICTION . I. L. R. 7 Bom. 448

See MUNSIF, JURISDICTION OF. I. L. R. 5 Bom. 180

See REVIEW—PROCEDURE ON RE-HEARING OF CASE . I. L. R. 11 Bom. 591

See SPECIAL OR SECOND APPEAL—PROCEDURE IN SPECIAL APPEAL. I. L. R. 13 Bom. 424

——— **XXII of 1882.**

See GENERAL CLAUSES CONSOLIDATION ACT, 1868, s. 6 I. L. R. 8 Bom. 340

See STATUTES, CONSTRUCTION OF. I. L. R. 8 Bom. 340

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622. I. L. R. 18 Bom. 347 I. L. R. 19 Bom. 286

——— **XVII of 1879**— *Civil Procedure Code (Act XIV of 1882), ss. 373 and 622—Civil Procedure Code (Act V of 1908), s. 115—Redemption suit—Sale really a mortgage—S. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.* Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed,

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was really a mortgage. The suit was not governed by s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit. *Held*, that the Court acted with material irregularity in passing the order. The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant. A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force. MAHIPATI *v.* NATHU (1909) I. L. R. 33 Bom. 722.

——— **Ch. II**—*Suit based on dispossession of an existing possession—Incidental reference to a mortgage in plaint.* A suit based on a dispossession of an existing possession does not fall within Chapter II of the Dekkhan Agriculturists' Relief Act (XVII of 1879). An incidental reference to a mortgage in the plaint does not affect the question, when the suit is one to recover possession from a person, who is not the mortgagor. *Mulchand* v. *Ravji, P. J. p. 184*, followed. KRISHNAJI *v.* HARI (1904) . . . . I. L. R. 28 Bom. 635

——— **XVII of 1879, XXIII of 1881, and XXII of 1882**—*Agriculturists, definition of—Change of definition between date of filing of suit and date of trial—Jurisdiction.* Some time previously to the institution of this suit, the defendants lived and carried on business as money-lenders at Yeola, a taluka not subject to the Dekkhan Agriculturists' Relief Act (XVII of 1879), and while there they become indebted to the plaintiff. Subsequently they removed to Kopargaon, in which district the said Act was in force. Both at Yeola and at Kopargaon they, in course of their business, acquired land which they cultivated. In 1882, the plaintiff brought this suit against them in the Subordinate Judge's Court at Yeola to recover the debt due to him. The defendants contended that they were agriculturists, and could not be sued in the Court of the Subordinate Judge at Yeola. The suit came on for trial in July 1883, at which date Act XXII of 1882 had come into force, which altered the definition of "agriculturist." The Subordinate Judge held that the defendants were agriculturists, and that he had no jurisdiction to try the suit. His decree was reversed by the District Judge, who held that the defendants earned their livelihood only

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partially, and not principally, from agriculture, and that the lower Court had jurisdiction. The defendants appealed to the High Court, and contended that the definition of "agriculturist" to be applied in the case was that contained in Act XXIII of 1881, which was in force when the suit was instituted, and not that in Act XXII of 1882, which was in force at the date of the trial. *Held*, that, having regard to the very special nature of the legislation embodied in s. 12 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) for the benefit of a particular and very limited class, it was intended by the Legislature that a person claiming the benefit of that section at the *trial* should fill the character of an agriculturist as then defined by law. SHAMLAL *v.* HIRACHAND . **I. L. R. 10 Bom. 367**

1. ——— s. 2—*Definition of "agriculturist"—Agriculturist also owner of the inam villages and a pensioner—Income from villages, owing to mortgage, together with pension less than income from other sources.* Where an owner of inam villages, the revenue from which, together with his income from other sources not agricultural, was greatly in excess of the income he derived from agriculture, mortgaged the inam villages, and thereby reduced the income actually received by him from non-agricultural sources to less than the income he derived from agriculture : *Held*, that, although his income from the inam villages and from other sources not agricultural might together be sufficient for his maintenance, nevertheless the construction of the definition of "agriculturist" given in the Act, which is quite independent of any such question, could not be affected thereby, and that he must be deemed to "earn the means of livelihood" principally from agriculture, and to be an agriculturist within the meaning of Act XVII of 1879. DWARKOJIRAV BABURAV *v.* BALKRISHNA BHALCHANDRA **I. L. R. 19 Bom. 255**

2. ——— cl. (2) and s. 11—*Jurisdiction—Courts of Small Causes.* The effect of the extension of s. 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), by the first section of it, to all India is simply to impose upon any person in any part of India who brings a suit of the nature mentioned in the third section against an agriculturist or agriculturists residing within the districts of Poona, Satara, Sholapur, and Ahmednagar, the necessity of instituting such suit, and having it tried in a Court within the local limits of whose jurisdiction he or they reside. The Court must necessarily be in some one of the said four districts. The word "agriculturist," as defined in s. 2, cl. (2) refers to an agriculturist residing within any one of the said four districts only, and not to one residing in any other district. On the 25th February 1879, a suit was filed for R85 in the Small Cause Court at Nadiad, in the district of Ahmedabad, against two defendants, one of whom was an agriculturist residing within the local limits of the Subordinate Judge's Court at Umreth, and not within those of

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——— s. 2—*contd.*

the Small Cause Court at Nadiad. The Judge was of opinion that he had no jurisdiction to try it under the Dekkhan Agriculturists' Relief Act, and referred the case for the opinion of the High Court. *Held*, that the Act did not affect the jurisdiction of the Small Cause Court in the case of a defendant who was an agriculturist and resided in a place in the district of Ahmedabad, and not in any one of the four districts mentioned in the Act. PURSHOTAM LALCHAI *v.* BHAVANJI PARTAB **I. L. R. 4 Bom. 360**

3. ——— *Time intervening between application to Conciliator and grant of certificate—Conciliator's certificate when necessary—Limitation.* The necessity to procure the Conciliator's certificate before the entertainment of a suit to which an agriculturist residing within any local area for which a Conciliator has been appointed is a party is not limited to suits specified in s. 3 of the Dekkan Agriculturists' Relief Act, 1879, but extends to all matters within the cognizance of a Civil Court. *Held*, that such certificate was necessary before bringing a suit against an agriculturist to obtain a declaration that certain property was liable to be sold in execution. In computing the period of limitation for such a suit, the time intervening between the application to the Conciliator and the grant of a certificate by him must be excluded. DURGARAM MONIRAM *v.* SHRIPATI **I. L. R. 8 Bom. 411**

4. ——— *Agriculturist—A person who is an agriculturist in 1871 but is not one when the suit is brought in 1905 cannot claim the benefit of the Act.* In 1871, the defendant executed a mortgage in plaintiff's favour. It was provided that the mortgage was not to be redeemed before 1886. The defendant was an agriculturist at the date of the mortgage ; but he was not one when the suit was brought. In 1879, the term 'agriculturist' first received a legal definition in the Dekkhan Agriculturists' Relief Act. In the suit by the plaintiff upon the mortgage the defendant claimed the benefits of the Act, on the ground that his liability under the mortgage was not incurred till 1886 : it was admitted that the defendant was not an agriculturist at the date of the suit. *Held*, that the liability incurred by the defendant was to pay back the money borrowed by him ; and that liability was incurred when the money was borrowed in 1871. *Held*, further, that in 1871, the defendant, whatever may have been his occupation in fact, could not have been an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which was enacted in 1879. *Held*, also, that the defendant was not entitled to the benefit of the Act. MAHADEV NARAYAN *v.* VINAYAK GANGADHAR (1909) . **I. L. R. 33 Bom. 376**

5. ——— *"Agriculturist"—Interpretation—"Earns his livelihood"—Sources of income.* In ascertaining whether a man who has two or more sources of income of which the

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——— s. 2—*concld.*

income from agriculture is one, occupies the status of agriculturist as defined in the Dekkan Agriculturists' Relief Act (XVII of 1879), the Court must take into account all these sources and ascertain whether the income derived from agriculture is larger or smaller than the rest. All the sources must be taken to be the means of his livelihood, and if the income from agriculture exceed the other incomes he must be deemed to be earning his livelihood principally by agriculture. *Dwarkojirav Baburav* v. *Balkrishna Bhalchandra, I. L. R. 19 Bom. 255,* explained. CHUNILAL *v.* VINAYAK (1909)
I. L. R. 33 Bom. 376

——— s. 3—*Land-revenue—Suit for land-revenue not a suit for rent.* A suit for land-revenue does not fall under s. 3 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The liability for land-revenue does not spring from a contractual engagement, and a claim in respect thereof is not one for rent or damages within the meaning of cl. (*x*) of s. 3 of the Act. GULAM JILANEE *v.* KASHINATH BAPUJI DANI (1900)
I. L. R. 25 Bom. 244

——— s. 3, cl. (3)—

See PLEADER—AUTHORITY TO BIND CLIENT . **I. L. R. 11 Bom. 591**

See VALUATION OF SUIT—SUITS—REDEMPTION, SUIT FOR **I. L. R. 11 Bom. 591**
I. L. R. 13 Bom. 489

1. ——— cl. (w)—*Application of Act to non-agricultural classes—Special Judge, revisional jurisdiction of.* The Dekkhan Agriculturists' Relief Act (XVII of 1879) is not limited in its application to agriculturists only, but applies to all classes under certain conditions. The plaintiff sued to recover R50 as money spent by him on account of the defendant. The suit was filed in the Court of the first class Subordinate Judge at Satara, where both parties resided. The Subordinate Judge passed a decree in plaintiff's favour. The Special Judge, in revision, reversed this decree, and dismissed the suit. The plaintiff thereupon applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882), urging that, as neither party to the suit was an agriculturist, the Special Judge had no revisional jurisdiction in the matter. *Held,* that the Special Judge had such jurisdiction, the suit being one falling within cl. (*w*) of s. 3 of the Dekkan Agriculturists' Relief Act. GANESH KRISHNAJI *v.* KRISHNAJI . **I. L. R. 14 Bom. 387**

2. ——— *Accounts—Duty of Court to take accounts in mode directed by Act.* It being obligatory upon the Court to take accounts in the mode directed in the Dekkhan Agriculturists' Relief Act (XVII of 1879), which requires annual rests, and that not having been done, the decree was reversed by the High Court on appeal, and the case sent back to the lower Court to take accounts

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——— s. 3—*contd.*

according to the Act. HANMANT RAMCHANDRA *v.* BABAJI ABAJI DESHPANDE
I. L. R. 16 Bom. 172

3. ——— cl. (x)—*Suit to recover rent—Question of title incidentally decided—Analogy with the decisions under the Small Cause Courts Acts—Appeal to the District Court—Revision by the Special Judge—Subordinate Judge, jurisdiction of.* In a suit to recover a sum of R30 as rent under s. 3 (*3*), cl. (*x*), of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a second class Subordinate Judge incidentally determined the question of the plaintiff's title to the land for which the rent was claimed. The point then arose as to whether the decision of the suit by the Subordinate Judge could be appealed against, or whether it was open to revision by the Special Judge under s. 50 of the Act. *Held,* that, although a question of title was incidentally raised and decided in the case, still by analogy with the decisions under the several Small Cause Courts Acts, the suit, as brought, was one properly falling under cl. (*x*) of s. 3 (*3*) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and that no appeal lay to the District Court from the decree of the Subordinate Judge who decided the suit. SHIDU *v.* GANESH NARAYAN . . **I. L. R. 16 Bom. 128**

4. ——— cls. (x) and (z)—*Suit to redeem a chattel pledged—Moveable property, redemption of—Appeal—Subordinate Judge, jurisdiction of.* A suit for the redemption of a chattel is one falling under cl. (*x*) of s. 3 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). In districts in which the Act is in force this clause is applicable to cases in which neither party is an agriculturist. The word "mortgaged" in cl. (*z*) of s. 3 of the Act applies only to immoveable property. A suit was brought to redeem an ornament pledged for a sum below R500. The suit was filed in the Court of the first class Subordinate Judge at Satara, where Act XVII of 1879 is in force. The Subordinate Judge passed a decree for redemption of the pledge. *Held,* that, though neither of the parties was an agriculturist, the case fell under Ch. II of the Act, and no appeal lay against the decree of the Subordinate Judge. *Held,* further, that the Special Judge had revisional jurisdiction in the matter. KASHIRAM MULCHAND *v.* HIRANAND SURATRAM . **I. L. R. 15 Bom. 30**

5. ——— *Plaintiff—Mortgagor—Assignee.* The provision in s. 3, cl. (*z*), of Act XVII of 1879 is not limited to an agriculturist who is himself the original mortgagor; so that, where the plaintiff, though an assignee, is an agriculturist, he is entitled to the benefit of ss. 12, 13, and 14 of the Act. ANNAJI WAGH *v.* BAPUCHAND JETHIRAM . . . **I. L. R. 7 Bom. 520**

6. ——— *Redemption, suit for—Possession of a defendant not as a mortgagee—Suit in ejectment—Appeal—Jurisdiction of the District Court.* In a redemption suit governed by the provisions of Ch. II of the Dekkhan Agriculturists' Relief Act (XVII of 1879), one of the

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——— s. 3—*concld.*

defendants being sued merely as a person in possession : *Held*, that the suit as against that defendant was one in ejectment. A suit in ejectment is not governed by cl. (*3*), s. 3 of the Dekkhan Agriculturists' Relief Act, and an appeal against the decree in such suit lies to the District Court. SAKHARAM *v.* SHRIHATI . **I. L. R. 16 Bom. 183**

——— ss. 3, 15A—

See MORTGAGE—CONSTRUCTION.
I. L. R. 26 Bom. 252

——— s. 4—*Jurisdiction of second class Subordinate Judge—Transfer of case—Institution f suit—Civil Procedure Code, 1882, s. 48—Presentation of plaint.* The plaintiff sued to establish his title to, and recover, a moiety of a cash allowance payable to him from the Mamlatdar's treasury at Satara. The claim was valued at R455-4. The plaint was filed in the Court of the first class Subordinate Judge at Satara, who transferred the case for trial to the Joint Subordinate Judge of the second class. The latter Judge dismissed the suit on the merits, holding that the plaintiff had no right to the moiety of the allowance which he sought to recover. This decision was reversed on appeal by the Assistant Judge on the ground that the Joint Subordinate Judge of the second class had no jurisdiction to hear the suit under s. 4 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). *Held*, that the requirements of s. 4 of Act XVII of 1879 were sufficiently complied with by the suit having been filed in the Court of the Subordinate Judge of the first class. He was competent under s. 23 of Act XIV of 1869 to transfer the suit to the Joint Subordinate Judge of the second class, who was deputed to assist him. MANAJI BAHIRJI *v.* NARAYANRAO MADHAVRAO
I. L. R. 19 Bom. 46

——— s. 7.

See WITNESS—CIVIL CASES—SUMMONING AND ATTENDANCE OF WITNESSES.
I. L. R. 5 Bom. 184

——— *Defendant summoned for examination—Payment of batta.* It is not necessary to pay *batta* to any agriculturist defendant summoned to be examined under s. 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The *batta* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it. GANGASHANKAR *v.* BADHUR MADHBHAI (1908)
I. L. R. 33 Bom. 249

——— s. 11.

See PLAINT—RETURN OF PLAINT.
I. L. R. 23 Bom. 679

1. ——— *Agriculturist.* The Dekkhan Agriculturists' Relief Act (XVII of 1879) is not limited in its application to suits for sums not exceeding R500. The effect of the reference, in s. 11 of the Dekkhan Agriculturists' Relief Act, to cl. (*w*) of s. 2 is to make all suits of the kinds therein

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——— s. 11—*concld.*

described, when brought against an agriculturist, cognizable by the local Courts, and by them only. S. 11 extends to the whole of British India as to suits brought against agriculturists of the description given in s. 2. In a suit against defendants, who were residents at Sholapur, for R1,947, the price of goods sold and delivered, the defendants moved for a postponement of the hearing in order that a commission might issue to take evidence at Sholapur, alleging that by the evidence thus obtained they would be proved to be agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act, and consequently under s. 11 could only be sued at Sholapur. The Court granted the commission, holding that, if the defendants established that they were *bonâ fide* agriculturists, they were exempt from the jurisdiction of the High Court. A man must have gained his livelihood by farming, for at least one full agricultural season, to have acquired the condition of an agriculturist under the Act. TULSIDAS DHUNJI *v.* VIRBASAPA
I. L. R. 4 Bom. 624

2. ——— ss. 11, 12—*Suits instituted after November 1897.* The provisions of ss. 11 and 12 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are applicable only to suits instituted upon and after the 1st November 1879. SURYAJI *v.* TUKARAM . . **I. L. R. 4 Bom. 358**

1. ——— s. 12—*Act XXIII of 1881, s. 4—Act XXII of 1882, s. 3—Definition of "agriculturist"—Change in the definition—Effect of a change of status on the rights of parties to litigation—Effect of change of law.* A change in the law does not generally affect any proceeding begun when it comes into force. But a change of status or legal capacity generally operates at once to extinguish, diminish, or vary the extent to which a party may claim the aid or protection of a Court. The plaintiff, who was earning his livelihood partially by agriculture within the districts to which the Dekkhan Agriculturists' Relief Act (XVII of 1879) applied, brought a suit for redemption. At the time of the institution of the suit he was an agriculturist as defined by s. 4 of Act XXIII of 1881. During the pendency of the suit the definition of agriculturist was changed by s. 3 of Act XXII of 1882. *Held*, that, if the plaintiff was not an agriculturist within the meaning of Act XXII of 1882 at the time of adjudication, he had no right to redeem on the special terms of s. 12 of Act XVII of 1879, as he had lost, *pendente lite*, the specific personal character on which the right depended. *Shamlal* v. *Hirachand, I. L. R. 10 Bom. 367*, followed. PADGAYA SOMSHETTI *v.* BAJI BABAJI
I. L. R. 11 Bom. 469

2. ——— *Mortgagee overpaid—Decree—Suit for account and redemption.* In a suit for account and redemption, if the mortgagee, on taking the accounts, is found to have been overpaid, the general practice is to order the payment by him of the balance due to the mortgagor, with

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——— s. 12—*contd.*

interest from the date of the institution of the suit. The application of the above rule, however, in redemption suits instituted under the Dekkhan Agriculturists' Relief Act (XVII of 1879), in cases where the terms of the mortgage contract between the parties are set aside for the purpose of taking the account under the provisions of s. 13 of the Act, would not only lead to the redemption of the mortgaged property, contrary to the terms and conditions of the contract, but would in many cases oblige the mortgagee to refund the money which rightly came into his hands under the contract. The plaintiff, an agriculturist, sued (as mortgagor) for account and redemption of the mortgaged property under the Dekkhan Agriculturists' Relief Act. The defendant pleaded that by the terms of mortgage-bond he was not bound to account, and that s. 12 of the Act did not apply. The Subordinate Judge overruled the objection, and on taking the account found a balance due from the defendant to the plaintiff. He accordingly made a decree in favour of the plaintiff for the land and the amount. The District Judge confirmed the decree of the first Court. *Held*, that the decree of the lower Court must be varied by omitting the direction ordering the defendant to pay the balance to the plaintiff. JANOJI *v.* JANOJI . . **I. L. R. 7 Bom. 185**

3. ——— ss. 12, 13—*Mortgage—Agriculturist mortgagor—Suit for account and redemption before the time fixed for payment.* Under the Dekkhan Agriculturists' Relief Act (XVII of 1879), an agriculturist mortgagor may sue for an account and possession of mortgaged property before the time fixed in the mortgage deed for the payment of the mortgage-debt, on the ground that the debt has been satisfied. The rule of law that the right to redeem is co-extensive with the right to foreclosure, and is consequently postponed until the time fixed for the payment of the mortgage-debt, does not apply to cases falling under that Act. BABAJI *v.* VITHU . . **I. L. R. 6 Bom. 734**

4. ——— *Usufructuary mortgage—Redemption—Payment of the amount found due on taking accounts.* S. 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is imperative and the amount due in a suit for redemption of a usufructuary mortgage in which the provisions of s. 12 of the Act have been complied with is the amount which is found to be due upon taking accounts in the manner provided by s. 13. DADABHAI *v.* DADABHAI (1908) **I. L. R. 32 Bom. 516**

5. ——— ss. 12, 13 and 71A—*Application of the sections to a suit instituted before the Act came into force in a particular district—Retrospective effect—Taking an account between parties.* Ss. 13 and 71A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) have no retrospective effect. S. 12 of the Act is retrospective only so far as it regulates procedure. That part of the section which relates to taking an account between the parties

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——— s. 12—*concld.*

is not retrospective. FATMA BIBI *v.* GANESH (1907) . . . . **I. L. R. 31 Bom. 630**

6. ——— ss. 12, 15—*Suit on bond the execution of which is admitted—Consideration—Burden of proof—Practice—Procedure.* In cases to which the Dekkhan Agriculturists' Relief Act (XVII of 1879) applies, where a suit is brought upon a bond the execution of which is admitted by the defendant, no strict rule can be laid down as to the party upon whom the burden of proof rests. If the parties adduce no evidence, the Court must be content with the evidence of the parties themselves, and endeavour, in the language of s. 15 of the Act, to "satisfy itself." If it cannot "satisfy itself as to the amount which should be allowed on account of principal or interest, or both," it may, under that section, direct, of its own motion, that such amount be ascertained by arbitration. Although proviso 2 of s. 92, and s. 102 of the Evidence Act I of 1872, which correspond with cl. 1 of Regulation V of 1827, have not been repealed, the intention of the Legislature in enacting the Dekkhan Agriculturists' Relief Act (XVII of 1879) clearly was to relieve the debtor from the necessity of proving failure of consideration, although admitted in the bond on which he is sued, and the execution of which he admits. MALOJI SANTOJI *v.* VITHU HARI **I. L. R. 9 Bom. 520**

——— s. 13.

See MORTGAGE—ACCOUNTS. **I. L. R. 14 Bom. 19**

1. ——— *Contract, effect of adjudication on, by Court—Merger of contract in decree—Revision of decree—Opening of account.* Where a contract has been made the subject of adjudication by the Civil Court, and a decree has been passed, the contract is thereupon merged in the decree and s. 13 of Act XVII of 1879 furnishes no warrant for the revision of the decree and opening of the account between the agriculturist debtor and his creditors from the commencement of the transaction, since a decree, though based upon a contract and giving effect to it in a particular way, is yet a very different thing from the contract, and in case of revision entirely different principles apply to the two cases. TATYA VITHOJI *v.* BAPU BALAJI **I. L. R. 7 Bom. 330**

2. ——— cls. (b) and (d), and s. 15—*Suit for redemption—Account—Principal debt how ascertained—Reference to arbitration.* In a redemption suit under the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court should, in taking an account, form its own opinion on the subject. As the law stands, a mere guess as to the sum of money actually advanced cannot be made in favour either of one side or the other. If there are no materials from which the Court can satisfy itself as to the amount which should be allowed on account of principal, whether under

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DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— **s. 13**—*concld.*

cl. (*b*) or cl. (*d*) of s. 13 of the Act, it is open to it to have recourse to arbitration under the provisions of s. 15. *Mahadu* v. *Rajaram, P. J.* (*1887*) *216*, considered. *Malaji* v. *Vithu, I. L. R. 9 Bom. 520*, referred to. DHONDI *v.* LAKSHMAN **I. L. R. 19 Bom. 553**

1. ——— **s. 15B**—*Mortgage—Conditional sale—Foreclosure—Instalments.* The applicant, an agriculturist mortgagor, sued the defendant, the mortgagee, for redemption on the terms provided by the Dekkhan Agriculturists' Relief Act, 1879. The account was made up, and the mortgagor was directed to pay the sum found to be due within six months, or to be for ever foreclosed. He failed to pay within the time fixed, and afterwards applied under s. 15B of the Act, as amended by Act XXII of 1882, to be allowed to pay the amount of the decree by instalments. *Held*, that the order asked for could not be made. An order for foreclosure, when the time appointed by the order has expired, itself operates to transfer the ownership; and the ownership, having once passed to the mortgagee, cannot be taken away from him by a subsequent order not founded on any new transaction of the parties, except on some special ground, such as fraud or inevitable accident. LADU CHIMAJI *v.* BABAJI KHANDUJI . . . **I. L. R. 7 Bom. 532**

2. ——— *Decree for redemption—Order for the payment of money within a certain period—Application after expiry of such period for payment by instalments—Alteration of decree.* In a redemption suit under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879), the Court having passed a decree for the payment of the mortgage amount within certain period, and the decree being confirmed in second appeal, the mortgagor, after the expiration of the time for redemption specified in the decree, applied to the High Court for an order for the payment of the amount by instalments under s. 15B of the Dekkhan Agriculturists' Relief Act. *Held*, that such an order could only be made in the course of the proceedings under the decree, that is, by the Court which carries out the decree. *Golabpuri* v. *Pandurang, P. J.* (*1886*) *142*, referred to. BHAGIRATHIBAI v. HARI RAVJI CHIPLUNKAR **I. L. R. 19 Bom. 318**

3. ——— **Sub-s.** (*1*)—*Suit on mortgage—Decree—Payment of interest not compulsory—Discretion in Court.* The terms of sub-s. (*1*) of s. 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) do not make it compulsory on the Court to award interest. There is a discretion in the Court as to whether or not interest should be allowed. NATHU LAXMAN *v.* VAZIR (1907) **I. L. R. 31 Bom. 450**

4. ——— *Extension of the Act to the district—Decree on mortgage for sale—Order for sale in execution—Application for payment by instalments—Decree nisi—Decree absolute.*

DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— **s. 15B**—*contd.*

In execution of a decree for the sale of mortgaged property a portion of the property was sold and the rest was ordered to be sold by the Collector to whom the decree was transferred for execution. In the meanwhile the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) having been made applicable to the district, the mortgagor applied to the Court for payment by instalments under s. 15 (*b*) of the Act. The application was refused by the Court on the ground that the decree having been transferred to the Collector, it had no power to grant instalments. *Held*, on appeal by the mortgagor, reversing the order of the lower Court, that payment by instalments could be decreed. The application for payment by instalments having been made within one month from the time the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) was made applicable, no question of limitation arose. *Per* RUSSELL, *Acting C. J.*—The term 'decree' in s. 15 (*b*) of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) refers to 'decree *nisi*' as well as to 'decree absolute.' *Per* BEAMAN, *J.*—There is a perceptible difference between the case of a 'decree absolute' for sale and for foreclosure. Theoretically the latter leaves nothing more to be done; there is nothing left to be paid by any one, no further step to be taken by the creditor or the Court. All is over. But that is not so when a decree for sale is made absolute. The amount for which the decree was passed is still payable, and though, strictly speaking, it may not be payable by the "mortgagor," it is payable out of what, but for the decree absolute, would be still his property. MANCHERJI *v.* THAKORDAS (1906) . . . **I. L. R. 31 Bom. 120**

5. ——— *Decree on mortgage—Direction to pay interest—Application to cancel direction.* A decree on a mortgage was passed by the first class Subordinate Judge of Thana. The decree contained a direction for the payment of interest. After the decree was passed the Dekkhan Agriculturists' Relief Act (XVII of 1879) was made applicable to the Thana District. Subsequently in an execution proceeding under the decree the judgment-debtor, who was found to be an agriculturist, contended that the direction for the payment of interest in the decree should be cancelled under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15B. *Held*, that s. 15B does not empower the Court to cancel a direction for payment of interest contained in a decree. The interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify in the particular manner there described the terms of the payment. GOKALDAS *v.* GOVIND (1907) . . . . **I. L. R. 32 Bom. 98**

6. ——— **s. 15B, cls. (1) and (2)**—*Decree of mortgage—Payment by instalment—Sale on default*

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DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— **s. 15B**—*concld.*

in payment of an instalment—Application to make the decree absolute—Extension of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for payment by instalments. The Court of the first class Subordinate Judge of Dharwar passed a decree on a mortgage, which directed payment of the debt by instalments, and on default of the payment of one instalment the debt to be recovered by the sale of the mortgaged property. The judgment-debtor having failed to pay an instalment the decree-holder applied for the decree to be made absolute. In the meanwhile the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Dharwar District and the judgment-debtor having thereupon applied for instalments under s. 15B of the Act: *Held*, that there is nothing in s. 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to warrant the view that the legislature intended that when a decree allowing instalments had already been obtained, the whole matter should be re-considered afresh in execution with a view to substitute some new scheme of instalments. *Held*, further, that the second clause of s. 15B refers only to those cases where directions for payment have already been given under the first clause of that section. SHANKAR SHAMRAO *v.* SHANKARGAUDAYA (1908)

I. L. R. 32 Bom. 445

1. ——— **s. 15D**—*Act as amended by Act XXII of 1882, s. 6—Several mortgage bonds—Suit for account—Jurisdiction of Subordinate Judge.* A suit brought under s. 15D of the Dekkhan Agriculturists' Relief Act (XVII of 1879 and XXII of 1882) must include all the mortgages affecting the land. If the total amount of the debt exceeds R500, the case does not fall under Ch. II of the Act. If it exceeds R5,000, the first class Subordinate Judge alone has jurisdiction (see s. 24 of Act XIV of 1869). BABAJI *v.* HARI

I. L. R. 16 Bom. 351

2. ——— *Dekkhan Agriculturists' Relief Amendment Act (XXII of 1882)—Suit for account—Subsequent suit for redemption—Civil Procedure Code, 1882, s. 43.* Under s. 15D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act XXII of 1882, an agriculturist mortgagor can sue for an account upon a mortgage, without at the same time asking for redemption. Such a suit will not bar a subsequent suit for redemption. The section was expressly intended to remove the bar created by s. 43 of the Code of Civil Procedure (Act XIV of 1882). LALUCHAND *v.* GIRJAPPA

I. L. R. 20 Bom. 469

——— **s. 16**—*Mortgage—Suit by a mortgagor for account only—Execution of a money-decree obtained by mortgagee.* Under the Dekkhan Agriculturists' Relief Act, XVII of 1879, s. 16, an agriculturist mortgagor has no right to sue his mortgagee in a mere action for account. HARI *v.* LAKSHMAN . . **I. L. R. 5 Bom. 614**

1. ——— **s. 20—Mortgage decree**—*—Decree in suit on mortgage—Payment by instalments—Civil Procedure Code (Act X of 1877), s. 210.* The words "decree passed against an agriculturist" in s. 20 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, mean a decree passed against an agriculturist personally, and do not include a decree for the recovery of money by the sale of mortgaged property. The effect of that section must be taken to be an enlargement of the indulgence granted by s. 210 of the Civil Procedure Code (Act X of 1877), but only in those cases to which the latter section applies. By s. 210 of the Civil Procedure Code, the Court may, after the passing of a decree in money-suits, order the amount to be paid by instalments, provided the decree-holder consents. By s. 20 of Act XVII of 1879 the Court may make the same order in similar suits, without the consent of the decree-holder. In the case of a debt secured by a mortgage the agriculturists' remedy lies in a suit, not for an account, but for redemption; and the only decree which can be made in such a suit, in the absence of any special provision in the Act, is the ordinary decree for payment of the whole amount within six months, or, in default, for foreclosure. *Hurdeo Das* v. *Hukum Sing, I. L. R. 2 All. 320*, approved. SHANKARAPA DARGO PATEL *v.* DANAPA VIRANTAPA . . **I. L. R. 5 Bom. 604**

2. ——— *Act XXII of 1882, s. 15B—Payment of decree by instalments—Default—Whole sum payable on default—No second order for instalments—Acquiescence—Effect of taking out of Court instalments paid in under second order.* S. 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorize a variation of any order once so made. Nor does s. 20 of Act XVII of 1879 authorize a series of instalment orders, each one varying from the preceding. A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default. Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of first instance refused but the Subordinate Judge on appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in. *Held*, that the Subordinate Judge on appeal had no power to make a fresh order for payment by instalments varying the original order. *Held*, also, that the judgment-

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——— **s. 20**—*concld.*

creditor, by taking out the money paid into Court by the judgment-debtor as instalments due under the second order for instalments, did not bind himself to abide by that order. BALKRISHNA INDRABHAN *v.* ABAJI BIN BAHIRJI MORE

I. L. R. 12 Bom. 326

3. ——— *Civil Procedure Code (Act XIV of 1882), s. 13—Suit on a promissory note—Issue as to payment by instalments—Finding in the negative—Extension of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for instalments—Res judicata.* In a suit instituted in the Court of the first class Subordinate Judge of Ahmedabad on a promissory note an issue was raised as to whether the amount sued for should be made payable by instalments and the finding was in the negative. The suit was decreed on the 21st July 1905. The Dekkhan Agriculturists' Relief Act (XVII of 1879) was extended to the Ahmedabad District on the 15th August 1905. Thereupon the defendant having applied for payment by instalments, the application was dismissed on the ground that the question of instalments was *res judicata. Held*, that s. 13 of the Civil Procedure Code (Act XIV of 1882) was not applicable. S. 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) contemplates that even when a decree has been passed, which does not allow of instalments, the Court should have power to allow instalments in execution. BAI DIWALI *v.* PATEL GIRDHAR (1908)

I. L. R. 32 Bom. 391

——— **ss. 21 and 22**—*Attachment in execution prior to the Act coming into operation—Right of holder of decree obtained prior to Act.* Neither s. 21 nor s. 22 of the Dekkhan Agriculturists' Relief Act, 1879, applies to a decree made previously to the 1st day of November 1879, the day on which the Act came into force; and the holder of such a decree may arrest or imprison his agriculturist judgment-debtor, as well as attach and sell his immoveable property not specifically mortgaged. DIPCHAND *v.* GOKALDAS.

I. L. R. 4 Bom. 363

——— **s. 22**

See LIMITATION ACT, 1877, ART. 179—NATURE OF APPLICATION—IRREGULAR AND DEFECTIVE APPLICATIONS.

I. L. R. 10 Bom. 91

1. ——— *Immoveable property—Standing crops—Attachment.* Standing crops are immoveable property within the meaning of s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), as well as within the Code of Civil Procedure, and not liable to attachment and sale in execution of money-decrees, unless specifically pledged. SADU *v.* SAMBHU

I. L. R. 6 Bom. 592

DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— **s. 22**—*contd.*

2. ——— *Dekkhan Agriculturists' Relief Act Amendment Act (XXII of 1882), s. 9—Mortgage by agriculturist—Subsequent money decree against mortgagor—Effect of sale of his equity of redemption in execution—Immoveable property—Suit for redemption.* *R*, an agriculturist, mortgaged the land in dispute to the defendant in 1872. In 1875 one *D* obtained a decree against *R* (the mortgagor), who was then represented by his widow, the plaintiff. In execution of this decree *R*'s equity of redemption was sold on the 10th February 1883, and was bought by the son of the defendant (the mortgagee). On the 12th April 1883, the sale was confirmed; and on the 10th November 1883, the purchaser took formal possession of the land. In 1891 the plaintiff (widow and heir of the mortgagor *R*) brought this suit to redeem the mortgage and to recover possession of the land, contending that, under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1872), the sale of the equity of redemption was a nullity. The lower Court dismissed the suit, holding that, although the sale might be illegal, so long as the certificate of sale remained in force, it was a bar to the plaintiff's right to redeem. *Held*, that, the plaintiff being found to be an agriculturist, the Dekkhan Agriculturists' Relief Acts (XVII of 1879 and XXII of 1882) applied. The provisions of those Acts applied, although the decree and order for sale under which the sale took place were made before the Acts were passed. The Act expressly forbids the immoveable property of an agriculturist to be sold in execution, and an equity of redemption is immoveable property within the contemplation of the Acts. The sale, therefore, on the 10th February 1883, of the equity of redemption in the mortgaged lands was illegal and a nullity, and was no defence to the plaintiff's suit to redeem the mortgage. MAHALAVU *v.* KUSAJI

I. L. R. 18 Bom. 739

3. ——— *Mortgage—"Specifically mortgaged"—What amounts to a mortgage—Covenant to pay produce of land—Transfer of Property Act (IV of 1882), s. 58.* Bhiku, an agriculturist (father of defendants 3 to 5), borrowed in 1866 a sum of money from the plaintiff's mother, Yesubai, under a bond, whereby he mortgaged his house as security and also covenanted to pay each year to Yesubai half the produce of certain land as interest and the other half in reduction of the principal, and in case of default she was to be at liberty to let the land to others and take the profits. Yesubai subsequently sued to recover the debt, and obtained a decree directing the sale of the land. In execution of this decree, the land was sold on the 5th June, 1896, and was bought by the plaintiff who now sued for possession. It was contended on behalf of the defendants that the covenant to pay the produce did not amount to a "specific mortgage" of the land, and that conse-

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DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— s. 22—*concld.*

quently the sale to the plaintiff was invalid under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). *Held*, that the land was specifically mortgaged for the repayment of the debt and that the sale was valid and the plaintiff was entitled to recover possession. BALSHET *v.* DHONDO RAMKRISHNA (1901) . **I. L. R. 26 Bom. 3**

——— **ss. 39, 46, 47, 48**—*Village conciliator—Proceedings before a conciliator—Certificate of a conciliator—Exclusion of the time occupied in proceedings before a conciliator in computing the period of limitation—Limitation.* Under s. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the conciliator to whom application is to be made for an amicable settlement of a dispute must be the one appointed for the local area in which the agriculturist is residing, and not for the district in which the land in dispute is situated. The plaintiff was an agriculturist residing in the Kopargaon talukh. He purchased the house in dispute from the defendant on the 30th January 1872, but did not get possession. On the 12th December 1883, the plaintiff applied to be put into possession under s. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the conciliator or appointed for the Khatav talukh, where the house in dispute was situate. The proceedings before the conciliator lasted until the 19th February 1884, on which day a certificate under s. 46 of the Act was granted to the plaintiff. On the 20th February 1884, the plaintiff brought this suit to recover possession of the house. The defendant pleaded limitation. The plaintiff contended that, under s. 48 of Act XVII of 1879, the time occupied in the proceedings before the conciliator should be deducted in computing the period of limitation. *Held*, that the plaintiff was not entitled to such deduction as the conciliator, before whom the proceedings had been instituted, was not the one appointed for the local area in which the plaintiff was residing, as required by s. 39 of Act XVII of 1879, and had, therefore, no jurisdiction to deal with plaintiff's application. *Held*, also, that the certificate obtained by the plaintiff was not such a certificate as is required by s. 47 of the Act. *Held*, further, that the want of a proper certificate was not fatal to the suit. As soon as a defect in a certificate becomes apparent the proper course is for a Court to stay proceedings to enable the plaintiff to make good the defect by producing the requisite certificate. NYAMTULA *v.* NANA VALAD FARIDSHA . . . **I. L. R. 13 Bom. 424**

——— **ss. 41, 43, 44, and 46**—"*Amicable settlement*"—"*Finally disposing of the matter*"—*Instalment—Interest.* The expression "finally disposing of the matter" in ss. 43 and 44 of Act XVII of 1879 means no more than the expression "amicable settlement" in ss. 41 and 46. An agreement for the settlement of a plaintiff's claim to be paid

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——— **ss. 41, 43, 44, and 46**—*concld.*

a mortgage-debt at once or to have the property sold by an arrangement for the payment of the debt by instalments with power to the plaintiff in default of payment of any instalment to take or retain possession until the debt has been satisfied out of the produce of the estate is an "amicable settlement," and therefore one "finally disposing of the matter," which, if duly presented, must be filed by the Court. Where the sum due upon such an agreement is partly made up of interest, a provision to pay interest on any instalment remaining unpaid does not make the agreement illegal. VASUDEV PANDIT *v.* NARAYAN JOSHI **I. L. R. 9 Bom. 15**

1. ——— **s. 44**—*Agreement of compromise.* Under s. 44 of Act XVII of 1879, the plaintiff presented to the subordinate Court of Talegaon an agreement compromising the amount of a decree obtained by the plaintiff against the defendant in the Small Cause Court at Poona. The agreement stipulated that the plaintiff was to receive, in full satisfaction of the amount of the decree (which was for R59-15-1), the sum of R40 to be paid by yearly instalments of R4 each, and that, in default, the plaintiff was to recover the whole amount of the decree by executing it. The Subordinate Judge refused to file the agreement, being of opinion that it did not finally dispose of the matter. The case being referred to the High Court: *Held*, that the agreement was one finally disposing of the matter within the meaning of s. 44 of Act XVII of 1879, and that, therefore, the Subordinate Judge of Talegaon was bound to receive it, and to proceed as directed in that section. LAKSHMICHAND *v.* ARJUNA **I. L. R. 6 Bom. 77**

2. ——— *Expression "show cause," Meaning of—Civil Procedure Code, 1882, s. 525.* The expression "show cause" in para. 2, s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), means to allege and prove sufficient cause, and not simply to object. *Dandekar* v. *Dandekars, I. L. R. 6 Bom. 663*, and *Surjan Raot* v. *Bhikari Raot, I. L. R. 21 Calc. 213*, referred to. RAJMAL MOTIRAM MARVADI *v.* KRISHNA VALAD MAHIPATI HAGADEKAR **I. L. R. 20 Bom. 208**

3. ——— *Agreement field under section and becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under s. 89 of Transfer of Property Act (IV of 1882).* On the 21st October 1894, the plaintiff and the defendant entered into an amicable agreement before a conciliator for payment of a mortgage-debt due to the former by annual instalments. The agreement was forwarded to the Court on the 21st December 1894, to be filed under s. 44 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). Default having been made in the payment of the

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——— s. 44—*contd.*

instalments, the first of which became due on the 25th January 1895, and which also was not paid, the plaintiff applied for execution by sale of the mortgaged property. The application was made on the 6th September 1897, and it was struck off the file for some formal defect on the 18th November 1897. Subsequently, on the 10th October 1898, the plaintiff having applied for an order absolute for sale under s. 89 of the Transfer of Property Act, questions arose as to the applicability of the section to agreements filed in Court under s. 44 of the Dekkhan Agriculturists' Relief Act and as to limitation. *Held*, that agreements filed under s. 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of s. 89 of the Transfer of Property Act. BHAGAWAN RAMJI MARWADI *v.* GAUN . . . **I. L. R. 23 Bom. 644**

4. ——— *Pensions Act (XXIII of 1871), s. 4—"Suit"—Execution proceedings—Payment of annuity charged on Saranjām lands—Liability of the son of the grantor to make the payment—Partition of family property—Income of a Saranjām village—Conciliation agreement—Decree.* A conciliation agreement was filed in Court on the 16th June 1882 under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). It effected partition of family property between two brothers, *A* and *N*. Under the agreement *A* undertook to pay to *N* R456-0-6 every year, and for the convenience of the parties this was to come out of the *Saranjām* lands, which had fallen to the share of *A*. The payment was regularly made during the lifetime of *A*, and after his death, *J*, the son of *A*, continued to make the payment till 1899, when he stopped making any more payment. *R*, the son of *N* who had died, then filed a *darkhast* to enforce the payment of 1899-1900. *J* objected to this *darkhast* on two grounds: (i) that a certificate under the Pensions Act (XXIII of 1871) was necessary; and (ii) that *A*'s interest having terminated with his death, the *Saranjām* must be considered as a fresh grant to the son who was not liable to continue the payment. *Held*, (i) that a certificate under the Pensions Act (XXIII of 1871) was not necessary for the word "suit" in s. 4 of the Act does not include execution proceedings. *Vajiram* v. *Ranchordji, I. L. R. 16 Bom. 731*, followed. *Held*, (ii) that *A* was a trustee in respect of the R456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the *Saranjām* and it followed that *N* and his descendants would have the right to call upon *A* and his descendants to account for their management of the *Saranjām* and pay to them R456-0-6 per annum. A consent decree can only be set aside upon the same grounds as an agreement can be set aside, *e.g.*, fraud or mistake or misrepresentation. *Per* BATTY, *J.*—A Court executing a decree cannot question the jurisdiction of the Court which passed it. "The present application in no way affects property falling within the purview of the Pensions Act, but seeks enforcement against the general assets of the judgment-debtor, whose liability under the decree is not made a charge on the *Saranjām* or cash allowance at all. That liability appears to have been imposed and accepted not as effecting any partition of the *Saranjām* property, but for the purpose of effecting equality in the partition of non-*Saranjām* property, the *Saranjām* property being merely indicated as a fund available to the defendant for the purpose of discharging that liability." TRIMBAKRAO *v.* BALVANTRAO (1905) **I. L. R. 30 Bom. 101**

DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— s. 44—*concld.*

——— ss. 46, 47—*Conciliator's certificate obtained in the name of one co-parcener—Suit on behalf of the family—The remaining co-parceners joining as plaintiffs to the suit—Hindu Law—Manager—Powers to represent the family.* In a suit brought on behalf of a joint Hindu family the conciliator's certificate required by s. 46 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was obtained in the name of one of the co-parceners alone: but all the co-parceners joined as plaintiffs and admitted in the plaint that the certificate had been obtained on behalf of the joint family. It was objected to this suit that as the certificate was in the name of one of the plaintiffs the suit could not lie. *Held*, overruling the objection, that the certificate obtained by one of the co-parceners, who was either the managing member of the family at the time the certificate was obtained or who, though not manager, obtained it with the consent and on behalf of the joint family, acting as its agent, was sufficient to support the suit. The rule of Hindu law is that a joint family is represented in all transactions or concerns with the outside world by its *karta* (manager), provided these are for the benefit or necessity of the family; and that any co-parcener who does not occupy that position of manager can represent and bind the family in such transaction or concerns, provided he was either previously authorised to represent it or, in the absence of such authority, the other co-parcener subsequently by words or conduct ratified his acts. VITHU DHONDI *v.* BABAJI (1908) **I. L. R. 32 Bom. 375**

——— s. 47.

See ARBITRATION—ARBITRATION UNDER SPECIAL ACTS—DEKKHAN AGRICULTURISTS' RELIEF ACT.

I. L. R. 8 Bom. 20
I. L. R. 21 Bom. 63

1. ——— *Code of Civil Procedure (XIV of 1882), s. 525—Construction—Arbitration award—Conciliator's certificate.* Where a matter has been referred to arbitration, without the intervention of a Court of Justice, by parties one of whom is an agriculturist, and an award has been made thereon, any person interested in the award may, without obtaining the conciliator's

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DEKKHAN AGRICULTURISTS' RELIEF ATCS—*contd.*

——— s. 47—*concld.*

certificate, apply for the filing of the award under s. 525 of the Code of Civil Procedure the provisions of which are not superseded by s. 47 of the Dekkan Agriculturists' Relief Act, 1879. GANGADHAR SAKHARAM *v.* MAHADU SANTAJI
I. L. R. 8 Bom. 20

2. ——— ss. 47, 48—*Application for execution of decree—Conciliator's certificate.* The presentation to any Civil Court of an application for execution of a decree passed before 1st November 1879 (the date on which the Dekkhan Agriculturists' Relief Act came into force), to which any agriculturist residing within any local area for which a conciliator has been appointed is a party, is no legal presentation at all, if the application be not accompanied by the conciliator's certificate. MANOHAR *v.* GEBIAPA
I. L. R. 6 Bom. 31

——— s. 48.

See LIMITATION ACT, 1877, ART. 179—PERIOD FROM WHICH LIMITATION RUNS——CONTINUOUS PROCEEDINGS.
I. L. R. 10 Bom. 108

——— s. 49.

See PARTIES—SUBSTITUTION OF PARTIES—PLAINTIFFS **I. L. R. 19 Bom. 202**

See RULES UNDER ACTS—DEKKHAN AGRICULTURISTS' RELIEF ACT.
I. L. R. 10 Bom. 189

——— s. 53.

See REVIEW—POWER TO REVIEW.
I. L. R. 19 Bom. 113, 116
I. L. R. 20 Bom. 281

1. ——— *Special Judge, power of, to review his own order—Review, grounds of.* The Code of Civil Procedure is not applicable to proceedings before the Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Special Judge has therefore no jurisdiction to grant a review of a decree or order once made by him on the ground of the discovery of new evidence. BABAJI BIN PATLOJI *v.* BABAJI BIN MAHADU . . . **I. L. R. 15 Bom. 650**

2. ——— *Revisionary power of the Special Judge—Cases in which failure of justice appears to have taken place—Discretion of Court.* Under s. 53 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the Special Judge has a revisionary power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction. *Shidhu* v. *Bali, I. L. R. 15 Bom. 180,* dissented from. GURUBASAYA *v.* CHANMALAPPA
I. L. R. 19 Bom. 286

DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— s. 53—*contd.*

3. ——— *Agriculturist—Plaintiff proved or admitted to be an agriculturist—Special Judge, revisional jurisdiction of—Dekkhan Agriculturists' Relief Act, s. 73.* The plaintiff alleging that she was an agriculturist, sued for redemption under Ch. II of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge raised an issue as to her status, and on that issue found that she was not an agriculturist. He, however, proceeded with the trial of the case, and on the merits dismissed her claim. She thereupon applied to the Special Judge, who took up the case in revision, reversed the decree of the lower Court, and passed a decree in the plaintiff's favour, holding that she was an agriculturist. *Held,* that the Special Judge had no jurisdiction. The Subordinate Judge had found that the plaintiff was not an agriculturist. Having done so, it must be deemed that he went on with the trial only in his ordinary jurisdiction, and the decree passed was one not under Ch. II of the Dekkhan Agriculturists' Relief Act, but under the general provisions of the Civil Procedure Code (Act XIV of 1882). By s. 53 the Special Judge has jurisdiction only over decisions and orders passed by a Subordinate Judge under Ch. II. *Per* PARSONS, *J.*—It is only when the plaintiff is admitted and proved (not merely when he claims) to be an agriculturist that the Court has jurisdiction to try a suit under Ch. II of the Act. The question of status ought to be raised and decided as a preliminary issue. LAKSHMAN BALAJI *v.* RAMCHANDRA PARASHRAM
I. L. R. 23 Bom. 321

4. ——— *Power of Special Judge to vary decree—Review—Mortgage—Profits in lieu of interest—Provision that mortgage not to be redeemed until unsecured loan paid off—Mortgage paid off out of profits—Balance of profits applied to interest on loan—Dekkhan Agriculturists' Relief Act, ss. 11, 12, 54.* *A* lent *B* R150, for which *B* gave him a bond, dated 6th July 1872. Of this loan R100 were advanced on the mortgage of certain land, and the bond contained the terms of the mortgage, one of which was that the profits of the land were to be taken by the mortgagee in lieu of interest on the R100. The remaining R50 of the loan unsecured by the bond were made repayable with compound interest at R1-8 per cent. per mensem. The bond further provided that the mortgage should not be redeemed until the latter sum of R50 with interest should be paid off. *B* sued for redemption of the mortgage. The first Court found that the mortgage had been paid off, and ordered redemption on the plaintiff paying R50 with interest, which, under the rule of damdupat, increased the amount to R100. The plaintiff applied to the Special Judge for review, on the ground that he had already paid the R50. The Special Judge did not review the case on that ground, but, acting under the power given him by ss. 53 and 54 of the Dekkhan Agriculturists' Relief Act, varied the decree by

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DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— s. 53—*concld.*

ordering redemption on payment of R50 only, holding that, as the mortgage had been long since paid out of profits, the balance of such profits should be applied to payment of the interest due on the R50. On appeal to the High Court: *Held*, that the Special Judge had jurisdiction *proprio motu* under the provisions of s. 53 to vary the decree of the lower Court while not reviewing the case on the ground applied for by the plaintiff. *Held*, also, that the Courts, while inquiring into the merits of a case under s. 12 of the Dekkhan Agriculturists' Relief Act, had authority under s. 13 to treat the original advance of R100 and R50 as a single transaction and to set aside the agreement of the parties to treat part of the loan as a mortgage loan and part as an unsecured loan, and to deal with the whole case (as in substance it was) as an advance on a mortgage. BALKRISHNA INDRABHAN *v.* MAHADEO BABAJI KULKARNI **I. L. R. 22 Bom. 520**

5. ——— ss. 53, 54—*Special Judge, powers of, in revision—Withdrawal of suit—Mistake in filing suit.* A Special Judge appointed under s. 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not competent, in the exercise of his revisional powers, to allow a plaintiff to withdraw his suit with liberty to bring a new one, merely on the ground that he has made some mistake in filing the suit. MUKTAJIJ BHAGOJI *v.* MANAJI . . . **I. L. R. 12 Bom. 684**

6. ——— *Special Judge—Revisional powers—Question of fact—Criminal Procedure Code (Act X of 1882), s. 435.* Under ss. 53, 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the Special Judge can interfere with an improper as well as an illegal decree or order. His revisional jurisdiction resembles that possessed by the High Court under the Code of Criminal Procedure (Act X of 1882), and ought if it be held to include the power of setting aside the decision of a lower Court on the facts, to be exercised only in very exceptional cases. SHIDHU BIN SUBHANA JADHAV *v.* BALI BIN MURARI JADHAV **I. L. R. 15 Bom. 180**

——— s. 56.

See REGISTRATION ACT, s. 17. **I. L. R. 19 Bom. 239**

1. ——— *Signed balance of account—Evidence.* A balance of account signed by an agriculturist is an instrument which purports to evidence an obligation for the payment of money, and cannot, therefore, be admitted in evidence, unless written by, or under the superintendence of, and attested by, a village registrar, as required by s. 56 of Act XVII of 1879. KANJI LADHA *v.* DHONDE KONDAJI . **I. L. R. 6 Bom. 729**

2. ——— *Account adjusted and signed by two debtors, one of whom was an agriculturist—Suit against one agriculturist—Evidence—*

DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— s. 56—*contd.*

Inadmissibility of unregistered khata for any purpose whatever. The plaintiff sued two defendants, one of whom was an agriculturist, on a khata which contained an acknowledgment of liability to pay the amount due to the plaintiff, and also an agreement to pay interest. The defendant, who was an agriculturist, was struck off the record, and the plaintiff proceeded against the other, and obtained a decree against him for the amount claimed, the Court being of opinion that s. 56 of Act XVII of 1879 did not apply, and that the khata sued on was valid and admissible in evidence, although not registered. *Held* by the High Court that the khata was an instrument purporting to evidence an obligation to pay money within the meaning of s. 56 of Act XVII of 1879, which section applied, although only one of the executants was an agriculturist. *Held*, also, that under the provisions of s. 56, the khata was not admissible in evidence in any case whatever, not even to enforce a liability against one who was not an agriculturist. DINSHA KUVARJI *v.* HARGOVANDAS GOVARDHANDAS **I. L. R. 13 Bom. 215**

3. ——— *Dekkhan Agriculturists' Relief Amendment Act (XXIII of 1886), s. 9—Proviso added to s. 56 of Act XVII of 1879—Its applicability to instruments executed before it came into force—Statute, construction of.* The general rule is that Acts are prospective, not retrospective, in their operation. To this rule there are two exceptions—(*a*) when Acts are expressly declared to be retrospective; (*b*) when they only affect the procedure of the Court. The proviso added to s. 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) by Act XXIII of 1886 is not retrospective in its operation, as it involves not merely a change of procedure but also a change of existing rights. The plaintiff purchased a house from the defendant, who was an agriculturist, under a deed of sale dated 23rd June 1886. The deed was registered under the Registration Act (III of 1877). On the 1st December 1886, the plaintiff sued to recover possession of the house. The defendant pleaded that the sale-deed was invalid for want of consideration. Both the lower Courts rejected the claim on the ground that the sale-deed, not having been executed according to the provisions of s. 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), was inadmissible and inoperative. In second appeal it was contended for the plaintiff that, as the amending Act XXIII of 1886 came into force after the institution of the suit, but before the suit came to a hearing, the plaintiff was entitled to the benefit of the proviso added to s. 56 by the amending Act, whereby it was provided that s. 56 was not to apply to instruments which were duly registered under the Indian Registration Act (III of 1877). *Held*, that the proviso to s. 65 of Act XXIII of 1886 did not apply, as it was not retrospective. JAVANMAL JITMAL *v.* MUKTABAI . . **I. L. R. 14 Bom. 516**

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DEKKHAN AGRICULTURISTS' RELIEF ACTS—*contd.*

——— **s. 56**—*concld.*

4. ——— *Agreement executed before a village conciliator—Agreement evidencing an intention to create a mortgage—Admissibility and validity of such agreement—Evidence.* On the 1st December 1891, defendant executed before a village conciliator a kabuliat to the following effect:—"I admit R460 are due from me to the plaintiff (under a mortgage). I also owe him R485 under a consent decree and R489 as a fresh-advance, in all R1,434. I agree to pay on this sum interest at 13 annas per cent. per mensem. For the same I give in mortgage the property mentioned in the said decree, and also my house at Junnar. I will repay the said money in four years. If I fail, the property should be sold, and the money should be recovered therefrom; should the sale-proceeds fall short, I will personally pay the deficiency. I have already put the plaintiff in possession of the property herein mentioned . . ." The village conciliator forwarded this kabuliat to the Subordinate Judge under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) but the Subordinate Judge refused to file it. Thereupon the plaintiff brought the present suit for recovery of the mortgage debt by sale of the property, or, in the alternative, for an order directing the defendant to execute a mortgage in terms of the kabuliat and for a personal decree against the defendant for the amount due. *Held*, that the kabuliat did not of itself create a mortgage, but only evidence the intention of the parties to create one. It did not, therefore, fall under s. 56 of the Dekkhan Agriculturists' Relief Act, and was admissible in evidence to prove the contract entered into. *Held*, also, that the plaintiff was entitled to a decree directing the defendant to execute a mortgage in terms of the kabuliat. MAHADAV *v.* MAHADU **I. L. R. 22 Bom. 788**

——— **s. 60.**

See REGISTRATION ACT, s. 17. **I. L. R. 19 Bom. 239**

——— **s. 63 (A).**

See TRANSFER OF PROPERTY ACT, s. 59. **I. L. R. 33 Bom. 44**

1. ——— **s. 72**—*Limitation Act, 1877, Sch. II, Art. 59—Non-agricultural principal—Agriculturist's surety—Contract of guarantee—Contract Act, ss. 126-147.* On the 11th September 1880, a suit was instituted against a non-agriculturist principal and agriculturist surety for R88-8-0, being principal and interest due on a bond dated the 5th August 1877 and payable on demand. The action being barred against the principal debtor under the Limitation Act, XV of 1877, Sch. II, Art. 59, the question was referred to the High Court, whether, under s. 72 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, the agriculturist surety was still liable for the amount sued for. *Held*, that, although the suit was barred as against the principal debtor under Art. 59, Sch. II of the Limitation Act, yet the surety, being an agriculturist, was still liable, inasmuch as s. 72 of the Dekkhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by that Act. Ss. 126 to 147 of the Contract Act, IX of 1872, considered in connection with the effect of s. 72 of the Dekkhan Agriculturists' Relief Act, XVII of 1879. HAJARIMAL *v.* KRISHNARAV **I. L. R. 5 Bom. 647**

2. ——— *Limitation—Surety—Principal.* *A* as principal, and *B* and *C* as sureties, obtained a lease from *D* of certain land, dated 30th July 1880. *A*, *B*, and *C* were agriculturists within the meaning of Act XVII of 1879, and the lease was registered under s. 56 of that Act. On 1st March 1884, *D* sued *A*, *B*, and *C* to recover to rent under the lease. *Held*, that, under s. 72 of Act XVII of 1879, as amended by Acts XXIII of 1881 and XXII of 1882, the extended limitation did not apply to the surety, even though the principal debtor was an agriculturist. The words "not merely a surety for the principal debtor (which enact the exception to the extended limitation given by that section) are not restricted to the case in which the principal debtor is a non-agriculturist. The lease, however, having been registered under s. 54: *Held*, that it was under s. 60 "to be deemed to have been registered under the provisions of the Indian Registration Act, 1877," and that therefore by cl. 116 of Sch. II of the Limitation Act, XV of 1877, the period of limitation applicable to the surety was six years from the date of default by the principal debtor to pay rent. KESU SHIVRAM *v.* VITHU KANAJI **I. L. R. 9 Bom. 320**

3. ——— *Agriculturist co-defendant sued as surety merely to principal debtor on an unregistered money-bond—Limitation Act, 1877, Arts. 67, 115.* Where an agriculturist, who was surety for the principal debtor, was made co-defendant in a suit on a money-bond: *Held*, that in his case the period of limitation was the ordinary period of three years, and not the period of six years allowed by s. 72 of Act XVII of 1879. GANESH RAVJI *v.* GOVIND GOPAL . **I. L. R. 9 Bom. 461**

4. ——— *"Written instrument"—Limitation.* On the 7th April 1888, an agriculturist in the Dekkhan passed a writing to his creditor to the following effect:—"Receipt taken by *V* from *R*, agriculturist. I have borrowed R1,045 from you from time to time for my private expenses. I have passed you no bond for the money. To-day I have taken R300 more, making R1,345 in all. For that I will give you a bond fifteen days hence. I have received the money." This document was duly registered under s. 58 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). In June 1897, the creditor sued to

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DEKKHAN AGRICULTURISTS' RELIEF ACTS—*concld.*

——— s. 72—*concld.*

recover the principal and interest due under this document. *Held*, that the document sued upon was a "written instrument" within the meaning of s. 72, cl. (*a*), of the Dekkhan Agriculturists' Relief Act, and that the suit was, therefore, not barred, having been brought within twelve years from the date of the document. *Held*, also, that the document was not a mere acknowledgment of a debt, but an agreement containing a distinct undertaking that the debtor would pass a bond for the debt within fifteen days. VASUDEO ANANT *v.* RAMKRISHNARAO NARAYAN
I. L. R. 24 Bom. 394

——— s. 73.

See REVIEW—POWER TO REVIEW.
I. L. R. 19 Bom. 113, 116

See STATUTES, CONSTRUCTION OF.
I. L. R. 21 Bom. 822

——— s. 74.

See ARBITRATION—ARBITRATION UNDER SPECIAL ACTS—DEKKHAN AGRICULTURISTS' RELIEF ACT.
I. L. R. 21 Bom. 63

See PARTIES—SUBSTITUTION OF PARTIES—PLAINTIFFS **I. L. R. 19 Bom. 202**

See REVIEW—POWER TO REVIEW.
I. L. R. 19 Bom. 113, 116

DEKKHAN AGRICULTURISTS' RELIEF AMENDMENT ACT (VI OF 1895).

See STATUTES, CONSTRUCTION OF.
I. L. R. 21 Bom. 822

DELAY.

See ACQUIESCENCE.

See ARBITRATION—AWARDS—DELAY IN MAKING AWARD **I. L. R. 26 Bom. 132**

See COSTS—SPECIAL CASES—DELAY.
I. L. R. 11 All. 372

See DIVORCE ACT, s. 14 . **7 Mad. 284**
I. L. R. 3 Calc. 688

See ENCROACHMENT.
I. L. R. 20 Bom. 298

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY . **I. L. R. 20 All. 345**

See LACHES.

See LIMITATION ACT, s. 28.
I. L. R. 17 Mad. 255

See PRACTICE—CIVIL CASES—SECURITY FOR COSTS . . **5 C. W. N. 119**

DELAY—*concld.*

See REVISION—CRIMINAL CASES—DELAY.

See SPECIFIC PERFORMANCE—GENERALLY.
I. L. R. 30 Calc. 265

——— caused by act of Court—

See LIMITATION ACT, 1877, s. 22.
I. L. R. 17 Bom. 29

——— in applying for sanction—

See SANCTION FOR PROSECUTION.
11 C. W. N. 119

——— in presenting appeal—

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE—MISCELLANEOUS CASES . **L. R. 30 I. A. 20**

See LIMITATION ACT, 1877, s. 5.
I. L. R. 31 Bom. 33

See MADRAS RENT RECOVERY ACT, s. 69.
I. L. R. 24 Mad. 558

——— in presenting appeal or review—

See LIMITATION ACT, 1877, s. 5.

——— in suit—

See EJECTMENT, SUIT FOR.
I. L. R. 34 Calc. 396

——— prevention of—

See CRIMINAL PROCEEDINGS.
I. L. R. 26 Bom. 552

DELEGATION OF AUTHORITY, POWERS OR FUNCTIONS.

See ARBITRATION—DUTIES AND POWERS OF ARBITRATORS . **L. R. 29 I. A. 168**

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION.
I. L. R. 3 Calc. 63
I. L. R. 4 Calc. 172

See LEGAL PRACTITIONERS ACT, 1879, s. 36. . . **6 C. W. N. 289**

See PENAL CODE, s. 186.
I. L. R. 22 Calc. 596, 759

See PLEADER—APPOINTMENT AND APPEARANCE . **I. L. R. 20 Bom. 293**
I. L. R. 22 Bom. 654
I. L. R. 9 All. 213

See PORTS ACT, s. 6.
I. L. R. 17 Mad. 118

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 25 All. 272

DELIVERY.

——— refusal to take—

See CONTRACT . **I. L. R. 36 Calc. 736**

DELIVERY ORDER.

See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 21 Calc. 173**

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DELIVERY ORDER—*contd.*

1. ——— Document of title—*Consideration.* A document in the following terms :—" Allahabad, 27th January 1866. Commercial Transport Association received from *C M* —— bales of —— which the Commercial Transport Association, in consideration of R —— when paid to their agent at Howrah, hereby agree and contract to deliver safely at Howrah," is a mere delivery order and not a document of title, at all events as between European parties. The claimant under it must prove consideration, and a consideration past at the time it came into the claimant's hands as between himself and his immediate indorser will not support a claim on such a document. ASSARAM BARTEAH *v.* COMMERCIAL TRANSPORT ASSOCIATION

2 Ind. Jur. N. S. 113

2. ——— Effect of endorsement of—*Vendor's lien—Contract Act (IX of 1872), s. 108.* The plaintiff was a broker in cotton, and also traded in cotton on his own account. On the 27th January 1883, he contracted with the defendants to sell to them 100 candies of cotton at R200 per candy, deliverable from the 15th to the 25th April following. On the 30th January 1883, in his capacity as broker, he effected a contract for the sale of the same 100 candies of cotton by the defendants to *L & Co.* at R202 per candy. *L & Co.* sold the cotton to *D*, and *D* again sold it back to the defendants at R191 per candy. The defendants then sold it to *H*, by whom it was sold to *K*, and *K* finally sold it to *B & Co.* at R191 per candy. *B & Co.* obtained possession of the cotton from the plaintiff on or about the 24th April on payment of R191 per candy, for which they had contracted to buy it from *K*. The delivery order for the cotton had been sent on the 20th April by the plaintiff to the defendants, who, immediately on receiving it, wrote to the plaintiff as follows :—"We beg to ask *pro formâ* for survey on 100 bales M.-G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party, please secure payment for the cotton direct, and before parting with cotton, if necessary." The delivery order was then endorsed by the defendants to their vendees (*L & Co.*), who in turn endorsed it to *D*, by whom it was endorsed to the defendants. By subsequent endorsements it came ultimately to *B & Co.*, who, as above mentioned, got delivery of the cotton from the plaintiff on payment of R191 per candy. The plaintiff, who had sold to the defendants at R200 per candy and who received from *B & Co.* only R191 per candy, sued the defendants in the Small Cause Court for the difference. The defendants contended that after the receipt of the letter written by them to the plaintiff he was bound not to deliver the cotton to *L & Co.*, or to any subsequent endorsee of the delivery order, until he had obtained payment of the full price (R200 per candy) which the defendants had agreed to pay him for it; that the delivery to *B & Co.* was not a delivery authorized by the defendants; that the payment made by *B & Co.* to the plaintiff was not a payment made by, or on behalf of, the defendants; that the plaintiff's cause of action, if any, against the defendants was for the full price of the cotton; and that, as that exceeded R2,000, the Small Cause Court had no jurisdiction. *Held*, that the defendant's letter to the plaintiff was ineffectual to control or alter the course of the delivery order, and that the plaintiff was bound to deliver the cotton to *B & Co* on payment by them of the price of R191 per candy. The defendants, having re-purchased the cotton after it had passed through several hands, sold it for R191 per candy to *H*, from whom it ultimately passed to *B & Co.* The plaintiff's lien, therefore, as regarded *H* and his sub-vendees, was confined to the price at the above rate, and *B & Co.* were entitled to the goods as against the defendants on payment of that price. The defendants' letter, therefore, of the 20th April 1883—however the plaintiff might have been bound to act on it as regarded *L & Co.*, to whom the cotton was sold at R202 per candy, and the other sub-vendees *prior* to the re-purchase by the defendants—could only, as regards *subsequent* purchasers, prevent delivery to them before payment of the price at which the defendants had re-sold the goods, *viz.*, R191 per candy. That price was actually paid to the plaintiff before he did deliver the goods, and credit was given to the defendants in the account. By the English common law a delivery order is regarded as a mere token of authority to deliver; and before the wharfinger has attorned, it does not, independently of statute or custom, enable the purchaser to confer a title upon a vendee or a sub-vendee free from the vendor's lien for the price. The Contract Act (IX of 1872) gives no larger effect, except by s. 108, to a delivery order than it had by English common law, and under that Act [s. 90, illus. (*c*), and ss. 95 and 98] the giving of a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien. The exception to this rule contained in excep. (1) to s. 108, which provides that a seller may give to a buyer a better title than he had himself where he is, by consent of the owner, in possession of the goods or documents relating thereto, cannot be held to apply to cases where the possession is entirely beyond the control of the owner. LE GEYT *v.* HARVEY

I. L. R. 8 Bom. 501

DEMOLITION.

See BUILDING . **I. L. R. 33 Calc. 287**

See CALCUTTA MUNICIPAL ACT (BENGAL ACT III OF 1899), s. 449.

I. L. R. 33 Calc. 646

See CALCUTTA MUNICIPAL ACT (BENGAL ACT III OF 1899), ss. 449, 450, 452, 579.

I. L. R. 34 Calc. 341

DEMONSTRATIVE LEGACY.

See PROBATE AND ADMINISTRATION ACT (V OF 1881) . **I. L. R. 29 Mad. 155**

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DEMURRAGE.

See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 13 Bom. 392**

See INTERPLEADER SUIT. **I. L. R. 18 Bom. 231**

——— **Delay caused by inability of captain to deliver goods.** Where a purchaser engaged to take delivery of cargo from a ship at a certain rate per diem, and, in the event of failure, to pay demurrage, and the contract contained a stipulation in the following terms: "But should the captain be unable to deliver weighment of the goods on account of the lightness of the vessel, to which I have no objection, but would not hold myself liable for any demurrage;" *Held*, that, according to a reasonable construction of the contract, if delay took place in unloading, demurrage was to cease so long as the delay was caused by the inability of the captain to deliver the goods; not that the matter was to be thereby set at large, and that there was no longer to be any period under the contract within which delivery was to be taken of the cargo. GILLANDERS, ARBUTHNOT & CO. *v.* OBHOY CHURN NUNDY . . **23 W. R. 139**

DEMURRER.

See CIVIL PROCEDURE CODE, 1882, s, 539. **I. L. R. 33 Calc. 788 s.c. 10 C. W. N. 581**

DENIAL OF EXECUTION OF A DOCUMENT.

See REGISTRATION ACT (III OF 1877). **12 C. W. N. 47**

DENIAL OF TITLE.

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.

See TITLE, DENIAL OF.

See TRANSFER OF PROPERTY ACT (IV OF 1882) . . **12 C. W. N. 587**

DE NOVO TRIAL.

See TRANSFER . **I. L. R. 35 Calc. 457**

DEO ESTATES ACT (IX OF 1886), s. 1.

See CHOTA NAGPORE ENCUMBERED ESTATES ACT, s. 3. **I. L. R. 20 Calc. 609**

See STATUTES, CONSTRUCTION OF. **I. L. R. 20 Calc. 609**

DEPORTATION UNDER REGULATION III OF 1818.

See LIBEL . **I. L. R. 36 Calc. 883**

DEPOSIT.

See CIVIL PROCEDURE CODE, 1882, s. 108. **8 C. W. N. 355**

See CIVIL PROCEDURE CODE, 1882, s. 310 A. **13 C. W. N. 100, 224**

See DEBTOR AND CREDITOR. **I. L. R. 31 Calc. 183**

DEPOSIT—*contd.*

See DEPOSIT OF MONEY.

See DEPOSIT OF TITLE DEEDS.

See INTEREST . **I. L. R. 35 Calc. 34**

See LIMITATION ACT, 1877. **I. L. R. 31 Calc. 519**

See LIMITATION ACT (XV OF 1877), ss. 19 AND 20, SCH. II, ARTS. 59, 60. **I. L. R. 29 All. 773**

See PAYMENT INTO COURT.

See PROVINCIAL SMALL CAUSE COURT ACT, s. 17.

——— **forfeiture of—**

See PENALTY . **I. L. R. 36 Calc. 960**

——— **in full discharge of mortgage bond—**

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 83, 84. **I. I. R. 36 Calc. 840**

——— **in Court—**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 244, 291. **11 C. W. N. 495**

——— **of costs of appeal—**

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE—TIME FOR APPEALING . **I. L. R. 1 Calc. 142 I. L. R. 2 Calc. 128, 272 23 W. R. 220 I. L. R. 6 All. 250 I. L. R. 10 Calc. 557 I. L. R. 14 Mad. 391, 392 note**

——— **of debt.**

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES. **I. L. R. 30 Calc. 425**

See TRANSFER OF PROPERTY ACT, s. 83. **I. L. R. 14 Mad. 49 I. L. R. 17 Mad. 267 I. L. R. 25 All. 179**

——— **of Government securities—**

See LIMITATION ACT, 1877, SCH. II, ART. 145 . . **7 C. W. N. 476**

——— **of mortgage-money—**

See MORTGAGE—REDEMPTION—MISCELLANEOUS CASES **I. L. R. 27 Bom. 23**

——— **of rent.**

See BENGAL TENANCY ACT, s. 61. **I. L. R. 21 Calc. 166, 680 I. L. R. 25 Calc. 289**

See BENGAL TENANCY ACT, s. 171. **13 C. W. N. 1175**

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DEPOSIT—*concld.*

——— **of rent**—*concld.*

See BENGAL TENANCY ACT, s. 174.

See BENGAL TENANCY ACT, SCH. III, ART. 2 (*a*) . **I. L. R. 29 Calc. 283**

See INTEREST . **11 C. W. N. 983**
I. L. R. 35 Calc. 34

See SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE.

——— **of revenue.**

See LIMITATION ACT, 1877, SCH. II, ART. 145 . . . **2. W. R. 162**
3 B. L. R. Ap. 57
I. L. R. 18 Calc. 234
I. L. R. 20 Calc. 51

See SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

——— **of security by person entitled to certificate.**

See APPEAL—CERTIFICATE OF ADMINISTRATION.

——— **order refusing to accept—**

See APPEAL—ORDERS.
I. L. R. 19 All. 140

——— **to stay sale—**

See SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

DEPOSIT OF MONEY.

See BANKERS . **I. L. R. 6 Calc. 70**

See CONTRACT—CONDITIONS PRECEDENT.
I. L. R. 14 Bom. 498

See LIMITATION ACT, 1877, SCH. II, ART. 59 . . **I. L. R. 13 Bom. 338**

See LIMITATION ACT, 1877, ART. 60 (1859, s. 1, CL. 9).

See PARTIES—PARTIES TO SUITS—LEGACY, SUIT FOR . . **13 B. L. R. 142**

See SALE IN EXECUTION OF DECREE—DISTRIBUTION OF SALE-PROCEEDS.
I. L. R. 30 Calc. 262

See SALE IN EXECUTION OF DECREE—INVALID SALES—DECREES BARRED BY LIMITATION . **I. L. R. 4 Calc. 6**

DEPOSIT OF TITLE-DEEDS.

See HINDU LAW—CONTRACT—LIEN.
7 Bom. O. C. 45

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMETS BY DEBTOR . . **I. L. R. 19 All. 76**
L. R. 23 I. A. 106

See LIEN . . **7 Bom. O C. 45**

See LIMITATION . **10 C. W. N. 270**

DEPOSIT OF TITLE-DEEDS—*contd.*

See LIMITATION ACT, 1877, SCH. II, ART. 147 . . **I. L. R. 14 Bom. 269**

See MORTGAGE . **I. L. R. 33 Calc. 410**

See NEGOTIABLE INSTRUMENTS ACT, s. 13 . **I. L. R. 17 Mad. 85**

See REGISTRATION ACT, 1877, s. 48.
I. L. R. 11 Calc. 158

1. ——— **Equitable mortgage**—*Security—Lien.* The firm of *C N & Co.*, Calcutta, had an account with a Bank of which *R* was manager, under an arrangement that the bank should discount bills accepted by *C N & Co.* to a certain amount, and that *C N & Co.* should keep in the Bank a certain fixed cash balance. In November *R*, finding that the limit of the discount accommodation had been exceeded, and the cash account overdrawn, declined to discount any more bills unless security were given for the amount then due to the Bank. *A*, the only partner in the firm of *C N & Co.*, then in Calcutta, verbally promised on 24th November to deposit with the Bank the title-deeds of the premises in which *C N & Co.* carried on their business; and in consideration of such promise, *R* discounted further bills from 24th to 29th November. *A* sent to *R* a letter on 25th November as follows: "In pursuance of the conversation the writer had with you yesterday, we now deposit the title-deeds of landed house property, as security against our discount account." The letter enclosed certain title-deeds of which *R* acknowledged the receipt. *R* subsequently discovered they were not the title-deeds which *A* had promised to deposit, and of this he gave *A* notice by letter on 28th November. *C N & Co.*, on the 5th December 1870, suspended payment and by the usual order their estate and effects vested in the Official Assignee, who thereupon, finding that the Bank claimed a lien on the deeds, brought a suit against the Bank for recovery of them. *Held*, that the Bank was entitled to retain the deeds as security both for the balance of the discount account existing at the time of the promise to deposit, and also for the bills discounted between the 24th and 29th November. *Semble*: The Bank was entitled to hold the deeds actually deposited as if they were the deeds which formed the subject of the verbal promise to *R*. MILLER *v.* CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA
6 B. L. R. 701

2. ——— *Security for debt.* Where title-deeds of land had been deposited by a debtor with the Bank of Bengal, and a letter was given authorizing the Bank to sell the land and apply the proceeds in liquidation of a debt then-existing and due to the Bank, it was held that a valid equitable mortgage was thereby created in favour of the Bank as a security for the money due. IBRAHIM AZIM *v.* CRUIKSHANK
7 B. L. R. 653; 16 W. R. 203.

3. ——— *Memorandum given after deposit—Security for loan.* The defendant

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DEPOSIT OF TITLE-DEEDS—*contd.*

deposited certain title-deeds with the plaintiff as security for the repayment of R1,200 lent him by the plaintiff at the time the deposit was made. On the evening of the same day, the defendant, by way of further security, gave to the plaintiff a promissory note for the amount of the loan, and endorsed thereon the following memorandum: "For the repayment of the loan of R1,200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff, as a collateral security by way of equitable mortgage, title-deeds of my property." *Held*, that the equitable mortgage was complete without the memorandum; the memorandum was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred. KEDARNATH DUTT *v.* SHAMLALL KHETTRY

11 B. L. R. 405 : 20 W. R. 150

4. ——————— *Return of deeds to satisfy doubts as to title.* Where the plaintiff had advanced to the first defendant R38,000, and had agreed to advance R27,000 more, the whole R65,000 to be secured by a mortgage of the first defendant's immoveable property, and the first defendant had deposited with the plaintiff the title-deeds of his immoveable property, for the purpose of enabling him to get a mortgage-deed prepared, and had agreed to execute such mortgage-deed on payment to him by the plaintiff of the balance of the R65,000, and the title-deeds were afterwards returned by the plaintiff to the first defendant for the purpose of enabling him to clear up certain doubts as to his title to some of the premises comprised in the deeds, and such deeds were not subsequently returned by the first defendant, nor were others deposited in lieu thereof, and the balance of the R65,000 was not paid by the plaintiff to the first defendant: *Held*, that there was an equitable mortgage to the plaintiff to secure R38,000, so far as concerned the property comprised in the deeds. DAYAL JAIRAJ *v.* JIVRAJ RATANSI

I. L. R. 1 Bom. 237

5. ——————— *Contract of mortgage—Letter stating terms of equitable mortgage, effect of—Equitable mortgagee, his proper remedy.* *A* and *B* executed a joint and several promissory note in favour of the plaintiff. On the same day *A* deposited with the plaintiff the title-deeds of his property as collateral security, and received conjointly with *B* a part of the consideration-money for the promissory note. Shortly afterwards *A* addressed a letter to the plaintiff to this effect: "As collateral security for the due payment of R2,000 secured by a promissory note of even date herewith hand you the title-deeds of my property . . . money borrowed and received in pledge of house," and obtained the balance. In a suit on the basis of the documents for foreclosure, or for sale, of the property, or in the alternative for a conveyance of the legal estate: *Held*, that the letter itself was not a contract of mortgage, and was without registration admissible in evidence of the equitable mortgage which had been completed upon deposit of title-deeds. *Held*, also, that the existence of the letter would not prevent the plaintiff from giving any other evidence in proof of his claim. *Kedarnath Dutt* v. *Sham Lall Khettry, 11 B. L. R. 405*, followed. *Held*, further, that the plaintiff was not entitled upon the transaction to a conveyance of the legal estate his proper remedy being by sale of the mortgaged property. OO NOUNG *v.* MOUNG HTOON OO

I. L. R. 13 Calc. 322

6. ——————— *Legal mortgage unregistered—Claim by mortgagee, who has failed to register mortgage-deed, to have an equitable mortgage by virtue of deposit of title-deeds previously to execution of mortgage-deed.* The plaintiff having consented to lend R10,000 to the defendant, the latter deposited with him, on the 2nd April 1883, the title-deeds of a certain property. On receiving them, the plaintiff told the defendant that he would take them to his attorney, have a deed drawn up, and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff (*i.e.*, the 2nd April 1885), there was no existing debt due by the defendant to the plaintiff. On the 6th April 1885, the mortgage-deed was executed, and on the same day the money was advanced by the plaintiff to the defendant. The plaintiff stated that he "had advanced the money on the security of the title-deeds on the same day." He did not say how long before the execution of the deed the money had been paid, but the deed itself recited that the R10,000 were paid immediately before the execution of the mortgage. The mortgage-deed was not registered. The plaintiff stated that he knew that it required registration, but that it was left unregistered at the request of the defendant, who did not wish to be "exposed in the eyes of the public." The plaintiff sued for a declaration that he was entitled to an equitable mortgage upon the said property, and for the sale thereof, in default of the payment of the mortgage-debt. He contended that the loan had been made on the security of the title-deeds which had been deposited on the 2nd April; that he had, no doubt, intended to obtain a legal mortgage, but that he had abandoned that intention by consenting to leave the mortgage-deed unregistered, and had on the 6th April elected to rely upon his equitable mortgage. *Held*, that the plaintiff had no equitable mortgage. At the time when the deeds were deposited, there was no antecedent or existing debt, nor was any oral agreement made that the title deeds should stand as a security for future advances, nor was any advance, in fact, made until the mortgage-deed was about to be executed. There could be no doubt that, if the defendant had not been ready to execute the deed, no advance would have been made. The money was really advanced on

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DEPOSIT OF TITLE-DEEDS—*contd.*

the security of the mortgage-deed, though, at the time the money was advanced, the plaintiff had the title-deeds in his possession. JAITHA BHIMA *v.* ABDUL VYAD OOSMAN . **I. L. R. 10 Bom. 634**

7. ——————— *Lien—Mahomedan law—Trust.* *S* purchased the muttah of *E*, and paid part of the consideration-money, when the parties came to complete, the vendors had not the title-deeds, but they promised to deliver them in a few days, and arranged that the remaining part of the purchase-money should be retained by the purchaser, and they handed over to him the title-deeds of another muttah called *T*, to be held as security for their delivering to the purchaser the title-deeds of muttah *E* in order to perfect his title. The purchaser, on the faith of this, advanced large sums and paid off a mortgage on muttah *T*. This latter muttah having been sold, *S* brought a suit to recover the amount advanced by him on account of that muttah, claiming to be equitable mortgagee, and to have a charge on that estate for the advances made by him in respect thereof. *Held*, that the transaction created a lien, and bound the muttah *T* for the advances made by *S*. *Semble:* By the Mahomedan law such a deposit for a security in respect of a contingent loss would be in the nature of a trust, not a power. VARDEN SETH SAM *v.* LUCKPATHY ROYJEE LALLAH . . **9 Moo. I. A. 303**

8. ——————— *Payment of mortgage-debt by third person at request of mortgagor—Deposit of mortgage-deed and documents of title with such third person at request of mortgagor—Effect of transaction—Equitable mortgage—Right of suit.* The first defendant held a mortgage as a security for a loan of R350. On the 23rd June 1893, the mortgagors themselves paid him the interest due on the mortgage, and on the same day, at the request of the mortgagors, the plaintiff paid him the principal sum of R350, which payment was endorsed upon the mortgage-deed. The deed so endorsed, together with another document of title, was thereupon handed over to the plaintiff by direction of the mortgagors. The plaintiff subsequently brought this suit, alleging that the defendant had agreed to assign over the mortgage to him and praying that he might be ordered to execute a transfer. The lower Court found that there was no agreement to assign the mortgage, but that the plaintiff was, under the circumstances, entitled to have an assignment executed to him by the defendant. On appeal by the plaintiff: *Held*, that the plaintiff was not entitled to an assignment of the mortgage from the defendant. But *held*, also, dismissing the appeal, that the plaintiff had no right of suit against the defendant. The defendant's mortgage was at an end. It was paid off, and nothing remained for the defendant to do but to retransfer the property to the mortgagors or to such person as they should direct; but as there was no contract or privity between the defendant and the plaintiff, the latter could enforce no right against the defendant. His remedy was against the mortgagors. When the defendant, at the request of the mortgagors, handed over the endorsed mortgage-deed and the other document of title to the plaintiff, a new mortgage, *viz.*, an equitable mortgage by deposit of title-deeds, was effected by the mortgagors in favour of the plaintiff. What rights that deposit gave against the mortgagors depended on the agreement between them. KHUSHAL SADASHIV *v.* PUNAMCHAND JUSRUPJI **I. L. R. 22 Bom. 164**

9. ——————— *Transfer of Property Act, s. 59—Deposit of title-deeds in Calcutta—Immoveable property in mofussil.* It is not necessary to the validity of a mortgage by deposit of title-deeds, under s. 59 of the Transfer of Property Act (IV of 1882), that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed. *Varden Seth Sam* v. *Luckpathy Royjee Lallah, 9 Moo. I. A. 303*, and *Manekji Framji* v. *Rustomji Naserwanji Mistry, I. L. R. 14 Bom. 269*, referred to. MADHO DAS *v.* RAM KISHEN **I. L. R. 14 All. 238**

10. ——————— *Transfer of Property Act (IV of 1882), s. 59—Mortgage by deposit of title-deeds before the coming into force of Act IV of 1882.* Up to the 1st of July 1882, being the date of the coming into force of Act IV of 1882, there was no difference between the law in the mofussil and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title-deeds with a creditor with intent to secure a debt. *Waghela Rajsanji* v. *Masludin, I. L. R. 11 Bom. 551 : L. R. 14 I. A. 89, Varden Seth Sam* v. *Luckpathy Royjee Lallah, 9 Moo. I. A. 303, Bunsee Dhur* v. *Heera Lall, 1 N. W. 166, Lalji* v. *Gobind Ram, 6 Sel. Rep. 165*, and *Muhammad Ali* v. *Salat Jang, 4 Sel. Rep. 168*, referred to. A mortgage effected as above described will cover future advances as well as the existing debt or contemporaneous advance in respect of which it was made. *Ex parte Langston, 17 Ves. Jr. 237*, referred to. HIMALAYA BANK *v.* QUARRY **I. L. R. 17 All. 252**

11. ——————— *Transfer of Prosperty Act (IV of 1882) s. 59—Immoveable properties situated party outside the limits of Calcutta—Transaction in Calcutta—Form of decree on mortgage—Practice.* The defendant borrowed money from the plaintiff in Calcutta by deposit of title-deeds relating to immoveable properties situated partly inside and partly outside the limits of the town of Calcutta. In a suit by the plaintiff: *Held*, that, the transaction having taken place in Calcutta, the mortgage was valid as an equitable mortgage under s. 59 of the Transfer of Property Act, though some of the properties were situated outside the limits of the town, and that, according to the practice of the Court, the appropriate remedy in such a mortgage suit is a decree for sale. SRINATH ROY *v.* GODADHUR DAS . **I. L. R. 24 Calc. 348**
1 C. W. N. 225

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DEPOSIT OF TITLE-DEEDS—*concld.*

12. ——— *Further advances —Equitable mortgage on title-deeds already deposited under previous mortgage.* The defendants had executed a mortgage in favour of the plaintiff, and handed him the title-deeds of the mortgaged property. Subsequently the plaintiff advanced a further sum to the defendants who agreed that the plaintiff should retain the title-deeds already held by him as security for the repayment of the further advances. There was no fresh deposit of the deeds. *Held*, that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advance. *Ex-parte Kensington, 2 V. & B. 79*, applied. *In re Beetham, 18 Q. B. D. 380*, referred to. GIRENDRO COOMAR DUTT *v.* KUMUD KUMARI DASI **I. L. R. 25 Calc. 611 2 C. W. N. 356**

DEPOSITARY.

See LIMITATION ACT, 1877, SCH. II, ARTS. 48, 49 AND 145 **I. L. R. 26 Bom. 430**

See LIMITATION ACT, 1877, SCH. II, ART. 145 . . **I. L. R. 18 Calc. 234 I. L. R. 20 Calc. 51**

DEPOSITION.

See COMMISSION—CRIMINAL CASES. **I. L. R. 19 Bom. 749**

See EVIDENCE—CIVIL CASES—DEPOSITIONS . **I. L. R. 35 Calc. 751**

See EVIDENCE—CRIMINAL CASES—DEPOSITIONS.

See EVIDENCE ACT, SS. 32, 33.

See LIMITATION ACT, 1877, S. 19. **I. L. R. 16 Mad. 220 I. L. R. 20 Mad. 239**

——— **of witnesses, reading over—**

See CRIMINAL PROCEDURE CODE, S. 360. **13 C. W. N. 942**

See FORGERY . **I. L. R. 36 Calc. 955**

See JURY . . . **13 C. W. N. 197**

——— **Proof of**—*Proof of a previous deposition, exhibited without objection—Identity of witness —Admissibility in evidence.* Where the deposition given by the petitioner in a previous case was sought to be proved in a subsequent case: *Held*, that the mere putting in of the previous deposition will not be sufficient proof of the same, but that it was necessary to prove that the present petitioner was the person who was examined in the previous suit. The fact that the document was not objected to when it was only made an exhibit made no difference. SHEIKH FAKIR MAHOMED *v.* SHEIKH UZIR ALI (1909) . . . **13 C. W. N. 409**

DEPUTY COLLECTOR, JURISDICTION OF.

See BENGAL DRAINAGE ACT, S. 44. **8 C. W. N. 669**

See COLLECTOR.

See FALSE EVIDENCE—GENERALLY. **I. L. R. 27 Calc. 820**

DEPUTY COLLECTOR, JURISDICTION OF—*concld.*

——— **Suit for restoration of specific moveable property**——*Madras Rent Recovery Act (Madras Act VIII of 1865), s. 49.* A raiyat brought a suit in the Court of a Deputy Collector as under the Rent Recovery Act praying for the release from attachment and the restoration to him of certain moveable property, and for some other subsidiary relief. *Held*, that the Deputy Collector had no jurisdiction to entertain the suit under the Rent Recovery Act, s. 49. RAJAH OF VENKATAGIRI *v.* YERRA REDDI . . **I. L. R. 16 Mad. 323**

DEPUTY COMMISSIONER.

See DISCHARGE OF ACCUSED. **19 W. R. Cr. 49**

See GUARDIAN **I. L. R. 34 Calc. 569**

1. ——— **Jurisdiction**—*Criminal Procedure Code, 1872, s. 36—Commitment to Deputy Commissioner as Court of Session when he could only act as Magistrate.* The prisoner was committed to the Court of Session for trial on the 21st day of December 1872, and the record was sent to the Deputy Commissioner of Jalaun. Under the Code of Criminal Procedure, Act X of 1872, which came into force on the 1st day of January 1873, the Deputy Commissioner was no longer a Court of Session, but received powers under s. 36 to try, as a Magistrate, classes of cases which formerly he would have tried as a Court of Session. The Deputy Commissioner, disregarding the commitment, took the case up afresh as a Magistrate of the district under s. 36. *Held*, that this was clearly illegal, and that the Magistrate was bound to have sent the commitment on to the proper Court, and had no power, a trial being in progress, to commence a new enquiry in the same matter against the prisoner. QUEEN *v.* POORUN . . . . **5 N. W. 219**

2. ——— **Assistant Commissioner, Chota Nagpore.** An Assistant Commissioner in Chota Nagpore (exercising the powers of a Sudder Ameen) has no jurisdiction to try a suit valued at R2,800. The suit is cognizable by a Deputy Commissioner who has the powers of a Principal Sudder Ameen. DHODHEYA *v.* MUNARAN TEWARY **7 W. R. 356**

3. ——— **Non-Regulation Province**—*Criminal Procedure Code, 1861, ss. 14, 412—Appeal.* A Deputy Commissioner in a non-Regulation Province came, under s. 14 of the Code of Criminal Procedure, under the designation of Magistrate of the district, and was competent to decide upon an appeal preferred under s. 412 from an order of a subordinate Magistrate who had exercised jurisdiction in a case in which he had no jurisdiction. QUEEN *v.* BORON DHOOM . . **16 W. R. Cr. 1**

4. ——— **District Court**—*Insolvent judgment-debtors—Civil Procedure Code, 1882, ss. 344, 360—Application to have judgment-debtor declared insolvent—Costs.* The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpore under ss. 2

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DEPUTY COMMISSIONER—*concld.*

and 344 of the Civil Procedure Code. A Deputy Commissioner, therefore, invested by the local Government with powers under s. 360 of the Code, has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent. *In re Waller, I. L. R. 6 Mad. 430*, and *Purbhudas Velji* v. *Chugan Raichand, I. L. R. 8 Bom. 196*, followed. The question of jurisdiction not having been raised in the lower Court, the order was set aside without costs. JOYNARAYAN SINGH *v.* MUDHOO SUDUN SINGH . . . . **I. L. R. 16 Calc. 13**

5. ——————— *Magistrate of first class, duty of, to commit to Sessions person accused of dacoity—Criminal Procedure Code (Act V of 1898), s. 30—Object of conferring special powers on District Magistrates—Jurisdiction.* A Magistrate of the first class who is holding an inquiry in a case of dacoity has jurisdiction either to commit the accused to the Court of Session or to discharge him. He has no authority to make over the case to a District Magistrate who is a Deputy Commissioner specially empowered under s. 30, Code of Criminal Procedure, to try such cases. But where it was found that an accused person who had been convicted by the District Magistrate in a case thus made over to him had not been prejudiced at the trial, the High Court maintained the conviction. AMIR KHAN *v.* KING-EMPEROR (1902) **7 C. W. N. 457**

DEPUTY COMMISSIONER, AKYAB.

——————— **Insolvency**—*Civil Procedure Code, 1877, s. 6 and ss. 344-360.* The Deputy Commissioner of Akyab sitting as District Judge has power to entertain applications under Ch. XX of Act X of 1877. S. 6 (*d*) of that Act interposes no obstacle in the way of the Deputy Commissioner dealing with such applications, nor does the exercise of power in any way "affect the jurisdiction of the Recorder of Rangoon sitting as an Insolvent Court in Akyab" within the meaning of that section. *In the matter of* ABDUL HAMED **I. L. R. 4 Calc. 94 : 2 C. L. R. 485**

DEPUTY COMMISSIONER OF POLICE, CALCUTTA.

——————— **confession signed by—**

See CONFESSION—CONFESSIONS TO POLICE OFFICERS . **I. L. R. 1 Calc. 207**

——————— **power of—**

See CALCUTTA POLICE ACT, s. 5. **I. L. R. 20 Calc. 670**

DEPUTY MAGISTRATE.

See APPEAL IN CRIMINAL CASE—ACQUITTALS, APPEALS FROM. **I. L. R. 26 Mad. 478**

See FALSE CHARGE **I. L. R. 33 Calc. 30**

See MAGISTRATE, JURISDICTION OF.

DEPUTY MAGISTRATE—*concld.*

——————— **power of, to administer oath.**

See FALSE EVIDENCE—GENERALLY. **I. L. R. 14 Calc. 653**

DESERTION.

See BURMESE LAW—DIVORCE. **I. L. R. 19 Calc. 469**

See DIVORCE ACT, S. 3, CL. 9, S. 14 AND S. 37. **I. L. R. 4 Calc. 260 : 3 C. L. R. 484**
I. L. R. 3 Calc. 485 : 1 C. L. R. 552
5 B. L. R. Ap. 153
I. L. R. 5 All. 71
I. L. R. 22 Mad. 328

See HINDU LAW—HUSBAND AND WIFE. **I. L. R. 13 All. 126**

DESIGN.

See INVENTIONS AND DESIGNS ACT, S. 51. **I. L. R. 25 All. 493**
I. L. R. 26 All. 96

DESTRUCTION.

——————— **of articles unfit for human food—**

See CALCUTTA MUNICIPAL ACT (BEN. ACT III OF 1899), SS. 502, 505. **I. L. R. 30 Calc. 421**

DETENTION OF ACCUSED BY POLICE.

See POLICE CUSTODY **11 C. W. N. 554**

1. ——————— **Criminal Procedure Code, 1882, s. 61 (1872, s. 124, para. 1 ; 1861 69, s. 152).** S. 152 of the Code of Criminal Procedure, 1861, does not apply to cases in which there has not been a continuous detention of twenty-four hours. INDROBUR *v.* QUEEN . . **1 W. R. Cr. 5**

2. ——————— **Criminal Procedure Code, s. 167**—*Remand of prisoners in custody of the police.* The right construction of s. 167 of the Code of Criminal Procedure is that in proceedings before the police under Ch. XIV, the period of remand cannot exceed in all fifteen days, including one or more remands. QUEEN-EMPRESS *v.* ENGADU **I. L. R. 11 Mad. 98**

3. ——————— *Remand of prisoners in police custody.* Under s. 167 of the Code of Criminal Procedure, the period for which a Magistrate can authorize the detention of the accused in police custody is fifteen days on the whole, including one or more remands. *Queen-Empress* v. *Engadu, I. L. R. 11 Mad. 98*, followed. *In re* KRISHNAJI PANDURANG JOGLEKAR . **I. L. R. 23 Bom. 32**

4. ——————— **Detention in police custody by order of Magistrate**—*Sufficient reasons, recording of—Criminal Procedure Code (Act V of 1898), s. 167.* A Magistrate should not order the detention of an accused person in police-custody, except for some special reason, which should be recorded in writing [s. 167, sub-s. (3), Criminal Procedure Code]. It would not be a sufficient

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DETENTION OF ACCUSED BY POLICE—*concld*

reason for sanctioning such detention that the accused was wanted by the Police for individually pointing out the places through which he passed on his way to commit a dacoity, or for the purpose of obtaining his identificaton in the village. AMIR KHAN *v.* KING-EMPEROR (1902) **7 C. W. N. 457**

DETENTION OF GOODS.

See DAMAGES, SUIT FOR.
I. L. R. 34 Calc. 51

DEVASTHAN COMMITTEE.

——————— *Powers of appointment and dismissal of Moktesars—Powers exercisable in the interests of the Devasthan—Dismissal of Moktesar—Good and sufficient cause—Burden of proof.* The powers of appointment and dismissal of Moktesars with which a Devasthan Committee are vested are exercisable not in their own interests, but in the interests and on behalf of the Devasthan, of which they are trustees. They are not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution. When a Moktesar is dismissed by a Devasthan Committee, the burden of proof is on him to show that the Committee did not act in a *bonâ fide* belief that the dismissal was necessary in the interests of the Devasthan, but had been actuated by some other improper motive. BHAVANISHANKAR *v.* TIMMANNA (1906) . . . **I. L. R. 30 Bom. 508**

DEVIATION.

See BUILDING . **I. L. R. 33 Calc. 287**

DEVOLUTION.

See HINDU LAW **I. L. R. 31 Bom. 453**

DEWAN.

See CRIMINAL PROCEDURE CODE, S. 45 (1872, S. 90).
I. L. R. 4 Calc. 603 : 3 C. L. R. 87

'DHARMAM,' BEQUEST TO.

See HINDU LAW—WILL.
I. L. R. 30 Mad. 340

DHATURA.

See PENAL CODE (ACT XLV OF 1860), SS. 302, 325, 328.
I. L. R. 30 All. 568

DIGNITY, SUIT TO ESTABLISH RIGHT TO.

See RIGHT OF SUIT—DIGNITIES.

DIGWAR OF GHAT TASRA IN JHERIA.

See SERVICE TENURE. **12 C. W. N. 193**

DIGWAR OF RAMGURH.

See SERVICE TENURE **12 C. W. N. 178**

DIGWARI TENURE.

——————— *Right of a Digwar to grant mokurrari lease—Sub-soil rights—Suit by landlord—Government whether a necessary party.* The position of Digwars of Ghat Tasra, in Manbhum, is analogous to that of the Ghatwals of Birbhum. *Bukronoth Singh* v. *Nilmoni Singh, I. L. R. 5 Calc. 389,* and *Nilmani Singh Deo* v. *Bakranath Singh, I. L. R. 9 Calc. 187,* referred to. The tenure consisting of mouzahs Tasra and Raharaband, has all along been a Digwari tenure, ancient and hereditary, held subject to the payment of a fixed rent to the landlord and on condition of the performance of certain police or public services, for the due discharge of which the holder has been responsible to the Government which alone has exercised the power of appointment to, or dismissal from, the office. A Digwari tenure-holder of the said two mouzahs granted a *mokurrari* lease of all the surface and sub-soil rights in them. Upon a suit by the landlord, without making the Government a party, for a declaration that the mineral rights in these mouzahs belonged to him as landlord, and that the defendant had no right to grant such a lease : *Held,* that the Digwar as holder of a permanent tenure, possessed all underground rights including mining rights, and that therefore the plaintiff was not entitled to the declaration prayed for. *Held,* further, that Government was a necessary party to the suit. BROJANATH BOSE *v.* DURGA PROSAD SINGH (1907)
I. L. R. 34 Calc. 753

DILUVION.

See BENGAL TENANCY ACT, S. 179.
9 C. W. N. 886

See LIMITATION ACT, 1877.
I. L. R. 29 Calc. 518

See LIMITATION ACT, 1877, SCH. II, ART. 142 (1871, ART. 143)
I. L. R. 6 Calc. 725

See ONUS OF PROOF—LIMITATION AND ADVERSE POSSESSION.

——————— *Alluvion—Eviction by Landlord—Rent, suspension of—New tenants on reformed land.* When land has been lost to a holding by diluvion and subsequently restored by alluvion, and then settled with persons other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord had evicted him from a portion of the demised premises. *Dhunput Singh* v. *Mahomed Kazim Ispahain, I. L. R. 24 Calc. 296, Harro Kumari Chowdhrani* v. *Purna Chandra Sarbogya, I. L. R. 28 Calc. 188,* and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen, I. L. R. 34 Calc. 191,* distinguished. RAI CHARAN SHAR MAZUMDAR *v.* ADMINISTRATOR-GENERAL OF BENGAL (1909)
I. L. R. 36 Calc. 856

DIRECTORS.

See BANKERS . **I. L. R. 16 All. 88**

See COMPANY—POWERS, DUTIES, AND LIABILITIES OF DIRECTORS.

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DIRECTORS—*concld.*

See COMPANY—WINDING UP—LIABILITY OF DIRECTORS AND OFFICERS. **I. L. R. 29 Calc. 688**

See LIMITATION ACT, s. 10. **I. L. R. 18 Bom. 119**

——— **discretion of—**

See COMPANY—TRANSFER OF SHARES AND RIGHTS OF TRANSFEREES.

——— **proceeding against—**

See COMPANY—WINDING UP—LIABILITY OF OFFICERS . **I. L. R. 18 All. 12**

See LIMITATION ACT, 1877, SCH. II. ART. 36 . . . **I. L. R. 18 All. 12** **I. L. R. 19 Mad. 149**

DISABILITY.

See LIMITATION ACT, 1877, s. 7. **5 C. W. N. 545**

See LUNATIC.

See MINOR.

DISAFFECTION.

See PENAL CODE, s. 124A. **I. L. R. 19 Calc. 35** **I. L. R. 22 Bom. 112, 152**

DISAPPEARANCE.

See HINDU LAW—PRESUMPTION OF DEATH.

DISBURSEMENTS, LIEN FOR.

See BOTTOMRY-BOND **6 B. L. R. 323**

DISCHARGE OF ACCUSED.

See COMPENSATION—CRIMINAL CASES—TO ACCUSED, ON DISMISSAL OF COMPLAINT.

See COMPLAINT—DISMISSAL OF COMPLAINT.

See CRIMINAL PROCEEDINGS. **I. L. R. 28 Calc. 104**

See CRIMINAL PROCEDURE CODE, s. 206. **I. L. R. 26 All. 564**

See CRIMINAL PROCEDURE CODE, ss. 435, 439 . . **13 C. W. N. 1221**

See REVISION, CRIMINAL CASES—DISCHARGE OF ACCUSED.

See WITNESS—CRIMINAL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES. **I. L. R. 25 Bom. 422**

——— **by Presidency Magistrate—**

See CRIMINAL PROCEDURE CODE, ss. 435, 439 . . **13 C. W. N. 1221**

——— **improper discharge—**

See CRIMINAL PROCEDURE CODE, s. 436. **5 C. W. N. 574**

DISCHARGE OF ACCUSED—*contd.*

——— **re-opening of proceedings after—**

See CRIMINAL PROCEDURE CODE, s. 437. **6 C. W. N. 163**

1. ——— **Acquittal**—*Warrant of release.* A prisoner is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced, and no formal warrant of release is necessary. ANONYMOUS . . . **5 Mad. Ap. 2**

2. ——— **Want of evidence**—*Discharge—Acquittal.* Where there is no *primâ facie* case against an accused, and he has not been put on his defence, nor any charge preferred against him, he should be discharged, and not acquitted. QUEEN *v.* BIPRO DOSS . . . **8 W. R. Cr. 45**

3. ——— **Omission to draw up charge**—*Discharge—Acquittal.* Where no charge in writing has been drawn up, and the prisoner has not been asked to make his defence, the Magistrate, if he thinks that no offence has been proved, can only discharge, and not acquit the prisoner. QUEEN *v.* SHERIFF . . . . **6 W. R. Cr. 13**

4. ——— **Investigation by Magistrate**—*Criminal Procedure Code, 1861, ss. 171 and 225.* Where, under s. 171 of the Criminal Procedure Code, a case was sent up for investigation by a Magistrate, it was competent for such Magistrate to discharge the accused under s. 225, if in his opinion, the evidence against the accused was not sufficient to warrant their committal to the Sessions Court. REG. *v.* PANDURANG MAIJRAL . **5 Bom. Cr. 41**

5. ——— **Re-trial by Magistrate after discharge and acquittal by Deputy Commissioner**—*Criminal Procedure Code, 1861, ss. 202, 207, 225.* Where a Deputy Commissioner held a proceeding in which the accused was charged with forgery and using a forged document, and after calling on the accused during the enquiry to make a statement, but without calling on him to make any further defence, and after hearing the whole evidence both for the prosecution and for the defence, discharged and acquitted the accused: *Held*, that there had been no trial, but that this was a proceeding under Ch. XII of Act XXV of 1861; that under s. 202 of that Act the Magistrate had discretion to examine the accused, and under s. 207 to examine witnesses on behalf of the accused, and under s. 225 the Magistrate, when finding there was no sufficient ground for committing the accused to the Sessions, was competent to discharge and acquit him. NILMONEE SINGH DEO *v.* OOMA CHURN ROY **19 W. R. Cr. 49**

6. ——— **Improper discharge without enquiry**—*Charge of false evidence—Criminal Procedure Code, 1872, s. 473.* A Joint Magistrate, having directed a recusant witness in a trial before him to be put on his trial for giving false evidence subsequently, on the 9th May, on hearing the statement of the witness confessing that what he had stated was false, and that he had wilfully withheld what he knew, recorded a proceeding stating that the case would not be proceeded with, and

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DISCHARGE OF ACCUSED—*contd.*

directing the discharge of the accused witness. *Held*, that, as the Joint Magistrate could not himself try the case by virtue of s. 473 of the Criminal Procedure Code, his proceeding of the 9th May was either a part of an enquiry into a case triable by a Court of Session or of some proceeding before a Magistrate other than such enquiry in respect of an offence which the enquiring Magistrate was not competent to try, and that in either case the Joint Magistrate had no authority to discharge the accused. QUEEN *v.* DUDRAJ DOSADH **22 W. R. Cr. 83**

7. ——— **Complaints sent up by Civil Court and referred by Sessions Judge to Magistrate**—*Improper discharge.* Where a Sessions Judge directed a Magistrate to make an enquiry into the matter of some complaints made by a Munsif against certain persons, and the Magistrate recorded the opinion that there was evidence enough to incriminate one of the accused, but dismissed the complaint against him because the complaint made against him had not been explicit : *Held*, that the Magistrate was wrong to have discharged the accused, and ought to have drawn up a charge against him. QUEEN *v.* THAKOOR RAM **25 W. R. Cr. 35**

8. ——— **Sufficient grounds**—*Criminal Procedure Code, 1872 s. 195.* As to the meaning of the words " sufficient grounds " for committing an accused for trial in s. 195 of the Criminal Procedure Code, and when he may be discharged. LUCHMAN *v.* JUALA . . . **I. L. R. 5 All. 161**

9. ——— **Warrant cases**—*Criminal Procedure Code, 1872, Ch. XVII.* In cases triable under the provisions of Ch. XVII of Act X of 1872, the Magistrate should not discharge the accused person until after trial as prescribed in that chapter. *In the matter of* NEWAR . . **7 N. W. 230**

10. ——— **Discharge without evidence**—*Criminal Procedure Code, 1872, s. 215.* In a warrant case in which, although the complainant's witnesses and the accused were persent, the Deputy Magistrate discharged the accused on the report of a police officer : *Held*, that his decision was illegal, as he was bound to take the evidence of the complainant before discharging the accused. AZEEM ALI *v.* HURNAM DASS . . . **24 W. R. Cr. 9**

11. ——— *Obligation to hear evidence before discharge.*—When a Magistrate has referred a case for police investigation and the police arrest certain persons and send in evidence against them, he is bound to consider that evidence before he discharges them. *In the matter of* BEPUTOOLLA *v.* NAJIM SHEIKH . **2 C. L. R. 374**

12. ——— **Power of Sessions Judge to commit**—*Criminal Procedure Code, 1861, s. 435.* The discharge by a Deputy Magistrate of a person charged with an offence triable only by a Court of Session is no bar to the Sessions Judge ordering the committal of such person to the Sessions under s. 435, Act VIII of 1859. QUEEN *v.* SREENATH DEY **15 W. R. Cr. 61**

DISCHARGE OF ACCUSED—*contd.*

13. ——— *Use by Magistrate of word " acquittal."* Where a Magistrate used the words " acquittal and discharge " when he intended only to discharge a person accused of an offence not triable by him : *Held*, that the Court of Session was competent, under s. 435, Criminal Procedure Code, 1861, to order the commitment of such accused person. QUEEN *v.* NEETEE DULAL **8 W. R. Cr. 41**

14. ——— **Effect of discharge**—*Criminal Procedure Code, 1861, s. 435.* The discharge of a person accused of an offence triable by the Court of Session is no bar to his being again brought, with a view to commitment, before a Magistrate, who may proceed in such a case without an order from the Judge. S. 435, Code of Criminal Procedure, applies where a Magistrate has not thought fit to commit. QUEEN *v.* TILKOO GOALA **8 W. R. Cr. 61**

15. ——— *Criminal Procedure Code (Act XXV of 1861), ss. 250, 251, 255, 435—Act VIII of 1869, s. 435—Sessions Judge, power of.* Where no formal charge had been drawn up by the Magistrate under s. 250 of Act XXV of 1861, and the accused had not been called upon under s. 251 to plead thereto, and was not tried thereunder, a release by the Magistrate of the accused did not amount to an acquittal under s. 255, but simply to a discharge under s. 250. Under such circumstances, s. 435, Act VII of 1869, empowers a Sessions Judge to direct the committal of the accused to take their trial. *In re* JAGABANDHU MYTI *v.* GOBERDHAN BERA . . **4 B. L. R. A. Cr. 1**
S. C. QUEEN *v.* GOBERDHAN BERA. **12 W. R. Cr. 65**
In re SHOODHUN MUNDLE . **5 W. R. Cr. 58**

16. ——— *Criminal Procedure Code, 1861, s. 250—Power of Sessions Court.* Where an accused person had been discharged by a Magistrate under s. 250 of the Criminal Procedure Code after enquiry into the case, the Court of Session could not, under s. 435, remand the case for further enquiry. *In the matter of the petition of* CASPERSZ . . . . **9 B. L. R. 337**
S. C. CASPERSZ *v.* RANEEGUNGE COAL COMPANY **18 W. R. Cr. 39**

17. ——— *Criminal Procedure Code, 1861, s. 250—Power of Sessions Court.* Where a Magistrate had discharged an accused under s. 250 of the Criminal Procedure Code, and afterwards the Sessions Judge, having remanded the case for further enquiry, re-tried it and convicted the accused, the High Court, while holding that the Sessions Judge had no power to make the order of remand, upheld the conviction. *In the matter of the petition of* JIAT SAHU . . **9 B. L. R. 339**
S. C. JIAT SAHU *v.* BHEEKON ROY **18 W. R. Cr. 39**

18. ——— *Committal by Magistrate after discharge—Sessions case. Per* GLOVER, *J.*—In a case triable by the Sessions Court

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DISCHARGE OF ACCUSED—*contd.*

a Magistrate had power to commit the accused to the Sessions after he had once discharged him. QUEEN *v.* RAMSODOY CHUCKERBUTTY . **20 W. R. Cr. 19**

19. ——— **Revival of charge**—*Dismissal of charge without enquiry—Fresh trial.* Where the Subordinate Magistrate dismissed a charge of theft without enquiry: *Held*, that the District Magistrate might institute a fresh enquiry into the complaint. ANONYMOUS **5 Mad. Ap. 31**

20. ——— *Power of Magistrate to revive case after discharge.* A Magistrate of a district has power to order a Subordinate Magistrate to revive a case in which the accused have been discharged. HARI SINGH *v.* DANISH MAHOMED **20 W. R. Cr. 46**

21. ——— *Power to revive case after discharge—Transfer of case part heard.* In a case before the Joint Magistrate in which the prosecution was closed and the accused discharged under s. 215 of the Criminal Procedure Code, the Magistrate, on a petition presented to him by the prosecutor, passed an order of remand directing the Joint Magistrate to proceed with the case at the stage at which he left it. *Held*, that, the discharge not being equivalent to an acquittal, the Magistrate might have received a complaint, if he saw sufficient reason for doing so, and might have made it over to a subordinate officer to be heard, but he had no power to make the order of remand which he made. KISTORAM MOHARA *v.* ANIS . **20 W. R. Cr. 47**
In the matter of the petition of NOOR MAHOMED **25 W. R. Cr. 31**

22. ——— *Revival of charge after withdrawal.* Where a Deputy Magistrate, under s. 210, Criminal Procedure Code, permitted a complainant to withdraw a complaint which was not considered heinous, and discharged the accused, and the District Magistrate revived the case against the accused at the instance of the Commissioner, *Held*, that the Magistrate had no jurisdiction to act as he did. QUEEN *v.* ZUHOORUL HUQ **25 W. R. Cr. 64**

23. ——— *Acquittal by Deputy Magistrate under s. 220, Criminal Procedure Code, 1872—Power of Magistrate to order re-trial.* A man accused of theft was acquitted by the Deputy Magistrate under s. 220 of the Code of Criminal Procedure. The District Magistrate, at the instance of the police, ordered the case to be re-tried. It appeared that the Deputy Magistrate had not framed any charge, but that no failure of justice had been occasioned by his not doing so. *Held*, that the Magistrate had no power to order a re-trial without first setting aside the order of acquittal, and that he had no power to set aside the order of acquittal, as the case had not been appealed to him. *In the matter of* JOJA PASHAN . . **3 C. L. R. 131**

24. ——— *Criminal Procedure Code, 1872, s. 216—Omission to prepare charge—Acquittal—Revival of prosecution.* A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. Such omission did not occasion any failure of justice. *Held*, with reference to s. 216 of Act X of 1872, explanation 1, that such omission did not invalidate the order of acquittal of such person and render such order equivalent to an order of discharge, and such order was a bar to the revival of the prosecution of such person for the same offence. EMPRESS OF INDIA *v.* GURDU **I. L. R. 3 All. 129**

25. ——— *Revival of prosecution—Place of enquiry or trial—Enticing away married woman.* A person was prosecuted before a Criminal Court in the Punjab for enticing away a married woman, with a criminal intent, an offence punishable under s. 498 of the Penal Code. Such prosecution was legally instituted in such Court, and such offence was properly triable by it. Such Court discharged such person under the provisions of s. 215 of Act X of 1872. Subsequently it appeared that such person was detaining such woman at a place in the North-Western Provinces, and he was prosecuted before a Criminal Court of the district in which such place was situated for the same offence as he had been prosecuted for before the Criminal Court in the Punjab, *viz.*, enticing away such married woman, and was convicted of that offence. *Held*, that, although his previous discharge did not bar the revival of a prosecution for the same offence, such prosecution could only be revived in the Punjab Court, and he could not be convicted under the latter part of s. 498 of the Penal Code for detaining an enticed woman until the enticing had been proved, and such conviction had been properly set aside by the Court of Session. EMPRESS OF INDIA *v.* TIKA SINGH . . . . **I. L. R. 3 All. 251**

26. ——— *Criminal Procedure Code, 1872, s. 215—District Judge, power of.* A District Magistrate has no power under the Code of Criminal Procedure, 1872, to revive a prosecution in a case where the accused has been improperly discharged under s. 215 by a Magistrate having jurisdiction to try the case. QUEEN *v.* VENGUVAYYANGAR . . . . **I. L. R. 6 Mad. 25**

27. ——— **Revival of proceedings**—*Presidency Magistrate— Warrant-case — Criminal Procedure Code (Act V of 1898), Ch. XXI—Case, rehearing of—Whether order of discharge is a judgment.* *Held*, by the Full Bench (GHOSE, *J.*, dissenting) that a Presidency Magistrate is competent to re-hear a warrant-case triable under Ch. XXI of the Code of Criminal Procedure, in which he has discharged the accused person. *Held*, by GHOSE, *J.*—Where a Presidency Magistrate, by reason of the absence of the complainant, and without pronouncing any opinion as to the guilt or innocence of the accused, strikes off the case, his order is not a judgment within the meaning of the Code, and may be altered or reviewed by him upon application being made; but where the Magistrate, after taking evidence, however incomplete that evidence may be, exercises his judgment, and makes an order of dis-

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DISCHARGE OF ACCUSED—*contd.*

charge, he is not competent to review or alter it' and make further inquiry, without the order of the Superior Court. *Queen-Empress* v. *Dolegobind Dass, I. L. R. 28 Calc. 211,* and *Opoorba Kumar Sett* v. *Sreemutty Probod Kumari Dassi, 1 C. W. N. 49,* approved of. DWARKA NATH MONDUL *v.* BENI MADHAB BANERJEE (1901)

I. L R. 28 Calc. 652: s.c. 5 C. W. N. 457

28. ——————— *Criminal Procedure Code (Act V of 1898), ss. 209, 436—Refusal by Magistrate to charge accused with offence triable exclusively by Court of Session—"Discharge"—Charge of offence triable by Magistrate—Acquittal—Order by Sessions Court for further inquiry and committal—Legality of such order.* Certain persons were charged before a Magistrate of the first class, under s. 379 of the Indian Penal Code, with the theft of a promissory note. The prosecution applied for a further charge to be framed under s. 477 of the Indian Penal Code; but this the Magistrate declined to do, as, in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence, the Magistrate acquitted the accused under s. 258 of the Code of Criminal Procedure. Application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under s. 477 of the Indian Penal Code. The Sessions Court ordered that a further inquiry be made and that the accused be committed for trial. On its being contended, on revision, that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged: *Held,* that the order of the Magistrate was, in substance, an order discharging the accused in respect of an alleged offence under s. 477, Indian Penal Code, and that the Sessions Judge had jurisdiction to make the order sought to be revised. *Queen-Empress* v. *Hanumantha Reddi, I. L. R. 23 Mad. 225,* considered. KRISHNA REDDI *v.* SUBBAMMA (1900)

I. L. R. 24 Mad. 136

29. ——————— *Warrant-case—Process, re-issue of, against accused in respect of the same offences—Magistrate, Provincial or Mofussil, powers of—Whether order for further inquiry necessary before re-issue of process—Judgment—Criminal Procedure Code (Act V of 1898), ss. 253, 367, 369, 403, and 437. Held,* by the Full Bench (GHOSE, *J.* dissenting) that a Magistrate, in a warrant-case, having passed an order of discharge, is competent to take fresh proceedings and issue process against the accused in respect of the same offence without an order for further inquiry being passed under s. 437 of the Criminal Procedure Code, having the effect of setting aside such order of discharge. *Dwarka Nath Mondul* v. *Beni Madhab Banerjee, I. L. R. 28 Calc. 652,* referred to. GHOSE, *J.*—An order of discharge when once made by a Magistrate, can only be altered, and the prosecution revived, by an order of a superior Court. The order of discharge made by the Magistrate in this case did not amount to a judgment within the meaning of s. 369 or s. 367 of the Criminal Procedure Code, as there was no judicial investigation by the Magistrate of the merits of the complaint, and therefore the order of discharge was not a bar to the revival of the same complaint. MIR AHWAD HOSSEIN *v.* MAHOMED ASKARI (1902)

I. L. R. 29 Calc. 726 : s.c. 6 C. W. N. 633

30. ——————— *Criminal Procedure Code (Act V of 1898), s. 435 (4)—Refusal by Sessions Judge to commit for trial—Subsequent commitment by District Magistrate, after taking up the case suo motu—Legality.* A second-class Magistrate, after inquiring into a charge of murder discharged the accused. A revision petition was then presented to the Sessions Judge, requesting that the accused might be committed for trial at the Sessions. The Sessions Judge dismissed the petition, holding that the Magistrate's reasons for discharging the accused were good. At a subsequent date, the District Magistrate took up the case *suo motu* and directed the commitment of the accused for trial at the Sessions Court on a charge of murder. On reference being made to the High Court for orders: *Held,* that the commitment that was made under the District Magistrate's order was invalid and must be set aside. Under cl. *(4)* of s. 435 it was not competent to the District Magistrate to entertain an application for the commitment being ordered when the Sessions Judge had refused such an order. Nor could he act *suo motu.* The reason for the prohibition in the section was to avoid a conflict between the orders of two District authorities having co-ordinate powers, and that reason applied equally to cases in which the authorities acted *suo motu.* KALIMUTHU *v.* EMPEROR (1902)

I. L. R. 26 Mad. 477

31. ——————— *Case revived by Chief Presidency Magistrate and transferred for trial to Honorary Bench—Preliminary objection that case could not be revived by Chief Presidency Magistrate, whether entertainable by the Bench.* The Chief Presidency Magistrate revived a case which had been dismissed, and transferred it for trial to a Bench of Honorary Magistrates. At the hearing before this Bench, a preliminary objection was taken that the Presidency Magistrate had no power to revive the case and to transfer it to the Bench for hearing. *Held,* that the Honorary Bench had jurisdiction to entertain such objection. *Held,* further, that the objection in question was met by the decision in the case of *Dwarka Nath Mondul* v. *Beni Madhub Banerjee, I. L. R. 28 Calc. 652.* WALTERS *v.* IBRAHIM (1903) **7. C. W. N. 527**

32. ——————— **Discharge after committal to Sessions, effect of**—*Criminal Procedure Code, s. 494—Irregular procedure—Discharge of prisoner committed to Sessions—New trial—Autrefois acquit.* A prisoner committed to Sessions on a charge cannot be discharged by the Sessions Court under s. 494 of the Code of Criminal Procedure, but must be convicted or acquitted. Where a prisoner was erroneously discharged by a Sessions Court under s. 494 *(a)*: *Held,* that, as the prisoner was entitled to be acquitted, a conviction obtained

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DISCHARGE OF ACCUSED—*concld.*

in a second trial the same offence was bad in law. QUEEN-EMPRESS *v.* SIVARAMA **I. L. R. 12 Mad. 35**

33. ——— Discharge when evidence might justify conviction—*Discharge of accused person under s. 209 of Criminal Procedure Code (Act v of 1898)—Sufficient ground for committing for trial, what is.* The words in s. 209 of the Criminal Procedure Code "sufficient ground for committing" do not mean sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *primâ facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction. EMPEROR *v.* VARJIVANDAS (1902) . **I. L. R. 27 Bom. 84**

DISCHARGE OF GUARDIAN.

See GUARDIANS AND WARDS ACT. **I. L. R. 33 Bom. 419**

DISCLAIMER.

See EVIDENCE . **I. L. R. 32 Calc. 710**

See LANDLORD AND TENANT. **12 C. W. N. 525**

DISCOVERY.

See INSPECTION OF DOCUMENTS. **I. L. R. 6 Bom. 572**
I. L. R. 11. Calc. 655
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——— *Civil Procedure Code (Act XIV of 1882), s. 59—High Court Rule 162—Practice—Inspection of documents not referred to in the plaint—Right of defendant to inspect last documents before filing his written statement.*—S. 59 of the Civil Procedure Code requires a plaintiff to annex to his plaint a list of documents on which

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he intends to rely at the hearing. It has heretofore been the practice not to order inspection of documents other than those referred to in the plaint or relied on in the list annexed to the plaint till after the written statement is filed. This is not an inflexible rule in all cases, for there may be many cases where it would be imperative to order the plaintiffs to produce and give inspection to the defendant before he has filed his written statement of a document or documents which they may not have mentioned in their plaint or enumerated in the list of documents annexed thereto. KHETSIDAS *v.* NAROTUMDAS (1907) **I. L. R. 32 Bom. 152**

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DISMISSAL FOR DEFAULT.

See LIMITATION . **I. L. R. 34 Calc. 491**

1. ——— **Appearance**—*Re-admission*—*Civil Procedure Code (Act XIV of 1882), ss. 556, 558.* An application by a counsel or pleader who is instructed only to apply for an adjournment, which is refused, is not an "appearance" within the meaning of the Code of Civil Procedure. When in such circumstances an appeal is dismissed, the dismissal is one for default under s. 556 of the Code of Civil Procedure, entitling the appellant to apply for re-admission under s. 558 of the Code. *Cooke* v. *The Equitable Coal Company, 8 C. W. N. 621,* approved. *Watson & Co.* v. *Ambika Dasi, 4 C. W. N. 237,* overruled. SATISH CHANDRA MUKERJEE *v.* AHARA PRASAD MUKERJEE (1907) . . . **I. L. R. 34 Calc. 403**

2. ——— *Civil Procedure Code (Act XIV of 1882), ss. 102, 103 and 157—Dismissal of suits—When plaintiff's pleader declines to proceed, it is dismissal for default within s. 102—Discretion in restoring such suit to file not to be interferred with on revision except on strong grounds.* On the day in which a suit was posted for hearing, the plaintiff's pleader appeared and applied for an adjournment which was refused. The pleader declined to proceed with the suit and the plaintiff, who was present in Court, took no steps. Thereupon the suit was dismissed in these words: "The plaintiff's pleader said that he was not willing to proceed. So the suit was dismissed." The plaintiff subsequently applied for restoration under ss. 103 and 157 and the suit was restored to the file: *Held,* that the dismissal of the suit under the above circumstances was a dismissal for default under s. 102, and that the order restoring the suit was rightly passed. A plaintiff 'fails to appear' within the meaning of s. 102, when his pleader declines to proceed with the suit and it makes no difference that the party himself was present in Court: *Held,* also, that, under the circumstances, the order of restoration should not have been interfered with on revision. GOPALA ROW *v.* MARIA SUSAYA PILLAI (1906) . **I. L. R. 30 Mad. 274**

3. ——— *Restoration*—*Sufficient cause.* Where the pleader engaged by the former could not attend owing to his wife's illness, and another gentleman who had agreed to take up the case as his substitute was unavoidably prevented from attending the Court, and there being three cases on the day's list above the case, the party himself did not anticipate that the case would be called at an early hour and so failed to be present with his witnesses at the time when the case was called: *Held,* that these facts combined made out a case of sufficient cause for the re-admission of the case but only subject to conditions. The case was restored on condition of the defaulting party (appellant) paying beforehand to his opponents the costs of the hearing on the day on which the case was dismissed, the subsequent costs of the application under s. 103 of the Civil Procedure Code, and the costs of the appeal before the High Court. BEHARY LAL SUR *v.* NANDA LAL GOSWAMI (1907) . . . **11 C. W. N. 430**

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——— **on failure to deposit costs of paper book.**

See LIMITATION ACT, ART. 168. **I. L. R. 23 Calc. 339**

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1 C. W. N. 21

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See COMPENSATION—CRIMINAL CASES—TO ACCUSED, ON DISMISSAL OF COMPLAINT.

See COMPLAINT—DISMISSAL OF COMPLAINT **I. L. R. 36 Calc. 415**

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——— **for default in appearance.**

See CIVIL PROCEDURE CODE, 1882, ss. 98, 99, 100, 102, 103 (1859, ss. 110, 111, 114, AND 217), AND 108.

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See COURT FEES ACT, s. 28. **I. L. R. 12 All. 129**

——— **on failure to pay Commissioner's fee.**

See COMMISSIONER FOR TAKING ACCOUNTS. **I. L. R. 3 Mad. 259**

1. ——— **Dismissal of suit against one defendant without trial after first hearing** —*Civil Procedure Code, 1882, ss. 32, 45, and 46.* The plaintiff sued for damages for the infringement of certain hereditary rights claimed by him in connection with a temple. The first defendant was a Magistrate, and it was alleged as the cause of action against him that he had disobeyed the instructions of his superiors and played into the hands of the other defendants by passing an illegal order. After issues had been framed, the Judge, without trial, dismissed the suit with costs against the first defendant. *Held*, that the order was illegal. SINGA REDDI *v.* MADAVA RAU **I. L. R. 20 Mad. 360**

2. ——— **Want of instructions to the pleader**—*Civil Procedure Code (Act XIV of 1882), ss. 102, 103, 157 and 158—Adjourned hearing—Dismissal of suit for want of prosecution—Remedy.* At an adjourned hearing of a suit, witnesses on behalf of the plaintiff not being in attendance, the plaintiff applied for issue of a warrant against one of them. The Court refused the application, and the pleader for the planitiff thereupon intimated that he had no further instructions to appear; and the suit was dismissed. Subsequently an application was made under s. 103 of the Civil Procedure Code to set aside the order of dismissal. On objection by the defendant that, inasmuch as the dismissal was under s. 158 of the Code, the remedy of the plaintiff was by way of an application for review: *Held*, that the suit was dismissed under s. 102 read with s. 157, and that the application was maintainable under s. 103 of the Code of Civil Procedure. MARIANNISSA *v.* RAM KALPA GORAIN (1907) . . . . **I. L. R. 34 Calc. 235**

3. ——— **Declaration affecting plaintiff**—A declaration affecting the plaintiff in a suit which is dismissed is not legal. CHHOTU MAHTON *v.* SHEOBARTI KOER (1901) . **5 C. W. N. 445**

DISPOSAL OF PROPERTY BY MAGISTRATE.

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See BENGAL TENANCY ACT, SCH. III, ART. 3.

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See LIMITATION ACT (XV OF 1877), s. 9. **I. L. R. 35 Calc. 209**

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See CRIMINAL PROCEDURE CODE. **I. L. R. 33 Calc. 352**

See POSSESSION . **I. L. R. 33 Calc. 68**

——— *Jurisdiction of Magistrate—Irregularities in procedure—Omission of personal and local notices—Filing of written statements—exparte order—No opportunity given to a party of adducing evidence.* Where the Magistrate drew up a proceeding under s. 145 of the Criminal Procedure Code in the presence of the representatives of the parties and fixed a day for the hearing of the case, but there was no personal service of notices of the parties nor local publication thereof and neither party filed written statements and the Magistrate, after taking the evidence of one witness on behalf of the second party, declared them to be entitled to possession: *Held*, that the proceedings were extremely irregular and had prejudiced the first party, and that the irregularities were so great as to amount to a want of jurisdiction, such as would justify the interference of the High Court. AHMED CHOWDHRY *v.* PARBATI CHARAN ROY (1908) . **I. L. R. 35 Calc. 774**

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See HINDU LAW—ENDOWMENT—SUCCESSION IN MANAGEMENT. **I. L. R. 22 Calc. 843**

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DISQUALIFIED PROPRIETOR.

——— *Disqualified proprietor, power of, to contract Debts and borrow Money—Estate under superintendence of Court of Wards—Contract Act (IX of 1872), s. 16—Bond—Unconscionable bargain—Compound interest.* A talukdar, who has been declared "a disqualified proprietor" under the provisions of the Oudh Land Revenue Act (XVII of 1876) and his estates placed under the management of the Court of Wards is not prohibited by the Act from contracting debts or borrowing money without the sanction of the Court of Wards. By the group of sections of the Act (161 to 177) relating to the property when under the superintendence of the Court it was not intended to interfere with the personal estate or rights of an adult disqualified proprietor, who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited. But he cannot without sanction of the Court of Wards create any charge upon the property. *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer, 11 Moo. I. A. 468,*

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DISQUALIFIED PROPRIETOR—*conc'd.*

and *Rai Balkrishna* v. *Masuma Bibi, L. R. 9 I. A. 182 ; I. L. R. 5 All. 142,* referred to. The defendant, a "disqualified proprietor," whose property on the ground of his indebtedness and consequent inability to manage it, had been placed in charge of the Court of Wards, executed in favour of the plaintiff a bond for R10,000 repayable in seven years on the condition of half-yearly payments of interest at 18 per cent. per annum, and compound interest in default of payment of instalments. The bond was one renewing the former bond in similar terms, on which R8,750 was due, with an additional loan of R1,250. Nothing having been paid in respect of the bond, when it fell due, which was after the defendant's estate was released from the charge of the Court of Wards, the plaintiff sued for the full amount of principal and R31,999 for interest and compound interest due on the bond. *Held,* by the Judicial Committee, that under the circumstances of the case, the plaintiff had been, at the time of the execution of the bonds, in "a position to dominate the will of the defendant" within the meaning of s. 16 of the Contract Act (IX of 1872) as amended by Act VIII of 1899. Both Courts below concurred in finding that simple interest at 18 per cent. per annum would not have been a high rate, but that the charging of compound interest was exorbitant and unconscionable, and accepting these findings, though not strictly findings of fact, the Judicial Committee *held,* that the plaintiff used his position to demand and obtain from the defendants more onerous terms than were reasonable, and that the bond should be set aside. In the particular circumstances of the case, interest at 18 per cent. per annum was allowed on the sums advanced by the plaintiff throughout. DHANIPAL DAS. *v.* MANESHAR BAKHSH SINGH (1906). **I. L. R. 28 All. 570**
s. c. L. R. 33 I. A. 118
10 C. W. N. 849

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See COMPENSATION—CRIMINAL CASES—TO ACCUSED ON DISMISSAL OF COMPLAINT . **I. L. R. 21 Calc. 979**

DISTRAINT OR DISTRESS—*contd.*

See DISTRESS ACT, 1875.

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9 W. R. Cr. 50
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5 B. L. R. 309

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I. L. R. 12 All. 409

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3 B. L. R. O. C. 56

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See MADRAS DISTRICT MUNICIPALITIES ACT, s. 103 . **I. L. R. 9 Mad. 429**

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I. L. R. 25 Mad. 503

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I. L. R. 24 All. 127

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I. L. R. 36 Calc. 67

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See MADRAS DISTRICT MUNICIPALITIES ACT, s. 103 **I. L. R. 14 Mad. 467**

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I. L. R. 24 Calc. 163

——— **power of—**

See MADRAS DISTRICT MUNICIPALITIES ACT, s. 103 . **I. L. R. 14 Mad. 467**

——— **no presumption of legality of—**

See PENAL CODE, s. 424.
I. L. R. 25 Mad. 729

——— **right of—**

See MADRAS RENT RECOVERY ACT, s. 1.
I. L. R. 8 Mad. 9
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——— **warrant of—**

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DISTRAINT OR DISTRESS—*contd.*

——— **wrongful—**

See WRONGFUL DISTRAINT.

1. ——— **Property of third parties on premises of tenant**—*Act VII of 1847.* The goods of third parties on the premises of the tenant are not distrainable for rent under provisions of Act VII of 1847. DWARKA NAUTH BISWAS *v.* UDDIT CHURN ADDY . **1 Ind. Jur. N. S. 361**

2. ——— **Right to distrain in presidency towns**—*Act VII of 1847—Distress warrant.* The right to distrain for rent in arrear has always to some extent existed and been recognized in the presidency towns, and the Acts passed since 1847 are distinct declarations by the Legislature, made while regulating the exercise of the right and providing for its exercise only through the intervention of a Judge of a Court of Small Causes, that the right itself, subject to the restriction, is general, and that "any person claiming to be entitled to arrears of rent of any house or premises" in a presidency town is authorized to apply for the issue of a distress warrant. MOHUN SINGH *v.* KAREEMOONISSA BEGUM . . . . . **8 Mad. 57**

3. ——— **Distraint for arrears of rent**—*Bengal Rent Act, 1869, ss. 71, 74 (1859, ss. 115, 118)—Distraint for arrears of rent—Trees—Produce of land.* Trees are not subject to distraint for arrears of rent under Act X of 1859. The term "produce of land" referred to in that Act means that which can be gathered and stored—crops of the nature of cereal, or grass, or fruit crops; it does not apply to the trees from which the crops, if fruit crops, are gathered. SHEO PERSHAD TEWARY *v.* MOLEEMA BEBEE **1 N. W. 53: Ed. 1873, 106**

4. ——— **Goods of sub-tenant**—*Bengal Rent Act, 1869, s. 68 (1859, s. 112)—Act X of 1859, s. 112—Sub-letting—Produce of land sub-let.* Where the tenant had sub-let his holding to a shikmi or sub-tenant: *Held*, that, under s. 112 of Act X of 1859, the produce of the land was hypothecated for rent payable in respect thereof, and that the crops cultivated by the sub-tenant were distrainable by the zamindar. GEETUM SING *v.* BULDEO KAHAR . . . . **4 N. W. 76**

5. ——— **Power to distrain**—*Bengal Rent Act, 1869, ss. 96, 98, 99 (1859, ss. 139, 142, 143).* The sections of Act X of 1859, (ss. 139, 142, and 143) which relate to distraint and the power to distrain, discussed. JOYLOLL SHEIKH *v.* BROJONATH PAL CHOWDRY . . **9 W. R. 162**

6. ——— **Distraint of Crops**—*Person not cultivator of crops.* A landlord cannot distrain crops for arrears due, not from the tenant, but from another person not in possession, and who did not cultivate the crops. MOHINEE DASSEE *v.* RAM COOMAR KURMOKAR . **W. R. 1864, Act X, 77**

7. ——— **Suit to contest distress**—*Bengal Act VIII of 1869, s. 80—Issue.* Where, after receiving notice of distress, a party brought a suit under Bengal Act VIII of 1869, s. 80, the first Court was held to be in error in thinking it necessary to enquire whether all the steps of the process of distraint were perfectly correct: the simple question to be determined having been whether the demand made by the distrainer was good and valid. DOONEE MAHTOE *v.* SHEO NARAIN SING **21 W. R. 37**

DISTRAINT OR DISTRESS—*concld.*

DISTRESS.

See DISTRAINT OR DISTRESS.

DISTRESS ACT (I OF 1875).

——— **s. 10**—*Seizure of property in possession of mortgagee.* Where moveable property upon leasehold premises has been mortgaged by the lessee, and the mortgagee is in possession, the landlord cannot seize it under a distress warrant, as it is not property "belonging to the person from whom the rent is claimed" within the meaning of s. 10 of the Distress Act. GOBIND LALL SEAL *v.* KNIGHT **I. L. R. 7 Calc. 372: 9 C. L. R. 390**

DISTRESS WARRANT.

See SUMMARY TRIAL. **I. L. R. 36 Calc. 67**

DISTRIBUTION, STATUTES OF.

See PARSIS . . **I. L. R. 2 Bom. 75**

DISTRIBUTION OF SALE-PROCEEDS.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES. **I. L. R. 29 Calc. 803**

See SALE IN EXECUTION OF DECREE—DISTRIBUTION OF SALE-PROCEEDS.

DISTRICT.

See LAND ACQUISITION ACT (I OF 1894). **I. L. R. 33 Calc. 396**

DISTRICT BOARD.

——— **power of—**

See LOCAL SELF-GOVERNMENT ACT (BENGAL ACT III OF 1885), ss. 78, 139. **11 C. W. N. 1099**

DISTRICT COURT.

See CONTEMPT OF COURT—CONTEMPT GENERALLY . **I. L. R. 26 Mad. 494**

See CONTRACT ACT, s. 265.

See REGISTRATION ACT, 1877, s. 77 (1871, s. 76) . . **I. L. R. 2 Calc. 131**

——— **appeal to—**

See APPEAL—ORDERS—ORDER REFUSING APPLICATION TO BE DECLARED INSOLVENT . . **I. L. R. 27 Bom. 604**

DISTRICT JUDGE.

See DISTRICT JUDGE, JURISDICTION OF.

——— **assignment of business by—**

See CIVIL COURTS ACT, s. 13. **13 C. W. N. 265**

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DISTRICT JUDGE—*concld.*

——— **duty of**—

See TRANSFER OF CIVIL CASE—GENERAL CASES . . **I. L. R. 14 All. 531**

DISTRICT JUDGE, JURISDICTION OF.

See BENGAL RENT ACT, 1869, s. 102.

See CIVIL PROCEDURE CODE, 1882, ss. 22, 23 . . **10 C. W. N. 902**

See CIVIL PROCEDURE CODE, 1882, ss. 25, 191 (2) . . **10 C. W. N. 12**
I. L. R. 26 Mad. 595

See CONTRACT ACT, s. 265.

See CRIMINAL PROCEDURE CODE, s. 487.
I. L. R. 16 Calc. 121, 766

See GUARDIAN . **I. L. R. 34 Calc. 569**

See HINDU LAW—INHERITANCE.
I. L. R. 34 Calc. 929

See LAND ACQUISITION ACT (I OF 1894).
I. L. R. 35 Calc. 1104

See PROBATE—JURISDICTION IN PROBATE CASES.

See PROBATE AND ADMINISTRATION ACT (V OF 1881) . **I. L. R. 32 Bom. 634**

See RETRANSFER **I. L. R. 36 Calc. 193**

See RIGHT OF SUIT—CHARITIES AND TRUSTS.
I. L. R. 12 Bom. 247, 267 note
I. L. R. 14 Mad. 186
I. L. R. 15 Mad. 241
I. L. R. 15 Bom. 148
I. L. R. 21 Bom. 48

See SANCTION TO PROSECUTION—POWER TO GRANT SANCTION.
I. L. R. 2 Bom. 481
I. L. R. 16 All. 80
I. L. R. 19 All. 121

See TRANSFER . **I. L. R. 32 Calc. 875**

See TRANSFER OF CIVIL CASE—GENERAL CASES . **I. L. R. 24 All. 304,356**
I. L. R. 25 All. 183
10 C. W. N. 12

See VALUATION OF SUIT—APPEALS.

1. ——— **Appointment of guardian**—*Beng. Reg. V of 1804, s. 20—Guardian—Minor—Estate paying revenue to Government.* A District Court has no jurisdiction under s. 20 of Regulation V of 1804 and s. 3 of Regulation X of 1831 to appoint a guardian of the estate of a minor when the estate pays revenue to Government. *In re* NADUVATH MANNAKEL SUBRAMANYAN NAMBUDRIPAD
I. L. R. 6 Mad. 187

2. ——— **Suit to compel guardian to account**—*Subordinate Judge—Bombay Minors Act (XX of 1864).* A suit to compel a minor's guardian, appointed under Act XX of 1864, to account for his administration of the minor's estate

DISTRICT JUDGE, JURISDICTION OF—*contd.*

cannot be properly brought in the Court of a Subordinate Judge, or in any Court, but in the principal Civil Court of the district where the property is situated, if it be in one district; but if it be in more districts than one, then in the principal Civil Court of the district in which the minor has his residence. UTAMRAM MANIKLAL *v.* DAMODHARDAS MANIKLAL
9 Bom. 39

3. ——— **Suit against municipality**—*Subordinate Judge—Small Cause Court Judge—Bom. Act VI of 1873, s. 7—Act X of 1876, s. 15.* In a suit by or against a municipality constituted under the Bombay District Municipal Act (VI of 1873), every individual commissioner must be regarded as a party within the meaning of s. 15 of the Bombay Revenue Jurisdiction Act (X of 1876); and, consequently, such a suit cannot be entertained by a Subordinate Judge or a Judge of a Court of Small Causes, but can be entertained by the District Judge alone. AHMEDABAD MUNICIPALITY *v.* MAHAMUD JAMUL . . **I. L. R. 3 Bom. 146**

4. ——— **Mad. Reg. IV of 1816, hearing of petition under**—*Subordinate Judge.* A Subordinate Judge has no jurisdiction to hear and determine petitions under s. 29, Regulation IV of 1816. The jurisdiction created by that Regulation, being peculiar, can only be exercised by the District Judge as representative of the Zilla Judge. PONNUSAMI PILLAI *v.* PACHAI
I. L. R. 2 Mad. 336

Overruled by PONNUSAMI CHETTI *v.* KRISHNA AIYYAR . . . . **I. L. R. 5 Mad. 222**

5. ——— **Power to refer case under s. 265, Contract Act**—*Bombay Civil Courts Act, 1869. Quære:* Whether the District Judge had power, under the Bombay Civil Courts Act, XIV of 1869, to refer to the Assistant Judge a case falling under s. 265 of Act IX of 1872. SORABJI FARDUNJI *v.* DULABHBHAI HARGOVANDAS
I. L. R. 5 Bom. 65

6. ——— **Order respecting execution of decree of Subordinate Judge**—*Civil Procedure Code, s. 270.* A decree was passed by the Subordinate Judge, and in execution of that decree a sale of certain property was held and conducted by the nazir of the District Judge. *Held*, that, in reference to that sale, the District Judge had no jurisdiction to pass any order under the provisions of s. 270 or any order respecting the re-sale of the property. NOBO KISHORE DASS *v.* PROTAP CHUNDER BANERJEA . . . **1 C. L. R. 534**

7. ——— **Transfer of case to Regulation Provinces**—*Appeal—Bom. Reg. XVIII of 1831—Bom. Act III of 1863.* A suit was instituted in a Court which, at the date of the filing of such suit, was in a non-regulation district, to recover possession of a piece of land situate in a village then within the jurisdiction of that Court; when the Regulations were introduced, the Regulation Court which succeeded the said Court was placed in a district different from that to which the said village

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DISTRICT JUDGE, JURISDICTION OF —*contd.*

was annexed. *Held*, that the village in which the suit arose having been transferred to a district different from that which included the Court which had succeeded the Non-Regulation Court, this last-named Court had no jurisdiction to try and determine the suit. *Held*, also, that an appeal to a Judge of one district from a decree of a subordinate Court in another district, when such an appeal was permissible, was not an appeal which could be referred by the District Judge for trial to a Principal Sudder Ameen under Regulation XVIII of 1831, s. 3. *Quære :* When a district, or particular portion of a district, is for the first time brought under the Regulations, can the Regulation Court, which is established in the territory where a Non-Regulation Court previously existed, continue the trial of suits instituted in the Non-Regulation Court, if no provision have been made in the Act by which the Regulations became operative in the said territory, for the continuance of the trial of such suits by the said Regulation Court ? PAYAPPA BIN SHESHAPPA NADNI *v.* DHONDO NARAYAN DAMLE **5 Bom. A. C. 26**

8. ——— Appeals in suits above R5,000 decided before Bombay Civil Courts Act (XIV of 1869). Appeals in suits wherein the subject-matter exceeds R5,000 in value decided before the Bombay Civil Courts Act (XIV of 1869) came into operation, lay to the District Courts as before the Act, and not to the High Court. RATAN CHAND SHRI CHAND *v.* HANMANTRAV SHIVBAKAS **6 Bom. A. C. 166**

9. ——— Sanction to prosecution— *Power of District Judge to revoke sanction of Subordinate Judge.* A District Court has jurisdiction under s. 195 of the Code of Criminal Procedure to revoke or grant a sanction granted or refused by a Subordinate Judge's Court. VENKATA *v.* MUTTUSAMI . . . . **I. L. R. 7 Mad. 314**

10. ——— Trial of case for false evidence in Civil case—*Criminal Procedure Code, s. 477—False evidence.* A man died leaving some money due to him in the hands of the Telegraph authorities. *P* wrote a letter to those authorities claiming the money as the sole heir of the deceased. This letter was sent to the District Judge for verification and orders. *P* supported his claim before the Judge by the evidence on oath of *C*. *C*'s evidence being, in the opinion of the District Judge false, the District Judge, in his capacity as Sessions Judge, tried him for giving false evidence, and convicted him of that offence. *Held*, that the District Judge had no jurisdiction, under s. 477 of the Criminal Procedure Code, to try *C*. EMPRESS *v.* CHAIT RAM . . . . . **I. L. R. 6 All. 103**

11. ——— Revisional power of District Judge in rent suits—*Bengal Tenancy Act (VIII of 1885), s. 153—Judicial Officer.* The words " Judicial Officer as aforesaid," as used in the proviso to s. 153 of the Bengal Tenancy Act, have reference to the " Judicial Officer " spoken of in cl. (*b*) of that section and to such officer only, and a District Judge has no power to revise decrees or orders passed by a District Judge, Additional Judge or Subordinate Judge referred to in cl. (*a*) of the section. SANKARMANI DEBYA *v.* MATHURA DHUPINI **I. L. R. 15 Calc. 327**

12. ——— Reference to High Court, power to make—*Stamp Act, 1879, s. 49.* A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court. *Held*, that the District Judge was not authorized to make the reference. REFERENCE UNDER STAMP ACT, s. 49 . **I. L. R. 11 Mad. 38**

13 ——— Execution proceedings— *Civil Procedure Code, 1882, ss. 223, 228, 249—Mofussil Small Cause Court Act (XI of 1865), ss. 20, 21—Appeal.* The plaintiff obtained a decree in a Small Cause suit in a subordinate Court in the mofussil, and a certificate was granted to him under s. 20 of the Mofussil Small Cause Court Act for the execution of the decree against immoveable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under s. 247 of the Code of Civil Procedure, but his petition was dismissed. An appeal to the District Judge was dismissed on the ground that he had no jurisdiction to entertain an appeal in a Small Cause Court case. *Held*, that an appeal lay to the District Court, and that the Judge had jurisdiction to entertain it. PERUMAL *v.* VENKATARAMA . . . **I. L. R. 11 Mad. 130**

14. ——— Appeal from order passed after Act came into force in proceedings commenced before it was in operation— *Civil Procedure Code Amendment Act (X of 1888).* A District Judge has jurisdiction to hear the appeal from an order passed after the 1st of July 1888 under the Civil Procedure Code Amendment Act of 1888, although the execution proceedings in the course of which the order was made were commenced before that date. BAGAL CHUNDER MOOKERJEE *v.* RAMESHUR MUNDUL **I. L. R. 18 Calc. 496**

15. ——— Jurisdiction of District Judge to try case which should have been instituted in Subordinate Judge's Court— *Civil Procedure Code, 1882, s. 15.* S. 15 of the Civil Procedure Code does not prevent a District Judge from trying a suit which ought properly to have been instituted in the Court of a Subordinate Judge. *Nidhi Lal* v. *Mazhar Husain, I. L. R. 7 All. 230,* and *Matra Mondal* v. *Hari Mohan Mullick, I. L. R. 17 Calc. 155,* followed. AUGUSTINE *v.* MEDLYCOTT **I. L. R. 15 Mad. 241**

16. ——— Appeal from order under s. 331—*Civil Procedure Code, 1882, s. 331—Bombay Civil Courts Act (XVI of 1869), s. 8.* *A* obtained a decree in the Court of a first class Subordinate Judge for possession of property worth more than

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R5,000. In executing this decree against a portion of the property awarded, which was worth R420, *A* was resisted by *B*, who claimed to hold the property under a title adverse to the judgment-debtors. *B*'s claim was thereupon numbered and registered as a suit under s. 331 of the Code of Civil Procedure (Act XIV of 1882). The First Class Subordinate Judge who investigated the claim ordered *B*'s obstruction to be removed and the property to be put into *A*'s possession. *B* appealed against this order. *Held*, that the appeal lay to the District Judge under Act XIV of 1869, the subject-matter of the claim being less than R5,000. MOULAKHAN *v.* GORIKHAN . . . **I. L. R. 14 Bom. 627**

17. ——— Reference by District Judge to Assistant Judge—*Bombay Civil Courts Act (XIV of 1869), s. 17—Jurisdiction of Assistant Judge on case so referred.* A District Judge referred for trial an appeal to his Assistant Judge under s.17 of the Bombay Civil Courts Act (XIV of 1869). The Assistant Judge dismissed the appeal for default of the appellant's (defendant's) appearance on the day fixed for hearing. An application was afterwards made to the Assistant Judge for the re-admission of the appeal, but he refused the application. A similar application was then made to the District Judge. He granted the application, and ordered the appeal to be re-admitted to the file. The appeal was then heard and decided by the Assistant Judge, who reversed the lower Court's decree. On appeal by the plaintiff to the High Court: *Held*, that the order of the District Judge re-admitting the appeal was *ultra vires*. By the reference under s. 17 of the Bombay Civil Courts Act, XIV of 1869, the Assistant Judge acquired full jurisdiction to try the appeal according to the procedure laid down by the Civil Procedure Code of 1882. The Assistant Judge had jurisdiction, under s. 558 of the Code, to entertain the application for re-admission, and his order refusing to re-admit was not subject to reversal or review by the District Judge. The order of the District Judge re-admitting the appeal was made without jurisdiction, and the proceedings subsequent thereto were also without jurisdiction and invalid. SAKHARAM LAKSHMAN *v.* GOVIND JOTI **I. L. R. 15 Bom. 107**

18. ——— Act IX of 1861, ss. 1, 3, 4—*Civil Procedure Code, s. 17.* An application was made to the District Judge of Allahabad, under s. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore. *Held*, that, under ss. 1 and 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad, where the cause of action arose; and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application. SARAT CHUNDRA CHAKARBATI *v.* FORMAN . . **I. L. R. 12 All. 213**

19. ——— Exercise by Subordinate Judge of jurisdiction of District Court—*Bengal, N.-W. P., and Assam Civil Courts Act, ss. 23, 24—Appeal—Act XL of 1858.* The words in s. 24 of the Bengal Civil Courts Act (XII of 1887) "subject to the rules applicable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore, orders passed under that section by a Subordinate Judge in proceedings under the Bengal Minors Act (XL of 1858), transferred to him under s. 23 (2) (*b*) of the former Act, are appealable to the High Court, and not to the Court of the District Judge. SOHNA *v.* KHALAK SINGH . . . . **I. L. R. 13 All. 78**

20. ——— Reference by a Collector—*Land Acquisition Act (X of 1870), s. 55.* A Collector is not competent to refer, nor a District Judge to decide, any question arising under Land Acquisition Act, s. 55. RAMALAKSHMI *v.* COLLECTOR OF KISTNA . . . **I. L. R. 16 Mad. 321**

21. ——— Applicability to guardians who had ceased to be such before the Act came into force—*Guardians and Wards Act (VIII of 1890), ss. 41 and 51.* The Guardians and Wards Act (VIII of 1890) does not apply to guardians whose powers had ceased by reason of their wards having attained majority, or otherwise, prior to the passing of the Act. The word "guardian" in s. 51 of the Act means a guardian who was such at the time the Act came into force. *A* was appointed a guardian of *B*'s property under the Bombay Minors Act, XX of 1864. *B* attained majority in 1886. In 1892 *B* applied to the District Judge for an order directing *A* to deliver to *B* his property, together with the accounts relating thereto. The District Judge made the order, as asked for, under s. 41, cl. 3, of Act VIII of 1890. *Held*, that the District Judge had no jurisdiction under Act VIII of 1890 to make the order in question, as *A* had ceased to be a guardian before the Act came into force. VALLABDAS HIRACHAND *v.* KRISHNABAI **I. L. R. 17 Bom. 566**

22. ——— Duty of District Court to hear all evidence—*Guardians and Wards Act (VIII of 1890), ss. 13, 46, and 39—Decision based on evidence taken by a subordinate Court illegal.* S. 46 of the Guardians and Wards Act (VIII of 1890) does not control s. 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a subordinate Court. Nor does it empower the District Judge to use the evidence taken by the subordinate Court. An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subor-

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dinate Judge for inquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before and all the evidence was taken by the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application. *Held*, that the procedure adopted by the District Judge was illegal, and his decision, based upon evidence not taken before him, could not be accepted. *Baroda Churn Bose* v. *Ajoodhya Ram, 23 W. R. 287, Shadhoo Singh* v. *Ramanoograha Lall, 9 W. R. 83,* and *Iswar Chandra Das* v. *Jugal Kishor, 4 B. L. R. Ap. 33,* referred to. GANESH VITHAL *v.* KUSABAI . **I. L. R. 23 Bom. 698**

23. ——— Appeal from insolvency order—*Civil Procedure Code, 1882, s. 589—Civil Procedure Code Amendment Acts (VII of 1888), s. 56 and (X of 1888), s. 3, cl. (a).* Bearing in mind that s. 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, the words "Court subordinate to that Court" in s. 3 of Act X of 1888 must be construed with reference to its appellate jurisdiction. Consequently a District Court has no jurisdiction to hear an appeal from an order in insolvency matters, in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject-matter of the suit is more than R5,000 in value. VENKATRAYER *v.* JAMBOO AYYAN . . . **I. L. R. 17 Mad. 377**

24. ——— Appeal to District Judge entertained without jurisdiction—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Decree passed by a Subordinate Judge invested with the jurisdiction of a Small Cause Court—Finality of such decree—Civil Procedure Code (Act XIV of 1882), ss. 622 and 646 A—Reference to High Court.* A Subordinate Judge invested with the jurisdiction of a Court of Small Causes, tried a suit under his Small Cause Court powers, and passed a decree in plaintiff's favour. The defendant appealed against this decree, and the Appellate Court, being of opinion that the suit was not of a nature cognizable by a Court of Small Causes, reversed the decree and remanded the case to the Subordinate Judge for trial under his ordinary jurisdiction. Thereupon the Subordinate Judge made a reference to the High Court under s. 646A of the Code of Civil Procedure (Act XIV of 1882). *Held*, that the reference was not authorized by the provisions of s. 646A of the Code, as it applied to a case before judgment. The High Court could, however, deal with the matter under s. 622 of the Code. *Held*, also, that, the suit having been tried by the Subordinate Judge in the exercise of his jurisdiction as a Judge of a Court of Small Causes, the decree was final, and not appealable to the District Court, and the District Judge had no jurisdiction to hear the appeal. The only remedy open to the aggrieved party was to apply to the High

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Court under s. 25 of Act IX of 1887. DIWALIBAI *v.* SADASHIVDAS . . **I. L. R. 24 Bom. 310**

25. ——— Appeal to District Judge—*Civil Procedure Code (Act XIV of 1882), ss. 25, 191 (2)—Suit commenced in a District Court—Issues settled by District Judge—Case transferred to Sub-Court by High Court—Decision by Sub-Judge—Validity of decision in appeal and of transfer by High Court.* A suit was instituted in a District Court, and issues were settled by the District Judge. The suit was then transferred by the High Court to the Court of the Subordinate Judge, who decided the case. An appeal was then preferred to and was heard by the District Court, though the Judge who heard the appeal was not the Judge who had settled the issues. On a second appeal being preferred to the High Court: *Held*, (i) that the District Court had jurisdiction to hear the appeal, s. 17 of the Madras Civil Courts Act (III of 1873) having no application; (ii) that the High Court had jurisdiction, under ss. 25 and 191 (2) of the Code of Civil Procedure, to make the transfer to the Subordinate Judge, although the case was in part heard. PALANISAMI COWNDAN *v.* THONDAMA COWNDAN (1902) . **I. L. R. 26 Mad. 595**

DISTRICT MAGISTRATE.

See COLLECTOR . **I. L. R. 1 Bom. 628**

See COMPLAINT—INSTITUTION OF COMPLAINT, AND NECESSARY PRELIMINARIES —DUTY OF MAGISTRATE. **6 C. W. N. 843**

See CRIMINAL PROCEDURE CODE, S. 437. **I. L. R. 32 Calc. 1090**

See FURTHER INQUIRY **I. L. R. 33 Calc. 8**

See JURISDICTION. **I. L. R. 35 Calc 434**

See MAGISTRATE—

GENERAL JURISDICTION **I. L. R. 30 Calc. 449** **I. L. R. 32 Calc. 1090**

POWERS OF MAGISTRATES. **I. L. R. 29 Calc. 242**

See REVISION—CRIMINAL CASES—ACQUITTALS . . . **7 C. W. N. 493**

——— **powers of**—

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 29 Calc. 455**

See TRESPASS . **I. L. R. 36 Calc. 433**

DISTRICT MUNICIPAL ACT.

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. III OF 1901).

See PENAL CODE, SS. 21, 186. **I. L. R. 33 Bom. 213**

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DISTRICT REGISTRAR.

——————— *Civil Procedure Code, 1882, s. 622—District Registrar not a 'Court' within the meaning of s. 622.* A District Registrar is a Court within the meaning of s. 622 of the Code of Civil Procedure, and the High Court cannot interfere with his proceedings under that section. *Atchayya* v. *Gangayya, I. L. R. 15 Mad. 138*, distinguished. MANAVALA GOUNDAN *v.* KUMARAPPA REDDY (1907).
I. L. R. 30 Mad. 326

DIVESTING OF PROPERTY.

See HINDU LAW—
ADOPTION—EFFECT OF ADOPTION.
INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE.
WIDOW—DISQUALIFICATIONS.
See WILL—CONSTRUCTION.
I. L. R. 4 Calc. 420
1 Ind. Jur. N. S. 375
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DIVIDENDS.

——————— **distribution of—**
See INSOLVENCY . **I. L. R. 36 Calc. 512**

——————— **gift of—**
See WILL—CONSTRUCTION.
I. L. R. 12 Bom. 137

——————— **payment of, out of deposit in bank—**
See BANKERS . **I. L. R. 16 All. 88**

DIVISION BENCH OF HIGH COURT.

——————— **appeal from judgment of—**
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See CIVIL PROCEDURE CODE, 1882, s. 575.
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I. L. R. 9 All. 655
See LETTERS PATENT, N.-W. P. HIGH COURT, CL. 27 . . **2 N. W. 117**
s. c. Agra F. B., Ed. 1874, 196
I. L. R. 11 All. 176

DIVISION BENCH OF HIGH COURT— *contd.*

——————— **difference of opinion between Judges of—***contd.*
See REFERENCE TO FULL BENCH.
I. L. R. 3 Calc. 20
See REFERENCE TO HIGH COURT—CIVIL CASES . . . **4 C. W. N. 389**

——————— **power of—**
See ENGLISH COMMITTEE OF HIGH COURT.
10 B. L. R. 79, 80, 82 note

1. ——————— **Power of—***Security for stay of execution.* *A* had executed a security bond on behalf of *K*, who had an appeal to the High Court in a case in which the Court had ordered stay of execution until the appeal was heard. The appeal was heard by a Division Bench, and the Judges differing, the appeal was decreed in accordance wth the opinion of the Senior Judge. From this judgment an appeal was preferred under s. 15 of the Letters Patent. After the opinion of the Division Bench was pronounced, *A* applied to the Judge before whom he had made it for the return of his security-bond, but his application was refused pending the final decree of the High Court in the matter. *A* then moved the High Court for the cancellation or return of the bond. *Held*, that there was no necessity that this motion should have been presented to the Judges who heard the appeal, for it related to matter beside the judgment, and a Division Bench may receive motions from all districts, without reference to the division into groups. *Held*, that the rule of practice, that applications referring to matters which have judicially arisen in a particular district should be made before the bench to which that district belongs, does not divest any Division Bench of the Court of the jurisdiction given to it by the Charter, nor can it be always properly adhered to. AMEER ALI KHAN *v.* KASSIM ALI KHAN
13 W. R. 403

2. ——————— **Reference to High Court after former reference in same case.**—An order passed by an Assistant Magistrate in a case of breach of the peace under s. 530 of the Code of Criminal Procedure was referred to the High Court by the Sessions Judge, with a recommendation that the order should be set aside on certain grounds stated, the want of jurisdiction in the Assistant Magistrate not being one of the grounds. The Division Bench before whom that reference came declined to interfere with the order. It was held by another Division Bench before whom the matter was subsequently brought on motion that they were not debarred from entering into the question of the want of jurisdiction, and, as the effect of the Assistant Magistrate's order was to prejudice one of the parties, the order, which was admittedly without jurisdiction, was set aside. RUN BAHADUR SINGH *v.* HAR DOYAL SINGH
21 W. R. Cr. 32

3. ——————— **Decision of Division Bench as to Bengali expression.** The decision of one

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DIVISION BENCH OF HIGH COURT— *concld.*

Division Bench as to the meaning of a Bengali expression occurring in a particular plaint cannot be binding upon another Division Bench for the purpose of a different suit. WATSON & Co. *v.* SURNO MOYEE . . . . . **24 W. R. 414**

4. ——— **Decision of, how far binding on another Court.** The decision of an Appeal Bench of the High Court upon a point of law, or the construction of a document in the case before them, is not necessarily binding on a single Judge of that Court when the same question again arises in another suit before him. ABHAI CHARAN GHOSE *v.* DASMANI DASI . . . **6 B. L. R. 623**

5. ——— **Ruling of Division Bench referred to Full Bench.** *Per* BAYLEY, *J.*—*Quære*: Whether a ruling of three Judges of the High Court of Bombay on a case referred by a Division Bench of two Judges for decision by the Full Bench can be regarded otherwise than a ruling of a Division Court of three Judges. *In the matter of the petition of* BAI AMRIT . **I. L. R. 8 Bom. 380**

6. ——— **Division Bench taking civil business**—*Orders under Civil Procedure Code, 1882, s. 643.* A Division Bench of the High Court taking the civil business of a particular group has jurisdiction to deal with an order under s. 643 of the Civil Procedure Code made by a Civil Court in any of the districts included in the group. MAHOMED BHAKKU *v.* QUEEN-EMPRESS . **I. L. R. 23 Calc. 532**

DIVISION OF OCCUPANCY HOLDING.

See AGRA TENANCY ACT, 1901, s. 32. **I. L. R. 31 All. 348**

DIVORCE.

See BURMESE LAW—DIVORCE. **I. L. R. 19 Calc. 469**

See DIVORCE ACT (IV OF 1869).

See HINDU LAW—CUSTOM—IMMORAL CUSTOMS . **I. L. R. 17 Mad. 479**

See HINDU LAW—MARRIAGE—RESTRAINT ON, OR DISSOLUTION OF, MARRIAGE. **I. L. R. 3 Calc. 305**
I. L. R. 8 Mad. 169

See HUSBAND AND WIFE. **I. L. R. 21 Bom. 77**

See MAHOMEDAN LAW. **I. L. R. 31 Bom. 264**
I. L. R. 36 Calc. 23, 184
13 C. W. N. 134

See MAHOMEDAN LAW—DIVORCE—MARRIAGE.

See MARRIAGE . **I. L. R. 25 Calc. 537**
2 C. W. N. 209

——— **plea of—**

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO . **10 B. L. R. Ap. 33**
I. L. R. 5 Calc. 558
I. L. R. 7 Bom. 180
I. L. R. 5 All. 224, 226
I. L. R. 14 Calc. 576
I. L. R. 15 All. 143
I. L. R. 19 All. 50

DIVORCE—*contd.*

——— **suit for—**

See HIGH COURT, JURISDICTION OF—BOMBAY—CIVIL **I. L. R. 16 Bom. 136**

See PARSI MARRIAGE AND DIVORCE ACT, s. 30 . . **I. L. R. 18 Bom. 366**

1. ——— **Mahomedan Law**—*Hanafi Sunnis—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Marz-ul-maut—Death of the husband before expiration of the period of iddat.* *A*, a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. *A* then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. *A* died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of *A* and claimed maintenance and residence. *Held*, overruling the contention that the divorce should have been pronounced three times, that the *atalak-ul-iddat* (*i.e.*, irregular divorce) is good in law, though bad in theology. *Held*, further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak*, such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing." In order to establish *Marz-ul-maut* there must be present at least three conditions:—(i) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is that at the given time death must be more probable than life: (ii) there must be some degree of subjective apprehension of death in the mind of the sick person: (iii) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations. Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband. SARABAI *v.* RABIABAI (1905) . . . **I. L. R. 30 Bom. 537**

2. ——— **Alimony pendente lite**—*Application for, after decree nisi—Indian Divorce Act (IV of 1869), s. 36.* Notwithstanding a decree *nisi* for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under s. 36 of the Indian Divorce Act, to order alimony *pendente lite* for the period between decree *nisi* and decree absolute. *Dunn* v. *Dunn, L. R. 13 P. D. 91*, considered. BOWEN *v.* BOWEN (1909) **I. L. R. 36 Calc. 1018**

3. ——— **Jurisdiction**—"*Permanent Residence*"—*Divorce Act (IV of 1869), s. 3 (1)*—"*Last resided together.*" In a petition for dissolution of marriage, where the husband and

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DIVORCE—*concld.*

wife had no permanent residence :—*Held*, that the petition could be entertained by the Court having jurisdiction over the place where they 'last resided together' though for a short period. BRIGHT *v.* BRIGHT (1909) . . **I. L. R. 33 Calc. 964**

4. ———— **Collusion**—*Husband's petition —Agreement between the Parties, not acted on whether constitutes Collusion.* A petition for divorce was presented by the husband, on the ground of the wife's adultery with the co-respondent. Subsequently an agreement was come to between the petitioner and the respondent, by which, for a pecuniary consideration, the respondent agreed not to defend the suit and to furnish the petitioner with evidence against herself and the co-respondent, should the latter venture to defend the suit. This agreement, however, fell through, and the respondent filed her answer denying adultery, and making a counter-charge of adultery against the petitioner. The co-respondent did not defend the suit. At the trial, the plea taken by the respondent was that the petition should be dismissed on the ground of collusion between the petitioner and herself. *Held*, that inasmuch as the agreement, which contemplated a fraud upon the Court, was not acted on, and in no way affected the decision of the Court, it did not constitute collusion. *Churchward* v. *Churchward*, [*1895*] *P. 7*, referred to. BOWEN *v.* BOWEN (1909) **I. L. R. 36 Calc. 874**

DIVORCE ACT (IV OF 1869).

See DIVORCE.

See MARRIAGE, DISSOLUTION OF. **12 C. W. N. 1009**

See PLEADER—REMUNERATION. **7 Mad. 394**

———— **appeal in case under—**

See HIGH COURT, JURISDICTION OF—N.-W. P.—CIVIL . **I. L. R. 18 All. 375**

1. ———— **Costs**—*Divorce—Wife's costs—Dismissal of wife's petition—Liability of husband —Deposit or security for costs.* In a divorce suit, where it is shown that the wife has no money of her own, the mere fact that no deposit has been made or security given for payment of the wife's costs is no obstacle to the making of an order against the husband to pay her costs, although her petition is dismissed. *Robertson* v. *Robertson, L. R. 6 P. D. 119 ; Otway* v. *Otway L. R. 13 P. D. 141 ;* and *Proby*, v. *Proby, I. L. R. 5 Calc. 357*, referred to. BOYLE *v.* BOYLE (1903) **I. L. R. 30 Calc. 631: s.c. 7 C. W. N. 565**

2. ———— **Intervenor**—*Divorce—Parties —Alleged adulteress, application by.* In a wife's petition for dissolution of marriage by reason of the husband's adultery with one Mrs. Ollenbach, the latter applied and obtained this rule calling upon the petitioner to show cause why she should not be allowed to intervene. BAILEY *v.* BAILEY (1897) . **I. L. R. 30 Calc. 490 note**

DIVORCE ACT (IV OF 1869)—*contd.*

1. ———— **s. 2—Application of Act**—*Polygamous contracts under Mahomedan law.* The Indian Divorce Act was intended to apply to such marriages as are recognized as marriages by Christians, and not to polygamous contracts, such as are the unions known as marriages to the Mahomedan law. Such polygamous contracts are not subject to the jurisdiction of the Courts created by the Indian Divorce Act of 1869. ZUBURDUST KHAN *v.* HIS WIFE . . . **2 N. W. 370**

2. ———— **Jurisdiction**—*Damages.* The High Court has jurisdiction to admit a petition for divorce; where the parties are resident, and the adultery is committed, in the district of the 24-Pergunnahs. Principle on which the Court will assess damage discussed. KELLY *v.* KELLY AND SAUNDERS . . **3 B. L. R. O. C. 67**

3. ———— *Jurisdiction—Dissolution of marriage.* A District Judge ought in all cases to enquire into, and set out in his judgment, the facts relied on as giving jurisdiction to the Court to pronounce a decree of dissolution of marriage. DURAND *v.* DURAND . **14 W. R. 416**

4. ———— *Jurisdiction—Residence of parties.* In a suit for dissolution of marriage, where at the time of the presentation of the petition the respondent does not reside within the jurisdiction of the Court, the jurisdiction of the Judge and the right of the petitioner to petition him will depend on where the parties "last resided together." WINGROVE *v.* WINGROVE **14 W. R. 416**

5. ———— *European British subjects—Jurisdiction of the High Court of Bombay to heur a suit for divorce arising in a Native State between European British subjects—Legislative powers of Governor General.* The petitioner, a European British subject resident at Secunderabad in the Dekkan, sued for a divorce, alleging against the respondent various acts of adultery committed at Secunderabad. *Held*, that the High Court of Bombay had jurisdiction to try the suit under the provisions of the Indian Divorce Act, IV of 1869. *Held*, also, that the provisions of the Indian Divorce Act, IV of 1869, apply to suits between European British subjects resident in Native States in India ; and that s. 2 of that Act, which extends those provisions to such persons, was not *ultra vires* of the Indian Legislature. Stat. 28 & 29 Vict., c. 15, s. 3, transferred to the Governor General in Council the power, previously vested in Her Majesty by s. 18 of the High Courts Act (Stat. 24 & 25 Vict., c. 104) to alter and determine the territorial limits of the jurisdiction of the High Courts in India. The power thus transferred was a power "by Order" to authorize the exercise of jurisdiction. But the power so conferred upon the Governor General in Council did not affect the general legislative powers as to matters of jurisdiction previously possessed by him under Stat. 24 & 25 Vict., c.67, s. 22. Those powers were (s. 6 of Stat. 28 & 29 Vict., c. 15) expressly reserved ; and the special power

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DIVORCE ACT (IV OF 1869)—*contd.*

——— s. 2—*contd.*

given by s. 3 of altering the limits of the jurisdiction by executive order does not exclude by implication the general legislative powers. To effect an alteration of such jurisdiction by Act instead of by Order is still within the general scope of the legislative powers of the Governor General in Council, although the more convenient course of an executive Government notification is usually followed. Previously to the institution of the present suit, the respondent had left India and gone to England without any intention of returning to India. It was contended that Act IV of 1869, passed by the Indian Legislature in exercise of its power to make laws for persons resident in Native territories, could not affect her. *Held*, that the petition satisfied the Act by alleging residence of the petitioner in India and the commission of the act of adultery whilst the parties last resided together in India. It was not necessary to show the residence of the respondent. THORNTON *v.* THORNTON **I. L. R. 10 Bom. 422**

6. ——— *Jurisdiction of District Court—Adultery committed in India—Place of marriage.* Under s. 2 of the Indian Divorce Act (IV of 1869), a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties. KYTE *v.* KYTE AND COOKE **I. L. R. 20 Bom. 362**

7. ——— *"Residence," meaning of the word—Jurisdiction of the Court to grant divorce.* That under the Indian Divorce Act domicile is not the test of the Court's authority to grant a divorce, it being sufficient if the petitioner resides in India at the time of presenting the petition and professes the Christian religion. That the meaning of the word "reside" must in each case be decided with reference to its own circumstances. It conveys the idea, if not of permanence, of some degree of continuance. That the "residence" to which the Indian Divorce Act points must be some thing more than occupation during occasional and casual visits within the local limits of the Court, more specially where there is a residence outside those limits marked with a considerable measure of continuance. That where the petitioner does not reside in India, the Court has no jurisdiction by virtue of the Charter of 1774 and the Letters Patent of 1862 and 1865 to grant him a decree for divorce. JOGENDRA NATH BANERJEE *v.* ELIZABETH BANERJEE . . . . . **3 C. W. N. 250**

8. ——— **Non-Christian marriage**—*—Application of Act—Conversion to Christianity—Native Converts Marriage Dissolution Act (XXI of 1866), ss. 4, 5, 7, 8, 9, 10, 15, 16.* The petitioner and the respondent were married while professing the Hindu faith, and afterwards became converts to Christianity. The petitioner subsequently applied for dissolution of the marriage on the ground of his wife's adultery. *Held*, that, being

DIVORCE ACT (IV OF 1869)—*contd.*

——— s. 2—*concld.*

a person professing Christianity at the time of presenting the petition, he was entitled to a dissolution of the marriage under the provisions of the Indian Divorce Act (IV of 1869). It is clear from the provisions of the Native Converts Marriage Dissolution Act (XXI of 1866) that a non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity, and may therefore be dissolved in accordance with the provisions of Act IV of 1869. GOBARDHAN DASS *v.* JASADAMONI DASSI **I. L. R. 18 Calc. 2**

9. ——— *Native Christian—Hindu convert to Christianity.* A pariah, who had been converted to Christianity, presented a petition of divorce under Act IV of 1869 on the ground of adultery committed by his wife before his conversion. *Held*, that the Court had no jurisdiction to entertain the petition. PERIANAYAKAM *v.* POTTUKANNI . . . **I. L. R. 14 Mad. 382**

——— s. 3 (1)—

See DIVORCE . **I. L. R. 36 Calc. 964**

1. ——— s. 3, cl. (2)—**Appeal**—*Judicial Commissioner of Oudh—Oudh Civil Courts Act (Act XIII of 1879), s. 27.* A decree dismissing a suit for dissolution of marriage made by the Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII of 1879, and the Divorce Act, 1869, is appealable to the High Court of the North-Western Provinces. MORGAN *v.* MORGAN . . . **I. L. R. 4 All. 306**

2. ——— cl. (9), and s. 10—**Desertion**—*Adultery—Judicial separation.* A husband and wife living in British Burma separated in 1861; the wife, for reasons of convenience, going to England, but with no intention of a permanent separation. After her departure, the husband contracted an adulterous connection with a Burmese woman, which was, however, unknown to the wife till 1875. During the separation he kept up correspondence with his wife, and in some of his letters he expressed an intention of never returning to England; and in 1868 expressed his willingness to aid her in obtaining a divorce. The wife never openly consented to the separation, although she could not be said to have made any active opposition to it. *Held*, that the wife was not entitled to a divorce, but only to a judicial separation, as there was no evidence of desertion. Desertion under the Indian Divorce Act implies "an abandonment against the wish of the person charging it," and although the word "abandonment" is undefined, the effect of the clause is to introduce into the Indian Statute the view adopted by the Courts in England in construing the English Act. The expression "against the wish of" is to be construed as meaning contrary to an actively expressed wish of the person charging abandonment, and notwithstanding the resistance or opposition of such person. A wife is bound, when seeking to prove desertion, to give evidence of conduct on her

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 3(1)**—*concld.*

part, showing unmistakeably that such desertion was against her will. The decisions of the Probate and Divorce Courts in England must be taken to be a guide to the Courts in India under the Indian Divorce Act except when the facts of any particular case arising out of the peculiar circumstances of Anglo-Indian life constitute a situation such as the English Courts are not likely to have had in view. FOWLE *v.* FOWLE
I. L. R. 4 Calc. 260 : 3 C. L. R. 484

——— **ss. 4 and 18—Matrimonial jurisdiction**—*Marriage—Nullity.* The High Court cannot entertain a suit of a matrimonial nature otherwise than as provided by the Indian Divorce Act, and therefore has no jurisdiction to make a decree of nullity on the ground that the marriage was invalid. GASPER *v.* GONSALVES
13 B. L. R. 109

1. ——— **s. 7—Inspection of letters**—*Practice.* The respondent is entitled to have brought into Court letters written to her by the petitioner while the facts to which they speak were fresh in her memory. If the petitioner has none, he should make an affidavit to that effect. GORDON *v.* GORDON . **3 B. L. R. O. C. 100**

2. ——— **Stay of proceedings**—*Petition for divorce in India—Suit by wife in England for restitution of conjugal rights—Practice.* The petitioner, having (as he believed), on the 12th December 1885, discovered that the respondent had been guilty of adultery, brought her from Secunderabad to Bombay, and sent her to England on the 25th December 1886. On the 26th February 1886 he filed his petition in the High Court of Bombay. On the 26th March 1886 the respondent filed a suit against the petitioner in the High Court of Justice in England for restitution of conjugal rights. On motion made on respondent's behalf to stay proceedings in the present suit until the suit in England should be determined: *Held*, in the circumstances of the case, that a stay of proceedings ought not to be granted. THORNTON *v.* THORNTON . . . **I. L. R. 10 Bom. 422**

3. ——— **Evidence of marriage**—*Suit for dissolution of marriage—Judicial separation, previous decree for—Cruelty—Adultery—Identity of parties.* In a suit for dissolution of marriage by reason of the cruelty and adultery of the respondent, the first charge and the marriage of the parties were held to be established by the production of a previous decree for judicial separation on account of cruelty, and by proof of the identity of the parties. *Bland* v. *Bland, 35 L. J. P. & M. 104*, followed. LEDLIE *v.* LEDLIE
I. L. R. 22 Calc. 544

4. ——— **Non-Christian marriage**—*Nature of the marriages contemplated by the Act—Suit for dissolution of marriage—Monogamous marriage.* The petitioner and his wife married according to the rites of the Hindu religion.

DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 7**—*concld.*

The wife subsequently left her husband, and lived in adultery with another man. Both the husband and wife subsequently became Christians but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage. *Held*, that, having regard to s. 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. *Hyde* v. *Hyde, L. R. 1 P. & D. 130*, and *Brinkley* v. *Attorney-General, L. R. 15 P. D. 76*, cited and followed. *Gobardhan Doss* v. *Jasadamoni Dassi, I. L. R. 18 Calc. 252*, dissented from. THAPITA PETER *v.* THAPITA LAKASHMI
I. L. R. 17 Mad. 235

5. ——— **Rules and principles referred to in s. 4.** The principles and rules referred to in s. 7 of Divorce Act, IV of 1869, are not mere rules of procedure such as the rules which regulate appeals, but are the rules and the principles which determine the cases in which the Court will grant relief to the parties appearing before it or refuse that relief—rules of *quasi*-substantive rather than of mere adjective law. A *v.* B
I. L. R. 22 Bom. 612

6. ——— **Wife's costs**—*Husband and wife—Wife's costs, application for—Foreign domicile—Property of wife.* On an application by the wife for her costs during the pendency of her suit for judicial separation and her husband's suit for divorce: *Held*, that a wife, whose property is retained by her husband, is entitled to her costs. *Also*, that, inasmuch as the parties are domiciled abroad, and the law of that country is not before the Court, s. 7 of the Divorce Act applies, and the Court will act on the general principles of English law. *Mayhew* v. *Mayhew, I. L. R. 19 Bom. 293*, followed. GEORGUCOPULAS *v.* GEORGUCOPULAS (1902) . **I. L. R. 29 Calc. 619**

——— **ss. 7, 11 and 45—Parties**—*Divorce—Intervention—Jurisdiction—Alleged adulteress, application by—Civil Procedure Code (Act XIV of 1882), s. 32.* In a wife's suit for divorce against the husband on the ground of incestuous adultery, the Court has no power under the Indian Divorce Act (IV of 1869) to allow the alleged adulteress to intervene. The words "all proceedings under this Act between party and party," in s. 45 of the Act, apply only to proceedings after the parties to the suit have been determined, and the parties can only be determined in accordance with the provisions of the Act. S. 7 of the Act does not apply to procedure. S. 32 of the Civil Procedure Code (Act XIV of 1882) cannot apply to the case of substitution, dismissal or addition of parties in divorce proceedings. *Bell* v. *Bell, L. R. 8 P. D. 217; Abbot* v. *Abbot 4 B. L.*

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **ss. 7, 11 and 45**—*concld.*

R. (O. C.) 51; and *Lowe* v. *Lowe*, [*1899*] *P. D. 204*, referred to. RAMSAY *v.* BOYLE (1903)
I. L. R. 30 Calc. 489 : 7 C. W. N. 504

——— **s. 11—Prostitution**—*Addition of co-respondent—Amending petition—Laches of petitioner.* Under the Divorce Act, IV of 1869, the addition of a co-respondent is not necessary if the wife has been leading the life of a prostitute, and the petitioner knows of no person with whom adultery has been committed. Where the respondent was living not a life of promiscuous intercourse with all who sought her, but living with separate persons in succession, and professed to be able to attribute her respective children to a father she was held not to be leading a life of prostitution within the meaning of the Act. Where a petitioner neglected for fourteen years to take any steps to obtain a separation from his wife, whom he knew to be living in adultery, the Court refused to allow the petition to be amended by the addition of co-respondents. ROE *v.* ROE . **3 B. L. R. Ap. 9**

——— **ss. 11 and 15**—*Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged adulterer to intervene.* A person who has been charged by the husband, in his answer to a petition by the wife for divorce, with having committed adultery with the wife, is entitled to intervene. *Wheeler* v. *Wheeler and Rhodes, L. R. 14 P. D. 154*, followed. STEVENSON *v* STEVENSON
4 C. W. N 506

——— **ss. 12 and 17—Decree nisi**—*Duty of the Court passing that decree—Confirmation.* The High Court should not make a decree *nisi* for dissolution of marriage absolute without a motion being made to it for that purpose. When after the passing of the decree *nisi* for dissolution of marriage no one represented either the petitioner or the respondent and co-respondent in the High Court: *Held*, that no order could be made on the reference for confirmation of such decree unless a motion was made to the Court for that purpose. *Held*, further, that under s. 12 of the Act the duties of a Court in the investigation of a suit for a divorce are that upon any petition for a dissolution of marriage being presented, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged but also whether or not petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and shall enquire into any counter-charge which may be made against the petitioner. *Culley* v. *Culley, I. L. R. 10 All. 559*, followed. FORSHAW *v.* FORSHAW (1909) . . **I. L. R. 31 All. 511**

——— **s. 13 - Collusion**—*Collusion in presentation of petition for dissolution.* Subsequently to the institution of a suit for dissolution of marriage, and on the same day on which the suit came on for hearing, the petitioner and the respondent each filed petitions, setting out that it was agreed between them that from that date the marriage between them should be dissolved; that neither of them should have any claim against the other; that each should marry again at pleasure, and prayed that dissolution of the marriage might be granted on these terms, each party bearing his and her own costs. *Held*, that this amounted to collusion within the meaning of s. 13 of Act IV of 1869, and that the petition must be dismissed. CHRISTIAN *v.* CHRISTIAN . . **I. L. R. 11 Calc. 651**

DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 13**—*concld.*

——— **ss. 13, 14, and 15—Cruelty—Condonation.** The petitioner sued for a divorce on the ground of his wife's adultery. The adultery was admitted, but the respondent proved that her husband had been guilty of various acts of cruelty towards her, which disentitled him to have an unconditional divorce, and claimed on this ground a right to a judicial separation with alimony under s. 15 of the Indian Divorce Act. She was at the time of the suit living with the co-respondent. *Held*, that the respondent was not entitled to a decree for judicial separation with alimony. The Court has discretion, under s. 14 of the Act, to refuse a decree for divorce if the petitioner has been guilty of cruelty, although the cruelty may have been condoned. Ss. 13, 14 and 15 of the Indian Divorce Act commented on. GORDON *v.* GORDON AND SARAN . . . **3 B. L. R. O. C. 136**

1. ——— **s. 14—Cruelty**—*Pleading—Issue.* The cruelty must be specifically pleaded, and, if it is not, the Court will not allow the issue to be raised or evidence given of it. KELLY *v.* KELLY AND SAUNDERS . . . **3 B. L. R. Ap. 6**

2. ——— *Husband and wife—Charges against wife of adultery—Cruelty.* A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, and without reasonable or probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to a judicial separation. AUGUSTIN *v.* AUGUSTIN . . . **I. L. R. 4 All. 374**

3. **Condonation of adultery**—*Revival by wife's misconduct.* When a husband having received reasonably probable information of his wife's adultery, has, by continuing cohabitation, condoned the offence, subsequent misconduct of the wife tending to, though falling short of, adultery, revives the condoned adultery. PEREIRA *v* PEREIRA AND BOUNJOUR.
I. L. R. 5 Mad. 118

4. ——— **Conduct conducing to wife's adultery**—*Dissolution of marriage—Discretionary bar—Separation from wife without reasonable cause* A husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, merely because she had run him into debt. He did not write to her, or go to see her, or make her an allowance proportionate to his income, after he had done so. *Held*, upon a petition by the husband for dissolution of his marriage on the ground of his wife's adultery, such

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 14**—*contd.*

adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought. HOLLOWAY *v.* HOLLOWAY AND CAMPBELL . **I. L. R. 5 All. 71**

5. ——— *Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion—Drunkenness of wife—Leaving wife without provision for maintenance.* Evidence adduced at the hearing of a petition by a husband for the dissolution of his marriage with his wife showed that the petitioner had left his wife voluntarily on account of her drunkenness; that he had not maintained her or contributed to her support since so leaving her; that he had no reason for believing that his wife had committed adultery during the time he had lived with her; and that she had (if the evidence were believed) been leading an immoral life since the petitioner had so left her. The petition was dismissed, whereupon the petitioner appealed. *Held*, that the petitioner, having deserted his wife without just or reasonable cause, and without making any provision for her, had conduced to the adultery (if any had been committed), and the petition had been rightly dismissed. X *v.* X . . . **I. L. R. 22 Mad. 328**

6. ——— **Discretion of Court**—*Suit for dissolution of marriage—Adultery of petitioner during marriage.* The Courts in India will adopt, as a guide in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by s. 14 of the Indian Divorce Act, the principles laid down in the English decisions with regard to the corresponding section in the English Act (20 & 21 Vict., c. 85, s. 31). The discretion to be exercised under s. 14 of the Indian Divorce Act must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable, or that it has been more or less frequent. There must be special circumstances attending the commission of such adultery or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner. G—— *v.* G—— . . **8 Bom. O. C. 48**

7. ——— **Desertion.** In a suit by a wife for a dissolution of her marriage on the ground of her husband's adultery and desertion, the adultery was proved, and it was found that the wife, notwithstanding the gross misconduct of her husband, continued to live with him for some years, during which time she supported her husband and herself by her own earnings, he contributing nothing to her support; that eventually, under the pressure of pecuniary difficulties, brought about by her husband's extravagance and dissolute habits, they came to an arrangement by which she went to live with her friends and he resided at his mother's house, until they could again find means to provide a common house; that for two years previously to the separation, though they had lived together, no conjugal intercourse owing to the husband's misconduct had taken place between them; that he left his mother's house without telling his wife where he was going, and subsequently went to Madras where he had since resided. *Held*, in the Court below, following the case of *Fitzgerald* v. *Fitzgerald, L. R. 1 P. & D. 694*, that the separation having originally been by mutual consent, desertion could not take place until cohabitation had been resumed; desertion not being proved, the wife was only entitled to a decree for judicial separation. *Held*, on appeal, that the separation, not being brought about by the act of the wife, but by the husband's misconduct, distinguished the case from that of *Fitzgerald* v. *Fitzgerald*, and that, under the circumstances, the desertion was proved, and the petitioner was entitled to a decree for a dissolution of marriage. WOOD *v.* WOOD **I. L. R. 3 Calc. 485 : 1 C. L. R. 552**

8. ——— **Delay—Connivance.** Whilst on the one hand there is no absolute limitation in the case of a petition for dissolution of marriage, yet the first thing which the Court looks to when the charge of adultery is preferred is, whether there has been such delay as to lead to the conclusion that the petitioner had either connived at the adultery or was wholly indifferent to it; but any presumption arising from apparent delay may always be rebutted by an explanation of the circumstances. WILLIAMS *v.* WILLIAMS **I. L. R. 3 Calc. 688**

9. ——— *Suit for divorce for adultery—Delay in bringing suit—Evidence of connivance.* The marriage took place in 1860; the adultery commenced almost simultaneously with the marriage. The relief was sought in 1872. *Held*, that, as until 1869 there was no means of obtaining relief, the question was whether the delay since that time had been sufficiently accounted for. Petitioner's excuse was that he believed that after seven years he could contract a second marriage. *Held*, also, that the delay ought not to be construed into an insensibility to the injury sustained, and the other circumstances of the case rebutted the existence of indifference approaching to connivance. DEVASAGAYAM PITCHAMATHOO *v.* NAIYAGAM . . . . **7 Mad. 284**

10. **ss. 14, 3, 17—Decree based on admissions and without recording evidence**—*Collusion.* A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence. BAI KANKU *v.* SHIVA TOYA . . **I. L. R. 17 Bom. 624**

11. ——— **Evidence of marriage.** The bare assertion of a petitioner under Divorce Act, 1869, is not sufficient proof of her marriage to satisfy the requirements of that Act. RATHNAMMAL *v.* MANIKKAM . . **I. L. R. 16 Mad. 455**

12. ——— **Ignorance of Law**—*Marriage by petitioner before decree of District*

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **ss. 14, 3, 17**—*concld.*

Court confirmed by High Court—Discretion of Court to make decree absolute. After the District Court had passed a decree for dissolution of marriage, but before the confirmation of the decree by the High Court, the petitioner, in ignorance of the law, married another woman, but he ceased to cohabit with the woman on discovering his mistake. Under the circumstances the High Court made the decree absolute, holding that, under s. 14 of the Indian Divorce Act (IV of 1869), it had a discretion to do so. KYTE *v.* KYTE AND COOKE **I. L. R. 20 Bom. 362**

1. ——— **s. 16—Application to make decree nisi absolute**—*Service of decree nisi on respondent and co-respondent—Practice.* When an application was made by the petitioner to make absolute a rule *nisi* for dissolution of his marriage with the respondent, and it appeared he had tried in vain to discover the respondent and co-respondent so as to serve them with notice of the decree *nisi*, the Court made the decree absolute without such service. WARDEN *v.* WARDEN . **9 B. L. R. Ap. 39**

2. ——— *Application to make decree nisi absolute—Notice.* The parties against whom a decree is made in a suit for divorce against the wife cannot come in to show cause why a decree *nisi* should not be made absolute: therefore, in an application to make the decree absolute, it is immaterial that the respondent has had no notice of the application. WILLIS *v.* WILLIS **4 B. L. R. O. C. 52**

3. ——— *Practice—Decree absolute—Service of decree on respondent.* It is not necessary, in order that a decree *nisi* for dissolution of marriage may be made absolute, that the decree should be served upon the respondent. Hicks *v.* HICKS . . **I. L. R. 8 Calc. 756**

4. ——— *Divorce, suit for—Decree absolute—Notice of application to make decree absolute—Practice.* When a decree *nisi* has been served on the respondent in a divorce suit it is not necessary to give him notice of an application to make such decree absolute. GOMES *v.* GOMES **I. L. R. 18 Calc. 443**

5. ——— *Decree absolute, application for—Decree nisi, Non-service of—Notice of application—Practice.* In an application to have a decree *nisi* made absolute, where it appeared that the decree had been passed *ex parte*, after the original summons had been personally served on the respondent and that, owing to this, the petitioner being unable to discover the whereabouts of the respondent, who had left Calcutta immediately after the decree was passed, no copy of the decree had been served on him, or notice of the application given him, *Held*, that sufficient cause was shown for the decree being made absolute, notwithstanding it had not been served, or notice of the application given, and the decree was made aboslute accordingly. HUNTER *v.* HUNTER . **I. L. R. 18 Calc. 539**

DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 16**—*contd.*

6. ——— **Intervenor**—*Procedure after decree nisi on application by respondent for liberty to intervene.* A wife sued for dissolution of her marriage on the grounds of her husband's adultery and cruelty. The respondent did not appear or file an answer, and the case was heard *ex-parte*, and resulted in a decree *nisi* being passed. Subsequently, and before the decree was made absolute, the respondent applied for liberty to intervene under the provisions of cl. (*c*), s. 16 of the Divorce Act, the application being based on affidavits alleging, *inter alia*, collusion on the part of the petitioner. *Held*, following *King* v. *King*, *I. L. R. 6 Bom. 416*, that the respondent could not be allowed to intervene or be heard when the decree came on to be made absolute, but that the affidavits should be filed, and that notice should be given to the petitioner that the decree would not be made absolute until the matter set out in the affidavits as regarded the collusion had been cleared up. STEPHEN *v.* STEPHEN **I. L. R. 17 Calc. 570**

7. ——— *Intervenor—Right of third person to intervene—Procedure in case of intervening after decree nisi—Right to move for new trial—Practice—Procedure—Review—Civil Procedure Code, 1877, s. 623—Limitation Act, 1877, Art. 162—Motion to make absolute a decree nisi—Discretion of Court to refuse motion—Further enquiry ordered by Court.* A wife sued for dissolution of marriage on the grounds of her husband's adultery and cruelty. The respondent entered an appearance through a solicitor, but did not file any written statement, and did not appear at the hearing, and a decree was made for the petitioner on the 26th July 1881. On the 3rd October, *T*, who had acted as solicitor for the respondent, appeared as intervenor, and under s. 16 of the Divorce Act (IV of 1869) obtained a rule *nisi* calling on the petitioner to show cause why a new trial should not be had and all further proceedings under the decree *nisi* should not be stayed. The rule was obtained upon an affidavit of *T*, in which he stated that since the date of the decree *nisi* he had been informed by the respondent that the petitioner had been, prior to that date, guilty of adultery with a person whose name he mentioned; that he was informed by the respondent that the reason why he (the respondent) had not defended the suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children; that application had been made both to the Advocate General of Bombay and to the Government Solicitor that they should intervene as representing the Queen's Proctor in India, but that both had declined. The respondent also filed an affidavit corroborating the statements made in *T's* affidavit. In showng cause against the rule it was contended on behalf of the petitioner that under the Divorce Act (IV of 1869) the proper course for a third person wishing to intervene was to file an appearance and

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 16**—*concld.*

then to show cause on the motion to make absolute the decree *nisi*, and that the rule for a new trial was wrong in form. *Held*, that a new trial could not be granted, there being no provision in the Civil Procedure Code (Act X of 1877) for the granting of a new trial. The respondent himself could only have applied for a review of judgment under s.623, and, even if otherwise entitled to a review, the motion of the 23rd October 1881, regarded as an application for a review, was too late under cl. 162, Sch. II of the Limitation Act, XV of 1877. Assuming that a third person had the right to apply for a review of judgment, *T*'s application of 3rd October 1881 was also barred. *Held*, also, that under the Divorce Act (IV of 1869) a third person may show cause against a decree *nisi* being made absolute, but is not at liberty to institute proceedings, *e.g.* by obtaining a rule as was done in this case. *Held*, also, that *T*, who had been the solicitor to the respondent, and who was, in fact, acting at the instance of the respondent, was not entitled to intervene or to show cause against the decree being made absolute. A respondent has no right to show cause, and he cannot do indirectly through another what he is not permitted to do himself. Counsel on behalf of the petitioner subsequently moved to make the decree *nisi* absolute, and contended that the Court having held that *T* had no right to intervene or to show cause, the affidavits filed by him should be disregarded and taken off the file, and that no cause having been shown by any other person, the petitioner was entitled, under the provisions of s. 16 of the Divorce Act (IV of 1869), to have the decree made absolute. The Court, however, refused the motion, and adjourned the case, directing that the petitioner should attend personally on a day specified, in order that the matters alleged in the affidavits might be investigated. KING *v.* KING

I. L. R. 6 Bom. 416

——— **ss. 16, 17—Compromise**—*Suit for dissolution of marriage—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute.* In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court, through the Registrar of the Court of the Judicial Commissioner, a petition in which they expressed their intention of living together as man and wife, and asked the Court not to make the decree absolute. On the 2nd June the case came before the Court, when an order was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil and he prayed the Court not to make the decree *nisi* absolute. *Held* by EDGE, *C. J.*, and BRODHURST, *J.*, that the Court should accede to the prayer of the petition, and not make absolute the decree passed by the Judicial Commissioner of Oudh. Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect. *Held* by MAHMOOD, *J.*, that proceedings in a Divorce Court are *quasi*-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties. *Held*, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed, and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. *Lewis* v. *Lewis, 30 L. J. P. & M. 199*, referred to. CULLEY *v.* CULLEY . **I. L. R. 10 All. 559**

DIVORCE ACT (IV OF 1869)—*contd.*

——— **ss. 16, 17**—*concld.*

1. ——— **s. 17—Confirmation**—*Act XIV of 1859, s. 1, cl. 16.* Act XIV of 1859, s. 1, cl. 16, does not apply to divorce suits. A decree of a High Court confirming the decree by a District Judge for dissolution of marriage reversed, so far as it affected the co-respondent, and condemned him in costs. HAY *v.* GORDON

B. L. R. P. C. 301 : 18 W. R. 480
L. R. I. A. Sup. Vol. 106

2. ——— **and s. 20**—*Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation.* Under the Indian Divorce Act (IV of 1869), a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof. A *v.* B

I. L. R. 23 Bom. 460

3. ——— *Decree for nullity of marriage passed by a District Judge—Confirmation of decree by High Court—Period for Confirmation—Evidence Act I of 1872, ss. 41, 44.* S. 20 of the Indian Divorce Act, No. IV of 1869, does not make the proviso in s. 17 applicable to the confirmation by the High Court of decree of nullity of marriage made by a District Judge, and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. *A* v. *B, I. L. R. 23 Bom. 460*, dissented from. Assuming the proviso in s. 17 to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired, cannot on that ground be treated as made by court not competent to make it, within the meaning of ss. 41 and 44 of the Indian Evidence Act, 1872, and is therefore under s. 41 conclusive

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **ss. 17, 20**—*concld.*

proof that the marriage was null and void. CASTON *v.* CASTON . . . **I. L. R. 22 All. 270**

——— **ss. 18, 19 (2).**

See MARRIAGE . **I. L. R. 17 Calc. 324**

——— **s. 19—Prohibited degrees**—*Restitution of conjugal rights, Suit for—Marriage, Validity of—Roman Catholics—East Indians—Customary law—Deceased wife's sister, marriage with.* In a suit for restitution of conjugal rights, the parties were East Indians, and at the time of the marriage on 22nd July 1877 were domiciled in British India, resident within the limits of Calcutta, and members of the Roman Catholic religion. The defence to the suit was that a previous marriage had, on 6th December 1871, been performed between the respondent and the petitioner's sister, and the respondent prayed that the second marriage might be declared a nullity. The ceremony of 6th December 1871 had taken place while the petitioner's sister was on her death-bed and *in extremis*, and had been celebrated in accordance with the rights of the Roman Catholic Church, and it was held both by the original Court and on appeal to be a valid marriage. The first Court (CUNNINGHAM, *J.*) held that the second marriage was null and void on the ground that the parties were within the prohibited degrees. *Held* by the Full Bench, that the prohibited degrees mentioned in s. 19 of the Divorce Act do not necessarily mean the degrees prohibited by the law of England. All that was known in respect of the parties to the marriage being that they were Roman Catholic subjects with Portuguese names, and it not having been found whether they were of English or any other European descent, or of native or mixed parentage: *Held*, that the prohibited degrees for the parties to the marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belonged, that is to say, the law of the Roman Catholic Church as applied in this country. LOPEZ *v.* LOPEZ **I. L. R. 12 Calc. 706**

——— **ss. 19 and 53.**

See MARRIAGE . **I. L. R. 12 Calc. 706**

——— **ss. 22, et seq.—Judicial separation**—*Desertion by petitioner not a bar to a suit for judicial separation—Statutes 20 and 21 Vict., Cap. LXXXV. Held*, that desertion without reasonable excuse constitutes a bar to a suit for judicial separation. *Duplainy* v. *Duplainy, 6 L. T. 267*, followed. ARTHUR *v.* ARTHUR (1904).

I. L. R. 26 All. 553

1. ——— **s. 35—Cost of wife**—*Succession Act (X of 1865), s. 4.* In a suit by a husband for a divorce on the ground of his wife's adultery, an application was made that the petitioner should be directed to pay the respondent's costs. The marriage took place after the passing of the Succession Act, 1865, and it was contended that, as s. 4 of that Act did not allow the husband to acquire any interest in his wife's property, he would not be made to pay her costs; there was, however, no evidence before the Court that the wife had any separate property, and the application was granted. BROADHEAD *v.* BROADHEAD . **5 B. L. R. Ap. 9**

DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 35**—*contd.*

2. ——— *Payment of wife's costs.* On an application by the wife that a sum should be paid into Court to cover her costs of a suit for divorce in which she was respondent, the Court ordered the Registrar to estimate the probable expenses of the suit from the commencement to the date of final hearing: such sum was ordered to be paid into Court, the wife's proctor to have a lien on the sum to the extent of his costs. An application that the amount estimated should be paid out of Court to her was refused; but the Court granted an application that the respondent's costs incurred should be taxed, and the amount thereof be paid out of Court to her proctor. KELLY *v.* KELLY AND SAUNDERS . . . . **3 B. L. R. Ap. 5**

3. ——— *Suit for judicial separation—Return to cohabitation—Withdrawal of suit—Costs.* Where, in a suit by a wife against her husband, the attorney for the petitioner made an application on notice to the petitioner, the respondent, and the respondent's attorney, for an order that the suit be dismissed or withdrawn, and that the petitioner's costs be taxed and the amount thereof be paid to him by the respondent, and stated in his affidavit that he had instituted the suit under the instructions of the pettioner; that the parties had returned to cohabitation and the suit had been amicably settled; that the petitioner had since instructed him to withdraw the suit, and the respondent would pay the costs, for which purpose he had drawn a petition, which the respondent's attorneys would not agree to, the Court granted the application, so far as to direct that the costs of the petitioner's attorney, when taxed, should be paid by the respondent, but refused to make any order for the withdrawal or other final disposal of the suit, and ordered that the attorney should personally bear the costs of the application. P—— *v.* P——

9 B. L. R. Ap. 6

4. ——— ——— *Suit for judicial separation—Liability of husband for costs of wife—Succession Act (X of 1865), s. 4.* In a suit for judicial separation between persons subject to the Succession Act, the Court will not, unless under exceptional circumstances, order the husband to give security for his wife's costs. The principle upon which the Divorce Court in England acts, in requiring the husband, in a suit for judicial separation, to provide for his wife's costs, is based upon the absolute right which the law formerly gave the husband upon marriage to the whole of his wife's personal estate, and to the income of her real estate, leaving her destitute of all means to conduct her case; but this state of the law has been completely altered in India by s. 4 of the Succession Act, which prevents any

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 35**—*contd.*

person from acquiring, or losing, rights in respect of property by marriage. PROBY *v.* PROBY
I. L. R. 5 Calc. 357 : 5 C. L. R. 1

5. ——— *Costs of wife—Succession Act, 1865, s. 4—Married Woman's Property Act, 1874.*—A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit. *Proby* v. *Proby, I. L. R. 5 Calc. 357,* distinguished and observed upon. NATALL *v.* NATALL . . . **I. L. R. 9 Mad. 12**

6. ——— *Costs of suit by husband against wife for divorce—Deposit of costs—Stay of proceedings until costs paid—Poverty of husband.* In a suit brought for dissolution of a marriage solemnized in 1859 (the parties to such marriage being of Anglo-Indian domicile) the respondent, being possessed of no separate property of her own, applied to the Court for an order directing her husband to deposit in Court a sum sufficient to cover her probable costs of suit. The Court made an order directing the Registrar to estimate and certify the wife's probable costs of suit, and directed the husband to pay the sum so certified into Court. The husband, being a man of next to no means, failed to pay into Court the sum certified by the Registrar. *Held,* on an application by the wife to stay proceedings until such costs were paid, that it would be unreasonable to stay proceedings on account of the husband being unable to pay into Court that which he did not possess; but that, inasmuch as the affidavits filed by the parties were contradictory as to the means of the husband, the matter should be referred (if the parties so desired it) for an enquiry by an officer of the Court into the question of means. THOMSON *v.* THOMSON
I. L. R. 14 Calc. 580

7. ——— *Suit against wife—Costs of wife—Practice—Rules and regulations in divorce cases in England.* In a suit for a divorce instituted by a husband against his wife, the Court has a discretion to make the husband pay the wife's costs already incurred, and to give security for her future costs. Rule 158 (as amended, 14th July 1875) of the English Rules and Regulations in divorce cases, which govern the practice of the Court in England, ought, having regard to s. 7 of the Indian Divorce Act (IV of 1869), to govern the practice of Indian Courts. MAYHEW *v.* MAYHEW . . **I. L. R. 19 Bom. 293**

8. ——— *Suit against wife—Costs of wife—Practice.*—Unless special circumstances are made out, the husband will not be ordered to pay the wife's costs in a suit by the husband for dissolution of the marriage. *Proby* v. *Proby, I. L. R. 5 Calc. 357,* followed. THOMAS *v.* THOMAS . . **I. L. R. 23 Calc. 913**

YOUNG *v.* YOUNG . **I. L. R. 23 Calc. 910 note**

9. ——— *Withdrawal of petition for dissolution of marriage—Costs of petitioner, on what scale allowed—Divorce Act (IV of 1869), ss. 7 and 45.* The petitioner on the 2nd June 1896, presented her petition, in which she prayed for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. A commission was issued at her instance to examine witnesses in England on the charges of adultery and cruelty and the result of their evidence was that the petitioner was satisfied that the charges brought by her against her husband were wholly unfounded, and she, on the 2nd September 1897, applied for leave to withdraw her suit, and for payment of her costs by the respondent. She contended that her costs should be paid by him as between attorney and client. The respondent submitted he ought to pay costs as between party and party. *Held,* that the petitioner's costs, including costs of this application, be taxed as between party and party, it being open for the attorney for the wife to sue the husband for the rest of the costs. BUTT *v.* BUTT
I. L. R. 25 Calc. 222
2 C. W. N. 37

10. ——— **ss. 35, 36—Alimony pendente lite**—*Decree nisi for dissolution of marriage—Application to make decree absolute—Arrears of alimony.* A husband who had obtained a decree *nisi* for the dissolution of his marriage with his wife on the ground of her adultery applied to have such decree made absolute. At the time this application was made, arrears of alimony *pendente lite* were due to the wife. The Court (STRAIGHT, *J.*) refused to make such decree absolute until such arrears were paid. DE BRETTON *v.* DE BRETTON
I. L. R. 4 All. 295

11. ——— **ss. 35, 37**—*Alimony pendente lite—Permanent alimony—Practice.* Alimony *pendente lite* cannot be granted on an application made after a decree *nisi* in the suit has been passed, nor is it in the power of the Court to grant permanent alimony until an application is made to make such decree absolute. BENNETT *v.* BENNETT
I. L. R. 11 Calc. 354

12. ——— **Condonation**—*Revival—Co-respondent—Costs—Evidence of misconduct on a date after suit.* Where a husband has condoned adultery committed with one co-respondent, which has been revived by adultery committed with another co-respondent, a decree *nisi* will be granted against both co-respondents, but cos s will not be given against the co-respondent whose adultery was condoned. During the hearing of the suit, evidence was tendered to show misconduct with one co-respondent on a date after suit. *Held,* that such evidence was admissible. Costs as between attorney and client against first co-respondent were disallowed. YOUD *v.* YOUD (1900)
I. L. R. 28 Calc. 221

——— **s. 36—**

See DIVORCE . **I. L. R. 36 Calc. 108**

1. ——— **Alimony**—*Application for Alimony.* In an application for alimony it is

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DIVORCE ACT (IV OF 1869)—*contd.*

——— s. 36—*contd.*

sufficient to set out the fact of the marriage in the petition. An affidavit to that effect is unnecessary. In making the application, it is sufficient to show the Court that there has been a ceremony which might be a valid marriage; and therefore, where the petitioner was shown to be the respondent's deceased wife's sister, alimony was granted. CRUMP *v.* CRUMP **3 B. L. R. O. C. 101**

2. ——— *Alimony—Failure to pay—Attachment of respondent.* The respondent in a suit brought by a wife for the dissolution of her marriage was ordered to pay her R120 a month for alimony, and to pay into Court R2,000, the certified amount of her costs. On his failure to pay this sum, he was directed by a further order to pay into Court to the credit of the suit R300 monthly, out of which R120 were for alimony and the balance for costs. The respondent continued in receipt of his usual income, but failed to make the payment directed by the order of the Court, and subsequently filed his petition of insolvency; in his schedule he entered the Accountant General as a creditor for R2,000, but made no mention of his liability for alimony, and he had not filed any accounts. On an application by the petitioner for his attachment stating the above facts, the Court granted the attachment. GEORGE *v.* GEORGE **11 B. L. R. Ap. 2**

3. ——— *Alimony—Application for refund of alimony paid by mistake after the period during which it was payable had expired—Minor children—Divorce Act, s. 3, cl. (5).*—In 1882, a decree for dissolution of marriage between *E M* and *S M* was passed by the High Court on the wife's petition, and the husband was ordered to pay alimony for the wife and certain minor children of the marriage. On the 26th of August 1895, a petition was presented to the Court, on behalf of *E M* stating that *S M* had married again on the 3rd of August 1895; that one of the children in respect of whom alimony was payable had come of age on the 16th of April 1895; and that another of such children had married in April 1893, and it was prayed that certain sums which had been paid into Court after the respective dates mentioned above as alimony in respect of the three persons above referred to, might be refunded. *Held*, that *E M* was not entitled to any refund of alimony except as to sums, if any, paid into Court after the date of the filing of petition for refund and relating to a period subsequent to that date. *In the matter of the petition of* MORGAN . **I. L. R. 18 All. 238**

4. ——— **Alimony pendente lite**—*Practice.* Alimony *pendente lite* will be granted by the Court from the date of the service of citations, not from the date of the return. KELLY *v.* KELLY AND SAUNDERS .. **3 B. L. R. Ap. 4**

5. ——— *Alimony pendente lite—Wife living with co-respondent—Costs.*—In a suit by the husband for a divorce on the ground of his wife's adultery, where it is found that the wife is at the time of presenting the petition living with the co-respondent, or living apart from the husband, under such circumstances that she does not pledge his credit, an application by the wife for alimony *pendente lite* will be refused. *Semble*: The wife's costs, however, will be allowed. GORDON *v.* GORDON AND SARAN . . **3 B. L. R. Ap. 13**

6. ——— *Alimony pendente lite—Nett income—Allowable deductions—Change of circumstances.*—A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony was treated by consent on appeal as a petition for alimony. It appeared that the respondent was in receipt of a salary from Government which was subject to deductions, on account of the pension and annuity funds, that his circumstances were involved, and he had agreed with his creditors to discharge his liabilities by certain instalments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony. *Held*, that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his nett income. In this case, however, the Court, in the exercise of its discretion, took into consideration the expenses the respondent was put to in maintaining his children, and also the arrangement he had made for liquidating his debts. *Quære*: Whether the Court has power to increase or diminish an allotment of alimony made *pendente lite* on account of change of circumstances? R *v.* R **I. L. R. 14 Mad. 88**

7. ——— *Alimony pendente lite—Application for alimony after decree nisi*—The Court has jurisdiction to grant alimony *pendente lite* in a suit by the husband for dissolution of marriage on an application made by the wife after a decree *nisi* has been pronounced. THOMAS *v.* THOMAS **I. L. R. 23 Calc. 913**

8. ——— *Alimony pendente lite, application for—Denial of means by respondent—Reference to Registrar—Respondent ordered to attend Court for cross-examination as to his means.* On an application alleging means made by a petitioner, the wife, for alimony *pendente lite*, the respondent denied means. The Court refused to refer the matter to the Registrar to inquire and report, but ordered the respondent to attend Court for cross-examination as to his means. STEVENSON *v.* STEVENSON . . . **I. L. R. 26 Calc. 764**

9. ——— *Divorce—Security for wife's costs—Absence of means of wife—Alimony pendente lite—Reference to Registrar.*—In a suit for divorce between persons subject to the Indian Succession Act, the mere fact that the wife has no means of her own is not such a special circumstance

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 36**—*concld.*

as will justify the Court in ordering the husband to pay in advance or give security for his wife's general costs of the action. Case where, on an application by a respondent, a wife, for alimony *pendente lite*, the Court, instead of referring the matter to the Registrar to inquire and report as to the amount that ought to be allowed, directed that the husband should attend Court for examination as to his means, although in his affidavit he had admitted that he was possessed of means. JAHANS *v.* JAHANS (1902) . **6 C. W. N. 414**

1. ——— **s. 37—Permanent alimony.** Principle on which the Court will grant permanent alimony. ORD *v.* ORD . **5 B. L. R. Ap. 34**

2. ——— *Alimony, permanent.* In granting alimony to the wife, the Court should be very reluctant, even supposing it has the power, to tie up the property of the husband, and so convert alimony into an absolute interest in, and charge upon, his estate. Rule as to costs in *Jones* v. *Jones, L. R. 2 P. & D. 333*, followed. FOWLE *v.* FOWLE

I. L. R. 4 Calc. 260 3 C. L. R. 484

3. ——— *Adultery and desertion—Delay in bringing suit—Permanent alimony.* A wife brought a suit for a dissolution of marriage on the ground of her husband's adultery and desertion. The desertion took place twenty four years before the suit was brought, and ever since the husband had made his wife an allowance. Latterly his circumstances had considerably improved. The Court gave a decree for dissolution, but in determining the suitable amount of permanent alimony it took into consideration the circumstances of the husband at the time of the desertion, and refused to give the wife the full advantage of the present improved circumstances of the husband. SMYTH *v.* SMYTH . . **5 B. L. R. Ap. 153**

4. ——— *Alimony—Costs.* The Court has power, under s. 37 of Act IV of 1869, to order permanent alimony to the wife when a husband obtains a divorce on the ground of her adultery. KELLY *v.* KELLY AND SAUNDERS **5 B. L. R. 71**

——— **s. 40—Marriage settlement.** By an ante-nuptial settlement, *A* settled certain immoveable property in Calcutta to which he was absolutely entitled, upon himself for life, then upon his intended wife for life, and then upon the children of the marriage; but in the event of the intended wife dying in his lifetime without leaving issue, then upon himself, his heirs and assigns for ever. The marriage having been dissolved on the ground of the adultery of the wife before any children were born of the marriage, and the wife having subsequently married the co-respondent, by whom she had children and with whom she continued to live, the Court, under s. 40, Act IV of 1869, declared the settlement void as regarded the wife, and

DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 40**—*concld.*

directed the trustees to re-convey the property to *A* for an absolute estate. WOOD *v.* WOOD **14 B. L. R. Ap. 6**

1. ——— **s. 41—Custody of children**—*Suit by wife for judicial separation*—When a wife obtains a decree for judicial separation on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children. MACLEOD *v.* MACLEOD **6 B. L. R. 318**

2. ——— *Adultery of wife—Access to children.* When the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage. KELLY *v.* KELLY AND SAUNDERS **5 B. L. R. 71**

——— **s. 42.**

See CUSTODY OF CHILD. **I. L. R. 18 Calc. 473**

——— **s. 45.**

See ante, SS. 7, 11, AND 45.

See COSTS—SPECIAL CASES—DIVORCE. **I. L. R. 28 Calc. 84**

——— *Practice as to filing written statements.* In a suit for divorce on the ground of the wife's adultery, the co-respondent *suo motu* filed a written statement only four days before the hearing, and gave notice thereof only one day before. In an application to have it taken off the file as not being filed within time: *Held*, that there was nothing in the rules of Court, or the Code of Civil Procedure, by which the proceedings under the Act are to be regulated (s. 45), which makes it compulsory on a party who tenders a written statement of his own accord to present it before the first hearing of the suit. ABBOTT *v.* ABBOTT AND CRUMP . **4 B. L. R. O. C. 51**

——— **ss. 51 and 52**—*Evidence of adultery—Suit for dissolution of marriage on the ground of wife's adultery—Co-respondent.* The corespondent, in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery, was summoned by the petitioner in such suit as a witness. The Court did not explain to him before he was sworn, that it was not compulsory upon, but optional with, him to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him that he was bound to do so, and he accordingly answered such question answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. *Held*, under such circumstances, that the co-respondent had not "offered" to give evidence within the meaning of s. 51 of the Divorce Act, 1869, and

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DIVORCE ACT (IV OF 1869)—*contd.*

——— **ss. 51 and 52**—*concld.*

therefore his evidence was not admissible. DE BRETTON *v.* DE BRETTON . **I. L. R. 4 All. 49**

——— **s. 52**—*Witness.* The respondent in a suit for divorce under Act IV of 1869 can be examined as a witness. By the 52nd section she may be compelled to give evidence in the cases there supposed. In other cases her evidence is admissible if she offers herself as a witness. KELLY *v.* KELLY AND SAUNDERS . . . **3 B. L. R. Ap. 6**

——— **s. 53.**

See MARRIAGE . **I. L. R. 12 Calc. 706**

See RESTITUTION OF CONJUGAL RIGHTS. **I. L. R. 12 Calc. 706**

1. ——— **s. 55—Appeal from decree absolute**—*Limitation for such appeal —Limitation Act (XV of 1877), Art. 151.* Under the Divorce Act (IV of 1869), an appeal lies from a decree absolute, although the decree *nisi* has been left unchallenged. An appeal against a decree absolute must be filed within twenty days from the date of decree, that being the period prescribed for appeals from decrees made on the original side of the High Court under the law for the time being in force (see s. 55 of the Divorce Act, IV of 1869). A *v.* B **I. L. R. 22 Bom. 612**

2. ——— *Right of correspondent to be heard on appeal.* A husband brought a suit for divorce against his wife on the ground of her adultery ; the co-respondent appeared in that suit. The respondent appealed on the ground (*inter alia*) that on the evidence the Court ought to have held that the adultery was not proved. *Held,* that in that appeal the co-respondent was not entitled to be heard in opposition to the appeal. KELLY *v.* KELLY AND SAUNDERS . **5 B. L. R. 71**

3. ——— *Appeal by a wife from order made in suit for divorce—Wife's costs —Security for costs—Memorandum of appeal admitted without requiring securtiy.* In a suit for divorce brought by a wife against her husband, the wife obtained a decree *nisi* which ordered the respondent to pay a monthly sum by way of alimony to the wife, and also ordered him to pay the wife's costs of suit. Under this decree a sum of R3,369 was due to the wife on the 26th May 1882. The wife appealed from an order made in the suit, and the Court, under the circumstances, admitted the appeal without requiring from the appellant the usual security for costs. KING *v.* KING **I. L. R. 6 Bom. 487**

4. ——— *Appeal — Production of additional evidence in Appellate Court.* At the hearing of an appeal from a decree dismissing a suit by a wife for dissolution of marriage on the ground of her husband's incestuous adultery with her sister *M* and cruelty, the appellant produced certain letters written by the respondent and *M* to each other which showed that a criminal intimacy existed between them. These letters were not

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——— **s. 55**—*concld.*

written until after the appellant had filed the appeal. *Held,* that such letters were admissible and should be admitted, and that, having been brought to the Court's notice by the appellant's counsel, the Court was bound in the interests of justice to require their production in order to enable it to decide the appeal on its real merits. MORGAN *v.* MORGAN **I. L. R. 4 All. 306**

5. ——— *Appeal from decree for dissolution of marriage—Omission to appeal as to damages—Power of High Court to deal with whole case on appeal.* The decree in a suit for dissolution of marriage by the husband having awarded damages against the co-respondent, and he not having appealed on the question of damages, it was contended that the High Court could only deal with that part of the decree which dissolved the marriage. *Held,* under the Indian Divorce Act (IV of 1869), that the Court had the fullest power to deal with the case according as justice might require, including the award of damages by the Court below. *Ravenscroft* v. *Ravenscroft, L. R. 2 P. & M. 376,* followed. KYTE *v.* KYTE AND COOKE **I. L. R. 20 Bom. 362**

DOBAS.

See FISHERY . . **9 C. W. N. 934**

See JALKAR . **I. L. R. 33 Calc. 15**

DOCK.

See LAND RECLAIMED FROM THE SEA. **I. L. R. 1 Bom. 513**

DOCTOR.

——— **fees of—**

See RIGHT OF SUIT—DOCTOR'S FEES.

DOCUMENT.

See CIVIL PROCEDURE CODE, 1882, ss. 137-140.

See CRIMINAL PROCEDURE CODE, 1898. **I. L. R. 30 Bom. 421**
I. L. R. 32 Bom. 152
12 C. W. N. 312

See DEED.

See EVIDENCE . **I. L. R. 31 Calc. 871**

See INSPECTION OF DOCUMENTS.

See INSPECTION OF DOCUMENTS—CRIMINAL CASES.

See OFFENCES RELATING TO DOCUMENTS.

See ONUS OF PROOF—DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR.

See PARDANASHIN WOMEN—EXECUTION OF DOCUMENT BY. **I. L. R. 29 Calc. 749**

See PRACTICE—CIVIL CASES—INSPECTION AND PRODUCTION OF DOCUMENTS.

See PRODUCTION OF DOCUMENT.

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DOCUMENT—*contd.*

See PUBLIC DOCUMENT.

See RECITALS IN DOCUMENTS.

See SPECIFIC PERFORMANCE.
I. L. R. 27 All. 696

See STAMP ACT (II OF 1899).
I. L. R. 32 Bom. 509
I. L. R. 30 All. 271
I. L. R. 33 Bom. 426

See TRANSFER OF PROPERTY ACT, S. 59.
I. L. R. 33 Bom. 44

——— **admitted without objection in first Court.**

See EVIDENCE, ADMISSIBILITY OF.
I. L. R. 34 Calc. 1059

——— **alteration of—**

See CONTRACT — ALTERATION OF CONTRACTS—ALTERATION BY PARTY.

——— **ancient.**

See EVIDENCE ACT. S. 90—PROPER CUSTODY **I. L. R. 33 Calc. 511**

See LIMITATION ACT, 1877, S. 19—ACKNOWLEDGMENT OF DEBTS.
I. L. R. 26 Bom. 128

——— **construction of**

See CONTRACT . **I. L. R. 29 All. 151**

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . **I. L. R 25 All. 337**

See GIFT . . **I. L. R. 23 All. 309**

See HINDU LAW . **I. L. R. 29 All. 217**

See LANDLORD AND TENANT.
I. L. R. 29 All. 203

——— **construction of wajib-ul-arz.**

See HINDU LAW—WILL—CONSTRUCTION OF WILL—ADOPTION.
I. L. R. 24 All. 195

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ.

——— **explanation of, to pardanashin women.**

See PARDANASHIN WOMEN.
I. L. R. 28 Calc. 546

——— **filed with plaint, copy of.**

See STAMP ACT, 1879, SCH. I, ART. 22.
I. L. R. 15 Bom. 687

——— **loss of.**

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—LOST OR DESTROYED DOCUMENTS.

See ONUS OF PROOF—POSSESSION AND PROOF OF TITLE.
I. L. R. 18 Calc. 201
L. R. 17 I. A. 159

DOCUMENT—*contd.*

——— **person "claiming" under—**

See REGISTRATION ACT, 1877, S. 73.
I. L. R. 1 All. 318

——— **referring to will.**

See WILL—FORM OF WILL.
I. L. R. 4 Calc. 721

——— **suit for cancellation of.**

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS.

See LIMITATION ACT, 1877, Sch. II, ART. 91.

See REGISTRATION ACT, S. 50.
I. L. R. 20 Mad. 250

See RIGHT OF SUIT—DOCUMENTS, LOSS OR DESTRUCTION OF.
I. L. R. 20 Mad. 250

See VALUATION OF SUIT—SUITS—DEED, SUIT TO SET ASIDE.

——— **thirty years or more old.**

See EVIDENCE ACT (I OF 1872), S. 90.
I. L. R. 33 Calc. 571

See PAROL EVIDENCE.
I. L. R. 30 Mad. 386

——— **unstamped or unregistered.**

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED AND UNREGISTERED DOCUMENTS.

1. ——— **Alteration of**—*Material alteration—Material alteration in a written acknowledgment of a debt does not render it inoperative and ineffective—Limitation.* The rule of English law that a material alteration of a document by a party to it after its execution, without the consent of the other party, renders it void, is in force in India. This rule does not apply to documents which are not the foundation of a plaintiff's claim, but are merely evidence of a defendant's pre-existing liability. A written acknowledgment of his liability by a debtor, which is intended merely to save the bar of limitation and not to give a right of action, is not within the rule. ATMARAM *v.* UMEDRAM (1901)
I. L. R. 25 Bom. 616

2. ——— **Execution of**—*Signature, sufficiency of—Limitation Act (XV of 1877), Sch. II, Arts. 91 and 142—Suit to recover possession of immovable property — Cancellation of document not required to be set aside—Fraud.* A document is a nullity, where the executant of it signed only on the first page but did not sign on the other pages, having discovered that it was not in accordance with the terms previously agreed upon; such a document does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands. *Thoroughgood's Case, 2 Co. Rep. 9; Foster* v. *Mackinnon, L. R. 4 C. P. 704; Sham*

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DOCUMENT—*contd.*

Lall Mitra v. *Amarendra Nath Bose, I. L. R. 23 Calc. 460 ;* and *Raghubar Dyal Sahu* v. *Bhikya Lal Misser, I. L. R. 12 Calc. 69,* referred to. A suit to recover possession of immoveable property by setting aside a document on the ground of fraud, but which document does not require to be set aside or cancelled, is governed by Art. 142 and not by Art. 91, Sch. II, of the Limitation Act (XV of 1877). BANKU BEHARI SHAHA *v.* KRISHTO GOBINDO JOARDAR (1902)
I. L. R. 30 Calc. 433

3. ——— **Construction of document**—*Bombay Revenue Jurisdiction Act (X of 1876, as amended by Act XVI of 1877), s. 4—"Any other written grant"—Land free from assessment—Treaty—Civil Courts—Jurisdiction—Specific Relief Act (I of 1877), s. 42—Suit for declaration—Consequential relief—Amendment of plaint. Held,* that, generally speaking, the name given by the parties to a document is not conclusive as to its nature ; but the designation given by the parties themselves to it cannot be lost sight of, where the document is ambiguous and is susceptible of more than one construction as to its nature and scope. KALABHAI *v.* THE SECRETARY OF STATE FOR INDIA (1905)
I. L. R. 29 Bom. 19

4. ——— *Construction of wills—Repugnancy in words—Held,* that the rule that, if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision. ADVOCATE GENERAL OF BOMBAY *v.* HORMUSJI (1905)
I. L. R. 29 Bom. 375

5. ——— *Construction of document—Mortgage—Interest—Possession—Liability of mortgagee in posesssion to account for rents and profits.* The defendants were in possession of two shops under a mortgage from the plaintiffs. The plaintiffs sought to recover possession alleging that the mortgage debt had been satisfied by the rents and profits of the shops. The defendants pleaded, *inter alia,* that they were not liable under the terms of the mortgage to render an account of the rent realized. The material portion of the mortgage was in the following terms :—"We have borrowed nine hundred and fifty-one (951) rupees in cash of the Nana Shahi coin on account thereof and paid the same to Punno and Chunnu of Saugor. Interest shall be paid on this money at R1 per cent. Rupees 9-3-6 shall be paid for every month as the sum remaining after deduction, the promised time being five years. Should we pay the money within five years, we shall get the shops. We shall pay the expenses relating to the two shops. Should they be paid by the mortgagees, we shall pay them the same together with interest without any objection. *Held,* on a construction of the mortgage by STANLEY, *C. J.,* and BLAIR, *J.* (AIKMAN *J., dissentiente*) that, there being no contract to the contrary, the mortgagees, if they got possession, which they did, were bound to account for the rents and profits received by them whilst in such possession. There was no agreement that the mortgagees should take the rents and profits without accounting in addition to the stipulated interest. MADARI *v.* BALDEO PRASAD (1905) . . **I. L. R. 27 All. 351**

6. ——— *Construction of document—Deed of trust executed by King of Oudh providing pensions to members of family and support to religious endowment out of interest on Government Loan subscription—"Heirs"—"Descendants"—Suit for pension on death of pensioner—Succession to pension.* By a deed of trust dated 23rd November 1839, the King of Oudh appropriated the interest of a sum of 12 lakhs of rupees lent to the East India Company to the payment in prepetuity of pensions to certain persons named in the deed and to making provision for the support of a religious endowment. By Art. 1 (which stated that "the interest has been bestowed as a gift on the person named herein") trustees were named and appointed, and after them "their descendants," to manage the endowment, and a person was named, and his "descendants" after him, as the vakil of the pensioners through whom the pensions were to be paid. Art. 2 commended the pensioners and their "descendants" to the kindness and support of the Government. Art. 3 provided for the gift over of the pensions in the case of any of the pensioners, or after them any of their "heirs," dying without "heir." Art. 4 referred to the trustees of the endowment and their "descendants" and in case no "descendant" remained, provided for the appointment of one of the pensioners "in place of the person dying without heir." *Held* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioners of Oudh), that on the true construction of the deed the succession to a pension on the death of one of the pensioners was not limited to an heir, who was also a descendant, but the heir by Mahomedan law of the deceased pensioner (in this case the sister) was entitled to succeed. *Nawab Sultan Mariam Begam* v. *Nawab Sahib Mirza, L. R. 16 I. A. 175 : I. L. R. 17 Calc. 234,* distinguished. This construction did not introduce any inconsistency between Art. 2 and Arts. 1 and 3 of the deed, because the class of persons mentioned in Art. 2 could not be assumed to be precisely co-extensive with the class who could, under the latter articles, enjoy the pensions. Even if the words "heir" and "descendant" were used as convertible terms in portions of the deed relating to the devolution of the rights of the managers of the endowment and of the vakil of the pensioners, that would not affect the right of succession to the pensions, the descent of the trusteeships and the descent of the beneficial interest in the pensions being distinct things, and there being nothing to show they were intended to be governed by the same rules. NUR JAHAN BEGAM *v.* FAGHFUR MIRZA (1905)
I. L. R. 27 All. 383

7. ——— *Construction of document—Grant of zamindari by Government to member of a joint Hindu family and another—Joint tenants—Tenants-in-common.* In 1886 Government

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DOCUMENT—*concld.*

granted, as a reward for services rendered during the Mutiny, certain zamindari property to Jiwan Ram, Chatterpat, and Nem Ram, members of a joint Hindu family, and to one Puse, a stranger to the family. Puse shortly afterwards got his share separated. Nem Ram died leaving a widow, Musammat Phulla, and after his death Jiwan Ram, Chattarpat, and Phulla joined in selling a portion of the property, the subject of the grant of 1866, to one Nur Ahmad. *Held*, on a suit by certain members of the joint Hindu family, who were not parties to the sale, to recover from the representatives of the vendees the share in the property sold, which had been of Nem Ram in his life-time, that the grant of 1866 conveyed the property to the grantees as joint tenants, and not as tenants-in-common, and therefore the transfer impugned was valid. GOBIND PRASAD *v.* INAYAT KHAN (1905)
I. L. R. 27. All. 310

8. ——— ——— *Lease — Admissibility of evidence—Dismissal of suit on account of inadmissibility of document relied on by plaintiff.* The plaintiff sued to eject the defendants from a certain shop, basing his case upon a document put forward as a "kirayanamah" or lease. This document was ruled inadmissible for want of registration and plaintiff's suit thereupon dismissed. *Held*, that even if the document were inadmissible in evidence, its rejection did not involve the dismissal of the plaintiff's suit. The document in question was in the following terms :—"I take the shop on a rent of R50 per annum without any limit of time for ever. . . I shall pay the rent month by month rateably to Mohant Puran Das . . . On non-payment of rent a right to eject the tenants shall at once accrue to the owner of the shop." *Held*, that this was not a lease, nor even a counterpart of lease, but a mere statement of the intention of the writer, which might be given in evidence for what it was worth. BENI *v.* PURAN DAS (1905)
I. L. R. 27 All. 190

DOCUMENTARY EVIDENCE.

See APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT BELOW—UNSTAMPED DOCUMENTS.

See EVIDENCE—CIVIL CASES.

See EVIDENCE—CRIMINAL CASES.

See EVIDENCE —PERSIAN JUDGMENT.
I. L. R. 33 Calc. 1345

See EVIDENCE ACT, SS. 9, 11, (CL. 2), 17, 32, 33, 35, 42, 68, 74, 83, 86, AND 90.

See HINDU LAW—PARTITION.
I. L. R. 31 All. 412

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—EVIDENCE, MODE OF DEALING WITH—DOCUMENTARY EVIDENCE.

1. ——— **Specialty documents.** The law of British India as administered in the mofussil recognizes no distinction between specialties and

DOCUMENTARY EVIDENCE—*concld.*

other documents. TIRUMALA RAU SAHEB *v.* PINGARA SANKARA RAU . . **1 Mad. 312**

2. ——— **Rejection of, without looking into it.** A piece of documentary evidence should not be excluded merely on the ground that it is of little evidentiary value, and without being looked into by the Court. BRINDABAN CHANDER DAS *v.* ISHAQUDDIN CHOWDHRY (1909)
13 C. W. N. 550

DOGS, INJURY BY, WITHOUT PROVOCATION.

See DAMAGES, SUIT FOR.
I. L. R 36 Calc. 1021

DOMESTIC SERVANTS.

See ACT XIII OF 1859.
2 B. L. R. A. Cr. 32

See WILL—CONSTRUCTION.
8 B. L. R. 244
9 B. L. R. Ap. 4

DOMICILE.

See FOREIGN COURT, JUDGMENT OF.
I. L. R. 29 Calc. 509

See HINDU LAW—WIDOW—INTEREST IN ESTATE OF HUSBAND—BY INHERITANCE.
I. L. R. 24 Mad. 650

See HUSBAND AND WIFE.
I. L. R. 4 Calc. 140

See MARRIAGE . . **13 B. L. R. 109**
I. L. R 17 Calc. 324

See PRIVATE INTERNATIONAL LAW.
9 C. W. N. 394

See SUCCESSION ACT, S. 4.
I. L. R. 1 Calc. 412
I. L. R. 23 Calc. 506

See WILL—CONSTRUCTION **5 B. L. R. 1**

——— **foreign.**

See DIVORCE ACT (IV OF 1869), S. 7.
I. L. R. 29 Calc. 619

——— **in Native State.**

See LETTERS OF ADMINISTRATION.
I. L. R. 21 Calc. 911

1. ——— **Will**—*Probate, Application for—Service under E. I. Company—21 & 22 Vict., c. 106—Succession Act, ss. 5 and 10.* A Scotchman, who entered into the service of the East India Company, and continued in that service after the Act of 1858 (21 & 22 Vict., c. 106), transferring the Government of India from the East India Company to the Crown, was passed, died in the year 1878, leaving a holograph will which was not attested according to the provisions of the Succession Act, but which was admittedly good according to Scotch law. *Held*, upon an application for a declaration that the document was a good will and for a grant of probate, that the deceased had acquired an Anglo-Indian domicile, which he had not lost at the time of his death, notwithstanding the Act of 1858 and the

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DOMICILE—*concld.*

Succession Act, and therefore, the will not having been properly executed, probate was refused. *In the goods of* ELLIOTT . . **I. L. R. 4 Calc. 106**
2 C. L. R. 496

2. ———— **Domicile of widow**—*Capacity to make contract—Contract Act (IX of 1872), s. 11.* The domicile of a widow is the same as was her husband's unless she has changed it since his death. By the law of England, the question of the capacity of a person to enter into a contract is decided by the law of the person's domicile. This principle of English law is adopted by s. 11 of the Contract Act. KASHIBA *v.* SHRIPAT NARSHIV
I. L. R. 19 Bom. 697

3. ———— **Domicile of origin**—*Abandonment—Acquiring fresh domicile—Onus of proof—Immoveable property, rights over.* The person, who attacks a settlement on the ground of nationality, must show conclusively that the rationality of the settlor was foreign, and, if he succeeds in doing so, the onus is then shifted upon the person supporting the settlement to show that the settlor had acquired a fresh domicile in British India, and that his estate ought to be administered according to Indian law. All rights over immoveable property are governed by the law of the country where the property is situate, this principle being universally recognised. *De Nicols* v. *Curlier*, [*1900*] *A. C. 21; In re De Nicols*, [*1900*] *2 Ch. 410*, dissented from. A. L. BONNAUD *v.* EMILE CHARRIOL (1905) . . **I. L. R. 32 Calc. 631**

DOMINANT AND SERVIENT OWNER.

See EASEMENT . **I. L. R. 35 Calc. 889**

DONATIO MORTIS CAUSA.

See HINDU LAW—GIFT—GIFTS MORTIS CAUSÂ.

See MAHOMEDAN LAW—GIFT—VALIDITY.

See TRUST . **I. L. R. 17 Calc. 620**

DONOR, DEATH OF.

———— **registration of gift.**

See TRANSFER OF PROPERTY ACT, s. 123.
I. L. R. 33 Calc. 584

DOWER.

See LAND REGISTRATION ACT (BENGAL ACT VI OF 1876).
I. L. R. 35 Calc. 120

See MAHOMEDAN LAW.
I. L. R. 26 All. 28
I. L. R. 30 Bom. 122
I. L. R. 36 Calc. 184
I. L. R. 31. All. 243
13 C. W. N. 134, 152

See MAHOMEDAN LAW—DOWER.

See RESTITUTION OF CONJUGAL RIGHTS
I. L. R. 17 Calc. 670

See TRANSFER OF PROPERTY ACT, s. 54.
I. L. R. 26 All. 266

DOWER—*concld.*

———— **cause of action in respect of**—

See LIMITATION ACT, 1877, ARTS. 103, 104.

———— **deferred**—

See HINDU LAW—DWIRAGAMAN.
13 C. W. N. 994

———— **lien for**—

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES.
5 B. L. R. 570

———— **suit for**—

See JOINDER OF CAUSES OF ACTION.
I. L. R 18 All.. 256

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION.
I. L. R. 18 All. 400

———— **transfer of property, in lieu of**—

See MAHOMEDAN LAW **13 C. W. N. 160**

1. ———— **Armenian widow, right of to dower**—*Act XXIX of 1839 — Widow of Armenian—English law of inheritance.* The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance. *Per* GARTH, *C. J.*—Estates which have been held by British subjects under the name of free-hold estates of inheritance are, in all essential respects, the same estates which have been held in England under the same name. SARKIES *v.* PROSSUNNO MOYEE DOSSEE . . . **I. L. R. 6 Calc. 794**
8 C. L. R. 76

2. ———— **Mahomedan Law**—*Widow—Remission effective without acceptance by the heirs of husband—Money spent for the benefit of another—Obligation to repay.* According to Mahomedan Law a dower is a debt and its remission by a widow without acceptance by the heirs of the husband is effective. It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. *Ram Tuhul Singh* v. *Bisseswar Lall Sahoo, L. R. 2 I. A. 131*, and *Ruabon Steamship Company* v. *London Assurance*, [*1900*] *A. C. 6, 15*, referred to. JYANI BEGAM *v.* UMRAV BEGAM (1908)
I. L. R. 32 Bom. 612

DOWL FEHRIST.

See REGISTRATION ACT, 1877, s. 18.
I. L. R. 3 Calc. 323
1 C. L. R. 328

DRAINAGE ACT.

See BENGAL DRAINAGE ACT.

DRAINAGE CHARGES.

———— **recovery of**—

See BENGAL DRAINAGE ACT, SS. 42, 44.
11 C. W. N. 57

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DRAWBACK.

See BOMBAY MUNICIPAL ACT, 1888, s. 158.
I. L. R. 17 Bom. 394

DRAWER'S RIGHT OF ACTION.

See BILL OF EXCHANGE.
I. L. R. 36 Calc. 291

DRUGS.

See BOMBAY ABKARI ACT (BOM. ACT V OF 1878), SS. 3 (*9*) AND 62.
I. L. R. 27 Bom. 551

DUFFADAR, ARREST BY.

See RESCUE FROM LAWFUL CUSTODY.
I. L. R. 35 Calc. 361

DUMBNESS.

See CRIMINAL PROCEDURE CODE, SS. 340, 341 (1872, s. 186) . **7 N. W. 131**
19 W. R. C. R. 37
22 W. R. C. R. 35, 72
I. L. R. 27 Calc. 368
4 C. W. N. 421

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 18 Calc. 341

See HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—DEAFNESS AND DUMBNESS.

See HINDU LAW—STRIDHAN—DESCRIPTION AND DEVOLUTION OF STRIDHAN.
I. L. R. 18 Calc. 327

See PARTIES—DISABILITY TO SUE.
2 N. W. 414

DUNLOP'S PROCLAMATION.

See FOREST ACT, SS. 75 AND 76.
I. L. R. 18 Bom. 670
I. L. R. 23 Bom. 518

DURESS.

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY THE COURT.
I. L. R. 8 Mad. 304

See WILL—CONSTRUCTION.
I. L. R. 20 Calc. 15

1. ——— Suit to set aside deed—*Restoration of advantage accruing to plaintiff under deed.* Where one seeks to set aside a deed on account of duress, and such duress does not amount to personal duress, but merely to pressure by threats as of injury to property, the plaintiff must offer to restore any benefit accruing to him under the deed. GUTHRIE *v.* ABUL MAZAFFER
7 B. L. R. 630 : 15 W. R. P. C. 50
14 Moo. I. A. 53

2. ——— Contract made under threat of criminal offence. In a suit to enforce performance of a contract, where defendant pleads that the contract was executed under compulsion and intimidation, it is not sufficient for him to prove that it was executed from fear of a criminal complaint, as that might have been a righteous fear, and not

DURESS—*contd.*

simply a bodily fear imposed on him, in order to his doing that which he would not of his own free will have done. KOMULANATH SEIN *v.* BEHAREE KANT ROY . . . . **11 W. R. 314**

3. ——— Avoidance of contract—*Imprisonment.* An agent employed by the plaintiff to purchase timber for him in the Siamese territory, was imprisoned by an officer of the Siamese Government, on a charge brought against him by the defendant of stealing timber. In order to obtain his release, he contracted to purchase from the defendant, for the plaintiff, the timber which he was charged with stealing, at a price much beyond its value. *Held*, that the plaintiff might repudiate the contract as obtained under duress. In England the mere fact of imprisonment is not deemed sufficient to avoid an agreement made by one who is in lawful custody under the regular process of a Court of competent jurisdiction where no undue advantage is taken of the situation of the party making the agreement. But in a country in which there is no settled system of law or procedure and where the Judge is invested with arbitrary powers, imprisonment may in itself amount to duress such as will avoid a contract entered into by the prisoner with a view of obtaining release. MOUNG SHOAY ATT *v.* KO BYAW
I. L. R. 1 Calc. 330 : L. R. 3 I. A. 61

4. ——— Suit to set aside agreement made under threat of criminal prosecution for which there was no foundation—*Right of suit.* The plaintiff, under threat of a criminal prosecution for the offence of criminal trespass, executed an agreement in writing, which conferred certain rights on the defendant. There was no foundation for the charge made by the defendant. In a suit to set aside the agreement : *Held*, that the plaintiff was entitled to maintain the suit. PUDISHARY KRISHNEN *v.* KARAMPALLY KUNHUNNI KURUP . . . . . **7 Mad. 378**

5. ——— Assent to, and validity of, mutation of names in the Collectorate record of rights—*North-West Provinces Land Revenue Act (XIV of 1873), ss. 94, 97.* The question was, according to the judgment of the High Court, whether a change of names in the Collectorate record-of-rights represented a *bonâ fide* transfer by the plaintiff or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that on the evidence no intimidation had been proved, and that a suit to cancel this *dakhil kharij* and for a declaration of the proprietary right of the plaintiff, in whose name the villages stood before the mutation, had been rightly dismissed in the first Court. HAR LAL *v.* SARDAR
I. L. R. 11 All. 399

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DURESS—*concld.*

6. ———— **Award made on consent given under duress**—*Setting aside award.* An award of the late Rajah of Satara, founded upon a deed of consent, set aside on proof being given that the consent had been obtained by duress. SUBHANJI BIN BAHIRJI *v.* BHAVANRAV BIN ANANDRA
1 Bom. 173

7. ———— **Common assembly**—*Damage done to property.* Coercion to form a member of a common assembly by the members of which damage has been done to property, or coercion to bear a part in the damage, is no excuse from responsibility in a civil suit for compensation. GANESH SINGH *v.* RAM RAJA
3 B. L. R. P. C. 44 : 12 W. R. P. C. 38

DUTIES.

———— **liability of Government to—**

See MADRAS CITY MUNICIPAL ACT, s. 341.
I. L. R. 25 Mad. 457

———— **of Collectors and Settlement Officers—**

See REGULATION VII OF 1822, s. 9.
I. L. R. 31 All. 247

1. ———— **Levy of duties**—*Haq—Act XIX of 1844 (Levy of Haqs, Bombay), Act XX of 1859 (Town Duties, Bombay)—Abolition of duties and haqs. Held,* (TUCKER, *J., dissentiente*), that all town duties, taxes, and cesses of every kind on trades or professions (and not merely such of them as were then levied by Government) were abolished by Act XIX of 1844, and that a privilege enjoyed by a private person to levy certain fees on articles imported and exported through three of the city gates of Surat, and originating in an alienation by a former sovereign of a portion of the royal revenues derivable from that source, ceased from the date when the said Act came into operation; and consequently that the Court was not precluded from so deciding, because the provisions of Act XX of 1839 (empowering the Governor in Council of Bombay to prohibit the levy of haqs and fees) had not been complied with in forbidding the levy of the fees in question. *Per* COUCH, *J.*—The intention of the Legislature in 1844 appears, from the language used by it in Act XIX, and from the recital in Act XVI of that year, to have been the import on salt being about to be increased, that, instead of leaving haqs such as this to be abolished at different times under the Act of 1839, they were then to be entirely abolished. NASARVANJI PESTANJI *v.* DEPUTY COMMISSIONER OF CUSTOMS
2 Bom. 80 : 2nd Ed. 75

2. ———— **Toda garas haq**—*Alienation of haq—Bombay Act VII of 1863, ss. 27, 32. Held,* in the absence of proof on the part of Government to the contrary, that there is nothing in the nature of a toda garas payment which makes it incapable of alienation; and that without such proof Government receiving such sums cannot withhold payment of them from the alienee of the person to whom, but for the alienation, they would be paid. *Held,* also, that toda garas haq does not come within the meaning of the word "lands" as defined by s. 32 of Bombay Act VII of 1863, and that a suit having reference to the recovery of sums due out of such haq is not affected by s. 27 of that Act. COLLECTOR OF SURAT *v.* HEIRESS OF KUVARBIA
2 Bom. 253 : 2nd Ed. 239

3. ———— *Amount collected, payment of—Onus probandi. Held,* that whatever may be the right of the Government as to the collection of toda garas from villagers, where it does collect toda garas, it is bound to pay over the amount so collected to the original garashia, or his representatives if the haq is a perpetual one. Where Government has paid a toda garas haq to a garashia for a long and uninterrupted period of time, the onus of proving that the haq is not perpetual lies upon Government. UMED SANGJI *v.* COLLECTOR OF SURAT . . . . **7 Bom. A. C. 50**

DWELLING-HOUSE.

See HINDU LAW—FAMILY DWELLING-HOUSE.

———— **lands appurtenant to—**

See RENT, SUIT FOR **2 W. R, Act X, 9**
3 B. L. R. A. C. 65
3 B. L. R. Ap. 133

See REGISTRAR OF HIGH COURT—SALE BY REGISTRAR . **5 C. W. N. 593**

———— **father's right to eject son from—**

See HINDU LAW—SELF-ACQUISITION.
I. L. R. 33 Calc. 1119

DWIRAGAMAN.

See HINDU LAW—GIFT.
13 C. W. N. 994

DYING DECLARATION.

See EVIDENCE—CRIMINAL CASES—DYING DECLARATION.

1. ———— **Admissibility of.** A dying declaration recorded in the absence of the accused, and by a Magistrate other than the inquiring Magistrate, is not admissible until it is proved by the recording officer. PANCHU DAS *v.* EMPEROR (1907)
I. L. R. 34 Calc. 698

2. ———— *Admissibility of petition of complaint and examination of complainant on oath as dying declaration—Record and mode of proof of such statements—Evidence Act (I of 1872), ss. 32 cl. (1), and 91—Criminal Procedure Code (Act V of 1898), s. 200—Assault by several but fatal blow by some one of them—Liability of each accused—Penal Code (Act XLV of 1860), ss. 34, 326.* A petition of complaint and the examination of the complainant on oath under s. 200 of the Criminal Procedure Code are admissible as dying declarations under s. 32, cl. (1), of the Evidence Act, and are not, as such, matters required by law to be reduced to

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DYING DECLARATION—*concld.*

the form of a document within s. 91 of the Evidence Act so as to exclude parole evidence of their terms. The statements admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and not the record of it; and such oral statement must be proved by the person who recorded it or heard it made. *Empress* v. *Samiruddin, I. L. R. 8 Calc. 211,* and *King-Emperor* v. *Mathura Thakur, 6 C. W. N. 72,* followed. Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow: *Held,* that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under s. 326, and not under s. 302, of the Penal Code. GOURIDAS NAMASUDRA *v.* EMPEROR (1908) . . . **I. L. R. 36 Calc. 659**

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EASEMENT.

See ALTERNATIVE CLAIM. **I. L. R. 34 Calc. 51**

See CRIMINAL PROCEDURE CODE, s. 147 **13 C. W. N. 859**

See EASEMENTS ACT (X OF 1882).

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY.

See JURISDICTION OF CIVIL COURT—PRIVACY, INVASION OF. **I. L. R. 18 Mad. 163**

See LANDLORD AND TENANT. **9 C. W. N. 856**

See LICENSE . **I. L. R. 16 Mad. 280**

See LIMITATION ACT, 1877, s. 26 (1871, s. 27).

See MADRAS DISTRICT MUNICIPALITIES ACT . . **I. L. R. 29 Mad. 539**

See MAHOMEDAN LAW—PRE-EMPTION. **I. L. R. 31 All. 519**

See ONUS OF PROOF—EASEMENT. **I. L. R. 11 Calc. 52**
2 C. L. R. 555
15 W. R. 83
21 W. R. 140

See PRE-EMPTION . **I. I. R. 28 All. 127**

See PRESCRIPTION—EASEMENTS.

See RIGHT OF WAY.

See RIGHT TO USE OF WATER.

See RIGHT OF SUIT—CUSTOMARY RIGHTS. **I. L. R. 6 All. 497**
I. L. R. 23 Bom. 666

See RIGHT OF SUIT—EASEMENTS.

EASEMENT—*contd.*

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY. **I. L. R. 19 All. 153**

See RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY **I. L. R. 1 All. 557**

See TRANSFER OF PROPERTY ACT, 1882, s. 54 . . **I. L. R. 31 All. 612**

See USER.

——— **dispute concerning—**

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DISPUTES AS TO RIGHT OF WAY, WATER, ETC.

1. ——— **Kumki right in South Canara**—*Easements Act (V of 1882), s. 15—Possession, right to.* The kumki right of land holders in South Canara is not an easement, but a right exercised over Government waste by permission of Government, and it does not entitle the landholder to a decree for possession. NAGAPPA *v.* SUBBA . . . **I. L. R. 16 Mad. 304**

2. ——— **Profits à prendre**—*Easements Act (1882), s. 4—Criminal Procedure Code (1882), s. 147—Limitation Act (1877), s. 3.* The term "easements" includes *profits à prendre*; it has not been used by the Legislature of this country in the restricted sense in which it is used in English law so as to exclude *profits à prendre.* DUKHI MULLAH *v.* HALWAY . . . **I. L R. 23 Calc. 55**

3. ——— **Implied grant**—*Easement upon the severance of a heritage by its owner into two or more parts—Continuous and apparent easement—Right of way—Limitation Act (XV of 1877), s. 26.* Implication of a grant of easement upon the severance of a tenement may extend to a "way," but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred. *Charu Surnokar* v. *Dokouri Chunder Thakoor, I. L. R. 8 Calc. 956,* distinguished. RAM NARAIN SHAHA *v.* KAMALA KANTA SHAHA . **I. L. R. 26 Calc. 311**

4. ——— **Right of way**—*Right to use of drain—Mortgage of part of a house—Easement over the other part granted to the mortgagee by the mortgage-deed—Subsequent sale of parts of the house to different owners—Sale of mortgaged part subject to the mortgage paid off by purchaser—Purchaser's right to easement—License—Grant of right of way in a mortgage of part of property of mortgagor—Reservation by mortgagor of similar right in respect of other property not mortgaged by him—Vendor and purchaser—Sale of land subject to a mortgage giving a right of way. V, the* owner of a house, mortgaged the east portion of it to *M* in 1878. The mortgage-deed gave to the mortgagee the use of a certain privy situated in another part of the house and the right of way to it through a certain bol or passage. *V* subsequently sold the whole house to *C*, and *C* in 1880 mortgaged the western part of it to *R*, who got a decree, and in execution the part mortgaged to him

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EASEMENT—*contd.*

(*i. e.*, the west) was sold in 1885, and the defendant became the purchaser. In 1887, *C* sold the east part to the plaintiff, who paid off the mortgage to *M*, and obtained *M's* endorsement of payment on his deed of conveyance. The plaintiff subsequently sued to restrain the defendant from interfering with his use of the passage and of the privy. The defendant alleged that both were comprised in the property purchased by him at the Court sale in 1885, and that the right given by the mortgage of 1878 was merely a license to the mortgagee, and not an easement. *Held*, that the use of the passage and of the privy was a privilege granted by the very instrument which created the mortgage, and should be regarded as a privilege ancillary to the use of the part of the house mortgaged to *M* in 1879. The defendant's purchase in 1885 was subject to the eastment acquired by *M* (the mortgagee), and the plaintiff had purchased the mortgagee's interest in the house, which included her right by way of easement. The plaintiff was therefore entitled to the use of the privy and the passage. In the mortgage-deed of 1880, by which the west part of the house was mortgaged by *C* to *R*, the following clause was contained : "You are to have the use of the drain for passing water as it has continued from old times." *Held*, that these words should be understood as intended to reserve to *C* (the mortgagor), in respect of the part of the house not included in the mortgage, a right to use the drain similar to the right given to the mortgagee. The right so reserved by *C* was afterwards sold by *C* to the plaintiff along with the east part of the house in 1887, and the plaintiff was therefore entitled to the use of the drain. The plaintiff purchased a part of the house which the vendor had previously mortgaged to *M*. The mortgage-deed gave to the mortgagee the use of a certain privy and the right of going to it through a passage situated at the rear of the mortgaged part of the house. *M* was not a party to the conveyance to the plaintiff, but at the time of the purchase the plaintiff paid off *M*'s mortgage, and *M* signed a receipt for the mortgage-money endorsed on the conveyance. *Held*, that the plaintiff must be taken to have purchased the mortgagee's interest in the house, including the right by way of easement over the passage. VISHNU *v.* RANGO GANESH . . **I. L. R. 18 Bom. 382**

5. ——— **Easements of necessity**—*Light and air—Severance of tenements by grantor—Implied reservation of easement—Derogation of grant—Reservation of easements of necessity—Injunction—Easements Act (V of 1882), s. 13—Act VIII of 1891.* One *W* was the owner of a certain house behind which was a courtyard or chok half of which belonged to him and the other half to one *M* (the defendant's father), who owned a house close by. Two of the rear rooms of *W's* house abutted upon his portion of the chok, and had two doors opening out into the chok. In 1861, *W* sold (*inter alia*) his half of the chok to *M*. The conveyance contained no reservation of any rights over the chok. *W.* having died in 1875-76, his widow *J* sold his house

EASEMENT—*contd.*

to the plaintiff, and shortly afterwards the defendant (*M's* son) put up a hoarding on the chok which blocked up the above mentioned doors of the plaintiff's house, and obstructed the light and air passing through them into the said two rear rooms. The pliantiff sued for an injunction. *Held*, that, as *W* had made an absolute sale to *M* of his portion of the chok, expressly reciting that he had reserved no interest in the chok, it would, in the circumstances of this case, be contrary to equity and good conscience to hold that he impliedly reserved a right of light and air over the chok, so as to prevent *B* from building on the chok and thus obstructing the windows and doors in *W's* house overlooking the chok. *Held*, also, that the case was not governed by s. 13, cl. (c), of the Easements Acts (V of 1882 which was not extended to the Bombay Presidency till Act VIII of 1891 was passed. CHUNILAL MANCHARAM *v.* MANISHANKAR ATMARAM **I. L. R. 18 Bom. 616**

6. ——— **Light and air**—*Partition of a joint family house—Effect of partition by a consent decree where the decree does not reserve any right to the use of light and air—Implied grant of easement upon severance of tenement.* On partition of a family dwelling house by a consent decree, the plaintiff claimed a right to the passage of light and air necessary for the enjoyment of his share of the building in the way in which it was enjoyed at the time of the partition, though no such right was expressly reserved in the decree. The defence was that the principle of an implied grant of easement upon severance of the tenement should not be applied to the case, but that the rights of the parties should be determined solely with reference to the decree made in the partition suit. *Held*, that the principles of justice, equity, and good conscience should be applied to the case, and that the plaintiff was entitled to the right claimed, even in the absence of any express provision in the decree reserving such right. *Quære :* Whether the principle of an implied grant of easement in severance of tenements would apply in a case where the partition was effected by a decree of the Court in a contested suit and not by a consent of parties. KADAMBINI DEBI *v.* KALIKUMAR HALDAR **I. L. R. 26 Calc. 516**

7. ——— **Easement by custom**—*Water rights—Landlord and tenant.* The plaintiffs were lessees from a zamindar of his entire zamindari, and were in occupation of lands depending for irrigation on a tank into which a natural stream emptied itself. The defendants were tenants in the zamindari, holding (under a lease prior to that of the plaintiffs) land supplied with water by an irrigation channel from the stream. The defendants erected a dam across the stream when it was low, and this had the effect of diverting all the water into the irrigation channel suplying their land. In a suit for an injunction that the dam be removed, the lower Appellate Court upheld a plea by the defendants that the dam had been erected in exercise of an established customary right of easement. *Held*, that the

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EASEMENT—*contd.*

customary easement asserted by the defendants was not unreasonable, and was enforceable by them against the lessees of the zamindar. ORR *v.* RAMAN CHETTI . . . . **I. L. R. 18 Mad. 320**

8. ———— Right of entry on land in order to repair—*Dominant and servient owners, rights and liabilities of—Easements Act (V of 1882,) s. 24, ill. (a)—Railways Act (IX of 1890), s. 122.* The Rajnaggar Spinning and Weaving Company had a mill on one side of the Bombay, Baroda and Central India Railway line and a ginning factory on the other. To bring water from the mill to the factory, a pipe had been laid beneath the railway line, and brick reservoirs at each side to preserve the proper level of the water. Servants of the company, having entered on the railway premises to repair the pipe and reservoirs without having first obtained the permission of the Railway Company, were convicted by a Magistrate under s. 122 of the Railways Act (IX of 1890) of an unlawful entry upon a railway. It was proved that the repairs were necessary. *Held,* reversing the convictions and sentences, that, as the pipes and reservoir belonged to the Spinning and Weaving Company and were kept in repairs by them, they, as owners of the dominant tenement, had a right to enter on the premises of the Railway Company, the owners of the servient tenement, to effect any necessary repairs, and that the entry in question, being in the exercise of a right, could not be called unlawful. QUEEN-EMPRESS *v.* VANMALI **I. L. R. 22 Bom. 525**

9. ———— Right to discharge smoke over a neighbour's land—*Easements Act (V of 1882), s. 28, cl. (d)—Acquisition of right by prescription.* A right to discharge smoke over adjoining land can be acquired by prescription. The definition of easement in the Easements Act (V of 1882) is wide enough to embrace such an easement and s. 28, cl. (*d*), expressly recognizes the right to pollute air as a right capable of being acquired by prescription. KASHINATH DADA SHENIPI *v.* NARAYAN . . . **I. L. R. 22 Bom. 831**

10. ———— Right of growing rice plants in another's land to be afterwards transplanted to his own—*Easements Act (V of 1882), ss. 4 and 52—License.* A "license" as defined by s. 52 of the Indian Easements Act (V of 1882) is not, as in the case of an "easement" connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property. The plaintiff claimed and proved a prescriptive right of using certain land belonging to the defendant's mortgagor for a part of every year for raising rice plants to be afterwards transplanted to his own land. *Held,* that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license, but an easement

EASEMENT—*contd.*

of the nature of *profits à prendre.* SUNDRABAI *v.* JAYAWANT . . **I. L. R. 23 Bom. 397**

11. ———— Water-course—*Riparian owners, rights of—Jurisdiction of mamlatdar.* The law as to riparian owners is the same in India as in England, and is stated in illus. (*h*) of s. 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use. What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners is a question of fact which the Legislature has given a mamlatdar jurisdiction to decide. NARAYAN HARI DEVAL *v.* KESHAV SHIVRAM DEVAL **I. L. R. 23 Bom. 506**

12. ———— Tenant—*Easement, right of—Whether a tenant having permanent interest on the land could acquire such right in other land of his lessor—Osat taluqdar.* A tenant of land, even if having a permanent right of tenancy on the land, cannot acquire an easement by prescription in other land of his lessor. *Udit Singh* v. *Kashi Ram, I. L. R. 14 All. 185,* and *Jeenab Ali* v. *Allabuddin, 1 C. W. N. 151* referred to. NANI CHANDER CHAKERBUTTY *v.* BAIKANTA NATH BISWAS (1902) **I. L. R. 29 Calc. 363**

13. ———— Water—*Easements Act (V of 1882), ss. 7, 17—Right to raise crest level of calingula of tank—Submersion of lands thereby—Right of owner of such lands to protect them from submergence.* The defendants, being the holders of land situated below a tank, had, for a period of over twenty years, by means of a dam, raised the calingula of the tank higher than its crest level. The effect had been to collect an increased quantity of water in the tank, and from time to time, to throw it back on to the plaintiff's lands, which were situated above the tank. The plaintiffs' lands were thus submerged. On a suit being brought by plaintiffs against the defendants, for an order that the dam placed by defendants on the calingula should be removed so that water should be stored in the tank only to the height of the crest level of the calingula: *Held,* that the defendants had not exceeded the right which they had been proved to have acquired. *Semble:* That, notwithstanding that right, plaintiffs were entitled to take measures to save their lands from being submerged. NARAYANA REDDI *v.* VENKATA CHARIAR (1900) **I. L. R. 24 Mad. 202**

14. ———— Right to cornice—*Acquired by, after 12 years' enjoyment.* Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour, if it has been in existence for more than 12 years. *Mohanlal Jechand* v. *Amrahlal Bechardas, I. L. R. 3 Bom. 174,* referred

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EASEMENT—*contd.*

to and followed. RATHINAVELU MUDALIAR *v.* KOLANDAVELU PILLAI (1906) **I. L. R. 29 Mad. 511**

15. ———— **Right of irrigation**—*Easements Act (V of 1882), s. 13—Purchase of land by Government at sale for arrears of revenue—Assessment of raiyats in occupation.* In 1846, certain villages, forming part of a *zamindari*, were brought to sale by Government for arrears of revenue, and bought by Government. The wet lands in these villages were irrigated by a tank in another village, which also formed part of the *zamindari*, but was not included in the sale. The *zamindar* had himself occupied the wet lands prior to the sale, and continued his occupation thereafter, as a *raiyat* under Government. At a date prior to 1866, the *zamindar* sold his interest in the land, and, at the settlement which took place in that year, his vendee was assessed with a consolidated wet rate on it. In 1869, the Head Assistant Collector directed that the *zamindar* should be credited, yearly, with the difference between the consolidated wet rate and the dry rate. In doing this he acted without the authority of Government. In 1894, the Board of Revenue directed that no portion of the assessment should be credited to the *zamindar*, who now sued for a declaration of his right, and for the amount since collected. *Held*, that the *melvaram* right in the villages passed, by the sale, to the Government, who were entitled by easement, to have the lands irrigated from the then existing source of irrigation, and to levy wet assessment on them. *Also*, that the action of the Settlement Department in assessing the consolidated wet rate was right, and that plaintiff was not entitled to the difference between the wet and dry assessment. *Held*, also, that the action of the Head Assistant Collector was beyond the scope of his authority, and not binding on the Government, who had neither authorized nor ratified it. SURANANI VENKATA PAPAYYA RAU *v.* SECRETARY OF STATE FOR INDIA (1902) . . **I. L. R. 26 Mad. 51**

16. ———— *Easements Act (V of 1882), s. 13 (c)—Grant of village as inam—Right to water for irrigation—Area under wet cultivation at time of grant subsequently increased—Claim by inamdar for proportionate increase of water for irrigation.* In 1859 a village with land comprising 339 acres was granted by Government, as *inam*, to plaintiff. At the time of the grant, 106·09 acres were under wet cultivation, the remainder being *poramboke*, prior minor *inams* and land under dry cultivation. The area of land under wet cultivation was subsequently increased, and plaintiff claimed to be entitled to water for the irrigation of this increased area without paying assessment thereon, and, in 1870, the Collector of the district permitted that increase. Plaintiff had now been assessed in respect of the increased area, and brought this suit for a declaration of his right and for a refund of the money paid by him under protest. *Held*, that plaintiff was entitled, under s. 13 (c) of the Easements Act, to irrigate 106·09 acres, and no more. *Also*, that the action of the Collector in 1870 was unauthorized and had not been subsequently ratified by Government, and was not binding on Government. CHIDAMBARA RAO *v.* SECRETARY OF STATE FOR INDIA (1902) **I. L. R. 26 Mad. 66**

17. ———— *Customary right—Use of water and water-course—Riparian rights—Irrigation—Continuous use—Interruption—Unreasonable rights—Nuisance.* An easement which is not a customary right need not be reasonable. An easement may be established of the right to cause river-water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation, by means of embankments erected on the dominant tenement. In establishing such easement, it is immaterial whether the exercise of the right is continuous, provided it has been exercised for the statutory period, during seasons of drought, when it could be taken advantage of. *Cooper* v. *Barbar, 3 Taunt. 99; Whalley* v. *Lancashire and Yorkshire Railway Company, L. R. 13 Q. B. D. 131;* and *Rylands* v. *Fletcher, 3 H. L. 330*, distinguished. *Hollins* v. *Verney, L. R. 13 Q. B. D. 304*, doubted. BUDHU MANDAL *v.* MALIAT MANDAL (1903) **I. L. R. 30 Calc 1077**

18. ———— **Ownership of soil**—*Encroachment by protrusion of beams—Mandatory injunction.* Plaintiff's beams overhung defendant's soil and defendant erected a building, which overhung those beams. A question having arisen as to whether the beams gave the plaintiff a right to the column of air above them: *Held*, that the defendant, being the owner of the soil, was entitled *primâ facie* to all above it and the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves. RANCHOD SHAMJI *v.* ABDULABHAI MITHABHAI (1904) . . **I. L. R. 28 Bom. 428**

19. ———— **User of water**—*Modes of drawing water at different times—Land in occupation of tenant.* The user for 20 years of the water of a tank drawn for irrigating an adjacent land, gives the owner of the land a right of easement, although the modes of drawing the water were different within that period, and the owner of the land has a right to sue, even if the land be in the occupation of his tenant. *Hollins* v. *Verney, L. R. 13 Q. B. 304*, distinguished. KRISTA DAS CHOWDRY *v.* JOY NARAIN PANJA (1904) . . . **8 C. W. N. 158**

20. ———— **Rain-water**—*Prescriptive right for passing surplus rain-water—Defined channel.* In order to give the owner of land a prescriptive right for passing the surplus rain-water of his land over another person's land, it must be proved that the water passed through a defined channel and not in various directions through the servient tenement. BIDHU BHUSAN PALIT *v.* BENY MADHUB MAZUMDAR (1904) . . . . **8 C. W. N. 244**

21. ———— **Right of way**—*User as of right—Onus—Limitation Act (XV of 1877), s. 26.*

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EASEMENT—*contd.*

In a suit to establish a right of way, the propriety of the English rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case, but also of each particular country, regard being had to the habits of the people of that country. It would not be right to draw here the same inference from user that would be proper and legitimate in a case arising in England. Under s. 26 of the Limitation Act the onus is upon the plaintiff to prove that the user was as of right. KHODA BUX *v.* SHAIKH TAZADDIN (1904) . . . . . **8 C. W. N. 359**

22. ——— **Right of pasturage**—*Limitation Act (XV of 1877)—Right of pasturage over landlord's lands, claimed by tenant—Enjoyment from time immemorial proved—Presumption of legal origin—Right not in gross—Landlord's right to cultivate and improve lands not affected—Application of doctrines of English law in India—Cultivators—Indigo concern—Zamindars—Waste lands—Decree, form of.* The plaintiffs, resident cultivators of villages belonging to the defendants, the proprietors of an indigo concern, claimed a right of free pasturage over the waste lands of the villages, and the Subordinate Judge made a decree in accordance with the finding of the two lower Courts that the plaintiffs had enjoyed the right without interruption from time immemorial. The High Court, in second appeal, differing as to the nature of the right and the character in which it was claimed, set aside the decree and made an order of remand for the case to be decided in accordance with their remarks. On appeal the Judicial Committee discharged the order of remand as unnecessary, and restored the decree of the Subordinate Judge with the addition of a clause that the decree should not prevent the defendants or their successors in title from cultivating or executing improvements upon their waste lands, so long as sufficient pasturage was left for the plaintiffs. *Held* (agreeing with the judgment of the High Court), that the right claimed was not a right in gross. BHOLA NATH NUNDI *v.* MIDNAPORE ZAMINDARI CO. (1904) . . **I. L. R. 31 Calc. 503**
s.c. 8 C. W. N. 425
L. R. 31 I. A. 75

23. ——— **Light and air**—*Obstruction—Injunction—Test of actionable obstruction—Nuisance.* To constitute an actionable obstruction of ancient lights and unrestricted flow of air, it is not enough that the light is less than before and the plaintiff enjoys less flow of air. The test is whether the obstruction complained of is a nuisance. An injunction was granted, where it was found that a wall built by the defendant on his own land would, having regard to its proximity to plaintiffs' godown, cause such substantial privation of light and impede the flow of air to such an extent as would prevent the plaintiffs from carrying on therein their jute-business as beneficially as before. *Colls* v. *Home and Colonial Stores [1904] A. C. 179,* followed. ANDERSON *v.* HARDUT ROY CHAMARIA (1905) . . . . **9 C. W. N. 543**

EASEMENT—*contd.*

24. ——— **Right of privacy**—*Defendant not allowed to give himself increased facilities for overlooking plaintiff's zenana. Held,* that the fact that the plaintiffs' zenana house might be to some extent overlooked by persons standing on the roof of the defendants' house was no justification for the defendants opening fresh doors or windows in the wall of their upper storey looking towards the plaintiffs' house, whereby the plaintiffs' house might be overlooked without the person inspecting it being visible to the occupants of that house. *Gokal Prasad* v. *Radho, I. L. R. 10 All. 358,* referred to. ABDUL RAHMAN *v.* BHAGWAN DAS (1907) **I. L. R. 29 All. 582**

25. ——— **Right to unobstructed view of shop.** *Held,* that no action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers-by formerly had of the shop. *Smith* v. *Owen, 35 L. J. Ch. 317,* and *Butt* v. *Imperial Gas Company, L. R. 2 Ch. 158,* followed. GOPI NATH *v.* MUNNO (1906) **I. L. R. 29 All. 22**

26. ——— **Permanent right of occupation as tenant**—*Tenant—Easements Act (V of 1882), s. 60—Landlord and tenant—Occupation of building site in abadi—Erection of permanent building—Suit for ejectment.* The defendants were found on the evidence to be tenants-at-will of the plaintiff of land in the abadi, the land having been allotted to their ancestors on condition of their rendering service as patwaris. The defendants had ceased to perform the duties of patwaris, but still occupied the land, and had built houses thereon of a permanent character. *Held,* on suit by the zamindar to eject the defendants, who had denied the zamindar's title, that the principles laid down in *Beni Ram* v. *Kundan Lal, I. L. R. 21 All. 496,* applied, and that there was no such conduct on the part of the zamindar as would justify the inference that she had contracted that the right of tenancy under which the defendants originally obtained possession of the land should be changed into a permanent right of occupation; neither could the defendants pray in aid s. 60 of the Indian Easements Act, 1882. *Held,* also, that the acquisition pending the suit by one of the defendants of a share in the village in which the land in suit was situate, did not give the defendants any title to retain possession of the site in the abadi from which the plaintiff was suing to eject them. BUDH SINGH *v.* PARBATI (1907) **I. L. R. 29 All. 652**

27. ——— **Ancient lights, obstruction to**—*Infringement—Nuisance—Acquiescence—Decree for damages—Mandatory injunction.* An obstruction to light and air must amount to a nuisance, to be an actionable infringement. Where the whole of the direct light, which formerly came to the plaintiff's building, was taken away by the defendant's new building, it is no defence that the amount of the reflected

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EASEMENT—*concld.*

light, which now comes to the plaintiffs' premises, is sufficient for the ordinary user thereof. Where there has been such a substantial dimunition of light as to amount to a nuisance, evidence that the plaintiff's office has more light left than many other offices in Calcutta or that the light coming to the plaintiff's premises is sufficint for business purposes, or that the plaintiff could by making internal alterations improve the light coming thereto, is not relevant. *Colls* v. *Home and Colonial Stores, Limited, [1904] A. C. 179,* followed. Inasmuch as the plaintiff was shown the plans of the proposed new building in May 1907 and no proceedings were instituted, until the 27th September 1907, when the defendant's building had reached a height of 30 ft., and as on that date permission was given to the defendant to go on building at his own risk, and the defendant had nearly completed his building at a very large cost by the date of hearing of this suit in January 1908 when the building had reached a height of 70 ft., and as the plaintiff's building was a small old-fashioned house, which, in the ordinary course, would in a few years be pulled down and rebuilt. *Held,* that the proper remedy would be a decree for damages and not a mandatory injunction to demolish the defendant's new building. ANATH NATH DEB *v.* GALSTAUN (1908) . . . **I. L. R. 35 Calc. 661**

28. ——— *Ancient lights—Injunction to restrain defendant from interfering with ancient lights—Quia timet action, necessary ingredients for.* There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will, if it comes, be very substantial. *Fletcher* v. *Bealey L. R. 28 Ch. D. 688,* followed. GANGABAI *v.* PURSHOTAM (1907) **I. L. R. 32 Bom. 146**

29. ——— **Release of easement**—*Non-user—Extinguishment—Transfer—Dominant and servient owner—Alienation—Civil Procedure Code (Act XIV of 1882), s. 276.* An easement can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner, and if expressly released, it would amount to an alienation. The transfer of an easement is an alienation within the meaning of s. 276 of the Code. Mere non-user is not an implied release of an easement. KRISTODHONE MITTER *v.* NANDARANI DASSEE (1908) **I. L. R. 35 Calc. 889** **s.c. 12 C. W. N. 969**

30. ——— **Musical festival.** No easement to hold something in the nature of a musical festival on a plot of ground can properly exist. MOHINI MOHAN ADHIKARY *v.* KASHINATH ROY CHOWDHRY (1909) . **I. L. R. 36 Calc. 615**

EASEMENTS ACT (V OF 1882).

See EASEMENT.

See PRESCRIPTION—EASEMENTS.

EASEMENTS ACT (V OF 1882)—*contd.*

——— **s. 4.**

See CUSTOM . **I. L. R. 16 All. 178** **I. L. R. 17 All. 87**

1. ——— **Right to discharge water**—*Transfer of Property Act (IV of 1882), s. 54—Document creating an easement—Registration—Transfer of ownership—Right to discharge water. Held,* that an agreement by which the owner of a house undertook to permit the owner of an adjoining house, when he built a second storey, which was in contemplation to discharge rain water and also water used for daily household purposes on to the premises of the former, was a grant of an easement within the meaning of s. 4 of the Easement Act, 1882, and did not require registration, not being a transfer of ownership as contemplated by s. 54 of the Transfer of Property Act, 1882. *Krishna* v. *Rayappa Shanbhaga, 4 Mad. H. C. Rep. 98,* referred to. BHAGWAN SAHAI *v.* NARSINGH SAHAI (1909) . . . . **I. L. R. 31 All. 612.**

2. ——— **Right of privacy**—*Suit by occupier of house.* Not only the owner, but the lessee or other person in lawful possession of premises may maintain an action if his right of privacy is interfered with. *Gokal Prasad* v. *Radho, I. L. R. 10 All. 358,* referred to. KUNDAN *v.* BIDHI CHAND (1906) . **I. L. R. 29 All. 64.**

3. ——— **Right to take water**—*Right to take water through another's land when sold by Government.* A right to take water through another person's land, whenever Government should sell such water is a right of easement within s. 4 of the Easement Act. It will make no difference that water was not taken for several years, because Government refused to sell or because there was no water in the source of irrigation. TIRUVENKATACHAR *v.* DESIKACHAR (1908) **I. L. R. 31 Mad. 532**

——— **ss. 6, 7 and 17.**

See RIGHT OF WAY **I. L. R. 15 All. 270**

See RIGHT TO USE OF WATER. **I. L. R. 11 Mad. 16**

——— **s. 7, ills. (a) and (i)**—*Right of proprietor on higher level under s. 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a)—District Municipalities Act (Madras Act IV of 1884), ss. 4-B (1), (b), 4-B (3), (b), 21, 261—Supersession of a municipal body under s. 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction.* The "supersession" of a Municipal Council under s. *4-B (1) (b)* of Madras Act IV of 1884 is only a suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under s. *4-B (1) (a).* The "reconstitution" of such a Council under s. *4-B (3) (b)* is the revival of the old corporation and not the creation of a fresh one, and all the rights and liabilities of the superseded Council will devolve on

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EASEMENTS ACT (V OF 1882)—*contd.*

——— s. 7—*concld.*

the Council so reconstituted as its rightful successor. The notice required by s. 261 of the District Municipalities Act is not necessary when the suit is for an injunction. The right of the owner of higher land under s. 7, illustration (*i*), of the Easements Act, *i.e.*, that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under s. 7, illustration (*a*), of the Act. The owner of the lower land cannot complain of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land. *Smith* v. *Kenrick, 7 C. B. 515,* referred to. *Rylands* v. *Fletcher, L. R. 3 H. L. 338,* referred to. MAHAMAHOPADYAYA RANGACHARIAR *v.* MUNICIPAL COUNCIL OF KUMBAKONAM (1906)

I. L. R. 29 Mad. 539

——— s. 7 (2) (*a*) and s. 7, ill. (*h*).

See "WATER" . **I. L. R. 32 Mad. 141**

——— s. 7, ill. (J)—Riparian owner—*Stream—Usufruct—Right to use and consume water without material injury to other like owners.* With respect to riparian owners, the law is that each such owner has a right to the usufruct of the stream, which passes through his land. The right is not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. *Embrey* v. *Owen, 6 Exch. 353,* followed. S. 7, illustration (*J*), of the Easements Act (V of 1882) shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners. DINKAR *v.* NARAYAN (1905) . . . . **I. L. R. 29 Bom. 357**

——— ss. 7 and 17.

See EASEMENT . **I. L. R. 24 Mad. 202**

——— s. 13.

See EASEMENT **I. L. R. 26 Mad. 51, 66**

——— s. 13, cls. (e), (f)—Easement of necessity—*No easement on the ground of convenience, when there is other means of access—Evidence Act (I of 1872), s. 92—Oral contemporaneous agreement cannot be set up to add to a written contract. Held,* that if *A* has a means of access to his property without going over *B*'s land, *A* cannot claim a right of way over *B*'s land on the ground that it is the most convenient means of access. The law under s. 13, cl. (*e*) of the Easements Act is the same as the law in England. *Wutzler* v. *Sharpe, I. L. R. 15 All. 270, 281,* followed. *Esubai*

EASEMENTS ACT (V OF 1882)—*contd.*

——— s. 13—*concld.*

v. *Damodar Ishvardas, I. L. R. 16 Bom. 552, 559,* not followed. *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap, I. L. R. 19 Bom. 797,* not followed. To sustain a claim under s. 13, cl. (*f*) of the Easements Act, the easement claimed must be apparent and continuous. A contract in writing cannot be added to by a contemporaneous oral agreement. KRISHNAMARAZU *v.* MARRAJU (1905).

I. L. R. 28 Mad. 495

——— ss. 15, 28 (c)—Light and air—*Prescriptive right to light and air—Infringement of right—Actual damage.* Where a plaintiff is claiming relief upon the ground that his prescriptive right to the passage of light and air to a certain window has been interfered with, it is enough to show that the right has in fact been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby. *Colls* v. *Home and Colonial Stores, Ld., [1904] A. C. 179,* and *Kine* v. *Jolly, [1905] 1 Ch. 480,* not applied. *Nandkishor Balgovan* v. *Bhagubhai Pranvalabhdas, I. L. R. 8 Bom. 95,* referred to. KUNNI LAL *v.* KUNDAN BIBI (1907)

I. L. R. 29 All. 571

——— s. 18.

See CUSTOM . **I. L. R. 16 All. 178**
I. L. R. 17 All. 87

——— s. 23.

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR . **I. L. R. 26 Bom. 374**

——— s. 28, cl. (c)—Physical comfort—*Disturbance of easements—Meaning of disturbance—Injunction to prevent disturbance—Light and Air—Substantial damage.* The Indian Easements Act is not merely prescriptive; it defines the law relating to easements and thus differs from the English Act in its ambit. S. 28, clause (c) of the Act provides that the extent of a prescriptive right to the passage of light and air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used. *Per* CURIAM—"In any case I see no reason for withholding from 'disturbance' its legal sense of an illegal obstruction, and, for the purpose of Chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore, I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiff's first contention fails." To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort. The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a

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EASEMENTS ACT (V OF 1882)—*concld.*

——— **s. 28**—*concld.*

test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how these conditions came into being or when they may cease, it is a present fact uninfluenced by past history or future fate. Therefore, for the purpose of applying the test of the plaintiff's physical comfort, we must look at the state of their property as it is not as it was, or as it may be. FRAMJI SHAPURJI *v.* FRAMJI EDULJI (1905) . **I. L. R. 30 Bom. 319**

——— **ss. 52, 56.**

See LICENSE . **I. L. R. 16 Mad. 280**
I. L. R. 23 Bom. 397

——— **s. 60.**

See EASEMENT . **I. L. R. 29 All. 652**
See LANDLORD AND TENANT.
I. L. R. 29 All. 133

1. s. 60 (b)—Thatched house—*License—Revocation—Work of permanent character.* A *kachcha* thatched house may be "a work of a permanent character" within the meaning of s. 60 (*b*) of the Indian Easements Act, 1882, although the thatch of the house is renewed from time to time. *Winter* v. *Brokwell, 8 East 308*, referred to. NASIR-UL-ZAMAN KHAN *v.* AZIM-ULLAH (1906) . **I. L. R. 28 All. 741**

2. ——— Transfer of non-transferable holding—*Ejectment—Abandonment—Sale.* GHOSE, *C. J.*—Where a tenant of a non-transferable holding sold his holding: *Held*, in a suit by the landlord for recovery of possession from the transferee, that if the transaction of sale was not meant to be an operative one, the title to the property still continued with the tenant. That the true question was whether there was an absolute abandonment of the holding by the tenant such as would entitle the landlord to treat the purchaser as a trespasser. If the defendant was holding possession on behalf of the tenant he could not be evicted. MATHUR MANDAL *v.* GANGA CHARAN GOPE GHOSE (1906)
I. L. R. 33 Calc. 1219
s.c. 10 C. W. N. 1033

——— **ss. 60, 61.**

See WASTE LAND . **I. L. R. 8 All. 69**

EAST INDIA COMPANY.

See SECRETARY OF STATE.
I. L. R. 28 Bom. 314

——— **service under**—

See DOMICILE . **I. L. R. 4 Calc. 106**

ECCLESIASTICAL TRUST.

——— **Right of officiating priest to church property**—*Right of permanent incumbent.* A person temporarily officiating as priest has no right or title to the property of the church in which he officiates. The permanent incumbent, and that portion of the community which remains attached to his ministrations, might perhaps claim the restoration of a portion of the property shared by trustees. FERNANDEZ *v.* FERNANDEZ.
2 Ind. Jur. O. S. 12

ECCLESIASTICAL TRUST—*concld.*

EDUCATION, EXPENSES OF—

See HINDU LAW—JOINT FAMILY—NATURE OF, AND INTEREST IN, PROPERTY—ACQUIRED PROPERTY.
I. L. R. 1 Mad. 25
6 Bom. A. C. 54
2 Mad. 56
I. L. R. 6 Bom. 225
I. L. R. 4 Mad. 330

EJECTMENT.

See AGRA TENANCY ACT (II OF 1901), SS. 56, 57, 80 . . **I. L. R. 28 All. 610**

See BENGAL TENANCY ACT, S. 50.
10 C. W. N. 930

See BENGAL TENANCY ACT, S. 85.
13 C. W. N. 183

See BENGAL TENANCY ACT, S. 171.
13 C. W. N. 97

See CENTRAL PROVINCES TENANCY ACT (XI OF 1898) . **I. L. R. 35 Calc. 470**

See CIVIL PROCEDURE CODE, 1882, S. 463.
I. L. R. 33 Calc. 1094

See EJECTMENT, SUIT FOR.

See FORFEITURE . **I. L. R. 35 Calc. 807**

See HINDU LAW . **10 C. W. N. 765**

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 339, 459, 531
10 C. W N. 719
I. L. R. 36 Calc. 927
13 C. W. N. 146, 635, 949

See LANDLORD AND TENANT—
NATURE OF TENANCY **5 C. W. N. 846**

See LANDLORD AND TENANT ACT (VII OF 1869, B. C.), S. 52 **13 C. W. N. 1060**

See LEASE, CONSTRUCTION OF.
11 C. W. N. 809

See LIMITATION ACT, 1877, SCH. II, ART. 144—ADVERSE POSSESSION.
I. L. R. 26 Bom. 442

See MADRAS RENT RECOVERY ACT, S. 10.
I. L. R. 25 Mad. 613

See MORTGAGE—CONSTRUCTION.
L. R. 30 I. A. 54

See OCCUPANCY HOLDING.
13 C. W. N. 220

See REGISTRATION **I. L. R. 33 Calc. 502**

See REVENUE SALE LAW, S. 54.
13 C. W. N. 407

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EJECTMENT—*concld.*

See TRANSFER OF NON-TRANSFERABLE HOLDING . **10 C. W. N. 1033**

——— **order for—**

See INSOLVENCY . **I. L. R. 36 Calc. 489**

1. ——— Estoppel—*Dispute between rival vendees—Evidence Act (I of 1872), ss. 115, 116, 117.* *A*, who had purchased from *X*, brought a suit against *B* for ejectment, alleging that *B* was in wrongful possession of his land. *A* admitted that *X* had sold the same property previously to *B*, but contended that *B* as the mukhtear of *X* had obtained possession fraudulently and by undue influence. *B* alleged that he purchased the property from *X* previously ignorant of the fact that she had no title, and that in reality *P* was the true owner. Subsequently *B* purchased from *P*. *A* contended that, even if *X* had no title, *B*, by reason of having obtained possession from *X*, was estopped from alleging that *A* had no title. *Held*, that *X* having no title, the conveyance to *A* was invalid, and the rule of estoppel only existed as long as the grantee claimed under the title of the grantor. *Dalton* v. *Fitzgerald*, [*1897*] *1 Ch. 440, s. c. on appeal* [*1897*] *2 Ch. 86*, distinguished. *Payne* v. *Jones, 18 Eq. 320*, referred to. WOODROFFE, *J.*—*X* had no title, and therefore *B* was not estopped from raising that defence. *Dalton* v. *Fitzgerald*, [*1897*] *1 Ch. 440, s. c. on appeal* [*1897*] *2 Ch. 86*, distinguished. *Clarke* v. *Adie, 2 App. Cas. 423, Osterhaut* v. *Shoemaker, 4 Barb. 180, Averall* v. *Wilson, 3 Hill 513*, and *Payne* v. *Jones, 18 Eq. 320*, referred to. It is not sufficient for *B* to establish that the sale to *A* was voidable at the option of the vendor: he must show that it was absolutely void. *Lala Achal* v. *Raja Kazim, L. R. 32 I. A. 103*, referred to. RUP CHAND GHOSH *v.* SARVESWAR CHANDRA CHANDRA (1906)

I. L. R. 33 Calc. 915
s.c. 10 C. W. N. 747

2. ——— Immoral transactions—*Contract Act (IX of 1872), s. 23.* If a plaintiff cannot make out his case, except through an immoral transaction, to which he was a party, he must fail. *Fivaz* v. *Nicholls, 2 C. B. 501*, followed. BANI MUNCHARAM *v.* REGINA STANGER (1907)

I. L. R. 32 Bom. 581

EJECTMENT, SUIT FOR.

See ACQUIESCENCE . **7 B. L. R. 152**
10 B. L. R. Ap. 5
I. L. R. 25 Calc. 896
I. L. R. 21 All. 496 : L. R. 26 I. A. 58
I. L. R. 27 Calc. 570 : 4 C. W. N. 210
I. L. R. 14 All. 362

See BENGAL RENT ACT, 1869, s. 52.

See BENGAL TENANCY ACT, s. 155.
I. L. R. 30 Calc. 1063

See CHAUKIDARI CHAKRAN LANDS.
I. L. R. 31 Calc. 703

EJECTMENT, SUIT FOR—*contd.*

See COMPROMISE—
CONSTRUCTION, ETC., OF DEEDS OF COMPROMISE . **7 C. W. N. 158**
COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE **7 C. W. N. 90**

See CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY —EJECTMENT.

See DECREE—CONSTRUCTION OF DECREE—EJECTMENT.

See DECREE—FORM OF DECREE—EJECTMENT.

See EJECTMENT.

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS—NORTH-WESTERN PROVINCES . **I. L. R. 23 All. 360**

See LANDLORD AND TENANT.
9 C. W. N. 141, 379, 460
I. L. R. 32 Calc. 41, 51
I. L. R. 34 Calc. 902 : L. R. 34 I. A. 160

See LANDLORD AND TENANT.
EJECTMENT . **I. L. R. 32 Calc. 51**
FORFEITURE—DENIAL OF TITLE.
I. L. R. 28 Calc. 135
6 C. W. N. 575
NATURE OF TENANCY.
I. L. R. 28 Calc. 738
TRANSFER BY TENANT.
6 C. W. N. 916

See LEASE . **I. L. R. 32 Calc. 648**

See ONUS OF PROOF—LANDLORD AND TENANT . . **7 C. W. N. 734**

See PARTIES—PARTIES TO SUITS—BENAMIDAR . **I. L. R. 25 Calc. 98, 874**
3 C. W. N. 12, 20
I. L. R. 18 All. 69

See PARTIES—PARTIES TO SUITS—EJECTMENT, SUITS FOR.
I. L. R. 21 Bom. 329
I. L. R. 20 Mad. 375

See PRESIDENCY SMALL CAUSE COURTS ACT . . **I. L. R. 31 Bom. 259**

See RES JUDICATA—COMPETENT COURT—REVENUE COURTS.
I. L. R. 30 Calc. 339

See SALE FOR ARREARS OF REVENUE.
I. L. R. 31 Calc. 725

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—RECOVERY OF IMMOVEABLE PROPERTY.
I. L. R. 5 Bom. 295
I. L. R. 10 Bom. 30
I. L. R. 17 Mad. 216

See TRUSTS . . **8 C. W. N. 918**

——— **notice—**

See RULES MADE UNDER ACTS—BENGAL TENANCY ACT . **I. L. R. 28 Calc. 590**

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EJECTMENT, SUIT FOR—*contd.*

1. ——— **Title, proof of**—*Necessity for plaintiff to prove superior title.* In a suit for ejectment the plaintiff must make out a title superior to that of the defendant before he can obtain a decree. MOHESH CHUNDER LAHOORY *v.* SUMBHOO CHUNDER ROY CHOWDHRY . . **2 Hay 303**

2. ——— *Necessity for plaintiff to prove superior title.* In a case of ejectment (even though the dispute be merely as to which of the two parties the land belongs) the plaintiff must succeed by the strength of his title only, and not by the weakness of the defence. SUTTO SURN GHOSAL *v.* DHONE KRISTNO SIRCAR . **1 W. R. 88**

CHUNDER MONEE CHOWDHRAIN *v.* RAJ KISHORE SHAHA . . . . . **5 W. R. 246**

See BHOOBUN MOHUN MUNDLE *v.* RASH BEHAREE PAL . . . . . **15 W. R. 84**

SHAM NARAIN *v.* COURT OF WARDS. **20 W. R. 197**

3. ——— *Necessity for plaintiff to prove superior title.* It is essential that a claimant, seeking to oust a party in possession of an estate, should establish his own right to the estate, and not rely upon the failure of the title impeached. A decree of the Sudder Court held that, although the title set up by the plaintiff was wholly bad, yet that a party defendant with whom the plaintiff had, by a deed of compromise, agreed to divide the estate, had shown his title, and on that ground decreed possession against the other defendant. Such decree reversed by the Privy Council on appeal, as the effect of the decree would be (i) to defeat the defendant's possessory title without giving him an opportunity of contesting the title of the party by whom he is turned out of possession, and (ii) as it was a violation of legal principles which protect possession and of the substantial principles of justice which regulate the joinder of parties and union of titles to sue in one suit. JOWALA BUKSH *v.* DHARUM SINGH **10 Moo. I. A. 511**

4. ——— *Proof of title of vendor where plaintiff is a purchaser.* In a suit for ejectment, strict proof of title must be adduced by a plaintiff. It is not sufficient for him to prove that the deed under which he claims was duly executed; he must be put to proof of the title of his vendor. KALEE PERSHAD MOITRA *v.* ITCHA MOYEE **24 W. R. 337**

TIERY *v.* KRISTO MOHUN BOSE. HORENDRO *v.* AKBAR ALI . . . **L. R. 1 I. A. 76**

5. ——— *Suit for possession of chur land—Onus probandi.* Where a party seeks to turn out another in possession of chur land which the plaintiff claims as a part of a mehal purchased by him from Government, the suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of his own title, and not on the weakness of that of his adversary. It is immaterial in such a case to consider whether or not the land is the property of the defendant; because, unless it is proved to be the property of the plaintiff, the latter is not entitled to turn out the former. SHORNOMOYEE *v.* WATSON & Co. **20 W. R. P. C. 211**

affirming decision of High Court in WATSON & Co. *v.* SHORNOMOYEE . . . . **9 W. R. 259**

6. ——— **Present right to possession**—*Suit by reversioner against widow for possession.* A plaintiff who has not a present right to possession cannot sue to eject. Where therefore plaintiffs, divided members of the family of defendant's husband, sued the defendant, a widow, for possession of property which she had received from her husband on the ground that she was improperly alienating it: *Held*, that the Court could not grant the relief asked for. BANGARAIYA *v.* BALABHADRA RAZU **2 Mad. 386**

RAMAN AMMAL *v.* SUBBAN ANNAVI *alias* SUBRAMAMAYAN ANNAVI . . . . **2 Mad. 399**

7. ——— **Ejectment suit by owner of "inter esse termini"**—*Landlord and tenant—Tenant remaining in occupation after passing a razinama—Effect of the razinama.* The first and second defendants were sub-tenants of the third defendant, who had certain land which was part of the inam village of *D*. In 1883 the third defendant executed a razinama in the following terms, which he gave to the receiver who had been appointed by the Court to manage the village:— "Up to the present time my father and I have been cultivating the land, but the land belongs to the inamdar. I have no title over it, and the inamdar can give it for cultivation to any one he pleases." Shortly after the date of this razinama, the inamdar gave the land to the plaintiff, who now sued to obtain it from the defendants, who had remained in possession. *Held*, that the plaintiff was entitled to sue in ejectment, although he had not been put in possession of the land. BHUTIA DHONDU *v.* AMBO **I. L. R. 13 Bom. 294**

8. ——— **Right to possession**—*Hindu mortgagee—Want of possession—Sufficient possession to maintain suit.* In order that a Hindu mortgagee may successfully maintain an action of ejectment against third persons wrongfully in possession of the mortgaged property, it is not necessary that such mortgagee should have been put in possession by his mortgagor. He can bring his action based upon the title of his mortgagor, if the mortgagor had a good title to the land, and was in possession of it within twelve years before the suit was brought. KRISNAJI NARAYAN *v.* GOBIND BHASKAR **9 Bom. 275**

9. ——— **Right to sue to set aside sale in execution of decree**—*Right to sue for ejectment—Title, sufficiency of.* In a suit to recover possession of land acquired by plaintiff's vendor by purchase at an auction-sale of the rights and interests of one *S*, where defendant claimed under a deed of sale from the same *S*, and the lower Appellate Court found that plaintiff had been in possession, and had been forcibly ejected by the defendant:

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EJECTMENT, SUIT FOR—*contd.*

Held, that defendant's only title was the right to sue to set aside the sale in execution under which plaintiff held possession, and that this title did not avail him to eject plaintiff without a decree first obtained. BUNGSHEE DHUR DOSS *v.* BHUGWAN DOSS **24 W. R. 117**

10. ——— Failure to prove title—*Possession by defendants under void decree.* *V* mortgaged to the plaintiff his house and certain undivided land in which *H* and others, Hindu co-parceners, had a share. *R* bought the interest of *H* in the land at a Court sale, and let it to *H* and *V*, who, failing to pay rent, were sued by *R*, who got a decree for possession. This decree was transferred for execution to the Collector, who sold the land and rateably distributed the proceeds, except to *V* who declined to take the amount tendered as his share. In a suit against *V* and the purchasers under *R*'s decree to recover his mortgage-debt by a sale of the property mortgaged to him, the proceedings of the Collector were held to be without jurisdiction, and the plaintiff was entitled to ignore them, and assert his claim under the mortgage. *Held*, that the defendants, being in actual possession,—albeit through a sale under a void decree,—could not be ousted in the present suit, and were entitled to say that the plaintiff had not proved his title to sell the specific lands mortgaged. NARAYAN NAGARKAR *v.* VITHU JAKHOJI . . . **I. L. R. 8 Bom. 539**

11. ——— Right to eject mortgagee of raiyat with right of occupancy. The sons of a zamindar, whose zamindari estate is held on mortgage by a third party, are not justified in ousting the mortgagee of a raiyat having a right of occupancy. KHOSHALEE *v.* BULJEET . . **2 Agra 79**

12. ——— Demand of possession—*Proceedings under Criminal Procedure Code, s. 530.* Proceedings in a Criminal Court, under s. 530 of the Code of Criminal Procedure, are not a sufficient demand of possession for the purpose of maintaining an ejectment suit. RAM ROTTON MUNDUL *v.* NETRO KALLY DASSEE . . **I. L. R. 4 Calc. 339**

13. ——— Fraudulent transfer of property—*Defendant not in possession.* In a suit for possession by parties claiming as mortgagors against two sets of defendants, (i) the representatives of the original mortgagees: and (ii) certain persons who were alleged to have effected, in collusion with the first defendants, a fraudulent transfer of the property from their hands in another name: *Held*, with reference to the nature of the suit, which was one in the nature of ejectment, and which was found to be barred against the second defendants, that no decree could rightly be given against the first defendants, though they might have been guilty of breach of trust against the plaintiff and be liable in a suit properly framed for the purpose, as they were in no sense in possession. AMEENA BEGUM *v.* DOORDANAH KHANUM . **19 W. R. 44**

14. ——— Mortgage—*Redemption, Decree for.* If a suit is brought in ejectment, and the defendant proves that he holds a mortgage, a decree for redemption cannot be made without his consent. CHANDU *v.* KOMBI . . **I. L. R. 9 Mad. 199**

15. ——— Misstatement of area of land—*Precise definition by other description.* In a suit for ejectment a mere misstatement of the area of the land sought to be recovered ought not to be regarded as anything more than a "false demonstration." If the space is precisely defined by other description, the statement of its measurement in square yards may be treated as surplusage and of no consequence. VIRJIVANDAS MADHAVDAS *v.* MAHOMED ALI KHAN . . **I. L. R. 5 Bom. 208**

16. ——— Obligation of plaintiff to accept compensation. The Court will not oblige the plaintiff in a suit in the nature of an action of ejectment to accept compensation. SORABJI NASARVANJI DUNDAS *v.* JUSTICES OF THE PEACE FOR CITY OF BOMBAY . . . **12 Bom. 250**

17. ——— Intervenor—*Issue, power of Judge to try.* Where, in a suit brought by a zamindar to eject a raiyat, a person intervenes claiming to be a mortgagee of a portion of the raiyat's tenure, the Judge is competent to try the mortgagee's right to oppose the ejectment. GOPAUL *v.* RAM SUROOP LALL . . . . . **1 Agra Rev. 51**

18. ——— Ejectment for non-performance of services—*Rate of rent where service is commuted.* Where a plaintiff sues for the ejectment of the defendant on the ground that the latter has failed to render certain stipulated service, and the defence is that the defendant offered a money payment in lieu of service, as he had the option of doing, the Court, in deciding against the plaintiff, is not bound to take evidence as to the rate of rent to which the service ought to be commuted. BALINDUR NARAIN *v.* KALLA MESSOO KOOS **18 W. R. 340**

19. ——— Right to bring ejectment suit—*Suit by lessee while lessor is out of possession.* A lessee is entitled to maintain a suit for ejectment against the party in possession, notwithstanding the fact that, at the date of the lease, his lessor was not in possession of the property. *Prankrishna Dey* v. *Biswambhar Sein, 2 B. L. R. A. C. 207*, and *Tiery* v. *Kristo Mohun Bose, L. R. 1 I. A. 76*, referred to. ACHAYYA *v.* HANUMANTRAYUDU . . . **I. L. R. 14 Mad. 269**

20. ——— Suit by second mortgagee to eject first mortgagee in possession—*Right of occupancy, transfer of—Suit for possession by one wrong-doer against another—First and second mortgages of occupancy holding.* Where an occupancy holding was mortgaged under two successive mortgage-deeds to different parties, and, the mortgagees under the first mortgage having been put in possession, the mortgagees under the second mortgage sued to eject them: *Held*, that both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants who were in possession had a right as against the plaintiffs to retain possession. USUF KHAN *v.* SARVAN **I. L. R. 13 All. 403**

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EJECTMENT, SUIT FOR—*contd.*

21. ———— Sale by mortgagor of parts of the mortgaged property—*Suit for sale by mortgagee without joining the vendees—Subsequent suit to eject mortgagor's vendees—Cause of action—Right of suit.* A mortgagor, who had given a simple mortgage over certain land, sold some of the mortgaged property. The mortgagee, after such sale had taken place, and without making the vendees parties to his suit, brought a suit for sale on his mortgage, and having caused the mortgaged property to be sold, including that portion which had been sold by the mortgagor, purchased it himself. The mortgagee then sued to eject the vendees of the mortgagor. *Held*, that the suit would not lie, inasmuch as the plaintiff (mortgagee) had at its commencement no title to present possession of that particular portion of the mortgaged property as against anyone. HARGU LAL SINGH *v.* GOBIND RAI . **I. L. R. 19 All. 541**

22. ———— Suit for ejectment by one auction-purchaser against the other—*Prior and subsequent mortgages—Mortgaged property sold twice in execution of decrees in suits in each of which the other mortgagee was not a party—Form of decree.* *B* mortgaged a house, first to *D*. and subsequently to *M* and *C*. *M* and *C* brought a suit on their mortgage without making *D* a party to it, obtained a decree, and put the house up to sale, and it was purchased by *M L*. Subsequently to the date of the decree in the above suit, *D* brought a suit on his mortgage, without making *M* and *C* parties thereto, obtained a decree and put the house up to sale, and it was purchased by *B D*. *B D* then sued *M L* for ejectment and damages. *Held*, that the plaintiff's suit must be dismissed ; and that it was not competent to the Court to grant a decree in favour of the plaintiff conditioned on the failure of the defendant to redeem the mortgage upon which the plaintiff's title was ultimately based. *Hargu Lal Singh* v. *Gobind Rai, I. L. R. 19 All. 541*, followed and explained. MADAN LAL *v.* BHAGWAN DAS . . . . **I. L. R. 21 All. 235**

23. ———— Law of Oudh—*Re-grant—Construction—Ambiguity—"Occupants."* In a suit to eject the defendant from the occupation of certain shops in a *bazar*, which, after its confiscation, had been entered in the *Nazul* Register under the erroneous impression that it was previously the property of the King of Oudh, it appeared that, on a claim thereto made by the plaintiff, the Government had directed that the *bazar* be expunged from the *Nazul* Register, and that the status of its "occupants," who were described as having all along exercised proprietary rights, should not be disturbed. *Held*, that, by the true construction of this direction, it was not a grant of proprietary right to the occupiers. The inquiry and report on which the grant was made explained the ambiguity, and showed that the intention of the Government was to re-grant to the persons who, but for the confiscation, would now be entitled. Until the re-grant, the property was that of the Government, and the defendants could not acquire title by limitation until twelve years thereafter.

EJECTMENT, SUIT FOR—*contd.*

Case remanded to try (i) whether the plaintiffs would have been entitled but for the confiscation ; and (ii) whether the occupiers had acquired any rights by long possession. CHOUDHRI MAKBUL HUSAIN *v.* LALTA PERSHAD (1901)

I. L. R. 24 All. 1
s.c. L. R. 28 I. A. 169

24. ———— Cause of action—*Compensation—Transfer of Property Act (IV of 1882), s. 51—Estoppel—Evidence Act (I of 1872), s. 115.* *A* brought a suit against *B* and others for ejectment, making the landlord a defendant to the suit, on the allegation that he (*A*), having obtained a lease of the land from the landlord, took possession, but subsequently was forcibly dispossessed by the defendants (second party) in collusion with the landlord. The defence of the defendants (second party) mainly was that the suit was bad for multifariousness, inasmuch as they were severally in possession of definite and distinct portions of the land under different demises by the first defendant, and that there was no community of interest ; that they, having taken leases from the first defendant in good faith and entered into possession of the land thereunder, spent a considerable amount of money in clearing jungles and making embankments, etc., and that, if the plaintiff be entitled to succeed at all, he could not obtain possession without paying them compensation. *Held*, that the suit was not bad for misjoinder of causes of action. The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendants profess to hold possession, for what concerns the plaintiff is that another is wrongfully in possession of what belongs to him ; and that fact gives him his cause of action, and it is a matter of indifference to him on what ground different persons in possession may seek to justify the wrongful detention of what is his. What the plaintiff is entitled to claim is the recovery of possession of his land as a whole and not in fragments, and all persons who oppose him in the enforcement of that right are concerned in his cause of action, and ought accordingly to be made parties to the suit. *Ishan Chunder Hazra* v. *Ramesuar Mondol, I. L. R. 24 Calc. 831*, referred to. *Held*, also, that, as it was not shown that the plaintiff knew that the defendants were spending money upon the improvement of the land and were doing so in the belief that they had a good title, while he stood by and allowed them to proceed with these expenditures, the plaintiff was entitled to get a decree for ejectment without indemnifying the defendants for their outlay. *Cawdor* v. *Lewis, 1 Y. & C. 427*, and *Wilmott* v. *Barber, L. R. 15 Ch. D. 96*, referred to. *Held*, further, that, even assuming that mere quiescence of the plaintiff amounted to a representation, in the absence of a finding, either that it was intended that the tenant defendants should believe or act upon it, or that in point of fact they did act upon it, the plaintiff was not estopped from asserting his possession against the defendants. NUNDO KUMAR NASKER *v.* BANOMALI GAYAN (1902)

I. L. R. 29 Calc. 87

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EJECTMENT, SUIT FOR—*contd.*

25. ———— Partial ejectment—*Joint estate—Co-sharer landlord, rights of—Service tenure—Fair and equitable rent—Bengal Tenancy Act (VIII of 1885).* Where tenants were originally let into possession of land by all the co-sharers in a zamindari, a co-sharer landlord is not competent to obtain a partial ejectment of the tenants to the extent of his share, unless the tenancy has been determined by all the co-sharers. *Hulodhur Sen* v. *Gooro Doss Roy, 20 W. R. 126*; *Radha Prosad Wasti* v. *Esuf, I. L. R. 7 Calc. 414*; and *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy, 2 C. W. N. 229*, distinguished. *Semble:* In the case of a service tenure created by all the co-sharers in a zamindari, not governed by the provisions of the Bengal Tenancy Act, a co-sharer landlord is not competent to sue the tenants for fair and equitable rent payable in respect of his share for failure of service originally performed. GHULAM MOHIUDDIN HOSSEIN *v.* KHAIRAN (1904) . . . **I. L. R. 31 Calc. 786**
s.c. 8 C. W. N. 325

26. ———— Ejectment of under-raiyat—*Delay in suing—"Holding over," presumption overt Act—Bengal Tenancy Act (VIII of 1885), s. 49.* After the expiry of a written lease, a mere delay in the institution of a suit by the lessor for ejectment of the lessee without notice to quit, is no reason for dismissal of the suit on the ground that the lessee was allowed to 'hold over.' RATAN LAL GIR *v.* FARSHI BIBI (1907)
I. L. R. 34 Calc. 396

27. ———— Res judicata—*Agra Tenancy Act (Local II of 1901), s. 199—Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself.* In a suit for ejectment under Act No. II of 1901, the defendants did not plead their own title to the plot in suit, and in fact did not oppose the suit for ejectment. *Held*, that a subsequent suit brought in a Civil Court by the then defendants for proprietary possession of the same plot was barred by the principle of *res judicata. Rani Kishori* v. *Raja Ram, All. Weekly Notes (1904) 109*; *Ashraf-un-nissa* v. *Ali Ahmed, All. Weekly Notes (1904) 141* and *Inayat Ali Khan* v. *Murad Ali Khan, I. L. R. 27 All. 565*, distinguished. *Salig Dube* v. *Deoki Dube, All. Weekly Notes (1907) 1*, and *Beni Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur, I. L. R. 29 All. 160*, referred to. *Gokul Mandar* v. *Pudmanund Singh, I. L. R. 29 Calc. 707*, discussed. BIHARI *v.* SHEOBALAK (1907) . . **I. L. R. 29 All. 601**

28. ———— Limitation—*Limitation Act (XV of 1877), Sch. II, Arts. 139, 113—Lease—Forfeiture—Suit for ejectment.* A lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent-free for six years and that in the beginning of the seventh year he should cause the lands to be measured and a settlement of rent made in respect of the reclaimed lands failing which the landlord would be entitled to possession.

EJECTMENT, SUIT FOR—*concld.*

Held, that a suit by the lessor for ejectment on the ground of the lessee's failure to comply with the above-mentioned provision in the lease was governed by Art. 143, and not by Art. 139, Sch. II, of the Limitation Act. GOOHI SHEIKH *v.* H. MATHEWSON (1907) . . . **11 C. W. N. 661**

29. ———— Parties—*Persons in actual possession necessary parties.* In a suit in ejectment the persons in actual possession need to be joined as parties. BANUBI *v.* NARSINGRAO (1906)
I. L. R. 31 Bom. 250

30. ———— Suit by Committee of management—*Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser—Title.* The Parsi Panchayat at Bombay appointed a committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman. *Held*, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser. JIVANJI JAMSHEDJI *v.* BARJORJI NASSERVANJI (1909)
I. L. R. 33 Bom. 499

EKRAR.

See SPECIFIC PERFORMANCE.
I. L. R. 31 Calc. 534

ELECTION.

See BOMBAY MUNICIPAL ACT (BOM. III OF 1888), S. 33.
I. L. R. 31 Bom. 604

See MISJOINDER OF PLAINTIFFS.
I. L. R. 34 Calc. 662

See MUNICIPALITY.
I. L. R. 31 Bom. 37

———— doctrine of—

See HINDU LAW—JOINT FAMILY—NATURE OF, AND INTEREST IN, PROPERTY . . **I. L. R. 20 Bom. 316**
I. L. R. 21 Bom. 349

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ELECTION, DOCTRINE OF.
I. L. R. 14 Bom. 438

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—SURVIVORSHIP.
I. L. R. 15 Bom. 443

———— list of candidates at—

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, S. 31.
I. L. R. 19 Calc. 192, 195 note, 298
I. L. R. 22 Calc. 717

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ELECTION—*concld.*

——— **order refusing to set aside—**

See SUPERINTENDENCE OF HIGH COURT —CIVIL PROCEDURE CODE, s. 622.
I. L. R. 21 Bom. 279

——— **reversioner's right of—**

See HINDU LAW—WIDOW.
I. L. R. 34 Calc. 329

——— **validity of—**

See JURISDICTION OF CIVIL COURTS.
I. L. R. 31 Bom. 604

——— *City of Bombay Municipal Act (Bom. Act III of 1888), s. 33—Election of Councillor, validity of—Applicant's right to question election—Chief Judge of Small Cause Court has sole jurisdiction to try suits relating to election petitions—Jurisdiction of High Court—Civil Procedure Code (Act XIV of 1882), s. 11.* Under s. 33 of the City of Bombay Municipal Act, 1888, an applicant can question the election of every candidate on the ground that the election as a whole was invalid, for the section, after specifying two permissible grounds of objection, provides that the validity of any election may be questioned for any other cause, and these words are wide enough to cover the ground of objection urged in this case. It is clear that the word "election" in the section is designed to express something wider than a legally valid election, and the words used are consistent with the view that an election which in fact took place under conditions that made it possible that there should be a valid election can be questioned. Under s. 33 the Chief Judge of the Small Cause Court has jurisdiction to determine the validity of a contested election. The High Court has no jurisdiction to entertain such a suit. Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any. The jurisdiction of the Courts can be excluded not only by express words but also by implication, and there certainly is enough in s. 33 of the Municipal Act for this purpose. *Semble:* If the High Court has jurisdiction there might be a conflict between the view of the High Court and the orders of the Chief Judge in which the order of the Chief Judge must, by the express terms of the Act, prevail. BHAISHANKAR *v.* THE MUNICIPAL CORPORATION OF BOMBAY (1907)
I. L. R. 31 Bom. 604

ELEPHANT.

See ANIMAL . **I. L. R. 35 Calc. 413**

See COMPANIES ACT, s. 4.
13 C. W. N. 638

EMBANKMENT.

See THEFT . **I. L. R. 35 Calc. 437**

——— **erection of—**

See RIGHT OF SUIT— INJURY TO ENJOYMENT OF PROPERTY.
I. L. R. 18 Mad. 158

1. ——— **Addition to existing embankment**—*Notification, publication of—Beng. Act II of 1882 (Bengal Embankment Act), ss. 6, 76, cl. (b), and 80.* The words "shall add to any existing embankment" in cl. (*b*), s. 76 of Bengal Act II of 1882, are not intended to mean any repair of an existing embankment, even if the effect of such repair be to make the embankment higher or broader, but only means an extension in the length of an existing embankment. The notification referred to in s. 6 of the Act must be published in the manner provided by s. 80, and it is not sufficient for such notification merely to be published in the *Calcutta Gazette.* GOVERDHAN SINHA *v.* QUEEN-EMPRESS
I. L. R. 11 Calc. 570

2. ——— **Maintenance of embankment**—*Prescriptive right—Liability for damage done by escape of water.* Where a defendant shows a prescriptive right to maintain a bund, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon if the escape or overflow be caused by the act of God, or *vis major.* RAM LALL SINGH *v.* LILL DHARY MUHTON . . . **I. L. R. 3 Calc. 776**

See MADRAS RAILWAY COMPANY *v.* ZAMINDAR OF CARVETINAGARAM
14 B. L. R. 29 : L. R. 1 I. A. 364

3. ——— *Inundation — Embankments—Liability to repair—Beng. Act VI of 1873—Regs. II, VIII, and XXXIII of 1793—Reg. VI of 1806—Reg. XI of 1829—Act XXXII of 1855.* In a suit for damages caused by the overflow of a river through an embankment on the defendant's land, it appeared that the defendants held under a kabuliat from Government, which provided that the zamindar should not object to pay rent on the score of drought or inundation; that he should bear all losses incurred on that account; and also that he should do embankment work at the proper time and should be liable for loss from negligence. It did not appear whether the embankment was in existence when the kabuliat was granted. It was proved that the defendants received an annual sum from Government as a contribution to the repairs of embankments, but such payment was not provided for in the kabuliat, and no evidence was given as to the terms of the agreement under which it was paid. *Held,* that there was no common law liability to repair imposed on the defendants; that it not having been proved that the embankment in question was in existence at the date of the kabuliat, the defendants were not liable *ratione tenuræ,* and that, if the sum paid by Government was in consideration of the defendants' maintaining the em-

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EMBANKMENT—*contd.*

bankment in question and if the terms of the agreement under which it was paid showed that it was intended to impose the obligation to repair for the public benefit, the defendants would be liable. Regulations and Acts relating to embankments in Bengal considered. NUFFER CHUNDER BHOTTO *v.* JOTINDRA MOHUN TAGORE

I. L. R. 7 Calc. 505 : 8 C. L. R. 553

4. ———— Addition to embankment—*"Shall add to"—Bengal Embankment Act (Ben. Act II of 1882), ss. 76, cl. (a), 79.* The words "shall add to any existing embankments," in s. 76, cl. (*a*), of Bengal Act II of 1882, include an addition to the height of an embankment. *Goverdhan Sinha* v. *The Queen-Empress, I. L. R. 11 Calc. 570,* overruled. AJODHYA NATH KOILA *v.* RAJ KRISHTO BHAR (1902)

I. L. R. 30 Calc. 481
s.c. 7 C. W. N. 284

5. ———— Notification—*Bengal Embankment Act (Ben. Act II of 1882), ss. 6, 76 (b), 80—Publication of notification in Gazette, effect of—Publication of proclamation and issuing of notices in the locality, if essential—Failure, how affects prosecution and punishment—Ignorance of law, plea of.* Under s. 6 of the Bengal Embankment Act, the provisions of s. 76 (*b*) of that Act take effect within a declared area one month after the notification mentioned in s. 6 appears in the Gazette. The further direction in s. 6 as to the publication of the notification in the manner provided by s. 80, as also the directions in s. 80 as to the publishing of proclamations and issuing of notices are merely directory, and intended to inform people living in the locality. Failure to comply with these provisions cannot override the declaration in s. 6 that the provisions of the notification shall take effect one month from the publication in the Gazette, and every one within the locality would thereafter be bound by the provisions of s. 76 (*b*). On the principle that ignorance of law is no excuse, a person who has committed any of the acts prohibited by s. 76 (*b*), one month after the publication of the notification in the Gazette, cannot escape prosecution by denying all knowledge of the publication. Although compliance on the part of the authorities with the provisions of ss. 6 and 80 relating to the publication of the proclamation is not essential to the commission of an offence under the Act, it is material on the question of punishment. BRINDABUN GHOSH *v.* EMPEROR (1902) . **7 C. W. N. 286**

6. ———— Sand-bank—*Bengal Embankment Act (Ben. Act II of 1882), ss. 3, 77—"Public embankment," meaning of—"Made or erected"—Sand bank formed naturally between two spurs erected by Government officers, cutting through or destroying—Statute affecting liberty of subject, construction of.* A bank made or erected is something directly caused by some act of construction, and not something which may or may not result from the forces of nature. A bank of sand which has artificially formed, by the action of the water between two

EMBANKMENT—*concld.*

spurs erected by Government for the protection of an embankment, is not an embankment within the definition of that expression, nor is it a public embankment. The cutting through of such a sand bank for the protection of one's own cultivation by preventing an accumulation of water is not an offence under s. 77 of the Bengal Embankment Act. In construing a Statute which affects the liberty of the subject, the Courts should not only adopt the natural and ordinary construction, but should construe strictly expressions occurring therein. BISSUMBHUR SINGH *v.* QUEEN-EMPRESS (1900)

5 C. W. N. 108

EMBLEMENTS, RIGHT TO.

See SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF—EMBLEMENTS.

I. L. R. 2 Bom. 970
I. L. R. 13 Mad. 15

EMIGRATION ACT (XXI OF 1883 AMENDED BY ACT X OF 1902).

———— ss. 6, 29, 108, 111—

———— Magistrate—Magistrate, First Class, in s. 111, includes Presidency Magistrate—Agreement with Native of India to depart out of India by sea to work as an artisan—Agreement made without the permission of the Protector of Emigrants—Liability of master for criminal acts done by servant on the master's behalf—Master liable for agreements entered into on his behalf by his servant in violation of s. 111—Protector of Emigrants has power to impose reasonable terms before he can issue permission applied for—Summons, issue of—Fresh summons issued on the same information—Irregularity in procedure—Criminal Procedure Code (Act V of 1898), s. 537. The term "Magistrate of the First Class" used in s. 111 of the Indian Emigration Act, 1883, means a Magistrate appointed to exercise the highest Magisterial powers ordinarily prescribed by the Criminal Procedure Code within his jurisdiction and includes a Presidency Magistrate. Where on an information a summons is issued to the accused and, owing to its disclosing no offence, a fresh summons is issued without any fresh or supplemental information, the error, omission or irregularity in the fresh summons is not sufficient, under s. 537 of the Criminal Procedure Code, to upset the finding and sentence unless it has in *fact* occasioned "a failure of justice," that is, unless it has unfairly affected the accused's defence on the merits. Sub-s. (*1*) of s. 111 of the Indian Emigration Act hits at not merely entering into an agreement, but also at any attempt to enter into it. An attempt consists in some external act which shows that progress is made in the direction of it or towards maturing and effecting it, that is, something tangible and ostensible of which the law can take hold, which can be alleged and proved. Where penal statute has been infringed by servants and criminal proceedings are taken against the master although it lies upon the prosecutor to

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EMIGRATION ACT (XXI OF 1883 AMENDED BY ACT X OF 1902)—*contd.*

——— **ss. 6, 29, 108, 111**—*concld.*

establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute. The statute should be construed, not merely with reference to its language, but also its subject matter and object. Sub-s. (*1*) of s. 111 of the Indian Emigration Act, 1883, does not break in upon the rule of law embodied in the maxim *qui per alium facit per seipsum facere videtur.* The word "whoever" in the clause means whoever either by himself or through his agent. In other words, the Act leaves untouched the right of every person to enter into such agreements through an agent. It merely provides that such agreements shall not be entered into without the previous permission of the Local Government. The intention of the section is to hold the master liable for his servant's act, provided the act was done by the servant so as to bind the master according to the law of contract. The coupling of the word with the words "terms," "conditions" in s. 107 of the Act shows the intention of the Legislature to be that the officer authorized to grant the permission should have power to impose any reasonable terms and conditions he thinks proper as conditions precedent to the grant, whether they relate to the terms of the agreement itself or being extraneous to it relate to the execution or other considerations which have to be taken into account in order to protect the interest of the Native of India departing out of it by sea. S. 29 of the Indian Emigration Act, 1883, makes it compulsory that the execution of the agreement therein referred to should be in the presence of the Protector. In s. 108 of the Act the power conferred on the Local Government, who have delegated their power to the Protector, is discretionary, and it is left to that Government to decide whether in any particular case any agreement referred to in s. 107 shall be executed or not in its presence, that is, in the presence of the Protector acting as its delegated authority. The two sections being thus distinguishable, the language of one cannot be invoked to aid the construction of the other, especially where the language of each is plain. EMPEROR *v.* JEEVANJI (1907)

I. L. R. 31 Bom. 611

——— **s. 107**—*Servant offending under the Act in the course of his master's employment for his master's benefit—Master's liability—Artisan—Engine driver on board a steamer.* If a servant having been appointed as an agent for a particular business by his master, enters into an agreement in connection with that business, everything which he does within the scope of his employment for that purpose will be binding upon the master and the master will be criminally liable for such act of the servant under the Indian Emigration Act (XXI of 1883). In such a case the master's express knowledge of or consent to the act is not necessary, because by the very fact of the appointment of the

EMIGRATION ACT (XXI OF 1883 AMENDED BY ACT X OF 1902)—*contd.*

——— **s. 107**—*concld.*

servant as an agent in such a business, the master's knowledge of or consent to every act done by the servant or agent within the scope of his employment is implied by law. A person engaged to drive an engine on board a steamer is an artisan within the meaning of the term as used in s. 107 of the Indian Emigration Act, 1883. EMPEROR *v.* HAJI SHAIK MAHOMED (1907)

I. L. R. 32 Bom. 10

EMIGRATION OF NATIVE LABOURERS.

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—EMIGRANTS, ETC.
4 Mad. Ap. 4

ENCROACHMENT.

See EASEMENT . **I. L. R. 28 Bom. 428**

See GRANT . **I. L. R. 35 Calc. 478**

See INJUNCTION **I. L. R. 28 Bom. 298**

See JURISDICTION OF MAGISTRATE.
I. L. R. 32 Calc. 287

See LANDLORD AND TENANT—ACCRETION TO TENURE . **1 B. L. R. A. C. 21**
22 W. R. 246
I. L. R. 10 Calc. 820
I. L. R. 16 Bom. 552
I. L. R. 25 Calc. 302

See LANDLORD AND TENANT.
13 C. W. N. 698

See LANDLORD AND TENANT—OBLIGATION OF TENANT TO KEEP HOLDING DISTINCT.
9 C. L. R. 347

See LAND-REVENUE.
I. L. R. 25 Bom. 752

See LIMITATION ACT, ART. 149.
I. L. R. 19 Mad. 154

See NUISANCE—PUBLIC NUISANCE UNDER PENAL CODE . **I. L. R. 20 Mad. 433**

See RIGHT OF SUIT—BUILDING, SUIT TO RESTRAIN . . **22 W. R. 73**
25 W. R. 524

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY.
I. L. R. 18 Bom. 699

——— **on public way.**

See NUISANCE—UNDER CRIMINAL PROCEDURE CODE . **6 C. W. N. 886**

——— **on vacant land.**

See POSSESSION—ADVERSE POSSESSION.
1 Agra Rev. 38
I. L. R. 16 Bom. 338

See RIGHT OF WAY.
I. L. R. 17 Bom. 648

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ENCROACHMENT—*contd.*

1. ——— **Legal rights of owner of land** —*Owner not compellable to accept compensation instead of removal of encroachment.* In a suit to recover land adjacent to a temple belonging to the defendants, on which land the defendants had encroached by building verandahs, the lower Courts found that the land sued for was the property of the plaintiff subject to the defendants' right of access to the temple, and directed the defendants to pay compensation to the plaintiff for the encroachment. The plaintiff appealed to the High Court. *Held*, that, the land being found to be the plaintiff's, the Courts could not compel him to part with his legal rights and accept compensation against his will, however reasonable it might appear to be. The defendants were accordingly ordered to remove the verandahs complained of and to restore possession of the land to the plaintiff. GOVIND VENKAJI *v.* SADASHIV BHARMA SHET
I. L. R. 17 Bom. 771

2. ——— **Injury to property**—*Contributory act—Tort—Contributory negligence.* As in the case of contributory negligence, so an act of one party can only be contributory to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury. MADHAVA RAU *v.* FERNANDES
I. L. R. 17 Mad. 368

3. ——— **Stranger building on land of another**—*Acquiescence of owner—Delay of owner in suing possession—Form of decree.* It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building. Delay by the owner in bringing a suit is not in itself sufficient to create an equity in favour of the person spending money on the land so as to deprive the owner of his strict rights. The decree made by the High Court was that the plaintiff should recover the land with liberty to the defendant forthwith to commence to remove his building and to restore the property to the condition in which it was when he took possession, the same to be completed within one year from date of decree. In default, the plaintiff to be at liberty to remove the building at the expense of the defendant. PREMJI JIVAN BHATE *v.* CASSUM JUMA AHMED
I. L. R. 20 Bom. 298

4 ——— **Projection "Fixture"** — *Obstruction on public street—Calcutta Municipal Act (Bengal Act III of 1899), ss. 3, sub-s. (37), 286, 336, 341.* A verandah attached to and projecting from a house and supported on pillars sunk down into the soil between a street and a drain which runs between the street and the front of the house, is a "fixture" and "a projection, encroachment, or obstruction over or on a public street" within the meaning of s. 341 of the Calcutta Municipal Act. CORPORATION OF CALCUTTA *v.* IMADUL HUQ (1907) . **I. L. R. 34 Calc. 844**

ENCROACHMENT—*concld.*

ENCUMBRANCE.

See GRANT . **I. L. R. 35 Calc. 931**

See INCUMBRANCE.

See SALE FOR ARREARS OF REVENUE.
8 C. W. N. 786

——— **annulment of—**

See BENGAL TENANCY ACT, s. 167.
11 C. W. N. 350

ENDORSEMENT.

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . **I. L. R. 14 Bom. 472**

See GOVERNMENT PROMISSORY NOTE.
13 B. L. R. 359

See HUNDI—ENDORSEMENT.

See PROMISSORY NOTES—ASSIGNMENT OF, AND SUITS ON, PROMISSORY NOTES.

See REGISTRATION ACT, s. 17.
I. L. R. 14 Bom. 472

See STAMP ACT, 1879, s. 39.
I. L. R. 11 Mad. 40

See STAMP ACT, 1879, SCH. II, ART. 15.
I. L. R. 10 Mad. 64

——— **assignment and re-transfer by—**

See STAMP ACT, 1869, SS. 34 AND 41.
I. L. R. 3 Calc. 347

——— **forged.**

See BILL OF EXCHANGE.
I. L. R. 15 Bom. 267

See HUNDI—PROPERTY IN HUNDI AND FORGED HUNDI.
7 B. L. R. 275, 289 note

——— **of transfer on bond.**

See STAMP ACT, 1879, s. 13.
I. L. R. 17 Bom. 687

——— **of warrant of arrest.**

See WARRANT OF ARREST—CRIMINAL CASES . . **5 C. W. N. 447**

——— **on deed of sale.**

See REGISTRATION ACT, 1877, s. 17.
I. L. R. 2 Bom. 547

——— **on mortgage-bond.**

See REGISTRATION ACT, 1877, s. 17.
I. L. R. 9 All. 108

——— **to allow third person to sue.**

See PROMISSORY NOTE—ASSIGNMENT OF, AND SUITS ON, PROMISSORY NOTES.
3 B. L. R. O. C. 130
2 C. W. N. 286

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ENDOWMENT.

See ACT, 1863—XX (RELIGIOUS ENDOWMENTS).

See APPEAL. . **I. L. R. 34 Calc. 584**

See BENGAL REGULATION VIII OF 1819.

See DEBUTTER . **13 C. W. N. 805**

See DEBUTTER PROPERTY.

See DECLARATORY DECREE, SUIT FOR—ENDOWMENT.

See DECREE—CONSTRUCTION OF DECREE—ENDOWMENT . **I. L. R. 17 Mad. 343**
L. R. 21 I. A. 71

See DECREE—FORM OF DECREE—ENDOWMENT . . . **21 W. R. 334**
I. L. R. 24 Bom. 50

See EVIDENCE ACT (I OF 1872), S. 90.
I. L. R. 33 Calc. 571

See HINDU LAW—ENDOWMENT.
9 C. W. N. 528
I. L. R. 27 All. 581
I. L. R. 36 Calc. 1003

See HINDU LAW—CUSTOM—ENDOWMENT.
L. R. 1 I. A. 209
I. L. R. 14 Bom. 90

See LIMITATION **I. L. R. 32 Calc. 129**

See LIMITATION ACT, 1877, SS. 2, 10, 28.
I. L. R. 31 Calc. 314
8 C. W. N. 809

See LIMITATION ACT, 1877, SCH. II, ART. 134.
I. L. R. 27 Bom. 363, 500

ARTS. 134 AND 144.
I. L. R. 27 Bom. 373

See MAHOMEDAN LAW **9 C. W. N. 625**

See MAHOMEDAN LAW—ENDOWMENT.

See MALABAR LAW—ENDOWMENT.

See MORTGAGE . . **9 C. W. N. 914**

See ONUS OF PROOF—TRUST, REVOCATION OF . . **10 B. L. R. P. C. 19**

See REFERENCE TO HIGH COURT—CIVIL CASES . **I. L. R. 25 Bom. 327**

See RIGHT OF SUIT—CHARITIES AND TRUSTS.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO **I. L. R. 13 Mad. 277**
I. L. R. 17 Mad. 143

See SMALL CAUSE COURT MOFUSSIL JURISDICTION—ENDOWMENT.
I. L. R. 14 All. 413

See TRUST . **I. L. R. 15 Bom. 625**

1. ——— Religious endowment—*Civil Procedure Code, 1877, s. 539.* S. 539 of the Civil Procedure Code, 1877, does not apply to the case of an endowment for purposes religious as well as charitable. KARUPPA *v.* ARUMUGA
I. L. R. 5 Mad. 383

ENDOWMENT—*contd.*

2. ——— *Suit for management of religious endowment—Right of suit—Act XX of 1863, s. 18—Parties—Jurisdiction of High Court.* The plaintiffs, describing themselves as the Calcutta Tairo Pantee Anungo Punch Brethren, in whom (as they alleged) was vested the management and control of the temples, endowments, and worship of the Degumbery sect of Jains, and who formed the committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India, brought a suit, praying, *inter alia*, for the construction of a will, and for a declaration of their rights thereunder as members of the said Punch, and to have property dedicated by the will to religious purposes ascertained and secured. *Held per* KENNEDY, *J.*, in the Court below, that the description of the character in which the plaintiffs sued was uncertain and ambiguous; that, inasmuch as the property in question was not dewutter, the plaintiffs were not sebaits, and all they could claim, therefore, was a right of management; and that a mere manager, without some special power which the Hindu law confers on sebaits, could not institute such a suit; that the plaintiffs not being a corporation could not sue in a corporate character; that assuming religious endowments had been created by the will leave to bring the suit should have been obtained under s. 18 of Act XX of 1863; and that, if the gifts in the will could be treated as charitable bequests, possibly the Advocate General could sue. *Held* on appeal, reversing the decision of the lower Court, that the right in which the plaintiffs sued was sufficiently shown, and that the object of the suit was not to assert any personal right of ownership in the plaintiffs. *Held*, further, that the Advocate General was not a necessary party, although it was desirable that such suits should be brought only with his consent, or by the leave of the Court. *Held*, further, that suits of this description do not fall under Act XX of 1863, but come under the ordinary jurisdiction of the Court, inherited from the Supreme Court, and conferred upon that Court by its Charter—a jurisdiction similar in its general features to that of the Lord Chancellor in England. PANCHCOWRIE MULL *v.* CHUMROOLALL
I. L. R. 3 Calc. 563 : C. L. R. 121

KALI CHURN GIRI *v.* GOLABI . **2 C. L. R. 128**

RUP NARAIN SING *v.* JUNKO BYE
3 C. L. R. 121

3. ——— *Creation of endowment, presumption of—Erection of temple—Ownership, presumption of.* The mere fact of the owner of land having erected a temple and planted a grove thereon does not of itself, without any further evidence, indicate a dedication to the god and a cessation of the rights of private ownership in respect of such land. DAKHNI DIN *v.* KARIM-UN-NISSA . . . **I. L. R. 16 All. 412**

4. ——— *Property in British India of a temple outside British India—Jurisdiction in suit to declare right to officiate in temple and for share of temple property.* The

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ENDOWMENT—*contd.*

plaintiff was a member of a family which had the management, and received the income, of certain property situate in British India belonging to a temple situate at Ashta in the Nizam's territory. Part of the income was devoted to religious services and part to the support of the family. The plaintiff sued to recover by partition his share of the income and for an injunction restraining the defendant from interfering with the plaintiff in celebrating religious worship at the temple when his turn came to officiate. The defendant (his brother) resided at Ashta. *Held*, that the right to share in the income followed the devolution of the office, and that the Court could not grant the relief prayed for, as the Courts in British India could not execute their decree by putting the plaintiff in possession of his office when his turn came to officiate at the temple which was outside British India. According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns, and of allowing alienation within certain restrictions. TRIMBAK RAMKRISHNA RANADE *v.* LAKSHMAN RAMKRISHNA RANADE

I. L. R. 20 Bom. 495

5. ——————— *Succession in management of muth—Religious Endowments Act (XX of 1863), ss. 14, 18—Want of asceticism of paradesi—Removal of paradesi—Form of decree—Civil Proceduce Code, ss. 13, 43, 539—Right of suit—Res Judicata—Relinquishment or omission to sue for portion of claim.* The plaintiff, the zamindar of Sivagunga, sued in a subordinate Court to remove the defendant from the office of head of a muth. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the muth, and it appeared that he had failed to perform the ceremonies of the institution. The muth in question came into existence under a deed of endowment or "charity grant," whereby the first zamindar of Sivagunga granted land to his guru for the erection and maintenance of a muth and the performance of certain religious exercises in perpetuity, and provided that the head of the muth should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the muth from the defendant, alleging another cause of action than his status as a married man and his misappropriation of the muth property; and in that suit it was established that the head of the muth for the time being had the right to appoint his successor, and that such appointment was not subject to confirmation by the zamindar. No sanction had been obtained for the institution of the present suit. It appeared that the trusts of the muth had been violated and the income misapplied, and that there was no qualified disciple in whom the right of succession had vested, and that the members of the plaintiff's family were the only persons interested in the appointment. *Held*, (i) that the jurisdiction of the subordinate Court was not ousted by Act XX of 1863, since the trusts of the institution were in the nature of private trusts; (ii) that sanction under s. 539 of the Civil Procedure Code was not a pre-requisite of the suit for the same reason; (iii) that the suit was not barred by limitaton, its object being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object; (iv) that the suit was not barred under s. 13 or s. 43 of the Civil Procedure Code; (v) that the proper decree was (*1*) to declare the plaintiff's right to appoint a qualified person with the concurrence of the rest of his family; (*2*) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff's family before it was confirmed; if such appointment were confirmed, the property should be directed to be delivered to the person appointed to be administered in accordance with the trusts and usage of the muth. *Semble*: That the paradesi or head of the muth might be a married man, provided he had been duly initiated. SATHAPPAYYAR *v.* PERIASAMI

I. L. R. 14 Mad. 1

6. ——————— **Public, religious, and charitable trust**—*Hindu temple, with a dharmashala and sadavart attached to it—Trustee—Liability of constructive trustee.* A Hindu built a temple in honour of the deity Shri Pandurang, to which were attached a dharmashala and a sadavart for feeding travellers and giving alms to the poor. For the maintenance of the temple and the charities connected with it, he dedicated certain property by a deed of gift, under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his lifetime he managed the temple as provided in the deed. On his death in 1867, the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community. In 1894 the pujari of the temple and five other worshippers of the idol filed this suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882) with the sanction of the Advocate General, for removing the defendant from the management of the temple on the ground of his misconduct and mismanagement of the trust property. The defendant pleaded (*inter alia*) that the property was not a public, religious, and charitable trust; that he was not a trustee; that the plaintiffs had no right to sue; and that the suit was time-barred. *Held*, (i) that, having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a dharmashala, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a sadavart, the intention of the founder was to devote the property to public, religious, and charitable purposes; (ii) that although the defendant was not appointed a trustee, yet by taking charge of the endowment, and purporting to manage it as temple property,

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ENDOWMENT—*contd.*

he made himself a constructive trustee, and was liable as such to the beneficiaries. JUGALKISHORE *v.* LAKSHMANDAS RAGHUNATH DAS
I. L. R. 23 Bom. 659

7. ———— **Suit by trustees for possession**—*Madras Regulation VII of 1817—Order of Revenue Board appointing manager.* The suit was brought by the trustees of certain pagodas for the recovery of six villages for the defendant on behalf of the pagodas and to declare a copper sanad, purporting to be an ancient grant on which defendant based his title, a forgery. The District Judge considered that the evidence sufficiently established that the title to the villages was in the temples, and not in the defendant, but he was also of opinion that, as defendant had been lawfully placed in management by the Board of Revenue in 1858, he was entitled to hold the villages for life. He therefore declared plaintiff's reversionary title as trustee of the temples on the death of the defendant. Defendant appealed from this decision as to the title, and plaintiff appealed as to the part of the decree which refused him immediate possession of the property. *Held* by INNES, *J.*, that the title to manage must reside in the pagoda if it did not reside in the defendant, that the evidence abundantly negatived the title of the defendant, and that plaintiff was entitled to possess and manage the property as trustee of the temples. Upon the question whether plaintiff was precluded from recovering during the lifetime of defendant, by reason of the order of 1858, placing defendant in possession: *Held*, that the Government could not create a valid title to more than they themselves possessed; that they had simply taken over the possession and management of the endowment, and afterwards given it over to defendant; that by so doing they relieved themselves of the trust they had undertaken under Regulation VII of 1817, but did not thereby appoint defendant a manager under Regulation VII of 1817. NALLATHUMBI BATTAR *v.* NELLAKUMARA PILLAI . . . **7 Mad. 306**

8. ———— **Hindu or Mahomedan religious endowment**—*Alienation or pledge of—Bombay Act II of 1863, s. 8, cl. 3—Common law of the country.* Religious endowments in this country, whether they are Hindu or Mahomedan, are not alienable; though the annual revenues of such endowments, as distinguished from the *corpus*, may occasionally, when it is necessary to do so in order to raise money for purposes essential to the temple or other institution endowed, but not further or otherwise, be pledged. Bombay Act II of 1863, s. 8, cl. 3, contained no new law but merely declared the pre-existing common law of this country. NARAYAN *v.* CHINTAMAN . **I. L. R. 5 Bom. 393**

9. ———— **Charity**—*Family idols—Sale of trust property in execution—Suit by trustee to recover the property—Limitation.* The Hindu law, unlike the English law with respect to charities, makes no distinction between a religious endowment having for its object the worship of a household idol and one which is for the benefit of the general public. In execution of decrees against the plaintiff as the representative of his deceased father and brother, certain lands were sold to the first defendant. The plaintiff sued to recover them, alleging that the former owner of the lands had assigned them to his (the plaintiff's) brother and himself (the plaintiff) and their descendants by a deed of gift to perpetuate the worship of the donor's household idol. *Held*, that the plaintiff was entitled to recover the property. The gift was a valid one, creating a religious endowment under the Hindu law, and that the plaintiff's suit was not to set aside the sale, but was one by the trustee of the endowment to recover the property to which the limitation of twelve years was applicable. RUPA JAGSHET *v.* KRISHNAJI GOVIND
I. L. R. 9 Bom. 169

10. ———— *Charitable endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution-purchaser.* A trust-deed of certain property executed by the member of a Hindu family provided that neither he nor his heirs should incumber or alienate it, but that in case of necessity his heirs might maintain themselves out of the income while administering the trust of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution-purchaser as heir to the settlor. *Held*, that the plaintiff was not entitled to recover the land. *Rupa Jagshet* v. *Krishnaji Govind, I. L. R. 9 Bom. 169*, distinguished. SUPPAMMAL *v.* COLLECTOR OF TANJORE
I. L. R. 12 Mad. 387

11. ———— **Trustee**—*Act XX of 1863, s. 14—Bengal Regulation XIX of 1810—Civil Procedure Code, 1882, s. 539—Suit to remove trustees of Hindu religious endowment—Right of representative of founder of trust to nominate trustee.* The Maharaja of *B* in 1862 assigned certain lands situated in Bengal for the maintenance of a temple at Chauria in the Gorakhpur district, and appointed certain trustees of the endowment. Those trustees dealt with the property in a manner inconsistent with the trust by making alienations thereof as if it were their own private property. In 1893 the representative in title of the original settlor sued in the Court of the District Judge of Gorakhpur to have certain alienations made by the said trustees set aside and the property restored to its original uses, and for the appointment of a new trustee or new trustees in place of the trustees, defendants to the suit. *Held*, that such a suit was rightly brought under s. 14 of Act XX of 1863, and that it was not essential for the application of that Act that the endowment should ever have been taken under the control of the Board of Revenue. *Ganes Sing* v. *Ramgopal Sing, 5 B. L. R. Ap. 55*, and *Dhurrum*

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ENDOWMENT—*contd.*

Singh v. *Kissen Singh, I. L. R. 7 Calc. 767*, approved. *Raghubar Dial v. Kesho Ramanuj Das, I. L. R. 11 All. 18, quoad hoc*, overruled. *Held*, also, that s. 539 of the Code of Civil Procedure was not applicable to the above suit. *Lakshmandas Parashram* v. *Ganpatrav Krishna, I. L. R. 8 Bom. 365*, and *Jawahra* v. *Akbar Husain, I. L. R. 7 All. 178*, referred to. *Held*, also, that, there being no special provision in the endowment for the appointment of trustees, the right of nomination remained vested in the founder of the endowment, and that the right to nominate continued to his heirs. *Gossami Sri Gridhariji* v. *Romanlalji Gossami, I. L. R. 17 Calc. 3 ; L. R. 16 I. A. 137*, referred to. SHEORATAN KUNWARI *v.* RAM PARGASH **I. L. R. 18 All. 227**

12. ——————— *Trust—Ground for removing hereditary trustee—Mistake by trustee as to true legal position—Appointment of a devasthan committee—Scheme of management.* A mistake by a hereditary trustee of a devasthan as to his true legal position does not of necessity afford a ground for removing him from his post of manager and entrusting it to new hands. The management of a devasthan being found to be lax and improvident, but not fraudulent and dishonest, the Court declined to remove the manager, but appointed a devasthan committee to supervise and control him, and framed a scheme for the management of the trust. ANNAJI RAGHUNATH GOSAVI *v.* NARAYAN SITARAM . . . **I. L. R. 21 Bom. 556**

13. ——— **Devasthanam committee**—*Grounds for removal from office—Errors of judgment on part of committee-man.* Mere error in judgment on the part of a member of a devasthanam committee is not sufficient to disqualify him from continuing to hold such office. To justify the removal of such an office-holder, it must be shown that the further holding by him of the office is incompatible with the interests of the temple under the charge of the committee of which he is a member. The duty of a devasthanam committee consists primarily in seeing that its endowments are appropriated to their legitimate purposes, and are not wasted. It is not a part of the duty of such a committee to interfere with the trustees in matters relating to rituals. TIRUVENGADATH AYYANGAR *v.* SRINIVASA THATHACHARIAR **I. L. R. 22 Mad. 361**

14. ——————— *Devasthanam committee—Dismissal of dharmakarta by three out of five members of committee without meeting—Legality of such dismissal.* The dharmakarta of a temple was suspended and dismissed from office in the following manner :—One member of the devasthanam committee consisting of five initiated an enquiry, received petitions and took evidence, submitting the results of his enquiry to two other members successively, the three signing an order calling upon the dharmakarta to present himself at the office for the purpose of an enquiry in certain charges laid against him. No date was fixed for the enquiry, and the two remaining members of the committee took no part in the proceedings. The dharmakarta took no notice of the order, whereupon the same three committee-men signed and issued another resolution dismissing him from his post. This resolution was sent to the other two members of the committee, but was not signed by them. *Held*, that the dismissal was illegal. The dharmakarta, being the holder of an office, could only be removed from it by the corporate act of the committee generally. The acts of a corporation (to which the committee might be likened) must be performed at a meeting convened after due notice to all the members of the body ; and though there might be exceptions to that rule, a case in which the matter to be decided involved the rights of third parties and a decision to their prejudice was one in which the rule should be enforced. THANDAVARAYA PILLAI *v.* SUBBAYYAR **I. L. R. 23 Mad. 483**

15. ——— **Christian endowment**—*Powers of a Christian congregation to elect under which Bishopric the endowment should be placed in spiritual matters—Effect of a concordat placing the endowment within the territorial jurisdiction of a certain Bishop—Suit for partition of the endowment.* In the year 1806, a fund was started by a caste of Roman Catholic boatmen in Royapuram for the purpose of supplying the religious wants of the caste, and in 1829 the Church of St. Peter at Royapuram was erected. The fund was under the control of the Government Marine Board, which in 1830, in consequence of disputes between the headmen of the caste, suspended all payment. In 1863 a member of the caste, claiming to be sole surviving headman, brought a suit against Government for a declaration that he was sole surviving headman, and as such entitled to the sole management of the funds then in the hands of Government, which funds the Government paid into Court to the credit of the said suit. By the decree in this suit it was declared that the fund in question belonged to the whole body of Roman Catholic boatmen in Royapuram, that it must be devoted to the religious observances of the body, and that it rested with that body to determine whether in spiritual matters the Church should continue under the Vicar Apostolic or the Goanese Bishop of Mylapore. In 1886 a concordat was executed between the Pope of Rome and the King of Portugal, the effect of which was to place St. Peter's Church within the territorial jurisdiction of the Vicar Apostolic. Plaintiffs, who were members of the Goanese party, complained, that having regard to the effect of the concordat of 1886, it would be impossible for their party—even if in a majority—to elect a priest of their own party, and prayed for a division of the fund. *Held*, that even if this were so, this fact would not justify the Court in taking away from St. Peter's Church part of its endowment. CHINNASAMI MUDALI *v.* ADVOCATE GENERAL . . **I. L. R. 17 Mad. 406**

16. ——— **Sale of office attached to a temple**—*Mirasi rights attached to Devastanams—Suit against office-holder—Compromise consenting to*

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ENDOWMENT—*contd.*

sale of office and its emoluments—Decree in terms of compromise—Execution proceedings—Invalidity of compromise opposed to public policy—Right of Court to refuse to execute. The sale of an office attached to a temple, involving services of a personal nature and entitling the holder of it to receive emoluments, is against public policy, and will not be recognised or enforced by the Courts. The holder of such an office was sued by a person to whom he had mortgaged his right to the office, together with other property; and a compromise was arrived at, by the terms of which the office-holder agreed that his right to the office and to its emoluments should be sold in satisfaction of the mortgage-debt. A decree was passed in terms of the compromise, and the decree-holder sought to have the right to the office sold in execution of that decree, and contended (on objection being raised) that inasmuch as a decree had been passed directing the sale of the office, the Court executing the decree was not at liberty to consider its validity, but must execute it according to its terms. *Held*, that, as the decree was based on an agreement of compromise, and the Court had merely adopted the contract, the Court must be taken to have adopted it with all its incidents. By s. 375 of the Code of Civil Procedure, the Court had no jurisdiction to pass a decree on a compromise unless it was a lawful compromise. Any terms of a contract which are opposed to public policy are invalid, and will, therefore, not be enforced by the Courts, and so far as a decree embodies unlawful terms of a compromise it is inoperative and will not be enforced. *Nagappa v. Vencata Rau, I. L. R. 24 Mad. 265*, referred to. LAKSHMANASWAMI NAIDU *v.* RANGAMMA (1902) **I. L. R. 26 Mad. 31**

17. ——— Words of dedication. Where in a deed of gift and dedication the following passage occurred: "The right and power of gift are yours. I and my heirs shall have no liability, claim or right:" *Held*, that there was no absolute dedication of the property to the idol so as to constitute the property covered by the same *debutter* and inalienable. HARASUNDARI MAJUMDAR *v.* BASANTA KUMAR ROY (1905) **9 C. W. N. 154**

18. ——— Valid religious endowment, conditions of—*Absolute gift, restraint upon immediate enjoyment—Residuary clause, construction of—"Moveable properties for the service of idols," construction of.* In order to constitute a valid endowment all that is necessary is to set apart specific property for specific purposes and when these purposes are clearly religious and charitable in their nature, the trust is not invalid merely because it transgresses against the rule, which forbids the creation of a perpetuity. The trust does not become invalid by reason of the fact that there is no express gift to any specific idol or that the gift of certain of the properties is to idols, which are not existent, provided the testator clearly expresses an intention to bequeath certain of his properties to specific religious or charitable trusts, *e.g.*, performance of Durga and Lakshmi Pujahs, which his executors and trustees are to carry out in the manner indicated by his will. The Court will only frame a scheme, when a testator having expressed a clear intention to create a trust has failed to indicate the means by which the trust is to be carried out. By his will the testator directed that the intermediate interest for 13 years in certain properties was not to go to his sons, but was to be dealt with by the trustees in carrying out certain specific trusts, after which period the properties were to go to the sons absolutely: *Held*, that the above restraint on the enjoyment of the properties was not bad in law. *Lloyd* v. *Webb, I. L. R. 24 Calc. 47*, distinguished. The last clause in the will was "I also direct that all the moveable properties and articles, which I shall leave, my executors and trustees shall keep apart such of them as they shall think necessary for the service of the *thacoors* and they shall after 13 years divide the remainder among my three sons in equal shares:" *Held*, that this clause applied only to those articles, which were suitable for the worship of the *thacoors* and that it did not refer to moneys and other articles in the hands of the executors. The Court also gave a direction that, after due administration, the executors should deal with the balance in their hands as in the case of intestacy and divide the same among the sons of the testator as his heirs. PRAFULLA CHUNDER MULLICK *v.* JOGENDRA NATH SREEMANY (1905) . **9 C. W. N. 528**

19. ——— Scheme for management of Hindu temple by Mahant—*Power to make and modify such a scheme—Power to alter trust of endowment—Civil Procedure Code (Act XIV of 1882), s. 539—Provision for application of surplus funds.* This was a suit in which the respondent charged the appellant, the manager of a certain Hindu temple, with neglect to keep proper accounts, misappropriation of offerings and other acts of a similar character, and the relief prayed was the settling of a scheme for the management of the temple including "provisions for the application of the surplus funds belonging to the temple with such modifications of the managing authority" as might be necessary to obviate the evils referred to, "and place the administration of the temple on a satisfactory footing." Objections were taken to the scheme settled by the High Court (which amended one framed by the District Court) that its effect would be to lower the position of the Mahant and weaken his authority, and that it provided for the application of surplus funds by devoting them to objects foreign to the purposes of the endowment. The Judicial Committee settled a scheme calculated to get rid of those objections and to meet the exigencies of the case without impairing the authority of the Mahant whose position, subject to the scheme, was to be the same as before, and providing that all surplus income should be invested for the benefit of the temple, with liberty to the Mahant or any person interested to apply to the District Court with reference to the carrying out the directions of the scheme, or to the

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ENDOWMENT—*concld.*

High Court for any modification of it which might appear to be necessary or convenient. PRAYAG DOSS JI VARU *v.* TIRUMALA SRIRANGACHARLA GARU (1907)
I. L. R. 30 Mad. 138 ; L. R. 34 I. A. 78

20. ——— Trustees, removal of—*Religious Endowments Act (XX of 1863), ss. 3, 18—Misfeasance—Breach of trust.* All endowments, which are affected by Regulation XIX of 1810, whether they come under the Board of Revenue or not, fall within the purview of Act XX of 1863. In a suit brought after having obtained the sanction of the District Judge under s. 18 of Act XX of 1863, for the removal, on the ground of misfeasance, breach of trust and neglect of duty, of a trustee of a religious endowment for the management of which the Local Government appointed in 1864 a Committee of three members under s. 7 of the Act, the defence was that s. 3 of the said Act had no application inasmuch as the endowed property had not vested in the Government before the passing of the Act, and that the proper course for the plaintiff was to have instituted the suit under s. 539 of the Code of Civil Procedure; and that the office of *Daroga* or Manager being hereditary, he could not be removed from that office: *Held*, that the provisions of Act XX of 1863 applied to the case, and that the suit was rightly instituted, and that the *Daroga* could be removed from his office by the District Judge, if he acted contrary to the trust. *Bibee Kuncez Fatima* v. *Bibee Saheba Jan, 8 W. R. 313 ; Sheoratan Kunwari* v. *Ram Pargash, I. L. R. 18 All. 227 ; Ganes Sing* v. *Ram Gopal Sing, 5 B. L. R. App. 55 ;* and *Dhurrum Singh* v. *Kissen Singh, I. L. R. 7 Calc. 767*, referred to. *Saturluri Seetaramanuja Charyulu* v. *Nanduri Seetapati, I. L. R. 26 Mad. 166*, followed. *Held*, further, that for the operation of this Act, it is immaterial whether the office of the trustee or manager is hereditary or not, and that in either case the trustee or manager who misconducted himself and acted contrary to the object of the endowment, could be dealt with under the provisions of this Act. *Fakurudin Sahib* v. *Ackeni Sahib, I. L. R. 2 Mad. 197*, and *Natesa* v. *Ganapati, I. L. R. 14 Mad. 103*, followed. MAHOMED ATHAR *v.* RAMJAN KHAN (1907) . **I. L. R. 34 Calc. 587**

ENGLISH COMMITTEE OF HIGH COURT.

See TRANSFER OF CRIMINAL CASE—GENERAL CASES. **I. L. R. 1 Calc. 219**

——— Dismissal of Munsif—*Power of Division Bench of High Court.* A Munsif who had been dismissed by an order of the English Committee, consisting of four Judges of the High Court, applied to a Division Bench, consisting of the Chief Justice and MITTER, *J.*, to reconsider his case. The Chief Justice having dismissed his application, while MITTER, *J.*, considered that he was entitled to a rehearing, he appealed under cl. 15 of the Letters Patent. The Court considered it unnecessary to enter into the merits of the questions raised, and held that the Munsif having been removed by an order of four Judges forming the English Committee, no Division Bench had any power to reconsider, or review, or set aside, or to order the Judges of the English Committee to reconsider, review, or set aside the decision of the English Committee. *In the matter of the petition of* HURISH CHUNDER MITTER . . **10 B. L. R. 79 : 18 W. R. 209**

In re DENONATH MULLICK
10 B. L. R. 80 and 82 note

ENGLISH LAW.

See CIVIL PROCEDURE CODE, 1882. s. 102.
I. L. R. 22 Calc. 8

See COMPANY—WINDING UP—COSTS AND CLAIMS ON ASSETS.
I. L. R. 16 All. 53

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See EASEMENT . **I. L. R. 31 Calc. 503**

See FALSE EVIDENCE—CONTRADICTORY STATEMENTS . . **4 Mad. 51**
I. L. R. 7 All. 44

See HINDU LAW—GIFT—CONSTRUCTION OF GIFTS . **I. L. R. 16 Calc. 677**
L. R. 16 I. A. 44

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, AND BEQUESTS TO A CLASS—REMOTENESS.
I. L. R. 2 Calc. 262

See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE—COMPENSATION FOR IMPROVEMENTS.
I. L. R. 8 Calc. 582

See LANDLORD AND TENANT—PAYMENT OF RENT—GENERALLY.
I. L. R. 26 Mad. 540

See LIMITATION ACT, 1877, s. 26.
I. L. R. 14 Bom. 213

See LIS PENDENS.
2 Ind. Jur. N. S. 169
1 Hyde 160
11 Bom. 64
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See MORTGAGE—TACKING.
5 B. L. R. 463
2 B. L. R. Ap. 45

See PARSIS . . **4 Bom. O. C. 1**
5 Bom. A. C. 109
I. L. R. 2 Bom. 75
I. L. R. 5 Bom. 506
I. L. R. 6 Bom. 151, 363
I. L. R. 13 Bom. 302
I. L. R. 22 Bom. 355

See PARTNERSHIP—WHAT CONSTITUTES PARTNERSHIP . **3 B. L. R. A. C. 238**
10 B. L. R. 312
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See RIGHT OF WAY.
I. L. R. 16 Bom. 552

See STATUTES, CONSTRUCTION OF.
I. L. R. 19 Bom. 340

See TERRITORIAL LAW OF BRITISH INDIA.
1 B. L. R. O. C. 87

See TRESPASS—GENERAL CASES.
I. L. R. 2 Mad. 232

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——— application of, in Calcutta.

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——— order 11 of 1883, rule 1, sub-s. (*e*).

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I. L. R. 28 Calc. 641

1. ——— Applicability of, to natives of India. It has always been the policy of the Courts of this country not to apply the strict rules of English law to natives of this country. PARABDI SAHANI *v.* MAHOMED HOSSEIN
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2. ——— Law in mofussil—*Bom. Reg. IV of 1827, s. 26.* Although the English law is not obligatory upon the Courts in the mofussil, they ought, in proceeding according to justice, equity and good conscience (Bombay Regulation IV of 1827, s. 26), to be governed by the principles of English law applicable to a similar state of circumstances. DADA HANAJI *v.* BABAJI JAGUSHET
2 Bom. 38 : 2nd Ed. 39

WEBBE *v.* LESTER . **2 Bom. 55 : 2nd Ed. 52**

3. ——— *English rules of equity in mofussil.* Instances in which the rules of English Courts of Equity have been applied in the mofussil, referred to. WAMAN RAMCHANDRA *v.* DHONDIBA KRISHNAJI . **I. L. R. 4 Bom. 126**

4. ——— Advancement, doctrine of.—*Benami purchase—Europeans in India.* The English doctrine of advancement is applicable in India as between a father and daughter, both of English extraction and living under English law. The status of the daughter, under an alleged *bonâ fide* purchase, made by her father for her advancement when a minor, cannot be set aside except by positive proof that the father merely made use of her name as he would that of any servant or stranger, retaining the beneficial interest in the property for himself. KISHEN KOOMAR MOITRO *v.* STEVENSON . . . **2 W. R. 141**

5. ——— Aliens, law relating to—*Devise of lands for charitable purposes—Statute of Mortmain—Introduction of English law into India.* The introduction of the English law into a conquered or ceded country does not draw with it that branch which relates to aliens if the acts of the power introducing it show that it was introduced, not in all its branches, but only *sub modo* and with the exception of this portion. The English law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into the East Indies so as to create a forfeiture of lands held in Calcutta or the mofussil by an alien, and devised by a will executed according to the Statute of Frauds for charitable purposes. *Semble :* The Statute of Mortmain does not extend to the British territories in the East Indies. MAYOR OF LYONS *v.* EAST INDIA COMPANY . **1 Moo. I. A. 175**

6. ——— Inheritance, law of—*English law how far applicable.* The case of *Mayor of Lyons* v. *East India Company, 1 Moo I. A. 175,* does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English statute law which from their very nature were only passed for reasons connected with England, and which would not be applicable in India or any Colony of the British Crown, *e.g.*, the Mortmain Acts, the Law of Aliens, and the like. SARKIES *v.* PROSONOMOYEE DOSSEE
I. L. R. 6 Calc. 794 : 8 C. L. R. 76

7. ——— Attainder, law of—*Law in force in India. Per Curiam*—The English law of attainder did not apply in India in 1782. PAPAMMA *v.* VENKATADRI APPA RAU. NARASIMHA APPA RAU *v.* VENKATADRI APPA RAU
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8. ——— Attorneys—*Stat. 3 Jac. I, c. 7.* Stat. 3 Jac. I, c. 7, has not been extended to India. WILKINSON *v.* ABBAS SIRKAR
3 B. L. R. O. C. 96

9. ——— Banking in mofussil—*Law of Merchants.* The Law of Merchants is not applicable to banking transactions in the mofussil. ALI *v.* GOPAL DASS . . . **13 W. R. 420**

10. ——— Bankruptcy—*Stat. 6 Geo. IV, c. 16, and 2 & 3 Will. IV, c. 114—Proof of bankruptcy under English Commission.* The Stat. 6 Geo. IV, c. 16, and 2 & 3 Will. IV, c. 114, made to facilitate the proof of bankruptcy and assignment in England, were held not to extend to the Courts in India, and in an action by the assignee of a bankrupt under an English Commission against a debtor, a native of India and resident within the jurisdiction of the Supreme Court at Calcutta, it was held that such evidence of the bankruptcy must be given as would have been required to prove the fact if no statutory regulations had been made. CLARK *v.* ROOPLALL MULLICK. CLARK *v.* DOORGAMONEY DOSSEE . . . **2 Moo. I. A. 263**

11. ——— Case Law—*Application of English precedents to India.* English precedents are only to be applied in India after being carefully weighed and tested with regard to the customs and habits of the people. JUGGOBUNDHOO SHAW *v.* GRANT SMITH & Co. . . . **2 Hyde 129**

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12. ——————— *Principles of English Common Law and Equity Courts.* The different principles on which Courts of Law and Equity in England administer justice observed upon, and the necessity of bearing in mind this distinction when English cases are referred to, pointed out. PEDDAMUTHULATY *v.* TIMMA REDD **2 Mad. 270**

See as to English cases *per* MACPHERSON, *J.*, in PARBATI CHARAN MOOKERJEE *v.* RAMNARAYAN MATILAL . . **5 B. L. R. 396, 400, 401**

13. ——— **Contracts**—*Common law of England.* The requirements of the common law of England cannot, unless made applicable by legislation or sanctioned by well-established judicial usages, be imported into the construction of a contract made in this country, unless it be clear from the construction of the contract that the parties at the time then entered into it had such requirements in view, and intended that the contract should be controlled by them. GREAT EASTERN HOTEL COMPANY *v.* COLLECTOR OF ALLAHABAD **2 Agra Ex. O. C. 1**

14. ——————— *Agreements under seal and by parol.* In agreements between natives of this country the law does not distinguish between those which are under seal and by parol, the English law to that effect not having been introduced into the country. KRISHNA *v.* RAIYAPPA SHANBHAGA . . . . **4 Mad. 98**

15. ——— **Equitable mortgage**—*Mad. Reg. II of 1802, s. 17.* Madras Regulation II of 1802, s. 17, enacts that, in the absence of any positive law to the contrary in force in the Presidency of Madras, the decision of the Court is to be according to the justice, equity, and good faith. The plaintiff was an Armenian, and the defendants Hindus, Mahomedans, and Christians. The plaintiff sought by the plaint to establish a lien on land, created by an equitable mortgage by deposit of title-deeds. *Held* (in the absence of any agreement that the transaction was to be governed by any particular local law), that under Madras Regulation II of 1802, s. 17, the principles of English law respecting equitable mortgages applied. VARDEN SETH SAM *v.* LUCKPATHY ROYJEE LALLAH **9 Moo. I. A. 303**

16. ——— **Estoppel**—*Approbation and reprobation of transaction.* The principle that a party cannot both approbate and reprobate the same transaction is applicable to Indian cases. MAKHANLALL *v.* SRIKRISHNA SINGH **2 B. L. R. P. C. 44 : 11 W. R. P. C. 19 12 Moo. I. A. 157**

17. ——— **Hundis**—*Analogy between hundi and bill of exchange—Application of English law.* Where the analogy between native hundis and English bills of exchange is complete, the English law is to be applied. SUMBOONATH GHOSE *v.* JUDDOONATH CHATTERJEE . **2 Hyde 259**

18. ——— **Immoveable property**—*Laws applicable to Bombay—Lex loci—Reality and personality.* The *lex loci* report of the Indian Law Commissioners and the introduction of English law into India discussed. Distinction taken, with reference to the observations of Lord Kingsdown as to Calcutta in the *Advocate General* v. *Surnomoyee Dossee, 9 Moo. I. A. 425-426,* between Bombay, which was held by the English in full sovereignty, and Calcutta, which was merely held by them as a factory. Statement of circumstances which led to the passing of Fergusson's Act, 9 Geo. IV, c. 33, and Act IX of 1837, relating to the immoveable property of Parsis. NAOROJI BERAMJI *v.* ROGERS . . . **4 Bom. O. C. 1**

19. ——— **Insurance**—*Applicability to Hindus—Law where no principle of Hindu law is applicable—Contract of insurance.* Where the defendants, underwriters of a policy of insurance on goods on board a vessel bound from Bombay to Calcutta, were Hindus, but no principle of Hindu law was applicable, the parties having selected the English language for the expression of their contract. *Held,* that the case was to be determined in accordance with the principles of English law. HARRIDAS PURSHOTAM *v.* GAMBLE . **12 Bom. 23**

20. ——— **Limitation, law of**—*Application of statutes to India.* The Statute of Limitations, 21 Jac. I, c. 16, extended to India. EAST INDIA COMPANY *v.* ODITCHURN PAUL **5 Moo. I. A. 43**

It applied to Hindus and Mahomedans as well as Europeans in civil actions in the Supreme Court. RUCKMABOYE *v.* LULLOBHOY MOTTICHUND **5 Moo. I. A. 234**

21. ——— **Married woman's property**—*Law applicable to Hindu converts.* The English law relating to a married woman's property, and the right of the husband therein, is not necessarily applicable to Hindu converts to Christianity. The rule of decision in such cases is the rule prescribed by equity and good conscience, which is in each case to refer the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged. PANDU *v.* SURBOMONGOLA DOSSEE . **1 W. R. 22**

22. ——— **Notice, doctrine of**—*Priority of registered deed.* The English equitable doctrine of notice, where there is a contest as to the priority of a deed registered under Act XVI of 1834 or Act XX of 1866 over an unregistered deed of a date prior to those Acts, is applicable in India. JIVANDAS KESHAVJI *v.* FRAMJI NANABHAI **7 Bom. O. C. 45**

23. ——— **Oaths in Courts of Justice**—*Stat. 17 & 18 Vict., c. 125.* The English Stat. 17 & 18 Vict., c. 125, does not apply to India. VALU MUDALI *v.* SOMERBY . . **2 Mad. 246**

24. ——— **Personalty, law relating to**—*How far English law is applicable in Calcutta—Term of years—Armenians—Construction of power in deed to invest.* The English law relating to personalty applies to personality in India held by

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ENGLISH LAW—*contd.*

British subjects and others to whom the English law is applicable. A term of years is therefore personalty in India as it is in England. Armenians in India are subject to the English law. A power contained in a trust-deed to invest R20,000 "in or upon any real or Government securities, or in or upon any public funds at interest," is of an optional character, and not imperative, and does not alter the character of the original property so as to convert it from personalty into realty. NICHOLAS *v.* ASPHAR . . . **I. L. R. 24 Calc. 216**

25. ——— **Prescription Act**—*Law of mofussil.* The English Prescription Act does not apply to this country in the mofussil. JOY PROKASH SINGH *v.* AMEER ALLY . **9 W. R. 91**

See CASES UNDER PRESCRIPTION.

26. ——— **Primogeniture, law of**—*Law applicable to Portuguese in Bombay.* The Portuguese inhabitants of the town and island of Bombay, not having had their laws, and usages having the force of laws, preserved to them by the treaty by which Bombay was (1661) ceded to the English, are subject to English law, so far as the same has been introduced into Bombay, and has not since been varied by legislation. Where a Portuguese inhabitant of Bombay, being entitled to certain immoveable estate in perpetuity, died intestate before the 1st of January 1866 (on which day the Succession Act, 1865, came into force), leaving two nephews by a sister as his next-of-kin, it was held that the elder of them, as heir-at-law of the intestate, was entitled to succeed solely to such immoveable estate. LOPES *v.* LOPES . **5 Bom. O. C. 172**

27. ——— **Profit á prendre**—*Rule as to statutes affecting the Crown—Profit à prendre—Right of pasturage in Bombay Presidency—Prescription.* The rule of construction according to which the Crown is not affected by a statute, unless specially named in it, applies to India. The rule of English law that a claim to a profit *à prendre* cannot be acquired by the inhabitants of a village either by custom or prescription does not apply to a right of pasturage claimed by a village in the Presidency of Bombay as against the Government. The right of free pasturage has always been recognized as a right belonging to certain villages, and must have been acquired by custom or prescription. SECRETARY OF STATE FOR INDIA *v.* MATHURABHAI . **I. L. R. 14 Bom. 213**

28. ——— **Sheriff's sale.** *Sale in execution of decree—Law in mofussil.* The law of the mofussil was the *lex rei sitæ* at Sheriff's sales, and controls or modifies the English law as to execution and delivery. BROWN *v.* RAM COMUL GHOSE. GOPEE CHUNDER CHUCKERBUTTY *v.* RAM KOMUL GHOSE . . . **W. R. 1864, 179**

29. ——— **Suicide**—*Forfeiture of property.* The English law of forfeiture of the personal property of persons committing suicide, if it ever applied to Europeans in India, is not applicable to Natives. *Quære:* Whether the law ever had existence as regards Europeans in India. ADVOCATE GENERAL OF BENGAL *v.* SURNOMOYEE **1 W. R. P. C. 14 : 9 Moo. I. A. 387**

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30. ——— **Superstitious uses, Statute of.**—The English statute as to superstitious uses is not applicable to the Courts in India, and those Courts have jurisdiction to entertain suits for the establishment and administration of native religious institutions. ADVOCATE GENERAL *v.* VISHVANATH ATMARAM . . **1 Bom. Ap. 9**

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31. ——— **Trust, declaration of**—*Binding effect of voluntary declarations of trust—Principle of Equity Courts. Quære:* Whether Hindu law admits of the principle in which Courts of Equity in England hold a voluntary declaration of trust to be binding against the declarant. VENKATACHELLA MANUJAKAREV *v.* THATHAMMAL **4 Mad. 460**

32. ——— **Wagers**—*Stat. 8 & 9 Vict., c. 109 (Games and Wagers).* The Stat. 8 & 9 Vict., c. 109, amending the law relating to games and wagers, does not extend to India. RAMLALL THAKOORSEYDASS *v.* SOORJUNMULL DHOONDMULL **4 Moo. I. A. 339**

33. ——— **By-laws**—*By-law held to be unreasonable, and its enforcement refused.* The English law as to the necessity of by-laws being reasonable is applicable to by-laws framed in the exercise of their statutory powers by Municipal Boards in India. EMPEROR *v.* BAL KISHAN (1902) **I. L. R. 24 All. 493**

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1. RIGHT TO ENHANCE.

1. ——— **Priority of title or tenure—** *Inference of right to rent.* A suit for enhancement implies such a priority of title or tenure existing between the parties that a claim to some rent is legally inferrible from it. The decision in *Surnomoyee* v. *Suttees Chunder Roy, 10 Moo. I. A. 123,* commented on. SATYASARAN GHOSAL *v.* MOHESH CHUNDER MITTER
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2. ——— **Suit not brought under Rent Act—***Suit to assess land at enhanced rate—Act X of 1859.* A suit to assess land and recover rents at an enhanced rate must be dismissed if not brought under some section of the Rent Act. SREEDHUR JHA *v.* DABEE DUTT . . . **9 W. R. 170**

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3. ——— **Suit to assess land paying no rent.** A suit to assess rent upon land paying no rent at all is not a suit for enhancement of rent. BARODA KANT ROY *v.* RADHA CHURN ROY
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4. ——— **Lakhiraj tenure—***Resumption, nesessity of, before enhancement.* A decree in a suit for resumption must be obtained before rent can

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be recovered against a tenant holding under a lakhiraj tenure. HILL *v.* KHOWAJ SHEIKH MUNDUL **Marsh. 554 : 2 Hay 663**

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5. ——— **Hereditary conditional tenure**—*Resumption, necessity of, before enhancement—Descendant of grantee of jaghir.* A suit to enhance is not maintainable against the descendant of the grantee of a hereditary conditional jaghir. The zamindar must first sue to resume on the ground that the jaghir has been determined by breach of the condition through neglect of the service. NILMONEY SINGH DEO *v.* RAMGOPAL SINGH CHOWDHRY . . . **Marsh. 518**

6. ——— **Punchukee lakhiraj lands**—*Necessity for resumption before enhancement.* A zamindar may sue to enhance punchukee lakhiraj lands without first suing for their resumption. MADHUB CHUNDRA JANAH *v* RAJKISSEN MOOKERJEE . . . . . **7 W. R. 86**

7. ——— **Tullubi bromuttur tenure**—*Necessity for resumption before enhancement.* A tullubi bromottur tenure is not a lakhiraj tenure, and it is not necessary for a landlord to bring a suit for its resumption before he can sue for enhancement of its rent. NILMONEE SINGH *v.* CHUNDER KANT BANERJEE . . . **14 W. R. 251**

8. ——— **Beng. Reg. VII of 1822, s. 9**—*Act X of 1859, s. 13—Right to enhance without notice.* S. 9, Regulation VII of 1822, related only to settlement, not to collection of rents, and did not entitle a person claiming from Government as a private zamindar to enhance rents without proceeding under the law for the collection of rent and without giving notice of enhancement under s. 13, Act X of 1859. NAWAB NAZIM OF BENGAL *v.* RAM LALL GHOSE *alias* JOGOBUNDHOO GHOSE **6 W. R., Act X, 5**

9. ——— **Rent paid in kind**—*Conversion into rent paid in money.* A zamindar may sue to convert rents paid in kind into rents paid in money. The fact of the raiyat having paid in kind for a number of years is no bar to enhancement. THAKOOR PERSHAD *v.* MAHOMED BAKUR **8 W. R. 170**

10. ——— **Assignment of rents to creditor for a term beyond existing lease**—*Right on expiration of term.* The mere circumstance that the landlord has assigned to a creditor a certain amount of the rents for certain years extending beyond an existing lease, does not prevent

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him from enhancing the rent after the expiration of the term. ESSEN CHUNDER MANICK *v.* SEEBJOY THAKOOR . . **Marsh. 435 : 2 Hay 503**

11. ——— **Sale of tenure in execution of decree**—*Bar to enhancement.* A landowner is not estopped from enhancing rent by the circumstance that he has caused the tenure to be sold under a decree. SURNOMOYEE *v.* ADOITO CHURN ROY . . . . . **Marsh. 605**

12. ——— **Farmer for a term of years**—*Absence of stipulation prohibiting enhancement.* A farmer for a term of years is entitled to enhance the rent of raiyats holding under him when there is no condition or stipulation in his lease precluding him from so doing. RUSHTON *v.* GIRDHAREE TEWAREE . . **Marsh. 331 : 2 Hay 394**

13. ——— **Ijaradar**—*Absence of stipulation prohibiting enhancement.* An ijaradar is entitled to enhance the rent of rayats holding under him where there is no condition or stipulation in his lease precluding him from so doing. DOORGA PROSAD MYTEE *v.* JOYNARAIN HAZRA **I. L. R. 2 Calc. 474**

14. ——— **Dur-ijaradar.** A dur-ijaradar can enhance the rents of the estate of which he holds the sub-lease. GUNGARAM *v.* UJOODHYARAM MYTE . . . . . **2 W. R. 158**

15. ——— **Auction-purchaser.** An auction-purchaser cannot eject a raiyat having a right of occupancy, or enhance his rent, except in the manner prescribed by law. DABEE BHUGGUT *v.* BEECHUN RAOOT . **W. R. 1864, Act X, 111**

16. ——— *Act I of 1845.* An auction-purchaser under Act I of 1845 is not entitled to sue to enhance the rent of a tenant, not being a raiyat or cultivator, without his consent. JUGGODESHURY DOSSIA *v.* UMA CHURN ROY **7 W. R. 237**

17. ——— *Beng. Regulation XLIV of 1793, s. 5.* According to the decision of the Privy Council in the case of *Surnomoyee* v. *Suttees Chunder Roy Bahadoor, 10 Moo. I. A. 123,* the right of an auction-purchaser under s. 5 of Regulation XLIV of 1793 is limited to raising the rent of a talukh created by the defaulter to what is demandable from it according to the pargana rates prevailing either at the time when the talukh is created or at the time when the auction-purchase takes place; and he cannot demand any higher rent, even if, at any subsequent time, such higher rent be in accordance with the prevailing current rate. MOHINY MOHUN ROY *v.* ICHAMOYEE DASSEA **I. L. R. 4 Calc. 612**

18. ——— **Independent talukh formerly part of a zamindari**—*Decree of 1805—Bengal Regulation VIII of 1793, ss. 5 and 50—Bengal Tenancy Act, 1885, s. 67.* A decree of the Sudder Diwani Adalut in 1805 declared that a talukh was fit to be separated from the zamindari of which it

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1. RIGHT TO ENHANCE—*contd.*

had originally been part according to the provisions of s. 5, Regulation VIII of 1793. The decree directed that, until separation, rent should be paid by the talukhdar to the zamindar, "according to the jumma already assessed upon the talukh"; this revenue to be, on the separation being effected, deducted from that assessed upon the zamindari. Proceedings with a view to separation then continued, but litigation and delays ensued, with the result that no separation had been effected when these suits were instituted in 1882 and 1885. In these suits, the holders of shares into which the zamindari had been partitioned claimed to enhance the rent on the talukh. *Held*, that the decree of 1805, acted upon for many years, was conclusive that the talukh was not dependent on the zamindari, but an independent one, within s. 50, Regulation VIII of 1793; and that therefore the zamindars had no right of enhancement. S. 67 of the Bengal Tenancy Act, 1885, applies only to rent payable quarterly. HEMANTA KUMARI DEBI *v.* JAGADINDRA NATH ROY . . . . **I. L. R. 22 Calc. 214 L. R. 21 I. A. 131**

19. ——— **Inamdar**—*Tenants in possession before grant of inam.* An inamdar, though he cannot eject his tenants who have been in possession before the grant of the inam as long as they pay the rent due for their land, may nevertheless raise such rent at his pleasure (they not having acquired a prescriptive title), and is not restrained in doing so by the rates fixed by the Government survey. HARI BIN JOTI *v.* NARAYAN ACHARYA **6 Bom. A. C. 23**

20. ——— *Miras—Limited power to enhance.* An inamdar's power to enhance the rent of mirasi tenants is limited. He cannot demand more rent than what is fair and equitable according to the custom of the country. PRATAPRAV GUJAR *v.* BAYAJI NAMAJI **I. L. R. 3 Bom. 141**

21. ——— *Mirasidars—Right of inamdar to enhance their rent—Custom.* Mirasidars in an inam village cannot always claim to held at a fixed rent. An inamdar can enhance their rents within the limits of custom. VISHVANATH BHIKAJI *v.* DHONDAPPA . **I. L. R. 17 Bom. 475**

22. ——— *Permanent tenant.* In every part of India the Government or its alienee is debarred, if not by law (as in Bengal), yet by the custom of the country, from enhancing the assessment of permanent tenants beyond a certain limit. What that limit is, must be determined by the circumstances of each case. In a suit by an inamdar, holding under a grant from Scindia made in 1793, against his permanent tenant for an enhanced rent, the Court, in the absence of law or contract to the contrary, affirmed the plaintiff's right to enhance the assessment to the extent to which, according to the old custom of the country, Scindia would have been entitled to enhance it, and upon a virtual admission of the defendant allowed enhancement to the extent of one-half the produce. PARSOTAM KESHAVDAS *v.* KALYAN RAVJI **I. L. R. 3 Bom. 348**

23. ——— **Nij-jote lands held by tenant without right of occupancy**—*Beng. Act VIII of 1859, ss. 8, 14, 15—Notice to quit.* A landlord seeking to obtain an enhanced rate of rent on account of nij-jote land held by a tenant without a right of occupancy has no right to obtain a judicial assessment upon the footing of a notice under Bengal Act VIII of 1869, ss. 14 and 15. His right in accordance with s. 8 is to make his own terms with the tenant or to turn him out of occupation. This he can do by serving the tenants with a reasonable notice to quit unless he agrees to pay the rent required, and if the tenant continues in occupation, he must be taken to have agreed by implication to pay the said rent. JANOO MUNDUR *v.* BRIJO SINGH **22 W. R. 548**

24. ——— **Lessee of house**—*Rent of sub-tenant.* The lessee of a share of a house has a right to raise the rent of such share, while in the occupation of a sub-tenant without a lease, after due notice of the increased rate, and to proceed to eject him if he refuses to pay the higher rent, even though he has been in possession for many years. RAM LALL *v.* CHUMMON GHUTTUCK . . **24 W. R. 271**

25. ——— **Shilatri lands**—*Bom. Reg. I of 1808, s. 4—Right of inamdars to raise assessment on shilatri lands.* Government, by an indenture, dated the 25th January 1819, conveyed to *A* and *B*, and their heirs and assigns, certain villages in the island of Salsette, with the exception of such spots of shilatri tenure as might be therein, or on any part thereof, which could only become the property of *A* and *B*, on their purchasing the same from the proprietors. Since 1819, the holders of these shilatri lands had paid to the grantees and their heirs assessment (or rent) at a fixed rate which, before the grant, they used to pay to Government. In an action brought by an heir of *B* and *A* in 1868 to recover an enhanced rent or assessment levied on these lands:—*Held*, that the effect of the exception in the indenture of 1819 being to throw upon the plaintiff the burden of proving his right to enhance the rent (or revenue), which he had failed to do, and Regulation I of 1808, s. 4, cls. 1 and 2, containing admissions by Government (which then was the immediate landlord of the shilatridars) that Government itself had no such right, plaintiff was consequently not entitled to raise the rent. DADIBHAI JAHANGIRJI *v.* RAMJI BIN BHAU . . . . . **11 Bom. 162**

26. ——— **Mirasi lands**—*Contractual relation—Usage of the locality—Enhancement to be just and reasonable—Land Revenue Code (Bombay Act V of 1879), s. 83—Inamdar—Grantee of Royal share of revenue or of soil.* *Held*, that in a suit by an Inamdar to enhance rent of Miras land, it must be determined whether what was paid was rent and whether the Inamdar

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ENHANCEMENT OF RENT—*contd.*

1. RIGHT TO ENHANCE—*concld.*

has a right to enhance as against one, who holds on the same terms as the defendant does ; the test is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure. RAJYA *v.* BALKRISHNA GANGADHAR (1905) **I. L. R. 29 Bom. 415**

2. LIABILITY TO ENHANCEMENT.

(*a*) GENERAL LIABILITY.

1. ——— Raiyats having right of occupancy. No tenures are liable to enhancement of rent by judicial proceedings except the tenures of raiyats having right of occupancy, unless on the foundation of custom or of agreement expressed or implied. SURNOO MOYE *v.* BLUMHARDT **9 W. R. 552**

CHUNDER COOMAR BANERJEE *v.* AZEEMOODEEN **14 W. R. 100**

2. ——— Raiyats with right of occupancy. In the absence of express stipulation or of a right such as is mentioned in ss. 3 and 4, Act X of 1859, all raiyats having rights of occupancy are liable to have their rents enhanced, if such rents are below the rate payable by the same class of raiyats for land of a similar description, and with similar advantages in the places adjacent. PUHLWAN THAKOOR *v.* GODOOREE KOONWAR **W. R. F. B. 142**

3. ——— Raiyats with stipulation prohibiting enhancement—*Agreement made before Act X of 1859.* If a zamindar has come under any valid and binding engagement with the raiyat to the effect that the rent shall not be enhanced during the term of the settlement or during any other term, Act X of 1858 gives him no privilege to set aside that contract. SHIB SINGH *v.* BHOOP SINGH **2 Agra 303**

BYJNATH *v.* CHUTTER SINGH . **3 Agra 181**

4. ——— *Settlement with Government for higher revenue.* If a raiyat has a right of occupancy, his rate of rent can only be enhanced in the mode prescribed by law ; if he has not, his landlord can only claim arrears of rent on the ground of actual agreement, express or implied. Such claim cannot be made at an enhanced rate simply because the landlord has settled with Government at a higher rate of revenue. ROOPUN ROY *v.* PURDEEP SINGH . . . . **22 W. R. 10**

5. ——— Tenure not agricultural—*Tenant at inadequate rent.* Except in the case of agricultural holdings, landlords and tenants cannot be compelled to enter into a contract against their inclination, nor can a tenant who holds at an inadequate rent and who has no right to hold at a fixed rate be compelled by proceedings in the Civil Court to pay a higher rate of rent. LALUNMONEE *v.* AJOODHYA RAM KHAN . . **23 W. R. 61**

ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*a*) GENERAL LIABILITY—*contd.*

See KYLASH CHUNDER SIRCAR *v.* WOOMANUND ROY . . . . . **24. W. R. 412**

6. ——— Intermediate tenants—*Hereditary and transferable tenure—Act X of 1859, s. 15.* Where a tenure was or has become hereditary and transferable, and the rent has not been changed from the time of the Perpetual Settlement, the tenants (being intermediate between proprietor and raiyats) are protected from enhancement by s. 15, Act X of 1859. Tenants, intermediate between proprietors and raiyats, are subject to the Rent Act, which contemplates under-tenants as distinct from raiyats, and contains provisions relating to both classes. DHUNPUT SINGH *v.* GOOMAN SINGH . **9 W. R. P. C. 3 : 11 Moo. I. A. 433**

7. ——— *Act X of 1859, ss. 13 and 17.* Where a notice under s. 13, Act X of 1859, clearly recognized defendants as talukhdars, and at the same time sought to enhance rent under s. 17, it was held (following a decision of the Privy Council), *Dhunput Sing* v. *Gooman Singh, 9 W. R. P. C. 3,* that a suit for enhancement would not lie, as s. 17 did not apply to intermediate holders, but only to raiyats having rights of occupancy. BUDURROONISSA CHOWDHRAIN *v.* CHUNDER COOMAR DUTT . . . . . **10 W. R. 455**

8. ——— *Act X of 1859, s. 17.* The holding of an intermediate tenure does not remove the holder from the category of raiyats whose lands may be enhanced under s. 17, Act X of 1859 ; nor does the sub-letting of part of a tenure alter the original character of the raiyat's holding. UMA CHURN DUTT *v.* UMA TARA DABEE **8 W. R. 181**

HURISH CHUNDER CHOWDHRY *v.* RAM CHUNDER CHOWDHRY . . . . **18 W. R. 528**

S.C. on review, RAM CHUNDER CHOWDHRY *v.* HURISH CHUNDER CHOWDHRY . **19 W. R. 196**

9. ——— *Act X of 1859, s. 17.* There is no class of persons intermediate between the tenure-holders and the raiyats entitled to a notice of enhancement under s. 17, Act X of 1859. RAM CHUNDER CHOWDHRY *v.* HURISH CHUNDER CHOWDHRY . . **19 W. R. 196**

Affirming on review . **s. c. 18 W. R. 528**

10. ——— *Act X of 1859, ss. 13-16.* Under ss. 13 to 16 of Act X of 1859, the rent of a tenant who is a middleman may be enhanced on notice on the same grounds (except as provided in those sections) on which he was liable to enhancement prior to the passing of that Act. GRISH CHUNDER GHOSE *v.* RAMTONOO BISWAS **12 W. R. 449**

11. ——— Tenants assessed at Government settlement—*Zamindars with percentage for risk and labour of collection—Act X of 1859, s. 23, cl. 3. Held,* that the plaintiff, whose land at

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*a*) GENERAL LIABILITY—*concld.*

the time of the settlement was assessed with a proportionate Government demand, was not liable to enhancement by zamindars who, in their right, were restricted to get a certain percentage only for risk and labour of collection by the order of the settlement officer. MOOSEY KHUTEREY *v.* MAHOMED TUQEE . . . . . **1 Agra Rev. 3**

WAZEER ALI *v.* DUNNE . **1 Agra Rev. 15**

12. ——— Lands held in excess of pottah—*Act X of 1859, s. 14.* The words "rent free" in cl. 14, s. 1, are not used in contradistinction to, but merely as showing the meaning of, the term "lakhiraj." Where lands in excess of the number of bighas specified in a pottah have been held for more than sixty years, and have always been considered to form part of what was covered by the pottah, they are held to have been occupied as land included in the pottah since before the Decennial Settlement, and the rent of them cannot therefore be enhanced. JANOKEE BULLUB CHUCKERBUTTY *v.* NOBIN CHUNDER ROY CHOWDHRY . **2 W. R., Act X, 33**

13. ——— *Act X of 1859, s. 17, cl. 3—Suit for kabuliat.* Where a zamindar sued a raiyat for enhancement of rent on the ground that he was holding more land than he paid for the land in excess not being included in any pottah which had been granted to the raiyat, but being within his "jote:" *Held,* that the zamindar could properly sue for enhancement of rent under Act X of 1859, s. 17, cl. 3, and the Court would grant such relief, notwithstanding that the plaint also asked that execution of a kabuliat might be ordered after determining the rate of rent. MUKTAKESHI DEBEE CHOWDRAIN *v.* SAJED SHEIK . **2 B. L. R. Ap. 5**

14. ——— Cultivators related to zamindar—*Assessment of rent—Rate of rent. Held,* that mere relationship does not constitute a class of cultivators, and a zamindar who allowed some of his kindred to hold at favourable rates cannot be compelled to show similar favour to other cultivators who may be equally near in relationship to him. DABEE SINGH *v.* PUNCHUM SINGH **2 Agra, Part II, 203**

15. ——— Transferable tenure—*Mutation of names—Tenant who has transferred his holding—Liability of.* The main object of a suit for enhancement is to have the contract between the landlord and tenant as regards the rate of rent readjusted. In a suit for enhancement it was found that the defendant had, prior to institution, sold his holding, which by custom was transferable without the consent of the landlord, to a third party. There had been no mutation of names, or payment of a nazar, or execution of fresh lease; but the landlord had received rent from the third party, and was fully aware of the transfer. *Held,* that the connection of the defendant with the holding had come to an end, and the suit against him did not lie. ABDUL AZIZ KHAN *v.* AHMED ALI . **I. L. R. 14 Calc. 795**

ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*b*) PARTICULAR TENURE-HOLDERS AND TENURES.

16. ——— Jungleboory tenants. Jungleboory tenants are liable to enhancement. DHUNPUT SINGH *v.* GOOMAN SINGH **W. R. 1864, Act X, 61**

HARAN CHUNDER GHOSE *v.* GOOROO CHURN SIRCAR . . . . . **10 W. R. 421**

17. ——— Moostagirs—*Act X of 1859, ss. 15 and 16.* Moostagirs are protected from enhancement, not as raiyats, but as intermediate tenants, under ss. 15 and 16, Act X of 1859. DHUNPUT SINGH *v.* GOOMAN SINGH **W. R. 1864, Act X, 61**

Affirmed by Privy Council in DHUNPUT SINGH *v.* GOOMAN SINGH . . . **11 Moo. I. A. 433**
9 W. R. P. C. 3

18. ——— Ex-maafeedar—*Rent-free holding. Held,* that an ex-maafeedar, whose land at the time of settlement was separately assessed, and the sum so assessed made payable through the zamindar, cannot be treated as a mere raiyat liable to enhancement. KEDAR POOREE *v.* KULLAN KHAN **1 Agra Rev. 56**

See HUMEDOOLLAH KHAN *v.* PRAN SOOKH **3 Agra 280**

19. ——— Farmers holding over—*Act X of 1859, s. 13.* S. 13, Act X of 1859, did not apply to farmers holding on after the expiry of their lease, who were therefore liable to enhancement without notice. NATOORAM SHAHA *v.* DOORGA MANJEE . . . **W. R. 1864, Act X, 92**

20. ——— Purchaser of transferable tenure—*Act X of 1859, s. 6.* The purchaser of a transferable tenure, under which the rent cannot be enhanced, is entitled to the benefit of it, although he may not have occupied for twelve years, or acquired a right of occupancy under s. 6, Act X of 1859. FISHER *v.* NUNDOO COOMAR MUNDLE **Marsh. 625**

21. ——— Purchaser from raiyat at sale in execution—*Liability to enhancement.* A purchaser at a sale in execution of a decree of the right and interest of a person in the position of a raiyat holding at a low and favourable rate (the privilege being personal to him and his family) is not entitled to exemption from enhancement. FLOWEST *v.* KOOTOOB HOSSEIN . . **2 Agra 274**

22. ——— Under-tenants—*Tenants holding directly from Government.* In a suit against the Government for a declaration that certain lands held by the plaintiffs were not liable to enhancement of rent, it appeared that the Government had in 1825 granted, at the rates then prevailing in the neighbourhood, the lands in question to the predecessors in title of the plaintiffs; that possession had been taken by the Government shortly afterwards, but again restored under an order of the Board of Revenue in 1827, a settlement being made

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*b*) PARTICULAR TENURE-HOLDERS AND TENURES —*contd.*

at R2-8 per kani; that in 1248 it was arranged that the plaintiffs should pay their rent through a talukhdar who had obtained a settlement for a term of thirty years over the whole of the chur in which the lands held by the plaintiffs were situate; that on the term of thirty years expiring, it was not renewed, and that the Government subsequently gave the plaintiffs notice of enhancement. *Held*, that the plaintiffs were not under-tenants, and that, under the circumstances, their tenure was not liable to enhancement. SECRETARY OF STATE *v.* RADHA PERSHAD WASTI . . . **9 C. L. R. 189**

23. ——— *Sale for arrears of rent.* Under-tenures fall with the original tenure of the defaulter, and are liable to enhancement by the purchaser of the tenure sold for arrears of rent. TARUCKNATH PORAMANICK *v.* MCALLISTER **6 W. R., Act X, 34**

24. ——— **Khamar lands**—*Act X of 1859, s. 4.* S. 4, Act X of 1859, makes no exception as to khamar lands. RAM COOMAR MOOKERJEE *v.* RUGOONATH MUNDUL . . . **1 W. R. 356**

25. ——— **Mandidari tenure**—*Tenant with right of occupancy at rates varying with revenue.* Mandidari tenure is the tenure of a tenant with rights of occupancy who is entitled to hold at rates varying with the revenue, and he possesses privileges superior to those of an ordinary raiyat. His rates of rent are not liable to enhancement. BUNKUT NURSEYA *v.* GOUREE SINGH **2 N. W. 369**

26. ——— **Talukh created before accession of British Government**—*Act X of 1859, s. 15.* A talukh created before the accession of the British Government, held at an unvaried rent from before the Perpetual Settlement, is protected from enhancement by s. 15 of Act X of 1859. GOBIND CHUNDER DUTT *v.* HURRONATH ROY **1 Ind. Jur. N. S. 52 : 5 W. R., Act X, 10**

27. ——— **Lessees, right of, to collect lac insects from trees**—*Act X of 1859.* Act X of 1859 does not entitle a lessor to enhance the rent payable by a lessee on account of right leased to the latter to collect lac insects from trees growing on the lands of the former. GOPAL SINGH MOORAH *v.* SUNKUREE PAHARIN . . **23 W. R. 458**

28. ——— **Sursory jote**—*Act X of 1859, ss. 3 and 4.* A sursory jote tenure is not exempt from the operation of ss. 3 and 4, Act X of 1859, but is protected from enhancement on proof of twenty years' payment of uniform rent. DOORGA MOYEE DOSSEA *v.* KASSISSUR DEBEA CHOWDHRAIN **4 W. R., Act X, 20**

29. ——— **Government khas mehal, mode of enhancement of rent of.** The rent of a Government khas mehal can only be enhanced by the same process as the rent on any private

ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*b*) PARTICULAR TENURE-HOLDERS AND TENURES —*concld.*

estate. AKSHAYA COOMAR DUTT *v.* SHAMA CHARAN PATITANDA . . **I. L. R. 16 Calc. 586**

30. ——— **Settlement of a Government khas mehal**—*Regulation VII of 1822—Bengal Act III of 1878—Bengal Act VIII of 1879, ss. 10-14.* In order to make the enhanced rent stated in a jummabundi settled under Regulation VII of 1822 binding upon a tenant, there must be either an assent to that enhancement or else a compliance with the provisions of the rent law with reference to enhancement of rent in force at the time of such enhancement. *D'Silva* v. *Rajkumar Dutt, 16 W. R. 153, Enayetoollah Meah* v. *Nubo Coomar Sircar, 20 W. R. 207,* and *Reazooadeen Mahomed* v. *McAlpine, 22 W. R. 540,* followed. AKSHAYA COOMAR DUTT *v.* SHAMA CHARAN PATITANDA . . . . **I. L. R. 16 Calc. 586**

(*c*) LANDS OCCUPIED BY BUILDINGS AND GARDENS.

31. ——— **Lands with buildings**—*Garden ground—Non-agricultural land.* Land held ancillary to the enjoyment of a house, as, for instance, a garden or compound, is not subject to enhancement of rent under the Rent Acts. Acts X of 1859 and XIV of 1863 do not apply to land occupied by houses, but only to land held for agricultural purposes. POWELL *v.* WAHID KHAN **1 N. W. 133 : Ed. 1873, 217**

KALEE MOHAN CHATTERJEE *v.* KALI KISTO ROY **2 B. L. R. Ap. 39 : 11 W. R. 183**

32. ——— **Garden lands**—*Act I of 1845, s. 26, cl. 4—Notice of enhancement.* In order to obtain the benefit of cl. 4, s. 26, Act I of 1845 (protecting garden lands from enhancement), it is not sufficient that the notice of enhancement should describe the lands as garden lands, but there must be a clear finding that the lands have been held as such under *bonâ fide* leases. SIDDESSUREE CHOWDHRAIN *v.* KISSOREEKANT GOSSAIN **W. R. 1864, Act X, 101**

33. ——— **Lands situated in a town**—*Bengal Rent Act, 1869.* A suit cannot be maintained under Bengal Act VIII of 1869 for rent at enhanced rates of land not used for agricultural or horticultural purposes, but situated in a town. MADAN MOHAN BISWAS *v.* STALKART **9 B. L. R. 97 : 17 W. R. 441**

34. ——— **Lands for building purposes**—*Bastu land.* Bastu land (land used for sites of houses) situated in a town cannot form the subject of suits under Act X of 1859 for enhancement. Bastu land, which is the site of a house occupied by a raiyat engaged in cultivating the surrounding lands, does fall under the provisions of Act X of 1859. NAIMUDDA JOWADDAR *v.* MONCRIEFF . . . . **3 B. L. R. A. C. 283**

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*c*) LANDS OCCUPIED BY BUILDINGS AND GARDENS—*contd.*

S.C. NYMOODDEE JOARDAR *v.* MONCRIEFF
12 W. R. 140

KAILAS CHUNDER SIRKAR *v.* DURGADAS TARAFDAR . . . **3 B. L. R. A. C. 284 note**

(*Contra*) KENNY *v.* GREEDHUR MANJEE
W. R. 1864, Act X, 9

35. ——— *Bastu lands—Oodbastu lands.* When lands are liable to be assessed with rent as bastu and when as oodbastu lands. PREM LAL CHOWDHRY *v.* BROWN
6 W. R., Act X, 92

36. ——— **Lands for building and horticultural purposes.** Land had been let under different pottahs to a man for building and horticultural purposes, to be enjoyed by him, his sons, and his sons' sons for ever at a rent mentioned in the pottahs. *Held*, that, though the suit was cognizable by the Collector, the rent was not liable to enhancement. KAILAS CHANDRA ROY *v.* HIRALAL SEAL. FAKIR CHAND GHOSE *v.* HIRALAL SEAL
2 B. L. R. A. C. 93 : 10 W. R. 403

37. ——— **Land with buildings—***Mokurari.* Where a pottah was granted at "mokurari" rates, and the lands were taken for erecting buildings thereon, and carrying on the works of an indigo factory, it was held to indicate a building lease at a fixed rent, and a suit for enhancement would not lie in respect of such land. KERRY *v.* MADANLAL DOSS . . **1 B. L. R. S. N. 11**

38. ——— *Beng. Act VIII of 1869.* A suit for enhancement of rent under Bengal Act VIII of 1869 will not lie in respect of lands occupied by buildings. BROJO NATH KUNDU CHOWDHRY *v.* STEWART
8 B. L. R. Ap. 51 : 16 W. R. 216

39. ——— *Jurisdiction.* A suit for enhancement of rent of land covered with buildings will not lie in the Revenue Court under cl. 4, s. 23 of Act X of 1859, but is cognizable only by a Civil Court. DURGA SUNDARI DASI *v.* BIBI UMDATANNISSA
9 B. L. R. 101 : 18 W. R. 234

On appeal from S.C. in which Judges differed.
17 W. R. 151

KHAIRUDDIN AHMED *v.* ABDUL BAKI
3 B. L. R. A. C. 65 : 11 W. R. 410

CHURCH *v.* RAMTANU SHAHA
9 B. L. R. 105 note : 11 W. R. 547

RAMDHUN KHAN *v.* HARADHAN PARAMANICK
9 B. L. R. 107 note : 12 W. R. 404

In re BRAMMAMYI BEWA (MITTER, *J.*, dissenting) . . . . **9 B. L. R. 109 note**
14 W. R. 252

40. ——— A plaintiff brought a suit for enhancement of rent of lands occupied with buildings under Bengal Act VIII of 1869. *Held, per* E. JACKSON, *J.*, that, though Bengal Act VIII of 1869 does not apply to lands used for building purposes, the Civil Court has jurisdiction to determine suits concerning the rent of such lands, and therefore had jurisdiction to entertain the present suit. *Held, per* MITTER, *J.*, that the word "land" in Bengal Act VIII of 1869 is used in its ordinary sense, quite irrespective of the purposes for which it is applied ; and that a suit for enhancement of the rent of land on which a house is built will lie under Bengal Act VIII of 1869. BRAJANATH KUNDU CHOWDHRY *v.* LOWTHER
9 B. L. R. 121

S.C. BROJONATH KOONDOO CHOWDHRY *v.* GOPEENATH SHAHA . . . . **17 W. R. 183**

41. ——— **Land forming part of street in town**—*Beng. Act VIII of 1869—Land with buildings on it.* Bengal Act VIII of 1869 relates only to agricultural holdings, and its provisions have no application to land forming part of a street in a town. The mere fact that a building has been erected on a piece of land with the consent of the proprietor does not give the occupant a right to hold the land perpetually at the same rate ; and if the proprietor with an ultimate view of raising the rent brings a suit for ejectment, he has a right to have his title to eject tried in that suit. COLLECTOR OF MONGHYR *v.* MADAR BUKSH . **25 W. R. 136**

42. ——— **Land let for building purposes.** A suit for enhancement of rent, in pursuance of a notice to pay the enhanced rent or quit the land within three months, cannot be maintained where the land in question was originally let by the ancestor of plaintiffs to the ancestor of defendants for building purposes. PURNO CHUNDER ROY *v.* SADUT ALI . . . . **2 C. L. R. 31**

43. ——— **Land for purpose of silk factory**—*Enhancement of rent, suit for—Beng. Act VIII of 1869, s. 14—Notice of enhancement.* Plaintiff, having served notice of enhancement, in terms of s. 14 of Bengal Rent Act VIII of 1869, of certain lands held by defendants on which reservoirs and buildings for the purposes of a silk filature had been constructed, brought a suit for such enhancement under Act VIII of 1869. The lower Court dismissed the suit, in spite of a statement in the plaint that the suit was brought under the latter Act on the ground that the rent of the tenure was not enhanceble under the Rent Law. *Held*, that the lower Court ought not to have refused to decide the suit in the form in which it was brought, but ought to have enquired as to the nature of the tenancy whether it was held at a fixed rate or not. *Held*, further, that, although the suit was brought under the general law of procedure, the notice was not vitiated by the fact that the reasons assigned for the enhancement were reasons taken from the Rent Law applicable to the

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*c*) LANDS OCCUPIED BY BUILDINGS AND GARDENS—*concld.*

case of raiyats possessing rights of occupancy. COOMAR PORESH NARAIN ROY *v.* WATSON & CO. **3 C. L. R. 543**

44. ——— Lease of land for building. —Perpetual leases for building are only protected as held at a fixed rate, when the rent is fixed by the original leases. SURBOMUNGULA DOSSEE *v.* SUTTISH CHUNDER ROY . . . **2 W. R. 231**

45. ——— *Dwelling-houses.* A raiyat who takes a pottah or gives a kabuliat for his homestead is not entitled to the privileges granted to those who erect "dwelling-houses" on leased lands and is not protected from enhancement. NUFFER CHUNDRA SAHA *v.* GOSSAIN JYSINGH BHARUTEE . . . **3 W. R., Act X, 144**

46. ——— Dwelling-house in village —*Jurisdiction of Revenue Court.* A suit for enhancement of rent of a dwelling-house in a village is cognizable by the Collector. ABDUL HAMID *v.* DONGARAM DEY . . **3 B. L. R. Ap. 133**

KALEE KISHEN BISWAS *v.* JANKEE **8 W. R. 250**

47. ——— Lands appurtenant to a dwelling-house—*Reg. XIX of 1814, s. 9.* The defendant had been declared entitled, under s. 9, Regulation XIX of 1814, to hold certain lands as attached to his dwelling-house at an equitable rent payable to the landlord. The landlord subsequently sued in the Revenue Court for enhancement of rent of these lands. *Held, per* GLOVER, *J.*, that the rent so fixed on that land must be considered the fixed rent of the homestead of the house and ground, and not, therefore, capable of enhancement. KHAIRUDDIN AHMED *v.* ABDUL BAKI **3 B. L. R. A. C. 85 : 11 W. R. 410**

48. ——— Land on which shop is built—*Jurisdiction of Revenue Court—Act X of 1859, s. 23.* A suit will not lie in the Collector's Court to enhance the rent of land on which a shop stands, the shop being the thing for which rent is paid and the land merely an adjunct to it. MADAN SINGH *v.* MADAN RAM DEB . **1 B. L. R. S. N. 11**

49. ——— Lands leased for building a school and church—*Jurisdiction of Revenue Court.* Revenue Courts have no jurisdiction in a suit to recover arrears of rent at an enhanced rate from a tenant to whom land had been leased for the express purpose of building a school and a church. SURNOMOYEE *v.* BLUMHARDT . **9 W. R. 552**

(*d*) DEPENDENT TALUKHDARS.

50. ——— Beng. Reg. VIII of 1793, ss. 49, 51. A dependent talukhdar, whose tenure was in existence before the Permanent Settlement, is entitled to protection under s. 49, Regulation VIII

ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*d*) DEPENDENT TALUKDARS—*contd.*

of 1793, unless his zamindar can prove a title to enhance rent under s. 51 of that law. RADHEEKA CHOWDRAIN *v.* RAM MOHUN GHOSE . **1 W. R. 367**

51. ——— s. 51—*Actual proprietors.* The "dependent talukhdars" mentioned in Regulation VIII of 1793 are actual proprietors, and not talukhdars whose talukhs are held under documents granted by proprietors which do not transfer property in the soil. The defendant was, therefore, held not exempt from liability to enhancement as being one of the latter. SUTTYANUND GHOSAUL *v.* HURO KISHORE DUTT . . . **15 W. R. 474**

52. ——— *Act X of 1859, s. 15.* A dependent talukh created before the Decennial Settlement is protected from enhancement by s. 51, Regulation VIII of 1793, except under the circumstances therein mentioned. In a suit by a zamindar for enhancement, brought after Act X of 1859 came into operation, against the holder at a fixed rent of a dependent talukh, the latter is protected from enhancement by the provisions of s. 15 of that Act, notwithstanding decrees pronounced in previous litigation between the parties declaring the zamindar's right to enhance, and directing that the rent of the talukh should be assessed at pargana rates, if it appears that the rent never has been assessed at pargana rates and never has been enhanced, but has remained unchanged from the time of the Permanent Settlement. Such decrees place the zamindar in no better position than other landlords who, previously to the passing of Act X of 1859, had a good right to enhance, but whose right, not having been exercised from the time of the Permanent Settlement, has been taken away by the 15th section of that Act. HURRONATH ROY *v.* GOBIND CHUNDER DUTT . **15 B. L. R. 120 23 W. R. 352 : L. R. 2 I. A. 193**

Affirming the High Court decision in HURRONATH ROY *v.* GOBIND CHUNDER DUTT **5 W. R., Act X, 11**

S.C. on review . . **6 W. R., Act X, 2.**

53. ——— *Unregistered tenure.* A dependent talukhdar, under s. 51 of Regulation VIII of 1793, is not debarred from claiming the benefit of that section because his tenure had not been registered by the zamindar under s. 48 of that law. The onus of proving that a dependent talukhdar under s. 51 of the Regulation is liable to enhancement under the provisions of that section must fall on the zamindar. DOYAMOYEE CHOWDHRAIN *v.* NUNDOCOOMAR DEY **2 Hay 220**

54. ——— *Persons not personal cultivators.* In a suit for arrears of rent at an enhanced rate against tenants who held a "kaimi jote jumma":—*Held*, that the fact that they did not personally cultivate land, but held a jumma with raiyats under them, could never place them in the position of dependent talukhdars, and even if it could, Regulation VIII of 1793, s. 51, could not

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*d*) DEPENDENT TALUKDARS—*contd.*

apply to them, unless they could show that their tenure existed, and was capable of being registered, at the date of the Decennial Settlement. ESHAN CHUNDER BANERJEE *v.* HURISH CHUNDER SHAHA **24 W. R. 146**

55. ——— *Person with lease terminable yearly or at will of zamindar.* S. 51, Regulation VIII of 1793, refers solely to dependent talukhdars, and cannot be applied so as to protect from enhancement a person whose tenure is terminable at the end of any year or at the pleasure or caprice of his zamindar. KALEEDHUN BANERJEE *v.* ROMESH CHUNDER DUTT . **3 W. R. 172**

56. ——— *Nature of tenure.* In a suit for enhancement of rent under Regulation VIII of 1793 the nature of the tenure is a material question, irrespectively of the question whether the rent is fixed or variable, the nature and extent of the proof which the plaintiff (zamindar) is bound to give being different according as the tenure falls within s. 49 or s. 51 of the Regulation. The rulings of the High Court holding that in order to bring a talukh within s. 51 of the Regulation, it is sufficient to show that it existed and was capable of being registered in the zamindari sherishta at the time of the Decennial Settlement, approved of. BAMA SOONDUREE DOSSEE *v.* RADHIKA CHOWDHRAIN . . . . . **13 W. R. P. C. 11**

S.C. RADHIKA CHOWDHRAIN *v.* BAMA SUNDARI DASI . . . . . **4 B. L. R. P. C. 8**
13 Moo. I. A. 248

57. ——— *Exemption from enhancement.* Suit for enhancement (under the old law) of rent of a talukh held to be a dependent talukh within the meaning of s. 51, Regulation VIII of 1793, although not duly registered by the zamindar. *Held*, that the defendant having made out a strong *primâ facie* case to prove that he and those through whom he claimed had held the talukh at a fixed rent from a date more than twelve years prior to the Decennial Settlement, and the zamindar having relied on the weakness of the defence and having failed to show that the rent had varied, the tenure was exempt from re-assessment. MOHAMOYA DOSSEE *v.* DOYAMOYE CHOWDHRAIN **7 W. R. 62**

58. ——— *Accretion to zimma tenure with fixed rent.* Where a permanent zimma tenure has been held at one rate of rent for more than twenty years, the terms of s. 15, Act X of 1859, as well as the provisions of s. 51, Regulation VIII of 1793, preclude the zamindar from assessing accretions to the parent talukh. JUGGUT CHUNDER DUTT *v.* PANIOTY . . . . **8 W. R. 427**

59. ——— *Raiyati kadimi tenure.* Where a zamindar, a purchaser from a mortgagee, sued to enhance the rent of lands (part of the purchased zamindari) held on a raiyati kadimi tenure, which had existed more than twelve years

ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*d*) DEPENDENT TALUKDARS—*contd.*

before the Decennial Settlement, but the holder of which had subsequently accepted a pottah from the zamindar :—*Held* the acceptance of such pottah did not debar the tenant from the right of exemption from enhancement to which he was entitled by reason of the nature of his tenure. Such a pottah may be confirmatory only, and is not inconsistent with the presumption that a prior title existed. *Semble :* A claim to exempt a tenure from enhancement on the ground that it is a raiyati kadimi tenure does not fall within Regulation VIII of 1793, s. 51. RAM CHUNDER DUTT *v.* JOGESH CHUNDER DUTT
12 B. L. R. P. C. 229 : 19 W. R. 353

60. ——— *Beng. Reg. VIII of 1793, ss. 48-52—Beng. Reg. XLIV of 1793, ss. 2-5.* A purchaser of a zamindari at a public sale may, by virtue of his ordinary right as zamindar, enhance the rent of a dependent talukh from time to time under the provisions of Bengal Regulation VIII of 1793, and is not barred from so doing by the provisions of s. 5 of Bengal Regulation XLIV of 1793. The words "for the same period as the term of their own engagements with Government" in s. 48 of Bengal Regulation VIII of 1793 refer to the period of the Decennial Settlement, and do not mean "in perpetuity." *Doorga Soondree* v. *Chundernath Bhadooree, S.D.A. (1852) 642,* dissented from. In an enhancement suit of the nature indicated above, the rate of rent to be fixed as payable by the under-tenure-holder must ordinarily be fixed with reference to the rents paid by raiyats within the tenure itself, and not with reference to those paid by raiyats in the neighbourhood outside the limits of the tenure. BISSESSURI DEBI CHOWDHRAIN *v.* HEM CHUNDER CHOWDHRY
I. L. R. 14 Calc. 133

61. ——— *Notice of enhancement.* S. 51, Regulation VIII of 1793 (looked at with ss. 13 and 15, Act X of 1859), does not require any notice in the case of a dependent talukhdar, preliminary to a claim for enhancement of rent ; but in order to succeed in a suit under that section, plaintiff must show that he is about to enhance on one of the three grounds therein mentioned. TARINEE KANT LAHOOREE *v.* KOONJ BEHAREE AWUSTEE
12 W. R. 112

62. ——— *Grounds of enhancement.* The grounds of enhancement stated in s. 51 of Regulation VIII of 1793, and not those in s. 17 of Act X of 1859, are applicable to dependent talukhdars. HURONATH ROY *v.* BINDOO BASHINEE DEBIA . . . . **3 W. R., Act X, 26**

63. ——— *Act X of 1859, ss. 13, 17.* In a suit for enhancement on one of the grounds set forth in s. 17, Act X of 1859, the notice under s. 13 can be served on a raiyat with rights of occupancy ; but in a case of a dependent talukhdar

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*d*) DEPENDENT TALUKDARS—*concld.*

the plaintiff must proceed under s. 51, Regulation VIII of 1793, and not on the grounds laid down in s. 17, Act X of 1859. The defendant's talukh in this case being a shikmi one, the suit under s. 17 was informal, and was accordingly dismissed. BROJO SOONDUR MITTER MOZOOMDAR *v.* KALEE KISHORE CHOWDHRY . . **8 W. R. 496**

64. ——— **Act X of 1859, s. 15.** A dependent talukhdar's rent is not liable to enhancement, unless it can be shown to have changed since the Perpetual Settlement, and he must be proceeded against under s. 15 (not 17) of Act X of 1859. NUBOKISHORE BOSE *v.* PANDUL SIRCAR **8 W. R. 312**

65. ——— **Rate of enhanced rent—** *Right to reasonable profit.* A talukhdar's rent cannot be enhanced to the same rate as that paid by cultivating raiyats; the talukhdar is entitled to some reasonable profits. HUROSOONDUREE CHOWDHRAIN *v.* ANUND MOHUN GHOSE CHOWDHRY **7 W. R. 459**

66. ——— *Neighbouring lands of same kind.* A talukhdar is liable to enhancement only to the extent of what other similar talukhdaris in the neighbourhood pay for similar under-tenures with similar lands. MOHIMA CHUNDRA DEY *v.* GOOROO DOSS SEIN . **7 W. R. 285**

67. ——— **Procedure—***Beng. Reg. VIII of 1793, s. 5.* Points out the procedure to be adopted by a Court in a suit for enhancement of rent when the defendant pleads that he is a shamilat talukhdar, that is to say, a talukhdar protected under the provisions of s. 5, Regulation VIII of 1793. SHARODA PROSUNNO MOOKERJEE *v.* BIPEEN BEHAREE BOSE . . . . **13 W. R. 71**

68. ——— *Ben. Reg. VIII of 1793, s. 51—Failure of defendant to prove presumptive protection from enhancement.* In a suit for arrears of rent of a talukh at an enhanced rate, where it was shown that the defendant was not entitled to set up as against any case for enhancement made out by the plaintiff, that he was protected by proof or presumption of holding from the permanent settlement:—*Held,* that that did not relieve the plaintiff from the necessity of proving a case under Regulation VIII of 1793, s. 51, under which alone he could maintain his suit. SUSTEE CHURN DEY *v.* ISHAN CHUNDER . . . **22 W. R. 383**

(*e*) CONSTRUCTION OF DOCUMENT AS TO LIABILITY TO ENHANCEMENT.

69. ——— **Maurasi lease.** A maurasi (perpetual) tenure does not necessarily carry with it fixity of rent; it is matter of evidence whether it does or not; therefore the rent of such a tenure may be liable to enhancement. ANANDLAL DASS *v.* MUSHUN ALI . . **2 B. L. R. A. C. 98 note**

70. ——— *Rent not fixed as invariable.* A maurasi pottah, in which the rent is not fixed as invariable, does not protect the raiyat

ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*e*) CONSTRUCTION OF DOCUMENTS AS TO LIABILITY TO ENHANCEMENT—*contd.*

from enhancement. TARUCK CHUNDER NUNDEE *v.* MODHOOSOODUN NUNDEE **5 W. R., Act X, 80**

71. ——— **Tikka mohto.** The words "tikka mohto" cannot be construed as conferring a permanent or maurasi lease at a fixed rate. NUFFER CHUNDER SHAHA *v.* GOSSAIN JOY SINGH BHARATTEE . . . **3 W. R., Act X, 144**

72. ——— **Mokurari tenure—***Suit for kabuliat—Rate paid for similar lands.* In a suit for a kabuliat at an enhanced rate under a pottah, the terms of which were that the lessee should hold the lands for four years rent-free; that after measurement the lands were to be assessed; that then he was to pay four annas a bigha in the year 1265, six annas in 1266, and eight annas and three gandas in 1267 and for five years after: *Held,* that this did not constitute a mokurari holding at a fixed rate. The case was remanded to ascertain what were the rates of similar lands in the neighbourhood in 1274, and decree to be made accordingly. KASIMUDDI KHANDKAR *v.* NADIR ALI TARAFDAR **2 B. L. R. A. C. 265 : 11 W. R. 164**

73. ——— *Expressions importing hereditary character of tenure.* The objection that the documents relied on by the defendant in support of their mokurari title contained no expressions importing the hereditary character of the alleged tenures was held to be one not open to the plaintiff in a suit for enhancement, where the pleadings admitted the existence of the tenure and the lawful occupation of the defendant, and the only question was whether the tenures were held at a variable or at a fixed and invariable rent. Even if the objection were open to the plaintiff, it was held that it could not prevail against the evidence which the record afforded that for upwards of a century the talukhs in question had been treated as hereditary, and as such had descended from father to son, and been the subject of purchase. GOPAL LALL TAGORE *v.* TILLUCK CHUNDER RAI **3 W. R. P. C. 1 : 10 Moo. I. A. 183**

74. ——— *Pura dastoor.* Where it was stipulated in the pottah that the land should be held rent-free for five years from 1250 to 1254; that for 1255 a rate of five annas a bigha should be paid; for 1256 ten annas a bigha; and that from 1257 the rate to be paid every year should be the "pura dastoor," or fully customary rate or fourteen annas,—it was held not to constitute a holding at a fixed rent. BHARAT CHANDRA AITCH *v.* GAUR MANI DASI **2 B. L. R. A. C. 266 note : 11 W. R. 31**

75. ——— ——— *Rent-fixed after stated time—Act X of 1859, ss. 13 and 17.* The defendant as middleman, took a clearing lease of certain land, which it was agreed in the kabuliat he should "hold during 1260 without any rent; for

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*e*) CONSTRUCTION OF DOCUMENTS AS TO LIABILITY TO ENHANCEMENT—*contd.*

1261 at the rate of R1 per kani; for 1262 at R2 per kani; for 1263 at R3 per kani; and in 1264 at the full customary rate of R5 per kani." The tenure was admittedly a permanent one. In a suit for arrears of rent for 1272, after notice of enhancement under s. 13, Act X of 1859 :—*Held*, that the intention was that after 1264 the rent should be fixed, and it was therefore not liable to enhancement. SOORASOONDERY DEBEE *v.* GOLAM ALLY
15 B. L. R. P. C. 125 note : 19 W. R. 142

76. ——— Lease not finally fixing rent —*Failure to specify duration.* An amulnamah, by which the defendant, for clearing and cultivating chur lands, was to pay no rent for the first three years, and then a low rate of rent gradually rising till it reached a certain rate, no period being fixed for the duration of such last-mentioned rate, was held to be no bar to the plaintiff's right of enhancement. PUDDO MONEE DOSSIA *v.* PURAMANUND SEIN . . . . . **7 W. R. 158**

77. ——— Lease of land uncleared—*Land let for purpose of clearing at low rent afterwards to be higher.* When land is let for the purpose of clearing jungle, or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at a certain rate as the full rent, such rent is not liable to enhancement. HURO PRASAD ROY CHOWDHRY *v.* CHUNDEE CHURN BOYRAGEE
I. L. R. 9 Calc. 505 : 12 C. L. R 251

78. ——— *Act I of 1845, s. 26, cl. 4—Jungle land.* The words "such land continuing to be used for the purposes specified in the leases" in cl. 4, s. 26, Act I of 1845, do not restrain the effect of a lease for clearing land of jungle solely to such time as jungle remains to be cut on the land, but should be taken to mean that the lease will stand good as long as the land is kept clear of jungle, and not allowed to fall back into its old state. If a pottah gives the tenant power to extend his lease beyond the land originally made over to him under the pottah, and gives the same rent for the additional land as for the other land, such additional land is not assessable with the pargana rate of rent, but the pottah is good and binding even on an auction-purchaser as respective the whole of the land cultivated by the tenant. WATSON & Co. *v.* JHUKROO SINGH . **1 W. R. 195**

79. ——— Lease containing no term for expiry—*Improvement of land—Agency of raiyat—Improvement by other means.* When a pottah contains no term and does not provide against enhancement, and the tenant has not occupied for twelve years, if it is shown that the tenant has improved the land, he will be entitled to a proportionate reduction in determining the rent he should pay. But if it is also shown that the value of land generally in the neighbourhood has increased irrespectively of the agency of the rayiat, the landlord will be entitled to enhancement proportionate to that improvement. MATHURA MOHAN SHAH *v.* GYARAM HALDAR . **W. R. 1864, Act X, 128**

80. ——— Transferee of lease—*Construction of lease—Liability to enhancement.* A lease contained the following words :—"You shall continue to pay the sum of sicca R5 fixed on the whole as ticca jumma of the said mouzah every year, and having cleared the villages of jungle and having brought the lands under cultivation, yourself and through others, as usual, enjoy and occupy the same with your sons and grandsons in succession." *Held*, that the lease conveyed an absolute interest, and that the grantee and his heirs were entitled to transfer it; and that a transferee, not an auction-purchaser, was not liable to enhancement of rent. WATSON & Co. *v.* JOGGESHAR ATTAH . . . **Marsh. 330 : 2 Hay 436**

81. ——— Lease stipulating against enhancement—"*Year by year.*" The stipulation in a pottah, "after this in no manner shall enhancement be demanded," precludes enhancement during the existence of the pottah, notwithstanding in a preceding part of the pottah the words "year by year" are used (BAYLEY, *J.*, *dissentiente*). PUNCHANUN BOSE *v.* PEARY MOHUN DEB . **2 W. R. 225**

82. ——— Solehnamah stipulating against enhancement—*Construction of solehnamah.* A member of a Hindu family, who had the management of the ancestral property was sued by one of the tenants for illegal distraint. Plaintiff put in a pottah in which the rent was described as a fixed rent, and the tenancy an old and existing tenancy The result of that suit was a solenamah or compromise between the parties, in which the manager, fixed or confirmed the rent of the tenure, and agreed that the rent should not be enhanced. *Held*, that the effect of the solenamah was to confer upon the tenant and his descendants a maurasi mokurari right in the land at a fixed rent, as far as the manager was capable of conferring such a right. BHOOBUNMOHINEE DOSSEE *v.* DHONAYE KARIGUR
15 W. R. 434

83. ——— Decree allowing enhancement—*Subsequent transfer of estate.* A childless Hindu widow granted a pottah to defendant. On her death there was a dispute as to the heirship to her husband, and the right of plaintiff's vendor having been declared, the latter brought a suit against defendant for a kabuliat at enhanced rates of rent. Defendant disputed the claim, setting up the title of the opposite party, but the suit was decreed to the extent of the rate of rent admitted by defendant. Subsequently plaintiff issued a notice of enhancement, and defendant, not coming to terms, sued to set aside the pottah and obtain possession.

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*contd.*

(*e*) CONSTRUCTION OF DOCUMENTS AS TO LIABILITY TO ENHANCEMENT—*contd.*

Held, that the decree obtained by plaintiff's vendor created a new contract between the parties under the kabuliat, by which defendant was entitled to hold at the rent admitted by him till plaintiff took further steps; and that plaintiff's vendor having conveyed his whole title to plaintiff, who then gave defendant distinct notice, plaintiff was entitled to succeed in the present suit. *Juggessur Buttobyal v. Roodro Narain Roy, 12 W. R. 299*, distinguished. NUBO KISHEN MOOKERJEE *v.* KALACHAND MOOKERJEE . . . **15 W. R. 438**

See JUGGESSUR BUTTOBYAL *v.* ROODRO NARAIN ROY . . . . . **12 W. R. 299**

84. ——— Agreement to pay increased rent—*Acquiescence.* One of the holders of an under-tenure having agreed with his immediate landlord that an enhanced rent should be paid in respect of the tenure, the enhanced rent fixed was paid for some years, when default being made, the landlord brought a suit against all the joint-holders for arrears of rent at the enhanced rate.—*Held*, that the landlord was entitled to rent at the rate claimed until circumstances were shown from which it would follow that the rate claimed was not the fair and equitable rate payable. *Held*, further, that the holder by whom the agreement to pay the enhanced rent, was made was not solely liable to pay that rent, but that the tenure was liable, and that, if it could be shown that the other holders had acquiesced in the agreement, they were likewise responsible. *Burhunuddi Howladar v. Mohun Chunder Guha, 8 C. L. R. 508* distinguished. BURHUNUDDI HOWLDAR *v.* MOHUN CHUNDER GUHA **8 C. L. R. 511**

85. ——— Decree in accordance with defendant's admission—*Beng. Act VII of 1869, s. 14—Suit for arrears of rent—Rate of rent payable.* The plaintiff sued for arrears of rent for the year 1282 at the rate of R2-8 per bigha. The defendant alleged that the rent was only fifteen annas per bigha. The Judge found that the plaintiff had not proved that the rate of rent was R2-8 per bigha, and, without finding that the proper rate was fifteen annas, gave the plaintiff a decree for that amount. The plaintiff brought a subsequent suit for arrears of rent for the year 1283, when it was held by the Court of first instance and by the lower Appellate Court that he could only recover arrears of rent at the rate of fifteen annas, that being the rate of "rent payable for the previous year" within the meaning of s. 14, Bengal Act VIII of 1869. *Held*, that the decisions were wrong, and must be reversed. PUNNOO SINGH *v.* NIRGHIN SINGH . **I. L. R. 7 Calc. 298: 8 C. L. R. 310**

86. ——— Stipulation in kabuliat for increase in rent—*Rent for land in excess of quantity held under kabuliat—Suit to recover rent as agreed—Notice of enhancement—Beng. Act VII of 1869, s. 14.* Where a kabuliat contains an agreement to pay a certain specified rent for a certain specified area, although no rate per bigha was fixed, and also an agreement to pay further rent at the rate specified for lands found on measurement to be held in excess of the lands of which the jumma was fixed, a landlord is entitled to recover such increased rent without serving any notice on the tenant under s. 14 of Bengal Act VIII of 1869, and it is a reasonable presumption to make that the rate per bigha was the average rate of rent payable in respect of the lands for which the total amount of rent payable was fixed. *Nistarini Dassi v. Bonomali Chatterjee, I. L. R. 4 Calc. 941*, followed. LAIDLEY *v.* BISHUCHARAN PAL . **I. L. R. 11 Calc. 553**

87. ——— Agreement to take rent as long as holdings continue—*Right to enhance—Exemption from enhancement.* Where the relative rights of the parties as landlord and tenants were determined by competent authority, and the matter referred for decision of the Collector was the commutation of the rents paid in kind into money rents, and that officer in so doing decided the rights of the parties declaring the tenants sub-proprietors and directing them to pay at the revenue rates with an addition of 5 per cent. allowance to the landlord:—*Held*, that the lumbardar, notwithstanding his failure to set aside the order and his receipt of the amount so fixed, was not precluded from enhancing the rent on any of the grounds specified in s. 17, Act X of 1859. Where a wajib-ul-urz stated that "the hereditary tenants in the village pay their rents like the proprietors, and so long as they shall continue to pay their rents, they and their heirs shall continue to cultivate their holdings:"—*Held*, that, on the terms of the wajib-ul-urz, the defendants could not claim exemption from enhancement. BUNSEE *v.* RAMSOOKH . . . . . **3 Agra 384**

88. ——— Provision in administration paper protecting from enhancement. A specific provision in the administration papers protecting the raiyat from enhancement of rent during the term of the settlement will be enforced. JHUMMUN SHAH *v.* DEBEE DASS **1 N. W. 8: Ed. 1873, 7**

89. ——— Wajib-ul-urz—Conditions with respect to enhancement of rent in a wajib-ul-urz are generally intended to have effect only during the period of the settlement being made at the date of such wajib-ul-urz. BAICHOO RAM *v.* DOWLUT RAM **2 N. W. 8**

90. ——— Agreement to pay enhanced rates—*Tenant-at-will—N.-W. P. Rent Act (XVIII of 1873), s. 21.* The patwari of a village entered in his diary that a tenant-at-will had agreed with the landholder to pay enhanced rent, but the agreement was not recorded, the terms as to rent were not stated, and there was nothing to show

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ENHANCEMENT OF RENT—*contd.*

2. LIABILITY TO ENHANCEMENT—*concld.*

(*e*) CONSTRUCTION OF DOCUMENTS AS TO LIABILITY TO ENHANCEMENT—*concld.*

that such tenant had assented to such entry. *Held*, that there was no record of such agreement within the meaning of s. 21 of Act XVIII of 1873. BHAWANI *v.* ABDULLA KHAN **I. L. R. 3 All. 365**

91. ———— **Agreement not to enhance, duration of**—*Liability to enhancement.* On the 27th June 1866 it was agreed between *B*, a zamindar, and *D*, a raiyat, that the latter should pay R20 annually as the rent of his holding, and that for the future no further sum in excess should be demanded or suit brought for enhancement of rent. The settlement of the district where the land in respect of which the agreement was made was situate expired on 1st July 1870. *B* having subsequently enhanced *D's* rent to R40, *D* brought a suit to contest his liability to pay enhanced rent, basing his suit on the agreement of 27th June 1866. The lower Courts held that *B* was not bound by the agreement after the expiry of the settlement in force at the time of the agreement, and directed *D* to pay an enhanced rate of rent. In special appeal *D's* claim was decreed. DEOJEET *v.* BHUGWANT . **6 N. W. 373**

92. ———— **Assessment of, and decree for, rent at enhanced rate**—*Kabuliat, effect of subsequent execution of.* On the 25th of January 1864, the plaintiffs obtained a decree against the defendants for assessment of enhanced rent. Shortly afterwards, the defendants executed a kabuliat, at a reduced rate, for eleven years ending the 31st Assin 1282 (16th October 1875). After the term had expired, the plaintiffs sought to recover rent from the defendants at the rate settled by the decree of 1864. *Held*, that the decree had been superseded by the subsequent arrangement, and that the plaintiffs could not recover rent at an enhanced rate, except under the provisions of Bengal Act VIII of 1869. NOBIN CHUNDER SIRCAR *v.* GOUR CHUNDER SHAHA . **I. L. R. 6 Calc. 759 : 8 C. L. R. 161**

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION.

(*a*) GENERALLY.

1. ———— **Tenant accepting pottah after long holding**—*Presumption—Act X of 1859, s. 4.* If a tenant has held land at a uniform rate for generations, and the pottah given to him subsequently does not fix a rent different from that previously paid, but merely asserts the rent he is to pay during the term of the pottah, he is entitled to the benefit of the presumption contained in s. 4, Act X of 1859, if it be found that his rent has not been changed for twenty years. NOWLAS KOONWER *v.* SHIVA SUHAI . . . **1 Agra Rev. 65**

2. ———— **Pottah not inconsistent with holding.** In a suit for enhancement, if the

ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*a*) GENERALLY—*contd.*

defendant plead pottahs which are not inconsistent with the presumption under s. 4, Act X of 1859, and proves twenty years' uniform payment of rent, the presumption will arise unless the opposite party prove a variance in the pottahs. KOROONA MOYEE DOSSEE *v.* SHIB CHUNDER DEB **6 W. R., Act X, 50**

3. ———— **Pottah subsequent to Permanent Settlement**—*Pottah not inconsistent with holding.* When a raiyat, in an enhancement suit, proves uniform payment of rent for twenty years previous to the suit, the production of a pottah dated more than twenty years before the suit, but subsequent to the Permanent Settlement, if not inconsistent with the inference that it is a continuation of a former state of things, will not interfere with or defeat the presumption of uniform payment from the Permanent Settlement. KISHEN MOHUN GHOSE *v.* ESHAN CHUNDER MITTER **4 W. R., Act X, 36**

4. ———— **Failure to prove pottah**—*Act X of 1859, ss. 3, 4—Presumption.* In a suit for enhancement of rent, a raiyat is not to be precluded from the benefit of the presumption under s. 4 of Act X of 1859, on proof of having held at a fixed rent for a period of twenty years merely because he has failed to prove a pottah which he has set up not inconsistent with that presumption. GIRISH CHUNDRA BOSE *v.* KALI KRISHNA HALDAR **B. L. R. Sup. Vol. 538 : 6 W. R., Act X, 57**

PEAREE MOHUN MOOKERJEE *v.* KOYLAS CHUNDER BYRAGEE . . . . **23 W. R. 58**

5. ———— **Existence of kabuliat within 20 years**—*Bengal Rent Act VIII of 1869, s. 4.* The presumption arising in favour of a tenant from a twenty years' occupation, when it is supported by evidence, is not necessarily displaced by the discovery of a kabuliat bearing a subsequent date. Such a kabuliat is as consistent with the confirmation of a pre-existing rent as with the settlement of a new rate, and it is for the Court to balance the inferences drawn from the kabuliat against those arising from the twenty years' holding. SOORJOMONEE DOSSEE *v.* PEAREE MOHUN MOOKERJEE . . . **25 W. R. 331**

6. ———— **Setting up pottah**—*Presumption of exemption from enhancement.* A defendant who rested his defence in a suit for enhancement upon a pottah, which he set up, as entitling him to hold free from enhancement under s. 4, Act X of 1859, cannot plead that the tenure is protected from enhancement by reason of payment of rent at a uniform rate for twenty years. JAUN ALI *v.* JAN ALI . . . . . **9 W. R. 149**

WATSON & CO. *v.* SHAM LALL PANDAH **10 W. R. 73**

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*a*) GENERALLY—*contd.*

WATSON & CO. *v.* ANJUNNA DASSEE
10 W. R. 107

7. ——— **Possession of ancient pottah**—*Act X of 1859, s. 4.* The discovery among title-deeds of an ancient pottah dated 1167, of the genuineness of which the raiyat could have no means of judging, is no bar to prevent him from claiming the benefit of the presumption under s. 4, Act X of 1859. HURONATH ROY *v.* KUMOLA KANT CHUCKERBUTTY . . **5 W. R., Act X, 56**

8. ——— **Existence of pottah and amulnama**—*Presumption of change in rent.* In a suit for enhancement where the defendants plead a holding at a uniform rate from the Permanent Settlement, the mere existence of a pottah and amulnama of 1215 is not conclusive evidence that the rate was then changed, or was then first fixed. LUCHMEE NARAIN SHAHA *alias* GOPEENATH SHAHA *v.* KOOCHIL KANT ROY . **6 W. R., Act X, 46**

9. ——— **Pottah not shown to be confirmatory of previous holdings**—*Commencement of possession.* In the absence of documentary evidence to show that a pottah of 1239 was merely confirmatory of a previous holding, the possession of a raiyat claiming under that pottah will commence from the date of his pottah, and he is not entitled to the benefit of the presumption under s. 4, Act X of 1859. JAINOODDEEN *v.* PURNO CHUNDER ROY . . . . **8 W. R. 129**

10. ——— **Pottah subsequent to Permanent Settlement.** A tenant is not entitled to the presumption, under s. 4 of Act X of 1859, of having held his tenure at a uniform jumma from the Permanent Settlement, when it appears from his pleadings that his holding first began under a pottah at a period subsequent to the Permanent Settlement, and he does not allege that he held the land previous to his obtaining the pottah. KUNDA MISSER *v.* GANESH SINGH
6 B. L. R. Ap. 120 : 15 W. R. 193

LUCHMEE PERSAD *v.* RAMGOLAM SINGH
2 W. R., Act X, 30

11. ——— *Act X of 1859, s. 4—Rebutting presumption.* The presumption of occupancy from the Permanent Settlement created by s. 4, Act X of 1859, is rebutted by the raiyat relying upon a pottah granted after the Permanent Settlement. MUNMOHUN SINGH *v.* WATSON & CO.
W. R. F. B. 22 : 1 Ind. Jur. O. S. 78

S.C. WATSON & CO. *v.* CHOTO JOORA MUNDUL
Marsh. 68 : 1 Hay 232

RAM LAL GHOSE *v.* LALLA PECUMLALL DOSS
Marsh. 403 : 2 Hay 526

RAMKISHEN SIRCAR *v.* DELER ALI
W. R. 1864, Act X, 36

ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*a*) GENERALLY—*concld.*

BEER KISHORE LALL *v.* KUNBOOLY LALL
W. R. 1864, Act X, 109

12. ——— **Reliance on and failure to prove mokurari tenure**—*Act X of 1859, s. 4—Presumption.* The fact of a raiyat having relied upon a mokurari tenure cannot prevent his falling back on the presumption arising under s. 4 of Act X of 1859. CHAMARNEE BIBEE *v.* AYENOOLLAH SIRDAR . . . . . **9 W R. 451**

13. ——— *Presumption.* In a suit for arrears of rent at an enhanced rate, where defendants pleaded protection under a mokurari pottah of old date, which had been lost long ago, and also pleaded the presumption arising from uniform payment for more than twenty years :—*Held,* that the defendants' inability to adduce sufficient proof of that pottah was no reason why they should not be allowed an opportunity to prove the uniform payment pleaded. NILMONEY SINGH DEO *v.* ANUNT RAM PUTNAIK . . **15 W. R. 393**

14. ——— **Setting up forged pottah**—*Presumption.* Presumption of occupancy from the Permanent Settlement cannot be pleaded after a pottah brought forward to strengthen the presumption is found to be fabricated. FORBES *v.* NUND, COOMAR MUNDUL . . **2 W. R., Act X, 35**

15. ——— *Act X of 1859, s. 4—Presumption. Quære :* Whether a party who has propounded a forged pottah could have the benefit of the presumption arising from paying a fixed rent for twenty years. GOPAL CHUNDER ROY *v.* GOOROO DASS ROY
B. L. R. Sup. Vol. 764 note : 7 W. R. 135

16. ——— *Forged deed—Dishonest defence.* In a suit for enhancement of rent, the raiyat, defendant, set up a mokurari pottah, which was found to be forged. *Held,* that the fact of the raiyat having relied on a pottah which was found to be forged did not entitle the landlord to a decree for enhancement of rent to the amount claimed. ISWAR CHANDRA DAS *v.* NITTIANAND DAS
B. L. R. Sup. Vol. 490 : 6 W. R., Act X, 70

(*b*) PROOF OF UNIFORM PAYMENT.

17. ——— **Sale for arrears of rent**—*Auction-purchaser, right of—Presumption.* When an auction-purchaser at a sale for arrears of revenue demands an enhancement, the presumption arising from a uniform payment holds good, and the tenant's protection is not swept away by the sale. SHUDEK SIRCAR *v.* MOHAMOYA DABEE
1 Ind. Jur. N. S. 77

S.C. SADUCK SIRCAR *v.* MOHAMOYA DEBIA
5 W. R., Act X, 16

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*b*) PROOF OF UNIFORM PAYMENT—*contd.*

18. ——— *Act X of 1859, s. 4—Presumption—Auction-purchaser at sale prior to passing of Rent Act, right of.* The plaintiff was the auction-purchaser at a sale of land made prior to the passing of Act X of 1859. In 1253 he dispossessed a tenant who had been in occupation of the land for twenty-seven years at a uniform rent. In 1260 the tenant was restored to the land under a decree, finding that he held a mokurari tenure. Afterwards, and before the plaintiff had received any rent, he brought a suit against the tenant for enhancement of rent. *Held*, that the enactment in s. 4 of Act X of 1859 that, when it shall be proved that the rent at which land has been held by a raiyat in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown did not apply to deprive the plaintiff of the right to enhance, since there had not been a holding for twenty years before the commencement of the suit within the meaning of the section; and the plaintiff under the law in force before the passing of Act X of 1859 was as an auction-purchaser not bound by the rent, unless the mokurari tenure was created twelve years before the date of the Permanent Settlement. LUTEEFOONISSA BEEBEE *v.* POOLIN BEHARY SEN
1 Ind. Jur. O. S. 10 : W. R. F. B. 31

Upheld on review . . **W. R. F. B. 91**

POOLIN BEHARY SEN *v.* LUTEEFOONNISSSA BIBEE
Marsh. 107: 1 Hay 242

19. ——— **Sale for arrears of revenue** *—Purchaser, right of—Act I of 1845, s. 26—Act X of 1859, ss. 1, 3, 4.* Raiyats who hold lands at fixed rates of rent which have not been changed from the time of the Permanent Settlement are not liable to have their rents enhanced even at the suit of a purchaser at a sale for arrears of revenue under Act I of 1845. HURRYHUR MOOKERJEE *v.* MOHESH CHUNDER BANERJEE
B. L. R. Sup. Vol. 623 : 7 W. R. 176

20. ——— *Purchaser, right of—Act XI of 1859, s. 37—Beng. Act VIII, of 1869, ss. 4 and 17—Presumption.* The procedure prescribed in Bengal Act VIII of 1869 applies to claims of enhancement under s. 37 of Act XI of 1859 by a purchaser at a revenue-sale, and the rights of any such purchaser are, therefore, subject to all the modifications contained in ss. 4 and 17, which form a presumption in favour of tenures of all classes held at an unchanged rent for a period of twenty years before the commencement of a suit, that such holdings have run on at the same rate from the time of the Permanent Settlement. PURNANUND ASRUM *v.* ROOKINEE GOOPTANI . **I. L. R. 4 Calc. 793**

21. ——— **Invalid lakhiraj resumed after Permanent Settlement**—*Beng. Act VIII of 1869, ss. 3 and 4.* Ss. 3 and 4, Bengal Act VIII of 1869, apply to invalid lakhiraj grants resumed at a time subsequent to the Permanent Settlement. BANEE MADHUB BANERJEE *v.* BHAGUT PAL
20 W. R. 466

22. ——— **Evidence of uniform payment of rent.** What is sufficient evidence to warrant a presumption that a tenure has been held at a uniform rate for twenty years will depend upon the circumstances of each case. PEAREE MOHUN MOOKERJEE *v.* ANNUND MOYEE DEBIA
9 W. R. 158

23. ——— **Issue as to change in rent** *—Act X of 1859, s. 15—Presumption.* In determining whether a party is entitled to the benefit of the presumption under s. 15, Act X of 1859, or not, the question to be tried is not whether the rent has been paid at a uniform rate, but whether it has not been changed within twenty years prior to the institution of the suit. AHMED ALI *v.* GOLAM GAFAR
3 B. L. R. Ap. 40 : 11 W. R. 432

24. ——— **Continuous and uniform payment**—*Presumption—Beng. Act VIII of 1869, ss. 3, 4.* S. 4, Bengal Act VIII of 1869, entitles the holder of land for the time being, however he may have acquired it, to the benefit of the presumption prescribed in that section if he can show that there has been a continuous and uniform payment of the same rent for twenty years. TIRTHANUND THAKOOR *v.* HERDU JHA
I. L. R. 9 Calc. 252

25. ——— **Calculation of period of twenty years**—*Act X of 1859, s. 4—Exclusion of time in calculating period.* In calculating the period of 20 years mentioned in s. 4, Act X of 1859, there is nothing in the section to warrant the exclusion of the period during which the estate was under farm. GOORBIN BHAGAT *v.* FUREED ALUM
3 Agra 401

26. ——— *Saleable tenures —Act X of 1859, s. 4—Possession of vendor.* In cases of saleable tenures the period of possession by the raiyat's vendor is included in the twenty years mentioned in s. 4, Act X of 1859. KHODA NEWAZ *v.* NUBO KISHORE RAJ . **5 W. R., Act X, 53**

27. ——— **Limitation of presumption** *—Act X of 1859, s. 4—Suit not under Rent Act.* The presumption arising under s. 4, Act X of 1859, was not necessarily restricted to proceedings under that Act; but even if it did not apply to suits other than those under Act X, a Court would not do wrong to follow the rule laid down in s. 4 in determining for what length of time payment of a fixed rent should be made in order to warrant the presumption of its having been made since the Permanent Settlement. DUKHINA MOHUN ROY *v.* KURREEMOOLLAH . . . . **12 W. R. 243**

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*b*) PROOF OF UNIFORM PAYMENT—*contd.*

28. ——— *Suit not under Rent Act—Act X of 1859, s. 4, and Beng. Act VIII of 1869, s. 4—Suit in Civil Court for declaratory decree.* A zamindar having sued a raiyat for rent, the defendant pleaded to a lower rate of rent than that claimed, and set up a mokurari tenure. The suit was decreed, and an appeal therefrom was dismissed. The raiyat then brought an action in the Civil Court to have it declared that he had a mokurari tenure. The suit was dismissed by the first Court, but the lower Appellate Court reversed the decision, relying mainly upon a presumption under s. 4 of the Rent Law. *Held*, that the lower Appellate Court was wrong in raising the presumption of uniform payment, s. 4 only applying to suits under the Rent Acts. ISHAN CHUNDER ROY CHOWDHRY *v.* BHYRUB CHUNDER DOSS . **21 W. R. 25**

29. ——— **Necessity of pleading holding at uniform rate**—*Act X of 1859, s. 4—Presumption.* The presumption under s. 4, Act X of 1859, of holding at a uniform rate from the Permanent Settlement need not be specifically pleaded, but (unless rebutted) arises as a matter of course on proof of uniform payment for twenty years. MUNEEKURNICKA CHOWDHRAIN *v.* ANUND MOYEE CHOWDHRAIN . . . . **8 W. R. 6**

30. ——— *Presumption—Act X of 1859, s. 4.* S. 4 does not require the defendant to plead uniformity of payment from the time of the Permanent Settlement, but provides that if, on the trial of a suit, it appears that the rent has not been changed for twenty years, it shall be presumed that the land has been held at that rate from the time of the Permanent Settlement. BHOYRUBNATH SANDYAL *v.* MUTTY MUNDUL **W. R. 1864, Act X, 100**

MAHMOODA BEBEE *v.* HAREE DHUN KHULEEFA **5 W. R., Act X, 12**

RAM COOMAR MOOKERJEE *v.* RAGHUB MUNDUL **2 W. R., Act X, 2**

RAKAL DOSS TEWAREE *v.* KINOORAM HALDAR **7 W. R. 242**

40. ——— **Possession for 50 years**—*Presumption—Act X of 1859, s. 4.* Proof of uniform payment of rent of twenty years by raiyats pleading possession from the Decennial Settlement will, unless rebutted by the landlord, entitle them to the presumption under s. 4, Act X of 1859, and save their holdings from enhancement. But proof of uniform payment by raiyats pleading possession for fifty or sixty years will entitle them to nothing but a right of occupancy. RAMNARAIN SINGH *v.* HORONATH ROY . . **W. R. 1864, Act X, 86**

HUREEKISEN ROY *v.* SHAIKH BABOO **1 W. R. 5**

EKRAM *v.* BUHOORAN . **2 W. R., Act X, 69**

ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*b*) PROOF OF UNIFORM PAYMENT—*contd.*

(*Contra*) RAMRUTNO SIRCAR *v.* CHUNDER MOOKEE DABEA . . . **2 W. R., Act X, 74**

41. ——— **Proprietors paying rent**—*Act X of 1859, s. 4.* Proprietors paying rent for the right of occupancy are not raiyats in the sense contemplated by s. 4, Act X of 1859. MITTURJEET SINGH *v.* FITZPATRICK . . **11 W. R. 206**

42. ——— **Inference from ancient dowl**—*Beng. Reg. VIII of 1793—Presumption of fixed rent.* The plaintiff claimed to enhance defendant's rent from sicca R661 to Company's R7,528. No evidence was given as to the time at which the holding had commenced, or how long it had continued; but an attempt was made to prove a dowl bundobust of 1803, which would have shown that the persons through whom the defendants claimed were then in occupation of the land at the same rent, but no legal evidence of the dowl was given. *Held, per* PEACOCK, *C.J.* (BAYLEY, *J.*, and KEMP, *J.*, *dissentiente*), that, independently of the dowl, it might be presumed, from the great differences between the rent at which the lands were held and the present value of the lands, that the occupation at the low rent had been continued as of right, and not merely by the sufferance of the zamindar, and that such occupation at the same rent had existed twelve years before the date of Regulation VIII of 1793. *Per* BAYLEY, *J.*, that independently of the dowl, the facts did not satisfy such a presumption; but that, if the dowl were proved, then it might be presumed that the occupation at the same rent had commenced twelve years before the date of the Regulation. *Per* KEMP, *J.*, that, even if the dowl were proved, the presumption would not arise. BROJUNGGONA DASSEE *v.* DEBRANEE DASSEE . . . **Marsh. 424**

DEBRANEE DASSEE *v.* BROJUNGGONA DASSEE **W. R. F. B. 94**

43. ——— **Possession for a long time from olden date, etc.**—*Presumption—Act X of 1859, s. 4.* A plea of holding "for a long time from olden date from before" is not inconsistent with a holding from the time of the decennial settlement so as to deprive the defendant of the benefit of the presumption created by s. 4, Act X of 1859, which does not require a specific plea that the tenure was held at a fixed rent at the Permanent Settlement, but only proof of payment for twenty years at a fixed rate in order to raise the legal presumption. MUNMOHUN GHOSE *v.* HUSRUT SIRDAR **2 W. R., Act X, 39**

JUGMOHUN DOSS *v.* POORNO CHUNDER ROY **3 W. R., Act X, 133**

HEM CHUNDER CHATTERJEE *v.* POORNO CHUNDER ROY . . . . **3 W. R., Act X, 162**

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*b*) PROOF OF UNIFORM PAYMENT—*contd.*

RAJ COOMAR ROY *v.* ASSA BEBEE **3 W. R., Act X, 170**

GOOROO DOSS MUNDUL *v.* DURBAREE **5 W. R., Act X, 86**

SHAM LAL GHOSE *v.* MUDDUN GOPAL GHOSE **6 W. R., Act X, 37**

44. ——— **Possession for a long time**—*Sufficiency of evidence.* When, in a suit for enhancement, a raiyat or talukhdar pleads possession for a long time and claims the benefit of the presumption under s. 4, that is tantamount to his having named the Permanent Settlement. DHUN SINGH ROY *v.* CHUNDER KANT MOOKERJEE **4 W. R., Act X, 43**

45. ——— *Possession for long time—Act X of 1859, s. 4—Presumption. Held* (by JACKSON, *J.*, whose opinion prevailed), that where a raiyat in his answer to a suit for enhancement pleads possession for a very long time, and expressly claims the benefit of the presumption under s. 4, Act X of 1859, it is tantamount to his naming the Permanent Settlement; but where the defendant's allegation, whether oral or written, suggests a commencement of a holding at a much later period, and his evidence is of the same character, then the presumption claimed will not arise from the proof of twenty years' occupation at a rate unchanged. HURRAK SINGH *v.* TOOLSEE RAM SAHOO . **11 W. R. 84**

Affirmed in HURRAK SINGH *v.* TULSI RAM SAHU **5 B. L. R. 47: 13 W. R. 216**

46. ——— **Possession from Permanent Settlement**—*Sufficiency of evidence.* Possession from the Permanent Settlement is not sufficient to prove that a uniform rate of rent has been paid from that date. MAHMOODA BEBEE *v.* HAREEDHUN KHULEEFA . **5 W. R., Act X, 12**

47. ——— **Possession from generation to generation**—*Presumption—Act X of 1859, s. 4.* In a suit for enhancement of rent the raiyat pleaded that he had held certain lands from generation to generation at a uniform rate; that he was therefore entitled to claim the presumption arising under s. 4, Act X of 1859, and that he should be allowed to date his claim from the date of the Permanent Settlement. *Held*, that he was entitled to such presumption on showing that he had paid rent at a uniform rate for a period of twenty years previous to the suit. MITRAJIT SINGH *v.* TUNDAN SINGH . . **3 B. L. R. Ap. 88 12 W. R. 14**

48. ——— **Sufficiency of proof**—*Act X of 1859, s. 4—Presumption.* In a suit for enhancement of rent, where defendant claimed the benefit of the presumption arising under s. 4, Act X of 1859, it was held that his sworn declaration that the rent had not varied for more than twenty years, corroborated by the records of the Collectorate, which showed that the rent was the same as it had been more than thirty years ago, was sufficient to warrant the presumption, seeing that plaintiff had failed to show any intermediate variation. RAJ DOOLLAB *v.* MOHESSUR BHUTT . **10 W. R. 364**

49. ——— *Act X of 1859, s. 4—Admission of plaintiff.* In a suit for enhancement of rent, plaintiff's admission that defendant had held the tenure for thirty or thirty-two years at the same rent was held not to amount to an admission that the land had been held at the rate of rent from the Permanent Settlement, and that plaintiff should have an opportunity allowed him of rebutting any presumption which might arise from that admission. PEAREE MOHUN DUTT *v.* RADHA MADHUB MOOKERJEE . . **10 W. R. 427**

50. ——— *Act X of 1859, s. 4—Decrees for arrears of rent.* In a suit for arrears of rent at an enhanced rate, where defendant pleaded the presumption arising under s. 4, Act X of 1859, and plaintiff produced in support of his claim a decree of 1860, declaring him entitled to the enhanced rent and a later decree for arrears on the same scale:—*Held*, that the fact that the later decree had only been executed in part, and that defendants never paid more than R24 to the Government, did not neutralise the effect of the decrees as the very best evidence that the rents had varied since the Decennial Settlement. WOODY NARAIN SEIN *v.* TARINEE CHURN ROY . . **11 W. R. 496**

51. ——— *Act X of 1859, s. 4—Presumption.* The presumption allowed by s. 4, Act X of 1859, of holding certain orchard land at a uniform rent since the Permanent Settlement was held not to be removed by defendant's statement that the orchard was planted more than forty years ago; and it was for plaintiffs to prove it to have been made since the Permanent Settlement. SOODISTEE LALL CHOWDHRY *v.* NUTHOO LALL CHOWDHRY . . . . **8 W. R. 487**

52. ——— *Presumption—Act X of 1859, s. 4.* Where a defendant who claims to have held lands for more than 100 years is able to prove that the rent has not changed for twenty years, he is entitled to the presumption allowed by s. 4, Act X of 1859. LUCHMEEPUT SINGH *v.* JUNGULEE KULLYAN DOSS . . . . **9 W. R. 147**

53. ——— *Act X of 1859, s. 4—Presumption.* When a raiyat alleges that he has paid rent at a uniform rate for forty years and claims the benefit of the presumption under s. 4, Act X of 1859, it is not necessary, in order to entitle him to a decree, that he should expressly state that rent has been paid at the same rate from the time of the Permanent Settlement. POOLIN BEHARY SEN *v.* NEMAYE CHAND . . **7 W. R. 472**

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*b*) PROOF OF UNIFORM PAYMENT—*contd.*

54. ——— *Beng. Act VIII of 1869, s. 4—Presumption.* In a suit for enhanced rent after notice, where defendant pleaded that he had for more than twenty years paid at the same rate:—*Held*, that he was entitled to the presumption under s. 4 of the Rent Law, unless plaintiff could prove that defendant's tenure commenced at some date subsequent to the Decennial Settlement. ASHRUF ALI *v.* VILAET HOSEIN . **24 W. R. 356**

55. ——— *Inference—Beng. Act VIII of 1869, s. 4—Presumption.* In a suit relating to four jummas in the possession of the same persons in which it was proved that three of the jummas had been held at the same rent for twenty years, but that the fourth, having only been purchased eighteen years previously by the said persons, had not been longer in their own possession:—*Held*, that the presumption might arise that the jumma itself had been held at an unchanged rent for twenty years, and that the lower Courts were justified in inferring that such had been the case. RADHAMOYE DEY CHOWDHRY *v.* AGHORE NATH BISWAS . . . . . **25 W. R. 384**

56. ——— *Beng. Act VIII of 1869, s. 4—Presumption of uniformity.* In suits to set aside notice of enhancement, where the plaintiffs put in evidence (in two cases) a chitti of 1257 B. S., and (in a third) a decree of 1857 citing an earlier chitti showing that they had long held at existing rates, and there was no evidence to prove that the land had not been held at those uniform rates from the Permanent Settlement, or that such rent had been fixed at some later period, the plaintiffs were held entitled to the presumption prescribed by Bengal Act VIII of 1869, s. 4. RAM BHUROSEE SINGH *v.* MAHOMED ASGUREE KHAN **19 W. R. 205**

57. ——— *Enhancement of rent, suit for—Beng. Act VIII of 1869, s. 4—Presumption of evidence.* In a suit for arrears of rent at enhanced rates, where the defendant relies on the presumption contained in s. 4 of Beng. Act VIII of 1869, it is not sufficient, in order to do away with that presumption, to show that the land has not been in cultivation from the time of the Permanent Settlement. It must be shown that the land has not been held since the time of the Permanent Settlement. PEARI MOHAN MUKHERJI *v.* BANSHI MAJHI . . . . **I. L. R. 11 Calc. 757**

58. ——— *Act X of 1859, s. 4—Evidence to establish presumption of uniform rent.* A raiyat is not bound to file dakhilas in order to establish the presumption allowed by Act X of 1859, s. 4, if he can establish it by other good independent evidence. RADHA GOBIND ROY *v.* SHAMA SOONDUREE DABEE . **21 W. R. 403**

59. ——— *Act X of 1859, s. 4—Enhancement on ground of there being excess land.* The rent of a tenure protected from enhancement under the provisions of s. 4, Act X of 1859, cannot be increased on the ground of the tenure containing excess land. DECOURCY *v.* MEGHNATH JHA . . . . . **15 W. R. 157**

60. ——— *Enhancement on ground of there being excess land—Act X of 1859, ss. 15 and 16—Presumption of uniform rent.* In a suit for arrears of rent at enhanced rates where defendant pleads the provisions of ss. 15 and 16, Act X of 1859, if it is found that the tenure has been held at a uniform rent from the time of the Permanent Settlement, the plaintiff has no right to enhance the rent, even though the land in possession of defendant may be in excess of that covered by the original tenure. If, on the other hand, the excess land was not included in the original tenure, but obtained subsequently without the consent of the plaintiff, the possession of the defendant must be considered adverse, and the suit must fail for want of privity. INDRO BHOOSUN DEB *v.* GOLUCK CHUNDER CHUCKERBUTTY . **12 W. R. 350**

61. ——— *Act X of 1859, s. 4—Pleadings.* *Per* NORMAN and HOBHOUSE, *JJ.* (BAYLEY, *J.*, dissenting)—*Held*, that in the present case the defendant had not, either in the written statement filed by him or by his statements in examination, raised the question whether he was entitled to the benefit of s. 4 of Act X of 1859. HURRAK SING *v.* TULSI-RAM SAHU **5 B. L. R. 47 : 13 W. R. 216**

62. ——— *Presumption.* In a suit for enhancement, before giving a defendant the benefit of the presumption created by s. 4, Act X of 1859, there must be legal evidence of actual uniformity of rent for the whole of the twenty years immediately preceding the commencement of the suit. RAJ NARAIN ROY CHOWDRY *v.* ATKINS **15 W. R. 45 : 5 W. R. 30**

SHIB NARAIN GHOSH *v.* KASHEE PERSHAD MOOKERJEE . . . . **1 W. R. 226**

RAM KISHORE MUNDUL *v.* CHAND MUNDUL **5 W. R., Act X, 84**

PREM SAHOO *v.* NYAMUT ALI **6 W. R., Act X, 84**

63. ——— *Proof requisite of uniformity of rent.* A raiyat is bound to give strict proof of a uniform payment of rent for twenty years. That is a matter which should not be decided in his favour on mere inference. SHAM LALL GHOSE *v.* BOISTUB CHURN MOZOOMDAR **7 W. R. 407**

BUNGO CHUNDAR CHUCKERBUTTY *v.* RAM KANYE BHAWAL . . . . . **10 W. R. 256**

SREENATH BOSE *v.* POOLIAN MOLLAH **17 W. R. 374**

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*b*) PROOF OF UNIFORM PAYMENT—*concl'd.*

64. ——— *Time for which the rent has been uniform.* Uniform payment must be shown, if not for every year in the twenty years, at least for the greater portion of that period, and for years in the earlier, as well as in the later, portion of the same. SURNOMOYEE DASSEE *v.* SHAM MUNDUL . . . . . **9 W. R. 270**

65. ——— *Act X of 1859, s. 16—Rent of talukh—Presumption.* S. 16, Act X of 1859, does not require proof of actual payment of one rate of rent for twenty years, but that the rent has remained unchanged for that period. Uniform rent for the twenty years preceding the suit ought not to be presumed upon evidence which only touches a portion of that period : on the other hand, it is not necessary to have evidence bearing directly on every one of the twenty years. It is sufficient if the whole time is included within limits upon which the evidence bears, provided the evidence leads to the belief of uniform rent. FOSCHOLA *v.* HURO CHUNDER BOSE . . . . . **8 W. R. 284**

RASHBEHARY GHOSE *v.* RAM COOMAR GHOSE **22 W. R. 487**

66. ——— *Evidence of each year's rent.* Uniform payment of rent for twenty years may be presumed without proof of such payment for every separate year. KOMUL LOCHUN ROY *v.* TUMEERUDDEEN SIRDAR **7 W. R. 417**

67. ——— *Presumption—Act X of 1859, s. 4.* Proof of uniform payment of rent up to the date of suit is not absolutely necessary to entitle a raiyat to the benefit of the presumption under s. 4, Act X of 1859, in a case when the landlord has refused to take rent for a few years before suit. GYARAM DUTT *v.* GOOROOCHURN CHATTERJEA . . . . . **2 W. R., Act X, 59**

68. ——— *Interruption in proof of duration—Act X of 1859, s. 4—Presumption.* In a suit for a kabuliat at an enhanced rent :—*Held* by SETON-KARR, *J.*, that, as there was a break of three years in the period of uniform payment which would give rise to the presumption of uniform holding from the time of the Permanent Settlement, the Judge, instead of accepting dakhilas, merely because they were not denied by the plaintiff, should have found whether the dakhilas were satisfactorily proved and attested, and, if so, whether they could legally support a uniform payment for twenty years. RADHA KANT DEB *v.* KHEMA DASEE . . . **7 W. R. 501**

(*c*) VARIATION BY CHANGE IN NATURE OF RENT AND BY ALTERATION OF TENURE.

69. ——— **Uniformity in rate**—*Variation.* Uniformity in the amount actually paid is

ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(*c*) VARIATION BY CHANGE IN NATURE OF RENT AND BY ALTERATION OF TENURE—*contd.*

not required to raise the presumption under s. 4, Act X of 1859, but uniformity in the rate agreed upon, either expressly or impliedly, between the parties to be paid. MORAN & CO. *v.* ANUND CHUNDER MOZOOMDAR . **6 W. R., Act X, 35**

SHAM CHARAN KOONDOO *v.* DWARKANATH KUBEERAJ . . . . **19 W. R. 100**

70. ——— *Act X of 1859, s. 4—Rent changed in amount, but at same rate.* The words of s. 4, Act X of 1859, refer to the rate as well as the amount of rent. Therefore, where from 1839 to 1858 a raiyat had paid rent at the same rate, but in 1856 the rent was, by order of the Civil Court, changed, and a proportionate amount remitted in consequence of a portion of the land having been lost by diluvion : *Held*, that the remaining portion of the rent being levied at the same rate as before, the raiyat had not lost his right to avail himself of the provisions of s. 4, Act X of 1859. RAIZUNISSA *v.* TEKUN JHA **1 B. L. R. S. N. 18 : 10 W. R. 246**

KENARAM MULLICK *v.* RAMKOOMAR MOOKERJEE **2 W. R., Act X, 17**

71. ——— **Rent in kind (bhaoli)**—*Act X of 1859, ss. 3 and 4. Semble :* A tenant who has paid at the same bhaoli rate—*i.e.*, in kind—for a period of twenty years is entitled to the presumption of s. 4, Act X of 1859, and to exemption from enhancement under s. 3. RAM DAYAL SINGH *v.* LATCHMI NARAYAN **6 B. L. R. Ap. 25 : 14 W. R. 388**

72. ——— *Rent in kind (bhaoli) varying in proportion to crop—Act X of 1859, s. 4.* A bhaoli rent, varying yearly in amount in a fixed proportion to the produce of the crop, is not a fixed unchangeable rent of the nature contemplated by s. 4 of Act X of 1859. MAHOMED YACOOB HOSEIN *v.* CHOWDHRY WAHEYD ALLY . . . **1 Ind. Jur. N. S. 29 : 4 W. R., Act X, 23**

HANUMAN PARSHAD *v.* RAMJUG SINGH **6 N. W. 371**

THAKOOR PERSHAD *v.* MAHOMED BAKU **8 W. R. 170**

73. ——— *Rent in kind (bhaoli) varying with amount of yearly produce—Act X of 1859, ss. 3 and 4—Act XVIII of 1873, ss. 5 and 6.* A rent in kind (bhoali) which, though it varies yearly in amount with the varying amount of the yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of s. 3 of Act X of 1859 (corresponding with s. 5 of Act XVIII of 1873). A tenant, therefore, in a permanently settled district holding his land at such a rent, is entitled to claim the

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(c) VARIATION BY CHANGE IN NATURE OF RENT AND BY ALTERATION OF TENURE—*contd.*

presumption of law declared in s. 4 of Act X of 1859 (corresponding with s. 6 of Act XVIII of 1873), if he proves that, for a period of twenty years next before the commencement of the suit to enhance his rent, he has paid the same proportion of the produce of his holding. HANUMAN PARSHAD *v.* KAULESAR PANDEY . . **I. L. R. 1 All. 301**

74. ——— Abatement of rent for unculturable land—*Act X of 1859, s. 4.* Where an abatement of rent was allowed in a lump sum upon a lump jumma on account of lands having been rendered unculturable by the overflow of a river, the abatement was held not to vary the rate of rent so as to debar the raiyat from the benefit of the presumption under Act X of 1859, s. 4. RADHA GOBIND ROY *v* KYAMUTOOLLAH **21 W. R. 401**

75. ——— Alteration in rate—*Proof of variation—Payment by tenant.* A mere alteration in the rate of rent on the part of a zamindar or person other than the tenant will not prove a variation, unless it be shown that the tenant submitted to or paid that varied and enhanced rate. GOPAL MUNDUL *v.* NOBBO KISHEN MOOKERJEE **5 W. R., Act X, 83**

76. ——— Variation of rent shown in dakhilas—*Average of payments of rent.* Where dakhilas are relied upon to prove uniformity of rent and any variation in the dakhilas is found to exist, there must be a distinct finding as to whether the short payments of one year were made up the next year, the variation *primâ facie* being evidence that the rent was not uniform. RAMJADOO GANGOOLY *v.* LUCKHEE NARAIN MUNDUL . **8 W. R. 488**

77. ——— Additional illegal cess for additional land—*Immaterial variation.* Additional rent for additional land, and the addition of a small illegal cess, are not such variations of the proper rent as deprive the tenant of the presumption arising from twenty years' payment of uniform rent. SUMEEROODEEN LUSHKUR *v.* HURONATH ROY . . . . **2 W. R., Act X, 93**

78. ——— Slight variation—*Immaterial variation.* A variation of one anna is not sufficient to destroy the uniformity required by s. 4, Act X of 1859. MUNSOOR ALLY *v.* BUNO SINGH **7 W. R. 282**

79. ——— *Immaterial variation.* The variation of a few annas in the dakhilas, when not proved to be a variation in the annual rents, is not sufficient to deprive the raiyat of the benefit of the presumption. TARA SOONDERY BURMONYA *v.* SHIBESSUR CHATTERJEE **6 W. R., Act X, 51**

ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(c) VARIATION BY CHANGE IN NATURE OF RENT AND BY ALTERATION OF TENURE—*contd.*

ELAHEE BUKSH CHOWDHRY *v.* ROOPUN TELEE **7 W. R. 284**

80. ——— Nominal reduction in jumma—*Immaterial variation.* A nominal reduction in the jumma of one anna and three pies, and that too in the raiyat's favour, is not a variation that deprives him of the benefit of the presumption created by s. 4, Act X of 1859. But the acceptance of a temporary kabuliat annuls such presumption. RAMRUTNO SIRCAR *v.* CHUNDER MOOKHEE DEBIA **2 W. R., Act X, 74**

Nor does an unexplained variation of one rupee in a total jumma of sixty rupees. ANUNDOLAL CHOWDHRY *v.* HILLS . **4 W. R., Act X, 33**

WATSON & CO. *v.* NUND LAL SIRCAR **21 W. R 420**

81 ——— Alteration in jumma—*Immaterial variation.* It must be a variation which affects the integrity of the jumma. GOPAL CHUNDER BOSE *v.* MOTHOOR MOHUN BANERJEE **3 W. R., Act X, 132**

HILLS *v.* HURO LAL SEN **3 W. R., Act X, 135**

82. ——— Material difference—*Difference in amount.* The difference between R11-13 and R13-4 was held sufficient to destroy the presumption of a uniform payment of rent. BISSESSUR CHUCKERBUTTI *v.* WOOMACHURN ROY **7 W. R. 44**

83. ——— Rent paid in different coinage. Rent is not altered by being paid in a different coinage, *viz.*, in *kaldar* instead of *sicca* rupees, and the apparent addition of one anna per rupee (the difference in value between the two kinds of rupees) is not a real addition to the rent. ROCHA RAM MISR *v.* NAGA DOSS . . **2 N. W. 92**

84. ——— Variation of rent from change of currency. A variation of rent from change of currency only is not a variation rebutting the presumption arising from uniform payment for more than twenty years. RAM COOMAR MOOKERJEE *v.* RUGOONATH MUNDUL . . **1 W. R. 356**

See also KALEE CHURN DUTT *v.* SHOSHEE DOSSE **1 W. R. 248**

KATTYANI DEBEA *v.* SOONDUREE DEBEA **2 W. R., Act X, 60**

See MEER MAHOMED HOSSEIN *v.* FORBES **22 W. R. 316 : L. R. 2 I. A. 1**

85. ——— Consolidation of jummas—*Act X of 1859, s. 4.* A consolidation of jummas into one tenure does not deprive the raiyat of the benefit of the presumption under s. 4, Act X of 1859, if it can be shown that the rent has not been changed. This principle applies also to jummas

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ENHANCEMENT OF RENT—*contd.*

3. EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, AND PRESUMPTION—*contd.*

(c) VARIATION BY CHANGE IN NATURE OF RENT AND BY ALTERATION OF TENURE—*contd.*

which have been derived in part or in whole with the consent of the landlord, and which are subsequently consolidated into one jumma. The presumptions of s. 4 are not restricted to holdings, but refer simply to the fact that land has been held by a raiyat at a rent which has not been changed for twenty years before the commencement of the suit. RAJ KISHORE MOOKERJEE *v.* HUREEHUR MOOKERJEE . **1 B. L. R. S. N. 8 : 10 W. R. 117**

86. ——— *Holding created since Decennial Settlement.* He must be entitled to the presumption in respect of the whole tenure as consolidated. If one of the holdings constituting it is shown to have been created since the Decennial Settlement, the presumption cannot be made as to the rest. MOULA BUKSH *v.* JODOONATH SADOO KHAN . . . . **21 W. R. 267**

87. ——— *Presumption.* The consolidation of several holdings into one, or the omission of fractions by the settlement officer, cannot deprive a raiyat of the benefit of the presumption under s. 4, Act X of 1859. LUKHI MONI HALDAR *v.* GUNGA GOBIND MUNDLE **W. R. 1864, Act X, 126**

KHODA NEWAZ *v.* NUBO KISHORE ROY **5 W. R., Act X, 53**

88. ——— **Division of holding among heirs**—*Preservation of continuity of holding.* The division of a raiyat's holding among his heirs, the continuity of the holding not being destroyed, does not deprive the raiyat of the benefit of the presumption under s. 4, Act X of 1859. In the latter case the default of one shareholder will vitiate the tenure of all, and give the landlord a right of enhancement. HILLS *v.* BESHARUTH MEER **1 W. R. 10**

89. ——— **Division of tenure**—*Act X of 1859, s. 4—Extent of proof necessary.* In order to bring himself within ss. 3 and 4, Act X of 1859, a raiyat need only show that the particular land which is the subject of suit, not the whole tenure of which it may once have formed a part, has been held at an unchanged rent since the Permanent Settlement. It is not necessary that the land should have remained a separate holding. KASEENATH NUSKER *v.* BAMA SOONDERY DOSSIA . **10 W. R. 429**

90. ——— **Variation of rent of undivided fractional share**—*Act X of 1859, s. 4—Presumption of uniformity.* A change in the rent of an undivided fractional part of a tenure is to be considered as a change in the rent of the whole tenure, and therefore destroys the presumption to be raised under s. 4, Act X of 1859. MAHOMED MUDDEEN MIRDHA *v.* GOPAL LALL TAGORE . **2 Hay 514**

91. ——— **Distribution of rent after sale of portion of tenure**—*Beng. Act VIII of 1869, s. 4.* The sale of a portion of a tenure involving a distribution of the rent over two parts does not amount to a change of rent within the meaning of Bengal Act VIII of 1869, s. 4. SOODHA MOOKHEE DOSSEE *v.* RAM GUTTEE KURMOKAR **20 W. R. 419**

92. ——— **Temporary holding by one of several joint owners under arrangement**—*Act X of 1859, s. 4.* A temporary arrangement among joint owners by which one of their number is allowed to hold a portion of the joint property on payment of a certain sum of money, does not convert the occupier into a raiyat holding at a fixed rent or entitle him to the benefit of the presumption under s. 4, Act X of 1859. ROGHOBUN TEWAREE *v.* BISHEN DUTT DOBEY **2 W. R., Act X, 92**

93. ——— **Partition**—*Evidence of previous enhancement in a suit by another co-zamindar—Talukh—Beng. Act VIII of 1869, s. 17.* More than twenty years before the institution of a suit for the enhancement of the rent of a share in a dependent talukh, the zamindari under which the talukh was held was partitioned under a batwara among three zamindars. A ten-anna share was allotted to one (the present plaintiff), a four-anna share to another, and a two-anna share to a third. The talukhdars continued to hold the entire property, and paid the rent apportioned by law severally to each of the parties entitled. In 1861, the owner of the two-anna share obtained a decree against the talukhdars for enhancement of the rent of his share. In the present suit against the same talukhdars, the defendants contended that the rent of their talukh had not been changed for a period of more than twenty years before suit. *Held*, that the "talukh," which was intended by s. 17 of the Rent Act, was the original talukh; and that, if the defendants could show that the rent of that taluk had remained unchanged, either in its original entirety or apportioned as it had been under the batwara, they would be entitled to the benefit of the section; but that the decree in the suit of 1861 had the effect of enhancing the rent payable for the whole talukh, and that the plaintiff could avail herself of that decree, although she was not a party to it. SARAT SOONDARY DABEA *v.* ANUND MOHUN SURMA GHUTTACK **I. L. R. 5 Calc. 273 : 4 C. L. R. 448**

See HEM CHANDRA CHOWDHRY *v.* KALI PRASANNA BHADURI . . . **I. L. R. 26 Calc. 832**

4. NOTICE OF ENHANCEMENT.

(a) NECESSITY OF NOTICE.

1. ——— **Intermediate tenure**—*Beng. Reg. VIII of 1793, s. 51.* A person holding a

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*a*) NECESSITY OF NOTICE—*contd.*

tenure of an intermediate character is entitled to a notice under s. 51, Reg. VIII of 1793, before his rent can be enhanced. NILMONEE SINGH *v.* CHUNDER KANT BANERJEE . **14 W. R. 251**

2. ——— **Tullubi bromuttur tenure** —*Beng. Reg. VIII of 1793, s. 51.* A tullubi bromuttur tenure, which has been held as such from the time of the Decennial Settlement, is such an intermediate tenure as entitles the holder to a notice under s. 51, Reg. VIII of 1793. NILMONEE SINGH DEO *v.* CHUNDERKANT BANERJEE **I. L. R. 2 Calc. 125 : 25 W. R. 200**

3. ——— **Necessity of notice**—*Act X of 1859, s. 13.* A suit for enhancement of rent cannot be supported without there has been a previous service of notice under Act X of 1859, s. 13. AKHAY SUNKUR CHUCKERBUTTY *v.* INDRA BHUSUN DEB ROY . . . **4 B. L. R. F. B. 58**

S.C. AKHAY SUNKUR CHUCKERBUTTY *v.* INDRO BHOOSUN DEB ROY . . . **12 W. R. F. B. 27**

4. ——— *Act X of 1859, s. 13—Specification of grounds of enhancement.* Under s. 13 of Act X of 1859, no tenant is liable to enhancement unless he is duly served with a proper notice at a proper time specifying on what ground enhanced rent is demanded. MAHTAB KOOER *v.* BULDEO SINGH . . **4 N. W. 58**

BINDESSUREE DUTT SINGH *v.* DOMA SINGH **9 W. R. 88**

BURODA KANT ROY *v.* RADHA CHURN ROY **13 W. R. 163**

5. ——— **Express engagement for specified rent**—*Act X of 1859, s. 13.* S. 13, Act X of 1859 (requiring previous service of notice), has no application to a case in which there is an express written engagement between the parties providing for the payment of rent at a specified rate from a specified point of time. BHYRUB CHUNDER MOJOOMDAR *v.* HURO PROSUNNO BHUTTACHARJEE **17 W. R. 258**

6. ——— **Under-tenants and raiyats** —*Specification of grounds of enhancement—Ground of enhancement—Act X of 1859, s. 13.* S. 13 of Act X of 1859 is applicable not merely to raiyats having rights of occupancy, but to all under-tenants and raiyats. The landlord cannot, by giving notice of enhancement, compel the tenant to pay more than a reasonable rent, and he cannot enhance without notice specifying the grounds of enhancement. BAKRANATH MANDAL *v.* BINODRAM SEN **1 B. L. R. F. B. 25 : 10 W. R. F. B. 33**

7. ——— **Raiyat without express engagement**—*Act X of 1859, s. 13—Reg. VII of 1822, ss. 7 and 9.* Where an under-tenant holding or cultivating land under the conditions mentioned in s. 13, Act X of 1859, enters into no fresh engagement at the time of re-settlement, he has a right to receive a written notice before he can be called upon to pay enhanced rent, the provisions of that section qualifying those of ss. 7 and 9, Reg. VII of 1822. D'SILVA *v.* RAJCOOMAR DUTT . **16 W. R. 153**

See ENAYETOOLLAH MEAH *v.* NUBO COOMAR SIRCAR . . . . . **20 W. R. 207**

WOOMANATH ROY CHOWDHRY *v.* DEBNATH ROY CHOWDHRY . . . . **16 W. R. 471**

8. ——— **Suit to set aside alleged right to quit-rent tenure**—*Act X of 1859, s. 13.* No notice is required under s. 13, Act X of 1859, to set aside an alleged right to a quit-rent tenure in a suit for declaration of title. GHUNSHYAM CHOBEY *v.* KASHEENATH SHANTEEKAREE **3 W. R., Act X, 4**

9. ——— **Accreted land afterwards diluviated**—*Act X of 1859, s. 13.* In a suit brought by a zamindar for two years' rent on account of newly-formed land which had accreted to the defendant's old jote, but had since diluviated, wherein the Civil Court decreed the rent, allowing defendants to retain possession as tenants:—*Held,* that no notice was necessary under s. 13, Act X of 1859, before rent could be demanded by the zamindar in the case. WATSON & CO. *v.* NEEL KANT SIRCAR . . . **10 W. R. 330**

10. ——— **Suit for arrears of rent of excess land**—*Act X of 1859, s. 13.* A suit for arrears of rent of a quantity of land alleged to have been held by defendant over and above the quantity covered by his pottah, was held to be in substance a suit for rent at an enhanced rate, requiring the issue of a notice under s. 13, Act X of 1859. THEKMEE BELDAR *v.* RAM KISSEN LALL . **15 W. R. 71**

11. ——— **Decree for rent according to yearly assessment**—*Act X of 1859, s. 13.* Where a decree of 1848 gave plaintiffs the right to assess and to receive the rents for each year according to the assessment made for that particular year, a notice under s. 13, Act X of 1859, was held not necessary when the rent found assessable for the years for which rent was claimed varied from what was found assessable in 1848. SALEHOONISSA KHATOON *v.* MOHESH CHUNDER ROY **1 W. R. 452**

12. ——— **Land held under ootbundee tenure or otherwise**—*Act X of 1859, s. 13.* Whether land is held under an ootbundee tenure or not, the tenant is entitled to notice under s. 13, Act X of 1859, before the rate at which he pays can be enhanced. DWARKANATH MISREE *v* NOBOO SIRDAR . . . . . **14 W. R. 193**

13. ——— **Lease, stipulation in, for increase or decrease of rent according to excess or diminution in amount of land**—*Beng. Act VIII of 1869, s. 14.* A lease from generation to generation gave the boundaries of the land leased,

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*a*) NECESSITY OF NOTICE—*contd.*

estimated the area thereof, and fixed a certain rent per bigha. It contained a condition that, if on measurement the actual quantity of land should turn out to be either more or less than the estimated area, the rent should be increased or decreased in proportion at the same rate per bigha. In a suit for enhancement of rent, on the ground that the land leased contained more than the estimated number of bighas, the lease being one which did not specify the period of the engagement :—*Held*, that notice of enhancement was necessary under Beng. Act VIII of 1869, s. 14. EKRAM MUNDUL *v.* HULODHUR PAL . . **I. L. R. 3 Calc. 271**

14. ——— Stipulation in pottah for increase in rental to be made yearly—*Beng. Act VIII of 1869, s. 14—Suit to recover rent as per pottah.* Where a pottah in its terms expressly stipulates for an increase of rental according as the lands let are brought under cultivation and a measurement taken, a landlord is entitled to recover such increased rent as agreed upon in the pottah without serving on the tenants any notice under s. 14 of Ben. Act VIII of 1869. NISTARINI DASI *v.* BONOMALI CHATTERJI. DINO NATH DAS *v.* BONOMALI CHATTERJI . . **I. L. R. 4 Calc. 941 4 C. L. R. 278**

15. ——— Lands found in excess. A notice of enhancement, according to the rate mentioned in an agreement, is necessary as to lands found in excess on measurement where no term is specified in the written agreement. BURODAKANT ROY *v.* SHIB SUNKUREE DOSSEE **4 W. R., Act X, 35**

16. ——— *Contract to pay for excess land after measurement—Notice—Rent Act (Beng. Act VIII of 1869), s. 14.* When a tenant contracts to pay rent at a certain rate for any such land as upon measurement may be found to be in excess of the estimated area, it is not necessary to serve him with notice under s. 14 of the Rent Act before instituting a suit for the rent of any additional land, nor is it necessary that he should be present at the measurement. DWARKANATH *v.* BABURAM LASKAR . . **I. L. R. 9 Calc. 72 11 C. L. R. 326**

17. ——— *Mistake in measurement—Act X of 1859, s. 17.* S. 17, Act X of 1859, is applicable to cases where the land was undoubtedly included in the original tenure, but it has been found in a fresh measurement that there was some mistake in the former measurement, and that a greater amount of rent ought to be paid, not in respect of any fresh land, but in respect of land which was included in the original tenure. PRANKISSEN BAGCHEE *v.* MONMOHINEE DASSEE **17 W. R. 33**

18. ——— *Beng. Act VIII of 1869, ss. 18 and 19—Rent of excess lands.* In a suit for arrears of rent after deduction of payments where the claim embraced excess lands found after measurement and was based on a kabuliat which stipulated that the raiyat would pay for such excess at the same rate as for the rest of the land, and from the date of the kabuliat :—*Held*, that there was no question of enhancing the rate of rent, and the raiyat was not entitled to notice under Beng. Act VIII of 1869, ss. 18 and 19. RAM NARAIN LALL *v.* GUMBEER SINGH . . . **19 W. R. 108**

19. ——— Accreted land—*Enhancement of rent after accretion—Notice of enhancement—Beng. Act VIII of 1869, s. 14—Reg. XI of 1825, s. 4, cl. 1.* Before increased rent, on the condition laid down in Reg. XI of 1825, s. 4, cl. 1, on account of the area of land held by a tenant under a permanent tenure having been increased by accretion can be recovered, a notice must be served upon the tenant under s. 14 of Beng. Act VIII of 1869, informing him of the amount of rent to be imposed and the grounds upon which it is claimed. RAMNIDEE MANJEE *v.* PARBUTTY DASSEE **I. L. R. 5 Calc. 823 : 6 C. L. R. 362**

20. ——— *Landlord and tenant—Arrears of rent, Suit for—Notice of enhancement.* When land has accreted to a raiyat's holding, the rent paid by the raiyat may be enhanced in respect thereof under the provisions of cl. 3, s. 18 of Beng. Act VIII of 1869 ; and no suit for rent in respect of such accretion will lie unless a proper notice of enhancement has been previously given. *Ramnidhee Manjee* v. *Parbutty Dassee, I. L. R. 5 Calc. 823*, followed. BROJENDRA COOMAR BHOOMICK *v.* OOPENDRA NARAIN SINGH **I. L. R. 8 Calc. 706**

21. ——— Suit after permission to hold at old rent—*Subsequent to declaration of right to enhance.* In a former suit brought by a raiyat against the holder under a temporary ijara extending down to 1,271, a decree was passed maintaining the ijaradar's right to enhance. But notwithstanding this decree, the raiyat was by express agreement allowed, and in fact continued, to hold at the old rates. On the expiration of the ijara, the zamindar entered upon the lands, and after collecting a part of the rents for 1272 gave the plaintiff a patni of the estate from 1273, and an assignment of the right to collect the uncollected portion of the rents of 1273. The patnidar now sues to recover from the defendant the rent for the remainder of 1272 and for 1273 at the enhanced rates decreed to the ijaradar. *Held*, that neither the zamindar nor the patnidar could recover enhanced rents from the raiyat without some notice. BODHNARAIN SINGH *v.* RUNGO LALL MUNDUR . . **7 W. R. 190**

22. ——— Previous decree after notice before Act X of 1859—*Suit for subsequent arrears.* Where notice of enhancement was issued according to the law in force before Act X of 1859,

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ENHANCEMENT OF RENT—*contd.*

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(*a*) NECESSITY OF NOTICE—*concld.*

and a decree obtained by the zamindar which ascertained the liability of the cultivator to an enhanced rate of rent and awarded arrears at that rate :—*Held*, that a suit by the zamindar for arrears for the years subsequent to the decree at the enhanced rate thereby determined was legal and good without issue of any fresh notice under Act X of 1859, and the effect of the decree ascertaining the liability to enhanced rent still continued, notwithstanding it was not executed and arrears not recovered under it. MOUZZUM ALI KHAN *v.* SEORUTTUN SINGH . . . . . **3 Agra 277**

23. ——— **Necessity for fresh notice** —*Act X of 1859, s. 13—Notice of enhancement.* Where a zamindar served a notice of enhancement of rent on the raiyats of a mouzah, and afterwards granted a lease of the mouzah to the plaintiff :—*Held*, that the plaintiff was entitled to sue for enhancement upon the notice already served. KHASKI ROY *v.* FARZAND ALI KHAN **9 B. L. R. 125 : 18 W. R. 144**

24. ——— *Landlord and tenant—Enhancement of rent, suit for—Bastu land within Municipality—Bengal Tenancy Act (VIII of 1885) not applicable—Maintainability of suit—Notice.* Where the subject-matter of a tenancy is *bastu* land situated in a Municipality (to which the provisions of the Bengal Tenancy Act are not applicable), a suit for enhancement of rent brought by a landlord without previously serving the tenant with notice either to quit or to pay rent at the enhanced rate, must fail. *Ranee Lalunmonee* v. *Raja Ajodhya Ram, 23 W. R. 61 ;* and *Trilochun Dass* v. *Gagan Chunder Dey, 24 W. R. 413*, referred to. KRISHNA KANT SAHA *v.* KRISHNA CHUNDER ROY (1905) **9 C. W. N. 303**

(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN.

25. ——— **Accuracy and precision in notice**—*Notice to pay lump sum on land in possession.* A notice of enhancement must be reasonably accurate and precise. A notice to pay a lump sum on the whole land in and out of defendant's possession is not sufficient. TARACHAND ROY *v.* KEENARAM KURMOKAR **W. R. 1864, Act X, 118**

26. ——— **Prospective notice**—*Disadvantage to tenant.* A notice of enhancement should not be prospective, the principle being that the raiyat should be prepared to meet the claim on grounds existing at the time the notice is received. BYJNATH KOONWAR *v.* SAHEB KOONWAR **12 W. R. 532**

27. ——— **Requisites for notice**—*Precise nature of claim.* The great strictness with which cases involving questions as to the form of

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(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

notice of enhancement were dealt with has been relaxed in the later practice of this Court, and it has been held in the later rulings that a notice is good if, without containing the exact terms of the law, it states with sufficient precision the nature of the claim, the amount asked for, and the grounds on which the enhancement is sought, so that the raiyat served with the notice may not be misled, and can clearly comprehend the case which he has to meet. MCGIVERAN *v.* HURKHOO SINGH . **18 W. R. 203**

28. ——— **Notice based on simple ground of rent having become less**—*Abatement—Beng. Reg. VIII of 1793, s. 51.* A notice of enhancement of the rent of a talukh on the simple grounds of the rents having become less by decrees is not based on the "abatement" contemplated by s. 51, Regulation VIII of 1793, or any of the other grounds specified in that section. NUBO KRISTO MOJOOMDAR *v.* TARA MONEE . **12 W. R. 320**

29. ——— ——— *Abatement—Beng. Reg. VIII of 1793, s. 51.* In a suit by a zamindar against his talukhdar for an increase of rent under Regulation VIII of 1793, s. 51, the notice served was held to be defective, because it did not state when and for what reason the talukhdar had received an abatement of his jumma, and thereby rendered himself liable for the increase demanded. NOBO KISHEN BOSE *v.* MAZAMOODDEEN AHMED CHOWDHRY . . . . . **19 W. R. 338**

30. ——— **Notice describing intermediate as ordinary tenant**—*Reg. VIII of 1793, s. 51.* A notice describing an intermediate holder as an ordinary tenant and avowedly served under Bengal Act VIII of 1869, s. 18, cannot be considered such a notice as is required by the provisions of Regulation VIII of 1793, s. 51. KOOMODINEE KANT BANERJEE CHOWDHRY *v.* HUREE CHURN TUPADAR **24 W. R. 190**

31. ——— **Specification of rent and grounds of enhancement**—*Dependent talukhdars—Reg. VIII of 1793, ss. 48 and 51—Non-registration.* Tenants holding a permanent transferable interest intermediate between the proprietor and the raiyats, and one which has been in existence from the time of the Decennial Settlement, are entitled, before they can be sued for enhancement of rent, to a notice which not only specifies the rent, but also states the ground on which enhancement is claimed, and shows how the landlord has the right of enhancement, as well as the particular ground on which the rent is to be raised. The fact of not having been registered under the provisions of Regulation VIII of 1793, s. 48, does not deprive them of the benefit of s. 51. NILMONEY SINGH *v.* RAM CHUCKERBUTTY . . **21 W. R. 439**

SHIB NARAIN GHOSE *v.* AUKHIL CHUNDER MOOKERJEE . . . . . **22 W. R. 485**

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

32. ——— Specification of general grounds—*Proof of grounds specified.* A notice of enhancement of an intermediate tenure specifying that the tenant holds more lands than he originally did, and that the productive powers of the land and the value of the produce have increased otherwise than by the agency or at the expense of the tenant, is sufficient if the grounds are proved to exist, and if the rent claimed as fair and equitable is not more than is paid by the holders of similar tenures in the pergunnah or neighbourhood. GRISH CHUNDER GHOSE *v.* RAMTONOO BISWAS **12 W. R. 449**

33. ——— Specification of particular grounds—*Beng. Act VIII of 1869, s. 18—Schedule appended to notice.* In notices of enhancement of rent it is absolutely necessary that in the statement of grounds there should be some words to show that it is the intention of the landlord to proceed under some particular clause or clauses of s. 18, Bengal Act VIII of 1869. It is not sufficient to leave this to be inferred from a schedule appended to the notice. HOORUL MUNDER *v.* HURRUCK DUTT KHOWAS . . . . . **22 W. R. 429**

34. ——— *Act X of 1859, s. 19—Sufficiency of notice of enhancement.* It is not sufficient for a notice of enhancement of rent to allege generally the grounds of enhancement mentioned in s. 17, Act X of 1859. It should set forth specific and tangible grounds of enhancement applicable to the particular case. DWARKA NATH CHOWDHRY *v.* BEEJOY GOBIND BURAL . **10 W. R. 333**

SHUMSOOL OSMAN *v.* BUNSHEEDHUR DUTT **15 W. R. 366**

BANEE MADHUB CHOWDHRY *v.* TARA PROSUNNO BOSE . . . . . **21 W. R. 33**

KALEE KANT CHOWDHRY *v.* BHOOBUNNESSUREE CHOWDHRAIN . . . . . **22 W. R. 416**

35. ——— Notice not setting out grounds as in s. 17 of Act X of 1859. A notice of enhancement which did not set forth grounds of enhancement in the words of s. 17, Act X of 1859, *held* not a sufficient notice. RAM SARAN SING *v.* BHAJAN DOBAY KARPARDAZ **6 B. L. R. Ap. 155 : 11 W. R. 515**

36. ——— Suit for enhancement of rent dismissed on the ground of the insufficiency of the notice of enhancement is not specifying the grounds on which it was sought in accordance with s. 17, Act X of 1859. DINANATH DASS *v.* GUGAN CHANDRA SEN **7 B. L. R. Ap. 45 note : 14 W. R. 274**

KALINATH CHOWDRY *v.* HUMI BIBI **7 B. L. R. Ap. 47 note : 12 W. R. 506**

KHONDKAR ABDOOR RUHMAN *v.* WOOMA CHURN ROY . . . . . **8 W. R. 330**

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4. NOTICE OF ENHANCEMENT—*contd.*

(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

SYEFOOLLA KHAN *v.* KALEE PERSHAD SAHOO **20 W. R. 256**

37. ——— Indefinite and uncertain notice. Notice of enhancement should distinctly set forth the grounds upon which enhancement of rent is sought. Notice of enhancement to the effect "that as the rent of the land" (in the occupation of the tenant) "is below the rates prevailing in the pergunnah and in adjacent places, and as the productive powers of the land and the value of the produce have increased, and as the patit lands have been cultivated, I am entitled to receive from you R794-5-7-11½ per annum," was held to be indefinite and uncertain; and therefore no suit thereon could lie for enhancement of rent. GOBIND KUMAR CHOWDHRY *v.* HURO CHANDRA NAG **5 B. L. R. Ap. 61 : 11 W. R. 571 21 W. R. 442 note**

NILMONEY SINGH *v.* SAGURMONEE DEBIA **12 W. R. 441**

KALI CHANDRA CHOWDHRY *v.* RATAN GOPAL BHADHURI . . . **4 B. L. R. Ap. 62 note**

HEERALAL SEAL *v.* GUNGADHUR SENAPUTTY **1 Ind. Jur. O. S. 8 W. R. F. B. 19 : Marsh. 60 : 1 Hay 229**

38. ——— Notice not specifying clause or section of Act under which enhancement was sought. A notice of enhancement held to be sufficient, although it did not specify in terms the clause or section of the Act under which enhancement was sought. KUMAR PARESH NARAIN ROY *v.* GAUR SUNKER BHUMICK **6 B. L. R. Ap. 154 : 15 W. R. 39**

RADHA BALLAB GHOSE *v.* BEHARILAL MOOKERJEE **6 B. L. R. Ap. 155 : s.c. 12 W. R. 537**

39. ——— Insufficient notice. A notice of enhancement stated that "you the defendants pay less than other raiyats in the neighbourhood, and therefore you are to pay for the future such and such rates," held not a sufficient notice as contemplated by s. 17, Act X of 1859. SHEMSULOSMAN *v.* BANSIDHAR DUTT **7 B. L. R. Ap. 32**

40. ——— Sufficient notice. In a suit for enhancement of rent of an intermediate tenure, a notice to the following effect was held sufficient: "You (defendant) hold a takshishi talukh, the rent of which has always been of a varying nature; you have been called upon to make a settlement with your landlord at the pergunnah rates; by the immemorial custom of the pergunnah, the holders of such talukhs as yours, after deducting 10 per cent. of the fair jumma for collection charges, and 10 per cent. for malikana, are bound to pay the residue as rent to the zamindar. You hold so much land which, according to rates paid for similar kinds of land in the same and adjacent villages, ought to pay such

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(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

and such a gross rental; from this, deducting your 20 per cent. on account of malikana and collection charges, the remainder (so much) ought to be paid to me as my rent, and you are hereby called upon to pay that amount." JANNOBA *v.* GIRISH CHUNDRA CHUCKERBUTTY

7 B. L. R. Ap. 44 : 15 W. R. 335

41. ——— Omission to state mode of increase of produce or productive powers of land. A notice of enhancement under the second clause of s. 17, Act X of 1859, is defective if it omits to state that the value of the produce or the productive powers of the land have been increased otherwise than by the agency or at the expense of the raiyat himself. SOOJAAT ALI *v.* HUREE THAKOOR . **6 W. R., Act X, 44**

42. ——— Notice with ground vaguely stated. A notice based on the first of the grounds in s. 17, Act X of 1859, and specifying "that the rates paid are below those paid for similar lands in adjacent places," was held to be bad. SHIB NARAIN DUTT *v.* KERAMOONISSA BEGUM **17 W. R. 356**

43. ——— Notice with ground incorrectly stated—"*Surrounding rates*"—*Act X of 1859, s. 17.* That a tenant is holding at a rent lower than surrounding rates is not a sufficient ground to be specified in a notice of enhancement; the words "surrounding rates" being not tantamount to the ground of enhancement indicated in s. 17, Act X of 1859. BOYDONATH *v.* RAMJOY DEY **9 W. R. 292**

44. ——— Notice not stating quantity of land—*Excess land.* A notice under s. 13, Act X of 1859, for enhancement of rent upon land held by a raiyat in excess of the land for which he pays rent to the zamindar, must state the quantity of land so held in excess. The mere statement of "excess land" is not a sufficient compliance with the provisions of the law. GRISH CHANDRA GHOSE *v.* ISWAR CHANDRA MOOKERJEE **3 B. L. R. A. C. 337 : 12 W. R. 226**

45. ——— Notice stating simply that rates are lower than neighbouring rates—*Enquiry as to rate of rent paid by neighbouring raiyats.* In a suit for enhancement of rent where the raiyats plead that their relations with the zamindar are peculiar, it is not sufficient for a notice to set forth, and for a Court to find, that the rent paid in respect of the land in dispute is lower than the rent paid in respect of neighbouring lands: the Court is bound to enquire into the status and situation of the defendant's raiyats with those of the raiyats of the neighbouring lands. LALLA ROGHOOBUNS SAHOY *v.* ASLOO . **20 W. R. 294**

46. ——— Notice not stating year for which enhancement is sought—*Act X of 1859, s. 13.* A notice of enhancement under s. 13, Act X of 1859, is not required to state that it is for the ensuing year. GUDADHUR BANERJEE *v.* NUND LAL BISWAS . **3 W. R., Act X, 145**

47. ——— Notice that land will bear higher rent—*Tenant-at-will.* A notice of enhancement, on the ground that the land will bear a higher rent, is a good and valid notice as against a tenant-at-will. ROGHOOBUNS TEWAREE *v.* SHIB DUTT . . . . **4 W. R., Act X, 48**

48. ——— Notice with some insufficient reasons for enhancement—*Act X of 1859, s. 13.* In the case of a tenant who has no right of occupancy, a landlord's notice of enhancement under s. 13 of Act X of 1859 is valid, if it specifies the rent to which the tenant will be subject for the ensuing year and the ground on which the enhancement is claimed, even if among the reasons assigned are some which will not bear examination. The only limit to the landlord's power of enhancement after notice is the fairness and reasonableness of the rent. SREEGOPAUL MULLICK *v.* DWARKANAUTH SEIN . . **15 W. R. 520**

49. ——— Notice in case of distinct holdings—*Act X of 1859, s. 13.* A landlord serving notice of enhancement under s. 13, Act X of 1859, has no right to consolidate distinct and independent holdings, wi hout the consent of the raiyat. The raiyat, on the other hand, is entitled to a notice or notices specifying the several holdings in his possession, the amount of enhanced rent he is liable to pay upon each, and the ground of such enhancement upon each instance. BEEJOY GOBIND BURAL *v.* JANOBEE BROMONYA . **8 W. R. 252**

DENOBUNDHU BHADOOREE *v.* PRANKISHEN SURMA . . . . . **20 W. R. 146**

DWARKANAUTH HALDAR *v.* HUREE MOHUN ROY **20 W. R. 404**

NIDHOO MONEE JOGINEE *v.* KISHEN NATH BANERJEE . . . . **20 W. R. 442**

50. ——— *Beng. Act VIII of 1869, s. 15—Distinct holdings.* A notice of enhancement under s. 15 of Bengal Act VIII of 1869 must, when the tenant holds different jotes the rent of which it is sought to enhance, distinctly specify the several holdings, the amount of enhanced rent claimed in respect of each holding, and the grounds for claiming such enhanced rent. UDOYTARA CHOWDHRAIN *v.* SHIB NATH SURMA BAHADOORI . . . **9 C. L. R. 207**

51. ——— *Separate holdings.* A notice of enhancement of rent need not be on a separate piece of paper for each holding; all that is required is that it shall be so distinct for each holding that the tenant may be able to distinguish those in respect of which he does not object to the enhanced rent, from others in respect

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of which he declines to pay it. MCGIVERAN *v.* DURIAW CHOWDHRY . . . **20 W. R. 479**

52. ——— Notice in case of land consisting of two or more plots—*Beng. Act VIII of 1869, s. 18.* When the lands the rent of which is sought to be enhanced consist of more than one plot, it is not sufficient for the landlord to serve the tenant with a notice of enhancement, specifying all the three grounds of enhancement mentioned in s. 18 of Ben. Act VIII of 1869. Such notice should specify the particular ground or grounds on which each separate plot is alleged to be liable to enhancement. *Semble:* This would not be so if the same ground or grounds applied to every plot the rent of which is sought to be enhanced. If in a suit for enhancement the plaintiff fails to prove that he has served the defendant with a proper notice, the Court is not bound to make a declaratory decree, but whether it shall do so or not lies entirely in its discretion. GUNNES CHUNDER HAZRA *v.* RAMPRIA DEBEA **I. L. R. 5 Calc. 53**

53. ——— Notice given by agent—*Farmer as agent of zamindar.* A notice of enhancement by a farmer as agent and on behalf of the zamindar is legal. HEM CHUNDER CHATTERJEE *v.* POORAN CHUNDER ROY . **3 W. R., Act X, 162**

54. ——— *Notice signed by naib—Evidence of authority to sign.* A notice of enhancement of rent under s. 13 of Act X of 1859, signed by the naib of the landlord, is valid, without evidence that he was specially authorized to sign the notice. DEGUMBUR MITTER *v.* GOBINDO CHUNDER HALDER **Marsh. 354 : 2 Hay 402**

55. ——— Notice by bringing suit—*Act X of 1859, s. 13—Plaint.* The plaint in a suit for enhancement is not a substitute sanctioned by law for the notice of intended enhancement required to be given by s. 13 of Act X of 1859. SOBHA MAHTON *v.* PABAROO . **2 N. W. 310**

56. ——— Notice by suit—*Act X of 1859, s. 13—Decree in contested suit.* Following a previous decision of a Division Bench, *Madhoo Soodun Koondoo* v. *Gopee Kishen Gossain, 6 W. R., Act X, 81,* it was held that a judgment passed against a raiyat in a contested suit operates as a notice to him under s. 13, Act X of 1859, taking effect from the commencement of the year following that in which the decree was passed. RAMANATH DUTT *v.* JOYKISHEN MOOKERJEE **11 W. R. 3**

57. ——— Notice by measurement—*Measurement made in previous suit.* In a previous suit the present plaintiff had sued the defendant for the amount of rent originally fixed in the lease, and the defendant claimed in that suit to have the rent reduced in accordance with the terms of the lease, and a measurement was thereupon made, which showed that the quantity of land held by the defendant was in excess of that named in the lease: that suit was decided in favour of the plaintiff for the rent claimed. *Held,* that the measurement adopted by the Court in the former suit was not, as regards the amount of the excess, binding upon the defendant, and that, even if it were, the fact of such measurement would be no sufficient notice of enhancement to the defendant. EKRAM MUNDUL *v.* HOLODHUR PAL . . . **I. L. R. 3 Calc. 271**

58. ——— Notice not of sufficient length—*Right to enhancement—Insufficient notice—Inamdar.* An inamdar is not entitled to recover an increased rent if he has given notice of such increase in December 1870 for the current year 1870-71. HARI YEMAJI *v.* PARSHRAM GUNDO **11 Bom. 23**

59. ——— Notice containing clerical error or omission—*Immaterial error—Act X of 1859, s. 17.* Where a defendant has known perfectly well the grounds upon which enhancement of rent is demanded from him, a clerical omission which in no way prejudiced the defendant cannot operate to invalidate the notice of enhancement under s. 17, Act X of 1859. RYESUNNISSA BEGUM *v.* BYDONATH SAHA . . . **17 W. R. 354**

60. ——— Notice where defendant was aware of ground of enhancement—*Act X of 1859, s. 17.* The object of the notice of enhancement is that the defendant may know what are the grounds on which the plaintiff seeks to enhance his rent, so that he may have an opportunity of coming forward to contest any of those grounds; and as the defendant's own answer in the case showed that he was fully aware of, and came forward to contest, the main ground on which the plaintiff sought to enhance his rent, the notice issued by plaintiff was held to be sufficient to meet the requirements of s. 17, Act X of 1859. TIRTH NUND THAKUR *v.* MOHUR MUNDLE **17 W. R. 278**

61. ——— *Informality in notice.* Informality in a notice for enhancement of rent was not allowed to prevail in this case where the defect was held to have been made good by the evidence on the record, and where there could be no doubt that the tenant knew exactly the nature of the demand he had to meet, and where also the objection was a mere after-thought and not put forward until after the order of remand by the High Court. WOOMA CHURN DUTT *v.* GRISH CHUNDER BOSE . . . . . **17 W. R. 32**

62. ——— Omission in notice. Where a raiyat well knew and pleaded to the grounds of enhancement, the mere omission of the words "same

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class of raiyats" in the notice was held not fatal to the plaintiff's suit. Nor was the omission of the words "otherwise than by the agency and at the expense of the raiyat" considered material when the plaintiff distinctly stated in his plaint that the productive powers of the soil had increased owing to the land having been irrigated from the plaintiff's khas tank. WATSON & CO. *v.* RAM DHUN GHOSE **17 W. R. 496**

63. ——— *Act X of 1859, s. 17.* The omission of the words "same class of raiyat" in a notice under Act X of 1859, s. 17, even if unintentional, is sufficient to invalidate a claim for enhancement. *Quære:* Would this be the case if, notwithstanding the omission, the raiyat knew all the grounds on which enhanced rent was demanded of him, and defended himself on all? SAYEFOOLLAH KHAN *v.* CHAYA THAKOOR **18 W. R. 532**

64. ——— **Informality in notice**—*Dismissal of suit for want of proper notice—Obiter dicta.* Where a suit for enhancement of rent is dismissed on the ground that no notice was served, any decision in the Court's judgment as regards the mal or lakhiraj character of the land must be deemed to be mere *obiter.* Where it is found in such a suit that the notice did not state that the raiyat pays less than raiyats of the same class, the informality may be overlooked if there is evidence on the record of the rates of rent payable by such raiyat; but if there is no evidence of that nature, the suit must be dismissed. MOTHOORNATH SIRCAR *v.* NIL MONEE DEO . . **13 W. R. 297**

65. ——— *Omission to specify among grounds stated those relied on.* The plea of informality of notice on the ground that it contained all the grounds of enhancement allowed by law without specifying any as those relied on was disallowed, inasmuch as the raiyat had not shown that he had been prejudiced thereby, or had been in any difficulty as to what he was called upon to answer. GOPEENATH JANNAH *v.* JETTO MOLLAH **18 W. R. 272**

HUSMUT ALI *v.* OUREE THAKOOR **20 W. R. 232**

OUDH BEHAREE SINGH *v.* DOST MAHOMED **23 W. R. 185**

66. ——— **Notice fully comprehended by tenant**—*Contesting suit for enhancement:* A raiyat who has received a notice of enhancement may be in a different position relative to its sufficiency according as he waits until a suit is brought against him, or comes into Court of his own accord to attack the notice. In the latter case, if he frames his suit on a thorough understanding of the notice, he cannot object to it as not reasonably sufficient. RAM BHUROSEE SINGH *v.* MAHOMED ASGUREE KHAN . **19 W. R. 205**

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(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

67. ——— **Mistake in notice**—*Notice erroneously including lakhiraj land.* A suit for enhancement should not be dismissed merely because the plaintiff has included in his notice of enhancement land belonging to the defendant's lakhiraj holding. CHUNDER COOMAR ROY *v.* BHOLANATH SIRCAR . **W. R. 1864, Act X, 110**

68. ——— *Notice erroneously including lakhiraj land.* A notice for enhancement, otherwise sufficient, is not invalided because a portion of the lands claimed as enhanceable in such notice turns out to be rent-free land, but is good so far as it is applicable to the portion of the land which is liable to enhancement. NEWAJ BUNDOPADHYA *v.* KALI PROSONNO GHOSE **I. L. R. 6 Calc. 543 : 8 C. L. R. 6**

69. ——— **Notice of enhancement in respect of portion of land**—*Validity of notice.* Notice of enhancement, issued on the application of the person to whom the rent is payable, on account of any part of the land in respect of which the notice is served, is good for that part. GUBDOO MULL *v.* HOOLASEE . . . . **2 Agra 247**

70. ——— **Notice to talukhdar as for a raiyat**—*Act X of 1859, s. 13.* The rent of a talukhdar cannot be enhanced under a notice treating him as a raiyat having a right of occupancy. DOYAMOYEE CHOWDHRAIN *v.* MOHIMA CHUNDER ROY . . . . . **12 W. R. 137**

71. ——— **Notice to non-cultivator treated as raiyat.** Where a party who was not personally a cultivator of the land, but held a large jumma with a number of raiyats below him, was treated, in a notice of enhancement under cl. 17, Act X of 1859, as an ordinary raiyat having a right of occupancy, it was held that the notice was not on that account illegal or informal. KALEE PROSUNNO GHOSE *v.* HURISH CHUNDER DUTT **15 W. R. 57**

72. ——— **Notice of excess after measurement**—*Statement of proof of measurement.* In a suit for enhancement of rent after notice on the allegation that the defendant holds land in excess of the area admitted by him to be in his occupation, it must be shown that the notice stated that such excess has been proved by measurement. KALEE KUMARY DASSEE *v.* SHUMBHOO CHUNDER GHOSE . . **6 W. R., Act X, 23**

73. ——— **Variation between notice of enhancement and plaint.** A plaintiff is not to be prejudiced by reason of his plaint demanding less rent than that specified in his notice to enhance, when such notice has not been disputed until after action brought. On the other hand, the plaintiff cannot recover higher rent than that demanded in the notice of enhancement. HILLS *v.* PANCH COUREE SHEIKH . . . . **1 W. R. 3**

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

74. ——— Notice not followed immediately by suit—*Validity of, for future suit —Act X of 1859, s. 13.* The object of s. 13, Act X of 1859, is that a suit for enhancement should not be brought without previous due notice, and not that when a notice under that section has been once duly given, if the tenant does not immediately, on service of notice, give up the tenure, a suit for enhanced rents for the next and following years must be brought within the said year. MAHOMED ROHIMUDDEEN *v.* RADHA MOHUN MUNDUL **6 W. R., Act X, 96**

75. ——— Notice, effect of, as regards rent after suit. In a suit for arrears of rent of a particular year, after notice of enhancement on specified grounds, plaintiff (if his title is established) can only have a decree for the arrears claimed, and on one or other of the grounds alleged. The Judge has no jurisdiction in appeal to declare his right to any enhanced rents for the future. BHOOBUN MOHINEE DASSEE *v.* KEDARNATH BOSE **12 W. R. 141**

76. ——— Notice omitting grounds of enhancement—*Act X of 1859, s. 13—Auction-purchaser.* Under s. 13, Act X of 1859, a raiyat served with a notice of enhancement, which is silent about the ground of enhancement, is not liable to pay the higher rent. An auction-purchaser is no exception to the rule by which every landlord is bound to ascertain the nature, extent, and condition of his raiyat's holding before he serves him with a notice of enhancement. A raiyat is competent to object to the legality of a notice of enhancement even in a suit in which he is plaintiff. LALLA SINGH *v.* REAZOONISSA . . . **8 W. R. 271**

77. ——— Notice to zimmadars in talukh—*Act X of 1859, s. 17.* S. 17, Act X of 1859, applies only to raiyats, not to zimmadars having a tenure of a talukhi character. PANIOTY *v.* JUGGUT CHUNDER DUTT . . **9 W. R. 379**

78. ——— Notice on first of grounds stated in s. 17—*Act X of 1859, s. 17, cl. 1. Semble* (by MARKBY, *J.*): That when a landlord gives notice of enhancement to a tenant on the first of the grounds stated in s. 17, Act X of 1859, he treats him as a raiyat having a right of occupancy. THAKOOR DUTT SINGH *v.* GOPAL SINGH **14 W. R. 4**

79. ——— Notice to tenant as raiyat —*Act X of 1859, s. 17—Suit for enhancement as against him as under-tenant.* By serving a notice on defendant under the terms of s.17, Act X of 1859, plaintiff was held to have treated defendant as a raiyat having a right of occupancy, and to be debarred from suing him for enhancement of rent as an under-tenant or middleman. CHUNDERNATH GHOSE *v.* SHOTOORAM MOJOOMDAR . **12 W. R. 343**

ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*contd.*

80. ——— Notice, effect of, as admitting valid tenure or right of occupancy —*Presumption of nature of tenancy—Onus of proof.* When a zamindar sues to enhance the rent of a talukhdar, and specifies certain churs as part of the land the rent of which is to be enhanced, he, by implication, must be considered to admit that the tenant has some valid tenure or right of occupancy in the land mentioned in the notice. *Bama Soondari Dossee* v. *Rhdhica Churn, 4 B. L. R. P. C. 8 : 13 W. R. P. C. 11,* cited. ASHANOOLAH *v.* KISTO GOBIND DASS . . . **2 C. L. R. 592**

81. ——— Notice, effect of, as binding plaintiff—*Ground of enhancement.* A plaintiff must be kept to the grounds of enhancement stated in his notice. HURRI MOHUN ACHARJEE *v.* OKHOY KUMAR BOSE . **W. R. 1864, Act X, 14**

And the decision should be on those grounds only. BHEEM SEIN *v.* HUR GOBIND **3 Agra Rev. 12**

82. *Enhancement in case of tenant-at-will.* A zamindar is not bound by the ground of enhancement mentioned in his notice in the case of a tenant-at-will. Nor has the tenant any right to claim the prevailing rate, but is liable, after notice of enhancement, to the highest rack-rent. KOOBIR SIRDAR *v.* GOLUCK CHUNDER CHUCKERBUTTY . . **3 W. R., Act X, 126**

MUNEEROODDEEN MERDHA *v.* KENNIE **4 W. R., Act X, 45**

RAMMONEE CHUCKERBUTTY *v.* ALLA BUKSH **4 W. R., Act X, 46**

83. ——— *Proof of rate of rent stated in notice.* In a suit for rent at an enhanced rate, the landlord is not indispensably bound to prove the very rate which he claims in his notice. SREEKANT GHOSE *v.* BHUGWAN CHUNDER SEIN **24 W. R. 13**

84. ——— Irregularity in drawing up notice—*Right to declaratory decree to enhance on service of fresh notice.* A slight irregularity in the drawing up of a notice of enhancement cannot affect the plaintiff's right to a declaratory order reciting his right to enhance at some future time on service of a fresh notice. RAM LOCHUN DUTT *v.* PETUMBER PAUL **W. R. 1864, Act X, 111**

85. ——— Notice given during pendency of suit—*Right to decree declaratory of right to enhance.* Where a notice of enhancement is served during the pendency of a suit in which the only decree which can be passed is one simply declaratory of the plaintiff's right to recover rent at an enhanced rate, and fixing the rate to which the rent is to be enhanced, the notice is inoperative, and will not enable the Court to give a decree in

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*b*) FORM AND SUFFICIENCY OF NOTICE, AND INFORMALITIES IN—*concld.*

that suit for the payment of a sum by way of rent from the year subsequent to the service of the notice. ROMANATH DUTT *v.* JOY KISHEN MOOKERJEE . . . . **6 W. R., Act X, 80**

86. ——— Notice of enhancement as distinct from requisition to tenant to come to terms—*Notice to pay current rate of rent.* Where a zamindar, after obtaining a decree declaring certain land to be invalid lakhiraj appertaining to his zamindari, serves a notice upon the occupier to pay rent at the rate current in the neighbourhood, such notice does not make the claim one for arrears of rent at an enhanced rate, but is simply a requisition to come to terms. DEEN DYAL PARAMANICK *v.* SUTTISH CHUNDER ROY **15 W. R. 272**

87. ——— Joint application for issue of notice of enhancement—*Collection of rent jointly made.* Where collection is jointly made by the lumberdars, they both ought to join in the application for issue of notice of enhancement. RAM PERSHAD *v.* MAHOMED HASHIM . **2 Agra 249**

(*c*) SERVICE OF NOTICE.

88. ——— Person to serve notice—*Act X of 1859, s. 13.* According to s. 13, Act X of 1859, a notice of enhancement must be served by the farmer, and not the zamindar, as the person to whom "the rent is payable," notwithstanding an agreement between the zamindar and the farmer by which the zamindar reserved to himself the right of serving notices of enhancement. BINODEE LALL GHOSE *v.* MACKENZIE **3 W. R., Act X, 157**

DOORGA ROY *v.* SHYAM JHA . **8 W. R. 72**

DOORGA CHURN CHATTERJEE *v.* GOLUCK CHUNDER BISWAS . . . . . **23 W. R. 228**

89. ——— Person to be served—*Personal service—Substituted service—Act X of 1859, s. 13.* According to s. 13, Act X of 1859, a notice of enhancement must be served, not upon the under-tenant or raiyat or his agent but personally upon the under-tenant or raiyat himself, in or before the month of Choitro. If it cannot be so personally served, it must be affixed at his usual place of residence in the district in which the land is situated; or if he have no such place of residence, at the mal cutcherry, etc. CHUNDER MONEE DOSSEE *v.* DHURONEEDHUR LAHOORY . **7 W. R. 2**

90. ——— *Service of notice on wrong parties.* A suit for arrears of rent at enhanced rates cannot be maintained where the notice of enhancement has been served on parties other than the one known to the zamindar as the actual tenant from whom he had received rents, and to whom he had given receipts, even though the parties served with the notice are the representatives of the registered tenant. HURO MOHUN MOOKERJEE *v.* GOLUCK CHUNDER SIRKAR . **12 W. R. 265**

ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(*c*) SERVICE OF NOTICE—*contd.*

91. ——— *Registered and unregistered tenants.* When a zamindar has received rent for twenty-two years from the tenant in possession, notwithstanding that he is not registered in his sherista, it is upon such recognized tenant, and not upon any other party, that his notice of enhancement must be served. NOBO COOMAR GHOSE *v.* KISHEN CHUNDER BANERJEE . **W. R. 1864, Act X, 112**

92. ——— *Service on husband when wife is tenant.* Notice of enhancement to a husband is not sufficient when his wife is the acknowledged tenant. SREERAM GHOSE *v.* MOLOOK CHAND DEB . . . **4 W. R., Act X, 3**

93. ——— Service of defective notice. The service of a defective notice of enhancement (*i.e.*, one not containing the reasons assigned in s. 13 or 17, Act X of 1859) is tantamount to non-service. RAJKISHEN ROY *v.* PRANKISHEN ROY **W. R. 1864, Act X, 89**

94. ——— Notice where there are several defendants. Notices of enhancement must be duly served on each defendant before enhanced rent can be decreed. LYON *v.* BANESSUR PAUL . . . . . **2 Hay 120**

95. ——— Personal service. Where the service of notice of enhancement relied on has not been personal, it will not be valid unless it appear that an attempt has been made to effect personal service on all the defendants. RASH BEHARY MOOKERJEE *v.* KHETTRO NATH ROY **1 C. L. R. 418**

96. Mode of service—*Substituted service—Avoiding service of notice.* Where substituted service of notice of enhancement is resorted to under Regulation V of 1812, s. 10, the Courts should take care to be first satisfied that the person who ought to be served personally is keeping out of the way. RAMCHUNDER DUTT *v.* JOGESHCHUNDER DUTT . **12 B. L. R. P. C. 229 : 19 W. R. 353**

97. ——— *Substituted service without attempting personal service.* A notice is not duly served when it is merely fixed on the defendant's residence without any attempt being made to effect personal service. BURODA KANT ROY *v.* RAY CHURN BURNOSHIL . . **24 W. R. 381**

98. ——— *Indigo factory—Conspicuous place—Act X of 1859, s. 13—Informality in notice.* An indigo factory is a "conspicuous place" within the meaning of s. 13, Act X of 1859, where a notice of enhancement may be fixed. A notice of enhancement served under the provisions of s. 13, Act X of 1859, is not informal because it does not bear the signature of the landlord or his agent. HURONATH ROY *v.* MIRNOMOYEE DABEE . . **W. R. 1864, Act X, 56**

99. ——— *Substituted service—Proof of intention to avoid service.* Service

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*contd.*

(c) SERVICE OF NOTICE—*contd.*

of notice upon a defendant, by affixing the same upon the door of his dwelling-house, is not sufficient, unless the condition exists which alone renders substituted service good, namely, that the person upon whom it is sought to effect service is keeping out of the way. *Ram Chunder Dutt* v. *Jogesh Chunder Dutt, 12 B. L. R. P. C. 229 : 19 W. R. P. C. 353,* cited and followed. RAMA RAI *v.* SRIDHUR PERSHAD NARAIN SAHAI . **4 C. L. R. 397**

100. ——— *Service on joint Hindu family—Beng. Act VIII of 1869, s. 14.* Service of notice of enhancement under s. 14 of Bengal Act VIII of 1869 must be made strictly in the manner provided by that section. *Chunder Monee Dossee* v. *Dhuroneedhur Lahory, 7 W. R. 2,* followed. When a tenure was held by a Hindu and three Santhals, and it was shown that service of the notice of enhancement had been personal on the latter, but only on the son of the former who was an adult and living with his father as a member of a joint Hindu family :—*Held,* that this was not sufficient service on the Hindu tenant. *Quære :* Whether, if it had been shown that the notice, though served on the son, had come into the hands of the father, that would not amount to a sufficient service of the notice. BOIDONATH MASHANTA *v.* LAIDLAY . . . **I. L. R. 10 Calc. 433**

101. ——— *Substituted service—Beng. Act VIII of 1869, s. 14—Reg. V of 1812, s. 10—Evidence of substituted service, nature of—Burden of proof.* Proof of the validity of substituted service required by s. 10, Regulation V of 1812, is stricter than that necessary under the terms of s. 14 of Bengal Act VIII of 1869. *Ram Chunder Dutt* v. *Jogesh Chunder Dutt, 19 W. R. 353 : 12 B. L. R. 229,* distinguished. Where the only evidence in support of substituted service was the statement of the serving peon that he had searched for the tenant and could not find him :—*Held,* that such evidence was sufficient, under the terms of s. 14 of the Rent Act, to throw the onus upon the defendant to show by cross-examination or otherwise that the search was not properly made. NOOR ALI MIAN KHONDKAR *v.* ASHANULLAH **I. L. R. 11 Calc. 608**

102. ——— *Joint family—Notice shown to have reached, though informally, person intended to be served—Beng. Act VIII of 1869, s. 14.* Where there is evidence that a notice under s. 14 of Act VIII of 1869 has actually reached the persons for whom it was intended, such notice is valid, although the formalities enjoined by the section have not been strictly complied with. Service of such notice upon two of four joint brothers is good service. BASSUNT LALL DASS *v.* PANA ALI . . . **3 C. L. R. 432**

103. ——— *Joint notice—Act X of 1859, s. 19.* A joint notice of enhancement was served upon several raiyats, whose jummas were in fact separate, but which for a great many years, in suits and other proceedings, had been mutually treated as joint. *Held,* that the raiyats ought not to be allowed, in a suit for an excessive demand of rent, to object that they were entitled to separate notices, but that they were entitled to the benefit of some of the holdings being separate for the purpose of surrendering some, and retaining others, of such separate holdings under s. 19 of Act X of 1859. JADUB CHUNDER HALDAR *v.* ETWAREE LUSHKUR **Marsh. 498: 2 Hay 599**

104. ——— *Joint undivided tenure—Joint tenure subdivided without sanction.* In a case of joint tenure not subdivided under any sanction from the superior landlord, notice of enhancement need not be served on all persons interested under an alleged subdivision. MOTHOORANATH CHATTERJEA *v.* KHETTERNATH BISWAS . . . **2 W. R., Act X, 92**

105. ——— *Tenure held jointly.* A suit for enhanced rent in respect of a tenure held jointly cannot proceed except on notice to all the joint tenants. SURNOMOYI *v.* JOHUR MAHOMED NASHYO . . **10 C. L. R. 545**

106. ——— *Joint Hindu family—Beng. Act VIII of 1869, s. 14.* Where a tenure is owned by a joint Hindu family, it is sufficient service of notice of enhancement under s. 14, Bengal Act VIII of 1869, if any one of the co-sharers is served with the notice. NOBODEEP CHUNDER SHAHA *v.* SONARAM DASS **I. L. R. 4 Calc. 592: 3 C. L. R. 359**

107. ——— *Co-sharers—Beng. Act VIII of 1869, s. 14.* Where personal service of notice upon a co-sharer, under Bengal Act VIII of 1869, s. 14, is found to be impracticable, the notice may be stuck up at the adjoining house of another co-sharer. MAHOMED ELAHEE BUKSH CHOWDHRY *v.* BROJO KISHORE SEN **24 W. R. 14**

108. ——— **Service of notice signed by only one of several share-holders**—*Suit by one of two joint khots for enhanced rent—Notice, sufficiency of service of.* In a suit brought by one of two joint khots to recover enhanced rent from a tenant, the notice of enhancement given to the tenant having been signed by the plaintiff alone and not concurred in by the other joint khot :—*Held,* by the High Court, that the notice was insufficient to render the tenant liable for the increased rent, and that the plaintiff was not entitled to recover. BALAJI BAIKAJI PINGE *v.* GOPAL KULI **I. L. R. 3 Bom. 23**

109. ——— **Service of notice at instance of only some of several share-holders**—*Beng. Act VIII of 1869, s. 14. Per* GARTH, *C.J.,* PONTIFEX and MITTER, *JJ.* (MORRIS and MCDONELL, *JJ.,* dissenting)—A suit for arrears of rent at an enhanced rate brought by all the share-

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ENHANCEMENT OF RENT—*contd.*

4. NOTICE OF ENHANCEMENT—*concld.*

(*c*) SERVICE OF NOTICE—*concld.*

holders will lie, notice under s. 14 of Bengal Act VIII of 1869 having been issued at the instance of some of the persons entitled to the rent. CHUNI SINGH *v.* HERA MAHTO

I. L. R. 7 Calc. 633 : 9 C. L. R. 37

(*Contra*) KASHEE KISORE ROY CHOWDHRY *v.* ALIP MUNDUL

I. L. R. 6 Calc. 149 : 7 C. L. R. 107

5. GROUNDS OF ENHANCEMENT.

(*a*) GENERALLY.

1. ——— Distinction between raiyats with and without rights of occupancy—*Act X of 1859, s. 17, cl. 1.* In ascertaining the rates of rent, the Courts should not fail to recognize the important distinction between raiyats having a right of occupancy and other raiyats, in a case of enhancement under cl. 1, s. 17, Act X of 1859. LUCHMUN *v.* JOGUL KISHORE . **3 Agra 99**

2. ——— Grounds in case of raiyat without right of occupancy—*Act X of 1859, ss. 6 and 17.* In a suit for enhancement of rent it was held that the provisions of s. 6, Act X of 1859, do not apply to the case of a raiyat not having a right of occupancy ; and in fixing a fair and equitable rate for such a raiyat, Courts are not restricted to the grounds laid down in s. 17. PITAMBAR KURMOKAR *v.* RAMTUNOO ROY . . **10 W. R. 123**

3. ——— *Bengal Tenancy Act (VIII of 1885), s. 46, sub-ss. (6) and (9)—Non-occupancy raiyat—Enhancement of rent—Fair and equitable rent.* Sub-s. (9) of s. 46 of the Bengal Tenancy Act is not exhaustive. It was not intended that, if there was no land of a similar description and with like advantage in the same village as the land in suit, it should be impossible to enhance the rent of a non-occupancy raiyat upon any other ground. HOSAIN ALI KHAN *v.* HATI CHARAN SHAW

I. L. R. 27 Calc. 476

4. ——— Grounds in case of raiyats treated as occupancy raiyats—*Act X of 1859, s. 17.* Where a landlord treats raiyats as having a right of occupancy subject to enhancement under s. 17 of Act X of 1859, he must, before he can enhance, show that some of the conditions of s. 17, Act of X of 1859, exist. FITZPATRICK *v.* SEETA ROY . . . **1 Ind. Jur. N. S. 170**

5. ——— Grounds for enhancement, enquiry into. A claim for enhancement of rent should not be disposed of without determining the propriety of the enhanced rent with reference to the ground on which it is claimed. HURDYAL OOPADHYA *v.* MAHOMED NAEEM

1 N. W. Part 2, 19 : Ed. 1873, 79

6. ——— Failure to prove one of several grounds—*Act X of 1859, s. 17.* There is nothing in s. 17, Act X of 1859, which provides that if one of the grounds specified in the notice of enhancement be not proved, there shall be no decree for enhancement on account of any other ground which is proved. RAM KANT CHUCKERBUTTY *v.* MOHESH CHUNDER SINGH . . **7 W. R. 172**

ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*a*) GENERALLY—*concld.*

7. ——— Grounds, procedure as to, where notice is bad—*Power of remand.* In a suit for enhancement against a raiyat having a right of occupancy, if the notice served is found to be bad in law the Judge has no power under the Procedure Code to remand the case with a view to the ascertainment by local enquiry of the area of the land in dispute and the rates prevailing in its neighbourhood. HUREE DOSS *v.* PARBUTTY CHURN MOJOOMDAR . . . **13 W. R. 227**

8. ——— Grounds, onus of proof of—*Act X of 1859, s. 17—Question of proper rate of rent.* In an appeal from a decree for enhancement of rent, where the lower Court found that the defendant had failed to give evidence of non-liability : —*Held*, that it should have enquired whether the rate assessed by the first Court were proper, and such as plaintiff would be entitled to have under s. 17, Act X of 1859. RUNGOMONEY DOSSEE *v.* CAMPBELL . . . . **12 W. R. 111**

9. ——— Grounds in case of proprietor who has settled with Government.—*Increase in value of produce—Excess land.* A proprietor who has settled with Government under a jummabundi cannot sue for enhancement on the mere ground that the rate is below the prevailing rate, but must sue either on the ground of increase in the value of the produce or of an excess quantity of land. SUKHI MANI HOLDAR *v.* GUNGA-GOBIND MUNDLE . **W. R. 1864, Act X, 126**

10. ——— Grounds in case of intermediate tenures—*Deduction.* A deduction of 15 per cent. from the gross rent is a fair and equitable mode of assessing the rent payable by an intermediate tenant in a suit for enhancement. Intermediate tenures should be assessed at a rate so as to allow the tenant a reasonable profit, and not at a rate at which actual cultivators are assessed. SWARNAMAYI *v.* GAURI PRASAD DASS

3 B. L. R. A. C. 270

11. ——— Unforeseen catastrophe—*Inundation.* The occurrence of a catastrophe such as an inundation, during the year succeeding a notice of enhancement, was held to be sufficient to render the demand of a higher rent unfair and inequitable. BAMASOONDEREE DOSSEE *v.* KALOO PEADAH . . . . . **10 W. R. 395**

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES.

12. ——— Principle of adjustment of rent—*Act X of 1859, s. 17.* Where enhancement of rent is sought on the ground "that the rate of

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES—*contd.*

rent payable by such raiyat is below the prevailing rate payable by the same class of raiyats for land of a similar description and with similar advantages in the places adjacent," the question of enhancement is to be determined by reference to such state of affairs as is provided for by Act X of 1859, s. 17, and cannot be decided merely on the ground that, although the value of the land has increased, there has also been an increase in the rate of wages and in the price of provisions consumed by the raiyats. SAVI *v.* JEETOO MEEAH

Marsh. 186 : W. R. F. B. 59
1 Ind. Jur. O. S. 80 : 1 Hay 451

13. ——— Mode of calculating rate of rent—*Act X of 1858, s. 17, cl. 1.* In a suit under cl. 1, s. 17, Act X of 1859, to enhance rents, on the grounds that the rates are below the prevailing rates payable by the same class of raiyats for land of a similar description and with similar advantages in the places adjacent, the question whether and to what extent the rents ought to be enhanced is to be determined by a comparison of the rents actually paid by similar adjoining lands and without reference to the value of the produce. SREERAM CHATTERJEE *v.* LUCKHUN MAGILLA

Marsh. 379 : 2 Hay 427

14. ——— *Act X of 1859, s. 17.* In enhancing rents on the first of the grounds specified in s. 17, Act X of 1859, not only must the amount of rent paid by neighbouring raiyats be considered, but also the class of the raiyats, and whether the lands in question are similar to the lands held by the neighbouring raiyats and enjoying similar advantages. SHIB NARAIN DUTT *v.* EKRAMOONISSA BEGUM . . . . . **17 W. R. 355**

15. ——— Necessity of specific finding as to rate paid by neighbouring raiyats. In a suit for enhancement on the ground that the defendant pays a lower rent than that paid by neighbouring raiyats of the same class for similar lands, the Judge instead of decreeing what he considers a fair rate, should find specifically whether the rate claimed by the plaintiff is actually paid by the neighbouring raiyats of the same class for similar lands, or what rate is so paid, and decide accordingly. PALARAM KOTAL *v.* NUND COOMAR CHUTTORAM . . . **6 W. R., Act X, 45**

16. ——— Necessity to enquire into whole of clause as to rate of rent. With reference to the first ground specified in s. 17, Act X of 1859, it is not sufficient to find that the enhanced rent claimed is the same as that in an adjoining village, but it is also necessary to enquire whether that rent is paid by the same class of raiyats or whether the land is of a similar description, or whether it possesses similar advantages. NOBOCOOMAR BISWAS *v.* OMAN

7 W. R. 148

ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES—*contd.*

17. ——— Claim to be rated at the "nerikh"—*Rate paid by same class of raiyats for similar land.* In a suit for a kabuliat at an enhanced rate, a claim to the nerikh may be considered to be a claim to the pergunnah rate, *i.e.*, the rate paid by the same class of raiyats for similar land in the neighbourhood. OMRIT LALL BOSE *v.* ARBACH CAZI . **4 W. R., Act X, 47**

18. ——— Rates of pergunnah—*Rates of places adjacent.* Under cl. 1, s. 17, Act X of 1859, the enhancement of rent is not restricted to the rates of the pergunnah or of the village, but is to be according to the rates prevailing in the places adjacent. SUDUROODDEEN *v.* BHETOO PULEE

5 W. R., Act X, 70

19. ——— Cultivated land originally held on jungle-bori tenure. In fixing the rent to be paid for cultivated land originally held on a jungle-bori grant, the Court should ascertain the rate payable by the same class of raiyats for lands of a similar description and with similar advantages. DEEN DYAL AGUSTEE *v.* WATSON

W. R. 1864, Act X, 113

20. ——— *Act X of 1859, s. 17.* Where a raiyat, who had taken a clearing lease for certain jungles at a russuddee jumma rising by degrees to 10 annas, which had been reached and had been paid for some time, was sued for enhancement of rent, it was held that the mere fact of the raiyat's produce having largely increased in value, and of his rent being materially below that paid for similar lands in the neighbourhood, were not sufficient grounds for enhancement of rent under s. 17, Act X of 1859. It is essential to a right to enhance, under cl. 1, s. 17, that the higher rates in the neighbourhood should be paid by the same class of raiyats, and by raiyats with similar advantages. PURMANUND SEIN *v.* PUDDO MONEE DOSSEE . . . . **9 W. R. 349**

21. ——— Assessment of rent on tanks—*Rent paid to Government.* A zamindar is entitled to as much rent for his tanks as leviable on tanks in the neighbourhood, without reference to the rent which Government may take from raiyats whose tanks it has resumed. KURRALY CHURN BANERJEE *v.* MODHOOSOODUN PATTER

3 W. R., Act X, 146

RAM CHURN BANERJEE *v.* KISTO DOOGAR

3 W. R., Act X, 132

22. ——— "Adjacent," meaning of—*Act X of 1869, s. 17. Held,* that the word "adjacent" cannot so narrowly be construed as to confine the enquiry to places bordering on the land, or even lying very near or close to it. TAIJA MULL *v.* OOMRAO . . . . **1 Agra Rev. 64**

23. ——— "Places adjacent," meaning of—*Beng. Act VIII of 1869, ss. 17 and 18—Rate of rent.* The words, "places adjacent" in-

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES—*contd.*

Bengal Act VIII of 1869, s. 18, cl. 1, cannot be restricted to lands in contract with that to which the rent suit relates. The general rule may be stated to be that the plaintiff is not, on the one hand, restricted to a comparison with lands immediately contiguous, and must not, on the other, pick and choose particular places, but should consider the rates prevailing in all the neighbouring places which are similarly circumstanced. The enhancement need not be to some rate which is actually paid. Where different raiyats holding similar lands with similar advantages in places adjacent pay at different but higher rates for lands of the same description and quality, and the only question is the extent to which the defendant is liable to enhancement, the clause must not be so construed as to deprive a zamindar of his fair rents; but the Court should be guided by a consideration of what is fair and equitable, as provided by s. 5, subject to the limitations prescribed in s. 17. If a generally prevailing rate cannot be found, the currency of the different rates being so nearly equal as to make it impossible to say which is the prevailing rate, the Court is not in error in taking an average. DENA GAZEE *v.* MOHINEE MOHUN DOSS . . **21 W. R. 157**

24. ——— Varying rates—*Bengal Tenancy Act (VIII of 1885), s. 30, cl. (a)—Prevailing rate.* In a suit for enhancement of rent under s. 30, cl. (*a*), where it is found that there is no one prevailing rate and that the raiyats holding land in the village of similar description and with similar advantage pay rent at varying rates, the lowest rate may be taken and the rent of the defendants may be enhanced up to that limit. ALEP KHAN *v.* RAGHU NATH PROSAD TEWARI. HINMUT KHAN *v.* RAGHU NATH PROSAD TEWARI. HARI MOHAN GAZI *v.* RAGHU NATH PROSAD TEWARI . . . . **1 C. W. N. 310**

25. ——— "Average rate" of rent—*Beng. Act VIII of 1869, s. 18.* In trying a question of enhancement upon the first ground mentioned in s. 18 of the Rent Law, 1869, it is not allowable to a Court to strike an average on the rates of rent proved before it. AUDH BEHAREE SINGH *v.* DOST MAHOMED . . . . **22 W. R. 185**

26. ——— Abwabs paid by neighbouring raiyats—*Act X of 1859, s. 17.* In determining the enhanced rent which a raiyat is liable to pay under s. 17, Act X of 1859, a Court cannot legally include patwarian and other abwabs paid by raiyats in the neighbouring lands. BURMAH CHOWDHRY *v.* SREENUND SINGH . **12 W. R. 29**

27. ——— Prevailing rate for neighbouring lands—*Intention of this portion of clause.* The provision for enhancing rent to the rate prevailing for the same class of lands is exceptional, applying to cases in which, from some exceptional causes, a raiyat is holding at an unusually low rate, and is not intended—after the rent has been raised on some raiyats in any place for a special reason—to furnish a means for raising the rents of all the raiyats of the same place to the same rate. GLASSCOTT *v.* RAJ CHUNDER MOOCHY MUNDUL **25 W. R. 381**

28. ——— Current rate prevailing in village—*Act X of 1859, s. 17.* In a suit for a kabuliat at the rate mentioned on the allegation that that rate was the current rate prevailing in the village, it was held that this assertion may be read as sufficiently indicating that the ground for enhancing the rate was the first grounds of s. 17. BHAMA *v.* MOHUR SINGH . . . **2 Agra Rev. 2**

29. ——— Cultivators of same class in places adjacent—*Calculation of rate.* When application is made for enhancement of rent of a right-of-occupancy cultivator, care should be taken to compare his rent with that paid by cultivators of the same class in places adjacent, even if not in the same mouzah and cultivating under similar advantages in every way. ISMAIL KHAN *v.* BHONDOO . . **1 N. W. 26 : Ed. 1873, 24**

30. ——— "Same class" of raiyats, meaning of—"*Prevailing rate*"—*Act X of 1859, s. 17.* The words "same class" in s. 17, Act X of 1859, refer to the division of raiyats into two classes, *viz.*, those having, and those not having, rights of occupancy. The words "prevailing rate" in s. 17 mean the rate generally prevalent, or the rate paid by the majority of the raiyats in the neighbourhood. SHADHOO SINGH *v.* RAMANOOGRAH LALL **9 W. R. 83**

31. ——— ——— *Special class of raiyats—Standard of enhancement.* In the absence of proof of any separate class of raiyats within the general body of occupancy raiyats, the general body of such raiyats must be held to be "the same class of raiyats" to whose standard a raiyat with a right of occupancy may be raised, although some may be more and some less ancient than he. RAM COOMAR DHARA *v.* BHOYRUB CHUNDER MOOKERJEE . **6 W. R., Act X, 33**

32. ——— ——— *Raiyats holding under same class of landlord.* Raiyats are not necessarily raiyats of the same class because they hold under a similar class of landlords. GOUREENATH ROY *v.* RAMGUTTY CHUNDER **12 W. R. 102**

33. ——— ——— ——— Same class of raiyats—*Cultivators of high and low caste—Calculation of rates of rent.* It is not incorrect to accept the rates paid by cultivators of low caste, with rights of occupancy for lands of the same description and with similar advantages as a basis for calculating the rates to be paid in future by a cultivator of high caste, but it is necessary to consider and allow for

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES—*contd.*

the difference of castes. KUNUK SINGH *v.* GHOLAM JELANEE . . . . . **2 Agra 329**

34. ——— *Difference of caste among raiyats.* Comparison must be made with raiyats of the same caste. BAINEE PERSHAD *v.* MAHOMED UKBER HOSSEIN . **3 Agra Rev. 3**

BHEEM SEIN *v.* HUR GOBIND . **3 Agra Rev. 12**

35. ——— **Comparison where no class of raiyats of same class**—*Allowance for difference of class. Held,* that where cultivators of similar stamp were not to be found in the village or its vicinity, plaintiff's rate may be compared with that of another class, making suitable allowance in consideration of the superiority of class attached to him. KUNCHUN SINGH *v.* SHEORAJ **1 Agra Rev. 7**

36 ——— **"Lands of similar description"**—*Mode of enhancement of tenure containing different descriptions of land.* Where the holding of a cultivator consists of several descriptions of land, the enhancement should be determined by comparing each description of land with similar adjacent land held by the same class of cultivators, and not by applying indiscriminately the average rates of tenants having a right of occupancy. MITHO LALL *v.* SEETA RAM **1 Agra Rev. 40**

37. ——— *Mode of enhancement—Adjacent lands.* Where in places adjacent no land of similar description, with similar advantages to the land sought to be enhanced, is found to exist, it is not illegal to decree enhancement at the average of the rates paid for adjacent lands. NUBEE BUKSH *v.* RAM SUHAI . **1 Agra Rev. 57**

TIKARAM SINGH *v.* SANDES . **22 W. R. 335**

38. ——— **Prevailing rates of rent**—*Ascertainment of fair rate of rent.* That the value of produce is said generally to have doubled or trebled is not a sufficient reason for doubling the rate of rent, except where new rates of rent are not to be found. The best mode of ascertaining a fair rate is by finding what rate is paid by similar raiyats for similar lands. AMANOOLLA *v.* RAM NIDHEE GHOSE . . . . . **9 W. R. 392**

39. ——— *Sufficiency of evidence to prove prevailing rate.* In a suit for enhancement of rent on the ground that the rates at which defendant held were below the prevailing rate paid by the same class of raiyats for adjacent lands of a similar description and with similar advantages, the evidence of three patwaris who put in their jummabundis showing the rates paid by almost all the raiyats, *i.e.,* the majority, was held sufficient to prove the prevailing rate. PRAIG LALL *v.* BROCKMAN . . . . . **13 W. R. 346**

ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES—*contd.*

40. ——— *Sufficiency of evidence to prove prevailing rate.* In a suit after notice for a kabuliat at enhanced rates, said to be those prevailing in the adjacent villages for similar lands held by the same class of raiyats as defendant, the evidence of seven occupant raiyats of the neighbourhood, though not a majority, was held to be legally sufficient to make a case which defendant was bound to rebut. SARROOP MANNA *v.* BONOMALEE CHURN MYTEE . . . . **15 W. R. 240**

41. ——— *Sufficiency of evidence of prevailing rate.* The mere fact of a particular rate of rent having been decreed against two raiyats not having a right of occupancy is not enough to show that the rate so decreed was the rate prevailing in the neighbourhood. SURAHUTOONISSA KHATOON *v.* GYANEE BUKTOOR . **11 W. R. 142**

42. ——— *Act X of 1859, ss. 13, 17—Raiyat without right of occupancy—Occupancy raiyats at lower rates.* In a suit for enhancement of rent after notice under s. 13, Act X of 1859 (such notice not treating the defendant as a raiyat having a right of occupancy), if the defendant claims to be protected from enhancement otherwise than under s. 17, it is for him to prove, or at least to allege, that he has a right of occupancy, before an issue can be received under the section last mentioned. If a defendant in such a suit has no right of occupancy, and the Judge considers the rate claimed represents the fair value of the land, he should give the plaintiff a decree, notwithstanding a very large number of ancient raiyats having right of occupancy at lower rates. DUFF *v.* SOWDAGUR SAHOO JOTEDAR . . . . . **13 W. R. 255**

43. ——— *Proof of rate of rent—Mistake as to area of land.* A suit for enhancement of rent after notice should not be dismissed merely because the landlord has made a mistake as to the exact area of the lands which his tenants hold. Where enhancement is sued for on the ground that the rent paid by the defendant is below the rate prevailing in the neighbourhood, it is not enough for the plaintiff to show that the adjacent lands are of a similar description to those held by defendant; he must also show that they are held by persons of the same class with the defendant. WOOMANATH ROY CHOWDHRY *v.* ASHUMBUREE BISWAS . . . . . **12 W. R. 476**

44. ——— *Evidence by hypothetical adjustment of rents.* In a suit for enhanced rent where the ground relied on is the prevailing rate paid by adjacent occupiers of similar land, such ground cannot be established by the probability or even the certainty that, if the rents of the neighbouring occupants were re-adjusted, they would come up to the rate claimed. BRINDABUN DEY *v.* BUSONA BIBEE **13 W. R. 107 : 13 B. L. R. 200 note**

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*b*) RATE OF RENT LOWER THAN IN ADJACENT PLACES—*concld.*

45. ——— *Failure to prove existence of ground for enhancement.* Where the ground of enhancement was that defendant paid rent below the prevailing rate for land of similar description and with similar advantages in the places adjacent, and the plaintiff failed to prove the existence of any such ground, the plaintiff was not entitled to a decree at the rates which the defendant's lands would bear, as Act X of 1859 does not authorize enhancement of the rent of a raiyat to the rates which the lands will bear. JAUN ALI *v.* JAN ALI . . . . **9 W. R. 149**

46. ——— *Data for calculation of.* In a suit for enhancement of the rent paid by shikmi talukhdars, the plaintiff is bound to afford data (*e.g.*, the rate paid by intermediate tenants of the same class) upon which the Court can come to a satisfactory conclusion as to what would be a fair and equitable rate to be paid by defendant, plaintiff being competent, under s. 10, Act VI of 1862, to measure the talukh and ascertain the assets. DABEE DOSS NEOGEE CHOWDHRY *v.* GOBIND MOHUN GHOSE . . . **10 W. R. 213**

47. ——— *Rate paid by neighbouring raiyats of same class.* In a suit for enhancement of rent on the ground that the defendant pays at a lower rate than that paid by the neighbouring raiyats of the same class for similar lands, if it be found that the prevailing rate is higher than the rent paid by the defendant, though lower than the rate claimed in the plaint to be the prevailing rate, the Court ought to give a decree at the actual rate found to be paid by the neighbouring raiyats. AKUL GAZA *v.* AMUNOODDEEN **5 C. L. R. 41**

48. ——— *Beng. Act VIII of 1869, s. 18—Grounds of enhancement, proof of.* In a suit to recover rent at an enhanced rate after notice upon grounds furnished by the first two clauses of s. 18, Bengal Act VIII of 1869, where the defendant pleaded that the land was maurasi, held by him at a fixed rate of rent for generation after generation :—*Held*, that the defendant's failure to prove this plea was no bar to his setting up that he had earned the right of occupancy in the land : *Held*, that the plaintiff could not succeed without proving the substance of each part of cl. 1, and that it was not enough to show that the rate paid by the defendant was below the prevailing rate for adjacent land of a similar description and with similar advantages ; but it must also be shown that the prevailing rate was paid by raiyats of the same class as the defendant. DOMA ROY *v.* MELON **20 W. R. 416**

(*c*) INCREASE IN VALUE OF LAND.

49. ——— **Valuation of produce—** *Proportion, principle of—Act X of 1859, ss. 13 and 17—Apportionment of increased value.* In a suit for enhancement of rent on the ground specified in s. 17 of Act X of 1859, that "the value of the produce, or the productive powers of the land, have been increased otherwise than by the agency or at the expense of the raiyat" the amount of the increased rent is not to be ascertained by establishing a proportion between the former rent and the old produce ; but the absolute increased value of the produce being ascertained, the enhanced rent is to be arrived at by considering what part of such increased value ought to be apportioned to the tenant as the produce of his capital and labour, and what part of it is rent, that is, as it has been defined, "that portion of the value of the whole produce which remains to the owner of the land after all the outgoings belonging to the cultivation of whatever kind have been paid, including the profits of the capital employed, estimated according to the usual and ordinary rate of agricultural capital at the time being." Rent cannot be enhanced beyond the rate demanded in the plaint, and it can be enhanced only in respect of such part of the land as has increased in value. HILLS *v.* ISHORE GHOSE . **Marsh. 151 : 1 Hay 350**

ISHORE GHOSE *v.* HILLS **W. R. F. B. 48 : 1 Ind. Jur. O. S. 25**

50. ——— *Wages of raiyats—Fair and equitable rent—Loss for crops destroyed.* The produce of a bigha of dhan in 1267 and 1268 should not be valued at the prices of 1269. Whether a raiyat borrows his food or not, he cannot receive his wages out of the proceeds of crops before the crops are gathered. An allowance for a house cannot be made to a raiyat in addition to a fair allowance for wages. Loss on account of crops destroyed or injured cannot be taken into consideration twice over : (i) in ascertaining the average of the quantities and prices, and (ii) in making an allowance for risks based upon injuries done to the crops, of which the quantities and prices must have been taken into consideration in calculating the average. A landlord cannot be charged with a rate of interest or profit on capital far beyond the ordinary rate of interest or profit, and also with an allowance for ensuring the return of the capital with such extraordinary rate of interest. One rate of rent cannot be fixed for a raiyat who spends his own capital, and another for a raiyat who is compelled to borrow it. The rate of rent which the landlord has a right by law to demand does not depend upon the size of the holding of the circumstances of the raiyat. What is a fair and equitable rent for one raiyat for lands of a similar description and with similar advantages in the same neighbourhood must also be fair and equitable for another, so far as the landlord is concerned. A raiyat who, but for the Permanent Settlement, would have been entitled to no

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*contd.*

more than half of the gross proceeds of his land, is not over-assessed when he is allowed to retain at least five-sixths of the gross proceeds for his labour and profit on capital, and called upon to pay something less than the other one-sixth as rent to the zamindar. HILLS *v.* ISHORE GHOSE **W. R. F. B. 131**

Held in the same case on review.—The condition and rights of raiyats, whose tenures have commenced since the Permanent Settlement, depend not on status, but on contract and on laws and regulations specially enacted. In 1793 the zamindars were declared to be the proprietors of the lands. From 1793 to 1812 they were prevented from granting pottahs or leases to raiyats for more than ten years, and could not, therefore, have created raiyats with hereditary rights of property in the soil. After Regulation V of 1812 they could grant leases at any rate and for any term. By the retrospective effect of s. 2, Regulation VIII of 1819, leases in perpetuity or for terms granted prior to 1812 were rendered valid. In this case it was admitted that the value of the produce had increased otherwise than by the agency or at the expense of the raiyat, and that the notice required by s. 13, Act X of 1859, had been served before the end of Choitro in the year preceding that for which enhancement was claimed. Upon being served with that notice, the defendant had a right to quit according to s. 19. The Statute of Limitation does not give him a right of occupancy under s. 6 by holding for twelve years. But for Act X of 1859, therefore, the defendant (assuming that he was not holding for a fixed term, and that his tenancy commenced since the Permanent Settlement) would have been liable to have his tenancy determined, and to be turned out of possession at the end of 1267, if he and his landlord could not agree as to the rent to be paid for the future. But it being admitted that he had a right of occupancy under Act X of 1859, he was entitled to hold at a fair and equitable rate. What is fair and equitable depends on the value of the produce and cost of production. After the Permanent Settlement, and before Act X of 1859, a right of occupancy was not acquired by a raiyat merely by holding or cultivating land for a period of twelve years. When that Act created the right, s. 5 declared the raiyats having rights of occupancy should be entitled to hold at fair and equitable rates, thus leaving it to the Court to determine in every case of dispute what is a fair and equitable rate. To be fair and equitable, it must be so as regards both parties. ISSHUR GHOSE *v.* HILLS . . . . **W. R. F. B. 148**

51. ——————— *Act X of 1859, ss. 5, 6, and 13—Adjustment, mode of—Proportion, rule of.* When there has been an increase in the value of the produce of land arising from an increase in prices, and the zamindar is entitled to a new kabuliat from an occupancy raiyat, at an enhanced rate, at fair and equitable rates:—*Held per* TREVOR, *J.* (concurred in by the majority of the Court)—The words "fair and equitable" in s. 5, Act X of 1859, are to be construed as equivalent to the varying expressions "pergunnah rates," "rates paid for similar lands in the adjacent places," and "rates fixed by the law and usage of the country,"—all which expressions indicate that portion of the gross produce calculated in money to which the zamindar is entitled under the custom of the country; that as the Legislature directs that, in cases of dispute, the existing rent shall be considered fair and equitable until the contrary be shown that rent is to be presumed, in all cases in which the presumption is not by the nature and express terms of the written contract rebutted, to be the customary-rate included in the terms "pergunnah rates," "rates payable for similar lands in the places adjacent," and "rates fixed by the law of the country"; that in all cases in which the above presumption arises, and in which an adjustment of rent is requisite in consequence of a rise in the value of the produce caused simply by a rise in price, this method of proportion should be adopted—the former rent should bear to the enhanced rent the same proportion as the former value of the produce of the soil calculated on an average of three or five years next, before the date of the alleged rise in value, bears to its present value; that in all cases in which the above presumption is rebutted by the nature and express terms of the written contract, the re-adjustment should be formed on exactly the same principle as that on which the original written contract, which is sought to be superseded, was based; and that in cases in which it appears, from the express terms of the contract, that the rents then made payable by the tenant were below the ordinary rate paid for similar land in the places adjacent, in consequence of a covenant entered into by the raiyat to cultivate indigo or other crops, the former rent must be corrected so as to represent the ordinary rate current at the period of the contract, before it can be admitted to form a term in the calculation to be made according to the method of proportion above laid down. *Per* MACPHERSON, *J.*—The rule of proportion,—as the old value of produce is to the old rent, so is the present value of produce to the rent which ought now to be paid,—is the rule which should be adopted in the absence of any recently-adjusted pergunnah customary rates. Either party should be at liberty, in each case, to prove any special circumstances tending to show that the application of the rule of proportion to that particular case would work injustice. *Per* PHEAR, *J.*—When the Collector is called upon in any given case to determine the rent which it is fair and equitable that the raiyat should pay, he ought to enquire:

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*contd.*

(i) Whether at the last antecedent period, when the arrangement between the parties (either then created or previously existing) was such as must, by reason of tacit acquiescence or otherwise, be taken to have been fair and equitable, that arrangement contained express stipulations as to rent; if so, then these stipulations, unless the reason for them is gone, should be followed in arriving at the rent for the new pottah. (ii) If the Collector finds no express agreement to guide him, then he must ascertain whether the raiyat is legally entitled by custom, based either on his personal status or on the character of the land occupied by him, to any definite share of the produce of the land or to any beneficial interest in it. If the raiyat is so entitled, the rent must be adjusted accordingly. (iii) If neither express agreement nor legal right in the raiyat be found to have determined the amount of rent, the last arrangement must have been governed by some locally prevailing custom, or the rent regulated, tacitly, according to some locally prevailing rates; and in that case the custom ought to be complied with, and the rates adhered to. The fair presumption will be, in the absence of evidence or unless a different foundation be actually shown, that the rate was originally based upon the principle of sharing the produce of the land between the raiyat and zamindar in a fixed ratio. The result of applying this presumption would be that the new fair and equitable rent would be the same proportionate part of the new produce that the old rent was of the old produce. In all cases, the duration of the intended pottah must be taken into consideration as an element affecting the question of fairness and equity. *Per* NORMAN, *J.*—(i) With respect to the rents of raiyats having mere rights of occupancy, a zamindar is entitled to claim from his raiyats such rents as are paid by the same class of raiyats for land of a similar description and with similar advantages in places adjacent. (ii) If such rents are too low, and the zamindar simply allege that the value of the produce has become increased, otherwise than by the agency, or at the expense, of the raiyat, he shows an increase in the value of that which primarily belongs to the producer, to a porportion of which alone the zamindar is entitled. It is only necessary to give the zamindar an amount of rent which shall bear the same proportion to the old rent which the present price of the produce does to the former. It must be taken that the old rent was fair and equitable. It is for the zamindar to prove his case, and he must carry back his evidence, as nearly as he can, to the time when the rent was fixed. (iii) If the rent consists partly of money and partly of services, or something equivalent to services, as an obligation to cultivate and supply indigo at a certain price, the value of such contract would have to be estimated and added to the old rent; and in such cases the aggregate value would form a term in the proportion. (iv) If a raiyat is holding below the rates paid by his neighbours, and in consequence of the increase of the value of the produce these rates are themselves too low, the zamindar may be entitled to the benefit of both grounds of enhancement in the same suit. (v) The cost of cultivation in the absence of evidence to the contrary, may be taken roughly to have increased in ratio proportionate to that of the increased price of produce. But in exceptional cases it may be found that the particular crop for which the land is specially fitted, as cotton, or crops on land in the vicinity of a town, has greatly increased in value without any general equivalent rise in the price of labour or the cost of food. In such cases, if the zamindar is not in a position to make out a case under the first clause, the increased profit may be divided between the zamindar and the tenant, as may appear reasonable under the special circumstances of the case; and in like manner any extraordinary increase in the cost of production may be proved by the raiyat in answer to the claim for enhancement on the ground of the enhanced price of produce. (vi) If the productive powers have increased from other causes, as in the case of lands protected from flooding by the embankments of the railway, without increase of outlay or labour by the tenant, the whole of such increase belongs to the zamindar, subject to any increased expenses which may be caused to the tenant by the collection or realization of the larger profit. *Per* PEACOCK, *C.J.* (dissenting)—The rule of proportion is not applicable. The rule laid down in *Ishore Ghose* v. *Hills, W. R. F. B. 131, 148,* should be followed. The definition of "rent" by Malthus in his "Principles of Political Economy" is the guide. Rent is "that portion of the value of the whole produce which remains to the owner of the land after all the outgoings belonging to its cultivation of whatever kind have been paid, including the profits of the capital employed, estimated according to the usual and ordinary rate of agricultural capital at the time being." In considering whether the whole of the increased value of the produce is to be added to the rent, the Court must be guided by all the circumstances of the case. It may take the old rent as a fair and equitable rent with reference to the former value of the produce. It must take into consideration the circumstances under which the value of the produce has increased, and whether these circumstances are likely to continue. It must also consider whether the costs of production, including fair and reasonable wages for labour, and the ordinary rate of profits derived from agriculture in the neighbourhood, have increased; and if so, it must make a fair allowance on that account. It is only the net increase, or such part of the net increase as will render the rent fair and equitable, that can be added to it. THAKOORANEE DOSSEE *v.* BISHESHUR MOOKERJEE

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3 W. R., Act X, 29.

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*contd.*

52. ——— *Cost of production—Calculation of rate of enhancement.* In ascertaining the rate of enhancement, the Court is not bound to calculate the exact value of the produce and the cost of production, but to estimate the average productive value and cost of production. HURO MOHUN MOOKERJEE *v.* THAKOOR DOSS MUNDUL . . . . . **1 W. R. 112**

53. ——— *Calculation of increase in produce—Proportion.* The mode of calculating the increase in the value of produce according to the rule of proportion is by simply taking the former and present value of produce, and not by calculating former and present profits after deducting costs. RAM TARUCK GHOSE *v.* BIRESSUR BANERJEE . . . **6 W. R., Act X, 32**

54. ——— *Rule of proportion—Decrease in productive power and value of produce.* In a suit for enhancement where not only the value of the produce has decreased, but the productive powers of the land have decreased, and the expenses of cultivation increased, the formula to be applied in determining the rent will be as follows: The average value of the produce before the decrease in the productive powers of the land will be to the average value of the present decreased produce, *minus* the increased cost of production, as the rent previously paid will be to that which the land ought now to pay. SHOWDAMINEE DOSSEE *v.* SHOOKOOL MAHOMED **7 W. R. 94**

55. ——— *Rule of proportion.* In a suit for enhancement of rent where the expenditure is stationary, and the value of the produce has increased, the proper rule is that the rate of rent to be paid shall bear to the old rate the same proportion as the present value of the produce bears to the old value. DOORGANATH SHAH *v.* KAZIM FAKIR . . . **9 W. R. 348**

SHIB NARAIN GHOSE *v.* KASHEE PARSHAD MOOKERJEE . . . . **1 W. R. 226**

56. ——— *Rule of proportion—Deduction for costs of production—Average values for series of years.* In applying the rule of proportion laid down in the Full Bench decision in the case of *Thakooranee Dossee, B. L. R. Sup. Vol. 202 : 3 W. R., Act X, 29,* the Judge must consider the amount the raiyats actually paid, and not what they ought to have paid. The raiyat is not entitled to any deduction on account of cost of production. It is necessary to take the average values of the produce of a series of years, including the years of abnormal plenty and scarcity. JOMEUT MUNDUL *v.* SHOORENDER NATH ROY **25 W. R. 391**

57. ——— *Accidental or exceptional increase in value—Drought or scarcity.* The increase in the "value of the produce" which is to form a ground for enhancement of rent under s. 17 of Act X of 1859 means an increase in its natural and usual value in ordinary years. The accidental and exceptional high prices of a particular year, in consequence of drought and scarcity, cannot be treated as a measure by which rent is to be adjusted. A tenant takes land, not with reference to the exceptional high prices of a past year, but with reference to the prices he may reasonably expect to realize for the crops which he will raise in succeeding years. BHAGRUTH DOSS *v.* MAHASOOP ROY . . **6 W. R., Act X, 34**

58. ——— *Casual increase in fertility.* A casual increase in the fertility of the land is not a ground for permanent enhancement of rent. KRISTO MOHUN PATTUR *v.* HUREE SUNKUR MOOKERJEE . . . **7 W. R. 235**

59. ——— *Casual increase in fertility.* In coming to a conclusion as to whether the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the raiyat, the average of four or five years ought to be taken; the increase of an exceptional year should not be the guide. RAJKRISHNA MOOKERJEE *v.* KALEE CHARAN DOBAIN **6 B. L. R. Ap. 122 : 15 W. R. 109**

60. ——— *Casual increase in fertility.* In deciding a suit for a kabuliat at enhanced rate for five years, the probable result of an exceptional bad season should not be taken into consideration, but the average of the past five years. SREESH CHUNDER DOSS *v.* ASSIMONISSA **7. W. R. 234**

61. ——— *Steady and normal increase.* The increase must be permanent, *i.e.*, steady and normal. THAKOORANEE DOSSEE *v.* BISHESHUR MOOKERJEE **3 W. R., Act X, 142**

62. ——— **Inconsistent grounds of enhancement**—*Increase of produce and value of produce—Lowness of rent compared with neighbouring rates.* Claims to enhancement on the basis of increased produce and increased value of produce are inconsistent and incompatible with one founded on an inequality between the rent paid by a tenant on the estate and paid by a tenant on a neighbouring estate. SHREESH CHUNDER DOSS *v.* ASSIMONISSA **7 W. R. 234**

63. ——— *Increase of produce—Increase of value of produce.* A claim to enhancement of rent on the basis of increased produce, and one on that of increased value of produce, are not inconsistent and incompatible; and if they were so, they would not, by being advanced together, cancel each other, and thus neutralize plaintiff's claim to the benefit of cl. 2, s. 17, Act X of 1859. GOPEENATH MOOKERJEE *v.* RAM HUREE MUNDUL . . . . **9 W. R. 476**

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*contd.*

64. ———— **Rule of proportion**—*Rates of present and former value unascertainable.* The rule of proportion is not applicable where the rates between the present value of the produce of the soil and the former value at the time of the original taking cannot be ascertained, and where it is only necessary to see what is a fair and equitable rate by comparison with the rate paid by the neighbouring raiyats for similar land. JADUB CHUNDER HOLDAR *v.* ETBURRY LUSHKUR **3 W. R., Act X, 160**

65. ———— *Calculation where adjustment has taken place.* In a suit for a kabuliat at enhanced rents, if the rents of the adjacent lands have been already adjusted and enhanced, the enhancement of the defendant's holding will depend on the rates paid by those adjacent lands, supposing them to be of the same kind and not on any doctrine of proportion which will only apply when no adjustment has taken place. AZIM MULLICK *v.* GUNGA DHUR BANERJEE **5 W. R., Act X, 58**

66. ———— **Rate for lands allotted on batwara**—*Reg. XIX of 1793, s. 19.* In a suit for khas possession of land made over to plaintiff on batwara, the defendant pleaded twelve years' adverse possession, and that he was entitled to retain possession on payment of rent, as the lands were occupied by gardens made by his ancestor. *Held*, that the rate given in the batwara papers was not necessarily the fair rate for the lands; for under s. 19, Regulation XIX of 1793, the gross produce of each village is calculated with the proportion of the public jumma assessed thereon. LULEET NARAIN SINGH *v.* GOPAL SINGH . . **9 W. R. 145**

67. ———— **Increase in productive powers**—*Increase in rent.* By the words "increase of productive powers" in s. 17, Act X of 1859, the Legislature did not mean capacity for realizing a higher rent for building or other purposes, but an increase of the productive powers of the land itself. BISSESHUR CHUCKERBUTTY *v.* WOOMACHURN ROY . . . . . **9 W. R. 122**

68. ———— *Agency operative at time of notice—Beng. Act VIII of 1869, s. 18.* In a suit for arrears of rent for two years of which the rate claimed for one year 1278 was the old rate and the rate claimed for 1279 was an enhanced rate after notice. *Held*, that, as the suit was from the beginning essentially a suit to recover arrears of rent due in respect of the years 1278 and 1279, and the question whether the plaintiff had made out a right to be paid rent at an enhanced rate for 1279 was only part of the larger question what was the rate at which rent was due for that year, there was no error in the lower Appellate Court's decreeing arrears of rent for 1279 at the rate which was found to be the true rate, although less than the enhanced rate claimed. *Held*, that the increase of productive power alluded to in s. 18 of the Rent Law as a ground of enhancement must be an agency subsisting and operative at the time, when the notice is issued. BROJONATH TEWAREE *v.* GRANT . . . . . **22 W. R. 13**

69. ———— *Beng. Act VIII of 1869, s. 18—Increase by natural agency.* An increase, either permanent or likely to last for a considerable time, caused by natural agency in the productive powers of the land, is one of the elements to be taken into consideration in determining its increased value within the meaning of Bengal Act VIII of 1869, s. 18. ABDOOL GUNEE *v.* BHUTTOO SHEIKH . . . . . **22 W. R. 350**

70. ———— *Rise in value owing to portion of town being swept away.* A rise in the value of lands, owing to a considerable portion of the town in which the lands are situated having been swept away by a river, is not such an increase in the productive powers of the land as is contemplated by cl. 17 of s. 17 of Act X. KHONDKAR ABDOOR RUHMAN *v.* WOOMACHURN ROY **8 W. R. 330**

71. ———— *Land improved otherwise than by cultivater. Held*, that, though the land may have been improved otherwise than by the exertions of the cultivator, yet the zamindar is not entitled to demand rent beyond what is fair and equitable for the same class of cultivators, as the cultivator sought to be enhanced to pay for such improved lands. JUMNA PERSHAD *v.* BHOWANEE . . . **2 Agra Rev. 1**

72. ———— *Act X of 1859, s. 17—Embankment, construction of.* An increase in the productive power of the land, occasioned by an embankment, constructed at the expense of Government, for excluding the sea from flooding the land, is a ground of enhancement under s. 17 of X of 1859. JADUB CHUNDER HALDAR *v.* ETWAREE LUSHKUR . . **Marsh. 498 : 2 Hay 599**

73. ———— *Canal, construction of—Expenses of making ducts and for canal rates.* A cultivator cannot claim altogether to be exempted from enhancement on account of the increase in the productive power of land which has been effected by a canal which was not made at his expense or labour, but he can fairly ask that the expenses, such as the cost of making ducts and the payment of canal rates, should be calculated and deducted from the total amount of increased value. PIRAN *v.* RAM BUKSH . . . **2 Agra 346**

74. ———— *Canal, construction of—Expenses for canal dues. Held*, that a raiyat is entitled to deduction of the actual amount paid by him in the shape of canal dues, and also other expenses which are occasioned by bringing the water into the land, together with interest on the capital employed in such expenses and pay-

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*contd.*

ment of canal dues. MAHEEPUT SINGH *v.* LOK INDER SINGH . . . . **2 Agra 179**

75. ——— *Middleman.* A middleman is liable to enhancement when the productive powers of his land have been increased otherwise than by the agency or expense of the raiyat. Two-thirds was held to be a fair proportion of the surplus profits of the land to be awarded to the landlord. JADUB CHUNDER HALDAR *v.* ISHORE LUSHKUR . . **W. R. 1864, Act X, 74**

76. ——— *Fair and equitable rate—Act X of 1859, s. 17.* S. 17 does not say that in every case the rate of rent may be raised to the prevailing rate, but only that the rent shall not be raised except on some one of the grounds specified. That section must always be read with reference to the general provision of s. 5, that the rent of a raiyat having a right of occupancy shall not be more than is fair and equitable; and in considering what is fair and equitable, the raiyat should not be called upon to pay to the landlord, under the name of rent, what is in fact not rent, but the produce of his own labour and capital sunk in the land. NOOR MAHOMED MUNDUL *v.* HURRIPROSONNO ROY **W. R. 1864, Act X, 75**

77. ——— *Grounds of exemption—Increase in value from natural causes.* In a suit for enhancement of rent, bare proof that the productive powers of the land in suit have been increased by the agency, or at the expense of the defendant or his ancestor, is not sufficient to exempt the defendant altogether from enhancement. In such a case where the value of similar lands in the same locality, but not sharing the especial advantages resulting from works or improvements erected or effected, by or at the expense of the defendant or his ancestor, has been increased by natural causes, it must be assumed that the lands of the defendant owe their increased value to that extent to natural causes, and are to that extent liable to enhancement. TEKAIT CHOORAMUN SINGH *v.* DUNRAJ ROY . . **I. L. R. 5 Calc. 56**

78. ——— *Act X of 1859, s. 17—Increase at expense of tenant.* Where it is found that the productive powers of a holding have been increased at the expense of the tenant, and it is not found that they have increased otherwise, no grounds of enhancement under s. 17 of Act X of 1859 are shown. OUNDA *v.* RAHEEM SHERE KHAN **3 N. W. 138**

79. ——— *Increase at expense of raiyat.* If the tenant's expenditure has caused an increase in the productive power of the land, such expenditure once made cannot permanently bar enhancement of rent, but after the lapse of such a time as may be fairly estimated as sufficient to enable him to recover his outlay and a just

ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*contd.*

share of profit in respect of it, his rent may be enhanced on any legal ground. MUJLIS *v.* MOHER **3 Agra 223**

80. ——— *Increase in value of land by tenant's means.* In a suit for enhancement of rent of land originally leased for the purposes of a homestead, where defendant had erected shops and made other improvements at a great outlay and considerable risk, as the river had encroached and was encroaching, a Judge was held not to have done wrong in allowing the tenant a reduction on account of the increase of value of the land induced by his energy. NUFFER CHUNDER SHAH *v.* GUNGA DUTTA BHARUTTY **11 W. R. 190**

81. ——— *Right to enhance rent where increased facilities for irrigation are provided by landlord.* Where a landlord provides facilities for irrigation, of which the tenants may without expense avail themselves, bringing the water to their holdings,—*Quære*: Whether, after proper notice, he would not be allowed to enhance the rent. A tenant of unirrigated land, if the landlord make that land irrigable without cost to the tenant, must pay at the rates paid by other similar tenants for irrigable lands in the neighbourhood. IKRAM ALI *v.* BABOO LALL **1 N. W. 178 : Ed. 1873, 257**

82. ——— *Right to increased rent where raiyat digs wells and does not use the irrigation already existing, though sufficient. Semble:* If a zamindar has, before the construction of a well by a tenant, provided sufficient means of irrigation, he will be entitled to receive rent at the rate payable by the cultivators of the same class as his tenant for land with the like facilities for irrigation in places adjacent, and will not be deprived of the right to claim rent at irrigated rates because the cultivator does not choose to avail himself of the irrigation provided for him, or things fit to make an outlay on the construction of a well which will not materially increase the productive powers of a holding to a greater extent than they would have been increased had the cultivator availed himself of the means of irrigation placed at his disposal by the zamindar. SHEO CHURN *v.* BUSSUNT SINGH. RAMJUTHUN SINGH *v.* MEHDEE **3 N. W. 282 : Agra F. B., Ed. 1874, 258**

83. ——— *Improvements by agency of tenants.* The fact that at a distant time the raiyat or his ancestors have by their own agency or at their own expense made wells or effected improvements, is not a legal bar to the landlord's right to enhance. LALLA SHEO NARAIN *v.* OODHUN SINGH **1 N. W. 180 : Ed. 1873, 258**

84. ——— *Reclamation of waste land by tenant.* In a suit to enhance rents the Deputy Collector found that the annual revenue

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*c*) INCREASE IN VALUE OF LAND—*concld.*

obtained by the raiyats was R12,579, and that an increase in such rates was partly due to the exertion of the defendant in reclaiming some waste land, and he deducted R2,579 as the defendant's share, and awarded R10,000 as a fair and reasonable rate to be paid to the plaintiff. *Held*, that there was no reason for impeaching his award of this rate. SURNO MOYE *v.* ADOITO CHURN ROY **Marsh. 605**

85. ——————— *Expenditure of labour and capital by tenant.* Where tenants held for some twenty-five years upon a rent apparently much below that payable for lands of the same description in the neighbourhood, they were held not entitled at the end of that long period to allege the expenditure of their own capital and labour against the landlord's claim to a kabuliat at an enhanced rate. PROSONO COOMAR PAUL CHOWDHRY *v.* RADHA NATH DEY CHOWDHRY . **7 W. R. 97**

86. ——————— *Increase by exertion of tenants.* In a suit for enhancement of rent upon the ground that the rates were below the prevailing rates payable by the same class of raiyats for land of a similar description and with similar advantages in places adjacent, the Judge exempted from any enhancement a tank and garden, on the ground that the tank had been dry for public use, and that the garden had been rendered productive by the exertion of the tenants. *Held*, that neither reason was any ground of exemption from enhancement. SREERAM CHATTERJEE *v.* LACKHUN MAGILLA . . **Marsh. 379 : 2 Hay 427**

87. ——————— *Care and labour expended by raiyat.* In a suit for a kabuliat at an enhanced rent, where in spite of the shortness or deficiency of the crops, their value, owing to the additional care and labour expended by the raiyat, had increased considerably above that in former years, it was laid down that the Court must try and discover what the raiyat was entitled to as a set-off against the increased value of the produce for the additional care and labour expended by him, and whether or not the zamindar was not entitled to some portion of the increased value of the produce in the shape of enhanced rent. SHODAMINEE DOSSEE *v.* HARAN CHUNDER SURMA **6 W. R., Act X, 103**

88. ——————— *Increase by agency of tenant—Beng. Act VIII of 1869, s. 18.* In a suit for enhancement of rent, defendant pleaded that the land was used solely for fruit trees, and that those trees were originally planted by the defendant; that consequently any increase in the value and productiveness of the land in consequence of the growth of the trees must be attributable to the agency of the defendant, and therefore by s. 18 of Bengal Act VIII of 1869 such increase would be no ground for enhancement. *Held*, a bad defence. OUHOY CHUNDER SIRDAR *v.* RADHA BULLUBH SEN **1 C. L. R. 549**

ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*d*) LANDS HELD IN EXCESS OF TENURE.

89. ——————— **Excess lands**—*Act X of 1859, s. 17, cl. 3.* Lands in excess of the area recorded in a mokurrari pottah containing no boundaries are liable to assessment under s. 17, Act X of 1859. BIPRO DOSS DEY *v.* SAKERMONEE DOSSEE **W. R. 1864, Act X, 38**

90. ——————— *Act X of 1859, s. 17, cl. 3.* Where a tenant is found to be holding a greater quantity of land than that for which rent has been paid by him, and the excess land lies within the land originally leased to him, the landlord is entitled to enhanced rent under cl. 3, s. 17, Act X of 1859. GOPEENATH MOKERJEE *v.* RAM HUREE MUNDUL . . . . **9 W. R. 476**

91. ——————— *Act X of 1859, s. 17, cl. 3.* In a suit for enhancement under cl. 3, s. 17, Act X of 1859, on the ground that defendants held lands in excess of that originally granted to him, the mere fact that defendant held for twenty years at an unvarying rent does not excuse him from payment of rent on any land in excess of his jote, unless under special circumstances. REAZOONISSA *v.* DAD ALI . . . . . **8 W. R. 326**

92. ——————— *Act X of 1859, s. 17, cl. 3.* In order to maintain a suit for enhancement on the ground mentioned in cl. 3, s. 17, Act X of 1859, it is necessary to prove the existence of the alleged excess and the rate at which such excess land ought to be assessed. NUBO KISHORE MUNDLE *v.* FUKEER PARAMANICK . . **17 W. R. 558**

93. ——————— *Expenses of cultivating excess lands.* Where a tenant holds excess lands for which no rent has hitherto been paid, the zamindar may treat him either as a trespasser or a tenant. In the latter case a suit will not lie for enhancement, but only for a kabuliat and for a determination of the rate at which the same should be delivered. See *Rajmohun Mitter* v. *Gooroo Churn Aych, 6 W. R., Act X, 106.* A raiyat is entitled to no deduction under s. 17, Act X of 1859, for the expenses which he has incurred in cultivating excess lands for which he had paid no rent. He is a mere squatter, and that section refers only to tenants with a right of occupancy. DAVID *v.* RAM DHUN CHATTERJEE . **6. W. R., Act X, 97**

94. ——————— *Rent of accreted land—Reg. XI of 1825, s. 4—Evidence that land has been subject of permanent settlement.* Where the area of a tenure is increased by alluvion, the proper remedy of the landlord is not to sue for enhancement of the rent under the Rent Laws, but, under s. 4 of Reg. XI of 1825, to sue for an additional rent for the alluviated lands. Such additional rent cannot be considered as forming part of the rent of the original tenure. In a suit for enhancement it is not necessary to show that the land, the rent of which it is sought to enhance, has been the subject of permanent settlement. In such

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ENHANCEMENT OF RENT—*contd.*

5. GROUNDS OF ENHANCEMENT—*contd.*

(*d*) LANDS HELD IN EXCESS OF TENURE—*concld.*

a suit the Government, as against the raiyats, is in no better position under the Rent Laws than other landlords. *Sudanundo Mytee* v. *Nowrutton Mytee, 8 B. L. R. 280 : 16 W. R. 289,* followed. GOPI MOHUN MUZOOMDAR *v.* HILLS
5 C. L. R. 33

95. ——————— *Accretion—Engagements of parties.* In a suit for enhancement in respect of an accretion the plaintiff is not bound to show any established talukhdari rates, but, if entitled to enhance, ought to obtain a decree for enhancement at a rate proportionate to that paid for the parent tenure. In the case of accretions to recently-created tenures, the question of enhancement will mainly depend on the engagement of the parties. GOPAL LALL THAKOOR *v.* KUMUR ALI
6 W. R., Act X, 85

96. ——————— *Accretion to original tenure—Ground of enhancement—Beng. Act VIII of 1865, s. 14 and s. 18, cl. 3.* A suit for an enhanced rent brought against a tenant on the ground that the tenure has been increased by accretion must be after service of notice required by s. 14 of the Rent Act, the ground for enhancement in such case being substantially within the grounds of enhancement contained in cl. 3 of s. 18 of that Act. See *Ram Nidhee Manghee* v. *Parbutty Dassee, I. L. R. 5 Calc. 823.* HURRO SUNDERI DOSSEE *v.* GOPEE SUNDERI DOSSEE . . **10 C. L. R. 559**

97. ——————— *Accretion—Notice to pay higher rent or give up possession.* Where a kabuliat stipulated that on the accretion to a certain howla of any new cultivable chur, a fresh measurement should be made of the chur and howla, and that excess rent should be paid for the excess land at a stipulated rate up to five drones, and at pergunnah rates for the residue : in default thereof rent to be realized according to law, or service made on the tenants of a notice "requiring them to take a settlement of the excess land, and to file a kabuliat and fixing the time at fifteen days," otherwise the excess land to be settled with others, the kabuliatdar measured the howla and accreted chur without notice to the tenants and in their absence, then served on the tenants a notice thereof, and of the increased rent demanded, requiring them to appear within fifteen days and file a kabuliat for the said amount of land and rent, or that he would take khas possession. In a suit, amongst other things, for assessment of rent of the excess land: *Held,* (i) that s. 14 of Bengal Act VIII of 1869 did not apply; (ii) that the kabuliatdar was entitled to a decree fixing the extent of the excess land and assessing the rent payable for it ; and was thereafter entitled to issue a fresh notice to the tenants to come to a settlement in respect thereof or to give up possession. RAM COOMAR GHOSE *v.* KALI KRISHNA TAGORE
L. R. 13 I. A. 116 : I. L. R. 14 Calc. 99

ENHANCEMENT OF RENT—*contd.*

6. DECREASE IN QUANTITY OF LAND.

——————— **Decrease in quantity of culturable land**—*Deduction of rent in suit for enhancement.* In a suit by the mother of the then zamindar of a talukh for enhancement of rent, a decree was made in 1821 in terms of a compromise, enhancing the rent from R1,600 to R2,000. A subsequent suit, in which rent was claimed at R3,200, was finally decided in 1862, the compromise being thereby set aside and the liability of the talukh to enhancement finally established. The ameen's report, which fixed the rent payable at R8,124, was not, however, made until 1869. In a suit to recover rent at R8,124 for the year 1871-72, the Subordinate Judge gave a decree for R5,062-15-6, a re-measurement of the talukh having shown a decrease in the amount of culturable land. *Held,* reversing the decision of the High Court, that the Subordinate Judge was right in making such a decree. SURAT SOONDARI DEBYA *v.* PRANGOBIND MOOZOOMDAR
5 C. L. R. 262

7. RESISTANCE TO ENHANCEMENT.

1. ——————— **Purchaser of patni talukh**—*Act X of 1859, s. 14.* S. 14, Act X of 1859, does not apply to the case of a purchaser of a patni talukh at a sale under Regulation VIII of 1819, unless the jumma is shown to be a mesne incumbrance which came into existence subsequently to the creation of the patni. HURROMOHUN MOOKERJEE *v.* BROJOKISHORE ROY
W. R. 1864, Act X, 103

2. ——————— **Suit to contest enhancement**—*Act X of 1859, s. 14—Question of rates.* In a suit by a tenant under s. 14, Act X of 1859, to contest the landlord's right of enhancement, the question of rates may be decided whether at the instance of the tenant or landlord. GORACHAND *v.* GUDADHUR CHATTERJEE . . **7 W. R. 470**

3. ——————— *Act X of 1859, s. 13—Pleading.* Where a raiyat brings a suit to contest the right to enhancement under s. 13 of Act X of 1859, it is not necessary to plead in terms that he held at a fixed rate from before the decennial settlement. At the same time, parties should use the exact terms of the pleas to assist which the presumption laid down in s. 4 of Act X of 1859 had been created. NOMUTOOLAH *v.* GOVIND CHUNDER DUTT **1 Ind. Jur. N. S. 2 : 4 W. R., Act X, 25**

KHODA NEWAZ *v.* NUBO KISHORE RAJ
5 W. R., Act X, 53

4. ——————— **Suit for reversal of notice of enhancement**—*Failure to prove holding at fixed rate.* In a suit for reversal of a notice of enhancement of rent the plaintiff endeavoured to show a holding at a fixed rate within Act X of 1859, ss. 3 and 4. *Held,* that upon his failing to prove such a holding the defendant was entitled to have the suit dismissed, and was not bound to show his

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ENHANCEMENT OF RENT—*contd.*

7. RESISTANCE TO ENHANCEMENT—*concld.*

title to enhance. GUNGAPERSAUD SINGH *v.* RAMLOLL SINGH
Marsh. 185 : W. R. F. B. 59
1 Ind. Jur. O. S. 118 : 1 Hay 452

PUDDOLOCHUN BHADOORI *v.* CHUNDER NATH ROY
1 Ind. Jur. N. S. 171 : 5 W. R., Act X, 51

5. ——— **Suit to resist notice of enhancement.** All the pleas under which a raiyat can resist a notice of enhancement ought to be considered in the suit he brings to resist the notice. PUDDOLOCHUN BHADOORI *v.* CHUNDER NATH ROY
1 Ind. Jur. N. S. 171 : 5 W. R., Act X, 51

6. ——— **Suit to contest enhancement**—*Act X of 1859, s. 14.* Where a raiyat on whom notice of enhancement has been served sues under s. 14, Act X of 1859, and fails to show that any excessive rate is demanded from him, or that he is not liable to pay the rent demanded, his suit ought to be dismissed. The Court ought not to go on to try defendant's case as if he were suing for enhancement. GUNGA NARAIN CHOWDHRY *v.* KOFA PALI . . **11 W. R. 377**

8. RIGHT TO DECREE AT OLD RATE ON REFUSAL OF ENHANCEMENT.

1. ——— **Refusal of enhancement**—*Arrears of rent at admitted rate.* Where, in a suit for arrears of rent at an enhanced rate, the rent was due under a kabuliat on the terms of which it was held that the rent was not liable to enhancement and the enhancement was consequently refused :—*Held*, that a decree should not be given for arrears of rent at the rate agreed in the kabuliat. SOORASOONDERY DABEE *v.* GOLAM ALLY
15 B. L. R. 125 note : 19 W. R. 142

Affirming the decision of the High Court in GOLAM ALLY *v.* GOPAL LALL THAKOOR . **9 W. R. 65**

HURRONATH ROY *v.* GOBIND CHUNDER DUTT
6 W. R., Act X, 2

SARODA MOHUN ROY CHOWDHRY *v.* SHIBOPOOREE DOSSEE . . . . **24 W. R. 35**

KASHEE PERSHAD SEN NAZIR *v.* JANU PERSHAD
2 C. L. R. 265

2. ——— *Failure to establish grounds—Admitted rate.* In a suit for rent at an enhanced rate, where the plaintiff is unable to establish the grounds upon which he claims enhancement, he may have a decree for rent according to the jumma for which the defendants admit liability. BHUBO SOONDEREE CHOWDRAIN *v.* KASHEENATH ACHARJEA . **22 W. R. 351**

AKASHBUTTY KOOER *v.* HEERA RAM MUNDUR
24 W. R. 82

3. ——— *Failure to prove notice—Decree at old rate of rent—Suit for arrears of rent.* The plaintiff sued for the

ENHANCEMENT OF RENT—*concld.*

8. RIGHT TO DECREE AT OLD RATE ON REFUSAL OF ENHANCEMENT—*concld.*

arrears of rent of the years 1284, 1285, and also for arrears of rent of the year 1286, the latter at an enhanced rate. The notice of enhancement was not proved, and the defendant insisted that the suit should be dismissed. *Held*, that, though the notice of enhancement had not been proved, the plaintiffs were not thereby precluded from the arrears of rent at the old rate. *Mahomed Rohimoodeen* v. *Radha Mohun Mundul, 6 W. R., Act X, 96 : Soorasoondery Dabee* v. *Golam Ally, 15 B. L. R. 125 note ; Brojonath Tewarce* v. *Grant, 22 W. R. 13 ; Bhagwan Dutt Jha* v. *Sheo Mungul Singh, 22 W. R. 256 ;* and *Bhubo Soonduree Chowdrain* v. *Kasheenath Acherjee, 22 W. R. 351,* referred to. GHUNSHYAM SINGH *v.* TARA PROSAD COONDOO
I. L. R. 8 Calc. 465
10 C. L. R. 447

ENHANCEMENT OF SENTENCE.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 439.
I. L. R. 32 Bom. 162

ENQUIRY.

See INQUIRY.
See CRIMINAL PROCEDURE CODE, s. 145.
13 C. W. N. 420

——— **by purchaser.**

See HINDU LAW . **13 C. W. N. 931**

ENTICING AWAY MARRIED WOMAN.

See ADULTERY . **I. L. R. 30 Calc. 910**
7 C. W. N. 143

See COMPOUNDING OFFENCE.
I. L. R. 1 Mad. 191

See PENAL CODE, s. 498.

ENTRY OF NAMES IN VILLAGE PAPER.

See HINDU LAW—PARTITION.
I. L. R. 31 All. 412

EPIDEMIC DISEASES ACT (III OF 1897).

See SANCTION FOR PROSECUTION—WHERE SANCTION IS NECESSARY, OR OTHERWISE.
I. L. R. 24 Mad. 70

——— s. 4—*Demolition of property—Non-payment of compensation—S. 4, "done or intended to be done," meaning of—Personal liability of Magistrate for omitting to pay compensation—Magistrate's assessment of value of demolished premises, if final—Plague Regulation A (Calcutta Gazette, 17th October 1900).* The words "done or intended to be done" in s. 4 of the Epidemic Diseases Act (III of 1897) do not include omissions. *Jolliffe* v. *Wallasey Local Board, 9 C. P. 162,* explained and distinguished. A Magistrate, who omits to pay adequate compensation in respect of property demolished under the Act, is personally

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EPIDEMIC DISEASES ACT (III OF 1897)—*concld.*

——— s. 4—*concld.*

liable and an action will lie against him in respect thereof, even though he may have acted in his administrative capacity as Chairman of the Calcutta Corporation under clause 2 of Plague Regulation A (2), *Calcutta Gazette*, 1900, part 1, page 1144. The Magistrate's decision as to the amount of the compensation to be accorded is not final and can be reviewed by the Courts. RAM LAL *v.* R. T. GREER (1904) . **I. L. R. 31 Calc. 829**
s.c. 8 C. W. N. 681

EPILEPSY.

——— death from—

See MEDICAL JURISPRUDENCE.
13 C. W. N. 622

EQUITABLE ASSIGNMENT.

See CLAIM TO ATTACHED PROPERTY.
I. L. R. 21 Bom. 287

See DEPOSIT OF TITLE-DEEDS.

See EQUITABLE MORTGAGE.

1. ——— Assignment of mortgage-bond. *A* pledged certain lands to *B* in 1865, and on the 24th of July 1868 granted a mokurrari lease of the same lands to *C*. On the 5th of June 1868, shortly before the granting of the mokurrari lease, *A* executed a single mortgage of 8 annas of the same lands to *D*. It was proved that the consideration-money given by *C* for the lease had been expended in paying off *B*'s mortgage, and that the bond had been made over to *C*, though not formally assigned to him. *Held*, that, under these circumstances, *C* was entitled to stand in the place of the first mortgagee; and that he was to be considered as having taken a regular assignment of the bond. DULI CHAND *v.* MONOHUR LALL UPADHYA
2 C. L. R. 18

2. ——— Assignment of decree—*Claim of attaching creditor—Assignee's incomplete equitable title.* *A* brought a suit against *B*, which was dismissed with costs. *A* subsequently brought a suit against *C*, in which he obtained an *ex parte* decree and assigned his interest under the decree to *D* and *E*. *D* and *E* neglected to have their names substituted for that of *A* on the record. *C* applied for and obtained an order setting aside the *ex parte* decree, and allowing him to come in and defend the suit on deposit in Court of the sum sued for. "At the re-hearing the suit was again determined in favour of *A*. *B* thereupon, in execution of his decree for costs, attached the moneys in the hands of the Court in the suit of *A* against *C*. *D* and *E* obtained an *ad interim* injunction restraining *B* from meddling with the money, and put in their claim under the assignment. *Held*, that the incomplete equitable title of *D* and *E* could not prevail against the right of *B*, the attaching creditor." GRISH CHUNDER SEIN *v.* GUDADHUR GHOSE
I. L. R. 5 Calc. 869 ; 6 C. L. R. 498

EQUITABLE ASSIGNMENT—*contd.*

3. ——— Assignment by power-of-attorney to solicitor to receive moneys—*Attachment of fund in Court. Liability to refund money paid out of Court.* *S*, a creditor of the estate of a deceased person which was being administered by the Court, gave a power-of-attorney to his solicitors to receive all moneys coming to him under the decree, and by a letter authorized them, after satisfying their own claims out of the money to be received, to pay the balance to the plaintiff. The solicitors, in the presence of the plaintiff, agreed to draw the money and pay the plaintiff. The fund in Court to the credit of *S*, having been ascertained, was afterwards attached by the defendants, judgment-creditors of *S*, and paid out of Court to the defendants. *Held*, that *S* had made a valid equitable assignment to the plaintiff, and that the defendants were bound to refund to the plaintiff the moneys paid out of Court to them. SHAIR MULL *v.* SINGARAVELU MUDALI
I. L. R. 6 Mad. 294

4. ——— Assignment by power-of-attorney—*Firm—Partnership—Contract made by one member of firm binding on firm.* The firm of *S & Co.*, the partners of which were *W S* and *F E*, took a contract from Government on 12th November 1877 to construct a barrel-house at the Gunpowder Manufactory at Kirkee, and on the 28th November 1877 the plaintiff agreed to advance moneys "up to R15,000" for the purpose of enabling the firm to carry out the contract. Under the agreement, the plaintiff was to receive all sums to become due from the Government on the contractors' bills and to pay the balance to the firm after repaying himself all advances with interest. On the same day the firm executed a power-of-attorney to the plaintiff, authorizing him to receive from the Government Engineer all such sums to become due to the firm under the contract, which power-of-attorney was deposited by plaintiff in the office of the Executive Engineer at Poona. In March or April 1878 *W S* left for England, up to which time R34,900 had been advanced by the plaintiff and a balance of R14,942-5-10 still remained due to him after giving credit for the sums received on the bills passed by the Executive Engineer. On 24th July 1878 the plaintiff entered into a fresh agreement with *F E*, similar to the former one, to make further advances to the firm up to R16,000 in addition to R15,000 on the same terms as those mentioned in the previous agreement, and by means of these advances the contract was completed at the end of 1879. In 1878 the defendant obtained a decree against *W S*, and attached the right, title, and interest of *W S* in a sum of R5,034-11-9 in the hands of the Executive Engineer, which was then due to the firm on the contract. The plaintiff, who alleged that R13,700-1-11 were due to him from the firm, applied to have the attachment removed, which application was refused on 30th September 1879, and the sum attached was paid to the defendant. The plaintiff sued the defendant to recover from him R5,034-11-9. *Held*,

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EQUITABLE ASSIGNMENT—*concld.*

that the first agreement of 28th November 1877, coupled with the execution of the power-of-attorney to him of the same date, amounted to an assignment to the plaintiff of the sums to become due to *S & Co.* on the bills passed by the Executive Engineer. *Held*, also, that the second agreement, although made by one member only of the firm of *S & Co.*, with the plaintiff was under the circumstances both necessary to the carrying out of the partnership business and in accordance with the ordinary practice of such partnerships as that of *S & Co.*, and was therefore binding on the firm, and that the two agreements, accompanied by the power-of-attorney, operated as an assignment of all the moneys to become due on the contractors' bills as a security for the plaintiff's advances with interest, and that the plaintiff was therefore entitled to recover the sum claimed from the defendant. JAGABHAI LALLUBHAI *v.* RUSTAMJI NASARWANJI . . **I. L. R. 9 Bom. 311**

EQUITABLE DEFENCE.

See COMPROMISE—CONSTRUCTION, ENFORCING, EFFECT, AND SETTING ASIDE, OF COMPROMISE . **I. L. R. 18 Bom. 721**

EQUITABLE ESTATES.

——— *Lease—Assignment of lease—Mortgage of lease—Liability of the mortgagee to the landlord—Possession of the mortgagee. Held*, that in India there is no distinction between legal and equitable estates, although in ordinary parlance the distinction is often referred to. Hence, when a lessee mortgages his interest in the land, the mortgagee becomes liable for the rent to the lessor only, if he (the mortgagee) enters into possession of the land or does any act equivalent to entry into possession. VITHAL NARAYAN *v.* SHRIRAM SAVANT (1905) . . . **I. L. R. 29 Bom. 391**

EQUITABLE LIEN.

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR . **I. L. R. 23 Calc. 592**

EQUITABLE MORTGAGE.

See BENAMIDAR . **I. L. R. 35 Calc. 551**

See BILL OF EXCHANGE. **I. L. R. 3 Calc. 174**

See CIVIL PROCEDURE CODE, 1882. **8 C. W. N. 174**

See DEPOSIT OF TITLE-DEED.

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR . **I. L. R. 4 Bom. 333**
I. L. R. 19 All. 76
L. R. 23 I. A. 106

See MORTGAGE—FORM OF MORTGAGE.
3 N. W. 54
10 C. W. N. 276
I. L. R. 33 Calc. 410

EQUITABLE MORTGAGE—*contd.*

1. ——— **Evidence of assignment.** To entitle a person to claim as equitable mortgagee, it is not sufficient to show that he paid off the original mortgage, but also that it was his own money that was paid, and that he was to stand in the position of the original mortgagee. PANDOORUNG BUHAL PUNDIT *v.* BALKRISHEN HURBAJEE MAHAJUN . **5 W. R. P. C. 124 : 2 Moo. I. A. 60**

2. ——— **Agreement creating charge on proceeds of an intended appeal**—*Property substituted by agreement between decree-holder and third parties for such proceeds—Right to follow such proceeds in hands of such third parties—Notice.* A judgment-debtor paid into Court the sum due under a decree passed against him on appeal. The expenses of the appeal had been advanced by the present plaintiff under an agreement signed by the appellants, which provided as follows:—"You should first take out of the amount which may be collected from the defendants the whole of the amount incurred on account of the said costs." Persons holding a decree against the successful appellants sought to enforce it against the money in Court, having notice of the above agreement. Their application was first resisted by the successful appellants on the ground that the money was charity property, but subsequently it was consented to, and the money was paid out to them on their substituting certain other property for the purposes of the charity. The present plaintiff, having obtained a decree on the above agreement, now sought to execute it against the money which had been so paid out. *Held*, that the above agreement constituted a valid charge on the funds realized under the appellate decree, which charge was binding on the payees of the money, and the plaintiff was not bound to proceed against the property substituted by them for the purposes of the charity. PALANIAPPA *v.* LAKSHMANAN
I. L. R. 16 Mad. 429

3. ——— **Equitable charge on property purchased**—*A charge created in favour of the lender of the purchase-money.* By the acts of the parties and their relations to one another, money borrowed by an agent for a principal for the purchase of property was rendered a charge upon the later in the principal's hands, he being the real purchaser. The lender of money, which he advanced to the nominal purchaser of property, who was the agent of the real purchaser, made the advance with the knowledge that it was for the principal's purposes, the latter only using the agent's name in the purchase. The nominal purchaser then executed a deed purporting to hypothecate the property as security for the loan. The lender, not having been paid, obtained a money decree against the nominal purchaser, and, bringing the property to a Court sale, bought it himself. He could not, however, obtain entry of his name in the Collectorate books, on the opposition of the real purchaser, and a suit brought by him for a declaration of his title and his right to possession against the nominal purchaser was dismissed

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EQUITABLE MORTGAGE—*concld.*

Afterwards in the present suit, which the lender brought against both the real and the nominal purchasers: *Held* that, although in regard to the previous judgment it might be difficult to decide that the deed itself constituted a valid hypothecation, the facts of the case were sufficient to show that the lender of the money was entitled to a declaration that the advance of money for the purchase formed an equitable charge upon the property against the real purchaser. BHAGWATI PRASAD *v.* RADHA KISHEN SEWAK PANDE

I. L. R. 15 All. 304

EQUITABLE RELIEF.

See FORFEITURE . **I. L. R. 31 Bom. 15**

——————— *Delay and Acquiescence when bar to equitable relief—Limitation Act, 1877, Sch. II, Art. 91.* Delay and acquiescence will not bar the defendant's right to equitable relief unless he knew that he had the right of being a free agent at the time, he deliberately determined not to inquire what his rights were or to act upon them. Where beyond signing the deed the defendant does not do anything to show that he considered the deed effectual, he will not be barred by mere lapse of time from setting up the invalidity of the deed. Art. 91 of Sch. II of the Limitation Act applies only to suits by plaintiffs to have instruments avoided. A defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a suit has become time-barred. *Jugaldas* v. *Ambashankar, I. L. R. 12 Bom. 501,* distinguished. *Ranganath Sakharam* v. *Govind Narasino, I. L. R. 20 Bom. 639,* referred to and followed. LAKSHMI DOSS *v.* ROOP LAUL (1906) . . . **I. L. R. 30 Mad. 169**

EQUITY.

See ACCOUNT . **13 C. W. N. 696**

See ADMINISTRATION . **9 C. W. N. 167**

——————— **of purchaser.**

See HINDU LAW . **13 C. W. N. 815**

——————— *Loan borrowed by a person in urgent need of money—Promise to pay a time-barred debt—Unfair and unconscionable bargain—Fraud—Undue influence—Coercion—Contract Act (IX of 1872), s. 16.* A Court of Equity will not set aside a contract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions, and showing that the defendant, having been victimised by the plaintiff's unfair and improper conduct, was unable to understand what he was doing. GANESH *v.* VISHNU (1907)

I. L. R. 32 Bom. 37

EQUITY OF REDEMPTION.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—EQUITY OF REDEMPTION. **I. L. R. 21 Bom. 226**

See CIVIL PROCEDURE CODE, 1882, ss. 278, 282, 287 . **I. L. R. 33 Bom. 311**

See MORTGAGE . **I. L. R. 28 All. 712**
9 C. W. N. 20

See MORTGAGE—REDEMPTION.
See SALE . . **9 C. W. N. 225**

See SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY.

See TRANSFER OF PROPERTY ACT. **I. L. R. 28 All. 279, 593**

See TRANSFER OF PROPERTY ACT s. 99. **I. L. R. 30 Calc. 463**

See VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY.

——————— **clog on—**

See MORTGAGE . **I. L. R. 31 All. 482**

——————— **purchaser of worthless—**

See SALE . **I. L. R. 36 Calc. 323**

1. ——————— **Attachment in execution of decree**—*Attachment—Money-decree. Semble:* An equity of redemption cannot be taken in execution of a decree for a money-debt under the attachment clauses of Act VIII of 1859. BRAJANATH KUNDU CHOWDHRY *v.* GOBIND MANI DASI

4 B. L. R. O. C. 83

2. ——————— *Sale of equity of redemption and purchase by mortgagee.* Under Act VIII of 1859, an equity of redemption can be sold in execution of a decree. SARASWATI DEBI *v.* NABADWIP CHANDRA GOSSAIN . **5 B. L. R. 380**

3. ——————— *Position of purchaser—Trustee.* A mortgagee cannot, properly in execution of a simple decree for money the repayment of which secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged; but if he do so and purchase it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title. KAMINI DEBI *v.* RAMLOCHUN SIRCAR

5 B. L. R. 450

4. ——————— **Sale in execution of decree**—*Position and powers of purchaser.* A mortgagee, having obtained judgment on the covenant in a mortgage deed, cannot, by becoming the purchaser at a sale of the mortgaged property in execution of his decree, deprive the mortgagor of his right of redemption. An injunction was granted to restrain the sale. RAM LOCHUN SIRKAR *v.* KAMINI DEBI . . . . **5 B. L. R. 460 note**

See s.c. on appeal where the decision, however, seems to have been confined to the special circumstances of the case . **10 B. L. R. 60 note**

ERRONEOUS DECISION.

See ERROR IN LAW **I. L. R. 30 Mad. 461**

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ERROR.

See PARTNERSHIP, ACCOUNT OF.
11 C. W. N. 776

See SALE IN EXECUTION OF DECREE—ERRORS IN DESCRIPTION OF PROPERTY SOLD.

——— affecting merits of case.

See APPELLATE COURT—ERRORS AFFECTING OR NOT MERITS OF CASE.

See APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT BELOW.

See WITNESS—CIVIL CASES.
I. L. R. 28 Calc. 37

——— in law.

See APPEAL—ARBITRATION.
I. L. R. 29 Calc. 167

See RES JUDICATA. **I. L. R. 30 Mad. 461**

See SPECIAL OR SECOND APPEAL—OTHER ERRORS OF LAW AND PROCEDURE.

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL.

——— of law.

See SECOND APPEAL . **11 C. W. N. 1028**

——— setting aside conviction for.

See ACCOMPLICE.
B. L. R. Sup. Vol. 459 : 5 W. R. Cr. 80
3 B. L. R. F. B. 2 note
5 W. R. Cr. 59
I. L. R. 14 Bom. 115

See REVISION—CRIMINAL CASES.

1. ——— *Accused—Offence triable as a warrant case—Conviction of offence triable as a summons case—Absence of charge—Conviction, legality of—Material error—Criminal Procedure Code (Act V of 1898), ss. 232, 242 and 254—Penal Code (Act XLV of 1860), ss. 143 and 279.* When a case is being tried as a warrant case, and a charge is drawn up of an offence which is triable as a warrant case, and it is intended to proceed against the accused also for an offence which is triable only as a summons case, that offence should form part of the charge. Where an accused person was summoned for offences under ss. 143 and 379 of the Penal Code, and the trying Magistrate drew up a charge only for the offence under s. 379, but convicted the accused only for the offence under s. 143 of the Code : *Held*, that the offence under s. 143 should have formed part of the charge, and that the accused was misled in his defence by the absence of such a charge. HOSSEIN SARDAR *v.* KALU SARDAR (1902)
I. L. R. 29 Calc. 481 ; s.c. 6 C. W. N. 599

2. ——— **in law**—*Erroneous decision—Subsequent suit—Res judicata.* An erroneous decision on a question of law in a previous suit is no bar, in a subsequent suit between the same parties, to the Court deciding the same question, provided the decision in the latter suit does not in any way question the correctness of the former decree or in any way affect its operation. *Gopu Kolandavelu Chetty* v. *Sami Royar, I. L. R. 28 Mad. 517*, referred to. *Alimunissa Chowdhurani* v. *Shama Charan Roy, I. L. R. 32 Calc. 749*, referred to. *Koyyana Chittamma* v. *Doosy Gavaramma, I. L. R. 29 Mad. 225*, referred to. MANGALATHAMMAL *v.* NARAYANSWAMI AIYAR (1907) . **I. L. R. 30 Mad. 461**

ERROR—*concld.*

ESCAPE FROM CUSTODY.

See ARREST—CRIMINAL ARREST.

See CONTEMPT OF COURT—PENAL CODE, S. 17 . . . . **1 Bom. 38**

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—ESCAPE FROM CUSTODY . . . **1 Bom. 139**

See PENAL CODE, S. 174 **7 Mad. Ap. 44**

See PENAL CODE, S. 186 . **2 Bom. 134**
I. L. R. 22 Calc. 759

See PENAL CODE, SS. 223-226.

See SENTENCE—GENERAL CASES.
8 W. R. Cr. 85

1. ——— **Criminal offence**—*Police Amendment Act, Presidency Towns (XLVIII of 1860), s. 8—Offence at Common Law.* To escape from custody under civil process is not a criminal offence within the meaning of s. 8 of the Presidency Towns Police Amendment Act of 1860. *Quære :* Whether such an escape without force is a misdemeanour at Common Law. REG. *v.* CONNON
6 Bom. Cr. 15

2. ——— **Arrest under civil process, escape from**—*Criminal liability of officer suffering escape—Penal Code (Act XLV of 1860), s. 223.* S. 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence or has been committed to custody, and not to cases where such person has merely been arrested under civil process. QUEEN-EMPRESS *v.* TAFAULLAH
I. L. R. 12 Calc. 190

3. ——— **Custody of Sheriff**—*Relaxation of imprisonment—Custody in private house.* If a Sheriff, upon the representation of a debtor's ill-health, takes upon himself of his own authority to relax the debtor's imprisonment, by letting him reside out of jail, it is an escape for which the Sheriff is liable to an action for damages. If the judgment-creditor voluntarily discharges the debtor out of custody, even for a week only, he cannot, by any agreement which he might have made with the debtor, afterwards retake him, although the debtor may have agreed that, if he does not pay the money within a week, he shall be retaken. A debtor removed from prison under a rule of Court, whether with or without the consent of his creditor, and kept in charge of a Sheriff's officer in a private house, is still in the custody of the Sheriff. The Sheriff may, without a rule of Court, refuse to allow the debtor to reside out of prison, though the credi-

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ESCAPE FROM CUSTODY—*contd.*

tor may have consented to it. When the Sheriff and all parties consent to the debtor being kept in custody in a private house, the Sheriff is liable to an action for escape on proof of want of proper care and surveillance; but it would be a matter of fact for a jury to consider whether the creditor, being in some measure instrumental to the escape, ought to recover against the Sheriff. HAINES *v.* EAST INDIA COMPANY
4 W. R. P. C. 99 : 6 Moo. I. A. 467

4. ——— Arrest under process of Revenue Court—*Civil Procedure Code, 1877, s. 651—"Revenue Court."*—A Revenue Court is a "Court of Civil Judicature" within the meaning of s. 651 of the Code of Civil Procedure. A person, therefore, who escapes from custody under the process of a Revenue Court is punishable under that section. EMPRESS *v.* HARAKHNATH SINGH
I. L. R. 4 All. 27

5. ——— Arrest in absence of warrant—*Civil Procedure Code, 1877, s. 651—Arrest in execution of decree—Possession of warrant of arrest.* The apprehension of a judgment-debtor in execution of a decree without the officer making the apprehension having the warrant of the Court executing the decree in his possession at the time of making the apprehension is illegal; and therefore in such a case the judgment-debtor does not render himself liable to punishment under s. 651 of the Civil Procedure Code, if he escapes from the custody of the officer making the apprehension. EMPRESS *v.* AMAR NATH . . . **I. L. R. 5 All. 318**

6. ——— Discharge by Judge—Liability of Sheriff. Where a prisoner is arrested under a warrant of the High Court at Calcutta directed to the Sheriff, authorizing his arrest for the purpose of being brought before the Court and committed to prison, and the commitment is ordered, but no warrant of commitment is drawn up, and the Sheriff delivers the prisoners to the jailor, with no other document than his own order to his bailiff to arrest the prisoner and the latter, in consequence, is discharged from custody by a Judge on application on a writ of *habeas corpus*:—*Held*, that the Sheriff is not liable for an escape. MAHOMED CONJEE *v.* DUNDAS
1 Ind. Jur. N. S. 228

7. ——— Custody for offences not punishable under Penal Code—*Criminal offence.* Escapes from custody by parties detained for offences not punishable under the Penal Code, are punishable under the Penal Code. ANONYMOUS . . . . **3 Mad. Ap. 11**

8. ——— Custody from inability to give security. A person in custody from his inability to give security is not in custody for an offence with which he has been charged or of which he has been convicted. He cannot, therefore, be convicted of escaping from such custody under s. 224 of the Penal Code. ANONYMOUS
3 Mad. Ap. 23

9. ——— Custody of village officers—*Penal Code, s. 224.* Escape from the custody of a village watchman by a person wanted by the police on a charge of theft and arrested on suspicion by the village watchman, is no offence under s. 244 of the Penal Code. *Queen* v. *M. Sinnadu Padiyachi, Wier 66*, followed. QUEEN *v.* BOJJIGAN
I. L. R. 5 Mad. 22

10. ——— Penal Code (Act XLV of 1860), s. 224—Escape from custody of village officers—Madras Regulation XI of 1816, s. 5. On a charge under the Penal Code, s. 224, it appeared that the accused had been apprehended on a hue and cry being raised as he was running away after committing robbery, and that he was handed over to the Village Magistrate, and was by him placed in the charge of taliyaries for detention till the next morning when he was to be taken to the police station, and that he escaped from the custody of the taliyaries. *Held*, distinguishing *Queen* v. *Bojjigan, I. L. R. 5 Mad. 22*, that the accused was rightly convicted of the offence charged. QUEEN-EMPRESS *v.* FAKIRA
I. L. R. 17 Mad. 103

11. ——— Custody while giving security for good behaviour—*Penal Code, s. 224.* The defendant, being detained in custody for the purpose of giving security for good behaviour, escaped from that custody. *Held*, that he had not committed an offence under s. 224 of the Penal Code. ANONYMOUS . . **7 Mad. Ap. 41**

12. ——— Penal Code, s. 224—Criminal Procedure Code, s. 59—Legal custody. The accused was arrested in the act of stealing and was handed over to the Village Magistrate, who forwarded him in custody of the village servants to a police station. The accused escaped on the way. He was convicted under s. 224 of the Penal Code. On appeal, the conviction was reversed on the ground that the custody was not legal. *Held*, that the conviction was right. S. 59 of the Code of Criminal Procedure, which requires a private person who arrests a thief in the act to take the thief to the nearest police station, is sufficiently complied with by sending the offender in custody of a servant. QUEEN-EMPRESS *v.* POTADU
I. L. R. 11 Mad. 480

13. ——— Arrest of person required to give security for good behaviour—*Escape from such arrest—Conviction for such escape illegal—Act XLV of 1860, s. 40—Criminal Procedure Code, ss. 55, 110, 117, 118.* An order was issued to a police officer directing him to arrest *K* under s. 55 of the Criminal Procedure Code as a person of bad livelihood. *K*, with the assistance of three others, resisted apprehension, and escaped. *Held*, that *K* was not charged with an "offence" within the meaning of that term as defined in s. 40 of the Penal Code, and that consequently no offence made punishable by s. 224 or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress* v. *Shasti Churn Napit, I. L. R. 8 Calc. 331*, followed. QUEEN-EMPRESS *v.* KANDHAIA . . . . **I. L. R. 7 All. 67**

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SCAPE FROM CUSTODY—*contd.*

14. ——— **Escape while being taken before Magistrate**—*Penal Code, ss. 224, 225—Subsequent conviction for such escape.* An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour is not punishable under either s. 224 or s. 225 of the Penal Code. EMPRESS *v.* SHASTI CHURN NAPIT
I. L. R. 8 Calc. 331 : 10 C. L. R. 290

15. ——— **Escape from transportation**—*Penal Code, ss. 224, 226.* To constitute the offence of escaping from transportation under s. 226 of the Penal Code, it is essential that the convicts should have been actually sent to a penal settlement and have returned before his term of transportation had expired or been remitted. Where a prisoner had escaped from custody whilst on his way to undergo sentence of transportation :—*Held*, that he had committed an offence punishable under s. 224, and not under s. 226, of the Penal Code. QUEEN *v.* RAMASAMY . **4 Mad. 152**

16. ——— **Apprehension without warrant**—*Penal Code, s. 224.* Where a person apprehended on a charge of a cognizable offence escapes from lawful custody, his liability to punishment is not affected by the circumstance that a competent Court determines his offence to be other than that with which he has been charged. But if charged with a non-cognizable offence, the police officer who apprehends him without warrant does not have him in lawful custody, and his escape is not punishable under the Penal Code, s. 224. QUEEN *v.* RAM SARAN TEWARY
24 W. R. Cr. 45

17. ——— *Penal Code (Act XLV of 1860), s. 224—Madras Salt Act (Madras Act IV of 1889), ss. 46 and 47—Right to arrest person without warrant in search for contraband salt.* The Madras Salt Act, 1889, only authorizes searches for contraband salt and arrest of the parties concerned in the keeping of such salt to be made by officers of the Salt Department without search-warrant in cases where the delay in obtaining such search-warrant will prevent the discovery of such contraband salt. *Held*, that, where the circumstances did not justify the officer in believing that the delay in obtaining a search-warrant would prevent the discovery of contraband salt, he had no power to search or arrest persons without such warrant, and the escape by the persons so arrested from custody was no offence within the meaning of s. 224 of the Penal Code. QUEEN-EMPRESS *v.* KALIAN . . . **I. L. R. 19 Mad. 310**

18. ——— **Escape from confinement negligently suffered by public servant**—*Escape from confinement intentionally suffered by public servant—Penal Code, ss. 222, 223—Criminal Procedure Code, ss. 61, 167.* While a case was being investigated by *A*, a police officer, under the provisions of Ch. XIV of the Criminal Procedure Code, *T* presented a petition to the Magistrate having jurisdiction to try the case, in which he accused *W* of being concerned in the commission of the offence, and prayed that he might be arrested and sent to the police officer investigating the case. *W* was accordingly arrested and brought before the Magistrate, who, having examined *T* on oath and taken *W*'s statement, made an order on the petition to the following effect : "As no police report has been made in this matter, and the petitioner only has presented this petition, ordered that these papers of *W* be sent to the District Superintendent of Police, and if a report of this matter be made, the case may be sent up according to rule with the papers." In accordance with this order, *W* was taken to the District Superintendent of Police, and was sent by that officer to *A*. *Held*, that the Magistrate's order might be taken to have been passed under s. 167 of the Code, and therefore *W* was lawfully committed to the custody of the police, and *A* was bound to detain him in such custody until released therefrom by due course of law ; and that consequently *A*, having negligently suffered *W* to escape, had been properly convicted under s. 223 of the Penal Code. EMPRESS *v.* ASHRAF ALI . . **I. L. R. 6 All. 129**

19. ——— **Irregular endorsement of warrant**—*Penal Code (Act XLV of 1860), s. 224—Criminal Procedure Code, 1898, s. 79.* An endorsement on a warrant of arrest under s. 79 of the Criminal Procedure Code should be regularly made by name to a certain person in order to authorize him to make the arrest. Where an endorsement was made to the officer of a certain police station without the name of such officer being given :—*Held*, that the arrest under the warrant was not legal so as to make any escape an offence under s. 224 of the Penal Code. DURGA TEWARI *v.* RAHMAN BUKSH . . . . **4 C. W. N. 85**

20. ——— **Obstructing public servant in his duty**—*Penal Code, ss. 186, 224.* Escaping from lawful custody is not obstructing a public servant in the execution of his duty within the meaning of s. 186 of the Penal Code. REG. *v.* POSHUBIN DHAMBAJI PATIL
2 Bom. 134 : 2nd Ed. 128

21. ——— **Right of entry in pursuit of prisoner escaped**—*Entry into lodging-house.* Court peons may pursue into the yard of a lodging-house, the door leading into which is open, a prisoner who has escaped from their custody. DUKHOO *v.* CHUNDRO KANT CHOWDHRY
3 W. R. Cr. 68

22. ——— **Rescue from lawful custody**—*Penal Code, s. 225.* Before a conviction can be had under s. 225, Penal Code, it must be proved that the person whom the accused are charged with having rescued was in lawful custody at the time. QUEEN *v.* DEGUMBER AHIR . **21 W. R. Cr. 22**

23. ——— *Penal Code, s. 225.* Where a police officer, duly appointed under Act V of 1861, was engaged in the discharge of his duty as such police officer at a time when an unlawful assembly took place, it was held that he was

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ESCAPE FROM CUSTODY—*contd.*

competent to apprehend any of the members of such unlawful assembly; and a person who rescued the party apprehended was convicted of rescuing from lawful custody within the meaning of s. 225 of the Penal Code. QUEEN *v.* ASSAM SHUREEFF **13 W. R. Cr. 75**

24. ——— *Penal Code, s. 225—Criminal Procedure Code, s. 59—Arrest of thief—Rescue from custody of private person.* To support a conviction under s. 225 of the Indian Penal Code, it is not necessary that the custody from which the offender is rescued should be that of a policeman: it is enough that the custody is one which is authorized by law. *Held*, therefore, that rescue from the custody of a private person who had arrested a thief in the act of stealing was an offence. QUEEN-EMPRESS *v.* KUTTI **I. L. R. 11 Mad. 441**

25. ——— *Person unlawfully arrested by a private person and made over to village-chowkidar—Rescue from custody of village chowkidar—Lawful custody—Penal Code (Act XLV of 1860), s. 225—Criminal Procedure Code (Act V of 1898), s. 59—Village Chowkidari Amendment Act, 1870 (Bengal Act I of 1892), s. 13.* *S*, who was alleged to have committed theft, was unlawfully arrested by a private person and made over to the custody of the village-chowkidar. The theft was not committed in view of such private person. *S* was rescued from the custody of the village-chowkidar by the accused. The accused were convicted under s. 225 of the Penal Code, and sentenced each to two months' rigorous imprisonment. *Held*, that a village chowkidar cannot be properly regarded as a police-officer within the terms of s. 59 of the Code of Criminal Procedure, and that *S*, therefore, was not in lawful custody at the time of his rescue. Conviction and sentence set aside. KALAI *v.* KALU CHOWKIDAR **I. L. R. 27 Calc. 366 4 C. W. N. 252**

26. ——— **Escape where detention is not for an offence**—*Penal Code (Act XLV of 1860), s. 224.* An offence was committed in 1866. In 1893 a person of the same name as the offender was arrested, tried, and acquitted. Whilst under arrest, the accused escaped from custody. *Held*, that he was not liable to conviction under s. 224 of the Penal Code. An escape from custody when such detention is not for an offence, is not punishable under that section. GANGA CHARAN SINGH *v.* QUEEN-EMPRESS . **I. L. R. 21 Calc. 337**

27. ——— **Escape from lawful custody**—*Penal Code (Act XLV of 1860), s. 224.* The accused having been legally arrested, was subsequently left unguarded and he escaped. He was then re-arrested, and was tried and convicted under the Penal Code, s. 224. *Held*, that the conviction was right. QUEEN-EMPRESS *v.* MUPPAN **I. L. R. 18 Mad. 401**

28. ——— **Omission to notify substance of warrant**—*Criminal Procedure Code (Act V of 1898), s. 80—Penal Code (Act XLV of 1860), s. 225B.* An arrest by a police-officer without notifying the substance of the warrant to the person against whom the warrant is issued, as required by s. 80 of the Criminal Procedure Code, is not a lawful arrest, and resistance to such an arrest is not an offence under s. 225B of the Penal Code. SATISH CHANDRA RAI *v.* JODU NANDAN SINGH . . . **I. L. R. 26 Calc. 748 3 C. W. N. 741**

But *see* QUEEN-EMPRESS *v.* BASANT LALL **I. L. R. 27 Calc. 320**

29. ——— **Aid of chaukidar**—*Power of a police-officer to demand aid of a chaukidar in arresting an accused—Code of Criminal Procedure (Act V of 1898), s. 42 (a)—Lawful arrest—Lawful custody.* A police-officer lawfully authorised to arrest a person can demand the aid of a *chaukidar*, under s. 42 (*a*) of the Code of Criminal Procedure, in preventing the person from escaping by a certain path; and the custody of a person so taken by the *chaukidar* is, for the time being, lawful custody. MANIK PAN *v.* KENARAM SIRDAR (1901) **6 C. W. N. 337**

30. ——— **Arrest by private person**—*Penal Code (Act XLV of 1860), ss. 224, 411—Escape from lawful custody—Actual thief arrested by private person whilst in possession of stolen property—S. 411 of the Indian Penal Code not applicable to the thief himself.* S. 411 of the Indian Penal Code does not apply to the person who is the actual thief. Where, therefore, a person whose bullock had been stolen in his absence traced it to the house of the thief, and there and then arrested him, and made him over to a *chaukidar*, from whose custody he escaped, it was *held*, that this was not an escape from lawful custody, within the meaning of s. 224 of the Code. *Semble:* That, if the owner of the bullock had himself been entitled to make the arrest, the subsequent custody of the prisoner by the *chaukidar* would have been a lawful custody. *Queen-Empress* v. *Potadu, I. L. R. 11 Mad. 480*, referred to. KING-EMPEROR *v.* JOHRI (1901) . **I. L. R. 23 All. 266**

31. ——— **"Offence"**—*Arrest—Cognizable offence—Escape from lawful custody—"For any such offence," meaning of—Code of Criminal Procedure (Act V of 1898), s. 54—Penal Code (Act XLV of 1860), ss. 144 and 224.* The words, in s. 224 of the Penal Code, "for any such offence" mean for any offence with which a person is charged or for which he has been convicted. So that it would be an offence for a man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence. An accused person is no less guilty than a convicted person, if he escapes from lawful custody. In the present case the petitioners were arrested by the police under the authority of s. 54 of the Code of Criminal Procedure. That arrest was perfectly

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ESCAPE FROM CUSTODY—*concld.*

lawful, and the subsequent detention was in lawful custody. *Ganga Charan Singh* v. *Queen-Empress, I. L. R. 21 Calc. 337,* distinguished. DEO SAHAY LALL *v.* QUEEN-EMPRESS (1900).
I. L. R. 28 Calc. 253 : s.c. 5 C. W. N. 289

ESCHEAT.

See CO-SHARERS—ENJOYMENT OF JOINT PROPERTY—ERECTION OF BUILDINGS.
I. L. R. 12 Mad. 287

See GRANT—CONSTRUCTION OF GRANTS.
I. L. R. 1 Calc. 391

See ILLEGITIMACY . **11 B. L. R. 144**

See INAMDAR . **I. L. R. 28 Bom. 276**

See LETTERS OF ADMINISTRATION.
10 C. W. N. 1085

See MALABAR LAW—MORTGAGE.
I. L. R. 10 Mad. 189

See REGULATION V OF 1799, s. 7.
I. L. R. 29 All. 277

1. ——— Onus probandi—*Jus tertii.* In a suit by the Crown claiming lands as an escheat, which are admittedly in the possession of the parties claiming as heirs, the onus is on the Crown to show that the last proprietor died without heirs. It is open to the defendant in such a suit to set up any *jus tertii* to bar the claim of the Crown. GIRIDHARI LALL ROY *v.* GOVERNMENT OF BENGAL
1 B. L. R. P. C. 44 : 10 W. R. P. C. 31

s.c. in High Court. GOVERNMENT *v.* GREEDHAREE LALL ROY . . . . **4 W. R. 13**

2. ——— Territorial law of India. The illegitimate son of an Englishman by a Mahomedan woman died intestate without lawful issue, leaving him surviving his mother, his mistress, and several illegitimate children. *Held,* that his property passed to the Crown in default of heirs. The territorial law of British India is a modified form of English law. SECRETARY OF STATE *v.* ADMINISTRATOR GENERAL OF BENGAL **1 B. L. R. O. C. 87**

3. ——— Cause of action—*Possession—Title.* The period during which the Government may sue on total failure of natural heirs dates from the time when the failure of heirs or reversioners became apparent. In the case of parties without any legal title, a possession of sixty years is necessary to create a title against the Government. PURSUN LAL *v.* GOVERNMENT . **W. R. 1864, 102**

4. ——— Brahmin dying without heirs—*Right of Crown.* On the death of a Brahmin (whether sacerdotal or not) without heirs, the Sovereign power in British India is entitled to take his estate by escheat, subject, however, to the trusts and charges previously affecting the estate. COLLECTOR OF MASULIPATAM *v.* CAVALY VENCATA NARAINAPAH
2 W. R. P. C. 59 : 8 Moo. I. A. 500

ESCHEAT—*contd.*

5. ——— Sale by proprietors free of revenue—*Death of holder without heirs.* The proprietors of a mehal held free of revenue transferred by sale all their rights and interests in a garden situated within the area of the mehal. When revenue was imposed on the mehal, no interference with the rights of the holder of the garden took place. Revenue engagements were not taken from him, and he remained, as before, a proprietor, although not a proprietor who engaged for the revenue of the mehal. *Held,* that the garden did not escheat to the zamindars of the mehal on the death of the holder without heirs. CHIRAGHAN *v.* HARBANS . . . . . **7 N. W. 213**

6. ——— Failure of male heirs—*Acquiescence—Waiver of right—Succession of females.* A suit by the Government for the possession of the polliam of Erasca Naikoor in Madras as an escheat for want of male heirs dismissed, the Government having acquiesced in the right of female succession to the polliam, and possession having been held for a period of eighteen years after the alleged escheat. COLLECTOR OF MADURA *v.* VEERACAMOO UMMAL
9 Moo. I. A. 446

7. ——— *Quære:* As to whether natural relationship to an adopted son would be efficacious to intercept an escheat to the Crown. MUTHAYYA RAJAGOPALA THEVAR *v.* MINAKSHI SUNDARA NACHIAR (1901)
I. L. R. 25 Mad. 394

ESTATES-LAND ACT (MAD. I OF 1908).

——— s. 189—*Civil Courts have jurisdiction to hear and determine suits instituted before Act came into force.* S. 189 of the Madras Estates Land Act does not take away from Civil Courts the jurisdiction to hear and determine suits which were taken cognizance of by them before the Act come into operation. The section merely bars cognizance of suits and says nothing of pending suits. *Sadasiva Pillai* v. *Kallappa Mudaliar, I. L. R. 24 Mad. 39,* referred to. *Vedavalli Narasiah* v. *Mangamma, I. L. R. 27 Mad. 538,* referred to. SUBBARAYA MUDALIAR *v.* RAKKI (1908) . . . . **I. L. R. 32 Mad. 140**

ESTATES PARTITION ACT (BENG. VIII OF 1876).

See PARTITION.

See PARTITION ACTS.

——— s. 31.

See JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION.
I. L. R. 15 Calc. 198

——— ss. 112, 116.

See PENAL CODE, s. 186.
I. L. R. 22 Calc. 286

——— s. 116—*Order excluding lands from partition—Suit to direct partition of lands excluded—Limitation Act (XV of 1877), Sch. II,*

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ESTATES PARTITION ACT (BENG. VIII OF 1876)—*concld.*

——— **s. 116**—*concld.*

Art. 14. Under s. 116 of the Estates Partition Act (Bengal Act VIII of 1876) the Collector can only adopt one of two courses, if any objection is raised before him that a particular plot of land does not appertain to the estate under partition, namely, either to strike off the partition or proceed with the partition, treating the disputed land as part of the estate. Where in proceedings under the Estates Partition Act (Bengal Act VIII of 1876), certain persons objected that certain lands did not appertain to the estate under partition and the Collector passed an order excluding the disputed lands from partition. *Held*, that the order of the Collector was not such an order as he could pass under s. 116 of the Act and was consequently a nullity, and that Art. 14 of Sch. II of the Limitation Act did not apply to it. *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi, I. L. R. 21 Calc. 226; Shivaji Yesji Chawan* v. *The Collector of Ratnagiri, I. L. R. 11 Bom. 429; Nagu* v. *Yalu, I. L. R. 15 Bom. 424; Narendra Lal Khan* v. *Jogi Hari, I. L. R. 32 Calc. 107*, followed. *Parbati Nath Dutt* v. *Rajmohun Dutt, I. L. R. 29 Calc. 369*, distinguished. ALIMUDDIN *v.* ISHAN CHANDRA DEY (1906) . . **I. L. R. 33 Calc. 693**

——— **ss. 116, 149, 150.**

See LIMITATION ACT, 1877, SCH. II, ART. 14.
I. L. R. 29 Calc. 367
I. L. R. 24 Calc. 149

——— **s. 123.**

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES—ACT XI OF 1859.
I. L. R. 24 Calc. 887

ESTATES-TAIL.

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, ETC.
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9 B. L. R. 377

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS . . **I. L. R. 7 Calc. 269**
I. L. R. 11 Calc. 684
L. R. 12 I. A. 103
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L. R. 16 I. A. 29

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See LAND-REVENUE. I. L. R. 26 Bom. 271

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——— by Assent of reversioner to alienation by widow.

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——— by misrepresentation.

See LEASE—CONSTRUCTION. I. L. R. 30 Calc. 883

——— of minor by act of guardian.

See LAND ACQUISITION ACT, s. 19. I. L. R. 17 Bom. 299

1. STATEMENTS AND PLEADINGS,

1. ——— Proof of estoppel. Estoppels must be made out clearly. TWEEDIE *v.* POORNOCHUNDER GANGOOLY . . . 8 W. R. 125

2. ——— Statement in former suit—*Estoppel in pais—Pleadings—Decision on pleadings.* An estoppel *in pais* need not be pleaded in order to make it obligatory. With the Indian system of pleading, a party's statement in a judicial proceeding cannot be excluded like allegations in bills in equity and pleadings at common law. But mere statements for the purpose of a particular judicial proceeding can only be conclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the Court upon the issues joined. They are then conclusive between the same parties, not because they are the statements of those parties, but because, for all purposes of present and prospective litigation, they must be taken as truth. *A* brought a pauper suit, and virtually denied possession of certain property. *B* petitioned to dispauper *A*, alleging that *A* was possessed of such property. The Court decided that *A* was in possession, and rejected her prayer to be allowed to sue as a pauper. *Held*, in a subsequent suit by *A*'s representative against *B*'s representative for the property, that, even if *A*'s allegation, found to be false, could be treated as an estoppel, *B*'s allegation, found to be true, would also be an estoppel; and "estoppel against estoppel setteth the matter at large;" but that, although *A*'s allegation was receivable evidence against *A* and her representative, they were not concluded by such allegation and the decision thereon. CIVA RAU NANAJI *v.* JEVANA-RAU . . 2 Mad. 31

3. ——— *Admission.* A plaintiff's statement in a former suit held not to bind him conclusively. It should be taken as an admission. JUGUTENDUR BUNWAREE *v.* DIN DYAL CHATTERJEE . . . . 1 W. R. 310

BISSESSUREE DEBEE *v.* JANKEE DOSS 1 W. R. 162

KHANTOMONEE DEBIA *v.* KOMODINEE DEBIA 25 W. R. 69

4. ——— *Denial of genuineness of mortgage—Subsequent suit to redeem.* *V* sued to eject *K* from certain land, alleging that *K*, having entered under a lease, held as a trespasser. *K* pleaded that he held as mortgagee. It was found that *K* obtained possession under a mortgage deed for R1,000, which had not been registered, and that he held also a second mortgage for R50, and it was held on second appeal that *K* was entitled to defend his possession by virtue of the mortgage for R50, and as *V* had not offered to redeem the charge, but had sued on false averments, the suit was dismissed. *V* then sued *K* to recover the land on payment of R50. In his plaint *V* stated that, though the mortgage-deed for R50 was fabricated, the High Court had decided that he was bound to pay R50 before recovering the land from *K*. The District Court on appeal dismissed the suit on the ground, *inter alia*, that, as *V* denied the genuineness of the mortgage, he could

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ESTOPPEL—*contd.*

1. STATEMENTS AND PLEADINGS—*contd.*

not sue for redemption. *Held*, that *V* was entitled to redeem. VARATHAYYANGAR *v.* KRISHNASAMI **I. L. R. 10 Mad. 102**

5. ——— *Admission not amounting to estoppel—Statement in suit for enhancement as to certain person being tenant.* A patnidar obtained decrees for enhancement of rent on kabuliats signed by a widow for her minor son, by which she agreed to pay it. *Held*, while finding that the minor was liable for the enhanced rent, that the patnidar was not precluded by the fact that he had, after the son had attained full age, sued the mother as tenant, stating that she, and not the son, was tenant. WATSON & CO. *v.* SHAM LALL MITTER . . **I. L. R. 15 Calc. 8 L. R. 14 I. A. 178**

6. ——— **Plea in former suit**—*Contrary defences. Held*, that the defendants, having in a previous suit set up the defence that *K* was disqualified by insanity and taken the decision of the Court on that ground, were estopped now from setting up the defence that he was not so disqualified, and that he was entitled to succeed. BRIJBHOOKUN LAL AWASTEE *v.* MAHADEO DOBEY **15 B. L. R. 145 note : 17 W. R. 422**

7. ——— The plaintiff sued the defendant for rent, basing his claim upon a kabuliat bearing date 6th Srabun 1258 B.S. His suit was dismissed, and the kabuliat pronounced to be spurious. *Held*, that he was not estopped from afterwards suing the same defendant to set aside a pottah of the 27th Aughran 1244 B.S., under which the defendant claimed the validity of the pottah not being in issue in the former suit. OOMANATH ROY CHOWDHRY *v.* RAGHOONATH MITTER **Marsh. 43 : W. R. F. B. 10 : 1 Hay 75**

JUGGUT MISSER *v.* BABOO LAL **5 W. R. Cr. 50**

8. ——— **Admission by party in other cases**—*Case between different parties.* An admission made by a party in other cases may be taken as evidence against him, but cannot operate against him as an estoppel in a case in which his opponents are persons to whom the admission was not made, and who are not proved to have ever heard of it, or to have been misled by it, or to have acted in reliance upon it. CHUNDERKANT CHUCKERBUTTY *v.* PEAREE MOHUN DUTT . . . **5 W. R. 209**

9. ——— **Statement in former suit**—*Assertion as to nature of tenure of land. Held*, that the plaintiff's assertion in a former suit claiming as "malikana" the land now in dispute, even if the identity of the land now claimed with the land then in suit be established (which had not been done), does not absolutely preclude him from asserting "mourasi" right to the same land and the Court from adjudging his true right. RAM SAHAI MISSER *v.* BISRAJ SINGH . . . **1 Agra Rev. 19**

10. ——— *Denial of pottah.* A raiyat is estopped from pleading, in a suit for a kabuliat and for determination of the rate at which such kabuliat is to be delivered, a pottah which he denied in a former suit for rent. MAHOMED HOSSEIN *v.* PEEROO MULLICK **W. R. 1864, Act X, 115**

11. ——— *Objection to regular suit. A* having obtained an order for the reversal of certain execution proceedings instituted by *B* on the ground that they were barred by limitation, and carried on fraudulently without his knowledge, *B* had that order set aside on appeal, on the ground that there was no execution case before the Court in which such an order could be made. *A* then brought a regular suit to set aside the execution proceedings, when *B* objected that a regular suit would not lie under the provisions of s. 11, Act XXIII of 1861. *Held*, that *B* was estopped from taking that objection in the present suit. HUR PROSHAUD ROY *v.* ENAYET HOSSEIN . . . **2 C. L. R. 471**

12. ——— *Admission—Receipt of money.* The plaintiffs, in their answer to a plaint by the defendants, admitted that they had received a certain sum on behalf of the defendants, and alleged that they had applied it in a particular way. The Judge discredited this statement, and made a decree not founded upon it. The plaintiffs thereupon sued for the sum the receipt of which they had so admitted. *Held*, that such admission was evidence against them. BHUGMUNT NARAIN JHA *v.* LOLL JHA . . **Marsh. 48 : 1 Hay 114**

LOLL JHA *v.* BHUGMUNT NARAIN JHA **1 Ind. Jur. O. S. 104**

13. ——— *Contradictory statements. Held*, that the former statement of the plaintiff, which was at variance with the one now made, was not an estoppel, but the Court ought to have determined which of the two statements was correct. JOY NARAIN *v.* TORABUN **3 Agra 216**

14. ——— *Pleading—Inconsistent claims.* Where a plaintiff deliberately claimed lands as rent-free, he was not allowed, merely on the ground of the proprietor admitting the lands to be leased to plaintiff's vendors, or even of the defendant making a somewhat similar admission, to benefit by such admissions and vary his claim. NIDHA CHOWDHRY *v.* BUNDA LALL TACOOR **6 W. R. 289**

15. ——— *Admission.* Because the decree in a former suit against the present plaintiff and the alleged holders of a separate half share awarded to another co-sharer who was the plaintiff in that case, owing to a mistake of that plaintiff supported by the admission of the present plaintiff less than he was legally entitled to, the mistake need not be perpetuated, nor will his former admission estop the plaintiff in a subsequent suit. RAM SUROHEE SINGH *v.* KASHEE ROY **6 W. R. 176**

16. ——— *Survey award made without authority.* In a suit for certain

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ESTOPPEL—*contd.*

1. STATEMENTS AND PLEADINGS—*contd.*

immoveable property it was held that the plaintiffs were not bound by an Act IV award against a person in whose name the property had been purchased by the father of the plaintiffs, but who had not either title or interest in the property, and did not conduct the Act IV proceeding with any authority from the plaintiffs. *Held*, too, that plaintiffs were not estopped by statements made by them as parties in another suit, which did not affect their status—nor by their failure to set forth their title in a former suit brought against them for mesne profits of the land in dispute. MOHENDRA NATH MULLICK *v.* RAKHAL DOSS SIRCAR . . . . **10 W. R. 344**

17. ——————— *Finding against statement.* The allegation of a plaintiff in a former suit, which was referred to arbitration, having been overruled by the arbitrators, and another state of things found by them to exist, he is not estopped by his former allegation from bringing a further suit founded on the finding of the arbitrators. RAM CHUNDER DEY *v.* KISSEN MOHUN SHAHA **6 W. R. 68**

18. ——————— Plaintiffs sued for their share in the property of their family. The Judge rejected their claim, mainly on the ground that, when parties in a former suit respecting the same property, they had pleaded division, and the Court found that the family was undivided. *Held*, that the Judge was wrong in attributing to the plaintiff the plea of division in the former suit, and, even if such plea had been raised, the judgment in that suit, pronouncing the status of the family to be that of non-division, was conclusive on that subject, and that it was open to the plaintiffs to sue for enforcement of their rights to effect a division. SANGOOVIEN *v.* KOLLATHOORAYEN **1 Ind. Jur. O. S. 116**

WATSON *v.* POKHUR DOSS PAUL. MOHINEE DOSSEE *v.* POKHUR DOSS PAL . . **4 W. R. 2**

19. ——————— *Disclaimer of defendant.* The plaintiff sued for a quantity of land which was family property in the possession of his brother, the defendant. The defendant in a former suit declared that the land sued for was not family property, but belonged to his sister, and in this suit he claimed the property under her will. The lower Court found that the property was family property, but that the plaintiff was entitled to a decree for the whole property on the ground that the disclaimer of the defendant in the former suit amounted to an estoppel and forfeiture of his share. *Held*, that the effect of the defendant's conduct did not operate either as an estoppel or a forfeiture, and that the plaintiff was only entitled to a decree for a moiety of the property. VELLAYN CHETTY *v.* AIYAN *alias* THUNDAVAMURTY CHETTY . **4 Mad. 374**

20. ——————— **False statement in plaint.** A plaintiff is not estopped by an evidently false statement in his plaint as to possession, but the Court may look behind the statement and determine upon its truth or otherwise and affirm or disallow it, as may seem right and proper. CHOONEE LALL *v.* KERAMUT ALI . . **W. R. 1864, 282**

21. ——————— **Erroneous admission in petition.** A party is not bound by an erroneous admission in a petition. KRISTO PREA DOSSEE *v.* PUDDO LOCHUN MYTEE . . **6 W. R. 288**

22. ——————— **Statement of dispossession in petition**—*Suit subsequently brought alleging possession.* A statement of dispossession made in a petition preferred under s. 269 of Act VIII of 1859 by a person claiming land sold in execution of a decree, and ordered to be put in possession of the auction-purchaser, cannot operate as an estoppel in a suit subsequently brought by the claimant to "establish her right" on the allegation of her being in possession of the land in question. KHANUM JAN *v.* RUTTON LAL . . **8 W. R. 95**

23. ——————— **Statement by stranger to suit**—*Transfer of interest of judgment-debtor—Liability.* Where a person filed a petition in a suit stating that all the interests of the judgment-debtor had been transferred to him, and for several years thereafter opposed all attempts on the part of the decree-holder to issue execution:—*Held*, that the person who had so come forward, and had so interfered in the suit was liable as a defendant, and that execution could be issued against him. A stranger to a suit cannot (even with the decree-holder's consent) so deal with a judgment-debtor as to acquire an interest in the suit which will enable him to oppose and prevent the execution of the decree, without rendering himself liable to be put upon the record as a judgment-debtor. LALLA POOROHIT LALL *v.* SABEERUN . . . . . **7 W. R. 368**

24. ——————— **Contradictory statements**—*Admission.* In proceedings under Act XXVII of 1860 the plaintiff, a widow, called herself the guardian and trustee of her minor adopted son, but the certificate was granted to the defendant, who claimed under the husband's will. The plaintiff afterwards sued as her husband's widow, without an adopted son, to call in question the will set up by the defendant, the so-called adopted son supporting her action. *Held*, that the plaintiff's former statement in the Act XXVII case was no bar to her present action. SOOR[illegible] MONI DOSSEE *v.* SUROOP CHUNDER SHAH . . . **W. R. 1864, 198**

25. ——————— **Admission of father as to ancestral property**—*How far binding on sons.* In the case of ancestral property the admission of a father may be used as evidence against his sons, but is not conclusive, and does not stop the sons from contending that such admission was collusive or erroneous. NOWBUT RAM *v.* DURBAREE SINGH **2 Agra 145**

26. ——————— **Plea in former suit**—*Denial of will.* *Held*, that the plaintiffs were not estopped in a suit under a will for a legacy by the denial

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ESTOPPEL—*contd.*

1. STATEMENTS AND PLEADINGS—*contd.*

of the will by the persons through whom they claimed. NANA NARAIN RAO *v.* RAMA NUND **2 Agra 171**

27. ——— Erroneous pleas—*Subsequent contradictory evidence.* In a suit for land the defendant pleaded that the land was his ancestral estate. He subsequently tendered evidence, then first obtained, to show that the land had in 1814 been mortgaged to, and in 1831 bought by, his father. *Held,* that the evidence was receivable notwithstanding the erroneous plea. RANGASVAMI AYYANGAR *v.* KRISTNA AYYANGAR . . . **1 Mad. 72**

28. ——— Admission by reversioner—*Suit by party to prevent sale of property in which he has an interest. Held,* that a party was not estopped from bringing a suit to bar sale of a property in which he had a reversionary right by the fact that he had admitted on previous occasions that he had no present right in the property. SUNJ BAREE *v.* PAYAG PATUK **I N. W. Part II, 5 : Ed. 1873, 65**

29. ——— Admission of predecessor in title—*Interest in property—Decree.* When the admission of his predecessor in title is set up against a party, it is open to him to show that the person whose admission is alleged to bind him had at the time no interest in the property (Evidence Act, s. 18) notwithstanding a decree under which the property was sold as the property of the admitting person and another co-debtor. BEPIN BEHAREE SIRCAR *v.* NILMONI SINGH DEO . **25 W. R. 125**

30. ——— Admission of having transferred rights—*Failure of transferee to prove it.* *A* sold his right and interest under a decree to *B.* Subsequently *A*'s right and title were sold in satisfaction of a decree against him and purchased by *C.* *B* sued *C*, but failed to establish his title, or right to set aside the sale to *C.* *A* appeared in that suit, and admitted having parted with his rights to *B.* *Held,* that he could not be now allowed to resume them, merely because *B* had failed to prove his title against *C.* HURO PERSHAD ROY CHOWDHRY *v.* RAM CHUNDER BABOO . . . . . **7 W. R. 360**

31. ——— Admission in former suit—*Effect between different parties.* To a suit brought by certain mortgagees against the inamdars to enforce mortgage rights existing since 1842, the defence was made that possession taken of the inam lands by the Collector in 1845 had determined the original inam rights therein, as well as the lien of the mortgagees. The present zamindar, son and successor of the grantor of 1863, now sued claiming that he had determined the tenancy by a notice to quit. *Held,* that the above did not operate as any estoppel as between the plaintiff and the inamdars, the zamindar not having been a party to the suit, but was only an admission, and not conclusive. MAHARAJA OF VIZIANAGRAM *v.* SURYANARAYANA **I. L. R. 9 Mad. 307**

ESTOPPEL—*contd.*

1. STATEMENTS AND PLEADINGS—*contd.*

32. ——— Difference between contention in original Court and Appeal Court. *Quære :* Whether the plaintiff, having successfully contended before the Assistant Judge that his plaint was for a declaration of right merely without consequential relief, and therefore properly stamped, could be permitted to say in appeal that the house was the subject-matter of the suit within the meaning of s. 16 of the Bombay Courts Act, XIV of 1869. MOTICHAND JAICHAND *v.* DADABHAI PESTANJI **11 Bom. 186**

33. ——— Diverse contentions in pleading—*Account—Limitation.* A defendant having by his written statement pleaded that, if a general partnership account were taken, he would be found not to be indebted to the plaintiff in respect of contribution claimed, cannot also plead the Limitation Act as a bar to the taking of such account. DAYAL JAIRAJ *v.* KHATAV LADHA **12 Bom. 97**

34. ——— ——— It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of appeal a plea which he has directly and fraudulently repudiated in the Court below. In an ejectment suit, the defendants, from whom the plaintiff alleged that he had purchased the land from which he sought to eject them, and who had before suit by parol disclaimed the plaintiff's title, set up in their written statement an adverse title in themselves. The lower Court found the plaintiff's allegation to be true. *Held,* that the defendants were estopped from contending on appeal that they were occupancy raiyats, and therefore not liable to be ejected ; and that by their own conduct they had forfeited the rights which they claimed. SUTYABHAMA DASSEE *v.* KRISHNA CHUNDER CHATTERJEE **I. L. R. 6 Calc 55**
6 C. L. R. 375

35. ——— False admission of ancestor. A false admission made by a seristhadar to avoid losing his appointment does not estop his heirs from afterwards setting up the truth. MAHOMED WAYEZ *v.* SUGEEROONISSA . **6 W. R. 38**

36. ——— Fraudulent statement—*Admission.* When, in answer to a suit, two parties combined to make a statement to defeat a third party, it is competent to either of those parties, when they are opposed to each other in a suit, to say that the combined statement was false, and intended as a fraud against the third party. The admission in the former suit is not to be regarded as an estoppel, against either of the two parties in a subsequent suit, but the Court is competent to enquire into the character of the transaction and to declare it void if it is satisfied that the transaction is not a *bonâ fide* one. RAM SARUN SINGH *v.* PRAN PIAREE. **1 W. R. 156**

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ESTOPPEL—*contd.*

1. STATEMENTS AND PLEADINGS—*contd.*

Affirmed by P. C. in RAM SURUN SINGH *v.* PRAN PEAREE
15 W. R. P. C. 14 : 13 Moo. I. A. 551

37. ———— Statement in former suit to defeat claim—*Benami transaction to defeat creditors—Proof of true nature of transaction.* Where the lower Appellate Court did not allow a defendant in the present suit to deny the truth of admissions made by her in a former case, or to adduce evidence of her own falsehood and deceit, it was deemed to have acted in opposition to the ruling of the Privy Council in a case in which a statement previously put forward in a Court of Justice with a view to defeat the claim of the plaintiff was held to be no estoppel to the party's showing the real truth of the transaction. Even where the object of a benami transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benami, and that in truth it still remained with the person who professed to part with it. DEBIA CHOWDHRAIN *v.* BIMOLA SOONDUREE DEBIA . **21 W. R. 422**

GOPEENATH NAIK *v.* JODOO GHOSE
23 W. R. 42

See RAM SURUN SINGH *v.* PRAN PEAREE.
15 W. R. P. C. 14 : 13 Moo. I. A. 551

UDEY KUNWAR *v.* LADU.
6 B. L. R. 283 : 15 W. R. P. C. 16
13 Moo. I. A. 583

BYKUNT NATH SEN *v.* GOBOOLLAH SIKDAR
24 W. R. 391

ASHRUF SIRDAR *v.* BHUBO SOONDUREE
25 W. R. 40

MUKUN MULLICK *v.* RAMJAN SIRDAR
9 C. L. R. 64

and cases there cited.

38. ———— Entry in settlement papers—*Persons not parties to administration paper. Held,* that a cultivator is not bound by a condition entered in the village administration paper to which he was no party. MEHUR ALI *v.* KUNHYEE
1 Agra Rev. 13

CHUNDUN SINGH *v.* NIRTO . . **3 Agra 11**

GIRDHAREE LALL *v.* OOMRAO SINGH **3 Agra 249**

39. ———— Return of Income tax—*Income Tax Act XXXII of 1860, s. 97, rule 4—Perpetuity of tenure.* Under rule 4, s. 97 of the Income Tax Act (XXXII of 1860), a return made to the Income Tax officer is not conclusive evidence against the party making it upon the point of perpetuity of tenure. JOWAHIR LALL *v.* POOKURUM SINGH . . . . **6 W. R. 252**

40. ———— Petition submitting account of income—*Act IX of 1869, s. 19—False statement of income.* A petition submitting the schedule of his income, filed by a petitioner in the Income Tax Office, is admissible as evidence against the person submitting and subscribing it; but it is not conclusive, and a false statement made in it, though it may render the petitioner amenable to a prosecution under Act IX of 1869, s. 19, does not estop the person verifying the petition from proving that he made the statement to evade the income tax, and that the fact was otherwise than as stated. GREEDHAREE SINGH *v.* FOOLJHUREE KOOER
24 W. R. 173

41. ———— Principle of estoppel—*Sale—Mortgage—Unregistered Sale-deed and Mortgage-bond—Transfer of Property Act (IV of 1882), s. 54—Suit for possession and mesne profits.* The principle of estoppel cannot be invoked to defeat the plain provisions of a statute. *Begam* v. *Muhammad Yakub, I. L. R. 16 All. 344, Ram Bakhsh* v. *Mughlani Khanam, I. L. R. 26 All. 266,* and *Karalia Nanubhai* v. *Mansukhram, I. L. R. 24 Bom. 400,* distinguished. JAGADBANDHU SAHA *v.* RADHA KRISHNA PAL (1909) . **I. L. R. 36 Calc. 920**

2. DENIAL OF TITLE.

1. ———— Parol evidence to prove different title from that in lease—*Suit for rent. A* executed a kabuliat for a term of years to *B* as zamindar. *B* gave a patni of the zamindari to *C*. *C* instituted a suit for arrears of rent under the lease for a term of years against *A*, the lessee. *A*, in defence, admitted the execution of the lease to *B*, but denied that *B* was his real lessor and beneficially entitled to the rent, alleging that *B* was only a benamidar for a third party. *Held,* that in India the English doctrine of estoppel did not apply, and that *A* was competent in a suit for rent to deny his lessor's title as stated in the lease, and by parol evidence to prove a different title to that recited in the lease. DONZELLE *v.* KADERNATH CHUCKERBUTTY . **7 B. L. R. 720 : 16 W. R. 186**

But see JAINARAYAN BOSE *v.* KADUMBINI DASI
7 B. L. R. 723 note

2. ———— Evidence Act, s. 116—*Landlord and tenant.* S. 116 of the Evidence Act does not debar one who has once been a tenant from contending that the title of his landlord has been lost or that his tenancy has determined. It precludes him only during the continuance of the tenancy from contending that his landlord had no title at the commencement of the tenancy. AMMU *v.* RAMAKRISHNA SASTRI . . **I. L. R. 2 Mad. 226**

3. ———— Denial by tenant of his landlord's title—*Ejectment, suit for.* In a suit to eject a tenant holding over after the expiration of his lease, it is not competent to the tenant to set up that his landlord, the plaintiff, holds under an invalid lakhiraj tenure, and that the zamindar and not the plaintiff is entitled to the land. MOHESH CHUNDER BISWAS *v.* GOOROOPERSAD BOSE
Marsh. 377 : 2 Hay 473

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ESTOPPEL—*contd.*

2. DENIAL OF TITLE—*contd.*

4. ——————— *Suit by landlord for possession—Ejectment, suit for.* The plaintiff sued for possession of a certain house, alleging the expiry of the lease (kabuliat), on which the defendants held it as tenants. The mamlatdar dismissed the suit, being of opinion that the plaintiff had no title to the house when he granted the lease, and the house belonged to the defendants when they executed the lease. *Held*, reversing the decree, that the defendants (tenants), having executed the kabuliat, could not deny the plaintiff's title as a ground for refusing to give up possession, and the mamlatdar himself, therefore, could not go into the question. *Parbhudas* v. *Fulba, I. L. R. 19 Bom. 133 note*, distinguished. PATEL KILABHAI LALLUBHAI *v.* HARGOVAN MANSUKH **I. L. R. 19 Bom. 133**

5. ——————— *Regular suit by tenant.* If the existence of a tenancy be established by the fact of the tenant's payment of rent to his landlord or otherwise, the tenant cannot ordinarily dispute the title of his landlord in a suit brought against him for recovery of possession. He must first give up possession, and then, if he has any title *aliunde*, that title may be tried in a suit of ejectment against the landlord. VASUDEV DAJI *v.* BABAJI RANU . . . **8 Bom. A. C. 175**

6. ——————— *Denial by tenant of landlord's title—Evidence Act (I of 1872), s. 116—Derivative title.* *A*, a raiyat, being in possession of a certain holding, executed a kabuliat regarding this holding in favour of *B* (who claimed the land in which the holding was included, under a derivative title from the last owner), and paid rent to *B* thereunder. *Held*, that *A* was not estopped by s. 116 of the Evidence Act from disputing *B*'s title. The words "at the beginning of the tenancy" in s. 116 of Act I of 1872 only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. LAL MAHOMED *v.* KALLANUS **I. L. R. 11 Calc. 519**

7. ——————— **Denial of title as holding under unregistered document**—*Admission of landlord's right.* Where a tenant has repeatedly acknowledged that a person in possession of the proprietary right was entitled to receive rent, and has in fact attorned to him, he cannot afterwards be allowed to question the validity of the title of such person on the ground that the instrument by virtue of which possession of the proprietary right had been obtained was unregistered. SHUMS AHMUD *v.* GOOLAM MOHEE-OOD-DEEN . **3 N. W. 153**

8. ——————— **Denial of lessor's title**—*Co-sharers—Lease from one of several co-sharers.* A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment. JAMSEDJI SORABJI *v.* LAKSHMIRAM RAJARAM **I. L. R. 13 Bom. 323**

ESTOPPEL—*contd.*

2. DENIAL OF TITLE—*contd.*

9. ——————— **Unassessed waste reclaimed by plaintiff**—*Evidence Act (I of 1872), s. 116—Pottah granted to defendant.* The plaintiff, who was the holder of a warg in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years, the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring warg. The defendant obtained a pottah for the land from the revenue authorities. In a suit by plaintiff to eject the defendant:—*Held*, that the defendant was not estopped from setting up a title adverse to the plaintiff, and that his possession became adverse when the pottah was granted to him. SUBBARAYA *v.* KRISHNAPPA **I. L. R. 12 Mad. 422**

10. ——————— **Denial of right of fishery in river**—*Licensee on payment of rent of fishery in navigable river—Suit for ejectment.* In an ejectment suit in respect of a julkur in a navigable river, the defendant, if he has paid rent to the plaintiff or his predecessors, is precluded from raising a defence that the plaintiff cannot have an exclusive right of fishery in a navigable river. GOUR HARI MAL *v.* AMIRUNNESSA KHATOON **11 C. L. R. 9**

11. ——————— **Denial of title of person supposed to be landlord**—*Payment of rent—Title.* In a suit for rent by a patnidar, who claimed under a lease granted him by a Hindu widow, whose husband had left a will giving her no power to alienate:—*Held*, that, although it was shown that the widow had been in receipt of rents, the suit was rightly dismissed. One who pays rent to another, believing him to be the landlord's representative, is not estopped from afterwards showing the want of title in that other: so here the defendant was not estopped from showing that, under the deceased husband's will, the plaintiff had no title. BANEE MADHUB GHOSE *v.* THAKOORDAS MUNDUL **B. L. R. Sup. Vol. 588 : 6 W. R., Act X, 17**

TILLESSUREE KOER *v.* ASMEDH KOOER **24 W. R. 101**

12. ——————— **Landlord and tenant**—*Collusion.* The plaintiff in an ejectment suit had established in a former suit that land formerly the property of the second defendant's father had been sold under a decree and purchased benami for him (the plaintiff), and that a rent agreement in respect of the same lands entered into between the ostensible purchaser and the first defendant had also been entered into by the former on his behalf; and possession had been formally delivered to the plaintiff under process of Court. It now appeared that the second defendant, who contested the validity as against him of the decree under which the land was sold, having withdrawn a suit filed by him to declare the sale invalid as against him after his

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ESTOPPEL—*contd.*

2. DENIAL OF TITLE.—*concld.*

father's death, had colluded with the first defendant and collected rent from him. *Held*, that the second defendant, having come in by collusion with the first defendant, was precluded from denying the plaintiff's title, and was liable to the plaintiff for the rent collected by him from the first defendant. PASUPATI *v.* NARAYANA . . **I. L. R. 13 Mad. 335**

13. ——— Mortgagor and mortgagee. The karnavan of a Malabar tarwad, having the jenm title to certain land and holding the uraima right in a certain public devasom to which other land belonged, demised lands of both descriptions on kanom to the defendants' tarwad, and subsequently executed to the plaintiff a melkanom of the first-mentioned land and purported to sell to him the jenm title to the last-mentioned land. In a suit brought by the plaintiff to redeem the kanom and to recover arrears of rent :—*Held*, that the defendants were not estopped from denying the plaintiff's right to redeem on the ground that he did not represent the devasom : and that the plaintiff, who had denied the title of the devasom in the Court of first instance, was not entitled to redeem the kanom as a whole, by virtue of his admitted title to part of the premises comprised in it. KONNA PANIKAR *v.* KARUNAKARA . - **I. L. R. 16 Mad. 328**

14. ——— *Mortgage by tenant at fixed rates—Ejectment of mortgagor by zamindar—Suit for redemption against mortgagee in possession of the mortgaged property.* The rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined. Hence where a tenant at fixed rates, who, having mortgaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the zamindar, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejectment, for redemption. *Held*, that the mortgagee could plead successfully that the mortgagor's interest in the holding had determined by the ejectment of the mortgagor. NAKCHEDI BHAGAT *v.* NAKCHEDI MISR . . . **I. L. R. 18 All. 329**

15. ——— Application for tenure to Collector under wrong impression—*Liability for rent.* Where application is made to a Collector for a tenure liable to pay revenue on account of an estate which applicant has carved out of unoccupied waste, and it is found that Government is not in a position to create such a tenure, the applicant is not bound by his offer made under an erroneous impression, nor is he estopped thereby from pleading as against the landlord that he is not liable to pay any rent. BRIJONATH CHOWDRY *v.* LALL MEAH MUNNEEPOOREE . . **14 W. R. 391**

16. ——— Denial in former suit of relationship of landlord and tenant—*Suit for possession.* A rent suit having been dismissed upon defendant denying that he was a tenant of the plaintiff, the latter sued the former for khas possession. *Held*, that, after his former denial, defendant could not now claim a settlement and refuse the khas possession sought. SONAOOLLAH *v.* IMAMOODDEEN **24 W. R. 273**

DABEE MISSER *v.* MUNGUR MEAH **2 C. L. R. 208**

17. ——— Payment of rent suit to contest title after—*Payment under erroneous impression.* The plaintiffs were the registered holders of the village of Mahkoli, in the Ahmedabad Collectorate, for which they obtained a sanad in 1864, under Bombay Act VII of 1863. The defendants were the descendants of the original owners of the village, who, about 1768, finding themselves unable to meet the expenses attaching to the village, gave up their title to it to the ancestors of the plaintiffs, on condition of retaining a third of the lands rent-free as their vanta or share, subject to no other condition but a house tax. *Held*, that the circumstances did not constitute the relationship of landlord and tenant between the parties. The fact that the defendants had for some years paid to the plaintiffs part of the amount of quit-rent levied from the plaintiffs by Government did not estop the defendants, when better informed of their rights, from contesting the title of the plaintiffs to any further payments. JESINGBHAI *v.* HATAJI **I. L. R. 4 Bom. 79**

18. ——— Acceptance of lease under coercion—*Payment of rent.* A person accepting a lease under coercion is not bound by such acceptance, nor do payments of rent by him to the person granting the lease estop him from questioning the title of the payee, unless the payee let him into possession. Even then the effect of the payment as an estoppel would be confined to the title of the payee at the time possession was given. COLLECTOR OF ALLAHABAD *v.* SURAJ BAKSH . **6 N. W. 333**

3. ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

1. ——— Deed, construction of. Those who rely upon a document as an estoppel must clearly establish its meaning ; if there is any ambiguity, the construction may be aided by looking at the surrounding circumstances. MEWA KUWAR *v.* HULAS KUWAR . **13 B. L. R. 312**

2. ——— Statement in bond—*Evidence of amount of consideration actually received.* Where a suit was brought upon two native bonds executed by the defendant for the principal and interest reserved, and the bonds contained a statement that the principal had been borrowed and received in cash :—*Held*, that it was open to the defendant to show by evidence that only a portion of the principal sum had been received by him. The strict technical doctrine of English law as to estoppels in the case of deeds under seal does not apply to the written

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ESTOPPEL—*contd.*

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instruments ordinarily in use amongst the natives of India. GAUREVALLABA RAMCHANDRA BOMAYA NAYIK *v.* VIRAPPA CHETTI . . **2 Mad. 174**

3. ——— **Stipulation in bond**—*Proof of payment—Omission to endorse payment.* A stipulation in a bond that all payments should be endorsed on the back thereof, and that all other pleas of repayment would be futile, does not estop the defendant from proving by other means that the debt, or part of it, has been satisfied. KALEE DOSS MITTRA *v.* TARACHAND ROY . **8 W. R. 316**

See GIRDHAREE SINGH *v.* LALLOO KOONWUR **3 W. R. Mis. 23**

NARAIN UNDIR PATIL *v.* MOTILAL RAMDAS **I. L. R. 1 Bom. 45**

4. ——— **Agreement of parties**—*Irregular procedure, agreement to be bound by.* Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ.* SADASIVA PILLAI *v.* RAMALINGA PILLAI **15 B. L. R. 383 : 24 W. R. 193 L. R. 2 I. A. 219**

SHEO GOLAM LALL *v.* BENI PROSAD **I. L. R. 5 Calc. 27 : 4 C. L. R. 29**

5. ——— *Acquiescence of judgment-debtor in irregular procedure—Omission to proceed under s. 90 of the Transfer of Property Act.* Where the mortgaged property was sold in execution of a mortgage-decree, but the sale-proceeds not having been sufficient to satisfy the decree, the decree-holder, without proceeding under s. 90 of the Transfer of Property Act, made applications for the execution of the decree for recovery of the unsatisfied balance by the attachment and sale of other properties of the judgment-debtor, and the applications were allowed and subsequently struck off, and the judgment-debtor raised no objections, although notices were served ; and the decree-holder having applied for execution again, the judgment-debtor raised an objection that the decree could not be executed, as no decree as provided for in s. 90 of the Transfer of Property Act had been obtained.—*Held,* that the effect of the previous proceedings being struck off after notice to, but without objection from, the judgment-debtor, is to estop the judgment-debtor from raising the objection, and the order of the executing Court (which was also the Court competent to pass a decree under s. 90) allowing execution to proceed against other properties of the judgment-debtor should be taken to have the effect of a decree made under s. 90. *Sadasiva Pillai* v. *Ramalinga Pillai, 24 W. R., 193 P. C.,* followed. MADHU SUDAN CHACKERBUTTY *v.* KAILASH CHUNDER BRAHMACHARI **2 C. W. N. 254**

ESTOPPEL—*contd.*

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6. ——— *Agreement to abide by punchayat—Proceedings to show decision of punchayet inequitable.* An agreement between the parties to abide by the determination of a punchayet fixing the line of boundary, and the determination of the punchayet, were held to be not conclusive evidence so as to bar either party from showing the determination of the punchayet to be inequitable. MOKUDDIMS OF MOUZA KUNKUNWADEY IN PERGUNNAH JAMUCUNDI *v.* EMAMDAR BRAHMINS OF MOUZAH SOORPAL **7 W. R. P. C. 8 : 3 Moo. I. A. 383**

7. ——— **Effect of valid award on reference to arbitration**—*Defence of submission to arbitration and award upon the matter in suit before suit brought.* An award upon a question referred to arbitrators on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award. Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole. The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only. *Held,* that, in the absence of mistake or misconduct on the part of the arbitrators, the award was binding on the parties. BHAGOTI *v.* CHANDAN **I. L. R. 11 Calc. 383 : L. R. 12 I. A. 67**

8. ——— *Contract—Construction of agreement to refer—Breach of contract.* The plaintiffs, on the 4th August 1881, entered into a contract with the defendant for the sale to the latter of a quantity of goods of a certain description "to be delivered up to the 31st December 1881." The plaintiffs stipulated that they would make no sales of goods of the same description to others before 1st December 1881 ; and the contract contained an arbitration-clause to the effect that "if the buyers object to accept all or any of the goods offered to them by the sellers in fulfilment of the contract on the ground of any variance, difference from the sample or muster, inferiority in weight or quality or colour, or damage or defect, or any other ground whatsoever," such objections should, in case of disagreement, be referred to two arbitrators, one to be named by the sellers and the other by the buyers. Such arbitrators to decide "whether the buyers' objections were valid, and if so, what allowance on the whole contract-price will be a reasonably adequate compensation to the buyers for such variance, difference, inferiority, damage, or defect, if any, and such decision shall be final and binding on both parties." If either buyers or sellers failed "to name an arbitrator within two days after

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ESTOPPEL—*contd.*

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being requested by the other to do so, the decision of the arbitrators named by the buyers or sellers, as the case may be, shall be final and binding on both parties." The goods arrived in Calcutta between the 4th and 24th November 1881. On the 15th August the plaintiffs entered into other contracts with other buyers for the sale of the same description of goods at a lower price than that at which they had sold to the defendant; these contracts were on the terms that the goods were not to arrive in Calcutta until after the 31st December 1881. The defendant refused to accept the goods on the ground that the plaintiffs had committed a breach of the contract by entering into other agreements for sale of the same description of goods before the 1st December, and refused to pay the difference between the contract price and the market value which the plaintiffs demanded from him. The plaintiffs thereupon appointed an arbitrator, who (the defendant declining to appoint an arbitrator) proceeded to act in the matter, and, finding that the plaintiffs had not committed a breach of the contract, made an award in their favour for R850, the difference in price of the goods at the contract and market values. The plaintiffs sued to recover the amount due to them under the award, or in the alternative for R850 as damages for non-acceptance of the goods. *Held*, that the defendant was not estopped by the award from setting up the breach of the stipulation not to sell other goods of the same description before the 1st December 1881 as a defence to the suit. *Per* GARTH, *C.J.*—The question whether the plaintiffs, by making the other contract, had committed a breach of the stipulation, was not properly a subject of reference to the arbitrator under the arbitration clause. The general words in that clause, "or any other grounds whatsoever," mean any other grounds of a like character, and do not include a pure question of law. CARLISLES NEPHEWS & CO. *v.* RICKNAUTH BUCKTEARMALL . . . **I. L. R. 8 Calc. 809**

9. ——— **Agreement not to execute under terms**—*Order in conformity with agreement.* Where the parties to a suit have by natural agreement made certain terms and informed the Court of them, and the Court has sanctioned the arrangement and made an order in conformity with it, and the agreement has been acted upon, neither party is at liberty to resile from it. The question whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into; the party who seeks to raise such question being estopped by his own conduct, and the action of the Court taken thereunder. SHEO GOLAM LALL *v.* BENI PROSAD . **I. L. R. 5 Calc. 27 : 4 C. L. R. 29**

10. ——— **Benami leases**—*Lease in name of wife—Showing true nature of transaction. Held*, that it would be very inequitable that there should be anything in this country of the nature of the old English doctrine of estoppel by deed. A party giving a kabuliat nominally in favour of *A* is not estopped from pleading that he did not contract with *A* at all, and that he did not obtain the leased premises from her, but that she knew nothing of the transaction, her name being used merely as a matter of convenience between the lessee and her husband. KEDARNATH CHUCKERBUTTY *v.* DONZELLE . . . . . **20 W. R. 352**

11. ——— **Admission of validity of deed.** An admission by an adoptive mother in a suit brought by her mother-in-law to set aside the adoption, that an alleged unomuttee-puttur, under which her mother-in-law had previously professed to adopt a son to her deceased husband was valid, would not estop her adoptive son from denying the validity of that instrument in a suit subsequently brought by him for the assertion of his rights under the adopton. ANNUNDMOYE CHOWDHRAIN *v.* SHEEB CHUNDER ROY . . **Marsh. 455**

12. ——— **Admission of execution of deed**—*Contest as to validity.*—The mere fact of a person having in a previous suit admitted the execution of a deed, did not preclude her from contesting its validity and maintaining that it was a colourable and not a real conveyance. USHRUFOONESSA BEGUM *v.* GRIDHAREE LALL **19 W. R. 118**

13. ——— **Agreement not to execute decree**—*Wrongful execution in breach of agreement—Deed of conditional sale—Defeating claims of third persons—Maxim, "In pari delicto potior est conditio possidentis."* The plaintiff sued in 1875 to recover possession of immoveable property which the defendant had obtained in 1873, in execution of an *ex parte* decree dated the 8th June 1861. That decree was founded on a deed purporting to be a deed of conditional sale dated the 24th December 1853 executed by the plaintiff in favour of the defendant. The plaintiff alleged that the deed was executed in order to protect the property against the claims of plaintiff's son, and the plaintiff sought to set it aside on account of defendant's breach of an agreement dated the 16th January 1856, whereby the defendant stipulated that plaintiff's possession should not be disturbed. The defendant, *inter alia*, pleaded estoppel. *Held*, that plaintiff was not estopped from showing the real truth of the transaction between plaintiff and defendant, and from obtaining relief through the Court against defendant's breach of good faith, because of plaintiff's attempt to hinder or defeat the possible claim of a third party, the maxim "*In pari delicto potior est conditio possidentis*" not being applicable without qualification to India, where justice, equity, and good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed, when the parties claiming under it or their representatives have been induced to alter

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ESTOPPEL—*contd.*

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their position on the faith of such instrument. PARAM SINGH *v.* LALJI MAL **I. L. R. 1 All. 403**

14. ——— Benami conveyance—*Relation of landlord and tenant.* The plaintiff having sued to obtain possession of certain land which the defendant held as tenant, and in respect of which he had for some years paid rent, the defendant alleged that, prior to the time when he became tenant, the plaintiff had for good consideration conveyed to him the premises leased, together with other property. This conveyance was found to be a mere benami transaction. *Held*, that the plaintiff was not estopped from asserting the tenancy, and under the circumstances was entitled to recover. SABUKTULLA *v.* HARI . . . . **10 C. L. R. 199**

15. ——— Mortgage fraudulently made to defeat execution of decree—*Right of mortgagor to sue subsequently to recover possession.* In 1851 *T* obtained a decree against *G*, the father of the plaintiff. In order to defeat the execution of that decree, *G*, in collusion with one *B*, permitted the latter to obtain a decree based upon an award against him, and to sell the land in execution, at which sale *B* himself and another person purchased it. In 1857 these purchasers sold the property to *V* (defendant No. 1). In 1858 *T* attached the land in execution of his decree, but the attachment was raised on the application of defendants Nos. 1 and 3, who alleged that the property was theirs. In 1876 the plaintiff, who was the son of *G*, sued the defendants to recover possession. He alleged that the transaction was only ostensibly a sale, but was really a mortgage made by his father to the defendants, and that the defendants held as mortgagees. Two documents were produced (exhibits 19 and 18), dated respectively in the years 1855 and 1862, whereby defendant No. 1 as a mortgagee acknowledged the receipt of two sums of R375 from *G*. It further appeared that on the faith of exhibit 18 the defendants had been permitted to remain in possession for ten years without disturbance as mortgagees. The subordinate Courts held that the decree, sale, and re-sale of the lands were fraudulent and collusive transactions, and that *G* having been a party to the fraud, the plaintiff could not recover the lands from the defendants. On appeal:—*Held*, that the plaintiff was entitled to recover; that the defendants, having accepted repayment of R750 as mortgagees, and, as such, having been permitted to remain in possession of the lands without disturbance, were estopped from setting themselves up as purchasers or owners, which false character had been merely assumed for the purpose of defeating the execution of the decree obtained by *T*. MAHADAJI GOPAL BAKLEKAR *v.* VITTRAL BALLAL **I. L. R. 7 Bom. 78**

16. ——— Mortgage without being owner of property—*Subsequent ownership by mortgagor of the same property—Auction-purchaser—Validity of mortgage.* In 1871, *M*, the mortgagee of certain property, styling himself the owner of it, mortgaged it to *S*. In 1875 *M* became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against *M*, and *A* purchased it. *S* subsequently sued *M* and *A* to enforce the mortgage of such property to him by *M*. *Held*, that, inasmuch as, if *S* had at any time sued *M* to enforce such mortgage after he had become the owner of the mortgaged property and before *A* had purchased it, *M* would have been estopped from denying the validity of such mortgage, and as there was nothing fraudulent in such mortgage, and *A* had purchased with a knowledge of the facts after *M* had become the owner, *A* was estopped from denying the validity of such mortgage, and the mortgaged property was liable in his hands to *S*'s claim. SEVA RAM *v.* ALI BAKHSH . . . . **I. L. R. 3 All. 805**

17. ——— Declaration in deed of sale—*Admission.* The mere fact of a vendor declaring in her deed of sale of a moiety of a landed estate that she was the proprietor only of that moiety, and that the other moiety belonged to her deceased sister's son, was held not to be conclusive evidence against her being proprietor of the other moiety, nor to injure the right of a purchaser from her of such moiety. NUNHOO SAHOO *v.* BOODHOO JUMMADUR **13 W. R. 2**

18. ——— Suit on a document executed by defendant in which he was described as a trader—*Plea in suit that he was an agriculturist—Dekkhan Agriculturists' Relief Act (XVII of 1879).* The mere fact that the defendant described himself in the instrument, on which the suit was brought, as a trader, would not of itself estop him from pleading at the trial that he was an agriculturist, and entitled to the protection of the Dekkhan Agriculturists' Relief Act. There must be evidence to show that by describing himself as a "trader" he represented himself as a trader, and intended that that representation should be acted on by the plaintiff. KADAPPA *v.* MARTANDA . . **I. L. R. 17 Bom. 227**

19. ——— Statement in deed of assignment—*Evidence of knowledge of alteration in purpose of assignment.* The plaintiffs received an assignment of debt due to a third person not a party to the suit. The document assigning the debt showed on the face of it that the assignment was an absolute payment to the plaintiff, and evidence went to show that such payment was in part payment of a debt due from the defendants to the plaintiff. *Held*, that, in default of evidence to show that the defendants were aware of any intended alteration in the apparent purpose of the assignment, the plaintiff was precluded from saying that he had received it in any other light. SCINDE, PUNJAB, AND DELHI BANK *v.* MUDHOOSOODUN CHOWDHRY **Bourke O. C. 322**

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ESTOPPEL—*contd.*

3. ESTOPPEL BY DEEDS AND OTHER DOCUMENTS—*contd.*

20. ——— Recital in deed of sale—*Title proof of—Variance between Pleading and Proof.* *A* claimed certain property from *B*, the daughter of *C*, on the ground that on the death of *C* it had descended to *D* as the heir of *C*, and produced a kobala containing a recital that on the death of *C*, who had died childless, it had descended to *D*. *Held*, that *A* was not estopped from proving that *C* had left a son, *E*, who survived him, and that *D* was entitled to the property as *E*'s heir, and that *D*'s heir could give the title to such property. GOUR MONEE DEBEA *v.* KRISHNA CHUNDER SANNYAL

I. L. R. 4 Calc. 397

21. ——— *Estoppel by agreement—Grantor and grantee—Possession obtained from a grantor, without title—Title subsequently acquired by purchase—Denial of grantor's title—Constructive trust.* The defendant having obtained possession of some land under a deed of sale from *P*, who had no title to it afterwards perfected his title by purchase from the real owner. In a suit for recovery of possession of the land brought by the plaintiff, claiming to be a subsequent purchaser from *P*, on the ground that the previous purchase by the defendant was a fraudulent one. *Held*, that the defendant was not estopped from denying *P*'s title and setting up his own as purchaser from the real owner. *Per* RAMPINI, *J.*—The estoppel only exists so long as the grantee claims under the title of his grantor alone. *Dalton* v. *Fitzgerald*, [*1897*] *1 Ch. Div. 440*; on appeal, [*1897*] *2 Ch. Div. 86*, distinguished. *Paine* v. *Jones*, *L. R. 18 Eq. 320*, referred to. *Per* WOODROFFE, *J.*—Ss. 116 and 117 of the Evidence Act are not exhaustive of the doctrine of estoppel by agreement. The ground of the rule of estoppel laid down in *Dalton* v. *Fitzgerald*, [*1897*] *1 Ch. Div. 86*, and similar cases examined. The principle of the rule in such cases is that where property is taken under an instrument and the taking possession is in accordance with a right, which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived, there is an estoppel. The ground of the rule of estoppel in the case of bailees, tenants, licensees and acceptors of bills of exchange indicated. RUP CHAND GHOSE *v.* SARBESSUR CHANDRA CHUNDER (1906) . . . **I. L. R. 33 Calc. 915**
s.c. 10 C. W. N. 747

22. ——— *Transfer of Property Act (IV of 1882), s. 55, cl. (4) (b), cl. (6)—Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Evidence Act (I of 1872), s. 115.* In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect.

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The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property. *Held*, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds. *Per* BATCHELOR, *J.*:—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. TEHILRAM *v.* KASHIBAI (1908) . . **I. L. R. 33 Bom. 53**

23. ——— Estoppel of judgment-debtor by previous petition—*Application to set aside sale in execution of decree not mentioning fraud and irregularity.* The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made no mention of the irregularities relied on does not create an estoppel. *Mahtab Deo* v. *Leelanund Singh*, *I. L. R. 7 Calc. 613*, followed. RAMAN *v.* KUNHAYAN . . **I. L. R. 17 Mad. 304**

24. ——— Parties to suit both deriving title from the same document—*Question of validity of document—Suit for possession.* The plaintiff sued the defendant to recover a sum of money by attachment and sale of certain property in the legal possession of the defendant. Both the plaintiff and the defendant professed to derive their title by virtue of a document which the Court found was invalid according to Mahomedan law. *Held*, that the defendant was not estopped from denying its validity, and the Court was not bound to hold that the document, as between the parties, was valid. The defendant being in possession, it was for the plaintiff to establish her right to attach and sell the property by showing superior title in herself, whatever might be the rights of the defendant. KUVARBAI *v.* MIR ALAM KHAN

I. L. R. 7 Bom. 170

25. ——— Rights of transferee of sub-lessee—*Lease, construction of—Right to deny validity of lease.* A Government farmer of a village (the farm being for his life) sub-leased it, and the sub-lessee, in consideration of a certain sum, made a perpetual lease in favour of the defendant at a certain annual quit-rent. Subsequently the proprietary settlement of the village (the possession being conditional on expiry of farm) was made with the sub-lessee, whose proprietary rights having been sold at auction were purchased by the plaintiff, who sued to set aside the lease. *Held*, on the construction of

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ESTOPPEL—*contd.*

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the lease, that the proprietor professed it to be a perpetual lease, without reference to its determination on the expiry of the sub-lease, and that the auction-purchaser, being the *locum tenens* of the person whose rights he purchased, was estopped, as would have been the latter, from questioning the validity of the lease in favour of the defendant. KURN CHOWBEY *v.* JANKEE PERSAD . . **1 Agra 164**

26. ——— Acquiescence—*Right of Hindu widows—Effect of alienation of interest in subject of suit.* A Hindu dying intestate left two widows (*D* and *M*) as his co-heiresses. A document put forward by a third party (*H*) as a will of the deceased having been set aside by the Courts, an order was passed in a summary suit, under Act XIX of 1841, by which the property was equally divided between the widows. One of them (*D*) subsequently died, leaving a will disposing of her share to her relatives. Steps were taken during *D*'s life by the other widow (*M*) and by *H* to resist the registration of the will ; and after *D*'s death, *M* applied for the attachment of *D*'s share and the appointment of a curator. Her application being dismissed, she commenced a regular suit. *Held*, that *M*'s original acquiescence in the title set up by *H* did not deprive her of any rights which accrued to her as one of the co-heirs of her husband when that claim was decided to be untenable, nor could her alleged alienation of her share bar her present suit. BHUGWANDEEN DOBEY *v.* MYNA BAEE
9 W. R. P. C. 23 : 11 Moo. I. A. 487

27. ——— Solehnama, effect of—*Finding by Judge on remand—Special appeal.* In a case which was remanded to be tried on its merits, the remanding Judges being of opinion that it was not barred, the additional Judge of the zillah adhered to his former opinion that the plaintiff's claim was barred by limitation, but found as a fact that she had been a party to a solehnama and other acts by which she was estopped from her present claim. *Held*, that the additional Judge was wrong in entering again into the question of limitation ; but that his finding of fact could not be interfered with in special appeal, and that the plaintiff was barred by the solehnama from maintaining this suit. *Bhugwan Deen Dobey* v. *Myna Baee, 9 W. R. P. C. 23*, distinguished. JUDOOBUNSEE KOOER *v.* ASMAN KOOER . **14 W. R. 370**

28. ——— Minor, contract by—*Deed of relinquishment executed by minor—Ratification by acquiescence.* *A* sued in 1885 to recover certain estates from *B*, alleging claim under his adoption, which took place in 1865. In 1875 *A*, being still a minor, relinquished by deed his claim to the estates for R12,000, but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title, who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878. *Held*, that, whether the cause of action arose in 1865 or 1867, it

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was equally barred from 1879 : and that the plaintiff was bound by the deed of relinquishment. Assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. His conduct of acquiescence in it had, moreover, acted as a ratification of the contract of relinquishment. VENKATACHALAM *v.* MAHALAKSHMAMMA . . **I. L. R. 10 Mad. 272**

29. ——— Objection of minority raised after completion of purchase and possession by vendees. The vendees in a suit to enforce a right of pre-emption, set up as a defence to the suit that the sale was invalid, on the ground that they were minors, and therefore incompetent to contract. *Held*, that, as they had paid their money to the vendor and the conveyance had been perfected, and they were in possession of the property, they were estopped from urging such ground. KHEM KARAM *v.* HAR DAYAL . **I. L. R. 4 All. 37**

30. ——— Plea of non-liability to pre-emption of property acquired by pre-emption. The fact that a property has been acquired under a claim of pre-emption does not estop the person who has acquired it from pleading that the right of pre-emption did not extend to such property. SALIG RAM *v.* DEBI PARSHAD . . **7 N. W. 38**

31. ——— Signature on blank bond—*Blank stamped paper.* Where a person chooses to entrust to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself, in order that the instrument may be duly drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt the *bonâ fides* of the transaction, it must, in the absence of any evidence to the contrary, be taken that the bond was drawn in accordance with the obligor's wishes and instructions. WARIDUNNESSA *v.* SURGADASS . **I. L. R. 5 Calc. 39**

32. ——— Destruction of document—*Omnia præsumuntur contra spoliatorem.* In a suit brought against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land, the only issue being whether the land was the private property of the judgment-debtors or Government service land, the plaintiff alleged that the land had been granted in fee mainly by a sanad which he petitioned the mamlatdar of the pergunnah to search for and send to the Collector ; and on reference by the High Court, the District Judge found that the Collector did destroy the document that purported to be a copy of a sanad, such as the plaintiff petitioned the mamlatdar to send for. *Held*, that it was not competent for the defendant to say that the document was not such a one as could be legally admitted in evidence, and that the case came within the rule, *omnia præsumuntur*

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ESTOPPEL—*contd.*

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contra spoliatorem. ARDESHIR DHANJIBHAI *v.* COLLECTOR OF SURAT . . **3 Bom. A. C. 116**

4. ESTOPPEL BY JUDGMENT.

1. _____ **Civil Procedure Code, 1882, s. 13 (1859, s. 2).** The doctrine laid down in the *Duchess of Kingston's Case, 2 Sm. L. C. 679,* as to estoppel by judgment is applicable to cases tried under the Civil Procedure Code, s. 2 of which is consistent with that rule. KHUGOWLEE SINGH *v.* HOSSEIN BUX KHAN
7 B. L. R. 673 : 15 W. R. P. C. 30

2. _____ **Decree**—*Difference between decree and agreement on which it was based.* So long as a decree subsists unreversed and unvaried, the parties thereto and those claiming under them are bound by it, and no effect can be given to any prior agreement regarding the same matter on the ground that the terms of the decree differ from those of the prior agreement, notwithstanding that the parties had requested the Court which passed the decree to draw it up according to the terms of the agreement. JANKIBAI *v.* ATMARAM BABURAV
8 Bom. A. C. 241

3. _____ **Decree in suit on kabuliat**—*Subsequent suit on same kabuliat.* A suit for rent was brought against the guardian of a minor, and the Court gave a decree founded on a kabuliat given by the ancestor of the minor. After the minor had come of age, a suit was brought against him for subsequent arrears under the kabuliat. *Held,* that he was estopped by the decree in the former suit from denying the validity of the kabuliat. TARINEEPERSAUD GHOSE *v.* SREEGOPAUL PAUL CHOWDHRY . . . **Marsh. 476 : 2 Hay 593**

4. _____ *Dismissal of suit on failure to prove kabuliat—Pleadings, admission in statement in.* Plaintiff sued before on a kabuliat of 1864, and did not admit in his plaint that he had cancelled a former kabuliat of 1862, but merely alleged that the defendant had executed the kabuliat of 1864 which recited that the kabuliat of 1862 had been voluntarily cancelled by the defendant. The defendant denied the kabuliat of 1864 and the plaintiff, having failed from inability to prove it, was not estopped now from suing on the kabuliat of 1862, and saying that that kabuliat was not legally cancelled by him. DOYNE *v.* KHOODEE RAM MUNDUL . . . **5 W. R. S. C. C. Ref. 16**

5. _____ **Decision of genuineness of documents.** An affirmation in general terms of the right of a plaintiff in a suit, which was based in some measure upon certain documents, is not such a decision between the parties as precludes the defendant from raising a question as to the genuineness of these documents in a subsequent suit between the same parties. HURREEHUR MOOKERJEE *v.* OOMA MOYEE DOSSEE . . . **12 W. R. 525**

ESTOPPEL—*contd.*

4. ESTOPPEL BY JUDGMENT—*contd.*

6. _____ **Order for execution of decree without notice to judgment-debtor.** A judgment-debtor, against whom an order for execution has been obtained behind his back, is not estopped from afterwards contending that there exists no decree which can be executed. ISHWARDAS JAGJIVAN DAS *v.* DOSIBAI . **I. L. R. 7 Bom. 316**

7. _____ **Order disallowing objections to attachment**—*Civil Procedure Code (1859), s. 246; (1879) s. 283.* *L,* in execution of a decree against *S,* a member of an undivided Hindu family, for a personal debt, attached the interest of *S* in certain lands alleged to be the joint property of the family of *S.* *K* intervened, and objected to the attachment on the ground that the property was not family property or partible. The objection was disallowed under s. 246 of the Code of Civil Procedure (Act VIII of 1859). No suit was brought by *K* within one year from the date of the order, but *L,* who purchased the right of *S* in the lands attached and sold, did bring a suit within a year from the date of the order to obtain what he had bought at the Court sale from *K* and others. *Held,* that *K* was estopped from again pleading that the same property was not family property or partible. BAILBUR KRISHNA RAU *v.* LAKSHMANA SHANBHOGUE
I. L. R. 4 Mad. 302

8. _____ *Civil Procedure Code, 1859, s. 249, rejection of claim under—Limitation—Adverse possession, plea of.* An order passed under s. 246 of the Code of Civil Procedure, 1859, rejecting a claim after investigation, will, if not contested by suit by the claimant, estop him afterwards from pleading adverse possession at the date of the order in a suit brought to eject him by the decree-holder. VELAYUTHAN *v.* LAKSMANA
I. L. R. 8 Mad. 506

9. _____ *Civil Procedure Code, 1882, s. 335—Order rejecting claim-petition.* An order rejecting a claim-petition under s. 335 of the Civil Procedure Code, not being appealed against within one year, acquires the force of a decree, *Velayuthan* v. *Lakshmana, I. L. R. 8 Mad. 506,* followed. ACHUTA *v.* MAMMAVU
I. L. R. 10 Mad. 357

10. _____ *Order rejecting claim under Civil Procedure Code, 1882, s. 281—Parties—Non-joinder of puisne mortgagee in a mortgage suit—Right of redemption—Transfer of Property Act (IV of 1882), s. 85—Claim in execution to mortgage premises.* A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognizing the priority of the decree-holder's lien and giving to the second mort-

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ESTOPPEL—*contd.*

4. ESTOPPEL BY JUDGMENT—*contd.*

gagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off, and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land, and his claim was resisted by the second mortgagee. *Held*, (i) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (ii) that the second mortgagee was estopped from now re-asserting his claim. KRISHNAN *v.* CHADAYAN KUTTI HAJI

I. L. R. 17 Mad. 17

11. ——— *Civil Procedure Code (Act VIII of 1859), s. 246—Civil Procedure Code (Act XIV of 1882), ss. 281, 283—Limitation Act (XV of 1877), Sch. II, Art. 11—Limitation Act (IX of 1871), Sch. II, Art. 15—Suit for possession.* In certain execution-proceedings land was attached, but before the sale the judgment-debtors, with the permission of the Court, sold the land to the plaintiffs. Previous to this sale, certain persons had come forward in the execution-proceedings, and had claimed the land as having been sold to them by the father of the judgment-debtors: this claim was disallowed in November 1876. In 1881 the plaintiffs, alleging that they had been dispossessed by certain persons, amongst whom were the claimants in the execution-proceedings, brought a suit to recover possession of this land against these persons. This suit was decided against the plaintiffs in the lower Appellate Court, on the ground that they had failed to prove that they had been in possession of the land twelve years before suit. On appeal to the High Court, the plaintiffs, appellants, contended that the claim of the defendants in the execution-proceedings having been rejected, and they not having brought a regular suit wthin one year from the order of rejection to establish their right to possession, the defendants were prevented by that order from contending that the plaintiffs had not been in possession at the time of that order. *Held*, that the order did not operate as an estoppel against the defendants; and even if it could so operate, it would not do so until the time had run out within which they could have brought a suit to establish their right to possession, and that such time had not expired. GEND LALL TEWARI *v.* DENONATH RAM TEWARI . . . **I. L. R. 11 Calc. 673**

12. ——— **Construction of decree made in order in execution-proceeding**—*Finality of such order—Omission to appeal against order.* A Court having jurisdiction decided in the course of execution-proceedings (in an order which was not appealed) that the decree to be executed awarded mesne profits according to its true construction. *Held*, that this decision had become final between the parties, not under s. 13 of Act X of 1877, but upon general principles of law, as an interlocutory order in the suit. The order construing the decree having been made in the same suit in which the application was made, the question whether the law of *res judicata* applied was not relevant, that term referring to a matter decided in another suit. RAM KIRPAL *v.* RUP KUARI

I. L. R. 6 All. 269 : L. R. 11 I. A. 37

13. ——— *Civil Procedure Code, s. 13, expl. II—Execution of decree—Principle of res judicata as applied to execution proceedings—Decision not in another suit, but in same suit.* Where a person on his own application was added as a party respondent to an appeal, and on the case on appeal being remanded under s. 562 of the Code of Civil Procedure for re-trial on the merits, practically took no steps whatever to defend the suit:—*Held*, that he could not afterwards plead by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it. *Ram Kirpal* v. *Rup Kuari, I. L. R. 6 All. 269*, referred to. KISHAN SAHAI *v.* ALADAD KHAN

I. L. R. 14 All. 64

14. ——— In reference to an application for execution of a decree, a Court made an order between the parties construing the decree to award interest at a certain rate till payment. *Held*, that no contrary construction could be placed upon the decree in a subsequent application in the execution proceedings. *Ram Kirpal* v. *Rup Kuari, I. L. R. 6 All. 269*, referred to and followed. BENI RAM *v.* NANHU MAL

I. L. R. 7 All. 102 : L. R. 11 I. A. 181

15. ——— **Decree in suit to set aside adoption**—*Reversioner. Quære:* Whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff. JUMOONA DASSYA *v.* BAMASCONDARI DASSYA

I. L. R. 1 Calc. 289 : 25 W. R. 235
L. R. 3 I. A. 72

See BHAGWANTA *v.* SUKHI **I. L. R. 22 All. 33**

and CHHEDDU SINGH *v.* DURGA DYI

I. L. R. 22 All. 352

16. ——— **Effect of decree appealed from after compromise on appeal**—*Limit of rule—No bar to persons contesting inter se under a title derived from one of the original litigants.* An adoption having been held to be valid by the High Court on appeal from a Subordinate Court, an appeal to the Privy Council was preferred, when the parties entered into a compromise and the appeal was permitted to be withdrawn. *Held*, that the decree of the High Court as to the validity of the adoption became final and was not affected by the compromise so as to allow the matter to be again litigated between the parties or their privies. Although the decision of a Court as to the validity of an adoption in a suit between *A* and *B* may, in any subsequent proceedings between *A* and those claim-

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ESTOPPEL—*contd.*

4. ESTOPPEL BY JUDGMENT—*contd.*

ing under him on the one side and *B* and those claiming under him on the other, estop the parties to such proceedings from again questioning the validity of the adoption, yet in a suit where both the contesting parties claim under *B*, such decision will not operate as an estoppel so as to prevent the validity of the adoption being again questioned by either party to such suit. VYTHILINGA MUPPANAR *v.* VIJAYATHAMMAL . . **I. L. R. 6 Mad. 43**

17. ——— Decree in compromised suit—*Purchaser pendente lite.* A person who buys with her eyes open, *pendente lite*, cannot maintain a suit involving a revival and re-trial of the very question decided in her vendor's suit. NADUROONISSA BIBEE *v.* AGHUR ALI CHOWDHRY **7 W. R. 103**

18. ——— Decree in suit to impeach conditional sale—*Purchaser from conditional vendor.* The purchaser of the conditional vendor's interest pending the suit to impeach the conditional sale must be bound by the decree in that suit. GHAZEE-OODDEEN *v.* BHOOKUN DOOBEY **2 Agra 301**

19. ——— Decrees against sisters with life-interest in property of father—*Effect of, on survivor.* The survivor of several Hindu sisters is not bound by decrees obtained against her sisters during their lives, whose interest was only a life interest in their father's property, which on their death passed to the survivor as heir of her father. JOYGOBIND SOHOY *v.* MAHTAB KOONWAR **7 W. R. 1**

20. ——— Decree as to right of way—*Effect of, as against auction-purchaser of lands in mortgage suit.* *A* brought a suit against *B* to have it declared that *B* possessed no right of way over his lands. This suit was dismissed, and *B* obtained a decree establishing his right. Previous to the institution of this suit, *A* had mortgaged the same lands to *C*, who, after the suit, caused the lands to be sold under his mortgage, and became the purchaser at the auction-sale. In a suit by *C* against *B* to have it declared that no such right of way existed over the lands :—*Held*, that *C* was not estopped by the previous decision against *A*, his mortgagor, from again raising the question of the validity of the right of way over the said lands. BONOMALEE NAG *v.* KOYLASH CHUNDER DEY **I. L. R. 4 Calc. 692**

21. ——— Reliance by plaintiff on case in their favour subsequently reversed. Where the plaintiffs appealed in both the lower Courts to the jurisdiction for the determination of a previous suit as evidence in their favour, and embodied it in their plaints as being a material particular of the cause of action which they proposed to establish, they were not allowed in appeal to the High Court to object to the reception by the lower Appellate Court of the judgment in question as evidence in the present cause, on the ground that they were not parties to that case, although the Judge, on review, reversed the judgment he had already passed in favour of these plaintiffs on the strength of the decision of the High Court, which reversed the judgment in the previous suit on which the plaintiffs had relied. PANIOTY *v* PARBUTTY CHOWDHRAIN . . . **8 W. R. 492**

22. ——— Decree in former unsuccessful suit—*Raising same title as defence in subsequent suit.* The fact that a person failed to establish a prescriptive title in a suit in which he was plaintiff, does not debar him from defending his right of possession against another plaintiff suing him for the property. SHRIDHAR VINAYAK *v.* BABAJI BIN JIVAJI . . **6. Bom. A. C. 220**

23. ——— Suit for wasilat after decree for possession—*Setting up title of third party.* In a suit for wasilat brought after a decree awarding possession to the plaintiff the defendant cannot set up the title of a third person. BENGAL COAL COMPANY *v.* DAREEMBAH DAHEA **Marsh. 105 : 1 Hay. 181**

24. ——— Decision in former suit declaring patni sale valid—*Claim in another form.* Where a patni talukh had been sold for arrears of rent, and certain persons, claiming to have been in possession of the superior zamindari rights in the estate, had sought on a former occasion to set aside the sale, but had failed, and now renewed the attempt :—*Held*, that, even if the claim of these persons to the zamindari rights had been proved, which was not the case, they could not now repeat their old suit against the patnidar in a new form : still less could they, after having always denied the existence of the patni talukh, now claim in appeal to be its owners, if it existed. HURO NATH DASS *v.* ROMA NATH SURMA **25 W. R. 321**

25. ——— Decree on disclaimer of title by defendant in written statement. If one of the defendants in a suit for possession puts in a written statement disclaiming all interest in the property in suit and a decree is made by reason and on the faith of such disclaimer, the decree is valid against him and he is absolutely concluded by it so long as fraud is not proved. RADHA KISHEN CHOWDHRY *v.* KOMUL SHAW **25 W. R. 128**

26 ——— Decree by consent in former suit—*Evidence Act, s. 116—Suit for possession.* Plaintiff alleged a purchase of land from *A* and *B*, of which he afterwards granted them a pottah and retained them in possession, and he put in evidence a consent decree obtained against *B* for arrears of rent. *Held*, in a suit brought to recover possession on the ground of the tenancy having expired, that the decree worked no estoppel against *B* by virtue of s. 116 of the Evidence Act, and did not relieve the plaintiff from the necessity of proving his case completely. SOLDAR MUNDUL *v.* NILCOMUL CHATTERJEA . . . . **1 C. L. R. 528**

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ESTOPPEL—*contd.*

4. ESTOPPEL BY JUDGMENT—*concld.*

27. ——— Judgment by consent. A judgment by consent raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. LAKSMISHANKAR DEVSHANKAR *v.* VISHNURAM **I. L. R. 24 Bom. 77**

28. ——— Decree establishing joint liability—*Suit for contribution—Denial of liability.* Where a joint decree, passed against several defendants, has been satisfied out of the property of one of them, and then a subsequent suit for contribution has been brought by the latter against her co-defendants in the former suit, there is nothing to prevent the defendants from showing that, as between themselves and the plaintiff, the latter alone was liable to satisfy the decree in the former suit, and that consequently they are not liable to contribute. ASMAN SING *v.* AJNAS KOER **2 C. L. R. 406**

29. ——— Decree against karnavan, effect of—*Representation by karnavan of members of Malabar tarwad—Civil Procedure Code, 1882, ss. 13 and 30.* Although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad in a suit, the decree therein does not raise an absolute estoppel against members not actually brought on the record. *Ittiachan* v. *Vellappan, I. L. R. 8 Mad. 484;* and *Sri Devi* v. *Kelu Eradi, I. L. R. 10 Mad. 79,* followed. KOMAPPAN NAMBIAR *v.* UKKARAN NAMBIAR . . . **I. L. R. 17 Mad. 214**

30. ——— Competent Court—*Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Court of competent jurisdiction—Whether a decision of a previous suit for compensation was one of a Court of competent jurisdiction to bar a subsequent claim for compensation in a suit for arrears of rent, as well as for compensation—Mixed question of law and fact.* A suit for compensation was brought in the Court of the Munsif at Goas in 1868 by the plaintiff (*patnidar*) against the defendant's predecessors (*darpatnidars*), upon the basis of a *darpatni kabuliyat,* which stipulated that the *darpatnidars* would deliver certain articles to the plaintiff's landlord, or in default they would compensate the plaintiff for any damage she might sustain. The Court (which had no jurisdiction to try suits for rent) gave a decree to the plaintiff for damages which she had sustained for the *darpatnidars'* default. In a subsequent suit brought by the same plaintiff against the same defendants in the Court of the Munsif at Moorshidabad for arrears of rent, as well as for compensation for breach of the aforesaid contract, it was contended on behalf of the defendants that the decision in the previous suit, so far as compensation was concerned, could not operate as *res judicata. Held,* that, although the Court of the Munsif at Goas was not competent in 1868 to entertain a suit for arrears of rent, it was competent to entertain a suit for compensation for breach of contract, and, as the previous suit was not a suit for arrears of rent, nor was the claim in the subsequent suit, so far as it related to the amount of compensation under the stipulation, a claim for arrears of rent, so the decision in the previous suit was a decision of a competent Court, and it would operate as *res judicata. Held,* also, that on the previous suit a particular stipulation contained in a particular *kabuliyat* having been held to be valid as between the parties, it was not open to the Court subsequently to try the issue whether that particular stipulation was valid or not, the question being a mixed question of law and fact. A decision in a previous suit on a question of law, even if erroneous, would operate as *res judicata* in a subsequent suit. *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar, I. L. R. 5 Mad. 304,* dissented from. BISHNU PRIYA CHOWDHURANI *v.* BHABA SUNDARI DEBYA (1901) **I. L. R. 28 Calc. 318**

31. ——— Decree—*Whether a decree estops a person not a party to it—Evidence.* Certain property conveyed by one Abdul Ali to his wife was purchased by one *G* at a sale held in execution of a mortgage-decree against the wife. In a previous suit, to which *G* and all the heirs of Abdul Ali were parties, it was held that the heirs of Abdul Ali were estopped from showing that the conveyance by Abdul Ali to his wife was a fictitious transaction, and a decree was made in *G*'s favour. In a subsequent suit between *G* and one *B,* who was no party to the previous suit: *Held,* that *B* was not estopped by that decree from disputing *G*'s title to the property. BROJENDRA KUMAR ROY CHOWDRY *v.* GOPI MOHAN ROY (1903) . **7 C. W. N. 574**

32. ——— Representative of deceased plaintiff—*Civil Procedure Code, ss. 401 et seq.—Suit in formâ pauperis—Death of plaintiff—Decree passed in ignorance of plaintiff's death—Appeal—Consent order for re-trial—Objection to plaintiff's representative suing in formâ pauperis.* The plaintiff in a suit brought *in formâ pauperis* died, but in ignorance of her death the Court passed a decree in her favour. The defendant appealed, making respondent to his appeal a lady whom he alleged to be the legal representative of the deceased plaintiff. On this appeal an order was passed, by consent of parties, sending back the suit to be re-tried on the merits as between the defendant and the person nominated by him as plaintiff, and it was so re-tried, and a decree was again passed in favour of the plaintiff. *Held,* that it was not thereafter open to the defendant to object that there had been no inquiry into the right of the representative of the original plaintiff to sue as a pauper. AKBAR HUSAIN *v.* ALIA BIBI (1902) **I. L. R. 25 All. 137**

33. ——— Purchaser of land—*Estoppel by judgment—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Purchaser, previous suit—Defence in previous suit—Vendor, possession of—Pleader, non-disclosure of facts by—Evidence Act (I of 1872), s. 115—Fraud—Silence, when fraudulent.* A purchaser of land cannot be estopped

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ESTOPPEL—*contd.*

4. ESTOPPEL BY JUDGMENT—*contd.*

by a judgment in a suit against his vendors commenced after the purchase, although the former had, as pleader for the vendors, actively defended the suit. *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan, and Agency Company,* [*1894*] *1 Ch. 578 ; Mohunt Das* v. *Nilkomal Dewan, 4 C. W. N. 283,* followed. If, however, the purchaser had allowed the vendors to remain in possession intending to mislead the plaintiff, who, having been so misled, had sued them, the decree in suit would bind him on the ground of fraud. Silence amounts to fraud for which a Court will grant relief only, when it is the non-disclosure of those facts and circumstances, which one party is *legally* bound to communicate to the other. *Fox* v. *Mackreth, 2 R. R. 55,* followed. *M'Kenzie* v. *British Linen Company, 6 App. Cas. 82,* distinguished. The silence must also be a true cause of the change of position of the other party. *Pickard* v. *Sears, 6 A. & E. 469 : 45 R. R. 538,* referred to. A person conducting as pleader the defence on behalf of a defendant is under no legal obligation to disclose to the plaintiff the fact that the defendant had, prior to the suit, transferred the subject-matter of the suit to him. *Mohunt Das* v. *Nilkomal Dewan, 4 C. W. N. 283,* referred to. S. 115 of the Evidence Act (I of 1872) does not apply to a case in which a belief, otherwise caused, has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised. JOY CHANDRA BANERJEE *v.* SREENATH CHATTERJEE (1905)
I. L. R. 32 Calc. 357

5. ESTOPPEL BY CONDUCT.

See HINDU LAW—SELF-ACQUISITION.
I. L. R. 33 Calc. 1119

1. ——— Representation made to, and acted upon by, party. When a person wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he and those who claim under him are conclusively bound by the representation so made. AMEER ALI *v.* SYED ALI . . **5 W. R. 289**

BANEEPERSHAD *v.* MAUN SINGH . **8 W. R. 67**

2. ——— Evidence Act, 1872, s. 115 —*Permitting person to believe in and act upon the truth of anything.* S. 115 of the Evidence Act, which contemplates a person "by his declaration, act, or omission intentionally causing or permitting another person to believe a thing to be true and to act on that belief" in which case he cannot "deny the truth of the thing" refers to the belief in a fact and not in a proposition of law. RAJNARAIN BOSE *v.* UNIVERSAL LIFE ASSURANCE CO.
I. L. R. 7 Calc. 594
10 C. L. R. 561

3. ——— *Admission of point of law.* An admission on a point of law is not

ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

an admission of a "thing" so as to make the admission matter of estoppel within the meaning of s. 115 of the Evidence Act. *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore, 9 B. L. R. 377 : L. R. I. A. Sup. Vol. 47,* and *Gopee Loll* v. *Chundrablee Buhoojee, 11 B. L. R. 391,* referred to. JAGWANT SINGH *v.* SILAN SINGH . **I. L. R. 21 All. 285**

4. ——— *Estoppel caused by representation on which action has followed —Title, as between rival purchasers supported by an estoppel affecting the assignee of the person estopped—Notice.* The law enacted in the Evidence Act, 1872, s. 115, relating to estoppel as a consequence of declaration, act, or omission causing another's belief, and action thereon, does not differ from the English law on that subject, of which the general principle is stated in *Cairncross* v. *Lorimer, 3 H. L. C. 829.* The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act, or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake or misapprehension. The word "intentionally" seems to have been used in s. 115 for the purpose of declaring the law as it had been stated to be in judgments in England. On this point, the opinions expressed in the judgments in *Ganga Sahai* v. *Hirah Singh, I. L. R. 2 All. 809,* and in *Vishnu* v. *Krishnan, I. L. R. 7 Mad. 3,* referred to and disaffirmed. A widow had held benami, for her husband during his life, property as to which he had executed a hibanama in her favour. After his death, she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the property comprised in the hibanama and in the mortgage, the plaintiff derived his title from the son, having purchased his inherited share of the estate, while the defendants relied on a purchase at a sale in execution of a decree obtained by the mortgagee. *Held,* that s. 115 of the Evidence Act was applicable. The son had represented that the hiba gave a right to his mother to mortgage, and consequently neither he nor his representative in estate could be allowed to deny the truth of this representation, intentionally made on his part, which also had been acted on by the mortgagee; and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of the mortgagee's interest, at a sale regularly carried out, would have acquired a valid title to the property, although such purchaser might have been fully aware of all the circumstances. SARAT CHUNDER DEY *v.* GOPAL CHUNDER LAHA . . **I. L. R. 20 Calc. 296**
L. R. 19 I. A. 203

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

5. ——— **Representative**—*Representation by person other than party through whom plaintiff claims—Suit for property through prior holder.* Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to rothsentations made by any one except that other person. RANGA RAU *v.* BHAVAYAMMI **I. L. R. 17 Mad. 473**

6. ——— **Minor, fraud by**—*Fraudulent representation by minor that he was of age—Contract by minor.* A minor representing himself to be of full age sold certain property to *A* and executed a registered deed of sale. The deed contained a recital that he was twenty-two years of age. *Held,* in a suit by him to set aside the sale on the ground of his minority, that he was estopped. GANESH LALA *v.* BAPU . . . **I. L. R. 21 Bom. 198**

7. ——— **Intention of parties as evidenced by their acts**—*Execution of deed of partition—Vendor and purchaser.* Whatever may by the real intention amongst themselves of some of the members of a Hindu joint family in executing a deed of partition, purchasers from them have an undoubted right to bind them by the execution of the deed and their public acts attending it to the fulfilment of those obligations which such public acts cast upon them. SUKHIMANI DASI *v.* MAHENDRO NATH DUTT . . . . **4. B. L. R. P. C. 16**

s.c. SOOKHEEMONEE DOSSEE *v.* MOHENDRO NATH DUTT . . . **13 W. R. P. C. 14**

8. ——— **False representations to induce others to contract.** Parties who by false representations induce others to enter into contracts are estopped from afterwards falsifying their statements, and, if necessary, may be compelled to make them good. RADHAKISHEN *v.* SHUREEFUNNISSA . . . . **W. R. 1864, 11**

9. ——— **Conduct of complainant conducing to acts complained of**—*Claim to relief.* If the person who asks for redress is a party who has countenanced the acts of which he complains, the Court is bound to refuse him any redress or assistance. BHYRO DUTT *v.* LEKHRANEE KOOER **16 W. R. 123**

10. ——— **Suit by guardian to set aside lease made by herself.** A guardian was not allowed, after having given a lease of the minor's property, to bring a suit to set it aside, because it was prejudicial to the minor's interests. Where a suit was brought under such circumstances, it was dismissed with costs, the Court leaving the minor to sue to set aside the lease through some other person as next friend. MONMOHINEE JOGINEE *v.* JUGOBUNDHOO SADOOKHAN . . **19 W. R. 233**

11. ——— **Mortgage by minor**—*Voidable mortgage—Estoppel—Evidence Act (I of 1872), s. 115—Fraud—Specific Relief Act (X of 1877), ss. 38, 41.* The general law of estoppel, as enacted by s. 115 of the Evidence Act (I of 1872), will not apply to an infant, unless he has practised fraud

ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

operating to deceive. A court administering the equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of the Court must come with clean hands and must establish, not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud. *Ganesh Lala* v. *Bapu, I. L. R. 21 Bom. 198,* dissented from. *Sarat Chunder* v. *Gopal Chunder Laha, I. L. R. 20 Calc. 296; Mills* v. *Fox, L. R. 37 Ch. D. 153; Wright* v. *Snow, 2 De Gex & S. 321;* and *Nelson* v. *Stocker, 4 De Gex & J. 458,* discussed. DHURMO DASS GHOSE *v.* BRAHMO DUTT **I. L. R. 25 Calc. 616 2 C. W. N. 330**

Held on appeal (affirming the above decision), that s. 115 of the Evidence Act has no application to contracts by infants; but the term "person" in that section applies only to a person of full age and competent to enter into contracts. The words "person" and "party" in s. 64 of the Contract Act are interchangeable, and mean such a person as is referred to in s. 11 of that Act, *i.e.*, a person competent to contract. A mortgagor employing an attorney, who also acts for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney; and, therefore, where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon enquiry as to it:—*Held* (affirming the decision of JENKINS, *J.*), that the mortgagor was not entitled to compensation under the provisions of ss. 38 and 41 of the Specific Relief Act. *Ganesh Lala* v. *Bapu, I. L. R. 21 Bom. 198,*, dissented from. *Mills* v. *Fox, L. R. 37 Ch. D. 153,* distinguished. BROHMO DUTT *v.* DHARMO DAS GHOSE . . . **I. L. R. 26 Calc. 381 3 C. W. N. 468**

12. ——— **Fraudulent conduct of parties**—*Pleading illegality of agreement.* In a case of fraudulent misdealing with property mortgaged, the defrauding parties are estopped by their own acts from setting up as against a third person, a mortgagor, the illegality of the agreement. The mortgagor is entitled to say this agreement is the real contract. NUZUR ALLY KHAN *v.* OJOODHYARAM KHAN . . . . . **1 Moo I. A. 540 5 W. R. P. C. 83**

13. ——— **Fraudulent endorsement on hundi**—*Forged hundi.* The *bonâ fide* holder for value of a forged hundi, to whom, after it had been dishonoured, it had been transferred by endorsement by the payees, who at the time of endorsement knew that the hundi was forged, sued the payees on the hundi, to recover the amount he had paid them for it. *Held,* that the payees were estopped from setting up the forgery of the hundi as a bar to the suit. BISSEN CHAND *v.* RAJENDRO KISHORE SINGH . **I. L. R. 5 All. 302**

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

14. ——— Laches of purchaser—*Acquiescence.* Where a purchaser of land lies by for five years allowing another person to occupy the land and afterwards to sell it he is estopped by his own conduct from afterwards claiming the land from a *bonâ fide* purchaser without notice. MOHESH CHUNDER CHATTERJEE *v.* ISSUR CHUNDER CHATTERJEE . . . **1 Ind. Jur. N. S. 266**

15. ——— Recognition of status of defendant as occupancy raiyat—*Suit subsequently treating him as occupying seer land. Held,* that the plaintiff, having once recognized the character of the defendant as an occupancy raiyat of certain land, could not afterwards sue for possession of the land, alleging it to be *seer* land which once belonged to the defendant and had by partition fallen to the plaintiff's puttee, possession never having been acquired by the plaintiff since partition. KALOO RAI *v.* MUHUNT RAI . **1 Agra 259**

16. ——— Suit in ejectment as against trespassers—*Previous admission by plaintiff of defendant's tenancy—N.-W. P. Rent Act (XII of 1881), s. 36.* The service of a notice of ejectment under s. 36 of Act No. XII of 1881 is, as between the person who causes such notice to be served and the person on whom it is served, a conclusive admission by the former of the existence between them of the relationship of landlord and tenant, and the landlord cannot afterwards sue in the Civil Court to eject the same tenant from the same land on the ground that he is not a tenant, but a mere trespasser. BALDEO SINGH *v.* IMDAD ALI **I. L. R. 15 All. 189**

17. ——— Application for ejectment as a tenant—*N.-W. P. Rent Act (XII of 1881), s. 36—Subsequent suit for ejectment as a trespasser—Civil and Revenue Courts—Jurisdiction. Held,* that the mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser. ZUBEDA BIBI *v.* SHEO CHARAN . . . . **I. L. R. 22 All. 83**

18. ——— ——— *N.-W. P. Rent Act (XII of 1881), ss. 36, 96 (b)—Subsequent suit for ejectment as a trespasser—Civil and Revenue Courts—Jurisdiction. Held,* that the fact that a plaintiff in a civil suit for ejectment of an alleged trespasser has on a previous occasion taken proceedings against the defendant under s. 36 of the Rent Act, 1881, is not of necessity fatal to the suit in the Civil Court. *Baldeo Singh* v. *Imdad Ali, I. L. R. 15 All. 189,* and *Deo Narain Rai* v. *Sheo Charan Rai, All. W. N. (1893) 166,* distinguished. *Zubeda Bibi* v. *Sheo Charan, I. L. R. 22 All. 83,* followed. HAMID ALI SHAH *v.* WILAYAT ALI **I. L. R. 22 All. 93**

19. ——— Transfer of occupancy-rights with zamindar's consent—*Acceptance of rent by zamindar from vendees—Contract Act, ss. 2, 23—Evidence Act, ss. 115, 116.* Under a deed, dated in 1879, the occupancy-tenants of land in a village sold their occupancy-rights, and the zamindars instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants. *Held* by OLDFIELD, *J.* (whose opinion prevailed), that sales of occupancy-rights were not void under s. 9 of Act XVIII of 1873, when made with the consent of the landlord; that the sale which the zamindars had consented to was valid; and that, under any circumstances, they were stopped by their conduct from bringing a suit to set aside the sale. *Per* MAHMOOD, *J.*—That the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. Also, *per* MAHMOOD, *J.*—That s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendee was misled by the fact that the zamindars were consenting parties to the sale-deed; that he could not plead ignorance that the deed was unlawful and void; that it had not been shown that he acted upon the zamindar's agreement to take no action, so as to alter his position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid. DURGA *v.* JHINGURI . . . . **I. L. R. 7 All. 511**

Reversed on appeal under the Letters Patent and the judgment of MAHMOOD, *J.*, upheld in JHINGURI TEWARI *v.* DURGA . . **I. L. R. 7 All. 878**

20. ——— Receipt of rent from mortgagee—*Denial of mortgage. Held,* that the plaintiffs, zamindars, who had received rents from the mortgagee as such, were estopped from pleading the invalidity of the mortgage. GUNGA BISHEN *v.* RAM GUTI RAI . . . . **2 Agra 49**

21. ——— Delivery under contract—*Subsequent repudiation. Held,* that, where a person delivered indigo pursuant to the terms of a sutta made by a third party professing to act on his behalf, he must be considered to have assented to the engagement, and was not afterwards competent to repudiate it. MAHOMED NUZZEROOLLAH *v.* FERGUSSON . . . . . **2 Agra 139**

22. ——— Agreement signed by parties and acted on, but not executed

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

under seal as provided in Madras Act III of 1871—*Tolls, farming of.* An agreement was entered into between the Commissioners of the town of *V* and the defendant, farming the tolls of the town of *V* to the defendant for one year. The agreement was duly signed by the defendant, but was not executed under seal by the Commissioners as required by Madras Act III of 1871. In a suit by the President, on behalf of the Commissioners, brought after the expiry of the year, for a portion of the sum due to them by the defendant:—*Held*, that, inasmuch as the plaintiff had fully performed all things to be performed on his part and both parties had acted under the agreement, though it was not formally executed by the Commissioners, and as the defendant had had the full benefit of the contract, it would be contrary to equity and good conscience to allow him to set up as a ground of defence that there was no contract in point of law. GOODRICH *v.* VENKANNA **I. L. R. 2 Mad. 104**

23. ——— **Account made up in accordance with usual course of dealing.** Where an account was made up in accordance with the course of dealing which had practically been assented to by him and had been followed between the parties for many years:—*Held*, that the defendant could not refuse to be bound by it. THAKOOR PERSHAD SINGH *v.* MOHESH LALL **24 W. R. 390**

24. ——— **Disputing validity of will by devisee**—*Previous acquiescence in will.* Where devisees under a will had, on attaining majority, made no objection to the will, but had, on the contrary, impliedly adopted the acts of their mother and guardian, and had by their conduct and acts agreed to treat the will as a valid will, they were held to be estopped from disputing its provisions. LAKSHMIBAI *v.* GUNPAT MOROBA. GUNPAT MOROBA *v.* LAKSHMIBAI **5 Bom. O. C. 128**

25. ——— **Repudiation of character of heir**—*Proceedings disclaiming inheritance.* An heir is not deprived of what he is entitled to as such by having, in proceedings taken against the property claimed, repudiated heirship and denied that he had inherited. KHEMUNKUREE DOSSEE *v.* GOOROO PROSAD MYTEE **11 W. R. 379**

26. ——— *Setting up will giving larger share.* Nor by having set up a will by which he claimed a larger share and failed to prove it. AHMEDOOLLAH *v.* GOUR HURREE BISWAS **15 W. R. 251**

27. ——— **Disclaimer of will**—*Suit subsequently setting up will.* Where *A*, having used a document in a suit and disclaimed all right under it as a will, on the ground that it was not of a testamentary nature, brought a suit to recover property in which he set up the document as a valid will and testament, the Privy Council held that the suit could not proceed, because, *A* having used the document and abandoned all right to it as a will, he could not again use it as a will, though for a different purpose. RAGHOONADHA PERYA OODYA TAVER v. KATTAMA NAUCHEAR **10 W. R. P. C. 1 : 11 Moo. I. A. 50**

28. ——— **Permitting conduct of suit as if fact were admitted**—*Tacit admission.* Where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards, on special appeal, question it and recede from the tacit admission. MOHIMA CHUNDER ROY CHOWDHRY *v.* RAM KISHORE ACHARJEE CHOWDHRY **15 B. L. R. 142 : 23 W. R. 174**

29. ——— **Waiver of objection to remand**—*Alleging illegality of procedure in remanding.* A party who submits without resistance to a remand cannot afterwards be allowed to complain of the legality of the step as an integral part of the proceedings. GHOLAM MORTEZA CHOWDHRY *v.* GOLUCK CHUNDER ROY . **3 W. R. 191**

30. ——— **Contesting suit**—*Subsequent objection to being made a party.* A person cannot at one time set himself up as a substantial party in a suit, contesting it in both the lower Courts on the merits, and then turn round and say in special appeal that he has nothing to do with it, and has been unnecessarily brought in. KRISTO GOPAL SHAHA *v.* KASHEENAUTH SHAH **6 W. R. 66**

31. ——— **Evidence Act (I of 1872), s. 115**—*Decree, if binding on a person who ought to have been sued and who has conducted defence in a suit wrongly instituted against another.* A son, against whom a suit ought to have been instituted, conducted on behalf of his mother a suit wrongly brought against her, knowing all the time that he, and not the mother, should have been sued, but there being nothing to show that it was by reason of any representation or conduct of the son that the plaintiff was led to think that the mother was the right person to be sued. *Held*, that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him, from contesting the vaidity of that decree. MOHUNT DAS *v.* NILKOMAL DEWAN **4 C. W. N. 283**

32. ——— **Settlement of issues**—*Omission of material issues—Consent of parties.* A statement was prefixed to the issues settled in the Court below to the effect that "the vakils of the parties accept the following issues." *Held*, that it was not competent after such consent to object on special appeal that a material issue was omitted. SABITRA MONEE *v.* MUDHOO SOODUN SINGH . . . . . **Marsh. 519**

33. ——— **Valuation of suit**—*Adoption by defendant of plaintiff's valuation.* A defendant to a suit, having adopted a certain valuation, cannot

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

in the same suit object to that valuation. KRISTO INDRO SAHA *v.* HUROMONEE DOSSEE
L. R. 1 I. A. 84

34. ——— Failure to appear at local investigation—*Right to object to it as erroneous.* A judgment-debtor who fails to appear before an Ameen deputed to make a local enquiry as to the mesne profits is not precluded from objecting to the Ameen's report on the ground that the investigation was erroneous. KAROO LALL THAKOOR *v.* FORBES
7 W. R. 140

35. ——— Suit for declaration of title. Where the defendant resists the plaintiff's title, he is estopped from afterwards objecting that a suit for a declaratory decree will not lie. SHIB JATON ROY *v.* PANCHANAN BOSE
3 B. L. R. Ap. 55
11 W. R. 467

36. ——— Omission to plead co-parcenership—*Joint property—Onus probandi.* Suit for share of joint ancestral property. The plaintiff claimed under *A*, who, when sued in 1812 as trustee for the defendant's father, then a minor, never pleaded that he was a co-parcener. *Held*, that the plaintiff, if not estopped from contending that the property was joint, had still the full burden of proving that it was joint. SURNOMOYEE DEBIA *v.* GUNGA GOBIND ROY . **2 W. R. 264**

37. ——— Omission to plead jurisdiction in foreign Court—*Raising plea in suit on decree of foreign Court.* Defendants appeared in the French Court at Mahé, defended a suit, and made no objection to the jurisdiction. In a suit upon the decree of the said Court, defendants pleaded want of jurisdiction. *Held*, that a man who has thus taken the chances of a judgment in his favour, which would, if obtained, have relieved him from all liability, is equitably estopped from afterwards pleading want of jurisdiction. KANDOTH MAMMI *v.* NEELANCHERAYIL ABDU KALANDAN
8 Mad. 14

38. ——— Suit on judgment of foreign Court—*Waiver of objection to jurisdiction.* In a suit in a foreign Court where the defendant took no objection to the jurisdiction, but appeared by an agent and defended the suit on the merits:—*Held*, that he must be held to have waived the jurisdiction; and in a suit brought on the judgment of the foreign Court, he was estopped from taking any exception to the jurisdiction. FAZAL SHAU KHAN *v.* GAFAR KHAN
I. L. R. 15 Mad. 82

39. ——— Defence suppressed in former suit—*Right to rely on it in subsequent suit.* In a former suit the present defendant sued as owner by right of inheritance to recover the property of her deceased husband, and the present plaintiff resisted that suit on the ground of her preferable right to inherit. Having failed in that suit, plaintiff brought the present suit to recover half the property on the basis of a family agreement made between her and the present defendant's deceased husband. This agreement was designedly suppressed at the period of the former suit. *Held*, that the suit should be dismissed; that plaintiff in the present suit insisted upon a valid family compact varying the ordinary rules of inheritance, having, however, previously appealed to that general rule and designedly kept back the compact upon which she now sought to insist; and that there could be no stronger case of an absolute waiver of that contract and of conduct rendering it wholly inequitable to permit her now to insist upon it. *Semble:* Where a defendant has been sued by a plaintiff upon his right of ownership, plaintiff's recovery negatives all grounds of defence to that action then existent and within the plaintiff's knowledge. JANAKI AHMAL *v.* KAMALATHAMMAL . . . . . **7 Mad. 263**

40. ——— Omission to object to decree—*Portion of case referred to arbitrators—Objection to award.* The plaintiff in the suit, which was one on an account stated, agreed to refer to arbitration the question whether the accounts were correct or not. It was unnecessary for the arbitrators to determine whether the account stated was proved. The decree was passed on the very day the award was filed. The plaintiff was not estopped from taking objections to the award by reason of his silence when the decree was pronounced. PHIRAN *v.* BAHORAN . . . . . **7 N. W. 367**

41. ——— Arbitration—*Umpire—Acquiescence in award, though irregular.* Where the parties prayed the Court to appoint two arbitrators and an umpire and to refer the case to them for decision, and undertook to abide by such decision as might be passed by them unanimously or by a majority of them:—*Held*, that the plaintiff, having appeared before the umpire and taken no objection to the procedure of the umpire from March to August, was estopped from raising the objection that an award of the umpire alone was invalid. KUPU RAU *v.* VENKATARAMYYAR
I. L. R. 4 Mad. 311

42. ——— Omission to plead agreement—*Suit to set aside decree for rent.* When an ekrar (providing for payment of rent by deduction from larger profits), which might have been pleaded as a bar to a suit for rent, has not been so pleaded, and a decree has been obtained under Act X, the matter cannot be re-opened in a subsequent civil suit. KOYLASH CHUNDER GHOSE *v.* KHETTERMONEE DOSSEE . . **2 W. R., Act X, 57**

43. ——— Omission to assert a claim in execution-proceedings—*Execution of decree.* Defendants Nos. 1 and 2 were sued by a creditor of their undivided grand-uncle *D* as his legal representatives, and a decree was obtained against them as such. In execution of that decree, the house in dispute was put up for sale and purchased by the plaintiff. After satisfying the decree, the

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

surplus of the sale-proceeds was paid to the defendants, who received it and divided it between themselves. Plaintiff, having been obstructed by the defendants in obtaining possession of the house, brought the present suit to recover possession. The Court of first instance rejected the plaintiff's claim on the ground that the house was the undivided family property of the defendants, and that the plaintiff should bring a partition suit. The plaintiff appealed to the Assistant Judge, who was of opinion that the defendant's omission to set up their title to the property in question at the execution-sale and the acceptance of the surplus of the proceeds of sale estopped them from impeaching the sale and setting up their title. He therefore reversed the lower Court's decree, and awarded the house to the plaintiff. On appeal by the defendants to the High Court:—*Held*, reversing the decree of the lower Appellate Court, that the defendants were not estopped from setting up their title. Proceedings in execution are *in invitum* as regards the judgment-debtor, and he is in no way called upon to notice them. It was not suggested that the defendants took any part in the execution-proceedings or stood by so as to induce bidders to suppose that they claimed no interest other than as representatives of the original judgment-debtor, or that their silence misled the bidders at the sale. As to the reception of the residue of the purchase-money after satisfaction of the judgment-debt, it took place after the sale was completed. GURUPADAPA *v.* IRAPA

I. L. R. 14 Bom. 558

44. ——— Acceptance of sum and receipt in full in satisfaction of decree—*Omission to allow for difference in exchange on Privy Council decree.* *A* obtained a decree against *B* in the Privy Council for the sum of £213-10. *A* applied to the High Court to direct execution of this decree for the sum of R2,500-1, being the equivalent of £213-10, at the then rate of exchange. This application, together with the Privy Council decrees was sent down to the lower Court, where execution was issued for the equivalent in rupees of £213-10, taking the rupee as equivalent to two shillings. This sum was paid to the decree-holder, who signed a receipt in full. *Held*, that, under the circumstances, the decree-holder was not bound by the receipt in full, and that he was entitled to receive the further sum of R365-1 which the judgment-debtor had paid into Court. LAKHPATTY THAKOORANI *v.* LEELANUND SINGH

2 C. L. R. 322

45. ——— Return to Compromise after contesting suit. A defendant cannot fall back on a deed of compromise conceding to the plaintiff a portion of his claim after having subsequently contested the whole case on the merits and run his chance of obtaining a decree dismissing the plaintiff's entire claim. MAN GOBIND DOSS MOHAPATTER *v.* JANKEE RAM . . **W. R. 1864, 211**

ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

DWARKANATH SURMA MOJOOMDAR *v.* UNNODA SOONDUREE . . . **5 W. R. Mis. 30**

46. ——— Kistbundi given by party on attaining majority—*Subsequent dispute of liability.* The appellants made a claim upon the respondents in respect of certain bonds given during their minority by their executor and guardian. On attaining majority, the respondents, being desirous of avoiding payment, were advised that they could only do so by instituting a suit to which the executor must be a party, and in which a settlement of his accounts would be required. Rather than do this they came to terms with the appellant in order to obtain time for the payment of the debt by instalments, and a kistbundi was accordingly executed. *Held*, that the respondents could not now, after the death of their guardian, dispute their liability for a debt which they had thus deliberately undertaken to pay. GHOLAB KHOONWARREE BEBEE *v.* ESHUR CHUNDER CHOWDHRY . . **2 W. R. P. C. 47**
8 Moo. I. A. 447

47. ——— Suit after compromise and decree—*Cause of action—Res judicata.* *A*, who was in partnership with *B*, *C*, and *D*, brought a suit in the Zillah Court of Jessore against *B*, *C*, and *D*, for an account and division of the parnership estate. An arrangement was come to between the parties, on the faith of which *A* filed a razeenamah, stating that his claim was satisfied and allowed a decree to go against him in terms of the razeenamah. The defendants failed to carry out their part of the arrangement. *A* petitioned the Zillah Court for leave to withdraw his petition of compromise, and that the suit might proceed as if no decree had been passed, but the Court refused the petition. The principal place of business of the defendants was in Calcutta. In the Court below an application was made to have the plaint taken off the file on the ground that it disclosed no cause of action, but showed that the plaintiff was estopped from suing, but the application was rejected. *Held*, on appeal, that *A* was not barred from bringing a suit in the High Court to compel the defendants to perform the agreement, upon the basis of which the decree was obtained in the Zillah Court, either by the fact of the consideration of the agreement being the consent of *A* to the compromise of the suit or by the decree of the Zillah Judge. KALLY NAUTH SHAW *v.* RAJEEB LOCHUN MOOKERJEE

2 Ind. Jur. N. S. 122 : on appeal, Id. 343

48. ——— Compromise of execution of decree—*Execution of compromise as a decree—Acquiescence.* The parties to a decree for the payment of money altered by agreement such decree as regards the mode of payment and the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor. On the 1st March 1878, the holder of such decree applied for execution of such agreement. The judgment-debtor objected that such agreement could not be executed as a decree

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

and such application, should, therefore, be disallowed. *Held* (OLDFIELD, *J*, dissenting), that such agreement could not be executed as a decree, and such application could not be entertained, and that the judgment-debtor was not, by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree. DEBI RAI *v.* GOKAL PRASAD **I. L. R. 3 All. 585**

See STOWELL *v.* BILLINGS . **I. L. R. 1 All. 350**

RAMLAKHAN RAI *v.* BAKHTAUR RAI **I. L. R. 6 All. 623**

49. _____ *Contract superseding decree.* A judgment-debtor, against whom a decree for money was in course of execution, presented a petition to the Court executing the decree, in which it was stated that a part of the money payable under the decree had been paid; that it had been agreed that a part of the balance should be set-off against a debt due to the judgment-debtor to be realized by the decree-holder, and the remainder should be paid by the judgment-debtor by certain instalments; and that, if default were made in payment of any one instalment, the decree-holder should be at liberty to execute the decree for the whole amount, and the judgment-debtor asked the Court to sanction the arrangement. The decree-holder expressed his assent to the arrangement, and the Court recorded a proceeding reciting the arrangement, and releasing from attachment property of the judgment-debtor which had been attached. Default having been made, the decree-holder applied for execution of the decree. *Held*, that the petition of the judgment-debtor set out above did not amount to, nor was it any evidence of, a new contract superseding the decree, and the decree-holder was not estopped therefore from executing the decree, which therefore the Court allowed to be executed. *Debi Rai* v. *Gokal Prasad, I. L. R. 3 All. 585*, distinguished. GANGA *v.* MURLI DHAR **I. L. R. 4 All. 240**

See DARBHA VENKAMMA *v.* RAMA SUBBARAYADU **I. L. R. 1 Mad. 387**

50. _____ **Evidence Act, s. 115**—*Sale in execution of decree—Erroneous impression of what was sold.* In execution of a decree for costs, the defendants caused the "rights and interest of the judgment-debtor to the extent of 16 annas" in a particular mouzah to be put up for sale. It appeared that in a former suit the defendants had already been adjudged a 12-annas share in the mouzah. The plaintiff, who became the purchaser, claimed to be entitled to the whole 16 annas, alleging that he had been misled by the description of the property sold, and contending that the defendants were estopped, under s. 115 of the Evidence Act, from denying that 16 annas had been put up for sale. *Held*, that, to bring the case within s. 115 of the Evidence Act, the following findings were necessary: (i) that the plaintiff believed that the judgment-debtor, whose rights and interest were sold, was the owner of the whole 16 annas; (ii) that acting upon that belief he purchased the property at the sale; (iii) that belief, and the plaintiff's so acting upon that belief, were brought about by some declaration, or act, or omission, on the part of the defendant, which declaration, act, or omission were intentionally made in order to produce that result; and that, inasmuch as the finding of the District Judge had not amounted to this, there was no estoppel. SOLOMON *v.* LALLA RAM LALL **7 C. L. R. 481**

51. _____ *Petition to postpone sale in execution of decree.* To petition for the postponement of a sale in execution of decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed, and occasions no estoppel within the Evidence Act, 1872, s. 115. The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by lapse of time. MINA KONWARI *v.* JUGGAT SETANI . **I. L. R. 10 Calc. 196 13 C. L. R. 385 L. R. 10 I. A. 119**

52. _____ **Causing sale of right**—*Subsequent plea that right was barred.* A party by whom malikana was payable obtained a decree against the maliks, and executed it by selling their right to malikana. The purchaser then sued the decree-holder for arrears of malikana, and the plea set up by the defendant was limitation. *Held*, that, as the defendant had caused the right to malikana to be sold, he could not avail himself in equity of the plea of limitation, and say that what was purchased was not a substantial right actually existing at the time. ALAI AHMED *v.* BODHOO SINGH **14 W. R. 204**

53. _____ **Sale of non-transferable holding by kobala**—*Landlord and tenant.* Where a non-transferable holding is sold by a tenant by a kobala, he is estopped from setting up the invalidity of the sale by him. The remarks of GARTH, *C.J.*, in *Ganges Manufacturing Co.* v. *Soorajmull, I. L. R. 5 Calc. 669, 678*, referred to. BHAGIRATH CHANGA *v.* HAFIZUDDIN **4. C. W. N. 679**

54. _____ **Acquiescence of decree-holder**—*Waiver of heir.* Where a decree-holder brings to sale in execution of his decree, property on which he holds a mortgage, without notifying his encumbrance upon it, and, on being asked by any intending bidder at the time of the sale whether there is any encumbrance on the property, gives an evasive answer which misleads the bidder and induces him to purchase the property as unencumbered, he cannot subsequently claim as against such bidder to enforce his mortgage. MCCONNELL *v.* MAYER . . . . **2 N. W. 315**

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

DOOLAB SIRCAR *v.* KRISTO COOMAR BUKSHEE **3 B. L. R. A. C. 407, 2 W. R. 303**

55. ——— Inducing person to buy property by denying existence of claim upon it—*Subsequent attempt to enforce charge.* A man who has represented to an intending purchaser that he has not a security in the property to be sold and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force. MUNNOO LALL *v.* LALLA CHOONEE LALL . . **21 W. R. 21 L. R. 1 I. A. 144**

56. ——— Evidence Act (I of 1872), s. 115—*Execution-purchaser without notice of mortgage.* The plaintiff sued to realize his security under a mortgage executed to him by defendant No. 1, by sale of the mortgaged premises which were in the possession of defendants Nos. 2 and 3. It appeared that the plaintiff had previously attached and brought to sale the mortgaged premises in execution of a decree against defendant No. 1, and that the other defendants had purchased at the Court-sale without notice of the plaintiff's mortgage, which was not referred to in the attachment lists or sale certificates. *Held*, that the plaintiff was estopped from setting up his present claim. JAGANATHA *v.* GANGI REDDI **I. L. R. 15 Mad. 303**

57. ——— *Omission to give notice of prior encumbrance to executing decree-holder—Subsequent suit to enforce encumbrance.* A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money-decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond: *Held*, that the plaintiff was estopped from recovering the secured debt against the land. KASTURI *v.* VENKATACHALAPATHI . **I. L. R. 15 Mad. 412**

58. ——— Sale in execution of decree against wrong person as representative of deceased—*Subsequent claim by proper representative—Quiescence of real representative.* One *S* died indebted to the second defendant, *M*. On his death his widow, *T*, became his heir, as he left neither son nor brother surviving. In 1878, *M* brought a suit to enforce payment of the debt due by the deceased *S*, and he made *B*, the mother of *S*, defendant in the suit, omitting *T* altogether. On 30th August 1878 *M* obtained an *ex parte* decree, and on the 26th July 1880 the house of *S*, then in the possession of *B*, was sold in execution, and the first defendant, *R*, purchased it. On 6th September 1880 the sale was confirmed, and on 26th November 1880 *R* was put into possession. On the 10th of December 1880, one *S B* presented a petition on behalf, as he alleged, of the plaintiff *T*, the widow of *S*, to set aside the sale. He did not produce any authority from her, and his application was rejected on the 14th June 1881. On the 31st October 1878, *T* adopted the plaintiff *B*, under an authority, as she alleged, of her deceased husband, *S*. In 1881 *T* filed the present suit on behalf of her adopted son *B* to set aside the sale and to recover the house. *Held*, that the plaintiff was entitled to have the sale set aside, and to recover possession of the house. The estate was vested in *T* as legal representative of her deceased husband. Had *T* wilfully put forward *B* as the repesentative of *S* so as to deceive and mislead *M*, then, no doubt, she might be held bound by the decree obtained by the latter against *B*. Her mere quiescence while *M* wilfully sued the wrong person could not affect her legal rights or deprive her adopted son, the plaintiff *B*, of his rights. He could not be bound by suit and sale to which he was not a party either in person or by representation. *Held*, also, that *T* was not bound to come forward to assert her ownership when the property was attached and sold under *M's* decree. The rule—that one who, knowing his own title, stands by and encourages a purchase of property as another's, will not be allowed to dispute the validity of the sale—implies a wilful misleading of the purchaser by some breach of duty on the owner's part. In this case there was nothing more than mere quiescence on the part of *T*. BASWANTAPA SHIDAPA *v.* RANU . . **I. L. R. 9 Bom. 86**

59. ——— Acquiescence in execution proceedings—*Representatives of judgment-debtor—Death of party to suit before final decree in appeal—Subsequent proceedings in execution taken against representatives of such party.* A decree was given to the defendant (then plaintiff) in 1856 for possession of land and mesne profits against numerous defendants, including one Dawan Rai. Some of the judgment-debtors, including Dawan Rai, appealed to the Sadr Diwani Adalat, but before the decree of the Sadr Diwani Adalat was passed, Dawan Rai died. No application was made to put any representative of Dawan Rai on the record; but in 1881 (the amount of the mesne profits payable under the decree having been finally determined in 1877), certain persons were made parties, as representatives of Dawan Rai, to various proceedings in execution of the decree for mesne profits, which ended in the sale of certain property which had been of Dawan Rai in his lifetime. Subsequently, the said representatives of Dawan Rai brought a suit to recover the property sold as above described on the ground that they were no parties to the decree under execution. *Held*, that, as it had not been shown that by reason of the plaintiffs not objecting that they had been improperly brought on to the record of the execution of proceedings the defendant had been induced to accept a less

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

favourable arrangement for the satisfaction of the decree that he might otherwise have done, there was no estoppel against the plaintiffs. BENI PRASAD KUNWAR *v.* MUKTESAR RAI **I. L. R. 21 All. 316**

60. ———— Mistake as to what was sold in proclamation of sale—*Purchase by decree-holder.* *M*, a judgment-creditor, having attached certain land of his judgment-debtor, entered, by mistake, one parcel thereof in the proclamation of sale as two parcels having different numbers in the list of property to be sold. This parcel was put up for sale and purchased by the decree-holder himself, and was subsequently put up for sale and purchased by *T*. In a suit brought by *T* against *M* to restrain *M* from entering on the land: *Held*, that *M* was estopped by his conduct from setting up his title as purchaser against *T*. TUMAPPA CHETTI *v.* MURUGAPPA CHETTI . . . **I. L. R. 7 Mad. 107**

61. ———— Disclaimer of title in former suit—*Evidence Act, s. 115—Sale in execution of decree—Intervenor in rent suit.* A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage, of the right, title, and interest of the mortgagor who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel. A suit for rent by a zamindar and patnidar against a darpatnidar was defeated by the defence of the latter that he had conveyed his interest to others against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title, and interest therein himself. From the darpatnidar who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zamindar and patnidar against an ijaradar of lands within the darpatni estate. *Held*, that, notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit above mentioned. PORESHNATH MUKERJEE *v.* ANATHNATH DEB
I. L. R. 9 Calc. 265 ; L. R. 9 I. A. 147

62. ———— Mortgagee purchasing at sale in execution of his decree on mortgage—*Estoppel operative against mortgagor.* A mortgagee who has purchased at the sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor. *Poresh Nath Mukerjee* v. *Anath Nath Deb, I. L. R. 9 Calc. 265 : L. R. 9 I. A. 147*, followed. KISHORY MOHUN ROY *v.* MAHOMED MUJAFFAR HOSSEIN
I. L. R. 18 Calc. 188

63. ———— Assertion of title by auction-purchasers independently of sale—*Admission of title by purchase.* It was held that the auction-purchasers at a sale in the execution of a decree were not estopped from asserting, as against a person claiming to be a mortgagee prior to the sale of the property purchased, that in fact the property was their own, independently of the auction-sale. At the most, their conduct in making the purchase could only be regarded as some evidence of an admission of title in the judgment-debtor, which they could explain or rebut. HANUMAN DAT *v.* ASSADULLAH . . . . . **7 N. W. 145**

64. ———— Benami purchase—*Mortgage by benami purchaser.* *A* purchased immoveable property in the name of *B*, and allowed *B* to occupy and retain possession of the property. *B* mortgaged the property to *C* for a valuable consideration. *Held*, that *A* and those claiming through him were estopped from asserting, as against *C*, his or their title to the property, and that the mortgage was valid. KALLY DOSS MITTER *v.* GOVIND CHUNDER PAUL . . . . . **Marsh. 569**

See RAM MOHINEE DOSSEE *v.* PRAN KOOMAREE **3 W. R. 88**

and SMITH *v.* MOKHUM MAHTON . **18 W. R. 526**

65. ———— ——— *Purchaser at execution-sale—Representative—Mortgage by alleged benamidar—Evidence Act I of 1872, s. 115.* *E*, being in possession of the documents of title, mortgaged land to the plaintiff. *E* and his father *A* borrowed money from one *R*, who obtained a decree against *A*, and purchased the land at the execution-sale. In a suit for foreclosure of the plaintiff's mortgage against *E* and *R*, the lower Courts held that *A* was the true owner, but the lower Appellate Court did not decide whether the plaintiff's mortgage was a valid transaction. *Held*, on second appeal, that *R* acquired the property adversely to *A*, not as his representative, and that there was no estoppel against him. *Dinendranath Sannial* v. *Ramkumar Ghose, I. L. R. 7 Calc. 107 : L. R. 8 I. A. 65*, and *Lala Parbhu Lal* v. *Mylne, I. L. R. 14 Calc. 401*, followed. BASHI CHUNDER SEN *v.* ENAYET ALI . . . **I. L. R. 20 Calc. 236**

66. ———— Benami transaction—*Execution of deed.* *A* executed a deed of sale of a house in favour of *B*, which was duly registered. *B* afterwards mortgaged the house to *C*. *Held*, that *A*, and those claiming through him, were estopped as against *C* from setting up that the sale of the house to *B* was a benami transaction, and that *A* continued notwithstanding to be the true owner. RAKHALDAS MODUCK *v.* BINDOO BASHINEE DEBIA
Marsh. 293 : 2 Hay 157

See RAM MOHINEE DOSSEE *v.* PRAN KOOMAREE **3 W. R. 88**

67. ———— ——— *Right of creditor to question acts of debtor's benamidar.* The creditor of a deceased proprietor is not estopped, in the way in which the deceased would have been, were he alive, from questioning acts done by the said proprietor's benamidar ; for the rule of law by which an heir or assignee stands in no better position

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

than the party through whom he derives his title admits of an exception in favour of those who would be themselves aggrieved or defrauded by the party through whom they claim. LEKHRAJ ROY *v.* MOTEE MADHUB SEIN . . **15 W. R. 333**

68. ——— Benami suit—*Suit brought by one person in name of another.* Defendant, in consideration of money advanced by *A*, chose to enter into a mortgage with *B*, who now sued for possession after foreclosure. *Held*, that it did not lie in the defendant's mouth to object to the suit being brought by *A* in *B's* name. SREE NATH NAG *v.* CHUNDER NATH GHOSE . **17 W. R. 192**

69. ——— Recital in conveyance—*Purchaser, effect of admissions on—Admissions by conduct.* The deed of conveyance of land in Calcutta recited that the vendor was "seised of, or otherwise well entitled" to the property intended to be sold "for an estate of inheritance in fee-simple," and it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser: *Held*, that, although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *primâ facie* evidence against the purchaser and persons claiming through him, that the estate conveyed was what it purported to be, it being an admission by conduct of parties, which amounted to evidence against them. SARKIES *v.* PROSONOMOYEE DOSSEE **I. L. R. 6 Calc. 794 : 8 C. L. R. 79**

70. ——— Endorsement on deed of conveyance—*Authority to convey.* The defendant had received a conveyance of half a certain piece of land from *S J* (*S J* having the right to convey only two-fifth of the said land, the remaining two-fifths and one-fifth belonging respectively to a brother and sister of *S J*). When *S J* gave the conveyance, it was endorsed by his sister. This endorsement amounted to an estoppel as against her, or any one claiming through her, against saying that *S J* had not a full right to convey. BLAQUIERE *v.* RAMDHONE DOSS **Bourke O. C. 319**

71. ——— Alteration of written agreement—*Inference drawn from acts of parties.* Where it was clearly inferable from the subsequent acts and conduct of the parties that an arrangement reduced to writing has been modified and tacitly cancelled, one of the parties cannot, in the absence of any understanding to return to it, be allowed to enforce the original agreement and set aside the arrangement subsequently agreed to. NUNKEE *alias* PARBUTTEE *v.* BESSUSSURNATH **3 Agra 428**

72. ——— Failure to put in defence in former suit—*Consent implied.* The failure of a party to put in an answer in a former suit, which in no way threatened his title as a reversioner, cannot be construed into a consent on his part to an alienation made by a Hindu widow, which has been found in a subsequent suit to be illegal on an issue raised to contest its validity as made without legal necessity. BISHESHUR MOOKERJEE *v.* JUDOONATH BOSE . . . . . **W. R. 1864, 48**

73. ——— Consent to allow joint property to be dealt with in certain way—*Power to withdraw consent.* After the several owners of joint property have given their assent to its being employed in a particular way, and such consent has been acted on, it is not competent to an individual owner or a purchaser under him to retract his consent. ROOP DEBEE *v.* GUNGOO MULL **3 N. W. 66**

74. ——— Disqualification of a brother to share—*Intention as evidenced by conduct—Waiver of rights—Hindu law—Inheritance—Mitakshara family.* Between the two surviving brothers of a Mitakshara family, the action of the elder to the younger, who had been born deaf and dumb, was such as to recognize for some years that the latter had a joint interest in the family property. The proper inference to be drawn from this was that the elder treated his brother as a member of the family, and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. Their Lordships would not infer that there was an intention shown by the acts of the elder to waive the rights accruing to him in consequence of this disqualification, nor would they hold that his acts operated to create a new title in the younger. LALA MUDDUN GOPAL LAL *v.* KHIKHINDA KOER **I. L. R. 18 Calc. 341 L. R. 18 I. A. 9**

75. ——— Agreement between widow and reversioners as to distribution of estate—*Reversioner witness to deed.* A Hindu widow in possession of her deceased husband's separate landed estate, her deceased husband's mistress, and his illegitimate daughter, and the next reversioner to such estate, with the object of adjusting family disputes, entered into an arrangement by an instrument in writing for the distribution of such estate. A remoter reversioner to such estate was a witness to such instrument, and took a prominent part in making such arrangement, and the same had his full consent. *Held*, that such remoter reversioner was estopped by such conduct from afterwards questioning the legality and genuine character of such distribution and the validity of assignments made by the persons who shared in such distribution. SIA DASI *v.* GUR SAHAI **I. L. R. 3 All. 362**

76. ——— Acquiescence in decree binding joint family for debts—*Sale in execution of joint property for decree against manager.* In a suit by *A*, a member of a Mitakshara joint family, to recover possession of a share of certain

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

property sold in execution of a decree, dated 21st April 1876, against his father only in a suit to which *A*, although he came of age in 1868, was not a party, it appeared that the debt for which the property was sold was begun in 1865, was increased in 1869, and re-affirmed in 1873 and 1875 under circumstances which would bind the family. *A* had lived jointly with his father, and acquiesced in his management of the property. *Held*, that, the joint property being liable for the debt upon which the decree was obtained, and the purchaser having purchased the property *bonâ fide*, the plaintiff was not entitled to disturb the alienation ; and, further, that under the circumstances, he was estopped from claiming his share DAMUDAR DASS *v.* MAHORAM PANDAH **13 C. L. R. 96**

77. ——— Recognition of adoption by widow—*Subsequent objection on ground of its invalidity.* Where it was not intended by the widow that her adopted son should succeed her in the management and enjoyment of the property without her consent, she may resist the claim of the adopted son to eject her, on the ground of the invalidity of the adoption under the Hindu Law, notwithstanding her previous treatment and recognition of the plaintiff as her adopted son, and her acknowledgment having been received and acted upon by the authorities without question. OOMRAO SINGH *v.* MAHTAB KOONWAR **3 Agra 103A**

78. ——— Adoption made in full belief it is valid—*Inducing adopted person from claiming share of inheritance in his natural family.* The rule of estoppel by conduct does not apply where an adoption is made by a person in full belief that the adoption is valid in law, and thereby, and by the subsequent conduct of the adopter, the person adopted is induced to abstain from claiming a share in the inheritance of his natural family, so as to prevent a person claiming through the adopter from impugning the validity of the adoption. ERANJOLI ILLATH VISHNU NAMBUDRI *v.* ERANJOLI ILLATH KRISHNAN NAMBUDRI **I. L. R. 7 Mad. 3**

79. ——— Conduct of ancestor—*Acquiescence.* A person on attaining majority cannot contest an arrangement which the person from whom he inherited had during his minority acquiesced in. TRIPOORA SOONDARE *v.* GOPAL NATH ROY . . . **25 W. R. 358**

80. ——— Estoppel by acts of ancestor when claiming through him—*Taking lease from Government.* In a suit against *S* and *G* to recover possession with mesne profits of land of which the plaintiff had been dispossessed by *G* as lessee of the Government, he claimed the land as part of an estate (*M*) which belonged to him and his ancestors by the title under which it was held, and had been in their possession very long under that title, and that he had held the property as of right adversely to *S* for a period which sufficed to give him a title. The lower Court made the Government a party, and finding that the plaintiff's father had repeatedly taken from Government a farm of the villages in question after they had been declared not to be a portion of *M*, but of a resumed talukh, concluded that the plaintiff was estopped by the conduct of his father. *Held*, that the Government ought not to have been made a party, for the plaintiff did not couch his plaint in any degree adversely to Government ; and that the father's acts were no estoppel to the plaintiff such as to prevent him from instituting the present suit against *S* and *G*. RAM RUNJAN CHUCKERBUTTY *v.* COURT OF WARDS **21 W. R. 192**

81. ——— Acquiescence—*Estoppel by acts of mother.* The plaintiff having known the nature of an original grant, and herself recognized and acquiesced in the acts of the lessee: *Held*, that she was bound by the acts of her mother, which as a whole resulted beneficially for the estate ; and that in any case she was precluded from questioning them now by the law of limitation, the present suit having been brought more than twelve years subsequent to the death of the mother. PUDDOMONEE DOSSEE *v.* DWARKANATH BISWAS . **25 W. R. 335**

82. ——— Acquiescence in adoption—*Subsequent objection to validity of adoption.* Where the defendant actively participated in the adoption of the plaintiff, the defendant's brother, and by many acts signified to the plaintiff and to his adopting father the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance, by the plaintiff, of the funeral ceremonies of his adoptive father, *Held*, that the defendant was estopped from disputing the validity of the adoption. SADASHIV MORESHVAR GHATE *v.* HARI MORESHVAR GHATE **11 Bom. 190**

CHINTU *v.* DHONDU . . **11 Bom. 192 note**

83. ——— Adoption—*Evidence Act, s. 115—Auction-purchaser—Representation.* *A*, a Hindu governed by the Mitakshara law, died on the 12th May 1867, leaving a widow *B* and a brother *R*, who was admittedly the next reversioner. In July 1867 *B* purported to adopt a son *D* to *A*, and subsequently, in September 1867, obtained a certificate under Act XL of 1858. In 1872 *B* obtained a loan from the plaintiff *M* of R9,000, and to secure its repayment executed as guardian of *D* a mortgage of seven mouzahs in favour of *M*. The money was advanced and the mortgage executed at the instigation of *R* and with his consent, and on his representation that *D* was the duly adopted son of *A*, and it was admitted that the money was advanced for, and specifically applied towards the payment of, decrees obtained against *A* in his lifetime and against his estate after his death. *B* died in 1878. On the 14th August 1880, *M* instituted a suit against *D* upon his

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

mortgage, and in that suit he made *S* a party defendant, as being a purchaser of the mortgagor's interest in one of the mouzahs included in his mortgage. On the 26th June 1882, *M* obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged mouzahs. In the proceedings taken in execution of that decree, *M* was opposed by *L*, who was afterwards held to be a benamidar for *S*, who claimed that he had, on the 8th November 1880, purchased five out of the seven mouzahs at a sale in execution of certain decrees against *R*. On the 28th February 1884, *L's* claim was allowed, and on the 11th August 1884 *M* brought this suit against *L*, *S*, *R*, and *D* and the decree-holders in the suit against *R* for a declaration of his right to follow the mortgaged property in the hands of *S*. It was found as a fact that the adoption of *D* was invalid; that the advance by *M* to *B* was justified by legal necessity, and that *L* was the benamidar of *S*. It also appeared that *M* had himself become the purchaser of one of the mortgaged mouzahs. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgage-money from the five mouzahs in the hands of *S*. *L* and *S* appealed, and *M* filed a cross-appeal, alleging the adoption to be valid and binding on *S*. It was contended that *S*, as the representative of *R*, was estopped from denying the validity of *D's* adoption, and thus, having been a party to *M's* first suit, the question as to the liability of the mouzahs to satisfy the mortgage lien was *res judicata* as against him. *Held*, that a purchaser at an execution-sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the evidence Act. *Held*, further, that, though *R* was estopped by his conduct from disputing the validity of the adoption or of *M's* rights as mortgagee, *S*, being an auction-purchaser, was not bound by *R's* acts, and was not estopped from disputing the adoption, as he derived his title by operation of law adversely to *R*, and was thus in a different position from a person claiming under a voluntary alienation. LALA PARBHU LAL *v.* MYLNE . . . **I. L. R. 14 Calc. 401**

84. _____ *Adoption—Suit to establish validity of adoption.* In a suit to establish the validity of an adoption of the plaintiff by the defendant, where it was shown that she had taken him in adoption, brought him up, and married him as the adopted son of her husband, and had put herself forward as his mother: *Held*, that the defendant was estopped from denying the validly of the plaintiff's adoption, and could not, when the plaintiff might have lost all right in his natural family, assert that she had not validly adopted him. RAVJI VINAYAKRAV JAGGANNATH SHANKARSETT *v.* LAKSHMIBAI . . **I. L. R. 11 Bom. 381**

85. _____ *Hindu law—Adoption.* A Hindu widow, professing to have authority from her husband to do so, took the second defendant in adoption, brought him up as her adopted son, and permitted him to perform the funeral ceremonies of her husband. Land to which she otherwise would have been entitled was attached in execution of a decree against defendant No. 2. She now sued to release the attachment, alleging the adoption was bad as having been unauthorized. *Held*, that the plaintiff was estopped from raising this contention. KANNAMMAL *v.* VIRASAMI **I. L. R. 15 Mad. 486**

86. _____ *Admission—Conclusive proof of adoption—Description of person as adopted son.* *A*, a Hindu, died leaving him surviving a mother *B* and three sisters. *A* had a brother *P*, who had been given in adoption to his maternal uncle *R*. On *A's* death, his property devolved on his mother *B*. *B* mortgaged the property to the defendant. The mortgage bond was attested by *P*, who described himself as the adopted son of *R*. The defendant obtained a decree on the mortgage, and himself became the auction-purchaser at the execution sale. Thereupon *A's* sisters sued as reversionary heirs, for a declaration that the sale to the defendant was valid only to the extent of *B's* life-interest in the property sold. The defendant pleaded that *P's* adoption was invalid, that on *A's* death the property vested in *P*, and that the plaintiffs had, therefore, no interest, in the property in dispute. The Court of first instance allowed these pleas, and dismissed the suit. The Appellate Court held that the description in the mortgage-bond, that *P* was the adopted son of *R*, amounted to an admission of the adoption by the defendant (mortgagee), and that he was therefore estopped from contesting the adoption. *Held*, that the defendant was not estopped. The mere fact that *P* was described in the mortgage-bond as *R's* adopted son was not any evidence of an admission; and even, if it were, it was not conclusive proof of the adoption (s. 31 of the Evidence Act, I of 1872). *Held*, further, that the fact treated by the lower Appellate Court as an estoppel had no such effect, as it had not caused or permitted the plaintiffs to believe the adoption to be valid and to act upon such belief. YASHVANT-PUTTU SHENVI *v.* RADHABAI **I. L. R. 14 Bom. 312**

87. _____ *Suit to set aside adoption in which the plaintiff has concurred—Hindu law, adoption.* The plaintiff, claiming a remote reversionary interest in the estates of a deceased Hindu, sued for a declaration of the invalidity of an adoption made by the widow. It appeared that the plaintiff himself had concurred in it at the time when it took place. *Held*, that the plaintiff was not estopped from impugning the adoption by reason of his conduct at the time when it took place. GURULINGASWAMI *v.* RAMALAKSHMAMMA . . . **I. L. R. 18 Mad. 53**

88. _____ *Hindu law, adoption—Treating invalid adoption as effective and subsequently repudiating it—Suit to uphold adoption.* A childless Hindu widow, aged 19, agreed

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

with the plaintiff's father to adopt the plaintiff, stating that her husband, who died at the age of 12, had given her authority to adopt. Subsequently she adopted the plaintiff and had his *upanayanam* performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about 18 months, when she repudiated the adoption and refused to maintain the plaintiff. *Held*, that, the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of 18 months. In order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family and the situation of the adoptee in his original family must have become so altered that it would be impossible to restore him to it. *Gopalayyan* v. *Raghupatiagyan, 7 Mad. 250*, followed. PARVATIBAYAMMA *v.* RAMAKRISHNA RAU

I. L. R. 18 Mad. 145

89. ——————— *Treating adoption as valid for a long period.* In a suit to recover possession of certain land to which the plaintiff claimed title as the adopted son of a deceased Saraswati Brahman, it appeared that he had been taken in adoption by the widow of the deceased acting on the authority of her late husband, that *datta homam* was performed subsequently, and that the plaintiff had since been recognized as the adoptive son of the deceased and had acted accordingly during a period of twenty-five years. The defendant was in possession under a claim of title as reversionary heir, the widow having died shortly before suit. *Held*, on the evidence that the defendant was estopped from denying the validity of the adoption. SANTAPPAYYA *v.* RANGAPPAYYA . **I. L. R. 18 Mad. 397**

90. ——————— *Mistake of law —Acknowledgment of adoption—Effect of recognition of status of adopted son as to property in Native State on his status as to property in British territory.* One *G* was possessed of considerable property both in British territory and in the territory of the Gaekwar of Baroda. He died in 1858, leaving three childless widows, *L*, *S*, and *B*. Shortly after his death, the plaintiff *K*, who was then a minor, was taken to Baroda by *L*, and, on her representations as well as those of her co-widows, he was acknowledged by the Gaekwar as their adopted son, and as such entitled to succeed to all the estate and privileges enjoyed by the deceased *G*. For several years afterwards the widows treated the plaintiff as the legitimate heir and successor of *G* in respect of the Baroda property. With regard to the estate in British territory, the widows as first put forward *K* as the adopted son of *G*. On their application, a certificate of heirship was issued under Regulation VIII of 1827, declaring that "the Bais were the widow heirs, and the minor *K* the son heir, of the deceased *G*." In one case the widows obtained a decree as guardians of the minor, on a bond executed in favour of *K* as heir to *G*. When the Bombay Summary Settlement Act (II of 1863) was passed, the widows accepted the summary settlement, in respect of the inam holdings of their deceased husband, and thereupon the holdings were entered in their names in the Government records. Finding themselves secure in the possession of their husband's estate, the ladies now dropped the allegation of adoption and dealt with the property in British territory in their own right, and not as trustees or guardians of the minor *K*. In 1871, *K* sought to have part of the property in British territory transferred to his own name as the adopted son of *G*. The widows resisted this attempt and denied his adoption. In 1881, *K* made a similar attempt, but failed, the revenue authorities having eventually resolved to leave the question of *K's* title by adoption to be determined by the Civil Court. In 1884, *K* filed the present suit against the widows of *G* for a declaration of his adoption by *G* and for possession of *G's* estate in British territory. The widows denied the factum of the adoption, and disputed its validity. They also contended that the suit was barred by limitation. The Agent for Sardars in the Dekkan, who tried the case, dismissed the suit, holding that the plaintiff's adoption by *G* was not proved and that the claim was barred by limitation, the widows having been in adverse possession of the property in British territory for more than twelve years. The plaintiff appealed against this decision to the High Court, contending, *inter alia*, that the widows were estopped by their conduct from denying the plaintiff's adoption. *Held*, that the widows were not estopped. *Per* BIRDWOOD, *J.*—The fact that the plaintiff was put forward by the widows as their adopted son in the Baroda territory did not estop them from disputing the plaintiff's allegation that he was adopted by *G*. Nor was the circumstance that the widows and the plaintiff obtained a joint certificate of heirship to *G* in British territory conclusive as an estoppel. *Per* JARDINE, *J.*—There was now no estoppel (i) because there was nothing to show that the plaintiff had been led to alter his position in life through belief in any misrepresentations made by the widows; and (ii) because the widows might have been under the same mistake of law as the plaintiff, *viz.*, that the Gaekwar's recognition of his adoption created a status operative everywhere, as well in British territory as in the Gaekwar's territory. KUVERJI *v.* BABAI

I. L. R. 19 Bom. 374

91. ——————— **Contradicting conduct in former case**—*Allowing attachment of property.* Plaintiffs, who have in a former case allowed property attached as theirs by their creditors to be claimed and taken by the defendants, are estopped in a subsequent suit from making a contrary averment. ERSKINE & CO. *v.* OKHOY CHUNDER DUTT

W. R. 1864, 58

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

92. ——— Transfer for fraudulent purpose—*Subsequent suit to recover property.* A father who transferred property to his sons for the sake of defrauding creditors, and permitted the sons to put forward claims on the property founded on a title inconsistent with his own, was held to have created a state of circumstances in which the sons were entitled to say that he could not afterwards sue to recover the property from them. HURRY SUNKUR MOOKERJEE *v.* KALI COOMAR MOOKERJEE **W. R. 1864, 265**

93. ——— Transfer by trustee in breach of trust—*Suit by trustee to recover possession—Bonâ fide transferee for value without notice.* A trustee, alleging that the trust property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith for valuable consideration and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property, and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. *Held*, that the plaintiff was estopped by his conduct from recovering possession of the land. GULZAR ALI *v.* FIDA ALI **I. L. R. 6 All. 24**

94. ——— Declaration of husband as to wife's ownership of property—*Subsequent claim of his heirs.* Where the husband during his lifetime did in every way, both publicly and privately, whenever called upon to make any representation on the subject, always represented that certain immoveable property was his wife's, the purchasers from her could not after his death be equitably turned out of property in favour of his heirs. The heirs after his death would be as much bound by the father's misrepresentations as he would have been during his life. LUCHMUN CHUNDER GEER GOSSAIN *v.* KALLI CHURN SINGH **19 W. R. 292**

95. ——— Benami transaction—*Misrepresentation—Heir when bound by the acts of ancestor.* *B* purchased some property from *D* (a member of a joint Mitakshara family) in the name of his wife *K*, with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in fact continued to treat the property as her own. During *S's* minority, *O*, the nephew of *D*, who was now of age, brought a suit for pre-emption against *K* in respect of this property, and obtained a consent decree under which he took possession. *S* then, on attaining majority, instituted a suit against *C* for the recovery of the property as the heir and representative of his father on the ground that *K* was a mere benamidar. The defence taken by *C*, amongst others, was that *K* was the real owner he believed her to be. *Held*, that on the authority of *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh, 19 W. R. 292*, it was a good defence, for, even on the assumption that the purchase was benami, *S* as heir of *B* was bound by the misrepresentation of the latter. CHUNDER COOMAR *v.* HURBUNS SAHAI **I. L. R. 16 Calc. 137**

96. ——— *Persons claiming under person who creates the benami.* The mere fact of a benami transfer does not in itself constitute such misrepresentation as to bind all persons claiming under the person who creates the benami. *O* made a benami gift of his property to his wife *A*. The deed of gift was registered and purported to be made in consideration of the fixed dower due to *A*. There was no mutation of names, but *O* managed the property as *A's* am-muktar under a general power-of-attorney executed by her in his favour. On the death of *O*, *A* mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against *A*, the mortgaged property was purchased by the defendants. On the death of *A*, *H* and *R*, the son and daughter of *A*, sold their shares in the property, which they had inherited from their father *O*, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of *H* and *R* and for partition: *Held*, that the acts of *O* were not such as to constitute an estoppel as against his heirs, and therefore the plaintiff was entitled to the relief he sought. *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh, 19 W. R. 292*, explained. SARAT CHUNDER DEY *v.* GOPAL CHUNDER LAHA . . **I. L. R. 16 Calc. 148**

97. ——— Equitable estoppel—*Extinguishment of charge.* An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was attached and sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession and for arrears of the annuity, claiming under the terms of the grant. *Held*, that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees. RADHEY LAL *v.* MAHESH PRASAD . . **I. L. R. 7 All. 864**

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

98. ——————— *Evidence Act (1 of 1872), s. 115.* A decree-holder at a sale in execution of his decree purchased a zamindari share belonging to his judgment-debtors. Afterwards, in execution of a subsequent decree held by another person, the same with other property was again put up for sale. Prior to the sale, the subsequent decree-holder applied to the officer conducting it, stating the fact of the sale and purchase under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtors' interest which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decree-holder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn, and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decree-holder did not bid again. Afterwards the prior decree holder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction-sale in execution of the subsequent decree. *Held*, that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale. *Rai Seeta Ram* v. *Kishun Dass, 1 N. W. 402 ; MacConnell* v. *Mayer, 3 N. W. 315 ; Agrawal Singh v. Foujdar Singh, 8 C. L. R. 346 ;* and *Solano* v. *Ram Lall, 7 C. L. R. 481,* distinguished. GHERAN *v.* KUNJ BEHARI . . **I. L. R. 9 All. 413**

99. ——— **Sale of mortgaged property in execution of decree**—*Effect of sale—Purchaser, right of.* Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee, at whose instance the sale is made, is held to pass to the purchaser, and the mortgage is estopped from disputing that such is the effect of the sale. KHEVRA JUSRUP *v.* LINGAYA . . . **I. L. R. 5 Bom. 2**

100. ——————— *Effect of sale—Purchaser, right of.* Where a decree is obtained upon his mortgage by a mortgagee and the mortgaged property is sold under the decree for the purpose of paying off the mortgagee, the interest of both mortgagor and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right, title, and interest of the mortgagor. It is not the practice in the mofussil, to require the mortgagee to convey to the purchaser. The transfer takes place by estoppel. SESHGIRI SHANBHOG *v.* SALVADOR VAS **I. L. R. 5 Bom. 5**

ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

See MAGANLAL *v.* SHAKRA GIRDHAR **I. L. R. 22 Bom. 945**

101. ——————— *Prior incumbrancer bidding at auction sale in execution of decree and not announcing his incumbrance—Sale by first mortgagee in execution of decree upon second mortgage held by him—Interest acquired by purchaser at such sale—Sale of portions of mortgaged property—Mortgagee not compelled to proceed first against unsold portions—Enforcement of mortgage against purchaser not having obtained possession.* At a sale in execution of a decree for enforcement of a hypothecation-bond, the decree-holder, by permission of the executing Court, made bids, but the property was purchased by another. At that time the decree-holder held a prior registered incumbrance which he did not personally announce. In a suit brought by him subsequently to enforce this incumbrance, it was contended on behalf of the auction-purchaser that he was estopped by his conduct from setting it up as against her. *Held*, that there was no estoppel ; that under s. 114 of the Evidence Act the Court was entitled to presume that the provisions of s. 287 (*c*) of the Civil Procedure Code had been complied with, and that consequently the notification of sale disclosed the existence of the incumbrance now sued upon ; that the plaintiff was entitled to assume that intending purchasers would read the notification or search the register for the purpose of ascertaining what was the property being sold ; and that his rights were not affected by his not having personally announced his incumbrance, nor could it be said that solely by bidding at the sale he had encouraged the purchaser to buy. *Mackenzie v. British Linen Co., L. R. 6 App. Ca. 82,* and *Gheran* v. *Kunj Behari, I. L. R. 9 All. 413,* referred to. *Held*, also, that it could not be said that under the circumstances the plaintiff must be taken to have sold in execution of his decree the interest which he held under the bond now in suit ; that he could not be compelled to proceed first against those portions of the mortgaged property which had not been sold ; and that the bond was enforceable against a purchaser of part of the mortgaged property who had never obtained possession. BANWARI DAS *v.* MUHAMMAD MASHIAT **I. L. R. 9 All. 690**

102. ——————— *Sale of mortgaged property in execution of a money-decree without express notice of mortgage—Omission to declare mortgage at time of sale—Civil Procedure Code, 1882, s. 287—Right of mortgagee to enforce mortgage against the property in hands of purchaser.* A mortgagee under a registered mortgage-deed obtained a money-decree against the mortgagors in some matter other than the mortgage, and sold the mortgaged property in execution of the decree. The mortgage lien was not announced in the proclamation of sale as required by s. 287 of Civil Procedure Code (Act XIV of 1882) and the auction-purchaser had no actual knowledge of the mortgage.

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

In a suit brought by the mortgagee against the mortgagors and the auction-purchaser to recover the mortgage-debt by sale of the mortgaged property: *Held*, that the omission to declare the mortgage at the time of the sale could not be treated as an estoppel. DHONDO BALKRISHNA KANITKAR *v.* RAOJI . . . **I. L. R. 20 Bom. 290**

103. ——— *Rights of purchasers at sale in execution of a mortgage-decree—Purchase without notice that mortgagor was only benami-holder for the judgment-debtor.* The plaintiffs and defendants, either party holding a separate decree against the same estate, had by leave purchased in execution. Both parties claimed the proprietary right and possession, the defendants holding the latter. The first of the decrees in date was the plaintiff's for money against the representatives of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow. The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title, and interest. The mortgagees, having got a decree upon their mortgage against the widow, purchased at the sale in execution and defended the possession which they obtained. *Held*, that the defendants, in whose favour the decree had been made upon a *bonâ fide* mortgage, without notice that the mortgagor had been only holding benami for her husband, had the better title; that the High Court had rightly disallowed an objection taken by the plaintiffs that this defence, as distinguished from the defendants' answer that the widow was the real owner, had not been set up or decided in the Court of first instance; and *held*, that the owner, having in his lifetime authorized his wife to hold herself out as proprietor in her own right, could not have succeeded in a suit to disentitle the mortgagees without proving that they either had taken the mortgage with such notice or that they had been put upon inquiry; that the same principle applied to these plaintiffs, who had purchased his right, title, and interest; and that they were bound equally with him. *Ramcoomar Coondoo* v. *Macqueen, L. R. I. A. Sup. Vol. 40 : 11 B. L. R. 46*, referred to and followed as to the application of estoppel. MAHOMED MOZUFFER HOSSEIN *v.* KISHORI MOHUN ROY . **I. L. R. 22. Calc. 909 L. R. 22 I. A. 129**

104. ——— *Lease by mortgagor to mortgagee—Subsequent sale of equity of redemption by mortgagor—Suit by purchaser to redeem and for possession—Acquiescence.* The purchaser from the mortgagor of the equity of redemption having brought a redemption-suit, the mortgagee contested his right to recover possession on the ground that prior to the purchase, the mortgagor had granted to him (the mortgagee) a mulgeni or permanent lease. *Held*, that the plaintiff was not bound by the lease, although a long period had elapsed since it was granted, it having appeared that the plaintiff had on a former occasion contended that the lease was a forgery and fraudulent; and as the mortgagee was then entitled to possession under his mortgage, no acquiescence in the lease could be inferred from the mere fact of the mortgagee having remained in possession, it not being alleged that rent was ever paid to the plaintiff. SUBRAO MANGESHAYA *v.* MANJAPA SHETTI . . . **I. L. R. 16 Bom. 705**

105. ——— *Suit for sale by mortgagee against auction-purchaser, mortgagee having accepted part of the proceeds of former sale.* On the 10th of February 1873, one *S R* mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March 1877, *J P* and *G P* brought to sale, in execution of money-decrees against *S R*, two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale, R1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction-purchaser for sale of one biswa in satisfaction of his mortgage. *Held*, that, even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage. JHINKA *v.* BALDEO SAHAI **I. L. R. 14 All. 509**

106. ——— **Yeomiah lands**—*Madras Rent Recovery Act, ss. 3, 9, 79, 80—Unregistered holder rendering service and granting pottahs—Estoppel by acquiescence of person entitled to the yeomiah holding.* A yeomiahdar died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pottahs of the land. The holding was resumable on failure of the service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pottahs tendered by him to the raiyats who had already accepted pottahs from, and executed muchalkas to, the assignee. *Held*, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given them. KHADAR *v.* SUBRAMANYA **I. L. R. 11 Mad. 12**

107. ——— **Mortgaged land subsequently sold by mortgagee in execution of money-decree**—*Purchaser at such sale without notice of mortgage—Mortgagee stopped from subsequently enforcing his mortgage as against purchaser.* Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies, even though the mortgage-deed has been registered. AGARCHAND GUMAN CHAND *v.* RAKHMA HANMANT
I. L. R. 12 Bom. 678

RAMCHANDRA VITHURAM *v.* JAIRAM
I. L. R. 22 Bom. 686

108. ——— Assignee of mortgagor— *Evidence Act (I of 1872), s. 115—Right to sue for redemption.* Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem: *Held*, that, as there was nothing in that litigation to show that the defendant mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption. MUHAMMAD SAMI-UD-DIN KHAN *v.* MANNU LAL . . . **I. L. R. 11 All. 386**

109. ——— Sale of mortgaged property under a decree other than a decree on the mortgage— *Mortgage not disclosed—Effect of such non-disclosure on mortgagee's rights under his mortgage.* *Held*, that a mortgagee who causes the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage lien, is estopped for ever from setting up that lien against the title of a *bonâ fide* purchaser. *Agar Chand Guman Chand* v. *Rakhma Hanmant, I. L. R. 12 Bom. 678*, and *Dullab Sirkar* v. *Krishna Kumar Bakshi, 3 B. L. R. A. C. 407*, followed. MUHAMMAD HAMID-UDDIN *v.* SHIB SAHAI . . **I. L. R. 21 All. 309**

110. ——— Acts of agent— *Authority of agent—Member of Hindu joint family.* A person's agent for the purchase of an estate is not necessarily his agent to re-convey the same. Thus, where one member of an undivided Hindu family, with the authority of his brothers, purchased a share in certain property, and afterwards (without any authority from them) cancelled the sale, received back the consideration-money, and surrendered the kobala: *Held*, that the brothers were not estopped from suing the parties in possession of the whole property to set aside what the single brother had done, and to obtain possession of the share in question. BHUJONANUD MYTEE *v.* RADHA CHURN MYTEE . . . . **7 W. R. 335**

ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

111. ——— Purchase by agent— *Setting up character as principal.* Where a man steps in during an auction-sale and assumes the character of a principal agent, and, deposing another who is really acting as agent, purchases the property, he cannot afterwards be allowed, in equity, to turn round and claim to have purchased not for the principal, but for himself, and to obtain a profit out of his purchase. LOKHEE NARAIN ROY CHOWDHRY *v.* KALLY PUDDO BANDOPADHYA
23 W. R. 358 : L. R. 2 I. A. 154

112. ——— Estoppel by assent to delivery order— *Evidence Act, Ch. VIII—Vendor and purchaser.* *A* contracted to buy from *B & Co.* 180,000 gunny bags for cash on delivery. Subsequently *C* agreed with *A* to advance R15,000 against 87,500 bags. *B & Co.* gave delivery orders to *A*, although the goods remained unpaid for. *A* then endorsed certain of the delivery orders over to *C*. On these orders the agents of *B & Co.*, at the request of *A*, wrote the following words: "The bearer of this will personally take delivery of each lot as required." *C* took delivery of 50,000 bags, but *B & Co.* refused to deliver to him the remainder on the ground that *A* had not paid them according to the terms of his contract. *Held*, that, although there had been no actual appropriation of any goods to *A*, yet as *B & Co.*, by their agents, had consented to the transfer, and had thereby induced *C* to advance R15,000 on the delivery orders being endorsed and made over to him, it was not now open to them to repudiate the transfer, which they had, through their agent, been the means of confirming. Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety and are by no means confined to the subjects, which are dealt with in Ch. VIII of the Evidence Act. A man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention which the rules of equity and good conscience prevent him from using as against his opponent. GANGES MANUFACTURING CO. *v.* SOURUJMULL
I. L. R. 5 Calc. 669 : 5 C. L. R. 533

113. ——— Acquiescence of mortgagee — *Waiver of priority.* When a prior encumbrancer with a full knowledge of his title stands by and through his agency allows the mortgagor to deal with the property as if it was unencumbered: *Held*, that by such conduct he loses that priority to which the prior date of his encumbrance would, had he acted otherwise, have entitled him. RAI SEETA RAM *v.* KISHUN DASS *alias* KISHNARAM
3 Agra 402

114. ——— Right of appeal by defendant disclaiming all interest on his own account— *Suit for redemption.* *S* sued to redeem land mortgaged to *N*, and made *P* a defendant in the suit on the ground that he was in possession on account of *N*, his brother. *P* disclaimed all interest on his own account, and alleged that he was in

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

possession on behalf of *N*, and that the mortgage was a forgery. *N* did not appear. The Munsif decreed for the plaintiff. *P* appealed. The Subordinate Judge dismissed the suit on the ground that the mortgage was not proved. *Held*, on second appeal, that *P* had no *locus standi*, and could not appeal from the Munsif's decree. SESHAYYAR *v.* PAPPUVARA-DAYYANGAR . **I. L. R. 6 Mad. 185**

115. ——— **Acquiescence**—*Mortgage executed during plaintiff's minority.* The plaintiff sued the defendant on mortgages executed to the plaintiff by the adoptive mothers of the defendant (who were also defendants) subsequently to his adoption. The plaintiff contended that the mortgages had become effectual as against the defendant by reason of his subsequent conduct. Evidence was given that he had promised his adoptive mothers to redeem the mortgages, and that he had stood by and allowed the plaintiff to carry out the provisions of the mortgage-deeds to his own detriment by paying maintenance to the defendant's adoptive mothers and by paying off certain mortgages which had been created by them previously to the adoption of the defendant. *Held*, that knowledge on the part of the defendant that the plaintiff was carrying out the provisions of the mortgage-deeds, and his allowing the plaintiff to do so, did not estop him from disputing them afterwards, for it was no part of his duty to step in and protect the plaintiff against the consequences of his own unauthorized dealings with his property. SHIDDHESHVAR *v.* RAMCHANDRARAV **I. L. R. 6 Bom. 463**

116. ——— **Intervenor made party by plaintiff**—*Appeal by plaintiff against order making him party.* When an intervenor in a suit to recover rent is made a party at the request of the plaintiff, the latter cannot afterwards, by special appeal, get rid of the effect of his own act. SHAM CHUND GHOSE MUNDUL *v.* DOYAMOYEE MUNDULNEE . . . . . **9 W. R. 338**

117. ——— **Representation as to transfer of property**—*Suit for rent—Intervenor—Evidence Act, s. 115.* In a suit for rent brought against an ijaradar by a person claiming to be the dar-patnidar of certain property, the defendant resisted the claim upon the ground that another person was the real owner of the dar-patni, and this person was made a co-defendant, and intervened for the purpose of supporting his title to the rent. It appeared that in the year 1259 *A* purchased the dar-patni estate, and sold it in 1256 to his wife *B*, and son *C*. Afterwards *A* successfully resisted a suit for rent brought against him by the present plaintiff as superior landlord on the ground that he had parted with his interest in the estate to *B* and *C*. The plaintiff then sued *B* and *C* for the rent and obtained a decree, under which the dar-patni was sold to him. He now sued the ijaradar. The intervening defendant contended that *A* had mortgaged the property to him, and that such proceedings had been taken on the mortgage that he was entitled in the *A's* right to the rent of the property as the owner of it. *Held*, that the intervening defendant could take no better title than *A* himself; and that, as *A* had directly induced the plaintiff to believe that he had sold the property absolutely to *B* and *C* and had led him to bring a suit against them for the rent and under the decree obtained in that suit to purchase their interest in the property, the intervening defendant could not set up a claim to the rent in the present suit as against the plaintiff. AUNATH NATH DEB *v.* BISTU CHUNDER ROY **I. L. R. 4 Calc. 783**

118. ——— **Joint decree**—*Amount of shares in joint property.* The mere fact of two parties having jointly sued and obtained a decree by right of pre-emption against a third party does not preclude either from contending that by agreement they were not to take equal shares in the purchase. BERUNJA KOEREE *v.* HURPERSHAD LALL **3 Agra 235**

119. ——— **Acceptance by landlord of lower than decretal rate of rent.** Where a decree has declared a certain rate of rent payable, the landlord is not prevented, by the mere fact that he has not insisted on the rent being paid at that rate, but has accepted a lower one, from recovering at the rate given by the decree. MAZZUM ALLY KHAN *v.* PIRTHEE SINGH . **3 Agra 263**

120. ——— **Effect of condition in wajib-ul-urz**—*Suit to set aside condition.* Where a wajib-ul-urz contained a condition restricting the landlord's right to enhance: *Held*, that, having signed it, he must be held to be bound by it until he establishes his right by a civil suit to have the condition in the wajib-ul-urz set aside. KYALEE RAM *v.* MAHOMED ALI KHAN . . **1 Agra Rev. 62**

NUTTHA RAM *v.* SOOKH RAM . **3 Agra 90**

121. ——— **Assertion of proprietary right**—*Subsequent claim to maintenance.* Under special circumstances, a widow who had asserted a proprietary right in certain property, without putting forward any claim for maintenance, not allowed afterwards to enforce her claim for maintenance against such property in the hands of a purchaser. GOOLABEE *v.* RAMTAHAL RAI **1 N. W. 191: Ed. 1873, 275**

122. ——— **Grant of mokurari pottah by parties who afterwards acquire permanent settlement.** Parties holding a permanent settlement from Government cannot question the validity of a mokurari pottah previously granted by themselves when they held the property under a temporary settlement. ABDOOL MANNAH *v.* BARODA KANT BANERJEE . . **15 W. R. 394**

123. ——— **Recognition of talukhdari right**—*Purchaser at sale for arrears of revenue.* At a sale for arrears of revenue, Government purchased a pergunnah containing a certain talukh

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ESTOPPEL—*contd.*

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belonging to *A*. The talukh was not cancelled, and the Government made successive temporary settlements with *A*, in which his talukhdari right was recognized. The right and interest of Government in the pergunnah were afterwards sold to *B*, who ousted *A*. *A* afterwards joined with *C* in taking a patni lease of the same land which he had in the talukh. *Held*, in a suit by *A* against *B* and *C*, that this conduct estopped him from recovering possession of the dependent talukh from which he was ousted by *B*. *Assanoollah* v. *Obhoy Churn Roy, 13 Moo. I. A. 317 : 13 W. R. 24*, cited and distinguished. GOOROO PERSHAD CHUCKERBUTTY *v.* BANI NATH CHUCKERBUTTY . . . **2 C. L. R. 216**

124. ——— Registration in Collectorate—*Onus probandi.* In a suit to recover possession of certain land and houses, in which the plaintiffs rested their claims on the allegation that when the succession opened out they were seventh in degree, whereas the defendants were eighth in degree, from a common ancestor, and were entitled to no part of the property, it appeared that immediately after the opening out of the succession, the plaintiffs had treated the defendants as having equal rights with themselves and as being in an equal relationship to the common ancestor, and had permitted their names to be registered as such in the Collector's books. *Held* (affirming the decree of the High Court at Allahabad), that the course of conduct of the plaintiffs, although not amounting to an estoppel in point of law, threw the burden upon them of proving the allegation on which they rested their claim. AGRAWAL SINGH *v.* FOUJDAR SINGH **8 C. L. R. 346**

125. ——— Deposit of money—*Rate of interest.* The plaintiff deposited money with defendants, bankers, on 30th August 1863. On 2nd January 1867, an account was stated and a balance found to be due to the plaintiff consisting of the original deposit and interest at six per cent. per annum. On 11th February 1876, the defendants proposed to pay the plaintiff such balance, together with interest on the original deposit from January 1867 to February 1876, at only 4 per cent. per annum. The plaintiff now claimed the difference between interest at 4 and at 6 per cent. *Held*, that the defendants were estopped from disputing the plaintiff's demand for interest at the latter rate. MAKUNDI KUAR *v.* BALKISHEN DAS . . **I. L. R. 3 All. 328**

126. ——— Construction of document making suit premature—*Subsequent contention that suit is barred.* In a suit brought to recover money lent upon a mortgage which the defendant refused to register, the defendant put a construction upon the arrangement which was accepted by the Court, and the claim dismissed as premature. *Held*, that, when the plaintiff sued again in due (*i.e.*, mature) time, it was not open to the parties or to the Court to say that the first construction was wrong. EFATOONNISSA *v.* KHONDKAR KHODA NEWAZ **21 W. R. 374**

ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

127. ——— Giving notice of action under s. 53, Mad. Act XXIV of 1859—*Contention of non-applicability of section.* The plaintiff, a constable of police, sued the defendant, an inspector of police, for money had and received to the plaintiff's use. The defendant had received the pay of the plaintiff, but failed to give it to the plaintiff. Notice of suit was given by the plaintiff under s. 53 of the Madras Police Act, XXIV of 1859. *Held*, that the plaintiff was not estopped by his having given such notice from contending that s. 53 was not applicable to the case. GUNDAM VENKATASAMI *v.* CHUNNIAM PURUSHOTTAMA **5 Mad. 466**

128. ——— Agreement not to appeal—*Subsequent appeal.* After a plaintiff had obtained a decree and under it, in execution, arrested his judgment-debtor, the latter filed a petition in Court agreeing not to prefer any appeal against the judgment obtained by the plaintiff, and the judgment-creditor at the same time agreed to release the judgment-debtor from arrest and to take payment of the sum decreed to him by instalments. An order was passed by the Court embodying this arrangement. The judgment-debtor, in contravention of this arrangement, preferred an appeal. *Held*, that the judgment-debtor, having induced the decree-holder to believe and having expressly undertaken that he would not prefer an appeal, and having by the representation and undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking. PROTAP CHUNDER DASS *v.* ARATHOON. ARATHOON *v.* PROTAP CHUNDER DASS **I. L. R. 8 Calc. 455 : 10 C. L. R. 443**

See AMIR ALI *v.* INDURJIT KOER **9 B. L. R. 460**

RAJMOHUN GOSSAIN *v.* GOURMOHUN GOSSAIN **4 W. R. P. C. 47 : 8 Moo. I. A. 91**

129. ——— Acquiescence in use of trade mark—*Subsequently denying right to use it.* Where the plaintiffs by their conduct let the defendant to believe that they claimed no right to a certain trade mark and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market, *Held*, that the plaintiffs were estopped from denying the defendant's right to use the trade mark in the Indian market. LAVERGNE *v.* HOOPER **I. L. R. 8 Mad. 149**

130. ——— Refusal of registered letter—*Presumption of knowledge.* A person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents. LOOTF ALI MEAH *v.* PEAREE MOHUN ROY . . **16 W. R. 223**

131. ——— Alienation of service vatan land by the holder of it—*Impeachment of such alienation by the alienor—Hereditary Offices*

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*contd.*

Act (Bombay Act III of 1874, s. 5)—Vatandars. The plaintiff, who was a vatandar kulkarni, sued to recover from the defendant possession of certain land with mesne profits, alleging that it was his service vatan land wrongfully taken possession of by the defendant in 1880. The defendant set up a mortgage of the land alleged to have been executed to the defendant by the plaintiff's mother in the plaintiff's name during his minority. Both the lower Courts found that the land was the plaintiff's kulkarni vatan land; that it had been mortgaged by the plaintiff's mother to the defendant for good consideration; and that the mortgage was binding on the plaintiff. On appeal by the plaintiff to the High Court: *Held*, confirming the decree of the lower Court, that the plaintiff was estopped from denying his title to mortgage the field. The general rule being that the grantor cannot dispute with his grantee his right to alienate the land to him, the circumstances of the case did not justify a departure from the rule. The plaintiff, although an hereditary public officer, was not a trustee for the purposes of the Vatan Act, and it could not be presumed that the grantee knew that the plaintiff's guardian had not obtained the previous sanction of Government to the mortgage. The plaintiff was, therefore, estopped from saying that the grant was forbidden by the Act. NARAYAN KHANDU KULKARNI *v.* KALGAUNDA BIRDAR PATEL . **I. L. R. 14 Bom. 404**

132. ——— Payment of a tax for one year without protest—*Payment of the tax in a subsequent year under protest—Suit to recover money so paid—Cause of action.* The plaintiff paid a house tax at the rate of R6 for the year 1890 without any protest. When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under the protest. He then sued to recover what he alleged was an excess charge of R5 in respect of the tax for 1891. His claim was rejected on the ground that he was estopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest. *Held*, that the suit was not barred. The levy of a tax in each year gives a new and distinct cause of action, and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year. PITAMBER DAS *v.* JAMBUSAR TOWN MUNICIPALITY . . . **I. L. R. 17 Bom. 510**

133. ——— Order of Court made without jurisdiction—*Order of same Court for refund under execution.* Where a Court on the application of a decree-holder made an order for execution, and such order was set aside (on appeal) on the ground that such Court had no jurisdiction to entertain the application: *Held*, that the decree-holder, having invoked the jurisdiction of the Court, was estopped from calling in question an order subsequently passed by it, directing him to refund a sum realized under the order for execution. GOVIND VAMAN *v.* SAKHARAM RAMCHANDRA **I. L. R. 3 Bom. 42**

134. ——— Party not bound by proceedings not allowed to take advantage of them. Where a person who was called as a witness and set up a claim in execution-proceedings was not made a party, and was therefore not bound by those proceedings, it was held that in a subsequent suit against him for possession (he having obstructed execution of the former decree), in which suit he contended that the suit was barred as not having been brought within due time after the plaintiff's application in the execution-proceedings was dismissed, he could not take advantage of the execution-proceedings to resist a claim otherwise admissible against him. BALVANT SANTARAM *v.* BABAJI BIN SANTHOPA . **I. L. R. 8 Bom. 602**

135. ——— Acting on order containing reservation—*Disputing validity of reservation.* Where an application for leave to institute a suit was granted under cl. 12 of the Charter, leave being reserved in the order to the defendant to move to have it set aside, and the plaintiff had acted on the order: *Held*, that he could not afterwards object to the validity of the reservation it contained. RADHA BIBI *v.* MUCKSOODUN DASS . **21 W. R. 204**

136. ——— Fictitious sale—*Relief—Promoting public policy. Held*, that, though the law under the ordinary rule would not assist parties who have colluded in order to evade its provisions by restoring them to their original status, yet relief may be granted if public policy is promoted by so doing. RAM PERSHAD *v.* SHEVA PERSHAD **1 Agra 71**

137. ——— Repudiation of authority of guardian—*Adoption of beneficial acts.* A person who disputes the authority of another to act as his guardian, and repudiates the acts done by such guardian in that capacity, cannot take advantage of those acts so far only as they are beneficial to him. SOOBAH PRITHEE LALL JHA *v.* SOOBAH DOORGAH LALL JHA. SOOBAH DOORGAH LALL JHA *v.* NEELANUND SINGH . . . . . **7 W. R. 73**

138. ——— Recognition of tenure by Government—*Purchaser, Right of.* The Government having once recognized the plaintiff's talukh by selling it for arrears of rent to the parties through whom the plaintiff claimed, and no disclamer of his talukhdari right having ever been made by the plaintiff, *Held*, that it was not competent to the Government to deny the title of a tenure which it had by selling once guaranteed to the purchaser. JEEBUN SINGH BURMONO *v.* COLLECTOR OF BACKERGUNGE . . . . . **2 W. R. 77**

GOLUCK CHUNDER SEIN *v.* COLLECTOR OF BACKERGUNGE . . . . . **2 W. R. 139**

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ESTOPPEL—*contd.*

5. ESTOPPEL BY CONDUCT—*concld.*

139. ——————When the zamindari rights in a property have been purchased by Government at a sale for arrears of revenue, and Government guarantees the rights and position of certain talukhdars therein, and then sells its zamindari rights, the second purchaser is bound by the acts of the Government, and the talukhdars, if dispossessed, may recover possession under cl. 6, s. 23, Act X of 1859. BURNEE KHANUM *v.* MODHOOSOODUN DOSS . . . **3 W. R., Act X, 127**

JOOGUL KISHORE ROY *v.* AHSANOOLLAH **4 W. R., Act X, 6**

140. ——————**Legacy**—*Legacy in satisfaction of indebtedness.* It was contended that plaintiff was estopped from claiming a legacy under the will as he had disputed the validity of the latter, and had elected to take the R10,000 as a debt due to himself and not as a legacy. It appeared that plaintiff's brother had sued for a share in the testator's estate as family property, and that plaintiff had supported him and had also claimed a share. *Held*, that there was no estoppel, and that plaintiff's right to the legacy was not affected by that claim. RAJAMANNAR *v.* VENKATAKRISHNAYYA (1902) **I. L. R. 25 Mad. 361**

141. —————— **Minor**—*Suit by minor.* A minor who, representing himself to be a major and competent to manage his own affairs, collects rent and gives receipts therefor, is estopped by his conduct from recovering again the money once paid to him, by instituting a suit through his guardian. RAM RATUN SINGH *v.* SHEW NANDAN SINGH (1901) . . **I. L. R. 29 Calc. 126 s.c. 6 C. W. N. 132**

142. —————— **Acquiescence**—*Evidence Act (I of 1872), s. 115—Question of legal inference—Plea of estoppel appearing for the first time in issues in appeal.* Acquiescence is not a question of fact, but of legal inference from facts found. This principle applies also to estoppel. To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. It must be found that the plaintiff would not have acted as he did. It must be found that the defendants by the "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief." A plea of estoppel should not be given effect to in appeal when it was not suggested in the written statement, nor made one of the issues in the first Court, nor one of the grounds of appeal, and only appears for the first time in the issues raised by the lower Appellate Court. In such a case the High Court can interfere in second appeal. NARSINGDAS *v.* RAHIMANBHAI (1904) . . . **I. L. R. 28 Bom. 440**

143. ——————**Mortgage by minor**—*Statement known to be false by person to whom it is made—Evidence Act (I of 1872), s. 115—Age, false representation as to—Contract by infants—Contract Act (IX of 1872), ss. 11, 19, 64, 65—Persons competent to contract—Void contract—Advances on mortgage declared invalid, re-payment of.* S. 115 of the Evidence Act (I of 1872) does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. *Nelson* v. *Stocker, 4 De G. & J. 458*, followed. On the true construction of the Contract Act (IX of 1872), a person who, by reason of infancy, is incompetent to contract, cannot make a contract within the meaning of the Act. A mortgage, therefore, made by a minor is void; and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to re-payment of the money on a decree being made declaring the mortgage invalid; ss. 64 and 65 of the Contract Act being based on there being a contract between competent parties, and being inapplicable to a case where there is not, and could not have been, any contract at all. *Thurston* v. *Nottingham Permanent Benefit Building Society [1902], 1 Ch. 1 : [1903] A. C. 6*, followed. MOHORI BIBEE *v.* DHARMODAS GHOSE (1902) **I. L. R. 30 Calc. 539 s.c. 7 C. W. N. 441 L. R. 30 I. A. 114**

144. —————— **Mortgage**—*Evidence Act (I of 1872), ss. 115, 116.* Certain property was mortgaged in 1884. In 1889, the appellant took from the mortgagors and another person a lease of certain lands which included a portion of the mortgaged property. In a suit by the mortgagee on his mortgage, to which the appellant was made a party defendant: *Held*, that the appellant was not owing to the lease taken by him in 1889, estopped from showing that the mortgagors were not entitled to the whole of the mortgaged property at the time the mortgage was executed in 1884, *i.e.*, five years before the lease was taken by the appellant. PROSUNNO KUMAR SEN *v.* MAHABHARAT SAHA (1903) . . . . . **7 C. W. N. 575**

145. —————— **Sale**—*Equitable estoppel—Compromise petition—How far a party is entitled to contest the validity of a sale, when in a proceeding for setting it aside he asked for time, binding himself not to contest the validity of the sale, and got time.* In a proceeding to set aside a sale on the ground of irregularity and fraud, the judgment-debtor put in a compromise petition to which the decree-holder consented, and it was agreed that the judgment debtor should have time up to a certain date to pay up the full decretal amount, and that then the sale should be set aside, but that, if he failed, the sale should stand good. On the day fixed for payment the judgment-debtor paid a portion of the money, and obtained further time from the Court to pay the

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ESTOPPEL—*contd.*

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balance. On the judgment-debtor's tendering the balance on the day fixed by the Court for payment, the decree-holder refused to accept the money. The Court tried the case on the merits, and set aside the sale. *Held*, that the judgment-debtor was bound by the agreement and that he was estopped from contesting the legality of the sale. *Protap Chunder Dass* v. *Arathoon, I. L. R. 8 Calc. 455*, referred to. UTTAM CHANDRA KRITHY *v.* KHETRA NATH CHATTOPADHYA (1901) . **I. L. R. 29 Calc. 577**

146. ——— Execution against surety —*Surety guaranteeing payment of judgment-debt—Execution against surety, when proper—Remedy by suit—Civil Procedure Code (Act XIV of 1882), s. 336.* In the course of the execution of a money decree the judgment-debtor was arrested and brought before the Court. Thereupon the respondents, who were not parties to the proceeding, put in a surety bond covenanting to pay the decretal amount in the event of the judgment-debtor not paying it within a month, and stipulating that, if they failed to pay "the decree-holder would be at liberty to realise the amount by auction sale of their moveable and immoveable properties and by arresting them." The judgment-debtor not having paid the money within a month as stipulated, the decree-holder sought to execute the decree against the sureties, who came in and applied for two months' time to pay in the decretal amount and time was allowed. No payment was, however, made and the decree-holder applied for execution and had one of the sureties' properties sold. The sale was subsequently set aside. On a fresh application for execution against the sureties, they objected that no execution could be levied against them and the decree-holder ought to institute a separate suit. *Held*, that although the proper course for the decree-holder in such a case would be to institute a separate suit against the sureties, still having regard to the agreement that was come to and the conduct of the parties in the previous proceedings it ought to be taken that the sureties had waived their right to insist upon a separate suit being brought against them. *Coventry* v. *Tulsi Prasad, 8 C. W. N. 672*, and *Sadasiva Pillai* v. *Ramalinga, L. R. 2 I. A. 219*, relied on. KAZIMUDDI PATARI *v.* FAUZDAR KHAN (1906) **10 C. W. N. 830**

147. ——— Sale of occupancy holding —*Evidence Act (I of 1872), s. 115—Non-transferable occupancy jote—Presumption of transferability without consent of landlord from purchase by him.* Where a landlord in execution of a money decree causes the sale of an occupancy holding and purchases it himself, he is not estopped from pleading non-transferability without his consent in a subsequent suit brought by the mortgagee of the occupancy raiyat. The English law of mortgage and a consequent estoppel is not applicable to such a case. S. 115 of the evidence Act is exhaustive and the law of estoppel in this country is contained in that

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section. *Ayenuddin Nasya* v. *Srish Chandra Banerji, 11 C. W. N. 76*, distinguished. ASMATUNESSA KHATUN *v.* HARENDRA LAL BISWAS (1908) . . . . **I. L. R. 35 Calc. 904**
s. c. 12 C. W. N. 721

148. ——— Lease—*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), s. 107—Lien—Charge—Assignment.* Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other as if they were landlord and tenants and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel. *Cornish* v. *Abington, 4 H. & N. 549*, referred to. ARDESIR BEJONJI SURTI *v.* SYED SIRDAR ALI KHAN (1908) . **I. L. R. 33 Bom. 610**

EUROPEAN BRITISH SUBJECT.

See CRIMINAL PROCEDURE CODE, ss. 44, *et seq* . . **I. L. R. 27 All. 397**

See EXTRADITION ACT, 1879. **I. L. R. 9 Bom. 333**

See HIGH COURT, JURISDICTION OF—BOMBAY—CRIMINAL. **8 Bom. Cr. 92**
I. L. R. 9 Bom. 288, 333

See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.

See MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES. **I. L. R. 9 All. 420**

See MAJORITY, AGE OF . **8 B. L. R. 372**
3 N. W. 338
1 B. L. R. O. C. 10
I. L. R. 7 All. 490

See OFFENCE COMMITTED ON THE HIGH SEAS . . **1 B. L. R. O. Cr. 1**
7 Bom. Cr. 39
I. L. R. 21 Calc. 782

See POLICE ACT, 1861, s. 29 **3 N. W. 128**

See TRANSFER OF CRIMINAL CASE—GENERAL CASES . **I. L. R. 18 Calc. 247**

——— in Bangalore.

See HIGH COURT, JURISDICTION OF—MADRAS—CRIMINAL. **I. L. R. 12 Mad. 39**

——— in Mysore, jurisdiction over—

See FOREIGN JURISDICTION ACT, 1879, ss. 4, 6 AND 8 **I. L. R. 26 Mad. 607**

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EUROPEAN BRITISH SUBJECT—*contd.*

——— **jurisdiction to commit, to jail—**

See HABEAS CORPUS, WRIT OF.
I. L. R. 29 Calc. 286

——— **person tried jointly with—**

See APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODES.
I. L. R. 14 Bom. 160

See MAGISTRATE—JURISDICTION OF—POWERS OF MAGISTRATE.
I. L. R. 16 Mad. 308

1. ——— Opportunity to plead being European British subject—*Plea not taken till too late—Waiver.* A Deputy Magistrate ought to give an opportunity to a prisoner to plead that he is a European British subject. The mere statement of a prisoner that he is a European British subject, made before the Deputy Magistrate after the trial was completed, cannot be acted on. CLARK *v.* BEANE . . . . . **5 W. R. Cr. 53**

2. ——— Mode of procedure—*Charge against European British subject.* Mode of procedure by a Magistrate with regard to European British subject accused of an offence. QUEEN *v.* SHERIFF . . . . . **6 W. R. Cr. 13**

3. ——— *European British subject—Claim of status as a European British subject without claim to be tried by a jury—District Magistrate—Jurisdiction.* One *G. D.*, who was sent for trial before a District Magistrate on a charge of rioting under s. 147 of the Indian Penal Code, claimed that he was a European British subject, but did not ask to be tried by a jury. The Magistrate after inquiry found that *G.P.* was not a European British subject, tried, and convicted him under s. 147, but passed upon him a sentence which as District Magistrate he could legally have passed upon a European British subject. *G. P.* appealed to the Sessions Judge. The Sessions Judge, on the question being again raised, found that *G. P.* was a European British subject, and thereupon set aside his conviction and sentence and directed that he should be retried by the District Magistrate. *Held*, that this procedure was erroneous, inasmuch as the appellant had never claimed to be tried by a jury, and the Magistrate, who had tried and convicted him, was competent to try him as a European British subject and had passed a sentence, which was not in excess of his powers as a Magistrate trying a European British subject. The Sessions Judge on finding that the appellant was a European British subject, should have gone on and heard his appeal on the merits. *Empress of India* v. *Berrill, I. L. R. 4 All. 141*, distinguished. EMPEROR *v.* GEORGE POWELL (1905) . . **I. L. R. 27 All. 897**

4. ——— Criminal proceeding against— *Competency of native mofussil Magistrate to hold an inquiry against a European British subject under s. 107 of the Criminal Procedure Code (Act V of 1898)—Applicability of s. 443 of the Code to such inquiry.* The provisions of s. 443 of the Criminal Procedure Code apply to an inquiry held under s. 107 thereof. The party against whom such an inquiry is instituted is in the position of an accused. *Queen-Empress* v. *Mutasaddi Lal, I. L. R. 21 All. 107, Queen-Empress* v. *Mona Puna, I. L. R. 16 Bom. 661*, and *Jhoja Singh* v. *Queen-Empress, I. L. R. 23 Calc. 493*, referred to. HOPCROFT *v.* EMPEROR (1908) . . . . **I. L. R. 36 Calc. 163**

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1. MODE OF DEALING WITH EVIDENCE.

1. ——— Discussion of mode of dealing with. The mode in which evidence is to be dealt with discussed. MATHURA PANDEY *v.* RAM RUCHA TEWARI . **3 B. L. R. A. C. 108 : 11 W. R. 482**

BHAJU SING *v.* KAIFNATH TEWARI **3 B. L. R. A. C. 332**

2. ——— Conflicting evidence, investigation of cases of. There is no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life. USUDOOLLAH *v.* IMAMAN **5 W. R. P. C. 26 : 1 Moo. I. A. 19**

EVIDENCE—CIVIL CASES—*contd.*

1. MODE OF DEALING WITH EVIDENCE —*contd.*

3. ——— Native testimony—*Suspicion of perjury.* Evidence should receive its due weight, and not to be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. RAMAMANI AMMAL *v.* KULANTHAI NAUCHEAR **17 W. R. 1 : 14 Moo. I. A. 346**

4. ——— *Probability—Ground for decision on evidence.* The general fallibility of native evidence in India is no ground for concluding against a transaction when the probabilities are in favour of it. BUNWAREE LALL *v.* HETNARAIN SINGH. **4 W. R. P. C. 128 : 7 Moo. I. A. 148**

5. ——— Native cases—*Presumption—Case supported by false evidence.* A native case is not necessarily false and dishonest because it rests on a false foundation, and is supported in part by false evidence. WISE *v.* SUNDULOONISSA CHOWDRANEE . **7 W. R. P. C. 13 : 11 Moo. I. A. 177**

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RAMAMANI AMMAL *v.* KULANTHAI NAUCHEAR **17 W. R. 1 : 14 Moo. I. A. 346**

6. ——— Judgment on facts—*Probabilities of the case—Rule of Privy Council.* Where a Judge, whose judgments have been observed to be very careful, comes to a conclusion on the weight of evidence as to a pure question of fact, the High Court would do wrong not to follow the principle laid down by the Privy Council, not to interfere in a judgment on facts, unless the conclusion be clearly shown to be a mistaken one. In this country, where native evidence, as a general rule, is fallible, it would be safe and proper to follow another principle laid down by the Privy Council, namely, to look to the probabilities of the case. EDUN *v.* BECHUN . . . . . **11 W. R. 345**

7. ——— Sufficiency of evidence—*Evidence which might have been, but was not adduced, as being unnecessary.* Where there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced. RAMALINGA PILLAI *v.* SADASIVA PILLAI **1 W. R. P. C. 25 9 Moo. I. A. 506**

8. ——— Consent to decision on such evidence as there is. Even if the evidence upon the record is in itself insufficient, a Judge may properly decide the case upon that evidence, if the defendant consents to its being taken as sufficient. SHEETUL PERSHAD MITTER *v.* JUNMEJOY MULLICK **12 W. R. 244**

CHOOLIE LALL *v.* KOKIL SINGH **19 W. R. 248**

9. ——— Conflict between Judge's memoranda and recorded evidence. Where there is a conflict between a Judge's memoranda of evidence and the recorded depositions of witnesses,

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1. MODE OF DEALING WITH EVIDENCE—*concld.*

the Court must be guided by the latter. HEERANATH KOOEREE *v.* BURM NARAIN SINGH
15 W. R. 375 : 9 B. L. R. 274

10. ——— **Questions of evidence.** Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given. JADU RAI *v.* BHUBOTARAN NUNDY . **I. L. R. 17 Calc. 173**

RAMJIBUN SEROWJY *v.* OGHORE NATH CHATTERJEE . . . . **I. L. R. 25 Calc. 401**
2 C. W. N. 188

11. ——— **Documentary evidence, dealing with**—*General rules.* When a document is tendered, it is the first business of a Court to satisfy itself whether the document is admissible at all. If no evidence between the parties, it should be rejected at once. If an admissible document comes under the class which requires proof, it should be distinctly noted that it is admitted on the record subject to proof, in order that, if no proof be offered, the opposite party may ask the Court to take it off the record. Manson *v.* GOLAM KABRIA MOONSHEE
15 W. R. 490

12. ——— **Evidence not adduced in former suit**—*Ground for rejecting evidence.* Documentary evidence tendered by a plaintiff cannot be rejected merely because it has not been adduced in a former suit to which plaintiff was a party. PUREEJAN KHATOON *v.* BYKUNT CHUNDER CHUKERBUTTY
9 W. R. 380

13. ——— **Production of false document**—*Duty of Court.* The production in evidence of a forged document by a party to a suit does not relieve the Court from the duty of examining the whole evidence adduced on both sides, and of deciding the case according to the truth of the matters in issue. SURNOMOYEE *v.* SUTTEESCHUNDER ROY
2 W. R. P. C. 13

CHOWDHRY CHUTTARSAL SINGH *v.* GOVERNMENT
3 W. R. 57

KULTOO MAHOMED *v.* HURDEB DASS
19 W. R. 107

GORIBOOLLA GAZEE *v.* GOOROODOSS ROY
2 W. R., Act X, 99

BENGAL INDIGO CO. *v.* TARINEE PERSHAD GHOSE
3 W. R., Act X, 149

14. ——— **Alteration in document**—*Admissibility in evidence of altered document.* If a document on which a case depends appears to have been altered, it cannot be received in evidence or be acted upon till it is most satisfactorily proved by all the subscribing witnesses at the least, and by other evidence, that the alteration was made antecedently to the signature. PETAMBER MANICKJEE *v.* MOTEE CHUND MANICKJEE
5 W. R. P. C. 53
1 Moo. I. A. 420

EVIDENCE—CIVIL CASES—*contd.*

1. MODE OF DEALIHG WITH EVIDENCE—*contd.*

15. ——— **Possession of title-deeds**—*Absence of proof of acquisition of possession.* The mere fact of possession of title-deeds without any very satisfactory proof of the mode by which possession of them was acquired was held by the Privy Council to be outweighed by the other adverse circumstances of the case. KRIPAMOYEE DEBIA *v.* ROMANATH CHOWDHRY . . **2 W. R. P. C. 1**

KRIPAMOYEE DEBIA *v.* GIRISH CHUNDER LAHOREE . . . . . **8 Moo. I. A. 467**

16. ——— **Reasons for disbelief**—*Omission to give reasons for not believing evidence.* Where the lower Appellate Court was directed by the High Court to try a particular point, *viz.*, whether the plaintiff had proved actual possession within twelve years of suit, and the Court, in dealing with the evidence, observed that it would not rely on private documents and on the witnesses, as "they were not of much importance and were easily procured," and rejected survey papers coming from proper custody, as being papers easy to alter and therefore not reliable, the High Court, in remanding the case, *held* that this was a most improper mod of treating the evidence. If the Court disbelieved particular witnesses or refused to receive certain documents, it should give its reasons for the refusal with reference to these documents in particular, or for its disbelief of the particular witnesses, and not with reference to documents or witnesses in general. CHANDRA MADHAB ROY *v.* KHEMAMANI DASI
1 B. L. R. S. N. 19

OMAN *v.* KUMAR PRAMATHANATH ROY
1 B. L. R. S. N. 25 : 10 W. R. 256

17. ——— **Unopposed evidence**—*Suit for damages—Non-appearance of defendants.* In a suit to recover damages caused by the defendants plundering the house of the plaintiff, the Court of first instance passed, upon the evidence of two witnesses, a decree in favour of the plaintiff. On appeal by some of the defendants, the Judges of the Sudder Dewanny Adalut of Agra held that the fact of plunder was not proved, and dismissed the suit as against all the defendants. *Held* by the Privy Council, that, as the defendants did not come forward to exculpate themselves by their own evidence, and as the evidence in support of the charge was unopposed, the decree of the Court of first instance could not be set aside. GANESH SINGH *v.* RAM RAJA
3 B. L. R. P. C. 44 : 12 W. R. P. C. 38

18. ——— **Settlement of accounts.** The appellant put forward a *rukka* and list evidencing a settlement of accounts, supported by a substantial body of evidence of persons apparently of good repute, but which the respondent alleged to be fabricated. *Held*, that the High Court rightly rejected the positive evidence in favour of the settlement when it appeared that the facts ascertained on other evidence in the case as to certain items in the list were conclusive to the contrary of what was there

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EVIDENCE—CIVIL CASES—*contd.*

1. MODE OF DEALING WITH EVIDENCE—*contd.*

set out, and inconsistent with the existence of the alleged settlement. ASGHAR ALI KHAN *v.* KHURSHED ALI KHAN (1901) . **I. L. R. 24 All. 27 : s.c. L. R. 28 I. A. 127**

19. ——— Res inter alios acta—*Documents.* Documents which would be admissible against persons through whom one claims cannot be objected to by him on the ground that they are *res inter alios acta.* RANI SRIMATI *v.* KHAGENDRA NARAIN SINGH (1905) . **I. L. R. 31 Calc. 871 9 C. W. N. 74 L. R. 31 I. A. 127**

20. ——— Consideration and weight of evidence—*Alleged substitution of one boy for another in infancy—One-sided enquiries made to support allegation—Evidence not judicially taken and without notice to interested parties.* The question in issue was whether the appellant, defendant in the suit, was entitled to the name he bore and to the property in dispute of which he had long been in possession, or whether, as maintained by the respondent, the plaintiff in the suit, the real heir to the property died in infancy, and the appellant, when a boy, was fraudulently substituted for him. The first Court found in favour of the appellant, but the High Court reversed that decision mainly on evidence taken on enquiries made under official orders, the effect of which was to place the services of the officials employed at the disposal of the pleader for the respondent in order to enable him to obtain material in support of his case. *Held,* by the Judicial Committee, that, even if admissible the evidence so taken was of little, if any, value. It was taken to support a foregone conclusion the enquiries were secret : no notice was given to anybody on behalf of the boy, nobody was present throughout the enquiries to represent the boy or protect his interests : there was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise, nobody to test the statements by cross-examination, nobody to watch the accuracy with which they were recorded. Considering the purpose, the nature and the circumstances of the enquiries, which, if they were official in any sense, were certainly not judicial, no weight could be given to the proceedings at, or the results of, those enquiries. The judgment of the High Court was therefore reversed. CHANDRASANGJI *v.* MOHANSANGJI (1906) . **I. L. R. 30 Bom. 523**

21. ——— Tender of documentary evidence after closing case—*Judicial discretion, exercise of—Practice.* The plaintiff tendered in evidence a Persian judgment of 1836, which was filed with the plaint, after he had closed his case, but before the defendant commenced his, and prayed that the document might be translated and admitted in evidence. The Court of first instance refused this application as "too late." *Held,* that the Court did not exercise a sound judicial discretion in refusing to receive this document in evidence.

EVIDENCE—CIVIL CASES—*contd.*

1. MODE OF DEALING WITH EVIDENCE—*contd.*

BARODA PRASAD CHATTERJEE *v.* MADHAB CHANDRA GHOSE (1906) . **I. L. R. 33 Calc. 1345**

22. ——— Additional evidence on appeal—*Evidence taken preliminary to hearing of appeal on the merits—Civil Procedure Code (Act XIV of 1882), ss. 568, 623.* The legitimate occasion for s. 568 of the Civil Procedure Code (XIV of 1882) is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it ; that is the subject of the separate enactment in s. 623. On an appeal on the merits of the case being filed the appellate Court without recording any reason as required by s. 568 of the Code allowed such further evidence to be taken, not after the appeal on the merits had been heard and the evidence as it stood had been examined by the judges but on special and preliminary application : *Held,* that the appellate Court had no jurisdiction to admit the additional evidence, that it was wrongly admitted and must be disregarded. KESSOWJI ISSUR *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY (1907)
I. L. R. 31 Bom. 381 : L. R. 34 I. A. 115

23. ——— Proof of adoption—*Illiterate pardanashin widow lady—Non-appearance of plaintiff in Court as witness—Absence of any account of expenditure on ceremony—Mode of carrying on business—Inability to give date of adoption—Inconsistent and contradictory evidence—Practice for each litigant to cause his opponent to be cited as a witness.* Where the question on an appeal was whether his claim to be the adopted son of a illiterate pardanashin widow lady had been established by the respondent, who lived in her house and was the manager of her business consisting mostly of "zamindari and money dealings" and on whom the burden of proof rested : *Held* by the Judicial Committee (reversing the decision of the High Court), that having regard to the contradiction between the principal witnesses examined on the respective sides on almost every important point ; the improbabilities of the respondent's story ; its inconsistency with the conduct and action of the principal parties concerned, as well as with the mode in which the business of the firm was conducted and carried on ; the suppression of documents ; the non-appearance of the respondent as a witness at the trial to explain, if he could, the many circumstances which called for explanation from him ; the absence of all reference to the date of the adoption ; and above all the non-production of any account of expenditure at the ceremony, which, if his witnesses spoke the truth, must have been notorious in the neighbourhood where it took place, the respondent had failed to discharge the burden of proof which lay upon him, and had not established his claim. The practice common in litigation in the United Provinces in India for each litigant to cause his opponent

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EVIDENCE—CIVIL CASES—*contd.*

1. MODE OF DEALING WITH EVIDENCE —*contd.*

to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client, disapproved of by their Lordships of the Judicial Committee as resulting in the embarrassment of litigation, and as being a practice which judicial tribunals ought to set themselves to render as abortive as it is objectionable. KISHORI LAL *v.* CHUNNI LAL (1908) **I. L. R. 31 All. 116**

2. ACCOUNTS AND ACCOUNT BOOKS.

1. ——— Books kept in course of business. Books proved to have been regularly kept in course of business are admissible as corroborative, but not independent, proof of the facts stated. DWARKA DASS *v.* DWARKA DASS **2 Agra 308**

2. ——— Account books—*Act II of 1855, s. 43.* The books of a creditor are not admissible as evidence against his debtor to prove the debt, unless there is other evidence of the debt, in which case entries in such books may be admitted as corroborative evidence under Act II of 1855, s. 43. RAMKISTO PAUL CHOWDHRY *v.* HURRY DASS KOONDO . . **Marsh. 219 : 1 Hay 569**

3. ——— *Evidence Act, s. 34.* It is only such books as are entered up as transactions take place that can be considered as books regularly kept in the course of business within s. 34 of the Evidence Act. MUNCHERSHAW BEZONJI *v.* NEW DHURUMSEY SPINNING AND WEAVING COMPANY . . . . **I. L. R. 4 Bom. 576**

4. ——— *Effect of account books.* One party, by merely producing his own books of account, cannot bind the other. SORABJEE VACHA GANDA *v.* KOONWARJEE MANICKJEE **5 W. R. P. C. 29 : 1 Moo. I. A. 47**

5. ——— Entries in account books—*Evidence Act, s. 32, cl. 2, and s. 34—Account books kept on behalf of firm by servant or agent—Admission.* Account books containing entries not made by nor at the dictation of a person who had a personal knowledge of the truth of the facts stated, if regularly kept in course of business, are admissible as evidence under s. 34 of the Evidence Act I of 1872, and *semble* under s. 32, cl 2. Account books, though not proved to have been regularly kept in course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm. QUEEN *v.* HANMANTA **I. L. R. 1 Bom. 610**

6. ——— *Evidence Act, s. 145—Statement.* *A* was employed by *B* at intervals of a week or fortnight to write up *B's* account books, *B* furnishing him with the necessary information either orally or from loose memoranda. *Held,* that the entries so made could not be given in evidence to contradict *A*, under s. 145 of the Evidence Act, as to previous statements made by him in writing. The statements were really made, not by *A*, but by *B*, under whose instructions *A* had written them. MUNCHERSHAW BEZONJI *v.* NEW DHURMSEY SPINNING AND WEAVING COMPANY **I. L. R. 4 Bom. 576**

7. ——— *Absence of entry in a book irrelevant—Evidence Act I of 1872, s. 34.* Though under s. 34 of the Evidence Act the actual entries in books of account regularly kept in the course of business are relevant to the extent provided by the section, such a book is not by itself relevant to raise as inference from the absence of any entry relating to a particular matter. QUEEN-EMPRESS *v.* GRISH CHUNDER BANERJEE **I. L. R. 10 Calc. 1024**

8. ——— Where a Judge considered it inequitable to reject plaintiff's books when they made for him, *viz.*, as to amounts lent to defendant, and to accept them when they were against his interest, *viz.*, in the amount of repayment credited to defendant, and therefore disregarded both descriptions of entries equally, but gave a decree in plaintiff's favour for such entries as were proved, without deducting the items credited to defendant:—*Held,* that entries in an account book, whether on the credit or debit side of the account, are not conclusive evidence either of amounts paid or of sums actually due which the Judge is bound to believe. The Judge was bound to look at the whole of the entries in the plaintiff's book, to give credit to such of them as he believed to be true, and to discredit those, if any, which he believed to be false. ISAN CHANDRA SINGH *v.* HARAN SIRDAR **3 B. L. R. A. C. 135 : 11 W. R. 525**

9. ——— *Entry against interest of witness.* In a suit for account by the representatives of *A*, deceased, a document was offered as evidence purporting to be a copy made by deceased of an account furnished him by the defendant containing an entry of a payment of R5,000 by the deceased to the defendant, and the purchase therewith by the defendant of Company's paper for the deceased. *Held,* that by itself the document was inadmissible. But when further evidence was given by a witness that the deceased had stated to him that the document was a correct statement of his account with the defendant:—*Held,* that such evidence was admissible; and that, with the addition of this evidence, the document also was admissible as containing an entry by the deceased against his interest. But, *quære,* whether the circumstance that the entry only indicated a conversion of the money into a new shape did not take away the character of its being an entry against interest. ZAYNUB *v.* HADJEE BABA CAZRANEE **2 Ind. Jur. N. S. 54**

10. ——— *Hat-chitta book—Evidence against vendors.* A hat-chitta book is a

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EVIDENCE—CIVIL CASES—*contd.*

2. ACCOUNTS AND ACCOUNT BOOKS—*concld.*

document kept especially as a security for the vendor and in the absence of fraud, it must be considered binding upon him. GOPEEMOHUN ROY *v.* ABDOOL RAJAH SURJUN NACODA

1 Ind. Jur. N. S. 358

11. ——— *Disputed items of account, proof of.* In an action by a banking firm against another firm to recover a balance upon an account between them, the plaintiff put in evidence the account books of his firm, and the Inspector of the Court certified that the books were regularly kept, consistently with the rules of banking, and that they agreed with the account rendered by the plaintiff to the defendant. The plaintiff, however, examined no witness to prove that the books were regularly kept or the general accuracy of the particular charges constituting the demand: he proved admissions by the defendant of the correctness of the account, and of an award in his favour of one of the disputed items. The defendant in his defence did not deny the accuracy of the plaintiff' account or of the books put in evidence, but objected to two items of the account, and claimed a set off, but examined no witnesses to rebut the plaintiff's case. *Held* (reversing the Sudder Court's decree), that, although the plaintiff's books and the Inspector's report were not conclusive evidence, yet that the necessity of strict proof was removed by the admission of the defendant, and the fact of the absence by him of any evidence to impeach the accuracy of the accounts, the disputed items being satisfactorily accounted for. DWARKA DASS *v.* JANKEE DOSS

6 Moo. I. A. 88

12. ——— *Evidence Act (I of 1872), s. 34—Evidence as to whether hundis are genuine or not—Comparison of handwriting—Entries in account books regularly kept—Tests of correctness of such books—Interest on decree.* The High Court had reversed the finding of the first Court on an issue which, in effect, was whether certain hundis were genuine or false. Under s. 34 of Act I of 1872 (The Indian Evidence Act), the plaintiff's account books were produced by the plaintiff as relevant evidence, and were relied on as corroborating direct testimony. The books were tested by reference to entries corresponding with other independent evidence. The Judicial Committee, on the whole evidence, affirmed the decision of the High Court that the hundis were genuine. In the decree which gave interest to its date, they extended the period until payment. JASWANT SINGH *v.* SHEO NARAIN LAL . . **I. L. R. 16 All. 157**

S.C. TEWARI JASWANT SINGH *v.* LALA SHEO NARAIN LAL . . . **L. R. 21 I. A. 6**

13. ——— *Corroborative evidence necessary to render defendant liable upon entries in plaintiffs' books—Evidence Act (I of 1872), s. 34.* In a suit to recover money due upon a running account, the plaintiffs produced their account books, which were found to be books regularly kept in the course of business, in support of their claim.

EVIDENCE—CIVIL CASES—*contd.*

2. ACCOUNTS AND ACCOUNT BOOKS—*contd.*

One of the plaintiffs gave evidence as to the entries in the account books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transaction entered in the books, the entries in which were largely in his own handwriting, or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. *Held,* that the evidence given as above should be interpreted in the manner most favourable to the plaintiffs, and might be accepted in support of the entries in the plaintiffs' account books which by themselves would not have been sufficient to charge the defendants with liability. DWARKA DAS *v.* SANT BAKHSH

I. L. R. 18 All. 92

14. ——— *Admissibility of books of account containing entries after transactions—Corroborative evidence—Evidence Act (I of 1872), s. 34.* By s. 34 of the Indian Evidence Act, 1872, the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them, but should not, if they have been made regularly in the course of business afterwards, make them irrelevant. The course of business in keeping the accounts in the office of a talukhdari estate was that monthly accounts were submitted by karindas at the head office, where they were abstracted and entered in an account book under the date of entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. *Held,* that the entry in the account book was admissible as corroborative evidence of oral testimony to the fact of a payment for what it was worth, objection being only to be made to its weight, not to its relevance under s. 34. The opinion expressed in the judgment in *Munchershaw Bezonji* v. *New Dhurumsey Spinning and Weaving Co., I. L. R. 4 Bom. 576,* against the reception of an account book containing an entry not made at the time of the transaction was not approved. DEPUTY COMMISSIONER OF BARA BANKI *v.* RAM PARSHAD

I. L. R. 27 Calc. 118
L. R. 26 I. A. 254
4 C. W. N. 417

15. ——— **Account books of factory—** *Payment of rent.* The account books of a factory, regularly sworn to by the manager, are legal evidence of payment of rent. KALEE KANT MOJOOMDAR *v.* WATSON . . **2 W. R., Act X, 75.**

16. ——— *Evidence Act, 1872, s. 34.* Factory books can be used as independent primary evidence of the payment to which

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EVIDENCE—CIVIL CASES—*contd.*

2. ACCOUNTS AND ACCOUNT BOOKS—*contd.*

the entries refer; Act I of 1872, s. 34. QUEEN *v.* HURDEEP SAHOY . . **23 W. R. Cr. 27**

17. ——— **Pymaish accounts**—*Evidence of right to property.* An entry in the pymaish account is not *per se* sufficient evidence to establish a right to property which is denied. KESHAVAN *v.* VASUDEVAN . . **I. L. R. 7 Mad. 297**

18. ——— **Accounts**—*Evidence of reputation as to ownership of property—Suit to recover forest tracts from Government.* In a suit by a zamindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts called Ayakut accounts as furnishing proof of the inclusion of the said tracts within the limits of his zamindari. The District Judge refused to accept these accounts as evidence of reputation, because no evidence was produced to show for what purpose, by whom, and in what circumstances, these accounts were prepared, and what guarantee existed to ensure their accuracy. *Held*, that, inasmuch as they were from time to time prepared for administrative purposes by village officers and were produced from proper custody and otherwise sufficiently proved to be genuine, they were admissible as evidence of reputation. No distinction can be drawn between evidence of reputation to establish and to disparage a public right. SIVA SUBRAMANIYA *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 9 Mad. 285**

19. ——— **Partnership books**—*Act II of 1855, s. 53.* *A & Co.* and *B & Co.* entered into a joint adventure in opium. *A & Co.* were to send money to various places to be handed to the agents, who were to buy and sell. They now claimed against *B & Co.* for money alleged to have been so sent after giving credit for sums received. The proof was the arrival of the money at *A & Co.'s* places of business supported by entries in *A & Co.'s* books at each place, but there was no proof of payment to the agents save such entries. As to remittances to the other places, the only evidence was the books of *A & Co.* at the place of despatch. *Held*, that there was no evidence as to the latter claims; and as to the former, although the evidence appeared insufficient, the case would not be remanded, as the appellant, independent of these claims, had balance against them. SETH LAKHMI CHAND *v.* SETH INDRA MULL **4 B. L. R. P. C. 31 : 13 W. R. P. C. 36 13 Moo. I. A. 365**

20. ——— **Bankers' account books**—*Suit against representatives of customer for balance of account.* In an action by bankers against the representatives of a deceased customer to recover a balance of an account alleged to be due to the plaintiff by the deceased at the time of his death, the production of the banker's books, with the entries of the items constituting the demand, kept according to the established custom of mahajuns in India, is not of itself sufficient evidence to establish such

EVIDENCE—CIVIL CASES—*contd.*

2. ACCOUNTS AND ACCOUNT BOOKS—*concl'd.*

a claim, strict proof of the debt being required. RAI SRI KISHEN *v.* RAI HURI KISHEN **5 Moo. I. A. 432**

21. ——— *Account books of banking firm—Suit for money unaccounted for—Proof of payment.* Where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him; particularly if he has the means of producing much better evidence. In a suit to recover moneys unaccounted for, where defendants plead payments endorsed on documents, and the endorsements purport to have been signed by the plaintiffs, the formal and regular method of proof is to call on the plaintiffs to admit or deny their signatures, and then to call upon witnesses to state whether they saw the plaintiffs sign or could speak to the handwriting or generally what took place. GUNGA PERSHAD *v.* INDERJIT SINGH . . **23 W. R. P. C. 390**

22. ——— **Suit for balance of unadjusted account.** In a suit for a sum of money on an unadjusted account, plaintiff filed a memorandum (A) with her plaint, from which the amount claimed in the plaint could not be made out. In her examination by the Court the plaintiff put in another memorandum (C) to explain memorandum (A). Defendant admitted that memorandum (C) was signed by him. It had reference to a period immediately preceding that for which the suit was brought. *Held*, that memorandum (C) was rather evidence to support the originally stated cause of action, than an amendment of the claim or the substitution of one claim or cause of action for another. The case was one which should have been decided not merely on the discrepancy between the two statements made by plaintiff, but on the whole of the evidence. The mere omission of an accountable party, framing his own account, to carry forward into a new account a balance against himself existing in a former one can constitute no evidence in his own favour. To prove the existence of the balance, such omission might be considered in conjunction with other evidence in the cause. MULKA MUKHDRA *v.* TEKAETH ROY **14 W. R. P. C. 24**

23. ——— **Suit for balance of account**—*Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 56—Signed balance of account—Attestation of account.* A balance of account signed by an agriculturist is an instrument which purports to evidence an obligation for the payment of money, and cannot therefore be admitted in evidence, unless written by, or under the superintendence of, and attested by, a village registrar, as required by s. 56 of Act XVII of 1879. KANJI LADHA *v.* DHONDE KONDAJI . . . **I. L. R. 6 Bom. 729**

See DINGHA KAVARJI *v.* HARGOVANDAS GOVARDHANDAS . **I. L. R. 13 Bom. 215**

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EVIDENCE—CIVIL CASES—*contd.*

3. ACCOUNT-SALES.

1. ———— **Account-sale**—*Goods consigned from London.* *A* at Calcutta consigned goods through *B* at Calcutta to *C* at London for sale on his (*A's*) own account and risk. *B* advanced money thereon to *A*. The goods were sold in London by *C*, who sent the account-sale to *B* in Calcutta. In a suit by *B* against *A* in Calcutta for the balance due to him on account of the money so advanced after giving credit to *A* for the amount realized by the sale of the goods according to the account-sale :—*Held*, that the account-sale was *primâ facie* conclusive of the amount realized ; and if *A* wished to falsify the account, the onus lay upon him. DOOMUN *v.* STEVENS . **2 Ind. Jur. N. S. 5**

2. ———— **Consignment of goods to foreign market**—*Implied contract.* Where goods are consigned to be disposed of in a foreign market, it is an implied term of the agreement by the consignor that the account-sales furnished by the correspondents abroad shall be taken as *primâ facie* evidence of what the goods realized. *Held*, that this was so, even though the consignor objected to the correctness of the account-sales when furnished to him. HODGSON *v.* RUPCHAND HAZARIMUL . . . **6 Bom. O. C. 39**

3. ———— In an action brought by the plaintiffs for the balance due to them from the defendant in respect of shipments which had been treated by the plaintiffs as consignments on the defendant's account, account-sales furnished by plaintiffs to the defendant were held to be *primâ facie* evidence of the amount realized by the sale of the goods mentioned therein. SHEARMAN *v.* FLEMING . . **5 B. L. R. 619**

4. ———— *Evidence Act (I of 1872), s. 32.* In a suit to recover loss sustained on the sale by the plaintiffs of goods consigned to them by the defendant for sale by their London firm, account sales are good *primâ facie* evidence to prove the loss, unless and until displaced by substantive evidence put forward by the defendants. BARLOW *v.* CHUNI LALL NEOGHI (1901) **I. L. R. 28 Calc. 209**

4. DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS.

(*a*) GENERALLY.

1. ———— **Decree of competent Court**—*Presumption.* The decree of a competent Court must be presumed to be valid and binding on the parties, until the party attacking the decree clearly shows that it was improperly obtained by reason of fraud or misrepresentation practised upon the Judge by the party obtaining the decree. RAJNARAIN DUTT *v.* GOUR MONEE DOSSEE . **6 W. R. 215**

2. ———— **Proceedings and decree in former suit**—*Decision as to execution of will.* Where plaintiff and defendant respectively put in as evidence different portions of the proceedings in a

EVIDENCE—CIVIL CASES—*contd.*

4. DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—*contd.*

(*a*) GENERALLY—*contd.*

former suit, and found arguments thereon, the Court is bound to use them all as evidence. The finding of a Civil Court as to the execution of a will is not conclusive evidence on the point, if the question of its execution was not a material issue in the suit. BEER CHUNDER ROY *v.* TUMEEZOODEEN . **12 W. R. 87**

3. ———— **Decree in previous suit**—*Admissibility of, in evidence.* Effect of a previous decree as evidence in a subsequent suit stated. RAMJAN KHAN *v.* RAMAN CHAMAR **I. L. R. 10 Calc. 89**

4. ———— **Decree as to authenticity of deeds.** A Judge may lawfully employ a former decision for the purpose of showing that documents which bear such a distant date that their attestation or proof in the usual form is impossible, had been used publicly on a former occasion in the same Court when they had been found to be authentic, though such decision is not evidence in the case. NAGUR SINGH *v.* MUSHUNUND KHAN SIRDAR **11 W. R. 309**

5. ———— **Decree as to situation of chur for a portion of which suit is brought.** A former decision as to the situation of a chur, when an eight-anna share was in dispute, is not binding as an estoppel, although it is strong evidence in a suit in which the other moiety is disputed. NAZIMOODEEN AHMED CHOWDHRY *v.* WISE **5 W. R. 282**

6. ———— **Decree for possession**—*Suit under Act XIV of 1859, s. 15.* A decree for possession in a suit under s. 15 of Act XIV of 1859 is *primâ facie* evidence that the plaintiff in that suit is entitled to recover from the defendant therein mesne profits for the period of dispossession. RADHA CHURN GHATAK *v.* ZAMIRUNNISSA KHANUM **2 B. L. R. A. C. 67 : 11 W. R. 83**

Reversing on appeal under Letters Patent ZAMURDOONISA *v.* RADHA CHURN GHUTTUCK **9 W. R. 590**

7. ———— **Decree in summary suit**—*Suit for arrears of rent.* In a suit for arrears of rent, decrees in summary suits against the defendant for rent for years subsequent to those in respect of which the rent is claimed are no evidence of such rent being due ; but such a decree is *primâ facie* evidence in support of a claim for rent for the next ensuing year. AFSUROODEEN *v.* SHOROOSHEE BULA DABEE . . **Marsh. 558 : 2 Hay 664**

8. ———— **Decree declaring amount of rent payable**—*Suit for rent.* A decree in a former suit declaring the rent payable by a raiyat is evidence of the rent still payable by him unless rebutted by him by proof of change in the rent. CHUNDER COOMAR ROY *v.* ZEEMUNTOOLLAH SIRDAR **W. R. 1864, Act X, 95**

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EVIDENCE—CIVIL CASES—*contd.*

4. DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—*contd.*

(*a*) GENERALLY—*contd.*

MONMOHENEE DEBEE *v.* BINODE BEHAREE SHAHA . . . . . **25 W. R. 10**

9. ——— Proceedings in former suit —*Reversed decree.* Where a plaintiff had been successful in both the lower Courts, and the decree which he had obtained was only reversed by the High Court on the ground that he was not entitled to the particular relief asked for, without the finding of the lower Appellate Court and the pleadings of the parties being displaced :—*Held,* that it was open to the plaintiff in a subsequent suit against the same defendant framed in a different way, to adduce the proceedings in the former suit as evidence for what they were worth. MOHESH CHUNDER BROHMOCHARE *v.* DINOBUNDHOO BOSE . **24 W. R. 265**

10. ——— Decision between co-defendants—*Admissibility of decree in former suit—Evidence Act, s. 13.* A finding in a former suit, in which the question was tried between all the parties to the present suit, was held to be admissible as evidence in this suit under the Evidence Act, s. 13, although the plaintiffs and defendants in the present suit were in form co-defendants in the former. GUTTEE KOIBURTO *v.* BHUKUT KOIBURTO **22 W. R. 457**

11. ——— Decision of Appellate Court where there is a decision of High Court in different proceedings on same point—*Decrees declaring decree a simple money-decree, and one creating a lien.* The decision of the High Court that a certain decree was only a money-decree and carried no lien has not any binding effect on a previous decision of a lower Appellate Court in another suit between different parties relating to other lands sold under the same decree, in which it was held that the decree gave a lien on the property sold, and the Appellate Court's decree was entitled to be treated as one in full force notwithstanding the subsequent High Court decision. MAHOMED DANISH *v.* MAHOMED KEAM . . **25 W. R. 111**

12. ——— Former suit for partition —*Partition of property as evidenced by deed without possession under it.* A partition of property between members of a family, though evidence that the property is probably theirs, is no evidence against a third party unless it is shown that there has been some possession in accordance with the partition. DOORGA PERSHAD SINGH *v.* OPENDRONATH CHOWDHRY . . . . . **12 W. R. 145**

13. ——— Depositions of witnesses in former suit in Collector's Court—*Evidence of relationship of landlord and tenant.* In a suit for arrears of rent of land for which no rent has ever been paid where the plaintiff asks also for assessment of the rate of rent, and where the tenure had commenced thirty years previously and had been in the possession of defendant's grandfather, father, and himself without any rent having been paid :—*Held,* that, in deciding whether the relation of landlord and tenant existed between the parties, the Civil Court was entitled to look at evidence taken in the Collector's Court, being that of witnesses who had been examined and cross-examined by the present defendant when the suit was originally tried there. KEDAR NATH CHUCKERBUTTY *v.* GOPEE NATH GHOSE **23 W. R. 426**

EVIDENCE—CIVIL CASES—*contd.*

4. DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—*contd.*

(*a*) GENERALLY—*concld.*

14. ——— Depositions of witnesses in former suit—*Different parties.* Copies of depositions given in suits in which defendant was not a party cannot be treated as evidence in a case in which he is a party. SHUMBO GEER GOSSAIN *v.* RAM JEWAN LALL . . . **8 W. R. 509**

15. ——— Copy of hustabood—*Different parties.* An authenticated copy of a hustabood of 1209 B.S., of which the original was put into the Collectorate by the zamindar according to Regulation VIII of 1800, was held to be no evidence against third parties, defendants in a rent suit. RAM NURSING MITTER *v.* TRIPOORA SOONDERY DASSIA **9 W. R. 105**

16. ——— Evidence of conduct—*Statements made by parties managing properties in suit.* The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the lower Court. The appellants sought to make use of these documents, not as constituting matters in dispute *res judicata,* but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct. *Held,* that the documents were inadmissible in evidence. SUBRAMANYAN *v.* PARAMASWARAN **I. L. R. 11 Mad. 116**

17. ——— Decree for possession under s. 9, Specific Relief Act (I of 1877)—*Subsequent suit "inter partes" for mesne profits—Admissibility in evidence of former decree.* A decree for possession made by a Court under s. 9 of the Specific Relief Act (I of 1877) in a suit beyond the pecuniary limit of that Court's jurisdiction, although not *res judicata,* is some evidence of dispossession by the defendants in a subsequent suit against the same defendants to recover mesne profits. *Gujju Lall* v. *Fatteh Lal, I. L. R. 6 Calc. 171 ; Brojo Behari Mitter* v. *Kedar Nath Mozumdar, I. L. R. 12 Calc. 580 ; Surendra Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry, I. L. R. 13 Calc. 352 ;* and *Radha Churn Ghuttack* v. *Zumuroonissa Khatoon, 11 W. R. 83,* distinguished. *Run Bahadur Singh* v. *Lucho Koer, I. L. R. 1 Calc. 301,* referred to. JIAULLAH SHEIKH *v.* INU KHAN . **I. L. R. 23 Calc. 693**

(*b*) UNEXECUTED, BARRED, AND EX PARTE DECREES.

18. ——— Decree for kabuliat—*Unexecuted decree—Evidence of amount of rent.* A decree

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EVIDENCE—CIVIL CASES—*contd.*

4. DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—*contd.*

(*b*) UNEXECUTED, BARRED, AND EX PARTE DECREES—*contd.*

for a kabuliat for arrears of rent is evidence of the rent which the judgment-debtor is liable to pay only when he is called upon to execute such kabuliat, not where the decree has never been executed and no kabuliat has ever been given. HEERA LALL SEAL *v.* JOHEER MOLLAH . . **20 W. R. 273**

BANEE MADHUB BANERJEE *v.* BHAGUT PAL **20 W. R. 466**

MAHOMED AKBAR *v.* REILY . **24 W. R. 447**

MISSER *v.* NASER ALI . . **21 W. R. 33**

19. ——— Decree assessing rent—*Evidence on question of title.* A decree of the High Court declaring plaintiff's right to assess rent upon land held by defendant as lakhiraj is a binding decision between the parties on the question of title, even though incapable of execution by reason of lapse of time, and should not be excluded from consideration by the Deputy Collector. RAMSOONDRY DABEE CHOWDRAIN *v.* RAM PERSHAD SADHOO **8 W. R. 288**

20. ——— Decree barred by limitation—*Decree for rent—Evidence of rate of rent.* A decree for rent is admissible in evidence against a defendant to prove the rate of rent he was liable to pay, although the decree has not been executed for three years, and has therefore become barred under the law of limitation. BEERCHUNDER MANIK *v.* RAMKISHEN SHAW **14 B. L. R. P. C. 370 : 23 W. R. 128**

21. ——— ——— *Decree for rent—Evidence of receipt of rent.* A decree for rent in a suit under Act X of 1859 against the defendant, an intervenor, which has remained unexecuted for more than three years, is not, in a subsequent suit, admissible in evidence to show that the defendant had not, during a perod subsequent to the decree, been in *bonâ fide* receipt of the rent. RAM SUNDER TEWARI *v.* SRIMANT DEWASI **14 B. L. R. 371 note : 10 W. R. 215**

22. ——— Ex parte decree unexecuted and barred by limitation—*Evidence of title.* A decree *ex parte* becomes inoperative if not executed within the time allowed by law, and a party who obtains such a decree, having accepted his status at variance with that assigned to him under the decree for a term beyond limitation, cannot, at any subsequent period, rely upon that decree as proof of his title, nor can it be accepted as such by the Courts. RAMJEEAWAN RAI *v.* DEEP NARAIN RAI **Agra F. B. 78 : Ed. 1874, 60**

23. ——— *Evidence of rent being due.* A decree obtained *ex parte* is, in the absence of fraud or irregularity, as binding for all purposes as a decree in a contested suit. Such a decree is admissible as evidence, even though the period for executing it has expired. Where the plaintiff

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sued the defendant for a year's rent at the same rate which had been decreed to him for the previous year in a suit which he had brought against the same defendant for rent of the same property and relied upon the former decree, which had been obtained *ex parte*, as evidence of the rent due to him from the defendant :—*Held*, that the decree was properly admissible as evidence though the plaintiff had not taken out execution upon that decree, and his right to take out execution was barred by limitation. BIRCHUNDER MANICKYA *v.* HURRISH CHUNDER DASS . . **I. L. R. 3 Calc. 383 : 1 C. L. R. 585**

24. ——— Ex parte decree. A judgment adduced as evidence is not to be rejected merely on the ground of its having been *ex parte.* OJOON SHAHOO *v.* ANUND SINGH . **10 W. R. 257**

CHUNDEE COOMAR DUTT *v.* JOY CHUNDER DUTT MOJOOMDAR . . . **19 W. R. 213**

25. ——— *Different parties.* An *ex parte* decree is admissible in evidence *quantum valeat*, even against a person who was no party to it. A decree obtained by one party against another cannot be considered as conclusive evidence against the title of a third party. HUNSA KOOER *v.* SHEO GOBIND RAOOT . **24 W. R. 431**

26. ——— *Evidence in suit for rent.* The fact of a decree in a rent suit having been given *ex parte* does not detract from its value as evidence of the relationship of landlord and tenant between plaintiff and defendant, provided due notice has been served on the latter ; and such a decree may be filed as evidence without the judgment on which it was founded. TOOMY *v.* DURRUP SINGH . . . . . **12 W. R. 473**

27. ——— *Admissibility and effect of.* Where a suit is tried *ex parte* and no issues of fact are raised beyond the general issue involved in the claim, the decree considered as evidence is, only evidence that the amount decreed was at the time due from the defendant to the plaintiff. GOYA PERSHAD AUBUSTEE *v.* TARINEE KANT LAHOREE CHOWDHRY . . **23 W. R. 149**

28. ——— *Decree under which nothing has been recovered.* A decree is evidence, even though nothing has been recovered under it. A Court is bound to consider the value of even an *ex parte* decree pending in appeal when it is tendered as evidence. MAHOMED KANA MEAH *v.* RUN MAHOMED . . . **24 W. R. 254**

29. ——— *Summary decree—Evidence of rate of rent. Ex parte* summary decrees are no evidence of the rate of rent leviable. ANNA PURNA DASI *v.* JOYKISTO MOOKERJEE **W. R. 1864, Act X, 107**

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30. ——— *Estoppel — ex parte decree, effect of—Rate of rent—Rent-suit—Civil Procedure Code (Act XIV of 1882), s. 13.* A mere statement of an alleged rate of rent in a plaint in a rent-suit in which an *ex parte* decree has been obtained is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised betwen the parties, so that the defendant is concluded upon it by such decree. Neither a recital in the decree of the rate of rent alleged by the plaintiff nor a declaration in it as to the rate of rent which the Court considers to have been proved would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case. MODHUSUDUN SHAHA MUNDUL *v.* BRAE . . **I. L. R. 16 Calc. 300**

31. ——— *Ex parte decree—Evidence of amount of rent.* An *ex parte* decree is not conclusive evidence of the amount of rent payable by the same defendant in another suit for subsequent rent of the same property. Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for a previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, and which he also alleged had been duly executed, as evidence of the amount of rent due to him by the defendant, but it appeared that the lower Court had found that the alleged execution-proceedings were fraudulent, and that no steps had been taken which gave finality to the decree:—*Held*, that the decree was not conclusive evidence of the amount of rent due from the defendant or of the questions with which it dealt. *Birchunder Manickya* v. *Hurrish Chunder Dass, I. L. R. 3 Calc. 383*, distinguished. NILMONEY SING *v.* HEERA LALL DASS **I. L. R. 7 Calc. 23 : 8 C. L. R. 257**

32. ——— *Ex parte decree for arrears of rent—Evidence of rate of rent.* An *ex parte* decree for arrears of rent which has been duly executed is some evidence as to the rate of rent. *Bukshi* v. *Nizamuddi, I. L. R., 20 Calc. 505, per* NORRIS, *J.*, followed. MADHU MANJARI CHOWDHURANI *v.* JHUMAR BABI . **1 C. W. N. 120**

MATI LAL PODDAR *v.* NRIPENDRA NATH ROY CHOWDHRY . . . . **2 C. W. N. 172**

33. ——— **Decree against registered co-tenant**—*Acquiescence of others in the name being registered—Evidence of rate of rent.* When the joint tenants of a homestead holding allow one of them to have his name registered in the landlord's books, a decree obtained by the landlord

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against such registered tenant is admissible in evidence against the other tenants as to the rate of rent. MOTI LAL PODDAR *v.* NRIPENDRA NATH ROY CHOWDHURY . . . **2 C. W. N. 172**

(*c*) DECREES AND PROCEEDINGS NOT INTER PARTES.

34. ——— **Former decrees and proceedings**—*Different parties.* Decrees and proceedings to which the defendants were not parties are not admissible as evidence against them. SUTTO SURN GHOSAL *v.* DHONE KRISTNO SIRCAR **1 W. R. 88**

MAHOMED ALI *v.* SHURUM ALI . **8 W. R. 422**

LALL SINGH *v.* MODHOOSUDUN ROY **8 W. R. 426**

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SURUT SOONDUREE DEBIA *v.* RAJENDUR KISHORE ROY CHOWDHRY . . . **9 W. R. 125**

MOHA MOYEE DOSSEE *v.* JOODHISTER DEB **10 W. R. 112**

SHEO DYAL POOREE *v.* MOHABEE PERSHAD **10 W. R. 477**

AMEEROONNISSA KHATOON *v.* JUGGER NATH ROY **11 W. R. 113**

KASHEE CHUNDER MOJOOMDAR *v.* SEETUL CHUNDER TULLAPATTUR . . . **17 W. R. 151**

MAHOMAD BUX *v.* ABDOOL KUREEM ALIAS ABOO **20 W. R. 458**

ANUND MOHIM GHUTTUCK *v.* SOORJI KANTO ACHARJEE CHOWDHRY . . **22 W. R. 538**

LALLA MOHADEO DYAL SINGH *v.* CHUNDEE PERSHAD . . . . . **25 W. R. 57**

35. ——— **Judgment in former case**—*Different parties—Similar interest.* A judgment in another case is of itself insufficient evidence against a party who had no part in it, even though his interest may be of a similar nature to those of the parties then suing. DOST MAHOMED KHAN CHOWDHRY *v.* SOOLOCHANA DABIA . **1 W. R. 270**

36. ——— *Different parties—Inapplicability of English rule.* Remarks on the admissibility in evidence of judgments in previous suits, and on the applicability in all its strictness to the Courts, of this country of the English rule that, except in matters of general interest or public rights, a verdict in a previous suit, to be admissible, must be between the same parties, or parties through whom the parties actually in litigation claim. DOORGA DOSS ROY CHOWDHRY *v.* NURENDRO COOMAR DUTT CHOWDHRY . **6 W. R. 232**

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(c) DECREES AND PROCEEDINGS NOT INTER PARTES—*contd.*

37. ——— *Subsequent suit brought by strangers to former suit.* The judgment in a former suit against the same defendants in respect of the same subject-matter is admissible, though not conclusive, evidence against the defendants in a subsequent suit brought against them by other parties. LALA RANGLAL *v.* DEONARAYAN TEWARY . **6 B. L. R. 69 : 14 W. R. 201**

38. ——— *Judgment admissible against third party.* A judgment *inter partes* may be received in favour of a stranger as against a party thereto, not as concluding such party, but as evidence for what it is worth. BHYRUB NATH TYE *v.* KALLY CHUNDER CHOWDRY **16 W. R. 112**

39. ——— *Suit by the purchaser at execution-sale to recover the purchase-money.* The plaintiff purchased land sold in execution of a decree in favour of the defendant, but was subsequently evicted by the son of the judgment-debtor; he now sued in 1889 to recover the purchase-money paid by him on the ground that the judgment-debtor possessed no saleable interest in the property in question. It appeared that the son of the judgment-debtor had obtained a decree in 1888 against the plaintiff and others declaring that she (the judgment-debtor) had no saleable interest in the property, and that in that suit the present defendant had given evidence in support of the present plaintiff's contention; the judgment in that suit was now admitted in evidence against the defendant. *Held*, that the judgment in the former suit was not evidence against the defendant, he not having been party to it; and that the suit should be dismissed on the ground that there was no legal evidence that the judgment-debtor, whose interest in the land had been purchased by the plaintiff, possessed no legal interest therein. NILAKANTA *v.* IMAMSAHIB . **I. L. R. 16 Mad. 361**

40. ——— *Evidence Act (I of 1872), ss. 8, 9, 13, 40, 43—Admissibility in evidence of judgments not inter partes—Judgment in criminal case.* *P* brought a suit against *K*, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to *K's* husband, and to have it declared that her husband died childless, and that *K* had falsely put forward a child of unknown parentage as her husband's son. *K* was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits by the Court of first instance, and by the High Court on appeal. After *K's* death, *P* brought a suit against *D*, whom the Collector, as manager of the Court of Wards, had accepted as the minor son of *K*, and against the Collector as such manager, for possession of the same villages upon the same grounds as those put forward in the former suit. *Held*, by the Full Bench, that the judgments of the Court of first instance and the High Court in the former suit did not operate as *res judicata* in the present suit, but (BRODHURST, *J.*, dissenting on this point) that they were admissible in evidence in the present suit. *Per* EDGE, *C.J.*, and TYRRELL, *J.*—The judgments were not admissible under s. 8 or s. 9 of the Evidence Act (I of 1872), nor was either of them a "transaction" or a "fact" within the meaning of s. 13. But the record, and not the judgments alone, in the former suit, was admissible, under s. 13 (*b*) independently of s. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed, the word "right" in both cls. (*a*) and (*b*) of s. 13 including a right of ownership, and not being confined, as held by the majority in *Gujju Lall* v. *Futteh Lall, I. L. R. 6 Calc. 171*, to incorporeal rights. But the reasons given in the judgments in the former suit for the decree could not be considered in the present suit. *Per* STRAIGHT, *J.*—Under s. 43 of the Evidence Act, the question was whether the existence of the former judgments was a fact in issue or relevant under some other provision of the Act. Here the question was not as to the existence of the former judgments and decrees as a fact in issue or relevant fact; but though s. 43 declared judgments, orders, and decrees other than those mentioned in ss. 40, 41, and 42 irrelevant *quâ* judgments, orders, and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees were not themselves a "transaction" or "instances" within the meaning of s. 13; but the suit in which they were made was a transaction or an instance in which the defendant's right as the living son of *K's* husband to obtain proprietary possession of his father's estate was claimed and recognized, and to establish that such a transaction or instance took place, they were the best evidence. *Per* BRODHURST, *J.*—That for the reasons given by GARTH, *C.J.*, and JACKSON and PONTIFEX, *JJ.*, in *Gujju Lal* v. *Fatteh Lall, I. L. R. 6 Calc. 171*, the judgments in the former suit were not admissible in evidence. *Per* MAHMOOD, *J.*—That for the reasons given in the dissentient judgment of MITTER, *J.*, in *Gujju Lal* v. *Fatteh Lall, I. L. R. 6 Calc. 171*, the former judgments were admissible in evidence. It having been alleged that the defendant was in reality one *R*, the defence attempted to use as evidence a judgment in a criminal case in which the defendant was prosecuted as *R* for causing simple hurt, and in which the Court had found that *R* had died some time before the date of the alleged offence, and expressed an opinion that the present plaintiff (who was not the prosecutor) had got up the case:—*Held* by EDGE, *C.J.*, and BRODHURST and TYRRELL, *JJ.*,

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that the judgment of the Criminal Court was not admissible in evidence. *Held* by STRAIGHT, *J.*, with doubt, and on the principle, that in cases of doubt a Judge should decide in favour of admissibility, rather than of non-admissibility, that the judgment was a fact which went to establish the identity of the defendant with the person he alleged himself to be, or at any rate to show that he was not the person the plaintiff said he was, and that it was therefore admissible under s. 9 of the Evidence Act. *Held* by MAHMOOD, *J.*, that the judgment was admissible under s. 8, and, if not, under other sections of the Evidence Act. COLLECTOR OF GORAKHPUR *v.* PALAKDHARI SINGH **I. L. R. 12 All. 1**

41. ——— **Decree not inter partes—** *Proceedings of Revenue Court.* Decrees obtained by either party, to which the other was not a party, or the proceedings of the revenue authorities, though not binding, should be treated as evidence to which the Court should give such weight as it thinks proper. COLLECTOR OF FUREEDPOORE *v.* KALEE DASS HAZARAH . . . . . **17 W. R. 194**

42. ——— *Evidence to explain inconsistency. Held,* that the Subordinate Judge was quite justified in using a decree between other parties to explain an apparent inconsistency between certain statements in the plaint and in the evidence of the plaintiff's witnesses, on the ground of which inconsistency the Munsiff had rejected that evidence. RADHANATH DASS *v.* KHELLUT CHUNDER GHOSE . . . . . **17 W. R. 558**

43. ——— *Ownership of property.* In a suit to have it declared that a certain howla was the property of *W*, plaintiff's judgment-debtor, defendants contended that it had been the property of another person and that they had purchased it in execution of a decree against that person. The lower Appellate Court found for the defendants on the basis of a decree dismissing a suit by *W's* representatives to have the property declared to be *W's*. *Held,* that the decree could not bind the plaintiffs who were not parties to it. GOLUCKMONEE DEBIA *v.* RAMMONEE BOSE **12 W. R. 21**

44. ——— *Evidence of possession—Admissibility in evidence of decree in former suit.* The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent. *Held* (MITTER, *J.*, dissenting), that the decree in the former suit was not admissible as evidence in the present suit. SURENDER NATH PAL CHOWDHRY *v.* BROJO NATH PAL CHOWDHRY . . . . **I. L. R. 13 Calc. 352**

45. ——— *Decree in former suit showing lands were mal—Suit by auction-purchaser for rent—Evidence Act, s. 11.* Where the plaintiff, who was an auction-purchaser of a share in certain lands, sued for arrears of rent against the owners of another share in the same, it was admitted that certain plots of the estate were held in exclusive possession. The defendants claimed these plots as lakhiraj. The plaintiff put in evidence certain decrees in respect of such plots in which it was held, against the persons in possession at the time, that the lands were mal. *Held,* that, having regard to the circumstances and the particular defence set up, that the decrees were admissible in evidence, not as showing that the lands were mal or lakhiraj, but as showing that rent had been successfully claimed in respect of the lands. HIRA LAL PAL *v.* HILLS . . . . . **11 C. L. R. 528**

46. ——— *Decrees as to rate of rent in former suits.* Decisions as to rates of rent in previous suits are admissible in a subsequent suit as evidence of local usage, though the parties in the subsequent suit were not parties to the previous suits. EASWARA DOSS *v.* PUNGAVANACHARI . . . . **I. L. R. 13 Mad. 361**

47. ——— *Rent suit—Decree obtained ex parte against registered tenant.* In a suit for rent the plaintiff claimed that he was entitled to payment both in cash and kind, and, in order to show that he was entitled to recover rent in kind, tendered two *ex parte* decrees obtained by his predecessor against the persons registered as tenants of the tenure at the time the decrees were obtained, such decrees being for rent both in cash and kind. It appeared that the defendant was the owner of the tenure at the time the two decrees were passed, having acquired the tenure by foreclosure, although he had not registered the transfer in the plaintiff's books, and that he was not made a party to the suits in which the decree was passed. *Held,* that, as the defendant was not a party to the suits in which the decrees were obtained, and did not claim through the parties against whom they were passed, they were not admissible in the suit as evidence against him. The decision in *Sham Chand Koondoo* v. *Brojonath Pal Chowdhry, 12 B. L. R. 484 : 21 W. R. 94,* does not lay down that a decree against a registered tenant is to be evidence for ever in future proceedings against an unregistered transferee not a party to it; but all that case decides, is, that for the purpose of satisfying that particular decree an

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unregistered transferee is bound by it, whether he was a party to the suit or not, the tenure being liable for the rent. RAM NARAIN RAI *v.* RAM COOMAR CHUNDER PODDAR **I. L. R. 11 Calc. 562**

48. ——— *Evidence of adoption.* In a former *bonâ fide* litigation to which the defendant was not party, the status of the plaintiff as an adopted son was in issue and disposed of in his favour. *Held,* that that was good evidence of the adoption in this case, in the absence of better evidence for the defendant. SEETARAM *v.* JUGGOBUNDHOO BOSE . . **2 W. R. 167**

49 ——— *Evidence of adoption.* A decree to which the defendant was not a party is admissible as evidence of great weight, though not as an estoppel against him, on the question of the plaintiff's adoption, which was established by it in the presence of certain members of the plaintiff's family who were interested in contesting its validity. ANNUNDNATH ROY *v.* THAKOOR DOSS MOZOOMDAR . . **2 Hay 472**

50. ——— *Evidence Act (I of 1872), s. 35—Judgments and private documents.* In a suit for partition of family property, it became necessary for the plaintiff to prove that his grandfather had been adopted by *A*, and he tendered in evidence judgments from which it appeared that *A's* brother, who was the grandfather of defendant No. 1, had sued to recover moneys due to *A*, alleging that the adopted son was an infant living under his protection. An adoption of the father of the defendant No. 1 by *D* was also put in issue, and to prove it, defendant No. 1 tendered in evidence decrees in which the alleged adopted son was so described and also other documents (to which neither defendant No. 5, who denied the adoption, nor his father was a party) where the same description was used. *Held,* that the decuments tendered in evidence of the two adoptions above mentioned, respectively, were admissible in evidence. KRISHNASAMI AYYANGAR *v.* RAJAGOPALA AYYANGAR **I. L. R. 18 Mad. 73**

51. ——— *Former suit on same matter between different parties—Decision on public right.* In a suit by the trustees of certain pagodas for the recovery of six villages on behalf of the pagodas from the defendant, the manager of the pagoda :—*Held,* that the judgment in another suit —in which the cousin of a former manager sued him for a partition of certain villages, some of which were included in this suit, and in which it was decided that the manager was manager and not owner—was a decision upon a question of public right, and was receivable against the defendant. KINDERSLEY, *J.*, agreed generally, but doubted whether the judgment in the other suit was upon a matter of such general interest as to be good evidence against a stranger. NALLATHAMBI BATTAR *v.* NILLAKUMARA PILLAI . . . . **7 Mad. 306**

52. ——— *Evidence Act, ss. 13, 43.* In a suit to establish an itmamee right to certain lands, the plaintiff produced certain transcript decisions of the Civil Court in suits in which a former holder of the tenure of the person who was said to have created the right was a party, but the lower Appellate Court rejected them as evidence, on the ground that the defendant was not a party to the suits. *Held,* that the proceedings in such suits came within the meaning of "any transactions" in the Evidence Act, 1872, s. 13, and were admissible as evidence in the case under s. 43, not as conclusive, but as of such weight as the Court might think they ought to have. NEAMUT ALI *v.* GOOROO DOSS . . . . **22 W. R. 365**

OMER DUTT JHA *v.* BURN . **24 W. R. 470**

53. ——— *Evidence Act, ss. 13, 42—Relevancy of judgments in suits in which right was asserted to collect dues for a temple.* In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple :—*Held,* that judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were relevant under s. 13 of the Evidence Act, as being evidence of instances in which the right claimed had been asserted. *Held,* also, that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature. RAMASAMI *v.* APPAVU **I. L. R. 12 Mad. 9**

54. ——— *Record of transaction by which rights of parties were recognized—Evidence Act, s. 13.* Where a suit was disposed of according to a compromise, of which the judgment set out the terms in the form of a recital :—*Held,* that the judgment, though not in the ordinary form of a decree, was the record of a transaction by which the rights of the parties were recognized, and was therefore relevant as evidence under the provisions of Act I of 1872, s. 13. ROOP CHAND BHUKUT *v.* HUR KISHEN DASS . . . **23 W. R. 162**

55. ——— *Evidence Act (I of 1872), s. 35—Title-deeds—Petition of plaintiff's predecessor asserting title—Judgment obtained by plaintiff's predecessor recognizing title.* In a suit to establish the plaintiff's title to certain land, he put in evidence (i) a conveyance in favour of his father ; (ii) a sale-certificate issued to his father's vendor ; (iii) an order made in certain execution-proceedings in which was recited a petition by his father asserting his title ; (iv) a judgment obtained by his father in which his title was recognized. Neither the defendants nor their predecessors were parties

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to any of these instruments or proceedings. *Held*, that all these documents were relevant and admissible in evidence. VENKATASAMI *v.* VENKATREDDI **I. L. R. 15 Mad. 12**

56. ——— *Evidence Act (I of 1872), s. 13—Document executed by other tenants—Suit for ejectment.* In a suit for possession of land, the plaintiffs claimed title under a lease from the shrotriemdars of the village where the land was situated. The defendants, who had obstructed the plaintiffs, from taking possession of part of the land, claimed to have permanent occupancy rights, and asserted that the shrotriemdars were entitled not to the land itself, but to melvaram only. To meet this allegation, the plaintiffs tendered in evidence documents executed by other tenants in the same village showing that they were purakudis merely. The defendants had received no notice to quit before suit. *Held*, that the documents above referred to were admissible under Evidence Act, s. 13. VYTHILINGA *v.* VENKATACHALA . **I. L. R. 16 Mad. 194**

57. ——— *Decision as to boundaries of land.* Where the boundaries of a piece of land, as given respectively in a sale-certificate and in a plaint, serve to identify it as the land in respect of which a former decision has been passed, then, although the present holders of the land may not be the legal representatives of the persons who were bound by the former decision, yet the decision is entitled under s. 13, Evidence Act, to consideration as evidence in support of the plaint. ANUND CHUNDER CHUND *v.* GUNEE GAZEE **25 W. R. 180**

58. ——— *Road-cess papers—Deed of sale—Evidence Act, s. 13.* Under the Evidence Act, s. 13, road-cess papers and a deed of sale are evidence *quantum valeant.* So is a decree, although the party against whom it is treated as evidence was no party to it. DAITARI MOHANTI *v.* JUGO BUNDHOO MOHANTI . **23 W. R. 293**

59. ——— *Decrees in former suits as to custom—Evidence Act, s. 13.* In determining the right to the office of audhikari of the Diflu Sastur at Nowgong, where defendant claimed to be audhikari and alleged the headship was elsewhere, previous judgments or decrees involving instances in which the right and custom in question had been successfully asserted were held admissible in evidence under the provisions of Act I of 1872, s. 13. KOONDO NATH SURMA GOSSAMEE *v.* DHEER CHUNDER SURMA ODHIKAR GOSSAMEE . . . . **20 W. R. 345**

60. ——— *Evidence Act (I of 1872), s. 13—Custom—Admissibility in evidence of judgments not "inter partes."* In a suit for rent the amount of the land held by the defendant was questioned, and it was contended that the land must be measured with a hath of 21⅝ inches and not one of 18 inches, as claimed by the plaintiff zamindar. Certain decrees obtained by the zamindar against other tenants in the same pergunnah in suits in which 18 inches had been taken as the hath were tendered in evidence in support of the plaintiff's contention that the customary hath in the pergunnah was one of 18 inches. *Held*, that such decrees were admissible in evidence under the provisions of s. 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed. JIANUTULLAH SIRDAR *v.* ROMONI KANT ROY. PIR BUKSH MUNDUL *v.* ROMONI KANT ROY **I. L. R. 15 Calc. 233**

61. ——— *Decrees of competent Courts—Evidence of custom—Matter of public interest.* The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities. Such decisions form an exception to the general rule, which excludes *res inter alios actæ.* BAI BAIJI *v.* BAI SANTOK . **I. L. R. 20 Bom. 53**

62. ——— **Judgments not inter partes**—*Suit for confirmation of title and for sale.* Plaintiff, as representing decree-holder, sued for confirmation of title and for sale of the property in execution. Defendant's case was that he was purchaser for valuable consideration from the original judgment-debtor. The lower Appellate Court set aside this plea on the ground that the High Court had declared in special appeal, in a previous litigation between defendant and another party, that the purchase in question was spurious, null, and void. *Held*, that the decision of the High Court, though not binding and final evidence against the defendant in this suit, was sufficient to give plaintiff a *primâ facie* case which, by the rules of pleading, it was for defendant to rebut. ABDOOL KAREEM *v.* SUFFER ALLY **11 W. R. 118**

63. ——— *Judgment not inter partes—Suit for possession—Evidence of character of possession.* In a suit for possession of land, the defendant, in order to show the character of his possession, offered in evidence a judgment obtained by him in a suit to which the plaintiff or his predecessors in title were not parties. *Held*, that the judgment was admissible in evidence. PEARI MOHUN MUKERJI *v.* DROBOMOYI DABIA **I. L. R. 11 Calc. 745**

64. ——— *Liability of land for rent.* In a suit for khas possession of land upon the allegation that the defendant refused to give up possession or to pay rent for it, a decree declaring that the land in suit was liable for rent was tendered in evidence. The decree had been obtained by an auction-purchaser against the defendants, but the plaintiff did not claim title through

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EVIDENCE—CIVIL CASES—*contd.*

4. DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—*contd.*

(c) DECREES AND PROCEEDINGS NOT INTER PARTES—*contd.*

the auction-purchaser who had in fact been treated as a trespasser and ejected. *Held*, that the ruling in the case of *Gujju Lall* v. *Fatteh Lall, I. L. R. 6 Calc. 171*, governed the case and that the decree was inadmissible in evidence. Although the case of *Hira Lall Pal* v. *Hills, 11 C. L. R. 528, inter partes* may be received in evidence, it does not lay down that such judgments can be treated as conclusive evidence of the facts with which they deal. MOHENDRA LAL KHAN *v.* ROSOMOYI DASI

I. L. R. 12 Calc. 207

65. ——————————— *Evidence Act, ss. 11, 13, and 40—Admissibility of such judgment.* The plaintiff sued to recover arrears of rent for a certain shop, alleging the annual rent to be R250. The defendant contended that it was only R60. The defendant and the plaintiff's brother were partners in business, and the plaintiff relied upon the evidence of his brother and on two entries in the firm's books in the writing of his brother. To prove the *bonâ fides* of the entries, the plaintiff tendered in evidence a judgment passed against the defendant in a suit brought by the defendant against the plaintiff's brother, charging him with having improperly debited their firm with R250 as the rent of the shop. *Held*, that the judgment was not admissible as evidence against the defendant in the present suit. *Naranji Bhikabhai* v. *Dipa Umed, I. L. R. 3 Bom. 3*, distinguished. RANCHHODDAS KRISHNADAS *v.* BAPU NARHAR

I. L. R. 10 Bom. 439

66. ——————————— *Subjects of public nature—Proof of custom of pre-emption. Held*, that in subjects of a public nature, such as to prove custom of pre-emption, etc., previous judgments between other parties are admissible as evidence, but must not be regarded as conclusive evidence. TOTA RAM *v.* MOHUN LALL . . **2 Agra 120**

67. ——————————— *Suit for pre-emption—Evidence of custom—Decrees enforcing right.* In suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom in suits in which it was alleged and denied, is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. *Gujju Lal* v. *Fatteh Lal, I. L. R. 6 Calc. 171*, distinguished. *Koodootoollah* v. *Mohinee Mohun Shaha, 5 Rev. Civ.* and *Cr. Rep. 290, Sheo Churn* v. *Goodur, 3 Agra 138*, and *Luchman Rai* v. *Akbar Khan, I. L. R. 1 All. 440*, referred to. GURDAYAL MAL *v.* JHANDU MAL . . **I. L. R. 10 All. 585**

68. ——————————— *Evidence of custom.* A co-owner of village lands sued in 1861 to have them divided among the villagers according to a custom that at the expiration of every twelve years the lands should be re-distributed by lot among the co-owners and to have two of the shares delivered to him as one of the co-owners. In 1851 another co-owner had, in a suit to which only some of the present defendants were parties, obtained a decree for the periodical allotment of the lands; and in 1853 such decree, which clearly recognized the existence and validity of the custom, was affirmed on appeal. *Held*, that, though the decree of 1851 was only a judgment *inter partes*, it was, as against such of the present defendants as were not parties to the former suit, cogent evidence of the existence and validity of the custom. VENKATASVAMI NAYAKHAN *v.* SUBBA RAU. SANKARA SUBBAIYAN *v.* SUBBA RAU

2 Mad. 1

69. ——————————— *Evidence Act (I of 1872), ss. 11 and 13—Admissibility in evidence of judgment in former case, the subject-matter of the former suit not being identical with that of the latter suit.* The rule laid down in the cases of *Gujju Lall* v. *Fatteh Lall, I. L. R. 6 Calc. 171*, and of *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry, I. L. R. 13 Calc. 352*, has been materially qualified by the decisions of the Privy Council in the cases of *Ram Ranjan Chakerbutty* v. *Ram Narain Singh, I. L. R. 22 Calc. 533 : L. R. 22 I. A. 60*, and *Bitto Kunwar* v. *Kasho Pershad, L.R. 24 I. A. 10*. Under certain circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property :—*Held*, that in the subsequent suit the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical. TEPU KHAN *v.* RAJANI MOHAN DAS

I. L. R. 25 Calc. 522
2 C. W. N. 501

70. ——————————— *Evidence Act (I of 1872), ss. 13 and 43—Judgments not inter partes—Admissibility of such judgments.* Judgments not *inter partes*, though not conclusive as *res judicata*, are admissible in evidence under s. 13 of the Evidence Act (I of 1872) to show the conduct of the parties, or particular instances of the exercise of a right, or admissions made by the parties or their predecessors in title, or to identify property, or to show how it has been previously dealt with. *A, B* and *C* were members of a joint Hindu family, each having a third share in the family estate. *A* assigned his interest in the joint estate to the plaintiffs, who in 1897 filed this suit to recover by partition their one-third share in the property. *B* and *C* pleaded (*inter alia*) that *A* had already relinquished his share in their favour by a release dated 7th August 1885. The

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EVIDENCE—CIVIL CASES—*contd.*

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plaintiffs relied upon the judgments in a former suit brought by certain creditors of *A* to establish *A's* title to a third share in the property. In that suit it had been decided that the release relied upon by *B* and *C* was a fraudulent and colourable transaction. *Held*, that the judgments in the former litigation, though not *inter partes*, were admissible under s. 13 of the Evidence Act. LAKSHMAN GOVIND *v.* AMRIT GOPAL . . . . **I. L. R. 24 Bom. 591**

71. ——— **Decree not inter partes**—*Decree obtained by some of the mortgagees against the mortgagors, vendors of the purchasers, if evidence against and binding upon purchasers.* A decree obtained by the mortgagees against the original mortgagors, the vendors of the appellants, is no evidence against the appellants, purchasers of the interests of the mortgagors, if they were no parties to that decree, and if the transfer to them was before the institution of the suit in which that decree was passed; and the purchasers are in no way bound by the result of that suit. BASUDEB GIRI *v.* BROJO MOHAN JANA (1902) . . **7 C. W. N. 54**

72. ——— **Proceedings not inter partes**—*Evidence of possession.* In a suit for possession, where plaintiff put in a copy of a solehnamah to which defendant was not a party:—*Held*, that, although no question of right or title could be decided adversely to the defendant on the basis of that agreement, yet it would be evidence that by an order of Court passed on that solehnamah the plaintiff was put in possession. SREEMUTTY DASSEE *v.* PELARAM DASSEE **15 W. R. 261**

73. ——— *Admissibility of proceedings between defaulting proprietor and third parties in suit by auction-purchaser at sale for arrears of revenue.* An auction-purchaser at a sale for arrears of Government revenue does not derive his title from the defaulting proprietor, and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him. RADHA GOBINDO KOER *v.* RAKHAL DASS MOOKERJEE . . . . **I. L. R. 12 Calc. 82**

74. ——— *Roobookari—Evidence Act, s. 13.* A roobookari (Court proceeding) in a case in which certain decree-holders sought to attach the mokurrari rights of an ancestor of the defendants in this jaghir was held to be relevant evidence under the Evidence Act (I of 1872), s. 13. LUCHMEEDHUR PATTUCK *v.* RUGHOOBUR SINGH . . **24 W. R. 284**

5. HEARSAY EVIDENCE.

1. ——— **Evidence in cases of pedigree, death and marriage.** Hearsay evidence

EVIDENCE—CIVIL CASES—*contd.*

5. HEARSAY EVIDENCE—*contd.*

though to be received with caution is not inadmissible in questions of pedigree, and by the Mahomedan law is held to be good respecting death, descent, and marriage. In India, in cases of such description, the declarations of illegitimate members of the family and also of persons who, though not related by blood or marriage to the family, are intimately acquainted with its members and state, is admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of the deceased members of the family. GHURRESH HOSSAIN CHOWDHRY *v.* USEEMONNISSA KHATOON **1 Hay 528**

2. ——— **Declarations of deceased persons in cases of pedigree**—*Evidence Act, II of 1855, s. 47.* S. 47, Act II of 1855, does not refer to evidence of living witnesses, but to declarations of deceased persons in cases of pedigree, who, though not related by blood or marriage to the family, were intimately acquainted with its members and state. Such declarations, after the death of the declarant, are admissible as evidence in the same manner and to the same extent as those of deceased members of the family. MOHIMA CHUNDER CHUND *v.* MOTHOORANATH GHOSE . . **9 W. R. 151**

3. ——— **Statements of ancestor of parties**—*Suit for property as shebaits.* In a suit to recover property claimed by plaintiffs as shebaits lately in possession, and wrongfully ousted therefrom, it was held that statements made by the ancestors of plaintiffs and defendants were receivable as evidence. NUND PANDAH *v.* GYADHUR **10 W. R. 89**

4. ——— **Evidence as to lands being mal.** The oral evidence of persons able from their position to testify as to certain lands being *mal* is not to be rejected as hearsay when they depose that they have known the lands to be *mal* for many years, and that defendant has been in the habit of paying rent for them. DABEE PERSHAD CHATTERJEE *v.* RAM COOMAR GHOSAL . . **10 W. R. 443**

5. ——— **Admissions in relation to property**—*Evidence Act, s. 60—Admissions of plaintiff's vendor.* The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness. ALI MOIDIN *v.* KOMBI ACHAR **I. L. R. 5 Mad. 239**

6. ——— **Evidence as to common report**—*Lunacy.* Where the fact of lunacy was admitted, and the question was the date at which it commenced, the evidence of a planter in the neighbourhood as to common report for years in the village as to the lunacy having been admitted by the lower Court, the Judicial Committee refused to reject it. The rule as to admission of evidence laid down by Dr. Lushington in *Unide Rajaha Raje Bommarauze* v. *Pemmasamy Venkatadry Naidoo, 17*

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EVIDENCE—CIVIL CASES—*contd.*

5. HEARSAY EVIDENCE—*concld.*

Moo. I. A. 137, followed. BODHNARAIN SINGH *v.* UMRAO SINGH. AJODHYA PERSAD SINGH *v.* UMRAO SING **6 B. L. R. 509 : 15 W. R. P. C. 1 13 Moo. I. A. 519**

7. ——— Hearsay evidence disregarded by Privy Council as not relevant. NARAIN DAS *v.* RAMANUJ DAYAL **I. L. R. 20 All. 209**

LALA NARAIN DASS *v.* LALA RAMANUJ DAYAL **L. R. 25 I. A. 46 2 C. W. N 193**

8. ——— **Pedigree, proof of**—*Evidence of witnesses who have heard names of ancestors recite—Evidence of relatives—Grounds for discrediting evidence—Mode of dealing with evidence—Witnesses, credibility of.* Evidence of competent witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives. The relationship of a class of witnesses should be considered only with the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted, and should not be treated as making them interested or unreliable witnesses. The fact that one of such persons besides being a relative was assisting the plaintiff in the case, and that the other witnesses were connected with this person by blood or service, is not necessarily sufficient ground for discrediting their evidence. The rejection of certain specific statements of a witness is not necessarily a ground for disbelieving the whole of his evidence ; nor is the fact that a Judge has not acted on certain portions of his evidence, which may be due to caution on the part of the Judge or inaccuracy on the part of the witness. DEBI PERSHAD CHOWDHRY *v.* RADHA CHOWDHRAIN (1905) **I. L. R. 32 Calc. 84 s.c. 9 C. W. N. 164 L. R. 31 I. A. 160**

6. JUMMABUNDI AND JUMMA-WASIL-BAKI PAPERS.

1. ——— **Jummabundi papers**—*Corroborative evidence.* Jummabundi papers can be used only as corroborative evidence. GAJJO KOER *v.* ALLY AHMED **6 B. L. R. Ap. 62 : 14 W. R. 474**

NEWAJEE *v.* LLOYD . . **8 W. R. 464**

2. ——— *Independent evidence.* Jummabundi papers can never be treated as independent evidence of any contested fact. CHAMARNEE BIBEE *v.* AYENOOLLAH SIRDAR **9 W. R. 451**

HEERA NATH *v.* SHUMSHERE SAHEE . **1 N. W. 14**

EVIDENCE—CIVIL CASES—*contd.*

6. JUMMABUNDI AND JUMMA-WASIL-BAKI PAPERS—*contd.*

3. ——— *Evidence of rate of rent.* Where the jummabundi was shown not to have been acted upon, jummabundi papers are not, without other evidence, sufficient to support a claim for rent at the rate stated in them. OOMED ALI *v.* MEHDEE HOSSAIN . . **2 N. W. 2**

4. ——— *Amount due by mortgagee.* Unless evidence be adduced to show the jummabundi papers to be unreliable, they may be taken as proof that the amounts entered in them are the amounts for which the mortgagee in possession may be called upon to account. GUNGA PERSAD SINGH *v.* GUNGA KOONWER **2 Agra, Pt. II, 210**

5. ——— *Evidence of rate of rent. Held,* that the entry in the jummabundi alone (though material evidence) is not sufficient to justify a decree for higher rent, if it be shown that the rent actually paid and received by the landlord or his agent for years was less than that therein stated. MOWLAS KOONWER *v.* SHIVA SAHAI **1 Agra Rev. 65**

6. ——— *Suit for mesne profits.* It is the practice of the Courts to accept the jummabandi papers which are filed by the patwaris under the zamindar's supervision as *primâ facie* evidence of the profits of the estate, it being open to the mortgagee is possession to show that the amounts entered could not with due diligence be collected. DEONARAIN SINGH *v.* NAEK PERSHAD **2 N. W. 217**

7. ——— *Evidence of amount of rent collected.* Jummabundi papers for the year in respect of which rent is claimed, made out by the officers of the person claiming the rent, cannot be evidence of his right to that which they set forth ; though the evidence of the patwari (as being the officer usually charged with the duty of collecting the rent) as to the amounts collected in previous years, corroborated by the jummabundi of those years, would be conclusive in respect of the claim. DHANOOKDHAREE SAHEE *v.* TOOMEY **20 W. R. 142**

BHUJWAN DUTT JHA *v.* SHEO MUNGUL SINGH **22 W. R. 256**

8. ——— *Partition proceedings—Suit for arrears of rent.* Jummabundi papers filed by a malik in batwara proceedings to which the tenant is not necessarily a party cannot be used as evidence against such tenant in a suit for arrears of rent. KISHORE DOSS *v.* PURSUN MAHTOON . . . . . **20 W. R. 171**

9. ——— **Jumma-wasil-baki papers** —*Use of, as evidence.* The use of jumma-wasil-baki papers as e vidence observed upon. ROUSHAN BIBI *v.* HURRAY KRISTO NATH . **I. L. R. 8 Calc. 926**

ALLYAT *v.* JUGGAT CHUNDER ROY **5 W. R. 242**

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EVIDENCE—CIVIL CASES—*contd.*

6. JUMMABUNDI AND JUMMA-WASIL-BAKI PAPERS—*contd.*

10. ——— *Proof of their genuineness.* Jumma-wasil-baki papers (when objected to by the other side) are not receivable in evidence until some proof beyond mere conjecture is given of their genuineness and authenticity. GOVIND CHUNDER ADDY *v.* ANLOO BEBEE **1 W. R. 49**

11. ——— *Evidence Act, 1855, s. 43—Corroborative evidence.* Jumma-wasil-baki papers ought not to be regarded as anything else than "books proved to have been regularly kept in the course of business;" and by s. 43, Act II of 1855, they are "admissible as corroborative, but not as independent, proof of the facts therein stated." They are consequently insufficient by themselves, and without independent proof, to rebut the presumption which arises under s. 4, Act X of 1859, in favour of a defendant who has been found to hold lands at a uniform payment of rent for more than twenty years. RAM LALL CHUCKERBUTTY *v.* TARA SOONDARI BURMONYA **8 W. R. 280**

12. ——— *Corroborative evidence—Evidence Act, 1855, s. 43.* Jumma-wasil-baki papers are at the best corroborative evidence, not independent testimony. *Quære:* Can such papers be dealt with as a "book," or be described as "kept in the regular course of business," within the meaning of s. 43, Act II of 1855? BEEJOY GOBIND BURRAL *v.* BHEEKOO ROY **10 W. R. 291**

13. ——— *Corroborative evidence—Evidence Act, 1855, s. 43.* It is doubtful whether, under s. 43, Act II of 1855, jumma-wasil-baki papers are admissible as corroborative evidence. SHEO SUHAYE ROY *v.* GOODUR ROY **8 W. R. 328**

14. ——— *Evidence Act, s. 34—Corroborative evidence.* Under s. 34 of the Evidence Act, jumma-wasil-baki papers have no weight except as corroborative evidence. SURNOMOYI *v.* JOHUR MAHOMED MASYO **10 C. L. R. 545**

15. ——— *Party holding under adverse title. Held,* that jumma-wasil-baki and peshgi papers, though corroborative evidence against tenants, cannot be admitted as against a party holding under an adverse title. MOHIMA CHUNDER CHUCKERBUTTY *v.* POORNO CHUNDER BANERJEE . . . . **11 W. R. 165**

16. ——— *Right of witness preparing them to refresh his memory from them.* Jumma-wasil-baki papers are not admissible as independent evidence of the amount of rent mentioned therein; but it is perfectly right that a person who has prepared such jumma-wasil-baki papers on receiving payment of the rents should refresh his memory from such papers when giving evidence as to the amount of rent payable. AKHIL CHANDRA CHOWDHRY *v.* NAYU . **I. L. R. 10 Calc. 248**

EVIDENCE—CIVIL CASES—*contd.*

6. JUMMABUNDI AND JUMMA-WASIL-BAKI PAPERS—*concld.*

17. ——— *Evidence Act, 1855, ss. 39, 43, 45—Right of witness to refresh memory from them.* In a suit for enhancement of rent, a collection account or jumma-wasil-baki filed many years previously by the plaintiff's predecessor in a suit to which the defendants are not parties is not *per se* evidence for the plaintiff that the defendants' predecessor held at the rates of rent mentioned therein. *Semble:* That, if proved to have been regularly kept in the way of business, the paper might have been put in as corroborative evidence under s. 43 of Act II of 1855, or might have been used by the writer thereof to refresh his memory under s. 45. *Semble:* That, if it were shown that the writer was dead or could not be found, the original might have been put in evidence under s. 39. *Semble:* That a series of collection accounts or jumma-wasil-baki papers appearing to be regularly kept may be evidence and entitled to credit on the same principle as other contemporaneous records made and kept by the party producing them in the ordinary course of his business. KHEERO MONEE DASSEE *v.* BEEJOY GOBIND BURAL . **7 W. R. 533**

18. ——— *Evidence to rebut presumption of uniformity of rent. Held,* in a suit for enhancement of rent, that jumma-wasil-baki papers, when produced by the zamindar at the citation of the defendant himself, were not merely corroborative, but, under s. 4, Act X of 1859, good and sufficient evidence as against the latter in rebutting the presumption under s. 4, Act X of 1859. SHIB PROSAD DOOBEY *v.* PROMOTHONATH GHOSE **10 W. R. 193**

19. ——— *Evidence Act, 1872, s. 34.* Though not alone sufficient to charge any one with liability, documents admissible as evidence under Act I of 1872, s. 34, were held to be sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant,—*e. g.*, in a suit for enhancement of rent, to rebut a presumption arising from uniform payment for twenty years. BELAET KHAN *v.* RASH BEHAREE MOOKERJEE . . . **22 W. R. 549**

7. LEGITIMACY.

——— *Possible length to which the period of gestation may be protracted, discussed.* Where a child, born some 365 days after the last period at which he could have been begotten by the husband of his mother, was set up as legitimate: *Held,* that, although such a period of gestation was perhaps not absolutely beyond the bounds of possibility yet, there being evidence that the mother had been married to her husband for 10 years without having had any children by him, and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child. TIKAM SINGH *v.* DHAN KUNWAR (1902) . . . **I. L. R. 24 All. 445**

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EVIDENCE—CIVIL CASES—*contd.*

8. MAPS.

1. ———— **Map**—*Evidence of title—Evidence of possession.* A map is not evidence of title, but only of possession, even though prepared by the gomastahs of both plaintiff and defendant. GOURMONEE *v.* HUREE KISHORE ROY . **10 W. R. 338**

2. ———— **Map prepared for another purpose.** Maps drawn for one purpose are not admissible as evidence in a suit for a totally different purpose. KERR *v.* NUZZAR MAHOMED **2 W. R. P. C. 29**

3. ———— **Map of nazir not called as witness.** The report and map of a nazir who is not examined in a case are no evidence whatever. GOBIND MUHTOO *v.* GOOPEE BHUGGUTT **16 W. R. 4**

4. ———— **Map made by ameen**—*Suit to establish title. Held* in a suit to establish title to land, where an ameen's map which professed to show the daghs of a hustabud chittah was not questioned by either party, it was not open to the Court to question its correctness, and to try whether it was possible to construct any map from the chittah. BRIJANATH CHOWDRY *v.* LALL MEEAH MUNNEE POOREE . . . . **14 W. R. 391**

5. ———— **Collectorate map**—*Map not made by authority of Government.* Where a civil ameen makes a local enquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs, and not objected to by the defendants who are present and recognize the boundary indicated as that whereon the enquiry is to be based, the map must be taken to be one which the parties recognize as correct and trustworthy, irrespective of the question whether it was prepared with the authority of Government. GUNGA NARAIN CHOWDHRY *v.* RADHIKA MOHUN ROY. RADHIKA MOHUN ROY *v.* GUNGAA NARAIN CHOWDHRY . . . . **21 W. R. 115**

6. ———— **Schedule map, copy of**—*Measurement and demarcation of land.* Where a copy (the original having been filed in another suit) of a schedule map showing the different plots of land belonging to each of several shareholders and defining their boundaries had, as appeared from various petitions on the record, been filed on more than one previous occasion, and relied upon by the parties to this suit, including the plaintiffs when it suited their purpose to do so, and where it appeared moreover that plaintiffs had on many previous occasions admitted the correctness of the map, and that their shares had been demarcated therein: *Held,* that the plaintiffs could not now sue for a fresh measurement and demarcation, and that the Judge, in not considering the copy of the map as binding on the plaintiffs, was wrong in his estimate of the weight to be given to it. ROMANATH ROY CHOWDRY *v.* KALLY PROSHAD ROY CHOWDHRY . **18 W. R. 346**

7. ———— **Survey and thak maps.** A survey map as well as a thak map is admissible as evidence. JUGDISH CHUNDER BISWAS *v.* CHOWDHRY ZUHOORUL HUQ . . **24 W. R. 317**

EVIDENCE—CIVIL CASES—*contd.*

8. MAPS—*contd.*

8. ———— **Maps, certified copies of.** Certified copies of maps are admissible in evidence. GOPEENATH SINGH *v.* ANUND MOYEE DEBIA **8 W. R. 167**

9. ———— **Survey map**—*Ameen's report.* A survey map sought to be set aside may be used for the purpose of testing the correctness of an ameen's report. PUDDO MONEE DOSSEE *v.* BISSESHUR DUTT CHOWDHRY . . **5 W. R. 34**

10. ———— *Evidence of area and boundary.* A survey map may be resorted to for assistance in considering the evidence of a thak map as to area and boundary. BURN *v.* ACHUMBIT LALL . . . **20 W. R. 14**

11. ———— But it is a piece of evidence only like other evidence in a case, and of no effect in determining the onus of proof. NARAIN SINGH ROY *v.* NURENDRO NARAIN ROY. NORENDRA NARAIN ROY *v.* NARAIN SINGH ROY **22 W. R. 296**

12. ———— *Memo. on survey map—Evidence of title and possession.* Pencil memoranda on a Government survey map held to be admissible as evidence. Survey maps prepared under the authority of Government are evidence of possession and therefore also of title. SHASEE MOOKHEE DOSSEE *v.* BISSESSUREE DEBEE **10 W. R. 343**

13. ———— *Evidence Act, 1855, s. 13—Evidence of rights.* Under s. 13, Act II of 1855, Government survey maps are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down. Further than this, they are not evidence as to rights to ownership. KOOMODINI DEBIA *v.* POORNOO CHUNDER MOOKERJEE . . **10 W. R. 301**

14. ———— *Suit for right of fishery—Evidence of title.* Survey maps are not evidence of title in a dispute regarding a right of fishery. BROMA *v.* LALLITNARAIN DAO **W. R. 1864, 120**

15. ———— *Suit for possession—Evidence of title.* A survey map is not sufficient, in the absence of other satisfactory proof of title or of long antecedent possession, to establish a plaintiff's right to the land and to disturb the defendant's present possession. COLLECTOR OF RAJSHAHYE *v.* DOORGA SOONDERY DEBIA **2 W. R. 210**

16. ———— *Proof of title.* A survey map and proceedings may in certain cases form evidence sufficient to prove title; and it is beyond the province of the High Court in special appeal to lay down any rule as to what weight is to

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EVIDENCE—CIVIL CASES—*contd.*

8. MAPS—*contd.*

be attached to that evidence. OOMMUT FATIMA *v.* BHUJO GOPAL DASS . . . **13 W. R. 50**

17. ——— *Evidence of title—Boundary dispute.* Maps made on the occasion of a boundary dispute are evidence of title in a subsequent suit where the question of boundaries arises. RADHA CHURN GANGOOLY *v.* ANUND SEIN **15 W. R. 444**

18. ——— *Evidence of title—Evidence of possession.* Survey officers having no jurisdiction to enquire into questions of title, a survey map is not direct evidence of title in the same way that a decree in a disputed cause is evidence of title, but it is direct evidence of possession at the time of the survey being made. NOBO COOMAR DOSS *v.* GOBIND CHUNDER ROY **9 C. L. R. 305**

19. ——— *Boundary dispute.* In a case involving a boundary dispute, a survey map, if not conclusive evidence, is evidence of an important character, which ought to be looked into and considered. GUDDADHUR BANERJEE *v.* TARA CHUND BANERJEE . . **15 W. R. 3**

20. ——— *Boundary dispute—Conduct of parties.* In a boundary dispute, where the question relates to the situation of the pillars which formed the line and the sketch map left by the officer who laid down the pillars affords room for ambiguity as to the direction of the line, it is of importance to see what has been the conduct of the parties since the line of pillars was decreed to be the boundary. If there has been a Government survey, the survey map must be taken as evidence; and if one of the parties has made a settlement according to the survey boundary, the fact must be taken into account unless explained away. RADHA CHOWDHRAIN *v.* GIREEDHAREE SAHOO . **20 W. R. 243**

21. ——— *Boundary disputes.* Where a plaintiff claimed to be holding certain lands under two puttees, and the defendants contended that plaintiff's possession extended only to the cultivated and not to the uncultivated plots of the said lands, but the survey map showed that the land in suit fell within plaintiff's area, and that it was distinguishable from other lands falling within the same boundaries which had been specially reserved by the talukdar: *Held*, that, though the testimony of a survey map was not conclusive, it should not be disregarded unless there was clear and direct evidence to the contrary. PROSONNO CHUNDER ROY *v.* LAND MORTGAGE BANK OF INDIA **25 W. R. 453**

22. ——— *Suit for possession—Ejectment—Evidence of possession and title.* In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser at a revenue sale, the only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47. *Held*, that a survey map is evidence of possession at a particular time, *viz.*, the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not is a question to be decided in each particular case. *Held*, further, that, as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys —that is to say, at two periods with an interval of nearly twenty years between them—they might be sufficient evidence of title, and the decree of the lower Court was correct. *Mohesh Chundra Sen* v. *Juggut Chundra Sen, I. L. R. 5 Calc. 212*, discussed. SYAM LAL SAHU *v.* LUCHMAN CHOWDHRY **I. L. R. 15 Calc. 353**

23. ——— **Thakbust map**—*Right of fishery in tidal navigable river.* Value as evidence of the thakbust map in the decision of a case of right of fishery in a tidal navigable river discussed. *Syam Lal Sahu* v. *Luchman Chowdhry, I. L. R. 15 Calc. 353*, and *Syama Sundari Dassya* v. *Jogobundhu Sootar, I. L. R. 16 Calc. 186*, referred to. SATCOWRI GHOSH MONDAL *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 22 Calc. 252**

24. ——— *Evidence Act (I of 1872), s. 83—Thakbust survey map—Statements recorded in such map.* Debutter land within the limits of a revenue-paying mouzah which has been mortgaged by the defendants to a predecessor in title of the plaintiffs was exempted from the mortgage, the deed specifying the number of bighas making the area of the debutter, and this statement in the deed was held to be an admission. Among other evidence, adduced to counteract the effect of this admission, was a thakbust map made at a revenue survey. The ameen who made it had no authority to determine what lands were debutter, but only to lay down and to map boundaries. *Held*, that this map could not be treated as raising a presumption of correctness within s. 83 of the Indian Evidence Act, 1872, on the question as to the amount of debutter land in one of the villages mapped. Statements also as to what lands were debutter appeared on the face of the map to have been made according to the pointing out of the agents of the proprietors of the mouzah and the principal tenants in the presence of the agents of the holders of estates in the neighbouring mouzahs. *Held*, that these statements were not evidence on the issue now raised. JARAO KUMARI *v.* LALONMONI **I. L. R. 18 Calc. 224**
L. R. 17 I. A. 145

25. ——— *Ownership of alluvial land, again formed after diluvion—Evidence of the identity of the sites—Thak and survey maps.* Riparian owners disputed the right of property in plots of alluvial land formed by the action of the current at a place where similar land, within

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EVIDENCE—CIVIL CASES—*contd.*

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a revenue mehal, bounded on one side by a river had been carried away by diluvion some years before. The claimants in these three separate suits, each claiming possession had title as zamindars to the formerly existing plots. The new formations now claimed were alleged to have been thrown up on the sites of the former plots, and to be part of the claimants' several estates. These estates were represented in a thakbust map, made before the diluvion, and showing what had been mapped as the boundary lines. On the re-appearance of the land a survey map was made. Between this and the thak map there were discrepancies as to the boundary lines. There were also differences between the thak and the state of the locality as existing when, for the purposes of this suit, a local investigation was made by an ameen appointed by the Court of first instance. *Held*, that it was not a necessary part of the claimants' cases that there should be a complete agreement between the above maps or that the thak should be shown to accurately represent the former plots. To ascertain the precise boundaries would require more accuracy than could be well expected in a thak map; and the identity of the sites of the reformed plots with those of the plots formerly existing had, in the judgment of their Lordships, been established by evidence reasonably sufficient. MONMOHINI DEBI *v.* WATSON & CO. SARNAMOIYI DEBI *v.* WATSON & CO. HEMANTA KUMARI DEBI *v.* WATSON & CO.
I. L. R. 27 Calc. 336
L. R. 27 I. A. 44
4 C. W. N. 113

26. ——— *Thakbust map—Record of tenures—Evidence of extent of interest of shikmi talukhdar.* A thakbust map is not intended to represent, and is in no sense a record of, tenures subordinate to Government revenue-paying estates, and is of no value as evidence in a suit in which the extent of the interest of a shikmi talukhdar is matter for determination. MOHIMA CHUNDER ROY CHOWDHRY *v.* WISE . . . **25 W. R. 277**

27. ——— *Admissibility in evidence in future suits.* In a suit for confirmation of possession by demarcation of boundaries which the plaintiff alleged had been wrongly described in the thakbust map, a decree was refused to him. *Quære:* Whether or not the map would be admissible in evidence in a future proceeding upon a question of boundary to which the plaintiff may be a party. MOTEE LALL *v.* BHOOP SINGH
2 Ind. Jur. N. S. 245 : 8 W. R. 64

28. ——— *Evidence of possession—Possession.* Value of thak maps as evidence of possession discussed. JOYTARA DASSEE *v.* MAHOMED MOBARUCK
I. L. R. 8 Calc. 975 : 11 C. L. R. 399

29. ——— *Suit for possession—Ejectment.* In a suit for possession, the only evidence for the plaintiff was a thakbust map which had been signed as correct by predecessors in title of both the plaintiff and defendant, and on which the lands in dispute were laid down as the lands of the plaintiff's predecessor. *Held*, that the evidence was not sufficient to justify a decree for the plaintiff. MOHESH CHUNDER SEN *v.* JUGGUT CHUNDER SEN
I. L. R. 5 Calc. 212

30. ——— Thakbust maps where they are evidence of possession are also some evidence of title, though not conclusive. POGOSE *v.* MOKOOND CHUNDER SURMA . **25 W. R. 36**

CHAROO *v.* ZOBEIDA KHATOON . **25 W. R. 54**

31. ——— *Boundary—Title, question of.* The sole question for determination being a question of the boundary of two talukhs, the Judge hearing the case refused to give effect to a certain thak map which had been prepared in 1859, and upon the face of which appeared what were admitted by the parties then owning the talukhs to be the boundary lines of the talukhs at the time; no evidence was given showing that these boundary lines had ever been altered. *Held*, that the map was clearly evidence of what the boundaries of the properties were at the time of the Permanent Settlement, and also as to what they admittedly were in 1859. SYAMA SUNDARI DASSYA *v.* JOGOBUNDHU SOOTAR . . . . **I. L. R. 16 Calc. 186**

32. ——— *Thak or survey map as evidence.* Unless it can be proved that the person against whom a thak or survey is attempted to be used expressly consented to the delineation or admitted the correctness of such maps, they have no binding effect. KRISTOMONI GUPTA *v.* SECRETARY OF STATE FOR INDIA **3 C. W. N. 99**

33. ——— *Thak map, value of—Onus of proof—Suit for declaration of title.* In a suit for recovery of possession of certain lands and declaration of title, defendants said that the lands belonged to them as their *lakhiraj*, and that the burden of proving that the lands were *mal* lay on the plaintiff, and further contended that the *thak* map of the village (which showed no such *lakhiraj* lands) was no evidence in the case. *Held*, that the *thak* map was evidence in the case, as, at the time the *thak* map was made in the present case, it was necessary to show in such maps such *lakhiraj* lands as might be claimed. *Also* that there was no ground for interfering with the lower Appellate Court's judgment with regard to the objection as to *onus*. *Jarao Kumari* v. *Lalon Moni*, *I. L. R. 18 Calc. 224*, distinguished and explained. RAJ KUMAR PAUL CHAUDHURI *v.* BASANTA KUMAR GUHA (1902) . . . **7 C. W. N. 612**

34. ——— *Thakbust maps, value of entries in—Evidence Act (I of 1872), s. 36—Presumption—Continuance of the same state of things from the time of the Permanent Settlement.* The object of the *thak* map being to delineate the various estates borne on the Revenue roll of the district, the entry in a *thak* map that certain lands formed part of a certain estate becomes a relevant fact

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under s. 36 of the Evidence Act, and such entries in *thakbust* maps are evidence on which a Court may act. It is open to a Court to hold that the same state of things existed at the time of the Permanent Settlement. *Jugadindra Nath Roy* v. *Secretary of State for India, I. L. R. 30 Calc. 291,* and *Nobo Koomar Dass* v. *Gobindo Chunder Roy, I. L. R. 9 Calc. 305,* relied on. *Kristo Moni Gupta v. The Secretary of State for India, 3 C. W. N. 99,* and *Jarao Kumari* v. *Lalon Moni, I. L. R. 18 Calc. 224,* referred to. ABDUL HAMID MIAN *v.* KIRAN CHANDRA ROY (1903) . . **7 C. W. N. 849**

35. ——— Thakbust and survey maps —*Thak and survey maps—Relative value of each as evidence—Principle which should guide Court in following either—Reference to local land-marks.* As a general rule, the *thak* and the survey maps should agree; where they differ, the one that more clearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other; the Court may, if it considers the *thak* map more reliable, follow that in preference to the survey map. ABID HOSSEIN MANDUL *v.* DOWCURRY PAL (1900) **6 C. W. N. 629**

36. ——— *Thakbust and survey maps—Act IX of 1847, ss. 3, 5 and 6—Permanent Settlement of 1793—Liability of lands to assessment—Onus of proof—Suit for wrongful assessment.* Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong; but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made. *Salcowri Ghosh Mondal* v. *Secretary of State for India, I. L. R. 22 Calc. 252; Syama Sundari Dassya* v. *Jogobundhu Sootar, I. L. R. 16 Calc. 186; Sarat Sundari Dabi* v. *Secretary of State for India, I. L. R. 11 Calc. 784; Dewan Ram Jewan Singh* v. *Collector of Shahabad, 14 B. L. R. 221 (note),* and *Ram Jewan Singh* v. *Collector of Shahabad, 19 W. R. 127,* referred to. In every case, the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The *onus* of proving that the Government revenue fixed in 1793 is assessed on any particular lands as being included in the Permanent Settlement is on those who affirm that such is the case. Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under s. 3 of Act IX of 1847 is to be taken as the starting point for deciding when the next survey is made, whether lands are within ss. 5 and 6 of that Act. But when the question is whether lands, shown on a particular *thak* or survey map made since 1793, were or were not included in the lands charged with the assessment permanently fixed in 1793, the last *thak* or survey map cannot in all cases be acted upon or treated as decisive in the absence of evidence to the contrary. In this case, in which the plaintiff sued the Government for wrongful assessment of lands which he alleged to be part of his permanently-settled estate, the survey maps were held not to be sufficient to shift the *onus* on to the defendant. JAGADINDRA NATH ROY *v.* SECRETARY OF STATE FOR INDIA (1902)

I. L. R. 30 Calc. 291: s.c. 7 C. W. N. 193; L. R. 30 I. A. 44

37. ——— Map made by Deputy Collector for particular purpose—*Evidence Act (I of 1872), ss. 36 and 83—Proof of accuracy of map.* A map made by a Deputy Collector for the purpose of the settlement of land forming the silted bed of a river is not one which is admissible in evidence under ss. 36 and 83 of the Evidence Act; but it is a map the accuracy of which must be proved before it can be admitted in evidence. KANTO PRASHAD HAZARI *v.* JAGAT CHANDRA DUTTA **I. L. R. 23 Calc. 335**

9. RECITALS IN DOCUMENTS.

1. ——— Recital in deed—*Evidence against third persons.* A recital in a deed or other instrument is in some cases conclusive and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be. BRAJESHWARE PESHAKAR *v.* BUDHANUDDI

I. L. R. 6 Calc. 268 : 7 C. L. R. 6

See FULLI BIBI *v.* BUSSIRUDDI MIDHA **4 B. L. R. F. B. 54**

and MANIKLAL BABOO *v.* RAMDAS MOZUMDAR **1 B. L. R. A. C. 92**

2. ——— *Effect on evidence of recitals in instrument of mortgage.* Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajesware Peshakar* v *Budhanuddi, I. L. R. 6 Calc. 268,* referred to. MANOHAR SINGH *v.* SUMIRTA KUAR . . **I. L. R. 17 All. 428**

3. ——— *Evidence of legal necessity for alienation.* A recital in a deed that it is necessary to contract a debt binding on a minor, or a member of a joint family, is some evidence that the fact recited was present to the minds of the parties to the transaction, and the absence of any such recital will make it more difficult for the party on whom the burden of proof lies to establish

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the existence of a legal necessity. But such a recital is not evidence sufficient to establish the fact so recited. SIKHAR CHUND *v.* DULPUTTY SINGH
I. L. R. 5 Calc. 363 : 5 C. L. R. 374

OBHOYCHURN DOSS *v.* MEER SAHEB ALI
5 W. R. 244

ROOPMONJOREE DOSSEE *v.* RAMLALL SIRCAR
1 W. R. 144

4. ——— *Evidence of legal necessity for alienation.* A recital in a deed of sale by a Hindu widow of her deceased husband's property setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity. RAJLAKHI DEBI *v.* GOPAL CHUNDRA CHOWDHRY
3 B. L. R. P. C. 57 : 12 W. R. P. C. 47
13 Moo. I. A. 209

See RAJARAM TEWARI *v.* LUCHMAN PRASAD
4 B. L. R. A. C. 118 : 12 W. R. 478

5. ——— *Recital in bond for money borrowed by Hindu widow—Evidence of necessity.* A recital in a bond for money borrowed by a Hindu widow to the effect that the bond was given for the performance of her husband's sradh is no evidence of the fact in a suit against the heirs of her husband, or in a suit to charge the estate. SUNKER LALL *v.* JUDDOOBUNS SUHAYE
9 W. R. 285

6. ——— *Untrue recital in bond—Contradiction by obligor allowed.* In a suit on a bond containing an agreement, by which an insolvent who has obtained his personal, but not his final, discharge, without notice to the Official Assignee or his other creditors, settles the claim of one creditor, and by which that creditor agrees not to oppose his final discharge, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors had been settled with was untrue. NAOROJI NUSSERWANJI THOONTHI *v.* SIDICK MIRZA . . **I. L. R. 20 Bom. 636**

7. ——— *Recital as to possession.* The recital in a deed that a certain party was in possession held not sufficient to prove a case which depended on proof of that party's possession. MAHOMED HAMIDOOLLAH *v.* MODHOO SOODUN GHOSE . . . **11 W. R. 298**

8. ——— *Evidence of intention.* The recital of the terms of an old mortgage-deed of 1844 in the wajib-ul-urz prepared in 1862 held not to amount to a new contract to be evidenced by the terms of the wajib-ul-urz, but was only a record of existing rights, and therefore did not estop the mortgagor's claim for redemption under the old usury law. RAO KURAM SINGH *v.* MEHTAB KOONWER . . **3 Agra 150**

9. ——— *Evidence of separation.* A recital in a deed of mortgage granted by one of two undivided brothers to a third party, that a division had taken place between the mortgagor and his brother, is no evidence of separation as against the latter or his representatives. GOPAL *v.* NARAYAN BIN TUKAJI . . **1 Bom. 31**

10. ——— *Estate of inheritance —Admission by conduct of parties.* The deed of conveyance of land in Calcutta recited that the vendor was "seized of, or otherwise well entitled to, the property intended to be sold, for an estate of inheritance in fee-simple;" and it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser:—*Held*, that, although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *primâ facie* evidence against the purchaser and persons claiming through him that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them. SARKIES *v.* PROSONOMOYEE DOSSEE
I. L. R. 6 Calc. 794 : 8 C. L. R. 76

11. ——— *Statement of payment of consideration.* According to the practice in India, the statement in a deed of compromise of the payment of consideration-money is not conclusive evidence of payment. CHOWDHRY DABEY PERSHAD *v.* CHOWDHRY DOWLUT SINGH
6 W. R. P. C. 55 : 3 Moo. I. A. 347

LOLITTA DOSSIA *v.* RUTTUN MOLLEE BHUTTACHARJEE . . . . . **10 W. R. 208**

NEYNUM *v.* MAZUFFER WAHID . **11 W. R. 265**

12. ——— **Recital in lease**—*Evidence of existence of mooktearnamah.* The recital in a lease granted by a husband of his wife's property that he was empowered by mooktearnamah to manage her business generally, is not evidence against the wife that such a mooktearnamah existed. BHIKNARAIN SINGH *v.* NECOT KOER
Marsh. 373 : 2 Hay 446

13. ——— **Recital in will**—*Evidence of power-of-attorney.* A recital in a will of a power-of-attorney held to be not sufficient evidence of such power, there being no evidence of the existence of the power or of any circumstance which would enable the Court to presume the existence of such power. BOMANJI MUNCHERJEE *v.* HOSSAIN ABDOOLLAH
5 W. R. P. C. 61 : 1 Moo. I. A. 494

14. ——— *Age of child.* The incidental mention of a child's age in the recital of a will is no proof of the exact age of that child. NILMONEE CHOWDHRY *v.* ZUHEERUNISSA KHANUM
8 W. R. 371

15. ——— *Statement in will of value of property—Acceptance of share on partition.* The statement in a will as to the value of the testator's property is no evidence thereof

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The acceptance by one brother of a certain sum of money in satisfaction of his own share in 1868, though it might be evidence of the value of the ancestral property in that year, affords no indication of the value of that property in 1876. LAKSHMAN DADA NAIK *v.* RAM CHANDRA DADA NAIK. RAM CHANDRA DADA NAIK *v.* LAKSHMAN DADA NAIK . . . . . **I. L. R. 1 Bom. 561**

10. RENT RECEIPTS.

1. ——— **Receipts for rent**—*Mode of proving.* Dakhilas should be attested or proved by some oral evidence in the same manner as all other documentary evidence; the tenant should be required to attest them himself as far as he can. It will then remain for the zamindar to deny their genuineness, and he also should be examined regarding them. RAJESSUREE DEBIA *v.* SHIBNATH CHATTERJEA . . . **4 W. R., Act X, 42**

2. ——— *Unattested dakhilas.* Unattested dakhilas, without corroborative evidence, are not in law sufficient evidence of payment of rent. ODIUT ZUMAN *v.* MOHIOODDEEN AHMED *alias* MOGUL JAN . . **9 W. R. 241**

LUCHMEEPUT SINGH *v.* JUNGULEE KULLYAN DOSS . . . . . **9 W. R. 147**

3. ——— *Unattested dakhilas.* Dakhilas unattested, or attested only by the evidence of a manager and mooktear, were held to be no legal evidence of uniform payment of rent. REAZOONISSA *v.* BOOKOO CHOWDHRAIN **12 W. R. 267**

4. ——— *Proof of handwriting of.* Receipts for rent purporting to have been given by the former owners of a jote are not admissible in evidence without proof as to the handwriting of the parties who gave them or some satisfactory account of the custody from which they came. WOMESH CHUNDRA MOOKERJEE *v.* BAMA DOSSEE . . . . . **7 W. R. 15**

5. ——— *Proof of receipts.* To prove receipts, it is not necessary to produce the writer of them. The raiyat can prove his own receipts. GANGA NARAYAN DASS *v.* SARODA MOHUN ROY CHOWDHRY **3 B. L. R. A. C. 230 : 12 W. R. 30**

6. ——— *Proof of receipts.* Dakhilas or rent-receipts filed by a raiyat in a suit for arrears of rent or for enhancement must be proved, whether denied by the zamindar or not. KIRTEEBASH MAYETEE *v.* RAMDHUN KHORIA **B. L. R. Sup. Vol. 658**

S.C. KIRTEBASH MYTEE *v.* RAMDHUN KHARAL . . **2 Ind. Jur. N. S. 197 : 7 W. R. 526**

7. ——— *Proof of receipts.* Dakhilas relied upon by a defendant in a suit for arrears of rent at enhanced rates, to obtain the benefit of the presumption arising under

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s. 4, Act X of 1859, must be proved even if not positively denied. RAMJADOO GANGOOLY *v.* LUCKHEE NARAIN MUNDUL . . . **8 W. R. 488**

8. ——— *Proof of uniform payment.* In a suit for enhancement of rent, where the defendant filed receipts with a written statement duly verified as proving uniform payment of rent, but was not examined as to the genuineness of the receipts filed.—*Held* (by LOCH, *J.*), that the receipts were not proved; (by GLOVER, *J.*) that there was legal evidence of uniform payment; and as the lower Court believed it, however weak, its decision could not be interfered with. LUCHMEEPUT SINGH DOOGUR *v.* WOOMANATH MUNDUL **10 W. R. 490**

9. ——— *Proof of dakhilas.* Where a party filing dakhilas deposed that the amounts of rent he had paid were, according to the sums, entered in the dakhilas, such statement was held not to prove the dakhilas, being merely a deposition to the fact of a certain payment of rent, and not to the authenticity of the document filed. KOYLASH NATH HALDAR *v.* OOMANATH ROY CHOWDHRY . . . . . **11 W. R. 170**

10. ——— *Rent receipts, proof of genuineness of—Bengal Tenancy Act (VIII of 1885), s. 50—Suit for enhancement of rent—Appellate Court, power of.* In a suit for enhancement of rent the defendant produced certain dakhilas and deposed to having receipted them on payment of rent. *Held*, that this was sufficient evidence to prove them. *Held*, further, that it was perfectly open to the lower Appellate Court which had to deal with the facts of the case, to say whether, taking the receipts which extended over a number of years together, and having regard to the fact that the receipts did not specify the years to which the amounts related, the amounts paid in any particular year were partly for the rents of that year and partly for the arrears due in respect of previous years. SURJA KANTA ACHARJEE *v.* BANESWAR SHAHA . . . **I. L. R. 24 Calc. 251**

11. ——— *Proof of payment of rent or debt.* A party is perfectly competent to prove the payment of a debt or rent by the production of the receipt and proof that it is the document which he received on paying the money. He is not bound to summon the parties who gave the receipts to prove their signatures, nor is his own evidence secondary evidence. RAJ MAHOMED *v.* BANOO RASMAH . . . . **12 W. R. 34**

12. ——— *Undisputed dakhilas.* A Civil Court has every right to accept dakhilas tendered by a party as undisputed documents, where the opposite party says that he is not prepared to deny their genuineness. INDRO BHOOSUN DEB *v.* GOLUCK CHUNDER CHUCKERBUTTY **12 W. R. 350**

13. ——— *Dakhilas, proof of.* The party producing dakhilas is bound to give

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some evidence of their having been signed by the person by whom they purport to have been granted, although the opposite party does not deny the signature. BHARUT ROY *v.* GANGA NARAIN MOHAPUTTER. . . . . **14 W. R. 211**

14. ——— *Dakhilas, proof of.* The evidence of a tenant deposing to the genuineness of dakhilas produced by him, if not rebutted, is legally sufficient to prove them. MADHUB CHUNDER CHOWDHRY *v.* PROMOTHONATH ROY **20 W. R. 264**

15. ——— *Acknowledgment of receipt of rent—Presumption.* An acknowledgment of the plaintiff in a former case of having realized a certain sum of money on account of rent paid for three years may afford some presumption that the older items in the account were satisfied, and, if that presumption could not be rebutted, might be an answer to an action on the older demand. ENAYET HOSSEIN *v.* DEEDAR BUX **W. R. 1864, Act X, 97**

16. ——— *Receipts by agent of landlord.* Receipts signed by the landlord's agent, if shown to be authentic, are *primâ facie* evidence of payment of rent, but not conclusive evidence. AMEER BUKSH *v.* YUSOOF ALI. **22 W. R. 489**

17. ——— *Evidence of rate of rent—Rate admitted in other cases.* In suits for arrears of rent, where the account books put in by the plaintiff to establish the rates claimed by him were held by the Courts below to be unreliable, the lower Appellate Court was considered to have been justified in accepting (according to its own knowledge of them) rates which were admitted and had been awarded in other cases. BUDHUA CRAWAN MAHTON *v.* JUGESSUR DOYAL SINGH **24 W. R. 4**

11. REPORTS OF AMEENS AND OTHER OFFICERS.

1. ——— **Report of ameen**—*Report on local enquiry.* Of the value of a local enquiry report made by a competent official as evidence, see SARUT SUNDARI DABI *v.* PROSONNO COOMAR TAGORE **6 B. L. R. 677 : 15 W. R. P. C. 20 13 Moo. I. A. 607**

KALEE DOSS ACHARJEE *v.* KHETTRO PAL SINGH ROY . . . . . **17 W. R. 472**

CHUNDER COOMAR DUTT *v.* JOY CHUNDER DUTT MOJOOMDAR . . . . . **19 W. R. 213**

2. ——— *Reports on local investigations.* Unless there be very good grounds for dissenting and differing from reports made upon local investigations, the Courts even in India, and *à fortiori* the Privy Council in England, in dealing with boundary questions ought to give great weight to and be guided by them. RAM GOPAL ROY *v.* GORDON STUART & Co. **14 Moo. I. A. 453 : 17 W. R. 285**

EVIDENCE—CIVIL CASES—*contd.*

11. REPORTS OF AMEENS AND OTHER OFFICERS—*contd.*

PROTAB CHUNDER BURROOAH *v.* SURNOMOYEE **19 W. R. 361**

3. ——— *Civil Procedure Code, s. 180.* Where local enquiry is ordered by a lower Court, and evidence is taken by an ameen and a report made, the return made by the ameen becomes legal evidence under s. 180, Act VIII of 1859, which the Appellate Court is not justified in refusing to consider. RAJNATH PANDAH *v.* DOORGA LALL . . . . . **12 W. R. 136**

SHEO DOYAL SINGH *v.* HODGKINSON **24 W. R. 342**

4. ——— *Evidence on special points.* Where a Court ameen is appointed a commissioner under the Civil Procedure Code, his report is only evidence on the point to which the commission refers; any report he chooses to make on any other point is no legal evidence in the case. ABDOOL ALI *v.* MULLICK SUDDEROODEEN AHMED **14 W. R. 493**

See DOORGA CHURN SURMAH CHOWDHRY *v.* NEEM CHAND SURMAH CHOWDHRY . **24 W. R. 208**

5. ——— *Local investigation not objected to.* Where an order for a local investigation under s. 180, Code of Civil Procedure, is not objected to by the opposite party at the time it is made, the Court is justified is viewing as evidence the report of the commissioner and the depositions taken by him, being a part of the record. RAMRUKHA ROY *v.* GOBIND DASS BYRAGEE **15 W. R. 291**

6. ——— *Act X of 1859, s. 73.* The report of an ameen under s. 73, Act X of 1859, is receivable as evidence, and a decision can be legally based upon it. SUJUN KOOER *v.* HEITHOO **1 N. W. 165 : Ed. 1873, 244**

7. ——— *Local investigation.* The report of an ameen upon a local investigation is sufficient evidence to support a decree if it is believed by the Court and considered sufficient without further evidence to corroborate it. SEETARAM MOOKERJEE *v.* RAMNARAIN MOOKERJEE **6 W. R. 51**

8. ——— Further evidence, however, may be taken. Whether it should be taken or not is a matter for the discretion of the Court in each case. In this case the Court was held to have exercised a proper discretion in refusing to receive further evidence. GRISH CHUNDER LAHIRI *v.* SHOSHI SHIKARESWAR ROY **I. L. R. 27 Calc. 951 L. R. 27 I. A. 110 4 C. W. N. 631**

9. ——— An ameen's report is evidence without any specific documents corroborating his finding. ESHAN CHUNDER SEIN *v.* HUREE CHURN DEY . . . **2 W. R. 278**

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EVIDENCE—CIVIL CASES—*contd.*

11. REPORTS OF AMEENS AND OTHER OFFICERS—*contd.*

GOUREE NARAIN MOZOOMDAR *v.* MODHOSOODUN DUTT . . . . . **2 W. R., Act X, 1**

10. ——— *Report as to measurement—Oral evidence.* It is necessary that oral testimony should be taken in order to effect a measurement, or that an ameen's report must have depositions attached to it to make it legal evidence. CHUNDER MONEE DOSSEE *v.* NILAMBUR MUSTOFEE **7 W. R. 43**

11. ——— *Civil Procedure Code, 1959, s. 180.* The report of a civil ameen and the depositions taken by him are admissible as evidence under s. 180, Act VIII of 1859. NUTHOO *v.* GHUNESSAM SINGH . . . **8 W. R. 267**

ABDOOL GUNNEE *v.* BUTTOO SHEIKH **22 W. R. 350**

BHYRUB ROY *v.* NOBIN ROY . **9 W. R. 601**

12. ——— *Evidence taken under powers given him.* A civil ameen's report and the depositions of the parties and witnesses examined by him must be considered, even though the Court exercised its discretion unwisely and wrongly in giving him too extensive powers. UMBICA CHURN DEY *v.* GOLUCK CHUNDER CHUCKERBUTTY . . . . . **9 W. R. 596**

13. ——— *Depositions without report.* An ameen had been deputed to make a local investigation, and had examined certain witnesses, but could not examine the rest, or complete his investigation and draw up his report, owing to the plaintiff not paying the necessary expenses. *Held,* that the depositions of the witnesses without the ameen's report were not admissible in evidence. DEBNARAIN DEB *v.* KALI DAS MITTER **6 B. L. R. Ap. 70 : 14 W. R. 397**

Affirming on appeal KALEE DASS MITTER *v.* DEB NARAIN DEB . . . . . **13 W. R. 412**

14. ——— *Civil Procedure Code, 1859, s. 180.* Where an ameen who had been deputed to make a local enquiry took the depositions on oath of several witnesses on both sides and afterwards for further satisfaction recorded the statements of certain persons whose religious prejudices stood in the way of their giving evidence on oath:—*Held,* that his reports and the original depositions on oath were receivable in evidence under s. 180 of the Code of Civil Procedure. DOLE GOBIND SINGH *v.* CHAMOO SINGH . **10 W. R. 312**

15. ——— *Evidence taken by ameen.* The report of an ameen and the evidence recorded on a local enquiry are evidence in the suit, and there is no legal objection to the parties to the suit agreeing that the evidence should be taken before the ameen, and that the matters in dispute should be referred to him for enquiry. SARAT CHANDRA ROY *v.* COLLECTOR OF CHITTAGONG **2 B. L. R. Ap. 3**

EVIDENCE—CIVIL CASES—*contd.*

11. REPORTS OF AMEENS AND OTHER OFFICERS—*contd.*

16. ——— *Report and map made by ameen.* A lower Appellate Court was held to have erred in law in taking an ameen's report and map as its sole guide, and making them the sole basis and foundation of its decision to the total disregard of the other evidence on the record. BUSTEE SAHOO *v.* JEONARAIN SINGH **24 W. R. 338**

17. ——— *Ameen giving credit to local rumour.* In a suit for enhancement of rent, when the defendant objected in his grounds of appeal that the rates of the village in which his land was situated were lower than the pergunnah rates:—*Held,* that the Judge had no right to take the report of an ameen who did not give credit to defendant's witnesses on account of something he heard in the neighbourhood, but that he ought himself to have examined those witnesses. TWEEDIE *v.* POORNO CHUNDRA GANGOOLEE . **12 W. R. 138**

18. ——— *Ameen's report and map.* When an ameen's map is received in evidence by consent, and admitted by both parties to be topographically correct, the Court is entitled to look at the ameen's report as explanatory of the map. MAHOMED ANWAR CHOWDRY *v.* RAJ CHUNDER GHOSE . . . . . **17 W. R. 522**

19. ——— *Question of possession.* The report of an ameen, however valuable in clearing up difficulties as to the identify and position of lands, is, generally speaking, of no value in determining questions connected with the possession of lands in dispute in past times. PRANNATH CHOWDHRY *v.* MIRNOMOYEE CHOWDHRY **W. R. F. B. 39**

20. ——— The Judge is bound, under s. 180 of Act VIII of 1859, to take notice of, and pronounce an opinion upon, evidence taken by an ameen as to possession. JANNOBEE CHOWDHRAIN *v.* COLLECTOR OF MYMENSING **8 W. R. 287**

21. ——— ——— *Proof of possession.* An ameen's report held not sufficient of itself to prove possession. AMEENOODDEEN SHAHA *v.* ASGUR ALI . . . . . **8 W. R. 464**

22. ——— *Suit for rent—Evidence of measurement.* In a suit for rent for 1283, 1284, 1285, and 1286 upon a jungleburi lease which provided that the area of jungle lands brought under cultivation should be ascertained by measurement, the only evidence of measurement was a report of an ameen made in a previous suit in 1879, the accuracy of which report was not proved in the present suit. *Held,* that the report itself was not admissible in evidence. DENOBUNDHU GHOSE *v.* NISTARINI DASSEE . . **12 C. L. R. 50**

23. ——— *Civil Procedure Code, 1859, s. 180.* The report of an ameen in a proceeding to make a partition, which is a

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EVIDENCE—CIVIL CASES—*contd.*

11. REPORTS OF AMEENS AND OTHER OFFICERS—*contd.*

judicial proceeding under s. 180, Act VIII of 1859, must be treated in the same way as the report of an ameen in an ordinary suit. The report and depositions are to be taken as evidence in the suit and to form part of the record. The Court is not bound by the report, but ought to enquire further into the matter if there is any necessity for so doing, and to examine witnesses *bonâ fide* tendered for examination. AZIM SARUNG *v.* ALIMOODDEEN **17 W. R. 270**

24. ——— *Without jurisdiction.* The proceeding of a Court ameen in a subdivision where he has no jurisdiction cannot be a legal proceeding or legal evidence. NIDHOO SIRCAR *v.* PHILLIPPE . . . . **10 W. R. 153**

25. ——— **Reports of officers appointed under Bengal Regulation I of 1814.** Reports of officers appointed under Regulation I of 1814, if received as evidence in the first Court and not objected to in the Appellate Court, may, under certain circumstances, be accepted *quantum valeat.* BHIKOO SAHOO *v.* TEIK ALI KHAN **9 W. R. 86**

26. ——— **Reports made by Collectors acting under Madras Regulation VII of 1817**—*Evidence of private rights.* Reports made by Collectors acting under Madras Regulation VII of 1817 are not to be regarded as having judicial authority when they express opinions on the private rights of parties; but being the reports of public officers made in the course of duty and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them. MUTTU RAMALINGA SETURPATI *v.* PERIANAYAGAUM PILLAI. ZAMINDAR OF RAMNAD *v.* PERIANAYAGAUM PILLAI . . . . . **L. R. 1 I. A. 209**

27. ——— **Report of special commissioner.** The report of a special commissioner was held to be inadmissible as evidence, as it did not come within any provision of the Evidence Act which would make it admissible. LEELANUND SINGH *v.* LAKHPUTTEE THAKOORANI **22 W. R. 231**

28. ——— *Commissioner appointed to prepare a map—Civil Procedure Code (Act XIV of 1882), s. 392—Statement of village officers made to such commissioner and recorded by him—Practice.* In a suit as to a right of way a commissioner was appointed under s. 392 of the Civil Procedure Code to prepare a map of the locality in question. *Held,* that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence. SHITAWA *v.* BHIMAPPA . **I. L. R. 24 Bom. 43**

EVIDENCE—CIVIL CASES—*contd.*

11. REPORTS OF AMEENS AND OTHER OFFICERS—*contd.*

29. ——— **Report of mouzadar**—*Report of officer not competent under s. 180, Civil Procedure Code, 1859.* The report of a mouzadar, not being that of a person competent within the meaning of s. 180, Act VIII, 1859, to report upon matters in process of judicial decision, may be disregarded by a Civil Court. RAJARAM KALITA *v.* ROOPA KAGATEE KALITA . . **13 W. R. 113**

30. ——— **Facts derived from local investigation as evidence**—*Evidence Act (I of 1872), s. 3.* The information derived from a local investigation by a Judge, though not evidence as defined in Evidence Act, is a matter which he can take into his consideration in order to determine whether a fact is "proved" within the meaning of the Act. *Joy Coomar* v. *Bundhoo Lall, I. L. R. 9 Calc. 363,* referred to. DWARKA NATH SARDAR *v.* PROSUNNO KUMAR HAJRA . . **1 C. W. N. 682**

31. ——— **Report of Munsif on local investigation.** A Munsif's report of a local investigation, when not shown to be substantially erroneous in its *data* or reasoning, should convey the greatest weight as evidence of the facts it sets forth. WISE *v.* AMEEROONISSA KHATOON . **3 W. R. 219**

32. ——— **Judgment on facts observed by Judge, but not proved.** In a suit respecting boundaries, the Munsif, before settling the issues in the case, visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit. These facts were not proved by any evidence, and the Munsif did not make any report as to them. The District Judge reversed the Munsif's decision on the oral evidence given in the case, holding that he could not take notice of the facts observed by the Munsif himself, and on which he had based his judgment. *Held,* that, though the result of the enquiry instituted by the Munsif was not evidence according to the definition in the Evidence Act, it was a matter before the Court which might have been taken into consideration. *Held,* also, that the Munsif should have put the result of his investigation upon paper. JOY COOMAR *v.* BUNDHOO LALL. **I. L. R. 9 Calc. 363 : 12 C. L. R. 490**

33. ——— **Report of nazir**—*Civil Procedure Code, 1859, s. 180—Ameen—Act XII of 1856.* The report of a nazir deputed to enquire into the condition of property in dispute under s. 180, Act VIII of 1859, is admissible in evidence, although he was not an ameen appointed under Act XII of 1856. BUZLAL ROHIM *v.* LUTAFUT HOSSEIN. KHODEJOONNISSA BIBEE *v.* LUTAFUT HOSSEIN **W. R. 1864, 171**

34. ——— **Report of sheristadar**—*Civil Procedure Code, 1859, s. 180.* The report of a sheristadar is not, under s. 180 of the Code of Civil Procedure, and in view of the fact that there was a commissioner attached to the Court, legal

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EVIDENCE—CIVIL CASES—*contd.*

11. REPORTS OF AMEENS AND OTHER OFFICERS—*concld.*

evidence. BYJNATH SINGH *v.* INDRUJEET KOOER **8 W. R. 331**

35. ——— *Local investigation.* The report of a sheristadar, after local investigation, cannot be legal evidence, unless it is shown that no Civil Court ameen was available for the duty in the district. GOLUCK CHUNDER KOOL *v.* DOOKHEE RAM . . . **12 W. R. 206**

12. MISCELLANEOUS DOCUMENTS.

1. ——— **Acknowledgments**—*Admission of amount of debt.* An unsigned paper, by which a person who agreed to the contents of that paper admitted that he owed the amount there stated, received in evidence as an acknowledgment in a suit for recovery of the debt admitted by such acknowledgment. EDULJEE FRAMJEE *v.* ABDOOLA HAJEE CHERAK **1 Moo. I. A. 461 : 5 W. R. P. C. 58**

2. ——— **Books of history**—*Evidence of usage or local custom.* Observations on the use of books of history to prove local custom. VALLABHA *v.* MADUSUDANAN . . **I. L. R. 12 Mad. 495**

3. ——— *Evidence Act (I of 1872), ss. 57, 87—Books of history.* In deciding a suit the District Judge referred to a Portuguese work dated 1606, "*India Orientalis Christiana,*" published in 1794, and Hough's "*History of Christianity in India,*" published in 1839. *Held,* that the District Judge was justified, under ss. 57 and 87 of the Evidence Act, in referring to the books above mentioned. AUGUSTINE *v.* MEDLYCOTT **I. L. R. 15 Mad. 241**

4. ——— **Bundobust papers**—*Evidence of commencement of tenure and assessment of rent.* Bundobust papers are nothing more than a contemporaneous record or tenures as they existed in the years specified, and do not in any way import the commencement of a tenure or a fixing of the rent at that particular time. DHUN SINGH ROY *v.* CHUNDER KANT MOOKERJEE **4 W. R., Act X, 43**

5. ——— **Canoongoe papers**—*Proceedings of settlement officers—Evidence of pergunnah rates and measurement.* Canoongoe papers and proceedings of settlement officers are good evidence in questions of pergunnah rates, standards of measurement, and the like. NUND DUNTPAT *v.* TARA CHAND PRITHEEBAREE **2 W. R., Act X, 13**

6. ——— *Evidence of rate of rent.* How far and when Canoongoe papers are admissible as evidence for the zamindar as to the rate of rent paid by the raiyat. KHEEROMONEE DOSSEE *v.* BEEJOY GOBIND BURAL **7 W. R. 533**

7. ——— *Evidence of proper custody.* Old canoongoe-papers cannot, in the absence of evidence to show what they are and that they came out of proper custody, be received in evidence; before such papers can be admitted as evidence against a party, it must be shown how they can be used against him. DWARKA NATH CHUCKERBUTTY *v.* TARA SOONDERY BURMONEE **8 W. R. 517**

8. ——— **Collection papers**—*Papers to refresh memory.* Collection papers are no evidence *per se;* they can only be used when they are produced by a person who has collected rent in accordance with them, and who merely uses them for the purpose of refreshing his memory. MAHOMED MAHMOOD *v.* SAFAR ALI . **I. L. R. 11 Calc. 407**

9. ——— **Confessions**—*Suit against approver—Confession and evidence at criminal trial if admissible—Criminal Procedure Code (Act V of 1898), s. 339—Sessions Court's finding if binds Civil Court—Civil suit if barred—Merger of tort in felony, rule of—Applicability in India—Civil Procedure Code (Act XIV of 1882), s. 11. Held,* that the confession and sworn evidence of an approver in a criminal trial for dacoity, are admissible in evidence against him in a suit for damages brought against him by the complainant for having instigated the dacoity. *Held,* further, that the Civil Court could act upon such statements even though the Sessions Judge did not think it safe to convict the accused upon such statements. "The conditions for receiving and acting on evidence in Civil Courts are very different to those governing the procedure of Criminal Courts. Specially is this the case with respect to the statements of accused persons and accomplices." Having regard to the provisions of s. 11 of the Civil Procedure Code, the fact that the criminal trial had not resulted in a conviction of the accused was no bar to the institution of the civil suit against him. KESHAB NATH BHATTACHARYA *v.* MANIRUDDIN SARKAR (1908) . . **13 C. W. N. 501**

10. ——— **Criminal Court, proceedings in**—*Suit for damages for assault—Previous conviction of defendant.* In a suit for damages for an assault, the previous conviction of the defendant in a Criminal Court is no evidence of the assault. The factum of the assault must be tried in the Civil Court. ALI BUKSH *v.* SAMIRUDDIN **2 B. L. R. A. C. 31 : 12 W. R. 477**

11. ——— *Plea of guilty—Verdict of conviction.* A plea of guilty in the Criminal Court may, but a verdict of conviction cannot, be considered in evidence in a civil case. SHUMBOO CHUNDER CHOWDRY *v* MODHOO KYBURT **10 W. R. 56**

12. ——— *Finding on facts.* A proceeding of a Criminal Court is not admissible as evidence; a Civil Court is bound to find the facts for itself. KERAMUTOOLLAH *v.* GHOLAM HOSSEIN **9 W. R. 77**

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EVIDENCE—CIVIL CASES—*contd.*

12. MISCELLANEOUS DOCUMENTS—*contd.*

13. ——— *Malicious prosecution—Suit for damages—Evidence, admissibility of judgment of acquittal.* In a suit for damages for malicious prosecutions, the order of the Criminal Court acquitting the plaintiff is admissible in evidence. Although the reasonings in the judgment and the conclusions drawn from them are not binding or conclusive, yet the judgment may be looked into for the purpose of seeing what the circumstances were which resulted in the acquittal. RAI JUNG BAHADUR *v.* RAI GUDOR SAHOY **1 C. W. N. 537**

14. ——— *Judgment in criminal case.* In a suit for arrears of rent from a patnidar, where plaintiff stated that he had, on an allegation made by defendant that a dacoity had taken place in her house, allowed her an abatement; but finding from a judgment of the High Court that no such dacoity had taken place, he claimed full rents:—*Held*, that the High Court's judgment was admissible, with a view to ascertain the truth of plaintiff's case. ENAYET HOSSEIN *v.* KHOOBUNNISSA . . . . . **9 W. R. 246**

15. ——— *Title to stolen property—Verdict of Criminal Court.* The verdict of a Criminal Court with respect to the alleged theft of notes is no evidence of the ownership of such notes. PANNA LALL *v.* GOPIRAM BUZURIAH **3 B. L. R. Ap. 2**

16. ——— *Proceedings under Act IV of 1840. Held* (by MARKBY, *J.*), that a Judge was justified in rejecting as evidence a proceeding under Act IV of 1840. ABDOOL ALI *v.* MULLICK SUDDEROODEEN AHMED . **14 W. R. 493**

17. ——— *Documents filed in case under Criminal Procedure Code, s. 318.* Documents filed in a case under s. 318, Code of Criminal Procedure, cannot be accepted as evidence in a suit before a Deputy Collector. CHOOBUN SINGH *v.* DHOORUB SINGH . . **11 W. R. 171**

18. ——— *Criminal Procedure Code (Act XXV of 1861), s. 318 (Act X of 1872), s. 530, and (Act X of 1882), s. 145—Reports accompanying orders for possession—Evidence Act (I of 1872), s. 13—Maps, proof of—Suit for possession where defendant is in possession under order of Criminal Court—Onus of proof—Boundaries of land diluviated and reformed.* Orders for possession under Act XXV of 1861, s. 318, Act of X 1872, s. 530, and Act X of 1882, s. 145, relating to "Disputes as to immovable property," are merely police orders made to prevent breaches of the peace, and decide no question of title. Such orders are admissible in evidence, on general principles as well as under the Evidence Act (I of 1872), s. 13, to show the fact that such orders were made. This necessarily makes them evidence of the following facts appearing on the orders themselves, *viz.*, who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissble in evidence for and against any one when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *i.e.*, the testimony of persons who know the locality. If the order refers to a map, that map is admissible in evidence to render the order intelligible, and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of the sort, be ascertained by extrinsic evidence. Reports accompanying the orders or maps and not referred to in the orders, may be admissible as hearsay evidence of reputed possession; but they are not otherwise admissible unless they are made so by s. 13 of the Evidence Act. Although an order for possession under the Criminal Procedure Code confers no title, yet the person in possession can only be evicted by a person who can prove a better right to the possession himself. Where, therefore, the plaintiff sued for possession of disputed land, of which the defendant had been, by an order under s. 145 of the Criminal Procedure Code (Act X of 1882), made in 1888, declared to be in possession: *Held*, that the *onus* was on the plaintiff to prove her title to the land. Where, however, she had done so, and had obtained a decree in her favour, the *onus* is on the defendant (who is the appellant) to show that the decision of the High Court was wrong, and where it was wrong. To induce the Judicial Committee to reverse the judgment appealed from, the appellant must do something more than show that the plaintiff's title is not free from doubt, and must at least give some acceptable explanation of the circumstances which have led the Court below to its conclusion. The principle laid down in *Raj Kumar Roy* v. *Gobind Chunder Roy, I. L. R. 19 Calc. 660*, followed. In a case of disputed boundaries, to prove a map, a witness was called, who had assisted as an *Amin* in preparing it with another *Amin*, who was dead; the witness had little or no knowledge of surveying, but the *Amin* with whom it was prepared was a skilled surveyor; and the Collector, who was also dead, had tested the accuracy of the measurements. *Held*, that the map was sufficiently proved to be admissible in evidence. On the evidence, the Judicial Committee upheld the decision of the High Court that the plaintiff had proved her title to the disputed land. DINOMONI CHOWDHRANI *v.* BROJO MOHINI CHOWDHRANI (1901) **I. L. R. 29 Calc. 187: s.c. 6 C. W. N. 386: L. R. 29 I. A 24**

19. ——— **Deceased person, statement by**—*Statement against his interest or proprietary right.* The principle upon which the admissibility of a written statement made by a deceased person is determined is whether it has been

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EVIDENCE—CIVIL CASES—*contd.*

12. MISCELLANEOUS DOCUMENTS—*contd.*

made under such circumstances as make it reasonable to suppose that it was done *boná fide*, and that the allegations it contains are true; and if, as a whole, it is against the interest or the proprietary right of its author, such parts as are in his favour cannot be rejected. LEELANUND SINGH *v.* LAKHPUTTEE THAKOORANI . . **22 W. R. 231**

20. ——— **Depositions**—*Living witnesses.* Depositions of witnesses in a former suit are not admissible in evidence when those witnesses are living, and their oral evidence is procurable. HARISH CHUNDER CHUKERBUTTY *v.* TARA CHAND SHAHA . . . . **2 B. L. R. Ap. 4**

NIRPAL SINGH *v.* GOYADAT . **3 Agra 311**

21. ——— *Depositions irregularly taken on commission.* Where a Commissioner took the evidence of witnesses when the last return day of the commission had expired, it was held that the depositions of the witnesses were not admissible in evidence in the cause. GREGORY *v.* DOOLY CHAND **14 W. R. O. C. 17**

22. ——— *Depositions—Admissibility—Presumption—Indian Merchant Shipping Act (V of 1883)—Preliminary enquiry—Statements not challenged.* In the course of a preliminary enquiry, held under the Indian Merchant Shipping Act of 1883, to investigate into a collision, the defendant Company being represented by their attorney, certain officers of the defendant Company made certain statements on oath. *Held*, that the failure of the attorney of the defendant Company to challenge the accuracy of these statements afforded a strong presumption that the imputations against the defendant Company therein contained were correct, and on this ground, among others, the statements were admissible in evidence. *Simpson* v. *Robinson, 12 Q. B. 511. R.* v. *Coyle, 7 Cox C. C. 76; Morgan* v. *Evans, 3 Cl. & Fin. 159; Freeman* v. *Cox, L. R. 8 Ch. D. 148, Hampden* v. *Wallis, L. R. 27 Ch. D. 251,* and *Sokram Misser* v. *Crowdy, 19 W. R. 283,* referred to. ASIATIC STEAM NAVIGATION COMPANY *v.* BENGAL COAL COMPANY (1908). **I. L. R. 35 Calc. 751**

23. ——— **Document receipt-book**—*Book kept by attorney—Receipt given by defendant for documents of title—Admission.* A witness (an attorney) cannot refer to his documents receipt-book in order to enable him to say whether a document of a particular character and date was in his possession on a particular day. A receipt by the defendant for documents relating to his title in a suit is receivable in evidence as being in the nature of an admission signed by the defendant. MADHAB CHUNDRA DUTT *v.* RAJKISTO SETT . **Cor. 148**

24. ——— **Documents "without prejudice"**—*Questions of admissibility of document—"Without prejudice"—Evidence Act (I of 1872), s. 23.* In a suit for R465 the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt given by the defendant. The alleged acknowledgment was written on a postcard sent by the defendant to the plaintiff. It was in Gujarati, and was as follows: "I was bound to send R30 according to my *vaida* (fixed time), but on account of the receipt of the intelligence of the death of my father, I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay R30 at Shet Mervanji's. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is, indeed, my earnest wish. After this, God's will be done. Therefore, I will positively pay R30." The postcard bore on it also the words "without prejudice" in English. The lower Courts held that it was therefore inadmissible in evidence, and consequently that the plaintiff's claim was barred, and they dismissed the suit. The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction and obtained a rule *nisi* to set aside the decree of the lower Courts on the ground that the postcard had been improperly excluded from evidence. *Held*, discharging the rule, that even if the postcard were admissible in evidence, it did not amount to an acknowledgment of the debt claimed by the plaintiff, which was, therefore, barred by limitation. *Per* CANDY, *J.*—I doubt whether the postcard was inadmissible in evidence. To exclude it from evidence, it would be necessary to hold that the words "without prejudice" amounted to an express condition that the card should not be used in evidence against the writer. In England apparently the card would have been admissible: *In re Daintrey [1893], 2 Q. B. 116.* MADHAVARAV GANESHPANT OYA *v.* GULABBHAI LALLUBHAI . . . **I. L. R. 23 Bom. 177**

25. ——— **Endorsed promissory notes**—*Negotiable Instruments Act (XXVI of 1881), s. 51—Promissory note in favour of two payees—Endorsement by one in favour of the other—Suit by endorsee as such—Maintainability—Suit by endorsee as assignee of chose in action—Endorsement evidence of assignment.* Where a promissory note has been made in favour of two payees, one of whom endorses it to the other, the endorsee cannot sue on the note as endorsee or as one of two joint payees. He may, however, maintain a suit, in respect of the amount due under the note, as assignee of the chose in action. Although such an endorsement cannot operate as an endorsement under the law merchant, it may be relied on as evidence of an assignment by way of release in favour of the endorsee. Rule 428 of the Rules of Procedure of the Presidency Small Cause Court is not *ultra vires.* MUHAMMAD KHUMARALI *v.* RANGA RAO (1901) **I. L. R. 24 Mad. 654**

26. ——— **Books of account**—*Enhancement of rent, evidence of ground of—Increased value of produce, evidence to prove.* In a suit for enhancement of rent, the plaintiff, among other grounds,

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contended that the value of the produce of the land had increased, and called witnesses belonging to the cultivating class, who stated from memory the prices which had prevailed in the locality for a number of years. The District Judge considered this evidence to be no safe guide to the value of produce, which he held could only be proved by traders and merchants with books of accounts, by which their memory could be refreshed and tested. *Held*, that the evidence adduced was relevant, and entitled to consideration. HURO PERSAD ROY *v.* WOMATARA DEBEE . **I. L. R. 7 Calc. 263 : 8 C. L. R. 449**

27. ——— Entries by officer of Court—*Evidence Act (II of 1855), s. 4—Entries by nazir—Issue of warrant.* Under s. 4, Act II of 1855, a Court is entitled to refer to entries made by its own officer, the nazir, and find thereon that a warrant had been issued in accordance with an application admitted to have been made. NILKUNT CHUCKERBUTTY *v.* SHEO NARAIN KOONWAR **8 W. R. 276**

28. ——— Government Gazette—*Conditions of sale, proof of—Suit to cancel patni tenure.* The Government Gazette containing the advertisement of sale and a printed paper purporting to be the conditions of sale alluded to in the Gazette and issued from the Master's office in the name of the Master, were admitted in evidence to prove the actual conditions of the deed of sale. JOTENDRO MOHUN TAGORE v. BROJOSOONDRY. **W. R. 1864, 50**

29. ——— Handwriting—*Forgery.* Where evidence could have been adduced, and was not as to a handwriting being forged, and the Judge by comparison with other handwriting, held it to be a forgery, such finding was disappoved of. KURALI PRASHAD MISSER *v.* ANANTARAM HAJRA . **8 B. L. R. 490 : 16 W. R. P. C. 16**

30. ——— Income-tax returns—*Production and admissibility in evidence of income-tax papers—Income Tax Act (II of 1886), s. 38—Rule 16 of rules made by Local Government under Income Tax Act.* Rule 16 of the rules made by the Local Government under s. 38 of the Income Tax Act (II of 1886) does not apply to the production of income-tax papers in a Court of law in a suit between two partners. *Lee* v. *Birrel, 3 Camp. 337*, and *Mayne's Commentary on the Criminal Law, pp. 86, 87*, cited. JADOBRAM DEY *v.* BULLORAM DEY **I. L. R. 26 Calc. 281**

31. ——— Issumnuvissi papers—*Enhancement of rent—Possession.* In a suit by a purchaser of a patni at a sale for arrears of rent to enhance the rent of the ghatwal under Regulation VIII of 1819.—*Held*, that issumnuvissi papers for 1811-1813, stating that the amount held by the ghatwal was 100 bighas, did not entitle the plaintiff to enhance the rent of the surplus over that 100 bighas in the face of satisfactory oral evidence of long uninterrupted possession. FARQUHARSON *v.* DWARKANAUTH SINGH . . **8 B. L. R. 504**

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S.C. FARQUHARSON *v.* GOVERNMENT OF BENGAL **14 Moo. I. A. 259 : 16 W. R. P. C. 29**

Affirming ERSKINE *v.* GOVERNMENT **8 W. R. 223**

and GOVERNMENT *v.* FERGUSSON **9 W. R. 158**

32 ——— Kabuliats—*Evidence against third parties.* In a suit for declaration of title and confirmation of possession, where plaintiff claimed as having the right title, and interest of the former zamindar in execution of a decree against him, urging that the lands were part of the khas lands of the estate and defendants claimed the lands as part of their maurasi tenure obtained from the same zamindar: *Held*, that attested kabuliats filed by the plaintiff, though good evidence as between plaintiff and the tenants of the land, could not, in regard to a third party, be held as evidence in the absence of the tenants themselves, who should have been examined. MOHIMA CHUNDER CHUCKERBUTTY *v.* POORNO CHUNDER BANERJEE **11 W. R. 165**

33. ——— Kursinama—*Evidence Act (I of 1872), s. 32, cl. (5)—Statements by members of family as to relationship—Document admitted in first Court without objection—Objection to admissibility not allowed on appeal.* In an application for Letters of Administration, the right of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their great-great-grandfather and the great-great-grandmother of the deceased was that of full brother and sister. To prove this, a *kursinama*, or genealogical table, made by the ancestress of the deceased "by the pen of gomasta," and alleged to have been filed by her in 1804 in a suit to establish the same fact, and a certified copy of an *ewaznama*, or deed of exchange, dated 17th January 1782, and corroborating the *kursinama* as to the relationship, were produced by the applicants. The *kursinama* was admitted in the first Court without objection. Both documents, which were pronounced genuine and admissible in evidence by the District Judge, were held by the High Court to be forgeries. *Held*, that the *kursinama* was admissible in evidence. *Held*, also, that it was too late on this appeal to object to the admissibility in evidence of a document which had been admitted without objection in the first Court. The certified copy of the *ewaznama* was also held to be admissible in evidence. On the question of the genuineness of both documents, their Lordships supported the conclusion arrived at by the District Judge, and held, that the title of the applicants was established. SHAHZADI BEGAM *v.* SECRETARY OF STATE FOR INDIA (1907) **I. L. R. 34 Calc. 1059 ; L. R. 34 I. A. 194**

34. ——— Letters—*Letter from Judge as to irregularity in return to commission.* A letter from a Judge cannot be given in evidence to show that a formal return, made by him on a commission

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to examine witnesses, was wrong. LAND MORTGAGE BANK OF INDIA *v.* MUNSUR ALI **1 C. L. R. 239**

35. ——— *Letters between members of a joint family and the kurta of the family.* In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the defendant at a sale in execution of a decree against *R*, a member of the family, for his separate debt, letters between *B*, the *kurta* of the family, and *R*, relative, to the purchase by the latter, as his separate property of the estate in dispute, were admitted in evidence as against the defendant. BODH SINGH DOODHOORIA *v.* GUNESH CHUNDER SEN . **12 B. L. R. P. C. 317 : 19 W. R. 356**

36. ——— **Record of market-rate**—*Ascertainment of marked rate in suit on an agreement of indemnity.* Where the Court has had the advantage of having in evidence before it a record of the market rate of any particular day made up by a broker of intelligence and experience, such a record should be received as evidence of the particular state of the market on that day. NARAIN CHUNDER DHUR *v.* COHEN **I. L. R. 10 Calc. 565**

37. ——— **Marriage register**—*Registration of Mahomedan marriages—Restitution of conjugal rights—Bengal Act I of 1876, s. 6, Sch. A—Copy of entry in register—Evidence.* A husband and wife, Mahomedans, registered their marriage under Bengal Act I of 1876, setting out in the form prescribed in Sch. A to the Act as "a special condition" that the wife under certain circumstances therein set out might divorce her husband. These circumstances occurred, and the wife divorced her husband. *Held*, in a suit by the husband for restitution of conjugal rights, that the "special condition" was a matter which under the provisions of the Act, it was the duty of the Mahomedan Registrar to enter in the register, and therefore a copy of the entry in the register was legal evidence of the facts therein contained. KHADEM ALI *v.* TAJIMUNISSA . . **I. L. R. 10 Calc. 607**

38. ——— **Bill of lading—Mercantile custom**—*Usage of carriers—Liability of carriers for damage to goods.* The defendants, carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damage to goods arising from insufficiency of packing. The plaintiff shipped certain goods in one of defendant's steamers in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay. In an action brought to recover damages for injury to the packages :—*Held*, that evidence of mercantile usage or custom would be admissible to show that the words "insufficiency of package" should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade. PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. *v.* MANICKJI NARAINJI PADSHA **4 Bom. O. C. 169**

39. ——— **Mutation proceedings**—*Evidence Act, s. 80—Statement in mutation proceeding—"Documents."* In a suit for recovery of lands claimed partly in virtue of rights obtained under a kobala and partly in virtue of rights purchased at a sale in execution of a decree in which the lower Appellate Court refused to recognize a statement made before a Collector in a mutation proceeding as a "document" under the Evidence Act :—*Held* by the High Court, that a statement made before a Collector in a mutation proceeding is a document entitled to be received as evidence under s. 80 of the Evidence Act. BUDREE LALL *v.* BHOOSEE KHAN . . . **25 W. R. 134**

40. ——— **Notes of depositions**—*Evidence irregularly taken.* Rough notes taken down by an Assistant Collector of what was said by witnesses whose depositions are not recorded, are not evidence such as is required by law, and an opinion based on such evidence is without legal validity. BALA THAKOOR *v.* MEGHBURN SINGH **14 W. R. 269**

41. ——— **Partition papers**—*Evidence of rate of rent.* Butwara papers are only evidence of the proportionate assessment of Government revenue payable by proprietors after partition, not evidence binding raiyats as to what holdings are theirs, or what are their arrears, rates, or periods of occupancy. DROBO MOYEE GOSMANEE *v.* DHURMO DOSS KOONDOO . . . **10 W. R. 197**

42. ——— *Butwara chittas—Suit to set aside summary award.* A butwara between zamindars is not binding in any way on the raiyats, and butwara chittas are no evidence in a suit for possession of a jote and to set aside a summary award under Act XIV of 1859, s. 15. GOPAL CHUNDER SHAHA *v.* MADHUB CHUNDER SHAHA . . . . . **21 W. R. 29**

43. ——— *Butwara papers—Lands comprised in estate.* Private butwara papers are good evidence towards showing what lands were in fact comprised in the estate at the time of butwara. DWARKANATH ROY CHOWDHRY *v.* HURONATH ROY CHOWDHRY **W. R. 1864, 238**

44. ——— **Pedigree**—*Aliyasantana law—Partition—Evidence—Admissibility as to pedigree in a document that has been set aside by the Court.* In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasantana law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable. *Held*, that the written agreement was admissible as evidence

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of pedigree, and that the plaintiff was entitled to the decree sought for. TIMMA *v.* DARRAMMA **I. L. R. 10 Mad. 362**

45. ——— **Petitions**—*Petitions stating fact of conveyance—Suit for possession.* In a suit to recover the possession of land, the petitions of alleged owners, through whom the plaintiff claimed title, presented to the Collector and to the Principal Sudder Ameen, which respectively stated the conveyance from the one to the other, and from the last supposed owner to the plaintiff, were tendered as evidence of the plaintiff's title, without production of the deeds, or even evidence that such alleged owners had ever been in possession of the property. *Held*, that the petitions were not admissible in evidence. CLARKE *v.* BINDABUN CHUNDER SIRCAR **Marsh. 75 : 1 Hay 137 : W. R. F. B. 20 1 Ind. Jur. O. S. 97**

46. ——— *Admissibility of petition signed by a person available, but not called as witness.* *A*, the son of a deceased zamindar, sued *B* and *C*, his widow and brother, for possession of the zamindari, which was impartible. In order to prove that *A* was illegitimate, *C* filed two petitions purporting to have been signed and sent to the Collector of the district by *C* in 1871, referring to *A's* mother as a concubine. *C* was not examined as a witness. *Held*, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein. PARVATHI *v.* THIRUMALAI **I. L. R. 10 Mad. 334**

47. ——— *Petitions—Landlord and tenant—Admissibility in evidence—Petition of claim on behalf of a person by her attorney—Authority, want of proof of.* A petition purporting to emanate from a particular person and filed on his behalf by a pleader acting on a *vakalatnama* signed by one who represented himself to be the attorney of that person is *primâ facie* evidence that it proceeds from him ; and is, as such, admissible in evidence in a subsequent suit. *Soorendra Nath Roy* v. *Heeramonee Burmoneah, 12 Moo. I. A. 81 ; Bhagain Megh Ranee Koer* v. *Gooroo Pershad Singh, 25 W. R. 68*, followed. LALITA SUNDARI *v.* SURNOMOYEE DASI (1900) . . **5 C. W. N. 353**

48. ——— *Petition—Compromise—Criminal proceedings—Value of such deed—Admissibility in evidence of such document in a later case.* An unregistered compromise petition, which was the root of the plaintiff's claim to an increased rent and was filed in previous criminal proceedings, was not incorporated in the order in such proceedings. *Held*, that it was not admissible in evidence in a later civil suit. *Pranal Anni* v. *Lakhsmi Anni, I. L. R. 22 Mad. 508 ; L. R. 26 I. A. 101 ; Kali Charan Ghosal* v. *Ram Chandra Mandal, I. L. R. 30 Calc. 783*, and *Birbhadra Rath* v. *Kalpataru Panda, 1 C. L. J. 388*, referred to. BIRAJ MOHINEE DASSEE *v.* KEDAR NATH KARMOKAR (1908) **I. L. R. 35 Calc. 1010 s.c. 12 C. W. N. 854**

49. ——— **Pleadings**—*Statements in verified written statement.* Statements made in a verified written statement of a party are not admissible in evidence (BAYLEY, *J.*, *dubitante*). MOOKTA KESSEE DOSSEE *v.* KOYLASH CHUNDER MITTER **7 W. R. 493**

50. ——— *Declaration in pleadings.* Declarations made in pleading, in suits instituted before the Code of Civil Procedure came into operation, were inadmissible as evidence of the facts stated therein. NARAPPA BINAPPA HEGDI *v.* GAPAYA BIN KAPYA **2 Bom. 361 : 2nd Ed. 341**

51. ——— *Written statement.* A written statement is not legal evidence, although the same penal consequences may follow from it if false as from a false deposition. IJJOTOOLAH KHAN *v.* RAM CHURN GANGOOLY . **12 W. R. 39**

52. ——— **Possession, fact of**—*Admissibility of evidence—Statement by witness.* A statement by a witness that a party was in possession is in point of law admissible evidence of the fact that such party was in possession. MANIRAM DEB *v.* DEBI CHURN DEB **4 B. L. R. F. B. 97 : 13 W. R. F. B. 42**

(*Contra*) ISAN CHUNDER BEHARA *v.* RAMLOCHUN BEHARA . . . . . **9 W. R. 79**

53. ——— **Probate**—*Executor, proof of title of—Administration, grant of—Jurisdiction of Court to modify—Succession Act (X of 1865, ss. 3, 179, 187, 260—Sale for arrears of rent—Incumbrances, annulment of—Notice—Disclaimer—Bengal Tenancy Act (VIII of 1885), s. 167.* Under ss. 179, 187, and 260 of the Indian Succession Act, where probate of a will has been granted, the executor, in order to bring a suit as such, is bound to prove his title ; to do which in case of dispute he must file, not merely a copy of the grant of administration, but also the copy of the will attached to it, the two together forming the probate as defined by s. 3. But a Court, not being the Court of Probate, cannot go behind the grant and interpret and modify its terms by the provisions of the will. In a suit for possession after annulment of an under-tenure under s. 167 of the Bengal Tenancy Act, absence of due service of notice on a person, who in the suit disclaimed all interest therein, cannot prejudice the plaintiff. But, if the application for the issue of the notice against some of the persons jointly interested in the incumbrance was not made within time, the whole suit must fail. DELANEY *v.* ROHAMAT ALI (1905) . . . **I. L. R. 32 Calc. 710**

54. ——— **Registers**—*Registration of tenure—Common registry—Act XI of 1859, s. 39.* The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of

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itself *primâ facie* evidence that such a tenure exists. LAKHYNARAIN CHUTTOPADHYA *v.* GORACHAND GOSSAMY . **I. L. R. 9 Calc. 116 : 12 C. L. R. 89**

55. ——— *Register prepared by a Special Commissioner appointed under the Chota Nagpur Tenure Act (Bengal Act II of 1869), effect to be given to, as evidence—Conclusive nature of such register.* A register of tenures prepared by a Special Commissioner appointed under Bengal Act II of 1869 (The Chota Nagpur Tenures Act) after it has been confirmed by the Commissioner of the Division, and such confirmation has been duly published in the *Calcutta Gazette*, is conclusive evidence of all matters recorded therein and it is not open to a Civil Court to hold that because a special Commissioner did not rightly understand a decision of the Commissioner, and because the register was not prepared in accordance with such order, it is otherwise than conclusive, nor is a Court competent even to discuss the question whether a Special Commissioner, in preparing such register, rightly appreciated the Commissioner's decision, when his own order has been given effect to by the register prepared, and has been confirmed by the Commissioner under s. 25 of the Act. PERTAP UDAI NATH SAHI DEO *v.* MASI DAS **I. L. R. 22 Calc. 112**

56. ——— *Bhuinhari register prepared under the Chota Nagpur Tenures Act (Bengal Act II of 1869)—Evidence of title.* A bhuinhari register prepared under Bengal Act II of 1869 is not conclusive evidence of the title of the person recorded therein. KIRPAL NARAIN TEWARI *v.* SUKURMONI . . . **I. L. R. 19 Calc. 91**

57. ——— *Registers of chakeran lands—Public records.* The registers of chakeran lands are public records supposed to contain a correct list of the chakeran lands in existence at the time of the Decennial Settlement. COLLECTOR OF EAST BURDWAN *v.* IMDAD ALI **W. R. 1864, 358**

58. ——— *Register of members—Winding up Company—Proof of person being shareholder—Presumption of Membership.* The evidence adduced by the official liquidator to show that the defendant was a member of the company and so liable as a contributory consisted of the register of members, a letter written by the objector, a reply thereto written by a managing director of the company, and the oral testimony of the director himself. The objector adduced no evidence at all. *Held*, that the official liquidator might, if he had chosen to do so, have put the register in evidence and waited before giving any further evidence until the objector had given some to displace the *primâ facie* evidence afforded by the register or to impugn the character of the register; but his case must be looked at as a whole, and having taken the line which he did he must take the consequence of his other evidence contradicting or impugning the *primâ facie* evidence of the register, and, notwithstanding that the objector gave no evidence, the register was not conclusive. RAM DAS CHAKARBATI *v.* OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY **I. L. R. 9 All. 366**

59. ——— *Proof of registration of documents—Suit on bond.* Before inforcing a duly registered bond without a suit, proof of the signature or handwriting of the Registrar is not necessary. The bond, with the further agreement endorsed thereon when registered, becomes a record and is of itself *primâ facie* proof of registration, and this with reference to the further agreement, as well as to the instrument itself. HOBEEBO SOBAIR *v.* HOSSEIN ALI **5 W. R. S. C. C. Ref. 14**

60. ——— **Rent-roll**—*Suit for arrears of rent.* In a suit for arrears of rent the rent-roll is not to be accepted as conclusive evidence. SURFRAZ KHAN *v.* TASAWUR ALI . **2 Agra 253**

61. ——— **Road-ceas papers**—*Evidence Act, s. 13.* Under the Evidence Act, s. 13, road-cess papers are evidence *quantum valeant*. DAITARI MOHANTI *v.* JUGO BUNDHOO MOHANTI **23 W. R. 293**

62. ——— *Road-cess return by shareholder—Sch. of Beng. Act X of 1871.* A road-cess return made by a shareholder under the schedule of Bengal Act X of 1871, is not admissible as evidence against another shareholder. NUSSEER *v.* GOURI SUNKER SINGH . **22 W. R. 192**

63. ——— *Road-cess Act (Bengal Act X of 1880), s. 95—Road-cess return signed by one of the plaintiff's vendors and the defendant, whether admissible in evidence as against plaintiff and in favour of the defendant.* A road-cess return, signed by one of the plaintiff's vendor and the defendant, was filed by two plaintiffs' vendors. It consisted of two parts, in one of which the joint properties of the plaintiff's vendor and the defendant were set out, and in the other the properties belonging to the defendant alone mentioned. In a suit by the plaintiff for some lands as being the joint property of his vendors and the defendant, the defendant put in the road-cess return in order to disprove plaintiff's allegation, by showing that the lands were included in the second part. The lower Court had relied on this return. It was contended in appeal that it was inadmissible under s. 95 of the Road-Cess Act, being evidence in favour of the principal defendant. *Held*, that the road-cess return was evidence against the plaintiff claiming through his vendor, and it is none the less evidence merely because, by admitting it as evidence against the plaintiff, it becomes evidence in favour of the defendant. BENI MADHAB DANDAPAT *v.* DINA BUNDHU DUTT . **3 C. W. N. 343**

64. ——— *Road-cess Returns—Returns made under s. 95, Bengal Cess Act (Ben.*

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Act IX of 1880)—Admissibility in evidence—Grounds of enhancement of rent—" Fair and equitable rates "—Presumption against person not producing evidence which he can produce—Evidence Act (I of 1872), s. 114 (g). In a suit for enhancement of the rent of a talukdari tenure, road-cess returns rendered under s. 95 of the Bengal Cess Act (Ben. Act IX of 1880), though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluk, and so fix a fair and equitable limit of enhancement. When such returns, produced by the plaintiff, showed that the talukdars were receiving from their sub-tenants a considerably higher rent relatively than that which they were paying to their superior landlords, and that the claim for enhancement could *primâ facie* be supported on the ground that the existing rate was consequently not " fair and equitable " within the meaning of the Bengal Tenancy Act, they were held sufficient to shift the onus to the defendants to rebut the presumption so raised against them. To rebut such presumption, the defendants might have produced their collection papers, but did not do so. *Held,* that the Court was justified in acting on the presumption under s. 114, Ill. (*g*), of the Evidence Act (I of 1872). HEM CHANDRA CHOWDHRY *v.* KALI PROSANNA BHADURI (1903)
I. L. R. 30 Calc. 1033 : s.c. L. R. 30 I. A. 177

65. ——— **Settlement papers.** In a suit for arrears of rent it was held that settlement papers were only corroborative evidence and under the circumstances insufficient to prove the yearly rental. BUNWARI LALL *v.* FORLONG
9 W. R. 239

66. ——— *Entry by settlement officer—Evidence of facts recorded.* An entry made by a settlement officer on the report of a co-sharer and on the strength of the report of the patwari and canoongoe, is, as a record framed by a public officer, admissible as evidence of the facts recorded. KINBAR DANSHA *v.* GOKURUN
3 Agra 316

67. ——— *Entries duly made in settlement proceedings.* Entries duly made in settlement proceedings with respect to matters therein properly recorded are, as against cultivators, evidence of such matters, although such evidence may be rebutted by other more reliable proof, if it be procurable. DABEE LAL *v.* GOOLZAR RAE
2 N. W. 394

68. ——— *Papers on settlement proceedings by Deputy Collector—Evidence of acquiescence of Collector.* Where a memorandum of an order made, or proposed to be made, by a Collector upon a reference by his subordinate, which was found on a paper taken from the middle of a settlement record, was produced in Court in that form without explanation, and used by the Judge as evidence of acquiescence : *Held,* that it was not susceptible of use in that way, nor could it bind the Collector. RUSSIK LAL SHAHA CHOWDHRY *v.* PREM DHUN BURAL . . **24 W. R. 279**

69. ——— **Signature**—*Proof of signature.* In considering whether a signature is genuine or not, it should not be compared with a document not before the Court, or with one of which the authenticity is doubtful. GURUMURTTI NAYUDU *v.* PAPPA NAYUDU . . . . **1 Mad. 164**

70. ——— *Evidence Act, s. 32, cl. (2)—Evidence—Deed—Proof of deed denied by the party by whom it was executed, where attesting witnesses were dead.* A deed of conveyance was tendered in evidence which purported to bear the mark of *G* as vendor, and which was duly attested by four witnesses. *G,* however, denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. *Held,* on the authority of *Whitelocke* v. *Musgrove, 2 Cr. & M. 511,* that the deed was admissible in evidence, its execution by *G* being sufficiently proved. ABDULLA PARU *v.* GANNIBAI . **I. L. R. 11 Bom. 690**

71. ——— **Small Cause Court, proceedings in**—*Suit on decree of Small Cause Court—Certified copy of record.* In suits on decrees of the Small Cause Court, Calcutta, a copy of the record duly certified by the Clerk of the Court, if it appears from such copy that the original has been duly authenticated by the Judge, is sufficient to prove the decree. HARONARAYAN *v.* MANIK SINGH
7 B. L. R. Ap. 61

72. ——— *Record of proceedings of Small Cause Court—Summons-book.* The summons-book of the Small Cause Court, Calcutta, is admissible in evidence, though not signed by the presiding Judge. QUEEN *v.* NAKUR SIRCAR . . . . . **6 B. L. R. 729**

73. ——— *Authentication of record.* The record of proceedings in the Small Cause Court is not admissible in evidence unless authenticated by the signature of the presiding Judge. QUEEN *v.* SHIB CHANDRA DOSS
6 B. L. R. 730 note

74. ——— **Survey and measurement papers**—*Survey proceedings—Evidence Act, 1855, s. 15.* Survey proceedings, if made without reference to litigation then pending are not only evidence, but are to be presumed to be correct, and it is beyond the functions of the High Court in special appeal to lay down any rule as to corroboration of such documents. RAM NARAIN DOSS *v.* MOHESH CHUNDER BANERJEE . **19 W. R. 202**

75. ——— **Chittas**—*Unattested chittas.* Where a party putting in chittas called in a witness to attest them, but the witness did not do so, and the party did not apply to the Court to compel him to do so, the chittas were held to be no legal

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EVIDENCE—CIVIL CASES—*contd.*

12. MISCELLANEOUS DOCUMENTS—*contd.*

evidence, even though admitted by the lower Court without objection from the opposite party. IJJUTCOLAH KHAN *v.* RAM CHURN GANGOOLY **12 W. R. 39**

76. ——— *Government chittas—Act III of 1851, s. 58.* Under s. 58, Act III of 1851, Government chittas are admissible as evidence in cases in Chittagong. MAHOMED FEDYE SIRDAR *v.* OZEEOODEEN . **10 W. R. 340**

77. ——— *Chittas—Boundary disputes.* Chittas are evidence of title in boundary disputes, if an account is given of them, and they are properly introduced and verified. SUDUKHINA CHOWDHRAIN *v.* RAJ MOHUN BOSE **11 W. R. 350**

78. ——— *Chittas made on boundary disputes.* Chittas made on the occasion of a boundary dispute are evidence of title where the question of boundaries arises in another suit. RADHA CHURN GANGOOLY *v.* ANUND SEIN **15 W. R. 444**

79. ——— *Chitttas in resumption proceedings.* Chittas and maps made in contemplation of resumption proceedings in the presence of both sides and signed by the parties, are legal evidence. SHAM CHAND GHOSE *v.* RAM KRISTO BEWRAH . . . **19 W. R. 309**

80. ——— *Copies of measurement papers and maps.* Certificated copies of survey measurement chittas and field books are admissible in evidence. GOPEENATH SINGH *v.* ANUND MOYEE DEBIA . . **8 W. R. 167**

81. ——— *Chittas—Attestation of chittas.* Where chittas were produced by plaintiff as evidence of certain lands being *mal*, it was held that they were sufficiently attested by the deposition of the village gomastah, that they were the chittas of the village while he was gomastah, and that he had been present when, with their assistance, a purtal measurement had been carried out in the village. DABEE PERSHAD CHATTERJEE *v.* RAM COOMAR GHOSSAL . . **10 W. R. 443**

82. ——— *Chittas made by revenue officers.* Chittas made by the revenue authorities in the course of measurement of a Government mehal stand precisely on the same footing as chittas made by them in enquiries relating to revenue, and are equally admissible in evidence; the circumstance that the proceedings relate to a khas estate cannot deprive them of the character of public proceedings upon matters of public interest. TARUCK NATH MOOKERJEE *v.* MOHINDRONATH GHOSE . . **13 W. R. 56**

MOOCHEE RAM MAJHEE *v.* BISSAMBHUR ROY CHOWDHRY . . . . **24 W. R. 410**

83. ——— **Measurement papers**—*Evidence of title.* Measurement papers of a zamindar made for the purpose of a partition are admissible as evidence as to title as showing what the zamindari consisted of, though the partition may not have been carried out. ANUND CHUNDER ROY *v.* HURONATH ROY . . . . **4 W. R. 26**

84. ——— *Measurement papers.* A lower Appellate Court was held to have been fully justified in rejecting measurement papers as inadmissible in law, where no proof was given to show in what circumstances, under what authority, and for what purpose they had been prepared. JHAREE SAHOO *v.* BUNDHOO SAHOO . **15 W. R. 218**

85. ——— *Measurement papers.* Measurement papers cannot be treated as inadmissible in evidence because set aside by the decisions of the lower Courts, if these decisions have been reversed by the High Court. GOBIND MUHTOO *v.* GOOPEE BHUGGUT . . **16 W. R. 4**

86. ——— *Suit for abatement of rent—Lands washed away—Measurement papers.* In a suit for abatement of rent on the ground that part of the talukh has been washed away by a river, measurement papers prepared by the revenue authorities in a case between Government and the talukhdar, in respect of a share belonging to Government in the zamindari of the zamindar, are not admissible as evidence against the latter, they being *res inter alios actæ.* AFZUROODDEEN *v.* SHOROSHEE BALA DABEA **Marsh. 558 : 2 Hay 664**

87. ——— **Thakbust papers**—*Loazima and thaka papers.* Loazima and thaka papers are legal evidence *quantum valeant.* SHUSEE MOOKEE DOSSEE *v.* BISSESSUREE DABEE . **10 W. R. 343**

88. ——— *Evidence against proprietors of estates.* Thakbust papers are *primâ facie* evidence against the proprietors of estates comprehended in them. KALEE TARA DEBIA *v.* NITTIANUND SHAHA . . . . **12 W. R. 90**

89. ——— **Translations**—*Translation of document by Court interpreter, authority of. Held,* that the translation of a deed by the interpreter of the Court must be accepted *primâ facie* as correct, and as evidence of the contents of the deed. MUZHUR HOSSAIN *v.* DINOBUNDO SEN **Bourke O. C. 8 : Cor. 94**

90. ——— **Variation of rent, proof of**—*Zamindar's papers.* Zamindar's papers filed or attested by gomastahs are not conclusive proof of variation, unless it can be shown not merely that the jumma-wasil-baki and similar papers show a varying rate, but that the raiyat has paid at a varying rate. GOPAL MUNDUL *v.* NOBO KISHEN MOOKERJEE . . . . **5 W. R., Act X, 83**

91. ——— **Wajib-ul-urz**—*Pre-emption—Custom—Records-of-rights—Onus probandi.* A wajib-ul-urz prepared and attested according to law is *primâ facie* evidence of the existence of any custom of pre-emption which it records, such evidence

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EVIDENCE—CIVIL CASES—*contd.*

12. MISCELLANEOUS DOCUMENTS—*concld.*

being open to be rebutted by any one disputing such custom. When such a wajib-ul-urz records a right of pre-emption by contract between the shareholders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the shareholders assented to the making of the record and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders repudiating such contract to rebut such presumption. ISRI SINGH *v.* GANGA **I. L. R. 2 All. 876**

92. ——— *Evidence of custom—Improper use of wajib-ul-urz to record wishes of sole proprietor of village—Primogeniture.* The object of the wajib-ul-urz is to supply a reliable record of existing local custom. It was never intended that the wajib-ul-urz should be used as an indirect means of giving effect to the wishes of a sole proprietor with regard to the nature of his tenure or the mode of devolution of the property which should obtain after his death. SUPERUNDDHWAJA PRASAD *v.* GARURADDHWAJA PRASAD **I. L. R. 15 All. 147**

Case reversed on appeal by Privy Council in GARURADHWAJA PRASAD SINGH *v.* SUPARAUDHWAJA PRASAD SINGH . **L. R. 27 I. A. 238**

13. SECONDARY EVIDENCE.

(*a*) GENERALLY.

1. ——— **Production of best evidence**—*Written documents—Evidence of authority of agent.* It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their own contents. Special authority of an agent to sign an acknowledgment of debt under s. 20, Act IX of 1871, cannot be proved by secondary evidence of the contents of a letter, the non-production of which is not satisfactorily accounted for. DINOMOYI DEBI *v.* ROY LUCHMIPUT SINGH . **L. R. 7 I. A. 8**

MAN SING MAHTOON *v.* BHAIK NARAIN MAHTOON **19 W. R. 210**

2. ——— **Condition for admission of secondary evidence**—*Accounting for non-production of original of document—Evidence of contents of document.* By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court is the accounting for the non-production of the original. BHUBANESWARI DEBI *v.* HARISARAN SURMA MOITRA **I. L. R. 6 Calc. 720 : 8 C. L. R. 337**

3. ——— *Evidence Act, s. 91—Oral evidence where pottah is not produced.*

EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*a*) GENERALLY—*contd.*

Where the contents of a lease (pottah) are in any way in question, it is necessary to prove them by the production of the document; where this is not the case, but it is only necessary to prove possession for 12 years, then, although the lease would have shown it, oral evidence of the pottah is admissible. KEDAR NATH JOARDAR *v.* SURFOONNISSA BIBEE **24 W. R. 425**

4. ——— *Non-procurability of original document.* Until a party has exhausted all the means prescribed by law for compelling a witness to produce a document known to be with him, and so long as the original is procurable, or its loss not satisfactorily accounted for, secondary evidence cannot be admitted. GREESH CHUNDER LAHOOREE *v.* RAMLOLL SIRCAR. ROOPMONJOREE CHOWDHRAIN *v.* RAMLALL SIRCAR . **1 W. R. 145**

MUHAMMAD VALAD ABDUL MULUA *v.* IBRAHIM VALAD HASAN . . . **3 Bom. A. C. 168**

WUZEER ALI *v.* KALEE COOMAR CHUCKERBUTTY **11 W. R. 220**

5. ——— *Evidence Act (I of 1872), ss. 65 and 74—Secondary evidence of contents of document—Public document.* Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act (I of 1872). KRISHNA KISHORI CHAODHRANI *v.* KISHORI LAL ROY **I. L. R. 14 Calc. 486 L. R. 14 I. A. 71**

6. ——— *Evidence Act (I of 1872), ss. 65, 66—Admission of secondary evidence.* On an appeal to the Judicial Committee from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only question was whether secondary evidence had been properly admitted in a case that had arisen for its admission. The question was decided in the affirmative by their Lordships on the ground that, whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (I of 1872), ss. 65, 66. LUCHMAN SINGH *v.* PUNA . **I. L. R. 16 Calc. 753 L. R. 16 I. A. 125**

7. ——— *Evidence Act (I of 1872), ss. 65, 66, 74 and 86—Judicial proceedings in Foreign-State Record not certified as specified in s. 86—Public document.* The record of proceedings in a Court of justice is presumed to be genuine and accurate if it is certified as directed by s. 86 of the Evidence Act. But the proceedings may be proved by an official of the Court speaking to what takes place in his presence and also to an

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*a*) GENERALLY—*contd.*

uncertified record thereof. The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74) admissible without notice to the adverse party where the person in possession thereof is out of the jurisdiction. HARANUND CHEBLANGIA *v.* RAM GOPAL CHEBLANGIA . **I. L. R. 27 Calc. 639**
L. R. 27 I. A. 1
4 C. W. N. 429

8. ——— *Secondary evidence not objected to—Evidence Act (I of 1872), ss. 65, 66. Per* BANERJEE and RAMPINI, *JJ.* Where oral evidence was given to prove the contents of a letter which was neither produced nor called for, but no objection was raised to the giving of the evidence :—*Held*, that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of s. 65 of the Evidence Act. S. 66 rendered it legally inadmissible, although no objection was raised to the giving of it. KAMESWAR PERSHAD *v.* AMANUTULLA
I. L. R. 26 Calc. 53
2 C. W. N. 649

9. ——— *Secondary evidence—Public document—Evidence Act (I of 1872), ss. 65, cl. (e) and (g), 74.* Where the fact to be proved is the general result of the examination of numerous documents and not the contents of each particular document and the documents are such as cannot be conveniently examined in Court, evidence may be given, under s. 65, cl. (*g*) of the Evidence Act, as to the general result of the documents by a person who has examined them and who is skilled in the examination of those documents although they may be public documents within the meaning of s. 65, cl. (*e*) and s. 74 of the Evidence Act. SUNDAR KUAR *v.* CHANDRESHWAR PRASAD NARAIN SINGH (1907) . . **I. L. R. 34 Calc. 293**

10. ——— *Evidence Act (I of 1872), ss. 91, 95, 97—Where sale-deed gives wrong survey numbers to the land sold, evidence admissible to show the real lands intended to be sold.* The general rule laid down in s. 91 of the Evidence Act is subject to the exceptions laid down in ss. 95 and 97 of the same Act. Where a sale-deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers. KURUPPA GOUNDAN *v.* PERIATHAMBI GOUNDAN (1907) . . **I. L. R. 30 Mad. 397**

11. ——— **Proof of coming from proper custody.** In accordance with former rulings, *Allucha* v. *Kashee Chunder Dutt, 1 W. R. 131,* and *Gooroo Pershad Roy* v. *Bykunto Chunder Roy, 6 W. R. 82,* it was held that, before a document, of whatever age it may be, can be put in as legal evidence, there must be sworn testimony as to the custody from which it has come. KALEE TARA DEBI *v.* NITIANUND SHAHA . **12 W. R. 90**

12. ——— **Proper custody**—*Identity of signature.* Where a pottah had no attesting witnesses and was not capable of direct proof, it was held to have been established by the fact of having come from proper custody, corroborated by the exact identity of the grantor's signature with his admitted signature on other documents. BINODE BEHAREE ROY *v.* MASSEYK . **15 W. R. 493**

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS.

13. ——— **Unstamped document**—*Lost unstamped document requiring stamp.* Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped. ARUNCHELLUM CHETTY *v.* OLAGAPPAH CHETTY
4 Mad. 312

14. ——— *Notice to produce—Evidence Act, s. 91.* Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it can only be admitted in the absence of evidence to show that it was unstamped when last seen. SENNANDAN *v.* KOLLKIRAN
I. L. R. 2 Mad. 208

15. ——— *Evidence Act, s. 91—Oral evidence of written contract.* Where a contract is reduced to writing and the only cause of action between the parties arises out of the document, no oral evidence is admissible to prove the terms of the contract. PROSUNNO NATH LAHIREE *v.* TRIPOORA SOONDUREE DABEE **24 W. R. 88**

16. ——— *Parol evidence—Proof of delivery—Suit for goods sold and delivered.* In a suit which was brought for the price of goods sold and delivered, the plaintiff swore to the fact of the sale and tendered in evidence a written admission of the defendant that the goods had been supplied to him. The writing was rejected as unstamped, and the suit was dismissed. *Held*, that the Judge should have allowed the plaintiff an opportunity of proving by oral testimony the delivery of the goods sold and their value. BINJA RAM *v.* RAJMOHUN ROY . . **I. L. R. 8 Calc. 282**

17. ——— *Evidence Act (I of 1872), s. 91—Bought and sold notes—Contract reduced to writing and unstamped.* The plaintiffs sued to recover damages for the non-acceptance of wheat which the defendant on the 16th May 1889, by two contracts, agreed to purchase. At the hearing, in order to prove the terms of the contracts, the plaintiffs tendered two notes or memoranda of the contracts which purported to be signed by the broker and also by the defendant. These notes were in fact the sold notes which the broker had given to the plaintiffs. Each of those notes had been

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS —*contd.*

stamped with an anna stamp, but the stamp on one of them had not been cancelled at all, and the stamp on the other was without any mark of cancellation except a small part of the first letter of the defendant's signature, consisting of a slightly curved line. On these notes being tendered in evidence, it was objected that they were inadmissible, being unstamped, having regard to ss. 11 and 34 of the Stamp Act, I of 1879. The Court allowed the objection and rejected the notes. The plaintiffs then sought to prove the contracts by oral evidence contending that the sold notes did not themselves constitute the contracts, but were only memoranda of parol contracts prepared by the broker for the information of the parties. *Held*, that the terms of the contracts were reduced to writing, and no evidence, except the documents themselves, could be given in proof of them—s. 91 of the Evidence Act, I of 1872. RALLI *v.* CARAMALLI FAZAL **I. L. R. 14 Bom. 102**

18. ——————— *Evidence Act, s. 91—Admissibility of evidence—Proof of consideration.* The plaintiff in a suit on a promissory note written on unstamped paper is not debarred from giving independent evidence of consideration. GOLAP CHAND MARWAREE *v.* MOHOKOOM KOOAREE **I. L. R. 3 Calc. 314 : 2 C. L. R. 412 note**

See KANHAYA LAL *v.* STOWELL **I. L. R. 3 All. 581**

and BENARSI DAS *v.* BHIKHARI DAS **I. L. R. 3 All. 717**

19. ——————— *Evidence Act, s. 91—Debt—Promissory note—Written acknowledgment of debt—Oral acknowledgment—Evidence of debt.* *H* lent R85 to *D* on a pledge of moveable property. *D* repaid *H* R40, and at the time of the repayment acknowledged orally that the balance of the debt, R45, was still due by him. It was agreed between the parties at the same time that *D* should give *H* a promissory note for such balance, and that such property should be returned to him. Accordingly *D* gave *H* a promissory note for R45, and the property was returned to him. *H* subsequently sued *D* on such oral acknowledgment for R45, ignoring the promissory note, which, being insufficiently stamped, was not admissible in evidence. *Held*, that the existence of the promissory note did not debar *H* from resorting to his original consideration, nor exclude evidence of the oral acknowledgment of the debt. HIRA LAL *v.* DATADIN **I. L. R. 4 All. 135**

20. ——————— *Suit for money lent, secured by unstamped promissory note—Decree against Hindu family.* A promissory note, which being improperly stamped was inadmissible in evidence, was executed in favour of *R* by *K* and *N*, members of an undivided Hindu family, in consideration of a loan made to them. The money was used for the purpose of the family trade. *R* sued *K* and *N* and their father *P* and other members of the family to recover the money lent. *Held*, that the existence of the promissory note was no bar to the suit, and that *R* was entitled to a decree against *K* and *N* and against *P* to the extent of the family property in his hands. KRISHNASAMI PILLAI *v.* RANGASAMI CHETTY . **I. L. R. 7 Mad. 112**

21. ——————— *Promissory note—Note of agreement in account book—Evidence of terms of agreement.* In 1876 accounts were stated between *B* and *D*, and a balance of R800 was found to be due from *D* to *B*. *D* gave *B* an instrument whereby he agreed to pay the amount of such balance in four annual instalments of R200. *B* at the same time noted in his account book that "such balance was payable in four instalments of R200 yearly." In July 1879 *B* sued on the instrument for the balance of the first instalment, but the Court held it was a promissory note, and, as it was unstamped, refused to receive it in evidence. *B* thereupon withdrew his suit with liberty to bring a fresh one. In the subsequent suit *B* based his claim on the note in his account book. *Held* by the Court, that the agreement by *D* to pay the balance found due from him to *B* on account stated between them in instalments of R200 annually could not be proved by the note made by *B* in his account book, but could only be proved by the promissory note. BENARSI DAS *v.* BRIKARI DAS . . **I. L. R. 3 All. 717**

See GOLAP CHAND MARWAREE *v.* MOHOKOOM KOOARI . . . **I. L. R. 3 Calc. 314**

and KANHAYA LALL *v.* STOWELL **I. L. R. 3 All. 581**

22. ——————— *Evidence Act, s. 91—Suit for money lent—Unstamped promissory note—Cause of action.* The terms of a contract to repay a loan of money with interest having been settled and the money paid, a promissory note specifying these terms was executed later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay :—*Held*, that plaintiff could not recover. POTHI REDDI *v.* VELAYUDASIVAN **I. L. R. 10 Mad. 94**

23. ——————— *Evidence Act, s. 91—Contract—Promissory note executed by way of collateral security—Admissibility of evidence of consideration aliunde.* A decree-holder agreed with the employer of his judgment-debtor who had been arrested in execution of the decree to discharge the latter from arrest upon the condition that his master would pay the amount of the debt. Accordingly, the master executed a document, the material portion of which was as follows:—"Be it known that

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS —*contd.*

I have borrowed R986-15 from you in order to pay a decree which was due to you by *D P*, so I write this in your favour to say that I will pay the said amount to you in six months with interest at 12 annas on every hundred rupees every month, and then take back this parwana from you." This was written upon plain unstamped paper. Subsequently, the amount due not having been paid, the decree-holder sued the executant of the document for its recovery. It was objected that the suit was not maintainable without the document being put in evidence, but that being a promissory note and not stamped as required by Art. 11 of Sch. I of the General Stamp Act (I of 1879), it was inadmissible in evidence with reference to s. 34. *Held*, that the document, though it was a promissory note, was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendant's fulfilment of his promise to pay the debt, and that, under the circumstances, the plaintiff was entitled to give evidence of consideration, and to maintain the suit as for money lent, apart from the note altogether. BALBHADAR PRASAD *v.* MAHARAJA OF BETTIA . . . **I. L. R. 9 All. 351**

24. ——————— *Evidence Act, s. 65, cl. (b), and s. 91—Stamp Act (I of 1879), s. 34, prov. I—Suit on an unstamped promissory note.* The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for consideration of R38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted by his written statement, execution of the note and the receipt of R37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note, being unstamped, could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the stamp duty and the penalty, under s. 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but that the defendant's admission of the consideration enable the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court:—*Held per* JARDINE, *J.*, that the document sued on was a promissory note, and that, the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp. *Held per* BIRDWOOD, *J.*, that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under s. 65, cl. (*b*), of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected. DAMODAR JAGANATH *v.* ATMARAM BABAJI **I. L. R. 12 Bom. 443**

25. ——————— *Evidence Act, s. 91—Bill of exchange—Original consideration—Evidence—Stamp—Account stated.* When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he had not endorsed, or lost, or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action is the bill or note itself, and does not exist independently of it, as, for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money. AKBAR *v.* SEIKH KHAN **I. L. R. 7 Calc. 256: 8 C. L. R. 533**

26. ——————— *Evidence Act, s. 91—Accounts stated—Bond given for balance—Bond impounded as insufficiently stamped—Suit on accounts stated.* Where accounts between a creditor and his debtor were stated, and the latter gave the former a bond for the balance found due by him to the creditor:—*Held*, that the creditor was precluded from subsequently suing on the account stated for the balance which had been found due. SIRDAR KUAR *v.* CHANDRAWATI . **I. L. R. 4 All. 330**

27. ——————— *Unstamped balance of account—Stamp Act (I of 1879), s. 34—Acknowledgment or admission of liability—Limitation Act, s. 19.* Though an unstamped acknowledgment cannot be "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. FATECHAND HARCHAND *v.* KISAN **I. L. R. 18. Bom. 614**

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS —*contd.*

(*Contra*) MULJI LALA *v.* LINGU MAKAJI **I. L. R. 21 Bom. 201**

28. ——— *Insufficiently stamped document—Suit on hathchitta—Right of suit if brought upon an insufficiently stamped document, where the defendant admitted the loan—Suit for money lent—Evidence Act (I of 1872), s. 91.* In a suit brought in the Court of Small Causes on a hathchitta bearing a stamp of one anna, the defendant admitted the loan, but pleaded payment. The Judge coming to the conclusion that the document sued upon was promissory note, and should have been stamped with a two-anna stamp, refused to admit it in evidence. He also came to the conclusion that the plaintiff had no cause of action independently of the document, and dismissed the suit. *Held*, that the plaintiff had a cause of action independently of the document. *Held*, also, that an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it. Therefore, in a case where the defendant admits the loan, and has not repaid it, the plaintiff may maintain an action against him for breach of his implied promise or contract, entirely independent of any security which may have been given for the advance. *Akbar* v. *Sheik Khan, I. L. R. 7 Calc. 256*, explained. *Golap Chand Marwaree* v. *Mohokoom Kooaree, I. L. R. 3 Calc. 314*, followed. PRAMATHA NATH SANDAL *v.* DWARKA NATH DEY **I. L. R. 23 Calc. 851**

29. ——— *Hundi insufficiently stamped—Proof of original consideration by parol evidence.* *V R* drew a hundi in favour of *M K* upon *M & Co.*, who, upon presentation, paid part of the amount due and referred the payee to the drawer for the balance. *M K* sued *V R* to recover the balance. *V R* pleaded that the hundi was inadmissible in evidence, not being properly stamped, alleging that it had been issued with a slip attached to the effect that it was payable ten days after sight, and this slip had been removed, making it appear to be payable on demand. The Munsif found this plea to be proved, but held, that, *V R* having admitted the grant of the hundi, *M K* might recover upon the original consideration without using the hundi in evidence, and decreed for *M K*. *V R* appealed, but not on the ground that the hundi was inadmissible in evidence as being improperly stamped and altered in a material part. The District Court confirmed the Munsif's decree. *Held*, on second appeal, that the suit must be dismissed on the ground that it was based upon the hundi, which was inadmissible in evidence being insufficiently stamped. VALIAPPA RAVUTHANNA *v.* MAHOMMED KHASIM **I. L. R. 5 Mad. 166**

30. ——— *Suit on unstamped hundi—Stamp Act (I of 1879), s. 34—Admission of liability by defendant.* In a suit brought upon two hundis, which were inadmissible in evidence for want of impressed stamps, the Judge allowed the claim, holding that the defendants' admissions in their written statement rendered it unnecessary to put the hundis in evidence. *Held*, reversing the decree, that a hundi is "acted upon" within the meaning of s. 34 of the Stamp Act where decree is passed on it, whether proved or admitted, and that the Court cannot give effect to it in either case. CHENBASAPA *v.* LAKSHMAN RAMCHANDRA **I. L. R. 18 Bom. 369**

31. ——— *Evidence Act, s. 91—Bill of exchange insufficiently stamped, admissibility of—Amendment of plaint—Stamp Act, 1869, ss. 20, 28—Evidence independent of the bill.* Where a bill of exchange for the sum of R1,000, drawn, accepted, and endorsed, is insufficiently stamped, it is not receivable in evidence in a suit on the note, even on payment of a penalty. Where such a suit is brought by the endorsee against his immediate endorser, the Court may not, if the application be not made in proper time, allow the plaint to be amended so as to recover on account for money paid to the defendants, even though the plaintiff may be allowed to bring a fresh suit. Ss. 5, 8, 19, 20, 26, 28 of the General Stamp Act, XVIII of 1869, discussed. *Golab Chand Marwari* v. *Mohokoom Kooaree, I. L. R. 3 Calc. 314 : 2 C. L. R. 412 note*, not followed. MOTHOORA MOHUN ROY *v.* PEARY MOHUN SHAW . . **2 C. L. R. 409**

See AUKUR CHUNDER ROY CHOWDHRY *v.* MADHUB CHUNDER GHOSE . . . **21 W. R. 1**

32. ——— *Hundi inadmissible in evidence for want of stamp—Independent admission of loan—Suit on the original consideration —Admission by pleader erroneous in law—Binding effect—Dishonour—Notice.* Where there is an independent admission of a loan, the holder of a hundi, bill, or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit. In a suit based on the consideration independently of a hundi, it is not necessary to prove notice of dishonour. KRISHNAJI NARAYAN PARKHI *v.* RAJMAL MANICKCHAND MARMADI . **I. L. R. 24 Bom. 360**

33. ——— *Stamp Act (I of 1879), s. 35—No secondary evidence admissible the receiving which will be to give some effect to an unstamped document.* In a suit by plaintiffs to redeem lands alleged to have been mortgaged under an instrument in 1841, the document was not produced and therefore secondary evidence was not receivable to prove the contents of the document. The plaintiff sought to rely on the oral evidence as to execution of the document and the passing of possession under the deed as showing that the defend-

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS —*contd.*

ant by such possession acquired only a mortgagee's right in the property. *Held*, that the receiving of such evidence will be to give some effect to the unstamped document by connecting the possession with the contents thereof, and was therefore contrary to the provisions of s. 35 of the Indian Stamp Act. An admission of the mortgage by the defendant's ancestor was also held not receivable on the same grounds. *Chenbasapa* v. *Lakshmanan Ramchandra, I. L. R. 18 Bom. 369*, referred to. THAJI BEEBI *v.* TIRUMALAIAPPA PILLAI (1907)
I. L. R. 30 Mad. 386

34. ——— **Unregistered document—** *Sodi razinama—Deed of relinquishment to landlord.* The document called a sodi razinama (whereby a party relinquishes his right of occupancy of land in his possession to his landlord, and requests the latter to register the land in the name of another party to whom it has been sold) is not a document of the kind mentioned in s. 91 of the Evidence Act, and therefore does not exclude the Courts from basing their findings upon other evidence, should any such exist. VENKATESA *v.* SENGODA
I. L. R. 2 Mad. 117

35. ——— *Unregistered bond —Contract Act, s. 91—Hypothecation-bond given for amount of account stated—Suit on account stated.* The plaintiff sued (i) for registration of a hypothecation-bond executed by the defendant; (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts and the plaintiff not being able to produce the bond or to maintain a suit on it by reason of its being unregistered, and the registration having been refused owing to the denial of execution by the defendant, the claim on the account stated failed. *Held*, that this decision was wrong, and that the plaintiff was entitled to sue upon the account stated. *Sirdar Kuar* v. *Chandrawati, I. L. R. 4 All. 303*, distinguished. Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration. KAIM-UD-DIN *v.* RAJJO . . **I. L. R. 11 All. 13**

36. ——— *Evidence Act, s. 91—Deed of partition.* A deed of partition was executed among three brothers, *C*, *N*, and *B*, on the 19th March 1867, but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide those houses among the brothers. In a suit brought by *C's* widow for the recovery of the house which fell to *C's* share:—*Held*, that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and therefore secondary evidence of its contents was inadmissible under s. 91 of the Evidence Act. KACHUBHAI BIN GULABCHAND *v.* KRISHNABAI
I. L. R. 2 Bom. 635

37. ——— *Evidence Act (I of 1872), s. 91—Terms of tenancy proved orally, although contained in a document—Landlord and tenant—Lease, terms of.* The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor in title in perpetuity on fazendari tenure for building purposes, subject to a certain rent. They complained that the defendant sought to eject them and they prayed for a declaration that they were entitled to the land in perpetuity, subject only to payment of the yearly rent. In the event of its being held that they were not perpetual tenants, they prayed that the defendant might be ordered to pay them R7,000, the value of the buildings on the land. The plaintiffs made out a *primâ facie* case without showing or its being shown, that there was any agreement or lease. Before the case had concluded, however, a document was produced which was said to be a counterpart of the agreement of letting made in 1866. It was not registered, and was therefore inadmissible in evidence. It was not tendered, but it was shown to the defendant in cross-examination, and he denied that it was a genuine document. *Held*, that the plaintiffs, having made out a *primâ facie* case without betraying the existence of a written contract relating to the subject-matter of the suit, were not precluded from obtaining a decree, even though it afterwards appeared that a written contract had been made. If the defendant intended to rely upon a written contract, it was for him to produce it as part of his evidence. In the present case, as the document was not referred to in the plaint, written statement, or issues, and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property. YESHWADABAI *v.* RAMCHANDRA TUKARAM . . . . **I. L. R. 18 Bom. 66**

38. ——— *Proof of lease not necessary to prove tenancy.* Even if he has a lease, a tenant can prove his tenancy right without proving his lease, though it is unregistered. LALA SURABH NARAIN LAL *v.* CATHERINE SOPHIA
1 C. W. N. 248

39. ——— *Endorsement on Deed of sale.* The plaintiff executed a deed of sale of a moiety, and a lease of the other moiety, of certain land to *B*. *B* instituted a suit under Act XIV

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS —*contd.*

of 1859, which was dismissed. *B* then returned the deed of sale and lease to *A*, with the following endorsement under his signature, *viz.*, "Returned; no claim." *A* instituted the present suit for recovery of possession of the said property, and the defendant set up in his defence that *A* had no right to sue for a moiety of the property, as the same had been conveyed to *B*; and that the endorsement of the deed of sale, "Returned; no claim," was not admissible in evidence, as the same had not been registered. *Held*, that the entry was only evidence that the transaction was inchoate, and not final, so as to require a re-conveyance. GIRISH CHANDRA ROY CHOWDRY *v.* AMINA KHATUN **3 B. L. R. Ap. 125**

40. ——————— *Instalment-bond —Unregistered pottah and kabuliat—Set-off.* Plaintiff sued in a Small Cause Court on an instalment-bond for R81. The bond had been executed for nuzur or salami contemporaneously with the execution of a pottah and kabuliat by which the defendants agreed to pay the plaintiff R335 a year for two years, as rent for certain land. The pottah and kabuliat had not been registered. A previous suit brought by the plaintiff under Act X of 1859 had been therefore dismissed, and no oral evidence was admitted to prove the terms of the pottah and kabuliat. The defendants now claimed a set-off against the amount claimed under the bond on the footing of a contract contained in the pottah and kabuliat. The Judge refused to receive them in evidence, or to receive oral evidence of their contents, and gave a decree in favour of the plaintiff, subject to the opinion of the High Court. *Held*, that the defendant having benefited in the Act X suit by the fact that no oral evidence had been admitted to prove the contents of the pottah and kabuliat, it would have been contrary to rule and inequitable to admit such evidence now in support of his claim of set-off. DINANATH MOOKERJEE *v.* DEBNATH MULLICK . **5 B. L. R. Ap. 1: 13 W. R. 307**

41. ——————— *Evidence Act, s. 65—Mortgage—Suit for ejectment.* Where a mortgage-deed had not been registered in accordance with s. 13 of Act XVI of 1864:—*Held*, in a suit for ejectment where the mortgage-deed was set up by the defendant, who claimed possession under it, that secondary evidence of it could not be given under s. 65, Evidence Act. DIVETHI VARADA AYYANGAR *v.* KRISHNASAMI AYYANGAR **I. L. R. 6 Mad. 117**

42. ——————— *Document inadmissible from want of registration—Admission as to contents.* A written contract can only be proved by the production of the writing itself; and if the document is inadmissible from want of registration, no secondary evidence of the contract can be received. A party's admission as to the contents of a document not made in the pleadings, but

EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*b*) UNSTAMPED OR UNREGISTERED DOCUMENTS —*concld.*

in a deposition, is secondary evidence, and cannot supply the place of the document itself. IBRAHIM VALAD LADLI MIYA *v.* PARVATA VALAD HARI **8 Bom. A. C. 163**

43. ——————— *Destruction of deed, proof of—Admission of registered copy.* In a suit on a bond, the defendant by his answer denied execution of the bond. The plaintiff in his reply stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and at the same time ordered the fragments of the original to be produced. At the trial the plaintiff produced the fragments, and under s. 11, Madras Regulation XVII of 1802, put in as evidence a registered copy of the bond. He called no witnesses to prove that the fragments produced formed part of the original bond. The Court admitted the registered copy as evidence and found for the plaintiff. The Judicial Committee on appeal reversed this finding on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. ABBAS ALI KHAN *v.* YADEEM RAMY REDDY . . . **3 Moo. I. A. 156**

44. ——————— *Proof of reason for its non-registration.* It is not enough for a party desirous of adducing secondary evidence of the contents of a document which ought to have been registered to show that he cannot produce it because it is not registered; he must show that its non-registration was not due to any fault or want of diligence on his part, or he must show that the party against whom he desires to use it was guilty of such fraud in the matter of non-registration that he cannot be allowed to object on that ground to the production of the secondary evidence. KUMEEZOODDEEN HALDAR *v.* RUJUB ALI SHAHA **9 W. R. 528**

45. ——————— *Document not produced because unregistered.* The fact that a pottah on which a plaintiff's title is based has not been registered, and consequently cannot be used by reason of the registration law, and is therefore not produced, is not a good ground on which a Court would be justified in admitting secondary evidence on the ground that the absence of the original is satisfactorily accounted for. CROWDIE *v.* KULLAR CHOWDHRY . . . . **21 W. R. 307**

(*c*) LOST OR DESTROYED DOCUMENTS.

46. ——————— **Lost deed**—*Attesting witnesses.* Where a Court is satisfied that a deed was executed, and has been lost or destroyed, it should receive secondary evidence of the contents, documentary or oral; and it is not necessary that the

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*c*) LOST OR DESTROYED DOCUMENTS—*contd.*

witnesses called in to give oral testimony should be attesting witnesses. LOTFOOLLAH *v.* NUSSEEBUN **10 W. R. 24**

47. ——— *Evidence Act (I of 1872), s. 65—Necessity of accounting for non-production of original document—Discretion of Court.* Whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled except in a clear case of miscarriage. In a suit alleging want of authority to adopt, the defence rested on the case that an *anumati putro* had been given by the defendant's deceased husband, but failed to show that there had been a sufficient search for, and to establish the loss of, the original document, so as to render secondary evidence of its contents admissible. HARRIPRIA DEBI *v.* RUKMINI DEBI . . . . **I. L. R. 19 Calc. 438**
L. R. 19 I. A. 79

48. ——— **Lost record**——*Additional evidence.* Where a party obtained a decree which was appealed from, and in transit from the first to the second Court the record was irrecoverably lost, the High Court directed the lower Appellate Court to receive secondary evidence from both parties of the papers which made up the entire record, or, failing this, additional evidence under s. 355, Act VIII of 1859. GOOROO DOYAL SINGH *v.* DURBAREE LALL TEWAREE . **7 W. R. 18**

49. ——— **Destroyed document**—*Claim for zamindari dues.* A claim for zamindari dues in respect of the sale of garden trees ought not to be allowed on mere usage alone, but it should also be enquired into whether such dues were recognized and recorded in the settlement papers as required by Regulations VII of 1822, s. 9, and IX of 1825, s. 9. Where the settlement papers are destroyed and not forthcoming, the contents in respect of the dues claimed may be ascertained by the other best evidence procurable. PAUL RAI *v.* RAM HIT PANDAY . . . . . **1 Agra 139**

50. ——— **Loss or destruction of document**—*Evidence Act (I of 1872), s. 65, cl (c)—Bond.* In a suit by the purchaser of a debt, the plaintiff stated that in 1873 *A* executed a bond in favour of *B* to secure the repayment of R1,000, and that he had purchased the interest of *B* at a sale in execution of a decree against him. The plaintiff now sued *A* upon the bond, making *B* a party. At the trial *A* denied the execution of the bond, and it was not produced by the plaintiff, who, having served *B* with notice to produce, tendered secondary evidence of its contents. *B* was not examined as a witness, and no evidence was given of the loss or destruction of the bond. *Held* by PONTIFEX and MORRIS, *JJ.* (PRINSEP, *J.*, dissenting), that secondary evidence was not admissible. WOMESH CHUNDER GHOSE *v.* SHAMA SUNDARI BAI **I. L. R. 7 Calc. 98 : 8 C. L. R. 489**

EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*c*) LOST OR DESTROYED DOCUMENTS—*contd.*

51. ——— *Evidence Act (I of 1872), ss. 63 (c), 114, ill. (g)—Copy of a copy—Suit for redemption of mortgage—Withholding evidence.* A deed executed in 1812 became the subject of litigation, resulting, on the 17th May 1813, in a decree, the effect of which was to create a usufructuary mortgage of rights and interests in two villages. In 1871 the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a gawanda-dari right under which a fixed jumma of R121 was payable by them in respect of the lands in the village; that what was mortgaged was not the lands, but only the right to receive the fixed jumma; and that the fact that the mortgage-money had been liquidated from the jumma did not entitled the plaintiff to oust them from possession. It appeared that the alleged gawanda-pattar, the original mortgage-deed, and the decree of the 17th May 1813 were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May 1813. *Held*, that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by ill. (*g*), s. 114 of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. *Held*, also, that, inasmuch as the plaintiff was no party to the alleged gawanda-pattar nor to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th May 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence, and inasmuch as the circumstances established a *primâ facie* case in his favour, the burden of proof in regard to the existence of the alleged gawanda-dari tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents above mentioned, and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on. *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh, L. R. 3 I. A. 85*, referred to. RAM PRASAD *v.* RAGHUNANDAN PRASAD **I. L. R. 7 All. 738**

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*c*) LOST OR DESTROYED DOCUMENTS—*concld.*

52. ——— Loss or destruction of document—*Evidence Act, s. 65.* In a case falling under cl. (*f*), s. 65 of the Evidence Act, and also under cl. (*a*) or (*c*) of the same section, any secondary evidence is admissible. *In the matter of a collision between the* " AVA " *and the* " BRENHILDA"
I. L. R. 5 Calc. 568 : 5 C. L. R. 331

53. ——— *Evidence Act (I of 1872), ss. 65, 91—Limitation Act (XV of 1877), s. 19—Acknowledgment in writing.* Limitation Act, s. 19, must be read with Evidence Act, ss. 65 and 91, and does not exclude secondary evidence in cases where such would be admissible under s. 65, as in cases of lost or destroyed documents. CHATHU *v* VIRARAYAN . **I. L. R. 15 Mad. 491**

54. ——— Destroyed mortgage-deed—*Suit to redeem mortgage–Destruction of mortgage-deed.* In a suit to redeem a mortgage it was proved that the mortgagees and their assignee had fraudulently destroyed the deed by which the property was mortgaged. *Held*, that the mortgagees could not be permitted to prove the contents of the deed or the amount of mortgage-debt by secondary evidence, and that the representative of the mortgagor should be allowed to recover the lands without any payment. ABDULLA *v.* MUHAMMAD . **1 Bom. 177**

55. ——— Loss of award—*Civil Procedure Code, s. 525—Loss of award, procedure on.* When an award has been lost, a Court acting under s. 525 of the Code of Civil Procedure cannot take secondary evidence of its provisions and pass a decree accordingly. GOPI REDDI *v.* MAHANANDI REDDI
I. L. R. 12 Mad. 331

56. ——— *Suit on award —Civil Procedure Code, s. 525.* Secondary evidence of the contents of an award is admissible on proof of its being lost. GOPI REDDI *v.* MAHANANDI REDDI . . . . **I. L. R. 15 Mad. 99**

57. ——— Deed lost in Mutiny—*No copy made.* Where a suit was brought on a mortgage deed alleged to have been destroyed in the Mutiny : —*Held*, that, if it were established that the original deed was destroyed, and that there was no copy of it in existence, the Court could receive oral evidence as to its contents and determine the genuineness or otherwise of the deed on that evidence solely. SHEOSURUN OJHA *v.* GOOLBANEE KOOER
W. R. 1864, 264

(*d*) NON-PRODUCTION FOR OTHER CAUSES.

58. ——— Lotbundi—*Evidence of certificate of sale.* A lotbundi cannot be accepted as secondary evidence in lieu of the certificate of sale unless the absence of the certificate is sufficiently accounted for, and no better evidence than the lotbundi can be produced. USTOORUN *v.* MOHUN LAL . . . . . **21 W. R. 333**

EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*d*) NON-PRODUCTION FOR OTHER CAUSES—*contd.*

59. ——— Document in party's custody, but not produced—*Ikrarnamah—Proof of document.* The proprietary right in a talukh was sold with the reservation of part of the land belonging to it, subject to the agreement that the vendor should be indemnified by the vendee in respect of the revenue required to be paid on the reserve part. Afterwards assignments on both sides took place, and the plaintiff, claiming through the vendor, sued the defendants, who derived title from the vendee, to enforce this liability. The plaintiff alleged the existence of, but did not produce, an ikrarnama admitting this agreement between the original parties to the sale. The only proof adduced was a judgment in a suit in which this agreement had been held established. The plaintiff's case failed, as it had not been adjudged that the right to this indemnity related to a future revenue settlement, nor had it been decided that the agreement was to run with the land so as to bind others, under whatever title they might be in possession. In the suit in which that judgment was given, the ikrarnama not having been produced, the Court of first instance would not admit secondary evidence of its contents. On appeal inspection of the document having been offered to, and declined by, the Appellate Court, secondary evidence was admitted. On this appeal, the error was pointed out of allowing the plaintiff to give secondary evidence of the contents of a document, the original of which was in his custody, without the Court's looking at the document. HIRA LAL *v.* GANESH PERSHAD
I. L. R. 4 All. 406 : 11 C. L. R. 109
L. R. 9 I. A. 64

60. ——— Failure to produce—*Hibanama—Evidence Act, s. 65.* Where a person's claim to some property rested on a hiba which had been executed in her favour by the brother of the parties who contested her claim to that property ; and the hiba had not been made over to her because it related to various properties of which the property claimed by her formed only a portion ; and one of the defendants, whom she had called on to produce the hiba, had failed to do so :—*Held*, that plaintiff was entitled, under s. 65 of the Evidence Act, to procure secondary evidence of its contents ; and having done so, to get the decree which the first Court had given her and which the High Court now refused to set aside. SADEERONNISSA BIBI *v.* SHOURUBBY DEBEA . . . **25 W. R. 459**

61. ——— Notice to produce not complied with—*Evidence Act, s. 66.* Where a defendant out of the jurisdiction of the Court was summoned to produce a letter and did not comply with the summons, but appeared by pleader at the last moment at the hearing of the suit, and service of notice on the pleader to produce the letter would have been nugatory, secondary evidence of the contents of the letter was admitted under s. 66

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*d*) NON-PRODUCTION FOR OTHER CAUSES—*contd.*

proviso 6, of the Evidence Act. MELLUS *v.* VICAR APOSTOLIC OF MALABAR . **I. L. R. 2 Mad. 295**

62. ——— Refusal to produce—*Evidence taken on commission—Documentary evidence, objection to admissibility of—Evidence taken by commissioner beyond jurisdiction—Notice to produce original document—Evidence Act (I of 1872), s. 63, sub-ss. 3, 65, 66.* If, when evidence is taken before commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence. Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original. RALLI *v.* GAU KIM SWEE . . **I. L. R. 9 Calc. 939**

63. ——— Power-of-attorney to register referring to power to execute—*Admission of original deed.* A power-of-attorney authorizing the registration of a deed of mortgage, and recognizing a previous power to execute the deed of mortgage, is admissible as original evidence by way of admission of the previous deed. HOSSEINEE JAN *v.* MUKHDOOMUN . **2 W. R. 44**

64. ——— Counterpart of lease—*Non-production of original lease. Held,* that the counterpart of a lease, being a registered document was admissible in evidence, and could not be rejected solely on the ground that the original registered lease was not before the Court. MAJID HOSSEIN *v.* JEKAWON KHEWAT . . . . **3 Agra 233**

65. ——— Production of kabuliat—*Absence of pottah. A* let lands to *B*, who sublet to *C*, a raiyat. *C* sued for possession of part, after an alleged dispossession, making *A* party defendant to the suit. At the hearing *C*, in order to prove that the lands in dispute were part of those let to him by *B*, tendered in evidence the kabuliat given by him to *B*. *Held,* that *C* should have produced the pottah given by him to *B*, and the grant from *A* to *B*, or sufficiently account for their absence; and that, as he did not do either, the kabuliat (which was merely secondary evidence of *C's* pottah) was inadmissible, even though it was produced from the possession of the landlord *A*. SURJO NARAIN GHOSE *v.* HURRI NARAIN MOLLO **1 C. L. R. 547**

66. ——— Non-production of account books—*Beng. Reg. VI of 1793.* In a suit for a sum alleged to be due on the balance of partnership accounts, the Sudder Court ought, under s. 16, Regulation VI of 1793, to have used the evidence to be supplied by the original account books, or to have ascertained that the sum mentioned as the balance due, subject to the objections, was a balance due without objection. SEETUL BOHOO *v.* HURKISHEN DOSS . . **5 W. R. P. C. 76**

EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*d*) NON-PRODUCTION FOR OTHER CAUSES—*concld.*

67. ——— Written contract, effect of failing to prove when alleged—*Mahomedan Law—Dower.* A suit was brought by a Mahomedan wife for dower alleged to be due to her under a kabinnamah executed by her husband at the time of the marriage. She alleged the amount of dower to be R10,000, of which R5,000 was prompt and R5,000 deferred, and she claimed to be entitled to the whole on the ground that she had lawfully divorced her husband in pursuance of power reserved to her in that behalf by the kabinnamah. At the hearing she failed to prove the kabinnamah, but the Court gave her a decree, holding that there was evidence to show that a dower of R10,000 was usually payable in that plaintiff's family, and that, in the absence of evidence to the contrary, the whole amount must be considered prompt, but as the plaintiff only claimed R5,000 as prompt, the decree was limited to that amount. *Held,* that the Court was wrong in decreeing the case upon an oral contract not alleged in the plaint nor admitted by the defendant, the suit being based upon a written agreement, which the plaintiff failed to prove. KHAJA MAHOMED ASGHUR *v.* MANIJA KHANUM *alias* BAKKA KHANUM **I. L. R. 14 Calc. 420**

(*e*) COPIES OF DOCUMENTS AND COPIES OF COPIES.

68. ——— Copies of documents—*Cause of non-production of original.* Although the admissibility in India of copies in evidence must not be dealt with by the strict rules prevailing at a *nisi prius* trial in England, yet their Lordships were of opinion that when a copy has been in any way received, and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question, and the weight and value which he will attach to it. There is a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument; strict proof may properly be required in the

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*e*) COPIES OF DOCUMENTS AND COPIES OF COPIES —*contd.*

latter case. Dealing with the present document, their Lordships were not prepared to say that the High Court had miscarried in concluding it to be genuine, but the High Court did not rest upon that document wholly, but proceeded upon the whole of the evidence in the case, which appeared to their Lordships amply sufficient to support the finding of the Court. RAMGOPAL ROY *v.* GORDON, STUART & Co. . . **17 W. R. 285 : 14 Moo. I. A. 453**

69. ——— *Permission to file original.* Documents tendered as evidence are properly rejected on the ground that they are copies inadmissible under the Law of Evidence, and it is entirely a matter of discretion of the Court in rejecting a copy to allow the party to file the original. HUREEHUR MOJOOMDAR *v.* CHURN MAJHEE **22 W. R. 355**

70. ——— *Accounting for absence of original.* A copy of a document should not be received in evidence until all legal means have been exhausted for procuring the original. Where a document is alleged to be in the possession or power of a certain party, such party's denial in pleading that he has ever had the document is not sufficient to justify the omission of the processes the law provides for his testimony, and of his being called on to produce the original. If a Judge is satisfied of a plaintiff's inability to produce an original pottah on which he relies, he ought to allow secondary evidence to be given of the contents of the document; but he should be satisfied, on reasonable grounds, that the evidence gives a true version of its contents, and he should require sufficient evidence of the execution of the pottah. SHOOKRAM SOOKUL *v.* RAM LALL SOOKUL . **9 W. R. 248**

71. ——— *Accounting for absence of original.* A copy of a document cannot be admitted as evidence, unless the absence of the original is properly accounted for; the mere fact of the latter being in another Court is not a sufficient reason. GOURMONEE *v.* HUREE KISHORE ROY **10 W. R. 338**

RAKHAL DASS BUNDOPADHYA *v.* INDURMONEE DABEE . . . . . **1 C. L. R. 155**

72. ——— *Attested copy where original is filed in another case.* An attested copy of a petition was admitted as evidence where the original was with the record of a different case, and application had been made to the Court to send for such record. OOPENDRO MOHUN MOOSTAFEE *v.* POORNO CHUNDER BHUTTACHARJEE **19 W. R. 85**

73. ——— *Copy of deed—Admissibility in evidence—Explaining absence of original.* Copy of a deed refused in evidence as the absence of the original was not sufficiently accounted for. ANUNDA MOYEE DASSEE *v.* MACKENZIE **W. R. 1864, 5**

EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*e*) COPIES OF DOCUMENTS AND COPIES OF COPIES —*contd.*

WATSON & Co. *v.* SHAM LALL PANDAH **10 W. R. 73**

ISHAN CHUNDER CHOWDHRY *v.* BHYRUB CHUNDER CHOWDHRY . . . . . **5 W. R. 21**

74. ——— *Explaining absence of original.* A plaintiff filing copies of documents is bound to explain why the originals have not been filed. RAM JOY SURMA *v.* PRANKISHEN SINGH. BURODA DEBIA *v.* RAM KISHEN SINGH. PROMODA DEBIA *v.* PRANKISHEN SINGH **2 W. R. 80**

75. ——— *Admission of existence of original.* A copy of a disputed deed cannot be taken as evidence without proof that the original is out of the power of the party producing the copy. The admission of the existence of the original is not tantamount to an admission of the correctness of the copy. KURUM *v.* RUTTUN BHUGGUT . . . . . **W. R. 1864, 186**

76. ——— *Proof of correctness of copy.* The absence of an original deposition from the record must be satisfactorily accounted for before a copy can be looked at; and such copy should be proved to be a correct copy before it can be used. ROHEE LALL *v.* DINDYAL LALL **21 W. R. 257**

LUKHIMONI DOSSEE *v.* KORUNA KANT MOITRO **3 C. L. R. 509**

77. ——— *Proof of execution of document where copy is produced.* In order to prove legally the execution of a document, of which a copy only is on the record, it is not enough for the witness to depose that he executed a document of that nature; the purport of the copy must be read to him, and he must be asked whether the original of the same was what he executed. KAMOOLA KHANUM *v.* MOHAMED ESA KHAN **13 W. R. 429**

78. ——— *Absence of objection.* Though a copy of a document should not be put in as evidence when the original itself is available, yet in a case in which a copy of a letter was filed without objection in the Court of first instance and the writer of the letter (one of the defendants), was cross-examined as to it, the lower Appellate Court was held not to be justified in refusing to consider that the copy was evidence of the letter. FEGREDO *v.* MAHOMED MODDESSUR **10 W. R. 267**

79. ——— *Evidence Act, 1872, s. 63—Comparison of copy with original. Held,* with reference to the provisions of s. 63 of the Evidence Act (I of 1872), that there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in evidence, inasmuch as it could not be regarded either as primary or as secon-

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

(*e*) COPIES OF DOCUMENTS AND COPIES OF COPIES —*contd.*

dary evidence of the contents of the original decree. RAM PRASAD *v.* RAGHUNANDAN PRASAD **I. L. R. 7 All. 738**

80. ——— *Certified copy —Evidence Act, s. 65, cl. (f)—Secondary evidence of destroyed record—Certified copy not essential.* The rule laid down in s. 65 of the Evidence Act that a certified copy is the only secondary evidence admissible when the original is a document of which a certified copy is permitted by law to be given in evidence, does not apply where the original has been lost or destroyed. KALANDAN *v.* KUNHUNNI **I. L. R. 6 Mad. 80**

81. ——— *Mortgage decree lost—Evidence of foreclosure—Evidence Act, s. 63.* In 1840 *K* mortgaged a certain house to two brothers, *R* and *C*. The mortgage-deed contained a gahan-lahan clause, or clause of conditional sale. It appeared that in 1852 the mortgaged house passed into the possession of *R* and *C*, and it was alleged that in that year the mortgage had been foreclosed. At a subsequent partition of the family property the house fell to the share of *R*, whose widow *P* (defendant No. 1) sold it to *L* (defendant No. 2) in 1868, and *L* in 1871 sold it to *T* (defendant No. 3). In 1881 *T* brought this suit to redeem the property. The foreclosure-decree of 1852 was not forthcoming, and the defendants alleged that it has been burned along with other judicial records at the burning of the Budhvar Palace at Poona in 1879. The only evidence that such a decree had been passed was a reference to a copy of the decree contained in a judgment passed in another suit, and a statement by *C* (who was dead in 1881) that the mortgage had been foreclosed. The lower Courts held that the reference in the above-mentioned judgment to the copy of the foreclosure decree was sufficient evidence of the original decree under s. 63 of the Evidence Act (I of 1872). On appeal :—*Held*, by the High Court, that there was no legal evidence that the mortgage had been foreclosed. A written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which s. 63 of the Evidence Act renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it. *C's* statement could not be made use of to establish the foreclosure. KANAYALAL *v.* PYARABAI **I. L. R. 7 Bom. 139**

82. ——— *Copy of document alleged to be lost.* A copy of a document, purporting to be the copy of an original kobala alleged to have been registered by a kazee, is not admissible in evidence within the provisions of Regulation XXXVI of 1793, s. 17. It might possibly be receivable as evidence if the accuracy of the first copy, and the execution and loss of the original, were proved. SREEMUNT KOWAR *v.* AKBAR MUNDUL . . . . . **8 W. R. 438**

83. ——— *Copy of kazee's register—Proof of loss.* A copy of a kazee's register is not receivable in evidence. The register itself should be produced or proof given of its loss and the entry should be verified. JAFFREE KHANUM *v.* IMDAD HOSSEIN . . . . **2 N. W. 314**

84. ——— *Copy of translation of Magistrate's order in English—Evidence of admission.* A copy of translation of what a Magistrate is supposed to have said in English in a proceeding under Act IV of 1840 is no evidence of an admission. RAMJEE LALL *v.* ANDERSON **7 W. R. 141**

85. ——— *Copy of income-tax returns.* Copies of income-tax returns should not be admitted as evidence without proof that the persons who made them are dead. LALLA GOOROO SAHAYE SINGH *v.* BROMO DEONARAIN **W. R. 1864, Act X, 105**

86. ——— *Copy of public document—Practice of native Courts in India.* The native Courts of India, in receiving evidence, do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document authenticated by the signature of the proper officer as *primâ facie* evidence, subject to further enquiry if it were disputed. NARAGUNTY LUCHMEDAVAMAH *v.* VENGAMA NAIDOO . . . . . **1 W. R. P. C. 30**
9 Moo. I. A. 66

87. ——— *Proper custody —Certified copy.* A copy of a document coming out of a public office, and certified by the officer in charge of that department to be a true copy, is admissible in evidence. UNIDE RAJAHA RAJI VENKATAPERUMAL RAUZE *v.* PEMMASAMY VENKATADRY NAIDOO **4 W. R. P. C. 121 : 7 Moo. I. A. 128**

See DEVAJI GOYAJI *v.* GODABHAI GODBHAI **11 W. R. P. C. 35**

88. ——— *Copy of record-keeper's report.* A copy of a record-keeper's report is not evidence, nor is a copy of a Magistrate's proceeding in a suit regarding other property covered by the deed in dispute. DWARKANATH BOSE *v.* CHUNDEE CHURN MOOKERJEE . . **1 W. R. 339**

89. ——— *Copy of quinquennial register—Non-production of original.* An examined copy of a quinquennial register is evidence without the production of the original. OODOY MONEE DABEE *v.* BISHONATH DUTT . **7 W. R. 14**

90. ——— *Copy from office of Registrar of Deeds.* The circumstances that a copy of a document has been obtained from

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EVIDENCE—CIVIL CASES—*contd.*

13. SECONDARY EVIDENCE—*contd.*

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the office of a Registrar of Deeds does not make that registered document evidence, or render it operative against the persons who appear to be affected by its terms. FYEZ ALI *v.* OMEDEE SINGH **21 W. R. 265**

91. ——— *Copy of decree —Decree, destruction of.* After an appeal was filed, the decree was destroyed. *Held*, that a copy in the possession of the appellant might be received upon evidence being given of its authenticity. BISHENDYAL SINGH *v.* KHADEEMA **Marsh. 213 : 1 Hay 584**

92. ——— *Destruction of document.* Where a wajib-ul-urz was destroyed in the Mutiny, and the plaintiff tendered in evidence a book obtained from the tahsil office, which purported to contain a copy of such wajib-ul-urz and of the signatures of the persons signing the original, and the name of the official in whose presence the instrument was executed and the Court below was satisfied that there was no reason to doubt its being a genuine copy :—*Held*, that such copy was evidence, not of a contemplated wajib-ul-urz, but of one which had been executed and completed. DABEE DUT *v.* ENAIT ALI . . **2 N. W. 395**

93. ——— *Lost document —Certified copy.* Secondary evidence of the contents of a document is admissible where the Court is satisfied that the document has been lost, and in such a case it is open to the Court to receive oral evidence of the transaction involved, and it is not necessary to insist on the production of a certified copy. A deed of sale is not a document of which a certified copy is permitted by law to be given in evidence, *i.e.*, to be given in evidence in the first instance without having been introduced by other evidence. HURISH CHUNDER MULLICK *v.* PROSUNO COOMAR BANERJEE . . **22 W. R. 303**

94. ——— *Evidence Act, ss. 16, 114—Company—Winding up—Contributories—Shareholders—Notice of allotment—Secondary evidence of notice—Press-copy letter—Evidence of original letter having been properly addressed and posted.* Upon the settlement of the list of contributories to the assets of a company in course of liquidation under the Indian Companies Act, one of the persons named in the list denied that he had agreed to become a member of the company or was liable as a contributory. The District Court admitted as evidence on behalf of the Official Liquidator a press copy of a letter addressed to the objector for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record ; but at the hearing of the appeal it was alleged by the Official Liquidator and denied by the objector that such notice had in fact been given. There was no evidence as to the posting of the original letter or of the address which it bore ; but the press copy was contained in the press-copy letter book of the Company, and was proved to be in the handwriting of a deceased secretary of the company, whose duty it was to despatch letters after they had been copied in the letter book. The objector denied having received the letter or any notice of allotment. *Held*, that the Court should not draw the inference that the original letter was properly addressed or posted ; that the press-copy letter was inadmissible in evidence ; and that there was no proof of the communication of any notice of allotment. RAM DAS CHAKRABATI *v.* OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY **I. L. R. 9 All. 366**

95. ——— *Evidence Act (I of 1872), ss. 65, 66—Admission of secondary evidence.* On an appeal to the Judicial Committee from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only question was whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document. The question was decided in the affirmative by their Lordships. Because the evidence consisting of a copy which was made of a document and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine. LUCHMAN SINGH *v.* PUNA . . . . **I. L. R. 16 Calc. 753 L. R. 16 I. A. 125**

96. ——— *Secondary evidence, admissibility of—Objection to reception of evidence—Evidence Act (I of 1872), ss. 61, 65, and 66.* No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document, which was admitted in evidence in the Court below without any objection. *Kameshwar Pershad* v. *Amanuttulla, I. L. R. 26 Calc. 53,* dissented from. KISHORI LAL GOSWAMI *v.* RAKHAL DASS BANERJEE (1904) . **I. L. R. 31 Calc. 155**

97 ——— **Copy of copy of document** *—Proof of execution of original.* An authenticated copy of an authenticated copy of a deed is admissible as secondary evidence ; but proof of the execution of the deed itself must be given before the copy can be admitted. TAYUBUNNISSA BIBI *v.* KUWAR SHAM KISHORE ROY **7 B. L. R. 621 : 15 W. R. 228**

98. ——— *Previous failure to produce original.* An original document upon which the plaintiff based his suit was proved to be in the possession of the defendant. In a previous suit the defendant's mother had filed the document, and on removing it had, according to the rules of

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EVIDENCE—CIVIL CASES—*concld.*

13. SECONDARY EVIDENCE—*concld.*

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practice, placed a copy there instead. The defendant, on being summoned, failed to produce the same. *Held*, that a copy of such copy, so filed in Court, was admissible as evidence. MAKBUL ALI *v.* MASNAD BIBI . **3 B. L. R. A. C. 54 : 11 W. R. 396**

99. _____ *Public document—Lost original.* The copy of a copy of a document may be admitted as evidence when it comes from a public office, and the original is shown to have been lost, but not otherwise. COURT OF WARDS *v.* BUNWAREE LALL THAKOOR **15 W. R. 102**

100. _____ *Absence of original explained.* A certified copy of a document deposited in a public office, which document is itself a copy, is admissible as secondary evidence where the absence of the original is duly accounted for. BHULABHAI GULLABHAI *v.* MODJI DESALJI **5 Bom. A. C. 48**

101. _____ *Sanad.* A copy of a copy of a sanad is not admissible in evidence. NEELANUND SINGH *v.* NUSSEEB SINGH **6 W. R. 80**

14. PRESUMPTION OF DEATH.

_____ *Presumption of death —Onus of proof—Evidence Act (I of 1872), s. 108.* S. 108 of the Evidence Act raises no presumption as to the time of a person's death. It is incumbent on him, who alleges that a person died at some antecedent date, to prove that fact by evidence. *Per* GEIDT, *J.* The question, for which provision is made in s. 108 of the Evidence Act, is the question, whether a man is alive or dead when the question of death is raised, and not whether he was alive or dead at some antecedent date. FANI BHUSHAN BANERJI *v.* SURJYA KANTO ROY CHOWDHRY (1907) . . . **I. L. R. 35 Calc. 25**

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1. CONSIDERATION OF, AND MODE OF DEALING WITH, EVIDENCE.

1. ——— **Evidence of robbery considered in trial for murder**—*Trial for robbery and murder—Offences constituting parts of the same transaction—Verdict of jury.* Persons convicted of robbery by a Sessions Judge and a jury, and of murder, by the Sessions Judge with assessors, appealed to the High Court against the conviction on the charge of murder. *Held*, that, in coming to a conclusion as to whether the evidence justified the conviction appealed against, the verdict of the jury should not be taken into consideration. But on its appearing that the two offences constituted parts of the same transaction :—*Held*, that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder. QUEEN-EMPRESS *v.* SAMI **I. L. R. 13 Mad. 426**

2. ——— **Evidence showing commission of another offence by accused other than that for which they are being tried**—*Evidence, admissibility of.* In a criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of which the trial is being held. *Reg.* v. *Briggs, 2 M. & R. 199*, referred to. QUEEN-EMPRESS *v.* MULUA **I. L. R. 14 All. 502**

3. ——— **Duty of Judge in trial by jury**—*Admission of inadmissible evidence.* In cases tried by jury it is the duty of the Judge to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. Evidence relating te proposals of compromise ought not, in the exercise of a proper discretion, to be allowed to go in as evidence of guilty knowledge against the accused. ABBAS PEADA *v.* QUEEN-EMPRESS . . . **I. L. R. 25 Calc. 736** **2 C. W. N. 484**

EVIDENCE—CRIMINAL CASES—*contd.*

1. CONSIDERATION OF, AND MODE OF DEALING WITH, EVIDENCE—*concld.*

4. ——— **Statement by dying person**—*Murder—Incomplete evidence—New trial—Further evidence—Admissibility of evidence—Dying person, statements of, recorded and attested, if admissible—Indian Evidence Act (I of 1872), s. 32, cl. (1)—Refreshing the memory—First information—Criminal Procedure Code (Act V of 1898), s. 154.* Case in which the lower Court passed sentence of death on the accused, but the High Court, on reference, ordered a new trial on the ground that the evidence was incomplete and it was necessary to take further evidence before judgment could properly be pronounced against the accused. Where, upon information received from the *chaukidar* of the offence (and which information was duly recorded in the station diary), the Sub-Inspector had gone to the hospital to see the wounded man and had there recorded the statement made by him : *Held*, that this record of such statement could in no sense be regarded as a first information of the offence, within the meaning of s. 154 of the Code of Criminal Procedure. *Held*, further, that the writing containing the statement so recorded by the Sub-Inspector and attested by witnesses could not be regarded as evidence. In order to make it evidence, the course indicated in the case of *Empress* v. *Samiruddin, I. L. R. 8 Calc. 211*, should have been followed. KING-EMPEROR *v.* DAULAT KUNJRA (1902) . . . . **6 C. W. N. 921**

5. ——— **Theory of prosecution**—*Evidence, concocted, to fit in with wrong theory of prosecution—Theory of case started before collection of evidence.* The theory of a murder upon which prosecution proceeded in this case was arrived at by the Sub-Inspector of Police the day following the night of the occurrence : *Per curiam*—It is scarcely necessary to say that a theory should succeed and not precede the collection of evidence, otherwise it is a matter of common knowledge that the evidence may be made to fit in with the theory such as the police-officer in this case propounded. EMPEROR *v.* GAYANATH DAS (1909) **13 C. W. N. 622**

2. CHARACTER.

1. ——— **Bad character, evidence of**—Evidence of bad character should not be put before the jury, but is only for consideration of the Judge in determining the sentence to be awarded. QUEEN *v.* MAHIMA CHANDRA DASS **6 B. L. R. Ap. 108 : 5 W. R. Cr. 37**

QUEEN *v.* PHOOLCHAND *alias* PHOLEEL AHIR **8 W. R. Cr. 11**

QUEEN *v.* GOPAL THAKOOR . **6 W. R. Cr. 72**

QUEEN *v.* BEHARY DOSADH . **W. R. Cr. 7**

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EVIDENCE—CRIMINAL CASES—*contd.*

2. CHARACTER—*contd.*

2. ——— It is improper to allow witnesses for the prosecution to state that the accused is not of good character. REG. *v.* TIMMI . . **2 Bom. 131 : 2nd Ed. 125**

3. ——— **Previous conduct and character.** Evidence of character and previous conduct of a prisoner, being matters of prejudice and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury. QUEEN *v.* BYKANT NATH BANERJEE **10 W. R. Cr. 17**

4. ——— In charging a jury, a Sessions Judge should not tell them that the prisoners had previously been bad characters. That fact might be taken into consideration by a Sessions Judge in passing sentence when the prisoners are convicted. QUEEN *v.* KULUM SHEIKH **10 W. R. Cr. 39**

5. ——— **Previous conviction**—*Evidence Act, s. 54.* In charging the jury upon the trial of a prisoner for being dishonestly in the possession of stolen goods, the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of the accused. *Held,* that this amounted to a misdirection : for, though s. 54 of the Evidence Act declares that " the fact that the accused person has been previously convicted of an offence is relevant " yet the same section also declares that " the fact that he has a bad character is irrelevant," and that the evidence was irrelevant and inadmissible. ROSHUN DOSADH *v.* EMPRESS **I. L. R. 5 Calc. 768 : 6 C. L. R. 219**

6. ——— **Evidence of general repute**—*Criminal Procedure Code (1882), s. 117—Rumours—Security for good behaviour.* Evidence that there are rumours in a particular place that a man has committed acts of extortion on various occasions, that he has badmashes in his employ to assist him, and generally that he is a man of bad character, is not evidence of general repute under s. 117 of the Criminal Procedure Code. Evidence of rumour is mere hearsay evidence of a particular fact. Evidence of repute is a different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of good character. On the other hand, if the state of things is that the body of his fellow-townsmen, who know him, look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character. It cannot be said that, because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind, these rumours are in themselves evidence under s. 117 of the Code. RAI ISRI PERSHAD *v.* QUEEN-EMPRESS **I. L. R. 23 Calc. 621**

EVIDENCE—CRIMINAL CASES—*contd.*

2. CHARACTER—*concld.*

7. ——— *Evidence of bad character—Evidence Act (I of 1872), ss. 14 and 54, as amended by Act III of 1891—Gang of persons associated for purpose of habitually committing theft.* The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, punishable under s. 401 of the Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. MANKURA PASI *v.* QUEEN-EMPRESS . **I. L. R. 27 Calc. 139 4 C. W. N. 97**

See SHRIRAM VENKATASAMI *v.* QUEEN **6 Mad. 120**

8. ——— *Criminal Procedure Code, ss. 107, 117—Security for keeping the peace—Evidence of general repute not available in such cases.* It is only in the case of a person who is an habitual offender, and is called upon to furnish security for good behaviour, that the fact of his being an habitual offender may be proved by evidence of general repute. Where a person is called upon to furnish security to keep the peace, evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. EMPEROR *v.* BIDHYAPATI (1903) **I. L. R. 25 All. 273**

3. CHEMICAL EXAMINER.

1. ——— **Report of Chemical Examiner**—*Criminal Procedure Code (Act XXV of 1861), s. 370.* Under s. 370, Act XXV of 1861, the report of a Chemical Examiner is evidence in a criminal trial if it bear the signature of the Examiner. The original should be produced. QUEEN *v.* BISWAMBHAR DAS **6 B. L. R. Ap. 122 : 15 W. R. Cr. 49**

2. ——— *Criminal Procedure Code, 1869, s. 380A.* The report of the Chemical Examiner to Government may be acted upon as evidence by all Criminal Courts by virtue of s. 380A of the amended Code of Criminal Procedure. ANONYMOUS . . . **6 Mad. Ap. 11**

3. ——— **Report of "Additional Chemical Examiner"**—*Criminal Procedure Code—Act X of 1882, s. 510.* A document purporting to be a report under the hand of an " Additional Chemical Examiner " upon a matter or thing submitted to him for analysis and report, cannot be received in evidence under s. 510 of Act X of 1882. QUEEN EMPRESS *v.* AUTAL MUCHI **I. L. R. 10 Calc. 1026**

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EVIDENCE—CRIMINAL CASES—*contd.*

3. CHEMICAL EXAMINER—*concld.*

4. ——— Inquest report—*Bom. Reg. XII of 1827, s. 52—Bombay Act VIII of 1867.* Regulation XII of 1827, s. 52, having been repealed by (Bombay) Act VIII of 1867, an inquest report is not admissible in evidence. REG. *v.* BHASHANKUR NARBHERAM . . . . **6 Bom. Cr. 75**

4. DEPOSITIONS.

See EVIDENCE ACT, 1872, s. 33.

1. ——— Mode of recording depositions—*Criminal Procedure Code, 1882, s. 355—Criminal Procedure Code, 1861, s. 195—Memo. of depositions of witnesses.* A memorandum by a Judge that certain witnesses had deposed the same as the former witnessess, is not in accordance with the requirements of s. 195, Code of Criminal Procedure. QUEEN *v.* MUTTEE NUSHYO **W. R. 1864, Cr. 18**

2. ——— Mode of recording deposition, evidence of. The evidence of a writer in the Judicial Commissioner's office, to the effect that "the document shown to him is a deposition taken before the Assistant Commissioner; it appears to have been taken in due form upon solemn affirmation, and is attested by the signature of the Assistant Commissioner," is not sufficient evidence of the prisoner having duly deposed. QUEEN *v.* MATI KHAWA **3 B. L. R. A. Cr. 36 : 12 W. R. Cr. 31**

3. ——— Depositions of witnesses taken by Magistrate—*Evidence on appeal.* Before depositions of witnesses taken before a Magistrate can be used on appeal, it should be shown either in the depositions or elsewhere that the evidence was read over or interpreted to the respective witnesses. QUEEN *v.* PARBUTTY CHURN CHUCKERBUTTY . . . **14 W. R. Cr. 13**

4. ——— Depositions in previous case. Previous statements of witnesses on oath are not available as evidence in a subsequent trial. QUEEN *v.* KISTO MUNDUL . **7 W. R. Cr. 8**

5. ——— The deposition of a witness in a former case is not evidence in a subsequent case in which he is examined, except when put in to contradict him. QUEEN *v.* NOBOKISTO GHOSE . . . . **8 W. R. Cr. 87**

6. ——— Evidence taken on the trial of one prisoner wrongly admitted as evidence on the trial of another. QUEEN *v.* ZULFUKUR KHAN . . . **8 B. L. R. Ap. 21**
16 W. R. Cr. 36

7. ——— The prisoners were convicted, under s. 154 of the Penal Code, upon evidence taken in another case to which the prisoners were not parties. The conviction was set aside. *In the matter of the petition of* BETTS **6 B. L. R. Ap. 83**
15 W. R. Cr. 6

EVIDENCE—CRIMINAL CASES—*contd.*

4. DEPOSITIONS—*contd.*

8. ——— *Absence of accused.* The Magistrate took the depositions by reading over to the witnesses depositions made by them in another case, at the hearing of which the prisoner was not present, and procuring them to affirm the truth of the same. *Held,* that the depositions were illegally taken, and therefore could not sustain a charge. QUEEN *v.* RAJKISHNA MITTER **1 B. L. R. O. Cr. 36**

9. ——— In a case in which the accused was bound down to keep the peace, the Assistant Magistrate admitted as evidence the depositions of witnesses in certain cases in which the accused was tried on charges of being a member of an unlawful assembly and of rioting, and was acquitted. *Held,* that the Assistant Magistrate ought not to have admitted this evidence. QUEEN *v.* DINA BUNDHOO ROY . . **24 W. R. Cr. 4**

10. ——— *Absence of accused.* Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them, and put in on their assenting to it as a true record of the facts :—*Held,* that the proceeding was irregular and prejudicial to the prisoner ; and such witnesses should have been subjected to a fresh oral examination ; and that then the former depositions might have been put in, not to add to their testimony, but to corroborate it. A new trial was ordered. QUEEN *v.* BISHONATH PAL **3 B. L. R. A. Cr. 20**
12 W. R. Cr. 3

11. ——— Depositions not read over to accused—*Oral evidence—Statement of mooktear as to faulty record—Criminal Procedure Code (Act X of 1882), s. 360—Evidence Act (I of 1872), s. 91.* A Sessions Judge, after hearing a general statement made by a mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown ; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held,* on appeal, that the conviction and sentence must be set aside. ADYAN SING *v.* QUEEN-EMPRESS **I. L. R. 13 Calc. 121**

12. ——— Depositions taken by Collector. The evidence of a prisoner taken by a Collector cannot be used against him on his trial before a Magistrate. QUEEN *v.* SOOKMOY GHOSE **10 W. R. Cr. 23**

13. ——— Depositions before Magistrate—*Criminal Procedure Code, 1861, s. 369—Depositions of gosha ladies.* The depositions of gosha ladies examined before the committing Magistrate in the presence of the accused are not admissible in evidence on the trial before the Sessions Court under

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EVIDENCE—CRIMINAL CASES—*contd.*

4. DEPOSITIONS—*contd.*

s. 369 of the Criminal Procedure Code, 1861. ANONYMOUS . . . . **4 Mad. Ap. 15**

14. ———— *Discrepancies in depositions.* In a trial before a Sessions Court the attention of the jury may be called to the discrepancies between the evidence given by witnesses in such Court and that given before the committing Magistrate without the depositions before the Magistrate being put in. EMPRESS *v.* HARAN CHUNDER MITTER . . **6 C. L. R. 390**

15. ———— *Criminal Procedure Code, 1861, s. 369.* When a deposition is received in evidence under s. 369, Code of Criminal Procedure, at a trial before a Sessions Judge, there ought to be on the record distinct proof of the existence of such a state of things as makes the deposition legal evidence. QUEEN *v.* BHEEKUN DOSS . . . . **7 W. R. Cr. 114**

16. ———— **Depositions taken before Civil Court**—*Criminal Procedure Code, 1861, s. 369—Evidence Act (II of 1855), s. 57.* When a Civil Court, authorizing a criminal prosecution in cases of offences against public justice, instead of completing the investigation itself and committing the parties for trial before the Court of Session, simply refers the proceedings and leaves it to the Magistrate to commit or not, as he thinks proper, the depositions taken before the Civil Court are not admissible in evidence, as depositions taken before the Magistrate are in certain cases under s. 369, Code of Criminal Procedure. But by s. 57, Act II of 1855, the improper admission of such evidence is not of itself ground for the reversal of the Sessions Judge's sentence when, independently of that evidence, there is sufficient evidence to justify the decision. QUEEN *v.* NUJUM ALI **6 W. R. Cr. 41**

17. ———— *Deposition in previous inquiry under Companies Act (VI of 1882), ss. 162 and 163—Accused tried jointly.* A deposition on oath made by one of several accused, as a witness in a previous inquiry under ss. 162 and 163 of the Indian Companies Act (VI of 1882), was admitted in evidence against himself only, and not against the other accused. QUEEN-EMPRESS *v.* MOSS . . . . . **I. L. R. 16 All. 88**

18. ———— **Depositions taken on commission**—*Evidence Act, s. 38—Evidence of witness taken upon commission when admissible in criminal trial—High Court's Criminal Procedure Act (X of 1875), s. 76.* The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33 of the Evidence Act. EMPRESS *v.* DABEE PERSHAD **I. L. R. 6 Calc. 532**

19. ———— **Deposition taken in absence of accused where he has absconded**—*Criminal Procedure Code, 1882, s. 512.* Where an accused person has absconded and it is intended to record evidence against him in his absence, it is requisite, under s. 512 of the Code of Criminal Procedure, that the fact of the absconding of the accused should be alleged, tried, and established before the deposition is recorded. GHURBIN BIND *v.* QUEEN-EMPRESS . . **I. L. R. 10 Calc. 1097**

20. ———— **Deposition of absent witness**—*Act I of 1859, s. 111.* The deposition of a person other than a merchant seaman is not admissible in evidence under s. 111 of the Merchant Seaman's Act (I of 1859). QUEEN *v.* RAMCOMAL MITTER . . . . . **1 Hyde 195**

21. ———— **Deposition of dead witness.** When it is proposed to read as evidence the deposition of a witness alleged to be dead, the death of the witness should first be strictly proved, unless it is admitted on the other side, and the reading of the deposition not objected to. QUEEN *v.* GAGALU MOYALU . **4 B. L. R. Ap. 50 : 12 W. R. Cr. 80**

22. ———— **Written reports of depositions**—*Criminal Procedure Code, 1861, s. 369.* Written reports of depositions are not evidence, except in the case provided for by s. 369 of the Code of Criminal Procedure, 1861. QUEEN *v.* KALLY CHURN GANGOOLY . . . **6 W. R. Cr. 92**

23. ———— **Documents tendered in civil case**—*False evidence, trial for giving.* Documents which were tendered in the civil suit, if relied on in a prosecution for giving false evidence, must be proved in the Criminal Court before they can be received as evidence. QUEEN *v.* KARTICK CHUNDER HALDAR . . **9 W. R. Cr. 58**

24. ———— **Documents not on record before Sessions Judge.** Documents which were on the record sent up by the Magistrate, but which were not put in evidence before the Sessions Judge, looked at because they told in favour of the prisoner. QUEEN *v.* SOOBJAN . . **10 B. L. R. 332**

25. ———— **Records of former trial**—*Depositions in former case.* The power granted to the Civil Courts of calling for and inspecting the records of a previous trial is one that ought to be exercised with the greatest caution, and does not extend to criminal proceedings. QUEEN *v.* JUMDEM SINGH . . . . **12 W. R. Cr. 73**

26. ———— **Depositions taken in former sessions case**—*Criminal Procedure Code, s. 512—Act I of 1872, ss. 33, 157—Witness, threatening.—Duty of Magistrate.* In 1874 five out of six persons who were named as having committed a murder, were arrested, and after enquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the enquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer the witnesses deposed to the absconder having been one of the participators in the crime charged

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EVIDENCE—CRIMINAL CASES—*contd.*

4. DEPOSITIONS—*contd.*

against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner. *Held*, that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity to cross-examining the witnesses. *Held*, however, that under the circumstances the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code. *Per* STRAIGHT, *J.*, that under the special circumstances the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner. QUEEN-EMPRESS *v.* ISHREE SINGH . . **I. L. R. 8 All. 672**

27. ——— Depositions in counter case. The depositions of witnesses given in a counter case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them. *Queen-Empress* v. *Gopal Dass, I. L. R. 3 Mad. 271*, and *Queen-Empress* v. *Ganu Sonba, I. L. R. 12 Bom. 440*, followed. MOHER SHEIKH *v.* QUEEN-EMPRESS **I. L. R. 21 Calc. 392**

28. ——— Deposition of medical witness taken by Magistrate tendered at sessions trial—*Criminal Procedure Code s. 509—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Deposition not admissible in evidence—Evidence Act (I of 1872), s. 114, illus.* (*e*). Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Criminal Procedure Code, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illus. (*e*), of the Evidence Act (I of 1872) to have been so taken and attested. QUEEN-EMPRESS *v.* RIDING **I. L. R. 9 All. 720**

29. ——— *Criminal Procedure Code, s. 509—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Evidence Act (I of 1872), s. 80.* Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory. S. 80 of the Evidence Act, therefore, does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen-Empress* v. *Riding, I. L. R. 9 All. 720*, referred to. QUEEN-EMPRESS *v.* POHP SINGH . . **I. L. R. 10 All. 174**

30. ——— *Deposition of medical witness—Criminal Procedure Code (X of 1882), s. 509—Deposition wrongly admitted in evidence—Evidence Act (I of 1872), ss. 80 and 114, ill.* (*e*). Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under s. 80, nor ought it to presume under either s. 80 or s. 114, ill. (*e*), of the Evidence Act (I of 1872), that the deposition was so taken and attested. *Queen-Empress* v. *Riding, I. L. R. 9 All. 720*, and *Queen-Empress* v. *Pohp Sing, I. L. R. 10 All. 174*, approved. KACHALI HARI *v.* QUEEN-EMPRESS **I. L. R. 18 Calc. 129**

31. ——— Depositions of witnesses before Magistrate—*Criminal Procedure Code, s. 288—Evidence—Confession retracted—Corroboration.* Where a prisoner was convicted of murder on a confession, retracted at the trial, corroborated by depositions read under s. 288 of the Code of Criminal Procedure, and also retracted at the trial:—*Held*, that the prisoner should not have been convicted on such evidence. QUEEN-EMPRESS *v.* BHARMAPPA . . **I. L. R. 12 Mad. 123**

32. ——— Previous statements of witnesses, admissibility of—*Criminal Procedure Code (1882), s. 288.* Although previous statements made by witnesses may be used, under s. 145 of the Evidence Act, for the purpose of contradicting statements made by them subsequently at the trial of an accused person, they cannot, if they have been made in the absence of the accused, be treated as independent evidence of his guilt or innocence; s. 288 of the Criminal Procedure Code will not avail anything for this purpose. ALIMUDDIN *v.* QUEEN EMPRESS . . . **I. L. R. 23 Calc. 361**

33. ——— Self-incriminating statements of witness – *Evidence Act, ss. 80 and 132*

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EVIDENCE—CRIMINAL CASES—*contd.*

4. DEPOSITIONS—*concld.*

—*Proof and admissibility of depositions containing such statements in proceedings against the witness.* A revenue official was charged with the offence of attempting to receive a bribe from certain rayiats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution. *Held*, that the depositions should have been admitted in evidence. QUEEN-EMPRESS *v.* SAMIAPPA **I. L. R. 15 Mad. 63**

34. ——— Deposition of deceased witness—*Evidence Act, s. 33—Admissibility of such deposition in subsequent proceedings.* Where a witness for the prosecution was examined before a committing Magistrate, but was not cross-examined, and then died before the case came on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial: *Held*, that the deposition was admissible under s. 33 of the Evidence Act (I of 1872). QUEEN-EMPRESS *v.* BASVANTA (1900) . . . . **I. L. R. 25 Bom. 168**

35. ——— Previous depositions—*Criminal Procedure Code (Act V of 1898), s. 288—Statement of witness before committing Magistrate treated as evidence at a trial before Court of Session—Evidence duly taken.* Under s. 288 of the Code of Criminal Procedure, the Court is not restricted to admitting the evidence of a witness duly taken before the committing Magistrate merely for the purpose of contradicting that witness when he is called as a witness at the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence in the case, at the trial, where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. QUEEN-EMPRESS *v.* DORASAMI AYYAR (1901) . . . . **I. L. R. 24 Mad. 414**

5. DYING DECLARATIONS.

1. ——— Proof of state of deceased person—*Mode of recording declaration.* A dying declaration is admissible in evidence in all criminal cases, provided the conditions attaching to its admission have been fulfilled, and is not confined to cases in which the death of the injured party is the sole object of enquiry. There must be evidence of the state of the deceased person at the time of making the declaration. The Magistrate recording a dying declaration should put on record the answer of the declarant to a question touching his knowledge or belief in his approaching death. QUEEN *v.* UJRAIL . . **3 N. W. 212**

2. ——— *Criminal Procedure Code, 1861, s. 371.* In determining whether a declaration alleged to have been made by a deceased person is admissible as a dying declaration under s. 371, Code of Criminal Procedure, a Sessions Judge ought to direct his attention to the point whether the declarant believed himself to be in danger of approaching death. The evidence of persons who cannot speak of their own personal knowledge to such declaration should not be admitted; and in deciding whether the accused is guilty of the charge of murdering the deceased declarant, the Court should confine itself to enquiring into the facts which occurred on the day of the murder. QUEEN *v.* ZUHIR . . . **10 W. R. Cr. 11**

3. ——— *Procedure.* Before a dying declaration can be received in evidence, it must be distinctly found that the person who made the declaration knew or believed at the time he made it that he was dying or was likely to die. Where a Sessions Judge sees from the Magistrate's record that there is evidence which could prove that the declaration was a dying declaration, he should, call for that evidence. A Magistrate should in all cases in which dying declarations are made, examine the complainant on the point, and record the question as well as the answer to it upon the record of the examination. *In the matter of* TANOO . **15 W. R. Cr. 11**

4. ——— Statement made by deceased—*Evidence Act, s. 32, cl. 1—Murder.* In a case of murder the statement made by the deceased in the presence of his neighbours and of a head constable was admitted as relevant evidence under s. 32, cl. 1, Act I of 1872, that section providing that such statement is relevant, whether the person who made the statement was or was not at the time when it was made under expectation of death. QUEEN *v.* DEGUMBER THAKOOR **19 W. R. Cr. 44**

5. ——— Declaration made before Magistrate other than the committing Magistrate—*Evidence of making of declaration.* The declaration of a dying person, albeit made on solemn affirmation before a Magistrate, who was not, however, the committing Magistrate, and signed by him, is not admissible in evidence without legal proof that the deceased made such a declaration. REG. *v.* FATA ADAJI . . . . **11 Bom. 247**

6. ——— Dying statement—*Presence of accused.* The dying statement of a deceased person must be taken in the presence of the accused; if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. *In the matter of the petition of* SAMIRUDDIN. EMPRESS *v.* SAMIRUDDIN . . . **I. L. R. 8 Calc. 211**
10 C. L. R. 11

7. ——— Statement of deceased as to cause of death—*Evidence Act, s. 32.* Where the accused was charged with culpable homicide not amounting to murder, the question was whether the deceased had died from the effects of a beating. *Held*, that a statement by the deceased that he had

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EVIDENCE—CRIMINAL CASES—*contd.*

5. DYING DECLARATIONS—*contd.*

been beaten by the accused was admissible in evidence under s. 32 of the Evidence Act, without proof that at the time of making the statement the deceased was conscious of any fatal effect of such beating. EMPRESS *v.* BLECHYNDEN **6 C. L. R. 278**

8. ——— Signs made by deceased whether "verbal statements"—*Cause of death signified in answer to question—Admissibility of evidence as to signs—Evidence Act (I of 1872), s. 3, s. 8, expls. 1, 2; s. 9 and s. 32—"Fact"—"Conduct"—"Verbal" statement.* In a trial upon a charge of murder, it appeared that the deceased, shortly before her death, was questioned by various persons as to the circumstances in which the injuries had been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. *Held*, by the Full Bench (MAHMOOD, *J.*, dissenting), that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section. *Per* STRAIGHT, *J.*, that statements by the witnesses as to their impressions of what the signs meant were inadmissible, and should be eliminated; but that, assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, it was not straining the construction to hold that the circumstances were covered by s. 32. *Per* MAHMOOD, *J.*, that the expression "verbal statements" in s. 32 should be confined to statements made by means of a word or words, and that the signs made by the deceased, not being verbal statements in this sense, were not admissible in evidence under that section. *Per* PETEHRAM, *C.J.*, that the signs could not be proved as "conduct" within the meaning of s. 8 of the Evidence Act, inasmuch as, taken alone, and without reference to the questions leading to them, there was nothing to connect them with the cause of death, and so to make them relevant; while the questions could not be proved either under explanation 2 of s. 8 or under s. 9, inasmuch as the condition precedent to their admissibility under either of these provisions was the relevancy of the conduct which they were alleged to effect, or of the facts which they were intended to explain. The "conduct" made relevant by s. 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. *Per* MAHMOOD, *J.*, that the word "conduct" as used in s. 8 does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact; that the signs made by the deceased were the conduct of "a person an offence against whom was the subject of any proceeding" and were relevant as such under s. 8, and that the questions put to her were admissible in evidence either under explanation 2 of the same section or under s. 9 by way of an explanation of the meaning of the signs. QUEEN-EMPRESS *v.* ABDULLA . . . **I. L. R. 7 All. 385**

9. ——— Statement of deceased—*Rape.* The dying declaration of a deceased person is admissible in evidence on a charge of rape. QUEEN *v.* BISSORUNJUN MUKERJEE . **6 W. R. Cr. 75**

10. ——— *Sessions Court, record of.* The dying declaration of a deceased person is admissible, and should form part of the sessions record. QUEEN *v.* SOYUMBER SINGH **9 W. R. Cr. 2**

In the matter of the petition of CHINTAMUNEE NYE **11 W. R. Cr. 2**

11. ——— *Indian Penal Code (Act XLV of 1860), s. 396.* Appellant was convicted and sentenced to transportation for life on a charge of dacoity. The most material evidence for the prosecution was the statement, in the nature of a dying declaration, made to the jamadar of police by one Fakiria Shimpi, who received wounds during the dacoity, and who died before the trial commenced. The Assistant Surgeon, who made the *post-mortem* examination on the deceased, was not called, being on leave; but the Civil Surgeon, on a perusal of the notes left by the Assistant Surgeon, gave evidence that the cause of the death of the deceased was pneumonia aggravated by a stab. In the notes themselves no cause of death was given, and there was no evidence as to how the pneumonia was aggravated. No explanation was given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there was nothing in the notes to support it. *Held*, that the statement of the deceased ought not to have been admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death. IMPERATRIX *v.* RUDRA (1900) **I. L. R. 25 Bom. 45**

12. ——— *Proof of record of declaration—Language in which declaration is made—Admissibility in evidence—Evidence Act, 1872, s. 32 (1).* A declaration, made by a person in expectation of death, recorded in the absence of the accused and in a language different from the one in which it is made, by an officer who is not examined in the case, cannot properly be used in evidence against the accused; and at any rate such a declaration should not be relied upon in convicting the accused. *Per* TAYLOR, *J.*—A Court should always examine witnesses in great detail, and elicit facts from them to show what was done by each of the accused persons, so that the Court may be in a

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EVIDENCE—CRIMINAL CASES—*contd.*

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position to judge of the culpability of each individual. Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under s. 32 of the Evidence Act; and that statement is not the document made by the Magistrate, but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement is made. When such a declaration is not a continuous statement made by the dying person, but is elicited in answer to one or more questions, the document, to be really of use, should clearly set out the exact questions put and the answers made to them. KING-EMPEROR *v.* MATHURA THAKUR (1901) . **6 C. W. N. 72**

6. EXAMINATION AND STATEMENTS OF ACCUSED.

1. ——— Statements made by accused person. Statements of accused persons can only be used in evidence as against the parties making them, and cannot be used as corroborative evidence against others. QUEEN *v.* HURGOBIND **2 N. W. 336**

QUEEN *v.* BUSSIRUDDI . **8 W. R. Cr. 35**

2. ——— Statements of prisoners— *Depositions before Magistrate.* Bare statements of prisoners are not admissible in evidence; nor are depositions taken before the Magistrate unless to contradict the evidence of the same witnesses as given before the Sessions Court. QUEEN *v.* BHEKOO SINGH . . . . **7 W. R. Cr. 108**

3. ——— Confession of prisoner made to Magistrate or to private person. A confession made to a Joint Magistrate of a district in charge of the sudder subdivision is receivable in evidence, although the Joint Magistrate may not have been specially empowered, under Act VIII of 1869, to receive the confessions of prisoners. A confession made to a private individual may be evidence against the prisoner if proved by the person before whom the confession was made. QUEEN *v.* GOOPEENATH KOLLU . . **13 W. R. Cr. 69**

4. ——— Admission by husband of having kicked his wife—Causing death. An admission by a husband in the presence of several witnesses that he had kicked his wife, and that she died after receiving the kick, was held to be direct evidence against him. QUEEN *v.* BYSAGOO NOSHYO **8 W. R. Cr. 29**

5. ——— Withdrawal of uncorroborated evidence by the witness—*Criminal Procedure Code, ss. 342, 364—Confessions.* *A* and *B* were charged with the murder of *C*, the husband of

EVIDENCE—CRIMINAL CASES—*contd.*

6. EXAMINATION AND STATEMENTS OF ACCUSED—*contd.*

B. There was some evidence that *B* had said her husband was dead a few days after his disappearance; and some bones, a skull and some cloths were found in a neighbouring burying ground which were identified as those of *C*. *B* made a statement, recorded on June 4th by the village Munsif, to the effect that she had lured *C* into a garden, and that *A*, who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court after she had been sentenced to death, she retracted her former statements and made the usual charges of ill-treatment against the police. *A* made a statement to the committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he had assisted in disposing of the corpse of *C* at the request of his brother-in-law, who corroborated the statement in two depositions before the Magistrate, which were likewise repudiated by the deponent before the Sessions Court. *Held*, that the conviction of *A* was wrong, and further (PARKER, *J.*, dissenting) that the conviction of *B* was wrong. *Per* KERNAN, *J.*—"As the second prisoner has withdrawn all the confessional statements made by her, it is necessary, according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain and doubts exist as to which statement is true, and the confessional statement cannot be safely relied on against the prisoner." *Semble:* The same rule should be followed when a witness withdraws his deposition before the Sessions Court. *Per* KERNAN, *J.*—The examination of an accused person under Criminal Procedure Code, s. 364, is subject to the purpose referred to in s. 342, *viz.*, "to enable him to explain any circumstances appearing against him," and not to supplement the case for the prosecution against him to show that he is guilty. QUEEN-EMPRESS *v.* RANGI . **I. L. R. 10 Mad. 295**

See QUEEN-EMPRESS *v.* JADUB DAS **I. L. R. 27 Calc. 295**

6. ——— Putting to jury to consider document purporting to be proved by statement of accused under that section—*Criminal Procedure Code (Act X of 1882), s. 342—Misdirection.* A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under s. 342 of the Criminal Procedure Code. It is a misdirection to ask the jury to consider a document, purporting to be proved by such a statement, as evidence against the accused. BASANTA KUMAR GHATTAK *v.* QUEEN-EMPRESS . . **I. L. R. 26 Calc. 49**

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EVIDENCE—CRIMINAL CASES—*contd.*

6. EXAMINATION AND STATEMENTS OF ACCUSED—*contd.*

7. ——— Statement under promise of pardon. A statement made under promise of pardon is no evidence against a prisoner. QUEEN *v.* RADHANATH DOSADH . . **8 W. R. Cr. 53**

8. ——— Statement made by prisoner after acceptance of pardon—*Subsequent retraction of statement.* A person accused of an offence was offered a pardon the conditions of which he accepted. On being examined, he stated in detail the circumstances of the offence, and named the prisoner as an accomplice. He afterwards retracted his statement. *Held*, that the statement could not be used as evidence against the prisoner. QUEEN *v.* HARDEWA . **5 N. W. 217**

9. ——— *Examination of accused person—Witness—Criminal Procedure Code, s. 347.* It is not competent to a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under s. 347 of the Code of Criminal Procedure. Evidence given by such a person who had received a pardon in the case of an offence not exclusively triable by the Court of Session, held not relevant, that person not having been acquitted or discharged or convicted. QUEEN *v.* HANMANTA **I. L. R. 1 Bom. 610**

See QUEEN-EMPRESS *v.* DURANT **. L. R. 23 Bom. 213**

10. ——— Statement of prisoner after tender of pardon—*Evidence Act (I of 1872), s. 80.* A deposition given by a person is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition. A pardon was tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate. *Held*, that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate. QUEEN-EMPRESS *v.* DURGA SONAR **I. L. R. 11 Calc. 580**

11. ——— *Criminal Procedure Code, 1861, ss. 205, 211, and 366.* Where a person to whom a tender of conditional pardon has been extended is considered by the Sessions Judge not to have conformed to the conditions under which pardon was tendered, the Sessions Judge, in exercising the power given him by s. 211 of the Code of Criminal Procedure, ought not to try him along with the prisoners in whose case he has already given testimony. QUEEN *v.* PETUMBER DHOOBEE **14 W. R. Cr. 10**

EVIDENCE—CRIMINAL CASES—*contd.*

6. EXAMINATION AND STATEMENTS OF ACCUSED—*contd.*

12. ——— Statement of person to whom pardon has been wrongly tendered—*Criminal Procedure Code, 1872, s. 347.* Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case: *Held*, that, the tender of pardon to such person not being warranted by s. 347 of Act X of 1872, he could not legally be examined on oath, and his evidence was inadmissible. EMPRESS *v.* ASHGAR ALI . **I. L. R. 2 All. 260**

13. ——— Statements of accused illegally pardoned. In cases not of the kind contemplated in s. 337 of the Criminal Procedure Code (X of 1882), it is not competent to a Magistrate holding a preliminary enquiry to tender a pardon to the accused, or to examine him as a witness. Statements made by the accused in the course of such examination are irrelevant. QUEEN-EMPRESS *v.* DALA JIVA . . **I. L. R. 10 Bom. 190**

See QUEEN-EMPRESS *v.* DURANT **I. L. R. 28 Bom. 213**

14. ——— Evidence of co-accused charged, but not arrested—*Admissibility of evidence.* A charge of theft having been laid against *A* and *B*, process was issued against *A* only, and upon his being put upon his trial, *B*, who had not been arrested, was produced as a witness for the defence. *Held*, that his evidence was admissible. *Queen* v. *Ashruff Sheikh, 6 W. R. Cr. 91*, and *Reg. v. Hanmanta, I. L. R. 1 Bom. 610*, distinguished. MOHESH CHUNDER KAPALI *v.* MOHESH CHUNDER DASS . . . . **10 C. L. R. 553**

15. ——— Examination of accused, language of—*Mode of recording evidence.* The examination of an accused person should be taken down in the language in which it is delivered and as far as possible in the words used by him. QUEEN *v.* MOONSAI BIBEE . . . **24 W. R. Cr. 54**

16. ——— Statement of accused before Magistrate—*Mode of recording evidence—Criminal Procedure Code, 1872, s. 80.* The deposition of the prisoner given in Hindustani, but taken in English by the Magistrate, and the memorandum at the foot of the deposition that it was read to the witness and was by him acknowledged to be correct, though held not to be quite satisfactory (as the person who took down in English what the prisoner had said in Hindustani was not examined as a witness and the prisoner had no opportunity of cross-examining him), was admitted as a proper deposition within the provisions of the Criminal Procedure Code, and the memorandum was taken under s. 80, Code of Criminal Procedure, as evidence of the facts stated in it, and as affording some evidence that the translation was correct. QUEEN *v.* GONOWRI **22 W. R. Cr. 2**

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EVIDENCE—CRIMINAL CASES—*contd.*

6. EXAMINATION AND STATEMENTS OF ACCUSED—*contd.*

17. ——— *Omission to make memorandum of evidence by Civil Court in case of perjury.* The failure of the Civil Court in a case of perjury to make a memorandum of the evidence of the accused when examined before it, does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was delivered in such Court. *In the matter of* BEHARY LALL BOSE . . . . **9 W. R. Cr. 69**

18. ——— *Evidence Act, s. 91—Criminal Procedure Code, 1872, s. 339—Prosecution for false evidence.* In a case of giving false evidence, the English record written by the Magistrate was put in to prove what the accused had stated before him. The document was not interpreted to the accused in the language in which it was given or which he understood ; nor was it read over in accordance with the requirements of s. 339, Code of Criminal Procedure, in the presence of the person then accused. *Held*, that the English record of the Magistrate was not legal evidence under the Evidence Act I of 1872, s. 91, of what the prisoner said before the Magistrate. Charges of perjury ought to be based strictly upon the exact words which are used by the person who is charged ; and no evidence which does not profess to give those exact words can alone be a safe foundation for a conviction. QUEEN *v.* MUNGUL DASS . . . **23 W. R. Cr. 28**

19. ——— **Statement of accused, informality in**—*Evidence Act, s. 91—False evidence in judicial proceedings—Deposition of the accused when admissible as evidence—Civil Procedure Code (Act X of 1877), ss. 178, 182, 183, and 647.* Failure to comply with the provisions of ss. 182 and 183 of Act X of 1877 (Civil Procedure Code) in a judicial proceeding is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition ; and under s. 91 of the Evidence Act (I of 1872), no other evidence of such deposition is admissible. *In the matter of the petition of* MAYADEB GOSSAMI. EMPRESS *v.* MAYADEB GOSSAMI **I. L. R. 6 Calc. 762 : 8 C. L. R. 292**

20. ——— **Examination of accused**—*Criminal Procedure Code, 1861, ss. 205, 366—Attestation of Magistrate.* Before the examination of a prisoner in the presence of the committing officer can be used as evidence against him under s. 366, Criminal Procedure Code, the provisions of s. 205 of that Code must have been complied with, and the committing officer's attestation affixed in full to the examination. QUEEN *v.* CHUPPUT KHYRWAR **15 W. R. Cr. 83**

21. ——— *Record of statements.* When the examination of the prisoner by the Magistrate has not been recorded in full so as to include the questions as required by s. 205 of the Code of Criminal Procedure, it cannot be given in evidence at the trial before the Court of Session, under s. 366, without further proof. REG. *v.* KALLA LAKHMAGI . . **2 Bom. 419 : 2nd Ed. 395**

REG. *v.* PEVADI BIN BASAPPA **2 Bom. 421 : 2nd Ed. 397**

REG. *v.* VITHOJI . **2 Bom. 422 : 2nd Ed. 398**

REG. *v.* GANU BAPU **2 Bom. 422 : 2nd Ed. 398**

But *see* EMPRESS *v.* SAGAMBUR **12 C. L. R. 120**

22. ——— *Criminal Procedure Code, 1861, s. 205.* Where a statement made by a prisoner before a Magistrate, though signed by the Magistrate, does not contain the certificate directed by s. 205 of the Code of Criminal Procedure, it does not of itself constitute *primâ facie* evidence of the examination within the meaning of s. 366 of that Code, and if other proof is not given to show that the statement was made by the prisoner before the Magistrate, the statement is not admissible as evidence at the sessions. QUEEN *v.* PETAMBUR DHOOBEE . . . . **14 W. R. Cr. 10**

23. ——— *Criminal Procedure Code, Act XXV of 1861, s. 205.* A Deputy Magistrate committed certain prisoners for trial on charge of dacoity. Some of the prisoners had confessed before the Deputy Magistrate, but he failed to record the examination of the prisoners, or to attest it, as required by s. 205 of the Code of Criminal Procedure. The Sessions Judge, therefore, refused to admit the examination of the prisoners by the Deputy Magistrate in evidence, and also refused to postpone the trial for the purpose of summoning the Deputy Magistrate, and taking his evidence in the matter. *Held*, that the examination of the prisoners was inadmissible in evidence. QUEEN *v.* RADHU JANA **3 B. L. R. A. Cr. 59 : 12 W. R. Cr. 44**

24. ——— *Statement of prisoner on examination before Magistrate—Criminal Procedure Code, 1861, s. 205—Signature of Magistrate.* To make the examination of an accused person before a Magistrate legal evidence in a Sessions Court, something more than the mere signature of the Magistrate thereto is necessary. The certificate under the Magistrate's hand (*i.e.*, not necessarily in his writing, but with his signature, *Queen* v. *Regga Hossein, 8 W. R. Cr. 55*), required by s. 205 of the Criminal Procedure Code, must be attached. QUEEN *v.* BHEEBEEKEE **4 N. W. 16**

See QUEEN *v.* NIRUNI . **7 W. R. Cr. 49**

and QUEEN *v.* BHIKAREE . **15 W. R. Cr. 63**

25. ——— *Attestation of Magistrate.* The attestation of the Magistrate is *primâ facie* proof of such examination, and it is to be presumed the proceedings were regular. QUEEN *v.* JAGA POLY . . **11 W. R. Cr. 39**

S.C. QUEEN *v.* JOGE POLY . **7 B. L. R. 67 note**

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EVIDENCE—CRIMINAL CASES—*contd.*

6. EXAMINATION AND STATEMENTS OF ACCUSED—*concld.*

REG. *v.* TIMMI . **2 Bom. 131 : 2nd Ed. 125**

26. ——— *Attestation of Magistrate.* The attestaton of a Magistrate stating why he could not proceed with the further examination of a witness, is *primâ facie* proof of the fact, and may be laid before a jury. QUEEN *v.* RASOOKOOLLAH . . . **12 W. R. Cr. 51**

27. ——— *Evidence in Sessions Court.* If the examination of an accused person taken before the Magistrate is afterwards read in evidence at the trial before the Sessions Court, the whole of it should be read out. ANONYMOUS . . . . . **5 Mad. Ap. 4**

28. ——— *Statement of prisoner before Magistrate—Attestation of Magistrate.* It is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate, and ask them if they have any objection to the reception of these confessions. The examination of prisoners before a Magistrate is to be received in evidence, and the attestation of the Magistrate is *primâ facie* proof of the circumstances. QUEEN *v.* MISSER SHEIKH . **14 W. R. Cr. 9**

29. ——— *Statements made before Magistrate as approvers—Refusal of Judge of Sessions Court to put them on record—Criminal Procedure Code, s. 287.* It is not optional with the prosecution, on the trial before the Court of Session, to put in confessional statement of persons who have been examined before the Magistrate: where the Sessions Judge refused to place on the record such statements, he was held to have committed an irregularity. QUEEN-EMPRESS *v.* RAMA TEVAN . . . . **I. L. R. 15 Mad. 352**

7. GOVERNMENT GAZETTE.

1. ——— **Gazette of India—Calcutta Gazette**—*Act II of 1855, ss. 6 and 8—Official letters.* The *Gazette of India* or *Calcutta Gazette*, containing official letters on the subject of hostilities between the British Crown and Mohamedan fanatics on the frontier, was rightly admitted in evidence under ss. 6 and 8 of Act II of 1855 as proof of the commencement, continuation, and determination of hostilities. Similarly, under s. 6, a printed letter from the Secretary to the Government of the Punjab, to the Secretary to the Government of India, was properly resorted to by the Court for its aid as a document of reference. It was not necessary that these documents should be interpreted to the prisoner. It was sufficient that the purposes for which they were put in were explained. QUEEN *v.* AMIRUDDIN . **7 B. L. R. 63 : 15 W. R. Cr. 25**

8. HANDWRITING.

1. ——— **Handwriting, knowledge of.** The knowledge by the Sessions Judge of the handwriting of the judicial officer before whom the statement was made is no evidence of the statement having been made before that officer. QUEEN *v.* FATIK BISWAS . . **1 B. L. R. A. Cr. 13**

S.C. QUEEN *v.* FUTTEALI BISWAS **10 W. R. Cr. 37**

2. ——— **Handwriting, proof of**—*Statement by third party—Memorandum.* *N* was charged with having made a false statement before a Sub-Registrar in identifying *K*, a person who had executed a mortgage-deed in favour of *R*, and who was a neighbour of his (*N's*), as being a person to whom *R* had agreed to advance the money, the consideration of the mortgage. The false statement consisted in his stating to the Sub-Registrar that he "knew *K* as his neighbour." During the hearing of the case it was sought to prove a statement made by *R* to a third party (*R* having died previous to the institution of the case) to the effect that *N* had told him certain facts. A memorandum, alleged to be in the handwriting of *N*, was also tendered and received in evidence without any further proof as to its being in *N's* handwriting than that it bore a similarity to another piece of paper proved to bear his handwriting. *Held*, that the statement made by *R* to the third party was inadmissible and irrelevant, and that the memorandum was wrongly received in evidence. NOBIN KRISHNA MOOKERJEE *v.* RASSICK LALL LAHA . . **I. L. R. 10 Calc. 1047**

9. HEARSAY EVIDENCE.

1. ——— **Hearsay evidence, inadmissibility of.** The admission of hearsay evidence prohibited. QUEEN *v.* KALLY CHURN GANGOOLY . . . . **7 W. R. Cr. 2**

QUEEN *v.* PITAMBUR SIRDAR . **7 W. R. Cr. 25**

2. ——— **Statement in absence of accused.** A statement by a witness that he heard *A* say, in the absence of the accused, that he had paid a sum of money to the accused as a bribe, is hearsay evidence and is not admissible. RAJONI KANT BOSE *v.* ASAN MULLICK **2 C. W. N. 672**

10. HUSBAND AND WIFE.

1. ——— **Admissibility of wife's evidence for or against husband or person charged jointly with him.** Upon a criminal trial in the mofussil, the evidence of a wife was held to be admissible for or against her husband or person charged jointly with him. NORMAN, *J.*, dissented. QUEEN *v.* KHYROOLLA **B. L. R. Sup. Vol. Ap. 11 6 W. R. Cr. 21**

REG. *v.* KADIR VALAD BALU . **7 Bom. Cr. 50**

2. ——— **Privileged communication**—*—Letter from husband to wife—Letter taken on search of wife's house—Evidence Act (I of 1872),*

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EVIDENCE—CRIMINAL CASES—*contd.*

10. HUSBAND AND WIFE—*concld.*

s. 122. On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the police. *Held*, that the letter was admissible in evidence against the accused. S. 122 of the Evidence Act was not applicable QUEEN-EMPRESS *v.* DONAGHUE . . . **I. L. R. 22 Mad. 1**

11. ILLEGAL GRATIFICATION.

1. ——— **Illegal gratification**—*Evidence of person bribing.* The evidence of the person who bribes is admissible against the person bribed. QUEEN *v.* ABHOY CHURN CHUCKERBUTTY **3 W. R. Cr. 19**

2. ——— *Receiving illegal gratification—Penal Code (Act XLV of 1860), ss. 161, 165—Evidence of subsequent but unconnected receipt, showing footing on which parties stood—Evidence Act (1 of 1872), ss. 5 to 13 and 14.* The accused was charged with having received illegal gratification from *C & Co.* on three specific occasions in 1876. In 1876, 1877, and 1878, *C & Co.* were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. *Held*, that evidence of similar but unconnected instances of receiving illegal gratifications from *C & Co.* in 1877 and 1878 was not admissible against him under ss. 5 to 13 of the Evidence Act: *Held, per* GARTH, *C.J.* (MACLEAN, *J.*, concurring), the evidence was not admissible under s. 14. *Per* GARTH, *C.J.*—S. 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. *Per* MITTER, *J.*—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876. EMPRESS *v.* VYAPOORY MOODELIAR **I. L. R. 6 Calc. 655 8 C. L. R. 197**

12. JUDGMENT IN CIVIL SUIT.

1. ——— **Judgment in civil suit out of which criminal prosecution arises.** In a suit by *A* against the obligors of a bond, the Court held, for the reasons stated in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of *A* on a charge of forgery. On the trial of *A* before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury. *Held*, that this judgment had been illegally admitted. GOGUN CHUNDER GHOSE *v.* EMPRESS **I. L. R. 6 Calc. 247 : 7 C. L. R. 74**

2. ——— **Admissibility in criminal prosecutions of judgment in a civil suit.** *Per* RAMPINI, *J.*—A judgment in a civil action cannot be given in evidence in a criminal prosecution for establishing the truth of the facts upon which it is rendered. Whatever may be the nature of the decision of the Civil Court, the Magistrate ought to decide the question of the accused's criminality by himself. *Per* GHOSE, *J.*—The decision in a civil suit would be admissible in evidence in a criminal case if the parties are substantially the same and the issues in the two cases are identical. RAJ KUMARI DEBI *v.* BAMA SUNDARI DEBI . . . . **I. L. R. 23 Calc. 610**

13. LETTERS.

1. ——— **Letters implicating prisoner found in his house.** Letters, etc., found in a man's house after his arrest are admissible in evidence, if their previous existence has been proved. QUEEN *v.* AMIR KHAN . **9 B. L. R. 36 17 W. R. Cr. 15**

14. MEDICAL EVIDENCE.

1. ——— **Examination of medical witness**—*Criminal Procedure Code, 1872, s. 323.* *Per* FIELD, *J.*—Under the provisions of s. 323 of the Code of Criminal Procedure, the examination of a medical witness taken and duly attested may be given in evidence in any criminal trial; but in order that such evidence may be admissible against any individual accused person, the examination must have been taken in the presence of the accused person. *In the matter of the petition of* JHUBBOO MAHTON. EMPRESS *v.* JHUBBOO MAHTON **I. L. R. 8 Calc. 739 : 12 C. L. R. 233**

2. ——— *Experts, evidence of—Medical witnesses, evidence of—Opinion of experts how elicited—Evidence Act (1 of 1872), s. 45.* A medical man who has not seen a corpse which has been subjected to a *post-mortem* examination, and who is called to corroborate the opinion of the medical man who made such *post-mortem* examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post-mortem* to the witness and to ask what in his opinion was the cause of death on the hypothesis that those signs were really present and observed. QUEEN-EMPRESS *v.* MEHER ALI MULLICK . **I. L. R. 15 Calc. 589**

3. ——— *Expert's opinion—Report of post-mortem examination.* The

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14. MEDICAL EVIDENCE—*concld.*

evidence of a medical man who has seen and has made a *post-mortem* examination of the corpse of the person touching whose death the enquiry is, is admissible, firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom. RAJHUNI SINGH *v.* EMPRESS **I. L. R. 9 Calc. 455 : 11 C. L. R. 569**

4. ——— **Report of subordinate medical officer**—*Concurrence of superior officer.* The substance of a report from a subordinate medical officer, with an expression of concurrence by his superior, cannot be read in evidence under s. 368 of the Code of Criminal Procedure. *In the matter of the petition of the* CHINTAMONEE NYE **11 W. R. Cr. 2**

5. ——— **Letter from medical officer**—*Letter expressing opinion.* A letter of a medical officer expressing an opinion is not evidence under ss. 368 and 370 of the Code of Criminal Procedure. QUEEN *v.* KAMINEE DOSSEE . **12 W. R. Cr. 25**

6. ——— **Post-mortem report.** A *post-mortem* report cannot be used as evidence at the Sessions trial, except by way of refreshing the memory of the person who made it, or to contradict him. RAM SARUP RAI *v.* EMPEROR (1901) **6 C. W. N. 98**

15. NATIVE SEALS.

——— **Comparison of native seals**—*Evidence Act, 1855, s. 48.* S. 48, Act II of 1855, is applicable to criminal trials. The test of comparison of native seals is at best but a fallible one, and must always be received with extreme caution. QUEEN *v.* AMANOOLLAH MOLLAH **6 W. R. Cr. 5**

16. NOTES OF INQUIRY.

——— **Notes on inquiry by registering officer.** The notes of an inquiry held before a registering officer are not admissible as evidence of what the prisoner said on that occasion. QUEEN *v.* PURNANUND BARICK **11 W. R. Cr. 13**

17. POLICE EVIDENCE, DIARIES, PAPERS, AND REPORTS.

1. ——— **Evidence of police officer**—*Act II of 1855, s. 31.* The practice of not examining a police officer who investigates a case

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17. POLICE EVIDENCE, DIARIES, PAPERS, AND REPORTS—*contd.*

condemned. The statements made to him might be proved by him in the witness-box, and would be admissible to corroborate the evidence of other witnesses on the same point given in Court before the Magistrate and Sessions Judge under s. 31, Act II of 1855. QUEEN *v.* AHMED ALLY . **11 W. R. Cr. 25**

2. ——— **Statement of constable of police.** Where the accused was charged with attempting to murder her child, the chief constable's statement (he having gone to search the house of the accused) that he "had information that the accused was about to kill the child," was most improperly admitted as evidence against the accused. REG. *v.* CHIMA . . . . . **8 Bom. Cr. 164**

3. ——— **Police diaries**—*Corroborative evidence.* Under s. 154, Code of Criminal Procedure, police diaries cannot be admitted as corroborative evidence. QUEEN *v.* THAKOOR CHUND SURMA **13 W. R. Cr. 22**

4. ——— *Corroborative evidence.* Police diaries cannot be legally used as substantive evidence or read to the jury. QUEEN *v.* HURDUT SURMA . . **8 W. R. Cr. 68**

5. ——— *Use of portion of diary—Criminal Procedure Code, 1861, s. 154.* Where certain portions of a police officer's diary are used as evidence against him, s. 154 of the Code of Criminal Procedure does not bar the admission of other portions of the diary as explaining the portions so used. QUEEN *v.* NOBOKRISTO GHOSE **8 W. R. Cr. 87**

6. ——— **Police papers**—*Judicial notice.* Police papers ought not to be taken judicial notice of as evidence, nor consulted in order to test evidence. QUEEN *v.* BUSSIRUDDI . **8 Wr. Cr. 35**

7. ——— **Police reports.** Police reports are not evidence, except against the reporting police officer. GOVERNMENT *v.* MUDUN DASS **6 W. R. Cr. 52**

8. ——— *Statements not made in Court—Evidence Act, II of 1855, s. 31.* It is not competent to a Court of Session to inspect an original report from the office of the Superintendent of Police, and to make it evidence against the prisoners. Statements made otherwise than before the Court and officers specified in s. 31, Act II of 1855, may be given in corroboration of testimony; but such statements must be regularly proved by the person who received them or by some one who heard them given. QUEEN *v.* BISSEN NATH **7 W. R. Cr. 31**

9. ——— *Breach of the peace, Likelihood of—Report of police officer.* The report made by a police officer that there is a likelihood of there being a breach of the peace is not legal evidence to prove the existence of any dispute likely to cause a breach of the peace. ABHAYA CHOWDHRY *v.* BRAE **6 B. L. R. Ap. 148 : 15 W. R. Cr. 42**

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17. POLICE EVIDENCE, DIARIES, PAPERS, AND REPORTS—*concld.*

QUEEN *v.* BHYRO DAYAL SINGH
3. B. L. R. A. Cr. 4 : 11 W. R. Cr. 46

In the matter of BHADRESWARI CHOWDHRANI
7 B. L. R. 329

In the matter of the petition of SHAMASANKER MAZUMDAR . . . **9 B. L. R. Ap. 45**

S.C. SAMASANKER MOZOOMDAR *v.* ANNUND MOYEE DOSSYA . . . **18 W. R. Cr. 64**

10. ——— Written statement recorded by police-officer during police investigation —*Admissibility in evidence against person making it —Record—Intentionally giving false evidence—Proof necessary of each statement made—Code of Criminal Procedure (Act V of 1898), s. 162—Evidence Act (I of 1852), s. 35—Penal Code (Act XLV of 1860), s. 193.*—There is nothing in s. 162 of the Code of Criminal Procedure which limits the prohibition of the use of a written statement recorded by a police-officer, as evidence, to the matter of the charge which is actually under investigation by the police officer when the statement is made. The prohibition extends also to the use of such written statement against the person who is alleged to have made the statement. Such a written satement does not come within the description of a record within the meaning of s. 35 of the Evidence Act, nor is it admissible in evidence under that section. It is very irregular, in a charge of intentionally giving false evidence, to put the whole of a long statement bodily to a witness at once. A conviction on such a charge could properly be had only on proof that the accused person had made to the police-officer each and every statement contained in the document. ISAB MANDAL *v* QUEEN-EMPRESS (1900)
I. L. R. 28 Calc. 348 : s.c. 5 C. W. N. 65

18. PREVIOUS CONVICTIONS.

1. ——— Previous convictions—*Admissibility of evidence.* Previous convictions are not admissible in evidence. QUEEN *v.* THAKOOR DASS CHOOTUR . . . . **7 Wr. Cr. 7**

QUEEN *v.* PHOOLCHAND *alias* PHOLEEL AHIR
8 W. R. Cr. 11

2. ——— *Determination of amount of punishment.* Except under very special circumstances, the proper object of using previous convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged. ROSHUN DOOSADH *v.* EMPRESS
I. L. R. 5 Calc. 768 : 6 C. L. R. 219

3. ——— *Report from Record office.* A kaifut, or report from the Record office, that *A* had been convicted of a crime, is no evidence of a previous conviction. QUEEN *v.* RAMZAN . **6 B. L. R. Ap. 15 : 15 W. R. Cr. 53**

EVIDENCE—CRIMINAL CASES—*contd.*

18. PREVIOUS CONVICTIONS—*concld.*

QUEEN *v.* NUZEE NUSHYO **15 W. R. Cr. 52**

4. ——— *Previous conviction for the purpose of increasing the evidence at the trial against accused—Evidence Act (I of 1872), s. 54—Criminal Procedure Code (Act X of 1882), s. 310.* Under s. 54 of the Evidence Act, a previous conviction is in all cases admissible in evidence against an accused person. QUEEN-EMPRESS *v.* KARTIC CHUNDER DAS . **I. L. R. 14 Calc. 721**

5. ——— *Previous commissions and convictions of dacoity—Conviction subsequent to the charge—Penal Code (Act XLV of 1860), s. 400.* Having regard to the character of the offence under s. 400, Penal Code, previous commissions of dacoity are relevant under s. 14 of the Evidence Act. Convictions previous to the time specified in the charge are relevant under explanation 2 of s. 14, but convictions subsequent to the time specified in the charge are not so admissible. *Queen-Empress* v. *Kartick Chunder Das, I. L. R. 14 Calc. 721,* referred to. EMPRESS *v.* NABA KUMAR PATNAIK . . **1 C. W. N. 146**

6. ——— *Accused, examination of, in respect of previous convictions—First offences—Sentence—Evidence Act (I of 1872), s. 91—Criminal Procedure Code (Act V of 1898), ss. 342 and 511—Penal Code (Act XLV of 1860), ss. 411 and 457.* In order to support a charge of a previous conviction, there should be on the record a copy of some judgment or extract from a judgment, or some other documentary evidence of the fact of such previous conviction, as is required by s. 91 of the Evidence Act or s. 511 of the Code of Criminal Procedure. The examination by a Magistrate of the accused in respect of such previous conviction is without legal warrant or justification. *Basanta Kumar Ghattak v. Queen-Empress, I. L. R. 26 Calc. 49,* followed. YASIN *v.* KING-EMPEROR (1901)
I. L. R. 28 Calc. 689 s.c. 5 C. W. N. 670

19. PROCEEDINGS OF CRIMINAL COURTS.

1. ——— Proceedings in criminal trial and proof of. The proceedings in a criminal trial, when necessary to be proved, should be proved by their production. REG. *v.* RAVJI VALAD TAJU . . . . . **8 Bom. Cr. 37**

2. ——— Evidence—*Order unsupported by evidence—Criminal Procedure Code (Act V of 1898), s. 147.* In proceedings under s. 147 of the Criminal Procedure Code, the first party filed their written statement, and the Magistrate, having declined to give the second party time to file their written statement, made an order under that section in favour of the first party, without recording any evidence. *Held,* that the Magistrate ought to have had some evidence in proof of the allegations contained in the written statement; and that, there being no such evidence upon which the order could

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EVIDENCE—CRIMINAL CASES—*contd.*

19. PROCEEDINGS OF CRIMINAL COURTS —*concld.*

be supported, it should be set aside. *Haro Mohan Sardar* v. *Gobind Sahu, 7 C. W. N., 351,* distinguished. MAHOMED NUR *v.* BIKKAN MAHTON (1903) . . . . **I. L. R. 30 Calc. 918: s.c. 7 C. W. N. 510**

20. STATEMENTS TO POLICE OFFICERS.

See CONFESSION—CONFESSIONS TO POLICE OFFICERS.

1. ——— Admission to police officer. Admissions made by prisoners to police officers while in their custody are not admissible in evidence. QUEEN *v.* BUSHMO ANENT . **3 W. R. Cr. 21**

2. ——— *Statement as complainant while in custody, as an accused person.* If a person while in custody as an accused gives information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial. MOHER SHEIKH *v.* QUEEN-EMPRESS **I. L. R. 21 Calc. 392**

3. ——— Statement extorted by police officer by inducement. A police officer acts improperly and illegally in offering any inducement to an accused person to make any disclosure or confession. No part of his evidence as to the discovery of facts in consequence of such confession is legally admissible. QUEEN *v.* DHURUM DUTT OJHA **8 W. R. Cr. 13**

4. ——— Statement obtained by persuasion and promise of immunity—*Criminal Procedure Code, 1861, s. 146.* An admission obtained from a prisoner by persuation and promises of immunity by the police ought not to be received in evidence as being in direct contravention of s. 146, Code of Criminal Procedure. The deposition of the police officer, moreover, should be taken before the admission can at all be used against the prisoner under s. 150, Code of Criminal Procedure. QUEEN *v.* BISHOO MANJEE . . **9 W. R. Cr. 16**

5. ——— Answers given by prisoner to police constables or magistrate. *G D* presented a Government promissory note at the Bank of Bengal bearing a forged endorsement, and was arrested. A police constable asked *N* if he knew *G D.* *N* replied that he knew him as a common man. The police constable then asked *N* if he knew anything about the note. *N* replied that he did not. No threat or inducement was held out, nor was any caution administered to *N.* *Held,* that the statements made by *N* in answer to the questions of the police constable were admissible. *N* was afterwards brought before *R,* the Deputy Magistrate of Serampore, who told him, before any depositions were taken, that he (*N*) was charged with having received a stolen promissory note, and *R* asked him if he wished to say anything. *N* replying in the affirmative, *R,* without administering any caution to him, asked him how or where he had obtained the note, and other questions, the answers to which were taken down. *N* was again brought up before *R,* and was asked whether a promissory note then produced was the one he had delivered to *G D* to take to the Bank. *R* told *N* that he was not bound to answer the question, but if he did, the answer would be taken down, and that, if he objected to answer, that would also be noted. *R* committed *N* to take his trial before the High Court. *Held,* that on the trial the answers of *N* to the questions of *R,* whether *R* acted as a Justice of the Peace for Bengal or as a Magistrate, were admissible. QUEEN *v.* NABADWIP GOSWAMIE **1 B. L. R. O. Cr. 15: 15 W. R. Cr. 71 note**

6. ——— Statement made to Magistrate by party in custody. A statement which a man in the custody of the police volunteers to one in the position of a Magistrate, can be used as evidence against the man who makes it. QUEEN *v.* MON MOHUN ROY . . **24 W. R. Cr. 33**

7. ——— Statements to police officer —*Evidence Act, s. 27—Theft of jewels from murdered woman.* The accused, charged with the murder of a woman, made a confession to a police inspector, part of which related to the concealment of certain jewels which belonged to the deceased woman, and in consequence of the information so received the jewels were discovered. *Held,* that, under s. 27 of the Evidence Act, that part of the accused's confession which described his assault on the deceased and her consequent death, and the way in which he became possessed of the jewels related distinctly to the fact of the discovery of the ornaments, and might be proved against the accused. QUEEN *v.* PAGAREE SHAHA **19 W. R. Cr. 51**

8. ——— *Written record of statement—Criminal Procedure Code, 1872, s. 119—Inadmissibility of written evidence—Oral evidence.* Where the accused was charged under s. 193 of the Penal Code with having given false evidence, in that he denied having made certain statements which he was alleged to have made to the inspector of police, that officer was examined and merely put in two documents containing the statements alleged as the records of what had taken place. *Held,* that, these documents being inadmissible in evidence under s. 119 of the Code of Criminal Procedure, evidence ought to have been given as to what was actually stated by the accused to the inspector of police. *In the matter of* DABU **6 C. L. R. 47**

9. ——— *Criminal Procedure Code, s. 119—Evidence Act, 1872, ss. 91-155, 159.* S. 119 of the Code of Criminal Procedure not making it obligatory upon a police officer to reduce to writing any statements made to him during an investigation, neither that section nor s. 91 of the

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20. STATEMENTS TO POLICE OFFICERS —*contd.*

Evidence Act renders oral evidence of such statements inadmissible. If the statements be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence, but may be used for the purpose of refreshing memory under s. 159 of the Evidence Act. Consequently the person making the statements may properly be questioned about them ; and, with a view to impeach his credit, the police officer himself, or any other person in whose hearing the statements were made, can be examined on the point under s. 155 of the Evidence Act. REG. *v.* UTTAMCHAND KAPURCHAND **11 Bom. 120**

10. ——— **Statements made by prisioners during police custody**—*Evidence Act, s. 27.* Under s. 27 of the Evidence Act, not every statement made by a person accused of any offence while in the custody of a police officer connected with the production or finding of property is admissible. Those statements only which lead immediately to the discovery of property, and in so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus immediately, but not necessarily or directly, connected with the fact discovered, are not admissible. That a witness says that a plan was prepared in his presence is not a sufficient reason for admitting the plan in evidence, unless the witness also says that to his own knowledge the plan is correct. REG. *v.* JORA HASJI **11 Bom. 242**

11. ——— *Criminal Procedure Code (Act X of 1882), s. 162—Statements of witnesses before police—Evidence Act (I of 1872), s. 157.* The positive prohibition under s. 162 of the Criminal Procedure Code (Act X of 1882), *viz.*, that statements to the police other than dying declarations shall not be sued in evidence against the accused, cannot be set aside by reference to s. 157 of the Evidence Act (I of 1872). QUEEN-EMPRESS *v.* JIJIBHAI GOVIND . **I. L. R. 22 Bom. 596**

12. ——— *Evidence Act (I of 1872), s. 157—Criminal Procedure Code, 1882, s. 162.* S. 157 of the Evidence Act, which lays down the general rule, must be taken subject to the exception contained in the special rule enacted by s. 162, Code of Criminal Procedure, which makes statements to the police other than dying declarations inadmissible in evidence against the accused. QUEEN-EMPRESS *v.* BHAIRUB CHUNDER CHUCKERBUTTY . . . . **2 C. W. N. 702**

13. ——— *Evidence Act, ss. 155 and 159—Criminal Procedure Code (Act X of 1882), s. 162—Statement taken down by a police officer under s. 162—Evidence.* A statement reduced to writing by a police officer under s. 162 of the Code of Criminal Procedure (Act X of 1882) cannot be used as evidence for the accused. But though it is not evidence, the police officer to whom it was made may use it to refresh his memory under s. 159 of the Evidence Act (I of 1872), and may be cross-examined upon it by the party against whom the testimony aided by it is given. The person making the statement may also be questioned about it ; and with a view to impeach his credit, the police officer, or any other person in whose hearing the statement was made, can be examined on the point under s. 155 of the Evidence Act. *Reg. v. Uttamchand, 11 Bom. 120,* followed. QUEEN-EMPRESS *v.* SITARAM VITHAL **I. L. R. 11 Bom. 657**

14. ——— *Criminal Procedure Code, 1882, s. 161—Statement taken down by police officer.* A statement take down in the course of a police investigation by a police constable under s. 161 of the Criminal Procedure Code (Act X of 1882) is not evidence at any stage of a judicial proceeding. QUEEN-EMPRESS *v.* ISMAL VALAD FATARU . . . **I. L. R. 11 Bom. 659**

15. ——— *Statement of accused to police officer during investigation—Admissions—Confessions—Criminal Procedure Code, ss. 25, 26, 27.* Instances of statements made by an accused person to a police officer held to be admissible or inadmissible in evidence against such accused person. QUEEN-EMPRESS *v.* MEHER ALI MULLICK . . . **I. L. R. 15 Calc. 589**

16. ——— *Evidence Act, ss. 26, 27—Confessional statements made in the custody of police—Tests of admissibility.* The test of the admissibility under s. 27 of the Evidence Act of information received from an accused person in the custody of a police officer, whether amounting to a confession or not, is—"Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact ?" QUEEN-EMPRESS *v.* COMMER SAHIB **I. L. R. 12 Mad. 153**

17. ——— *Criminal Procedure Code (Act X of 1882), ss. 161, 172, 211—Statements of witnesses recorded by police officers investigating under Ch. XIV, Criminal Procedure Code,—right of accused to call for and inspect police diaries.* Statements of witnesses recorded by a police officer while making an investigation under s. 161 of the Criminal Procedure Code form no portion of the police diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon. BIKAO KHAN *v.* QUEEN-EMPRESS . **I. L. R. 16 Calc. 610**

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MAHOMED ALI HADJI *v.* QUEEN-EMPRESS
I. L. R. 16 Calc. 612 note

18. ——— *Criminal Procedure Code, s. 161—Penal Code (Act XLV of 1860), ss. 191 and 193—False evidence—Statement made to a police officer investigating a case—Mode of recording such statement.* It is not necessary that the statement of a witness recorded under s. 161 of the Code of Criminal Procedure, 1882, should be elicited and recorded in the form of alternate question and answer. It is sufficient if such statement is substantially an answer to one or more questions addressed to the witness before the statement is made. The provisions of ss. 191 and 193 of the Penal Code apply to the case of false statements made under s. 161 of the Code of Criminal Procedure, 1882. It is not illegal, though unnecessary, for a police officer recording a statement under s. 161 of the Code of Criminal Procedure, 1882, to obtain the signatures of persons present at the time to authenticate his record of such statement. QUEEN-EMPRESS *v.* BHAGWANTIA
I. L. R. 15 All. 11

19. ——— *Criminal Procedure Code, ss. 161 and 162—Statement made by a witness to police officer making an investigation—Use of such statement to contradict witness—Use of statement against accused.* A statement made by a witness under s. 161 of the Code of Criminal Procedure to a police officer investigating a case, may be proved at the trial of such case to contradict such witness, the witness having been first cross-examined on the point in respect of which it is sought to contradict him. But where it appeared that, but for the principal witness for the defence having been discredited by means of proof of a previous inconsistent statement made by the said witness before the investigating officer, the accused would have been acquitted, it was *held* that this amounted to a using of such statement as evidence against the accused within the meaning of s. 162 of the Code of Criminal Procedure. *Queen-Empress v. Sitaram Vithal, I. L. R. 11 Bom. 657,* approved. QUEEN-EMPRESS *v.* MADHO . **I. L. R. 15 All. 25**

20. ——— *Criminal Procedure Code (Act X of 1882), ss. 161 and 172—Statements of witnesses recorded by police officers investigating under Ch. XIV of the Criminal Procedure Code—Police diaries.* The privilege given by s. 172 of the Code of Criminal Procedure does not extend to statements taken under s. 161, but recorded in the diary made under s. 172. SHERU SHA *v.* QUEEN-EMPRESS
I. L. R. 20 Calc. 642

21. ——— *Criminal Procedure Code (1882), ss. 161 and 162—Statements made to police officer in the course of an investigation—Use of notes of such statements at trial before the Court of Session—Police diaries—Practice.* A police officer's notes of statements made to him in the course of an investigation and recorded by him under s. 161 of the Code of Criminal Procedure should, if used at all at the subsequent trial, be used only after proper proof of them, and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge. Copies of such notes should not be given without question, and, as a matter of course, to the accused or his counsel. QUEEN-EMPRESS *v.* NASIR-UD-DIN
I. L. R. 16 All. 207

22. ——— *Criminal Procedure Code (1882), ss. 161 and 162—Use at trial in Sessions Court of statements made to police officer investigating case.* Though, speaking generally, statements, other than dying declarations, made to a police officer in the course of an investigation under Ch. XIV of the Code of Criminal Procedure may be used at the trial in favour of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may be shown by the evidence of the police officer that he did make a statement favourable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the police officer, he would be allowed to refresh his memory by referring to it, but the written statement itself, when the statement has been reduced into writing (according to the section, it must not be signed by the person making it), cannot be used as direct evidence of what was stated by the witness to the police officer. QUEEN-EMPRESS *v.* TAJ KHAN
I. L. R. 17 All. 57

23. ——— *Criminal Procedure Code (Act V of 1898), s. 161—Impropriety of taking down statements of persons immediately before their arrest—Evidence Act (I of 1872), s. 25.* Where there is evidence in the hands of a police officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person professedly under s. 161 of the Criminal Procedure Code and reduce it to writing; and by virtue of s. 25 of the Evidence Act such statement is inadmissible in evidence. QUEEN-EMPRESS *v.* JADUB DAS . . **I. L. R. 27 Calc. 295**
4 C. W. N. 129

24. ——— **Special diary**—*Criminal Procedure Code (1882), ss. 161, 162, 167, and 172—Police diaries—What the diary should or should not contain—Statements recorded under s. 161 of the Code of Criminal Procedure—Use which may be made of the special diary by the Court—Sessions Judge, power of—Right of the accused or his agent to see the special diary—Evidence Act (I of 1872), ss. 39, 145 and 161.* A Sessions Judge, although he has power in any particular case which is before him to send for the police diaries connected with the

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20. STATEMENTS TO POLICE OFFICERS —*contd.*

case, if he thinks it necessary to peruse them, has no authority to issue a general order that in every case committed for trial to the Court of Session and in every criminal appeal, the police diaries shall be submitted to the Court simultaneously with the Magistrate's record of the case. Such an order is illegal. In no case is an accused person entitled as of right to a copy of any statement recorded by a police officer in the special diary prepared under the authority of s. 172 of the Code of Criminal Procedure. The special diary may be used by the Court to assist it in the inquiry or trial by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused; but entries in the special diary cannot by themselves be taken as evidence of any date, fact, or statement therein contained. The special diary may also be used by the Court for the purpose of contradicting the police officer who made it, and the special diary may be used by the police officer who made it and by no witness other than such officer, for the purpose of refreshing his memory. If the special diary is used by the Court to contradict the police officer who made it or by the police officer who made it to refresh his memory, the accused person or his agent has a right to see that portion of the diary which has been referred to for either of these purposes, that is to say, the accused person, or his agent, is entitled to see the particular entry which has been referred to, and so much of the diary as, in the opinion of the Court, is necessary in that particular matter to the full understanding of particular entry so used, but no more. So *held* by the Full Bench. *Per* EDGE, *C.J.*, KNOX, BLAIR, and BURKITT, *JJ.*—A police officer investigating a case may lawfully reduce into writing in the special diary the full and unabridged statement made to him by a person whom he is examining or has examined under s. 161 of the Code of Criminal Procedure, and if he does so, his record of such statement is part of the special diary and is just as much privileged as any other entry in the diary. All statements made under s. 161 of the Code of Criminal Procedure to a police officer, and reduced into writing by him, should be reduced into writing in the special diary, and not elsewhere. *Per* BANERJI, *J.*, and AIKMAN, *J.*—Statements recorded under s. 161 of the Code of Criminal Procedure by a police officer making an investigation were not intended by the Legislature to be entered in the special diary, and if they are so entered, do not form an integral part of the diary and are not privileged, but the accused person or his agent is entitled to see them. A mere summary, however, of facts ascertained by an investigating officer from persons examined by him, not being a report of their actual statements, may properly find a place in the special diary. The following cases were referred to:—*Empress* v. *Kali Churn Chunari, I. L. R. 8 Calc. 154; Kallu* v. *Queen-Empress,*

20. STATEMENTS TO POLICE OFFICERS —*concld.*

29 Panj. Rec. Cr. 55; Queen-Empress v. *Nasir-ud-din, I. L. R. 16 All. 207; Queen-Empress* v. *Jhubboo Mahton, I. L. R. 8 Calc. 739; In the matter of Mahomed Ali Haji* v. *Queen-Empress, I. L. R. 16 Calc. 612 note; Bikao Khan* v. *Queen-Empress, I. L. R. 16 Calc. 110; Sheru Sha* v. *Queen-Empress, I. L. R. 20 Calc. 642; Queen-Empress* v. *Rudr Singh, All. W. N. (1896) 120;* and *Reg.* v. *Uttamchand Kapurchand, 11 Bom. 120.* QUEEN-EMPRESS *v.* MANNU **I. L. R. 19 All. 390**

25. ———— Statement as to ownership of property—*Evidence of ownership—Criminal Procedure Code (Act X of 1882), ss. 517 and 523—Confession made to police officer, admissibility of, for other purposes than as a confession.* Statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an enquiry held by the Magistrate under s. 523 of the Criminal Procedure Code (X of 1882). QUEEN-EMPRESS *v.* TRIBHOVAN MANEKCHAND **I. L. R. 9 Bom. 131**

26. ———— Admission of guilty knowledge—*Criminal Procedure Code, 1861, s. 150—Dacoity.* To make an admission of guilty knowledge of the means by which money supposed to have been acquired by dacoity was obtained evidence under s. 150 of the Code of Criminal Procedure, it must be shown that the admission was antecedent to the discovery of the money. QUEEN *v.* KAMAL FUKEER . . . . **17 W. R. Cr. 50**

27. ———— Statement of accused overheard by police officer. The evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it, is not legally inadmissible. QUEEN *v.* SAGEENA **7 W. R. Cr. 56**

21. STOLEN PROPERTY.

1. ———— Evidence of possession of stolen articles—*Non-production of, for recognition by witness.* Recognition of things not before the eyes of deposing witness is not evidence against a person accused of having been in possession of those things. QUEEN *v.* JOOMNEE **8 W. R. Cr. 16**

2. ——————— *Penal Code (Act XLV of 1860), s. 380—Theft from a railway van—Property found in an adjoining van, in which four railway coolies were travelling.* On suspicion of theft of certain articles from a running goods train, a van on the train, in which four railway coolies were travelling, was searched. The property missed was not found, but, hidden under a

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EVIDENCE—CRIMINAL CASES—*concld.*

21. STOLEN PROPERTY—*concld.*

heap of clothing belonging to the four coolies, were discovered 10 *thans* of cloth which on investigation were ascertained to have been abstracted from the next van. *Held*, that none of the four coolies travelling in the van where the 10 *thans* of stolen cloth were found could be convicted of the theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth. KING-EMPEROR *v.* ALI HUSAIN (1901) . . **I. L. R. 23 All. 306**

22. TEXT BOOKS.

1. ——— Text books, reference to—*Work on medical jurisprudence.* A well-known treatise such as Taylor's Medical Jurisprudence may be referred to in the course of a trial. *Hatim* v. *Empress, 12 C. L. R. 86*, followed. HURRY CHURN CHUCKERBUTTY *v.* EMPRESS **I. L. R. 10 Calc. 140**

2. ——— *Evidence Act, ss. 57 and 60—Reference to work on medical jurisprudence.* Under the provisions of the penultimate paragraph of s. 57 and of the first proviso of s. 60 of the Evidence Act, the Court referred to Taylor's Medical Jurisprudence with reference to the effect likely to be caused by a sudden blow on the abdomen. HATIM *v.* EMPRESS . . **12 C. L. R. 86**

23. THUMB IMPRESSIONS.

1. ——— Comparison of Thumb impressions—*Evidence Act (I of 1872), ss. 9, 11, cl. (e), and 45—Expert evidence as to impressions.* *F* was charged with having forged a document purporting to have been executed by *N* and with falsely personating *N*. When the document was presented, a witness was called to prove the identity of the thumb mark of the person, who alleged that he was the executant of the document, taken at the Registration Office with an admitted thumb mark of the accused *F*. *Held*, that, though a comparison of thumb mark was admissible in law, it can only be made by the Court: no evidence of the identity of thumb marks can be given by a witness. QUEEN-EMPRESS *v.* MAHOMED SHEIKH . . . . . **1 C. W. N. 33**

EVIDENCE—PAROL EVIDENCE.

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See LIMITATION ACT, 1877, s. 19—ACKNOWLEDGMENT OF DEBTS. **I. L. R. 25 Mad. 220**

1. VALUE OF, IN VARIOUS CASES.

1. ——— Proof of fact or title. Oral testimony, if worthy of credit, is sufficient, without documentary evidence, to prove a fact or a title. RAM SOONDUR MUNDUL *v.* AKIMA BIBEE **8 W. R. 366**

SURUT SOONDUREE DEBIA *v.* RAJENDUR KISHORE ROY CHOWDHRY . . . **9 W. R. 125**

GOLUCK KISHORE ACHARJEE CHOWDHRY *v.* NUND MOHUN DEY SIRCAR . **12 W. R. 394**

GIRDHAREE LALL SINGH *v.* MODHOO ROY **18 W. R. 323**

DINOO SINGH *v.* DOORGA PERSHAD **18 W. R. 348**

2. ——— Evidence of possession. In a suit brought on an allegation of forcible dispossession, oral evidence, if credible and pertinent, is sufficient to establish the fact of possession. SHEO SUHAYE ROY *v.* GOODUR ROY **8 W. R. 328**

DINOBUNDHOO SUHAYE *v.* FURLONG **9 W. R. 155**

3. ——— *Documentary evidence.* Mere oral testimony was, under the particular circumstances, held to be insufficient to prove possession of land without any of the documentary evidence (leases, agreements, collection papers, etc.) which is the invariable concomitant of actual possession in this country. THAKOOR DEEN TEWAREE *v.* ALI HOSSEIN KHAN **8 W. R. 341 : s.c. on appeal 13 B. L. R. 427 : 21 W. R. 340 : L. R. 1 I. A. 192**

4. ——— Boundary dispute. In a boundary dispute, oral evidence is quite insufficient to establish either the fact of possession or of title. GOLUCK CHUNDER BOSE *v.* SREEMURD RAJESHUREE BIDDIADHUR SOONDEAH NURRENDUR. **W. R. 1864, 135**

5. ——— Proof of prescriptive title. Oral evidence, if credible, is legally sufficient to prove a prescriptive title. MEHARBAN KHAN *v.* MUHBOOB KHAN . . . **7 W. R. 462**

6. ——— Suit for purchase-money—*Apportionment of money.* In a suit for purchase-money, oral evidence is admissible to show how the purchase-money has been apportioned. DHOKA THAKOOR *v.* RAM LALL SAHEE . **7 W. R. 408**

7. ——— Guarantee. There may be cases in which the Courts would accept and act upon parol evidence of the existence of a guarantee and its amount, but such parol evidence must be beyond suspicion. LEKHRAJ *v.* PALEE RAM **2 N. W. 210**

8. ——— Pedigree, question of—*Proof of native pedigree.* In proving a native pedigree,

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EVIDENCE—PAROL EVIDENCE—*contd.*

1. VALUE OF, IN VARIOUS CASES—*contd.*

the oral statements of deceased relatives will be admitted in the absence of any registers of births and deaths. MOHEDEEN AHMED KHAN *v.* MAHOMED **1. Ind. Jur. O. S. 132 1 Mad. 92**

9. ——— Oral evidence of acknowledgment—*Limitation Act, 1877, s. 19.* Under s. 19 of the Limitation Act (XV of 1877), oral evidence of the contents of an acknowledgment cannot be received. ZIULNISSA LADLI BEGAM *v.* MOTIDEV RATANDEV . . **I. L. R. 12 Bom. 268**

10. ——— Adjustment of account. An adjustment of accounts may be proved by oral evidence. KAMPILIKARIBASANAPPA *v.* SOMA SAMUDDIRAM . . . . . **1 Mad. 183**

11. ——— Evidence of payment of debt on bond. Payment of a debt due on a samaduskut may be proved by oral evidence alone. GUMAN GALUBHAI *v.* SORABJI BARJORJI **1 Bom. 11**

12. ——— Evidence of discharge of written obligation. Oral evidence of the discharge of an obligation executed by writing is admissible. RAMANADAMISARAIYAR *v.* RAMABHATTAR **2 Mad. 412**

13. ——— Repayment of Mortgage-debt—*Verbal agreement to repay in bond. Held,* that, though there may be a condition for repayment of a mortgage-debt in money, the mortgagee may bind himself to receive the payment in money's worth, and this orally, notwithstanding that the mortgage-debt is created by a written obligation. The mode in which an obligation may be discharged and satisfied by payment is a distinct matter from the obligation itself. DURYA *v.* MOHUR SINGH **2 Agra 163**

14. ——— Proof of payment—*When payments are to be endorsed.* A stipulation in a document that no other payments except payments endorsed on the document itself shall be admitted, does not exclude proofs of payment by other evidence. SASHACHELLUM CHETTY *v.* GOBINDAPPA **5 Mad. 451**

NUGUR MULL *v.* AZEEMOOLLAH **1 N. W. 146 : Ed. 1873, 228**

15. ——— *Mortgage-bond, Discharge of—Admissibility of oral evidence—Evidence Act (I of 1872), s. 92 (4).* Oral evidence is admissible to prove the discharge and satisfaction of a mortgage-bond. The provisions of s. 92, prov. 4 of the Evidence Act, do not exclude such evidence. RAMLAL CHANDRA KARMOKAR *v.* GOBINDA KARMOKAR . . . . . **4 C. W. N. 304**

16. ——— *Evidence Act, s. 92—Contemporaneous oral agreement—Bond payable by instalments.* In a suit upon a kistibundi bond the defendants pleaded that the debt had been liquidated from the usufruct of certain property, which, by an oral agreement entered into at the time of the execution of the bond, had been assigned by them to the plaintiffs for that purpose. The assignment having been proved, the Court of first instance, without further enquiry, dismissed the plaintiffs' suit. The District Judge, however, reversed the order of that Court on the ground that under s. 92, Act I of 1872, evidence of the alleged oral agreement was inadmissible, it being a contemporaneous agreement, varying, and to some extent contradicting, the terms of the kistibundi bond. On appeal: *Held,* that the allegation of the defendants amounted merely to a plea of payment, and that s. 92 of the Evidence Act was not a bar to an enquiry as to the foundation of such a plea, and the case was accordingly remanded for an enquiry to be made as to whether the whole or any portion of the kistibundi money had been liquidated from the profits of the land assigned. GOVINDO PROSAD ROY CHOWDHRY *v.* ANUND CHUNDER CHOWDHRY . **4 C. L. R. 274**

2. EXPLAINING WRITTEN INSTRUMENTS AND INTENTION OF PARTIES.

1. ——— Proof of existence of mortgage. Where a question arises (not between mortgagor and mortgagee) as to the previous existence or non-existence of a particular mortgage, the oral evidence of the mortgagee that it did exist will be sufficient to prove the fact, without the production of the mortgage-deed. AMJAD ALI *v.* MONIRAM KOLITA . . . . **I. L. R. 12 Calc. 52**

2. ——— Evidence that bond was executed in different capacity from what appears. It is competent to a party to show that a bond executed in favour of *A* was really in favour of *B*, and that *A* was a party to it merely in the capacity of gomastah of *B*. SUHOODERA *v.* RAM RUTTON TEWAREE . . **Marsh. 3 : 1 Hay 24**

3. ——— Benami purchase—*Hindus.* As between Hindus, oral evidence is admissible to show that land nominally purchased for *A* and conveyed to him by an instrument in writing was really purchased for *A*, *B*, and *C*. PALANYAPPA CHETTI *v.* ARAMUGAM CHETTI . **2 Mad. 26**

4. ——— Explaining use of benami name. Parol evidence is admissible to show that the name of the party used in a deed was only benami for another person. TARA MONEE DEBIA *v.* SHIBNATH TULAPATTUR . **6 W. R. 191**

5. ——— Explaining terms of document. Oral evidence may be submitted to explain a document, but not to vary the terms thereof when such terms are in themselves clear and undoubted. RAMBUDDUN SINGH *v.* SREE KOONWAR **W. R. 1864, Act X, 22**

CHUNDER NATN DEB *v.* GANGA GOBIND SINGH ROY . . . . . **1 W. R. 94**

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EVIDENCE—PAROL EVIDENCE—*contd.*

2. EXPLAINING WRITTEN INSTRUMENTS AND INTENTION OF PARTIES—*contd.*

MOHUN LALL ROY *v.* UNNOPOORNA DOSSEE **9 W. R. 566**

6. ——— Patent ambiguity—*Intention of parties.* Extrinsic evidence may be received to identify the thing referred to in a written agreement. Where there is a written agreement to deliver a quantity of grain (gulla) at a particular time, parol evidence is admissible under certain limitations to show what kind of grain the contracting parties had in their contemplation at the time the contract was made. VALLA BIN HATAJI *v.* SIDOJI BIN KONDAJI . . . **5 Bom. A. C. 87**

7. ——— Latent ambiguity—*Altering written contract.* Extrinsic evidence is not admissible to alter a written contract or to show that its meaning is different from what its words import; where there is a latent ambiguity in the wording, parol evidence is admissible to explain it. RAM LOCHUN SHAHA *v.* UNNOPOORNA DASSEE **7 W. R. 144**

8. ——— Evidence to explain deed—*Intention of parties.* Parol evidence was held admissible to explain a deed, *e.g.*, to prove that a village not included in a patni lease was intended by the parties to be included in it. DHUNPUT SINGH DOOGUR *v.* JOWAHUR ALI . **8 W. R. 152**

9. ——— Admissibility of Evidence to identify land as that mentioned in document. In a suit for redemption of land mortgaged to the defendant, the plaintiffs relied upon a document as containing an acknowledgment of the title of the plaintiff under s. 15 of the Act of Limitation (XIV of 1859). The document contained an admission by the defendant that he held land upon mortgage in a specified district from the temple of which plaintiffs were the trustees. *Held*, that oral evidence was admissible to apply the document to the land to which it was intended to refer. VALAMPUDDUCHERRI PADMANABHAN *v.* CHOWAKAREN PUDIAPURAYIL KUNHI KOLENDAN **5 Mad. 320**

10. ——— Evidence to identify land mortgaged—*Evidence Act, s. 92, cl. 6, and s. 95.* The obligors of a bond for the payment of money, describing themselves as "sons of *R*, zamindar and pattidar, resident of mouzah *S*," hypothecated as collateral security for such payment "their one biswa five biswansi share." *Held*, in a suit on the bond to enforce a charge on the one biswa five biswansi share of the obligors in mouzah *S*, that, under prov. 6, s. 92, and s. 95 of Act I of 1872, evidence might be given to show that the obligors hypothecated by the bond their share in mouzah *S*. RAM LAL *v.* HARRISON . **I. L. R. 2 All. 832**

11. ——— Evidence to explain clause in document—*Evidence Act, s. 92—Specific Relief Act, ss. 17, 22, and 26.* The plaintiffs sued for specific performance of an agreement in writing which set forth, *inter alia*, that the defendants had agreed to sell, etc., under "certain conditions as agreed upon." The defendants alleged that the written agreement did not contain the whole of the agreement between the parties, and offered parol evidence in support of their contention. *Held* (reversing the judgment of WILSON, *J.*), that the parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon." Per PONTIFEX, *J.* (GARTH, *C.J.*, dissenting)—The evidence was admissible under prov. 1, s. 92 of the Evidence Act (I of 1872). Discussion as to the meaning of s. 92 of the Evidence Act, and of ss. 17, 22, and 26 of the Specific Relief Act. CUTTS *v.* BROWN **I. L. R. 6 Calc. 328 : 7 C. L. R. 171**

12. ——— Evidence to explain identity of persons—*Evidence to specify debt—Suit on promissory note.* A suit was brought on a promissory note by which the defendant promised to pay to the plaintiff R1,000 with interest. The defendant afterwards wrote the following letter to *W*: "I further hold myself responsible to you for the two sums of R1,000 and R900 respectively, the latter sum bearing interest at 24 per cent. per annum. Both these sums of R1,000 and R900 I engage to pay you." *Held*, that parol evidence was admissible to show that, though the letter was addressed to *W*, the plaintiff *S* was the person referred to as *W*, and that the letter was given to her. Parol evidence was also admissible to show what debt was referred to in the acknowledgment, and that it related to the promissory note. UMESH CHANDRA MOOKERJEE *v.* SAGEMAN **5 B. L. R. 632 note**

S.C. UMESH CHANDRA MOOKERJEE *v.* SAGEMAN **12 W. R. O. C. 2**

13. ——— Evidence to supply words in deed partially destroyed by insects. The lower Court received parol evidence to supply words in an old deed, lost in consequence of the parts on which they were written having been eaten by insects. *Held*, that the parol evidence was properly admitted. BENODHEE LALL ROY *v.* DULLOO SIRCAR . . . . . **Marsh. 620**

14. ——— Ambiguity in document—*Ancient document—Evidence of acts of author.* Where a document is an ancient one and its meaning doubtful, the rule applies that "the acts of its author may be given in evidence in aid of its construction." Rule applied to the table of fees in the Recorder's Courts previous to the institution of Small Cause Courts in the presidency towns; the words "debt levied by execution" used therein being ambiguous with respect to the sheriff's right to poundage. VINAYAK VASUDEV *v.* RITCHIE, STEWART & Co. . . . **4 Bom. O. C. 139**

15. ——— Evidence to explain circumstances connected with transaction—*Conduct of parties—Value of property.* Parol evi-

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EVIDENCE—PAROL EVIDENCE—*contd.*

2. EXPLAINING WRITTEN INSTRUMENTS AND INTENTION OF PARTIES—*contd.*

dence is admissible to prove the conduct of the parties, the value of the property, and other circumstances connected with the transaction between the parties to the written contract. PHELOO MONEE DOSSIA *v.* GREESH CHUNDER BHUTTACHARJEE
8 W. R. 515

16. ——— **Intention of parties**—*Construction of document.* The Courts, in order to ascertain the intention of the parties, must look to the writing alone, and not to the statement of the parties themselves or their witnesses. ODIT NARAIN *v.* MAHESHUR BUX SINGH
Agra F. B. 52 : Ed. 1874, 39

17. ——— *Contract not containing whole agreement.* The rule that verbal evidence is not admissible to vary or alter the terms of a written contract, is not applicable where the parties did not intend that the writing should contain the whole agreement between them; and this may appear either by direct evidence or by informality in the writing. BEHAREE LALL DEY *v.* KAMINEE SOONDUREE . . . . **14 W. R. 319**

18. ——— *Explanation of written agreement by parol evidence.* In resisting specific performance of an agreement it is competent to the defendant to show by oral evidence that the real intention of the parties to the agreement has not been correctly expressed in the written document. VISHVANATH ATMARAM *v.* BAPU NARAYAN
1 Bom. 262

19. ——— *Execution of deed. Per* PEACOCK, *C.J.*, BAYLEY and CAMPBELL, *JJ.*—Verbal evidence is not admissible to vary or alter the terms of a written contract where there is no fraud or mistake, and in which the parties intend to express in writing what their words import. The parties cannot show by mere verbal evidence that at the time of the agreement what they expressed by their words to be an actual sale was intended by them to be a mortgage only. It is, however, material to enquire whether, having regard to the acts and conduct of the parties and having reference to the amount of the alleged purchase-money and the real value of the interest to be sold, the parties intended the writing to operate as an absolute sale and treated the transaction as such, or as a mortgage only. *Per* NORMAN and PUNDIT, *JJ.*—Parol evidence is admissible to show that a bill of sale, though absolute in its terms, was a mortgage. KASHI NATH CHATTERJEE *v.* CHANDI CHARAN BANERJEE
B. L. R. Sup. Vol. 383 : 5 W. R. 68

RAMDEE KOONWAREE *v.* SHIB DYAL SINGH
7 W. R. 334

20. ——— *Mortgage—Absolute sale, deed of. A*, by a deed purporting to be a deed of absolute sale, conveyed certain property to *B*. The deed was registered. *C* claimed a right of pre-emption. *Held per* PEACOCK, *C.J.*, BAYLEY and CAMPBELL, *JJ.* (NORMAN and PUNDIT, *JJ.*, dissenting), that the acts of the original parties or their statements could be admitted as against a third party to prove that their intention was different from that which their written deed expressed and was intended by them to express. MALUK CHAND SURMA *v.* KARLU CHANDRA SURMA
B. L. R. Sup. Vol. 399 : 5 W. R. 76

21. ——— *Evidence Act (I of 1872), s. 92—Oral evidence to show intention of parties.* A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee and his receipt of the profits. The vendor did not exercise his right of re-purchase; but after many years gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale. *Held*, that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in s. 92 of the Indian Evidence Act, 1872. This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts. BALKISHEN DAS *v.* LEGGE . . . **I. L. R. 22 All. 149**
L. R. 27 I. A. 58
4 C. W. N. 153

Affirming decision of High Court
I. L. R. 19 All. 434

22. ——— *Evidence Act (I of 1872), s. 92, cl. 5—Evidence of previous dealings between parties when admissible.* Evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent, or to read into it a liability which would otherwise not exist. It was impossible to find in dealings carried out on the basis of signed indents any clue to the intention of the parties when not only was no indents signed, but the defendant refused to sign one. MAHOMED HAJI JIVA *v.* SPINNER . . . **I. L. R. 24 Bom. 510**

23. ——— **Escrow**—*Deed, delivery of.* Where a deed is delivered to the party in whose favour it is executed, evidence is not admissible to show that it was intended to operate as an escrow only. MOHSUM ALLY *v.* BALASOO KOER
2 Hay 576

24. ——— **Purchase under joint deed**—*Agreement as to division.* Where the plaintiff and defendants purchased property by a joint deed: *Held*, that parol evidence was admissible to show the terms on which they agreed amongst themselves to purchase it and also as to the mode in

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EVIDENCE—PAROL EVIDENCE—*contd.*

2. EXPLAINING WRITTEN INSTRUMENTS AND INTENTION OF PARTIES—*concld.*

which the land so purchased was to be divided. RAM GUTTEE *v.* IBRAHIM ISMAILJEE SEEDAT **7 W. R. 353**

25. ——— **Waiver**—*Evidence Act (I of 1872), s. 92—Evidence to contradict statement in a kabuliyat—Rate of rent, evidence to contradict.* Oral evidence is not admissible for the purpose of contradicting a statement made in a registered *kabuliyat* as to the amount of rent; but evidence is admissible to show that, as between the landlord and the tenant, the *kabuliyat* was neve intended to be acted upon or enforced, or that there was a waiver of some of its terms. The evidence that since the execution of the *kabuliyat* the tenant paid rent at a lower rate than that stated in the *kabuliyat*, is admissible to show that the intention of the parties was that the *kabuliyat* from the very first was not intended to be acted upon, or that there had been a waiver by the parties. BENI MADHUB GORANI *v.* LALMOTI DASSI (1898) **6 C. W.N. 242**

3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS.

1. ——— **Evidence to vary deed**—*Evidence of conduct of parties—Oral stipulation at variance with a written document—Evidence Act (I of 1872), s. 92.* Evidence cannot be admitted to prove a contemporaneous oral stipulation varying adding to, or subtracting from, the terms of a written contract. Evidence of the acts and conduct of the parties to a written contract is not admissible if tendered solely in support of an oral stipulation varying its terms. DAIMODDEE PAIK *v.* KAIM TARIDAR **I. L. R. 5 Calc. 300 : 4 C. L. R. 419**

2. ——— Parol evidence is inadmissible to vary the terms of written document except under special circumstances. RAM DEYE KOWER *v.* BISHEN DYAL SING **8 W. R. 339**

3. ——— *Conduct of parties—Inadequacy of consideration*—Parol evidence is not admissible to alter or vary a written document, even if the inadequacy of the consideration and the conduct of the parties show that the transaction was different from what appears in the instrument or writing. MADHAB CHANDRA ROY *v.* GANGADHAR SAMANT **3 B. L. R. A. C. 83 : 11 W. R. 450**

4. ——— *Contemporaneous agreement.* Oral evidence is admissible in equity where, by way of defence, the object is to get rid of a written contract of a sale of land by showing that it is not the contract really entered into by the parties, but the evidence must be very powerful to induce the Court to believe that the terms expressed are not the real ones. Evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for a re-sale is executed is admissible as a defence even in a Court of law. DADA HONAJI *v.* BABAJI JAGUSHET **2 Bom. 38 : 2nd Ed. 36**

5. ——— *Evidence Act, s. 92.* Where the defendant claimed the property as a preferential heir, and also set up an alternative defence of an alleged oral agreement cancelling a registered deed of sale of property by her co-widow to the plaintiffs,—the lower Court was of opinion that prov. 4 of s. 92 of the Evidence Act (I of 1872) was a bar any to inquiry into the merits of this defence. *Held,* that the lower Court was wrong. The object of the oral agreement was not to rescind the original transaction, but to transfer any rights acquired by the plaintiffs to the defendant, and was an entirely new transaction. RAKHMABAI *v.* TUKARAM . . **I. L. R. 11 Bom. 47**

6. ——— *Suit in Small Cause Court—Agreement not correctly stated in deed.* In a suit in a Small Cause Court to enforce a written agreement, the defendant has a right to set up and adduce parol evidence to prove such a state of facts as would show that the instrument did not correctly set forth the terms of the arrangement between the parties, and thereby justify the Court in its character of a Court of equity in amending the agreement in a suit for that express purpose. FREWIN *v.* PAUL . . **12 W. R. 532**

7. ——— *Suit on bond—Intention of parties as to penal clause.* In a suit on a bond the defendant sought to adduce evidence to show that after the execution of the bond the plaintiff stated that a certain clause as to a high rate of interest in default was intended to operate as a penal clause, and that the conditions therein would not be enforced. *Held,* that the evidence tendered was not admissible. *Bakshu Lakshman* v. *Govinda Kanji, I. L. R. 4 Bom. 594;* and *Hem Chunder Soor* v. *Kally Churn Dass, I. L. R. 9 Calc. 528,* approved and distinguished. BEHARY LOLL DOSS *v.* TEJ NARAIN . . **I. L. R. 10 Calc. 764**

8. ——— *Proof of consideration different from that expressed in contract.* Parol evidence is admissible to show that in an agreement to pay an annuity there was a consideration for the granting of the annuity different from that expressed in the agreement. JAFAR ALI NIZAM ALI *v.* AHMED ALI IMAM HAIDAR BAKSH **5 Bom. A. C. 37**

9. ——— *Evidence Act (I of 1872), s. 92, prov. 4—"Oral agreement"—Variation of terms of registered instrument—Oral agreement to reduce rent.* The lessor of certain land held by the lessee under a registered deed of lease agreed to a reduction in the rent. The agreement was not reduced to writing, but rent was thereafter paid and accepted at the reduced rate. On a suit being brought to recover arrears of rent at the rate

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reserved in the registered deed: *Held*, that, under s. 92, prov. 4 of the Evidence Act, an agreement to accept reduced rent cannot be implied or inferred from the acts and conduct of the parties; and an unwritten agreement, if so implied, amounts to an oral agreement, within the meaning of the proviso. The word "oral" is used in s. 92, prov. 4, of the Evidence Act in the sense of being not committed to writing, and the words "oral agreement" in that section include all unwritten agreements whether arrived at by word of mouth or otherwise. MAYANDI CHETTI *v.* OLIVER **I. L. R. 22 Mad. 261**

10. ——— **Evidence to contradict deed** —*Contract contained in written instrument—Custom, evidence of.* Where a written instrument provided for a joint tenancy and joint contract by all the parties executing to pay the whole rent of a village without any reference to the quantity of land in the holding of each: *Held*, that oral evidence was not admissible to show that separate specific contracts were entered into by each of the parties, and it made no difference that the evidence was put forward as evidence of a custom. MORRIS *v.* PANCHANADA PILLAY . **5 Mad. 135**

11. ——— *Fraud or mistake, allegation of.* Parol evidence cannot be admitted to contradict a deed except when fraud, mistake, surprise, or the like is alleged. ERSKINE & CO. *v.* OKHOY CHUNDER DUTT **W. R. 1864, 58**

KASSIM MONDLE *v.* NOOR BIBEE . **1 W. R. 76**

12. ——— *Subsequent written agreement to abate rent—Variation of lease—Evidence Act (I of 1872), s. 92—Form of decree.* In the year 1879 the plaintiff granted a lease of certain lands to the father of the defendants. In May 1889, he agreed in writing to allow the defendants an abatement of rent to the extent of R100 per annum. This agreement was not registered, but was stated in the plaint in a previous suit brought by the plaintiff. He subsequently brought a suit against the defendants for the recovery of the entire amount of the original rent. *Held*, that the defendants could rely on the agreement, and that s. 92 of the Evidence Act (I of 1872) did not apply to it. *Held*, therefore, varying the order of the District Judge, that the decree for the entire amount of the original rent must be set aside, and a decree made for the amount of rent due at the reduced rate. SATYESH CHUNDER SIRCAR *v.* DHUNPUT SINGH **I. L. R. 24 Calc. 20**

13. ——— *Evidence of verbal agreement not to enforce document.* When a plaintiff attempts to enforce, as a contract of loan binding upon the defendant, immediately upon its execution, an instrument which he verbally agreed at the time should not so operate, and for which the defendant received no consideration, the latter may give evidence of the verbal agreement. ANNAGURUBALA CHETTI *v.* KRISTNASWAMI NAYAKAN **1 Mad. 457**

14. ——— *Contemporaneous oral agreement—Evidence Act, s. 92.* Plaintiff sued to recover R21,650-5-1, balance of principal and interest due. He alleged in his plaint that between the 16th February and 23rd July 1867 he paid at the request of defendant's father, the late G. F. Fischer, R25,000 on account of the Shivagunga zamindari; that the defendant, having assumed the management of the zamindari under an assignment from his father, gave plaintiff a receipt for the said sum of R25,000 under date the 7th August 1867; that in October and December 1867 defendant paid the sum of R5,000 and R3,000, respectively, in part liquidation of the debt, but since 20th December 1867 refused any further payment. Defendant answered that this debt due by the late G. F. Fischer had been validly released by the terms of an assignment dated 29th July 1871; that the receipt given by defendant was a mere acknowledgment of the payment of R25,000 by the plaintiff to the late G. F. Fischer, and imposed no obligation on defendant to pay the said amount; that there was no consideration for defendant's promise to pay R25,000; that when defendant executed the receipt he was not aware of the effect of the release; and that the part-payments were made under a mistaken idea of liability. At the hearing it was not disputed that a release was executed, and that this claim was embodied and intended to be embodied in that written release, but it was attempted to set up a contemporaneous oral agreement, leaving this claim as a subsisting demand. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written release. *Held*, on regular appeal, that the Civil Judge was right. The principle is,—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written? In the present case, to set up an oral agreement that the sum released should in fact be paid is to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words do mean, but what they were intended to mean. The subsequent receipt for the money did not create a debt, for the release had already extinguished it. FISCHER *v.* FISCHER . . . . . **6 Mad. 393**

15. ——— *Evidence Act, s. 92—Agreement for renewal inconsistent with terms of lease.* In a suit by a lessor for possession and for occupation after the expiry of a lease for three years, the defendant pleaded that it had been verbally agreed between himself and his lessors that he should be entitled to renewal of the lease for a further period of three years, if he so desired. *Held*,

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that evidence of this oral agreement was inadmissible under s. 92 of the Indian Evidence Act (I of 1872), being inconsistent with the terms of the second clause of the lease, which was as follows :—" If you mean me to vacate at the completion of the term, you must give one month's notice. In accordance therewith I will vacate and give up possession to you." EBRAHIM PIR MAHOMED *v.* CURSETJI SORABJI DE VITRE

I. L. R. 11 Bom. 644

16. ——— *Mortgage of, and advances to, indigo concern—Evidence Act, s. 92.* *M*, the manager of an indigo concern, under s. 243, Act VIII of 1859, by a deed dated the 1st February 1873, in which the owners of the concern joined, which was duly registered, and which was made with the Court's sanction, mortgaged the concern, and pledged and assigned the season's crop to *A* and *B*, who were pardanashins, to secure repayment of a large sum of money, consisting partly of the balance of previous loans from the husband of *A* and *B* and partly of a new loan to the extent of what was described in the deed as the estimated outlay of the season. The deed provided that *A* and *B* should have a first charge upon the indigo to be manufactured in the season in respect of the moneys secured thereby ; that the indigo should be sold, subject to *A's* and *B's* direction ; that until the debt was paid, *M* should have no power to transfer, sell, or mortgage the properties thereby mortgaged, pledged, and assigned, or in any way to deal with the sale-proceeds of the manufactured indigo ; and that *A* and *B* should have full power to arrange for the appointment and dismissal of the servants of the concern and for its better management. Previously to this, namely, in October 1872, *M* had, in pursuance of his letter of appointment, filed an estimate for the season's outlay largely exceeding the sum mentioned in the deed as the estimated outlay, and had alleged that, at the time of executing the mortgage-deed, he had informed one *C*, who was the general manager of *A* and *B*, and as such was the only medium of communication between *M* and *A* and *B*, that further advances would be necessary. According to *M's* account, *C* told him that *A* and *B* were unable to make further advances and that he could, if they were needed, obtain them on the usual terms from the plaintiffs, who were indigo brokers. In previous years, during the lifetime of the husband of *A* and *B*, who had held similar mortgages of the concern and of the crop in those years to secure advances made by him, such advances had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans. And it was alleged by *M* that it was upon the understanding that the same course was to be followed in the present instance that the mortgage-deed to *A* and *B* was executed. In a suit against *A*, *B*, and *M*, to establish a first charge in respect of their advances to *M* upon 360 maunds of the indigo : *Held per* GARTH, *C.J.*, PHEAR and MACPHERSON, *JJ.*, that the alleged oral agreement between *C* and *M*, as to obtaining loans, if necessary, from the plaintiffs and giving them a first charge on the season's indigo in respect of such loans, was in direct contravention and defeasance of the mortgage-deed to *A* and *B*, and was therefore inadmissible in evidence under s. 92 of the Evidence Act. MORAN *v.* MITTU BIBI . . **I. L. R. 2 Calc. 58**

17. ——— *Evidence Act, s. 92—Admissibility of parol evidence inconsistent with kabuliat.* Plaintiff having sued for arrears of rent payable under a kabuliat in respect of a share of four villages, the defendant pleaded that he had been put in possession of one only of the four leased to him, and that therefore he was not liable for the whole claim. Parol evidence was admitted to show that at the time the kabuliat was granted it had been agreed between the plaintiff and defendant (the title of the former being under dispute) that the whole rent payable under the kabuliat should be payable in respect of such of the villages as should actually come into defendant's possession. *Held*, that such parol evidence was rightly admitted, there being no stipulation in the lease that the defendant should only pay rent on being put completely into possession and that, although payment of rent is not oridnarily enforced, unless the lessor puts the lessee into possession, it was quite competent to the parties to waive such privilege. RAM KISHORE LALL *v.* NAND RAM . . **4 C. L. R. 100**

18. ——— *Evidence Act, s. 92—Verbal assignment of rent of land in lieu of interest—Jamog.* Subsequently to the execution and registration of a bond, a jamog was made orally between the creditor and debitor, by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the jamog. *Held*, that the jamog was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force within s. 92, prov. (4), of Act I of 1872. AUTU SINGH *v.* AJUDHIA SAHU

I. L. R. 9 All. 249

19. ——— *Evidence Act (I of 1872), s. 92, prov. 4—Endorsement on grant—Transaction distinct from original grant.* The plaintiff sought to attach a certain hak as belonging to his judgment debtor *K*. The defendant, who was the original grantor of the hak, pleaded a re-grant

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of the hak to himself. In support of this plea, the defendant produced from his possession the original sanad bearing the following endorsement by *K* :— "You have passed me a receipt for the sanad. I have accordingly given you the ownership of the sanad. Therefore over the said sanad I have no right or title." The defendant offered to put in this endorsement and also tendered the evidence of *K's* brother. *Held*, that the alleged re-grant was a transaction entirely distinct from the original grant, and therefore not one falling under prov. 4 to s. 92 of the Evidence Act (I of 1872). The defendant was at liberty to adduce evidence to prove this transaction. HERAMBDEV DHARNIDHARDEV *v.* KASHINATH BHASKAR . **I. L. R. 14 Bom. 472**

20. ——— **Evidence to add terms to deed**—*Evidence Act, s. 92—Suit for specific performance of written contract subsequently varied by parol.* A registered lease, renewable at the former rent at the expiration of the period fixed thereby, having been granted, it appeared that the lessors were entitled to a 6 annas share only instead of to the whole property leased. It was alleged by the lessee that it was then verbally arranged that the rent should be reduced in proportion, and the lessee in fact did pay the rent during the term in proportion to the interest of the lessors. On the expiration of the term, he sued for specific performance of the contract, as modified, for a renewal of the lease of the 6 annas. *Held*, that evidence of the parol variation of the contract was not admissible under s. 92 (4) of the Evidence Act, and that the plaintiff was not entitled to the relief sought. DWARKA NATH CHATTOPADHYA *v.* BHOGOBAN PANDA **7 C. L. R. 577**

21. ——— **Evidence to add terms to Contract**—*Evidence Act, s. 92, prov. (3)—Parol evidence in addition to condition in kistbundi—Part performance of portion of obligation in kistbundi. Per* GARTH, *C.J.*—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations. The true meaning of the words "any obligation" in the third proviso to s. 92 of Act I of 1872 is any obligation whatever under the contract, and not some particular obligation which the contract may contain. JUGTANUND MISSER *v.* NERGHAN SINGH **I. L. R. 6 Calc. 433 : 7 C. L. R. 347**

22. ——— *Evidence Act, s. 92—Bond—Contemporaneous oral agreement providing for mode of repayment.* In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that at the time of the execution of the bond it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents ; that in accordance with this agreement, the plaintiff obtained possession of the land, and that he thus realized the whole of the amount due. *Held*, that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence. RAM BAKHSH *v.* DURJAN . . **I. L. R. 9 All. 392**

23. ——— *Evidence Act, s. 92, prov. (1)—Fraud—Unlawful consideration—Act IX of 1872, s. 23.* Plaintiff sued to recover rent under a kabuliat. The defendant admitted execution of the kabuliat, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him R282 out of the purchase-money, and to obtain for him from the purchaser a maurasi pottah of the land ; it never having been intended that any rent should be payable under the kabuliat. *Held*, that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties. KASHI NATH CHUCKERBUTTY *v.* BRINDABUN CHUCKERBUTTY . . **I. L. R. 10 Calc. 649**

24. ——— **Wagering contract**—*Evidence Act, 1872, s. 92—Time bargain—Sale of Government securities.* The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms. JUGGERNATH SEW BUX *v.* RAM DYAL **I. L. R. 9 Calc. 791**

25. ——— *Evidence Act, s. 92, prov. I—Contract—Wagering contract Bombay Act III of 1865—Oral evidence admissible to prove a contract to be a gaming transaction.* In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract ; that the parties never intended to give or take delivery of the cotton, and that the contract was therefore void. *Held*, that oral evidence was admissible to prove the defence set up by the defendant. ANUPCHAND HEMCHAND *v.* CHAMPSI UGERCHAND **I. L. R. 12 Bom. 585**

26. ——— *Evidence Act (I of 1872), s. 92—Oral evidence to show that an agreement in writing to sell is only wager.* Oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way

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of wager. (*See* Evidence Act, s. 92.) *Anupchand Hemchand* v. *Champsi Ugerchand, I. L. R. 12 Bom. 585,* followed. *Juggernath Sew Bux* v. *Ram Dyal, I. L. R. 9 Calc. 791,* dissented from. ESHOOR DOSS *v.* VENKATASUBBA RAO
I. L. R. 17 Mad. 480

27. ———— Bill of exchange—*Evidence Act, s. 92—Exclusion of evidence of oral agreement.* It was agreed between the Bank of Bengal at Calcutta and *C & Co.*, who carried on business there, that the branch of the Bank at Cawnpore should discount bills to a certain extent drawn by *C*, who carried on business at Cawnpore, on *C & Co.*, against goods to be consigned by rail to *C & Co.*, and that the railway receipts for such consignments should be forwarded to *C. & Co.*, through the Cawnpore branch of the Bank. *C* accordingly drew a bill on *C & Co.*, payable twenty-one days after date, which the Cawnpore branch of the Bank discounted, receiving the railway receipt for certain goods consigned to *C & Co.* *C & Co.* having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against *C* on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to *C & Co.* until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, *J.* (SPANKIE, *J.*, dissenting), that evidence of such oral understanding was not admissible even under prov. 3 of s. 92 of Act I of 1872. COHEN *v.* BANK OF BENGAL
I. L. R. 2 All. 598

28. ———— Registered contract—*Evidence Act, s. 92, prov. (4)—Oral agreement to rescind registered contract.* *D* sold a house to *P* and executed a deed of conveyance which was duly registered. *P* did not pay the purchase-money, and therefore did not get possession. Shortly after the conveyance had been registered, *P* returned it to *D*, with an endorsement thereon to the effect that it was returned because *P* was unable to pay the purchase-money. In a suit by the purchaser at an execution-sale of the right, title, and interest of *P* in the house against *D* for possession : *Held*, the conveyance by *D to P* having been registered, no oral agreement to rescind it could be proved under the Evidence Act (I of 1872), s. 92, prov. (4). UMEDMAL MOTIRAM *v.* DAVU BIN DHONDIBA . **I. L. R. 2 Bom. 547**

29. ———— Evidence to vary nature of deed—*Parol evidence to vary contents of documents—Mortgage by Hindu pardanashin lady—Execution, proof of.* In a suit to enforce a mortgage against a Hindu pardanashin lady, the Court will look strictly at the circumstances under which the mortgage was executed; and if it appears that she was acting without sufficient advice, that her ignorance was taken advantage of, or that undue influence was exerted to induce her to execute

the deed, the Court will refuse to enforce the mortgage. The onus is upon the party interested in upholding the transaction to show the absence of undue influence, and that its terms were fair and equitable. He should show that the party he wishes to bind had good advice in the matter, and acted therein independently of himself. This is especially so when there was any fiduciary relationship between the contracting parties. KANAI LALL JOWHARI *v.* KAMINI DEBI
1 B. L. R. O. C. 31 note

30. ———— *Deed of sale.* Oral evidence is not admissible to set aside a deed of sale which by its terms is clearly absolute. JUGOBUNDHOO MOOKERJEE *v.* LUCKHESSUREE DEBIA
W. R. 1864, 388

RAM DOOLAL SEN *v.* RADHA NATH SEN
23 W. R. 167

31. ———— *Parol evidence qualifying an engagement in a written document—Admissibility of such evidence.* The proper meaning of prov. 3 to s. 92 of the Evidence Act (I of 1872) is that a contemporaneous oral agreement, to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may be proved. An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, *i.e.*, that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the prov. 3 to s. 92 of the Evidence Act. *Jugatanund Misser* v. *Nerghan Singh, I. L. R. 6 Calc. 433,* and *Cohen* v. *Bank of Bengal, I. L. R. 2 All. 598,* followed. RAMJIBAN SEROWGY *v.* OGHORE NATH CHATTERJEE
I. L. R. 25 Calc. 101
2 C. W. N. 188

32. ———— Conveyance by lease and release in fee, under the circumstances, *held* to be subject to a parol defeasance, and to be in the nature of a mortgage, with a power of repurchase on the footing of redemption ; and a reconveyance was decreed. MUTTY LALL SEAL *v.* ANNUNDO CHUNDER SANDLE . **5 Moo. I. A. 72**

33. ———— Parol evidence may be received to show that, notwithstanding a deed purports to be a deed of absolute sale, the true nature of the transaction is a mortgage. KASHINATH ROY *v.* NOWCOWRY KOONDOO . **1 W. R. 22**

SOOKNA MEHDEE *v.* GUNDHOO RAM MUNDUL
12 W. R. 264

BANESHUR DASS *v.* BANEE MADHUB DOSS
18 W. R. 256

NANDOLALL MITTER *v.* PROSONNO MOYEE DEBIA
19 W. R. 333

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EVIDENCE—PAROL EVIDENCE—*contd.*

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34. ——— *Allegation of fraud and collusion—Execution of deed.* In a suit by a pardah lady to set aside a bill of sale, execution of which by her had been obtained by collusion and fraud, the Court admitted parol evidence to show that the bill of sale was intended by her to operate only as a mortgage, and to vary the rate of interest therein stipulated for. MANOHUR DASS *v.* BHAGABATI DASI **1 B. L. R. O. C. 28**

35. ——— *Mortgage — Bill of sale—Suit for specific performance.* In a suit for specific performance of an agreement to convey certain property, the contract, which was in writing, was admitted by the parties; but the defendant alleged that there had been an understanding verbally come to that, if he repaid the consideration-money with interest, etc., to the plaintiff within two years, the plaintiff would reconvey the premises to him: *Held*, that the defendant could give parol evidence to supplement the written contract, and show that it was intended to be a mortgage and not an absolute bill of sale. BHOLANATH KHETTRI *v.* KALIPRASAD AGURWALLA . **8 B. L. R. 89**

36. ——— *Evidence Act, s. 92—Oral agreement contemporaneous with deed of sale.* The defendant admitted the execution of a deed of sale, but alleged that contemporaneously with it he entered into an oral agreement with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee. *Held*, in special appeal, that, as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by Act I of 1872, s. 92. *Mutty Lall Seal* v. *Annundo Chander Sandle, 5 Moo. I. A. 72,* distinguished. BANAPA *v.* SUNDARDAS JAGJIVANDAS . . **I. L. R. 1 Bom. 333**

37. ——— *Mortgage—Sale—Oral evidence when admissible to prove that an apparent sale is a Mortgage—Evidence Act (I of 1872), ss. 91, 92, and 115—Conduct of parties—Specific Relief Act, s. 26.* A party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, should not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakably from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale, and therefore, if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement. *Daimoddee Paik* v. *Kaim Taridar, I. L. R. 5 Calc. 300,* dissented from. Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more. It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. Conduct is, no doubt, evidence of the agreement out of which it arose; but it may be very much more. In many cases it may amount to an estoppel. In such a case it is clear that evidence of conduct would be strictly admissible under s. 115 of the Evidence Act (I of 1872). And even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved, from being taken into consideration. Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is on the face of it an absolute conveyance, was intended to be nothing more than a security for debt, and they will not only look to the conduct of the parties, but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, *viz.*, part performance and fraud. The Courts in India are not precluded by the Evidence Act from exercising a similar jurisdiction. The rule of estoppel, as laid down in s. 115, covers the whole ground covered by the theory of part performance. That section does not say that, in order to constitute an estoppel, the acts which a person has been induced to do must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call "part performance" would be brought within the Indian rule of estoppel. But the ground upon which this jurisdiction of the Courts in India may most safely be rested is the obligation which lies upon them to prevent fraud. The Courts will not allow a rule, or even a statute which was passed to suppress fraud, to be the most effectual encouragement to it, and accordingly in England the Courts, for the purpose of preventing fraud, have in some cases set aside the common law rules of evidence and the statute of frauds. The Courts in India have the same justification in dealing similarly with the obstacles interposed by the Evidence Act. In thus modifying the rules laid down by ss. 91 and 92 of that Act, the Courts will not be acting in opposition to the intention of the Legislature, which by enacting the provisions of s. 26, cl. (*c*), of the Specific Relief Act (I of 1877), has shown an intention to relax the rules of the Evidence Act so as to bring them into conformity with the practice of the English Courts

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EVIDENCE—PAROL EVIDENCE—*contd.*

3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*contd.*

of Chancery. *Quære:* Whether prov. (1) to s. 92 of the Evidence Act is not large enough to let in evidence of such subsequent conduct as in the view of the Court of Equity would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document. BAKSU LAKSHMAN *v.* GOVINDA KANJI

I. L. R. 4 Bom. 594

38. _____ *Evidence Act, s. 92—Admissibility of evidence to contradict document.* *A*, by a deed of sale absolute on its face, transferred certain land to *B* for the sum of R379. *A* alleged that at the time the transaction was entered into it was understood and orally agreed that the sale was merely by way of security for the payment of R400 due to a third party, *C*, under a compromise made by *A* with *C* for the satisfaction of a decree for R832, which the latter held against *A*; and that it was at the same time orally agreed between *A* and *B* that on the payment of the money by *A* to *C* the deed of sale should be delivered to the former. Subsequently *A* brought a suit against *B* for the return of the kobala, alleging that the whole of the money had been paid to *A*. *Held*, that s. 92 of the Evidence Act, I of 1872, prevented the admission of evidence of the oral agreement to contradict the deed of sale which had admittedly been contemporaneous. RAM DYAL BAJPIE *v.* HEERA LALL PARAY . . . . . **3 C. L. R. 386**

39. _____ *Evidence Act, s. 92—Evidence contradicting document—Mortgage—Conditional sale.* It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and sorrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of title-deeds and was the ostensible owner of the property. KASI NATH DASS *v.* HURRIHUR MOOKERJEE

I. L. R. 9 Calc. 898 : 13 C. L. R. 11

40. _____ *Evidence Act (I of 1872), s. 92—Mortgage—Sale—Conduct of parties—Oral evidence when admissible to prove that an apparent sale is a Mortgage—Admissibility of parol evidence to vary a written contract.* The defendant, in answer to a suit by the plaintiff for possession of certain land, alleged that the kobala, which purported to be an out-and-out sale in favour of the plaintiff and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage, and to prove such allegations tendered evidence of the circumstances under which the kobala was executed, and of the conduct of the parties to show that the document had all along been treated as a mortgage and intended to operate as such. *Held*, that such evidence was admissible. *Held*, also, that s. 92 of the Evidence Act made no alteration in the law as laid down in *Kashi Nath Chatterjee* v. *Chandi Churn Banerjee, B. L. R. Sup. Vol. 383*, but is in accordance with what was decided in that case. *Baksu Lukshman* v. *Govinda Kanji, I. L. R. 4 Bom. 594*, followed. *Ram Dayal Bajpai* v. *Heera Lall Paray, 3 C. L. R. 386*, and *Daimoddee Paik* v. *Kaim Taridar, I. L. R. 5 Calc. 300*, dissented from. HEM CHUNDER SOOR *v.* KALLY CHURN DASS

I. L. R. 9 Calc. 528 : 12 C. L. R. 287

41. _____ *Evidence Act (I of 1872), s. 92—Oral evidence to show that an apparent sale-deed was a mortgage.* In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor), and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bonâ fide* and supported by consideration. *Held*, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage, and that the mortgage had expired. VENKATRATNAM *v.* REDDIAH

I. L. R. 13 Mad. 494

42. _____ *Evidence Act (I of 1872), s. 92—Sale-deed—Contemporaneous oral agreement for re-conveyance—Mortgage.* In a suit to recover possession of land on the footing of a sale-deed executed by the defendants to the plaintiff's vendor, the defendants set up a contemporaneous oral agreement for the re-conveyance of the land to them on the repayment of a sum of money then borrowed by them from the vendee, and alleged that they had retained possession of, and held the pottah for, the land throughout. *Held*, that the defendants were entitled to prove by oral evidence that the transaction was a mortgage and not a sale, unless the plaintiff was an innocent purchaser for value without notice of the mortgage. *Lincoln* v. *Wright, 4 De G. & J. 16*, followed. *Venkatratnam* v. *Reddiah, I. L. R. 13 Mad. 494*, considered. RAKKEN *v.* ALAGAPPUDAYAN . . **I. L. R. 16 Mad. 80**

43. _____ *Evidence Act, (I of 1872), s. 92—Oral evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of parol evidence to vary a written contract.* Oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage. PREONATH SHAHA *v.* MADHU SUDAN BHUIYA . . . **I. L. R. 25 Calc. 603**
2 C. W. N. 562

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EVIDENCE—PAROL EVIDENCE—*contd.*

3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*contd.*

44. ——— *Evidence Act (I of 1872), s. 92—Evidence of conduct—Return of a lease—Intention of parties.* Evidence of conduct, as for instance return of a lease, is admissible in evidence under s. 92 of the Evidence Act to prove that such return was due to an intention to make the lease inoperative. *Preonath Shaha* v. *Madhu Sudan Bhuiya, I. L. R. 25 Calc. 603,* followed. SHYAMA CHARAN MANDAL *v.* HERAS MOLLAH **I. L. R. 26 Calc. 160**

45. ——— *Evidence Act (I of 1872), s. 92, prov. 4—Mortgage—Power of sale—Suit to set aside sale under power of sale—Promise by Mortgagee to postpone sale—Evidence of such promise admissible.* The plaintiff mortgaged certain property to the first defendant on 28th December 1895. By the mortgage-deed the mortgage-debt was made repayable on 28th December 1896. On the 12th May 1897, the first defendant sold it by auction under the power of sale contained in the mortgage-deed, and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days, and that the second defendant had notice of this fact before he purchased the property. *Held,* that evidence of such oral agreement was admissible. It was not an agreement to modify any of the terms of the mortgage; it was merely an agreement to forbear, for a period of four days, from the exercise of the power of sale given by the mortgage. It therefore did not fall within prov. 4 of s. 92 of the Evidence Act (I of 1872). TRIMBAK GANGADHAR RANADE *v.* BHAGWANDAS MULCHAND . . . . **I. L. R. 23 Bom. 348**

46. ——— **Evidence of agreement to pay interest on document**—*Evidence of contemporaneous agreement—Suit on hath-chitta.* In a suit upon a hath-chitta, the Court, having regard to the informal nature of the document sued upon, allowed evidence to be given of a verbal agreement to repay the amount acknowledged with interest, no mention having been made as to interest in the hath-chitta itself. UMESH CHUNDER BANERJEE *v.* MOHINI MOHUN DASS . **9 C. L. R. 301**

47. ——— *Suit on promissory note.* Where a promissory note is silent as to interest, a verbal agreement made subsequently to the execution of the note to pay interest may be proved under cl. 2 of s. 92 of the Evidence Act. *In the matter of* SOWDAMONEE DEBYA *v.* SPALDING . . . . . **12 C. L. R. 163**

48. ——— *Suit on promissory note.* When a note of hand promised repayment of a loan, with interest at five per cent., without stating either *per mensem* or *per annum: Held,* that the construction that interest was to be calculated without reference to time was contrary to all practice, and that the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom. MAHOMED SHAMSOODEEN *v.* ABDOOL HUQ **W. R. 1864, 379**

49. ——— **Evidence to vary deed**—*Evidence Act (I of 1872), s. 92—Evidence to show that a "deed of sale" was meant to be a "deed of gift"—Admissibility of oral evidence to vary a written contract.* Under the provisions of s. 92 of the Evidence Act (I of 1872) no oral evidence is admissible to show that a deed of sale was really meant to be a "deed of gift" and *not* a "deed of sale" *Shewab Singh* v. *Asgur Ali, 6 W. R. 267; Walee Mahomed* v. *Kumur Ali, 7 W. R. 428;* and *Lala Himmat Sahai* v. *Llewhellen, I. L. R. 11 Calc. 486,* distinguished. RAHIMAN *v.* ELAHI BAKSH **I. L. R. 28 Calc. 70**

50. ——— **Conduct of parties**—*Evidence Act (I of 1872), s. 92—Oral evidence when admissible to prove that a conveyance is a mortgage by way of conditional sale—Admissibility of parol evidence to vary a written contract.* Under the provisions of s. 92 of the Evidence Act (I of 1872), oral evidence of the acts and conduct of parties, such as evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale. *Preonath Shaha* v. *Madhu Sudan Bhuiya, I. L. R. 25 Calc. 603,* referred to. The case of *Balkishen Das* v. *Legge, L. R. 27 I. A. 58,* did not in any way affect the rule laid down in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya, I. L. R. 25 Calc. 603.* KHANKAR ABDUR RAHMAN *v.* ALI HAFEZ (1900) **I. L. R. 28 Calc. 256; s.c. 5 C. W. N. 351**

51. ——— *Evidence Act (I of 1872), s. 92—Acts and conduct of parties—Oral evidence when admissible to prove that a conveyance is really a mortgage by way of conditional sale—Admissibility of parol evidence to vary a written contract.* Oral evidence of the acts and conduct of parties, such as evidence of promise by the vendee to restore the property on repayment in two or three years, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale. *Balkishen Das* v. *Legge, L. R. 27 I. A. 58,* explained. *Preonath Shaha* v. *Madhu Sudan Bhuiya, I. L. R. 25 Calc. 603,* referred to. MAHOMED ALI HOSSEIN *v.* NAZAR ALI (1901) **I. L. R. 28 Calc. 289; s.c. 5 C. W. N. 326**

52. ——— *Registered kabuliyat, proof of—Contemporaneous oral agreement for reduction of rent—Evidence Act (I of 1872), s. 92.* A contemporaneous oral agreement cannot be proved under s. 92 of the Evidence Act, to show that the rent is less than what was stated in the registered

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EVIDENCE—PAROL EVIDENCE—*contd.*

3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*contd.*

kabuliyat. Per GUPTA, *J.*—The mere acceptance of a reduced rent, though it may amount to a full acquittance, cannot operate as a binding contract without proof of the agreement forming the basis of the reduction granted ; and such an acceptance does not amount to such an agreement or release of a portion of the rent as to have a binding effect. RADHA RAMAN CHOWDHRY *v.* BHOWANI PROSAD BHOWMIK (1901) . . . . . **6 C. W. N. 60**

53. ——— *Limitation Act (XV of 1877), s. 19, paragraph 2—Written acknowledgment—Date—Alteration.* Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible under s. 19, paragraph 2, of the Indian Limitation Act, 1877. *Atmaram* v. *Umedram, I. L. R. 25 Bom. 616,* distinguished. GULAMALI DALUMIA *v.* MIYABHAI MAHOMADBHAI (1901) **I. L. R. 26 Bom. 128**

54. ——— *Evidence Act (I of 1872), s. 92—Evidence to vary written instrument—Execution of sale-deed—Subsequent redemption suit on footing that the sale was in fact a mortgage—Evidence of subsequent conduct to show collateral agreement—Inadmissibility.* On the 23rd September 1876, defendant wrote to plaintiff, inviting plaintiff to execute a sale-deed of certain land in favour of defendant and promising that, if plaintiff did so, defendant would discharge plaintiff's debts out of the income to be derived from the land, and would, after the debts had been discharged, or before, if so requested, restore the land to plaintiff, upon payment by plaintiff of a sum of money that had been advanced to him by defendant. This document was not registered. On the 29th September 1876, plaintiff executed a deed of sale of the land in defendant's favour, which was unconditional in its terms, and which was duly registered. Plaintiff subsequently brought a redemption suit against defendant on the deed of 29th September, and he contended that, although that deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself and defendant, to show that the transaction was, in fact, not a sale but a mortgage. *Held,* that the evidence was not admissible. *Balkishen Das* v. *Legge, L. R. 27 I. A. 58,* followed. *Khankar Abdur Rahman* v. *Ali Hafez, I. L. R. 28 Calc. 256,* and *Mahomed Ali Hossein* v. *Nazar Ali, I. L R. 28 Calc. 289,* dissented from. Plaintiff further contended that the contract was not contained in the deed of sale alone, but must be gathered from both of the documents referred to above. *Held,* that the document of 23rd September, being unregistered was inadmissible in evidence, as it purported to create or limit an interest in the immoveable property conveyed under the deed of sale. *Pranal Annee* v. *Lakshmi Annee, L. R. 26 I. A. 101,* followed. ACHUTARAMARAJU *v.* SUBBARAJU (1901) **I. L. R. 25 Mad. 7**

EVIDENCE—PAROL EVIDENCE—*contd.*

3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*contd.*

55. ——— *Evidence Act (I of 1872), s. 92, proviso 4—Registered document—Subsequent oral agreement—Contract Act (IX of 1872), s. 63—Remission of portion of promise—Discharge in full on receipt of portion of amount due—Evidence of oral agreement.* In a suit for two years' rent, due under a registered lease, defendant pleaded a subsequent oral agreement by plaintiff to remit a portion of the rent each year, and filed a receipt by which plaintiff accepted payment at the reduced rate in full discharge in respect of one of the years. *Held,* that, although, under proviso 4 to s. 92 of the Evidence Act, evidence of such an agreement was inadmissible and plaintiff was entitled to claim rent at the rate stipulated in the registered lease, the discharge for one of the years was valid under s. 63 of the Contract Act, and took effect. It was immaterial that the discharge had been given in pursuance of the alleged oral agreement, which though not admissible in evidence, was not illegal. KARAMPALLI UNNI KURUP *v.* THEKKU VITTIL MUTHORAIKUTT (1902) . **I. L. R. 26 Mad. 195**

56. ——— **Evidence to show rate of interest**—*Evidence Act, s. 92—Suit on promissory note.* Suit for balance of principal due for money lent, with interest thereon at 5 per cent. per mensem. It appeared that the defendant, being indebted to plaintiff on a promissory note for R500, applied to him for a further loan of R1,500, proposing to lay out the whole amount of R2,000 in the performance of a contract then subsisting between himself and the Madras Railway Company and offering to give plaintiff a share in such contract ; that plaintiff consented to lend the said sum payable with interest at 6 or 7 per cent. per mensem in lieu of becoming a partner, and also to give defendant two months' previous notice on requiring repayment of the loan. Defendant demurred to the rate of interest, which he said he would further consider on his return to Cuddapah, but, being in immediate want of the money, proposed to borrow it on a promissory note. Plaintiff accordingly, on the 13th October 1870, lent defendant R1,500, and obtained, in lieu of the note for R500, which was returned, a promissory note for 2,000, payable on demand, with interest at 12 per cent. per annum, which note, plaintiff alleged it was agreed, should be cancelled on receipt of a letter from the defendant fixing the rate of interest (this was denied by defendant). Defendant subsequently wrote two letters to plaintiff, agreeing to pay interest at 5 per cent. per mensem, and plaintiff endorsed the said note as cancelled. Plaintiff also alleged that he received interest at the rate of 5 per cent. per mensem for two months, and produced a witness who deposed to that effect. This defendant denied. *Held* by the Original Court (following *Abray* v. *Crux, L. R. 5 C. P. 37*), that the oral evidence was inadmissible to show the rate of interest *dehors* that of the promissory note, and that the subsequent letters, offering a higher

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rate of interest, were without consideration, for there was not any evidence of forbearance, and that the plaintiff had a right to sue on the promissory note the very day after it was made. Plaintiff appealed on the ground that the evidence was admissible. *Held* by MORGAN, *C.J.*, that the evidence was admissible: that the law is that, notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find, upon sufficient evidence, that this writing is not really the contract; and the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it; that in this case at the time of the advance of the money, there was an agreement touching the transaction of loan, although the rate of interest was still unsettled and under discussion; the plaintiff declined to lend on the terms of a joint interest in the venture as proposed by the defendant; and the latter refused to pay the rate demanded; before any final agreement and while the transaction was still incomplete, the note was given, not as a writing which expressed or was meant to express the final contract, but rather as a voucher, or a temporary and provisional security for the money pending the discussion respecting the rate of interest; and that, if the note was thus given and received, it should not be regarded as the contract between the parties or as a written contract excluding other evidence of the true contract. *Held* by KERNAN, *J.* (concurring with the Chief Justice as to the admissibility of the evidence), that assuming that the promissory note did represent a complete contract between the parties, such contract was waived and discharged by the acts and agreement of the parties before breach, and a new contract, namely, the contract for larger interest, substituted. *Abray* v. *Crux, L. R. 5 C. P. 37*, distinguished. GUDDALU RUTHNA MUDALIYAR *v.* KUNNATTUR ARUMUGA MUDALIYAR . . . **7 Mad. 189**

57. ——— **Consideration for deed——*Proof of consideration—Recital in bond.*** Oral evidence is admissible to prove that consideration has not been paid at all or in full, notwithstanding the recital in the bond that full consideration has been paid. WALEE MAHOMED *v.* KUMUR ALI **7 W. R. 428**

58. ——— *Proof of want of consideration, or only portion paid.* Oral evidence may be received to prove that the consideration stated in a deed to have been paid was not paid, but not to prove that only a small portion of the consideration stated in the deed to have been received in full was to be paid at the time, and that the rest was not only to remain in abeyance pending the result of a suit, but to be paid only in case of the successful termination of that suit. SHEWAB SINGH *v.* ASGUR ALI . **6 W. R. 267**

59. ——— *Evidence to show only portion of consideration of bond was received.* Where a suit was brought upon two native bonds executed by the defendant for the principal and interest reserved, and the bonds contained a statement that the principal had been borrowed and received in cash: *Held*, that it was open to the defendant to show by evidence that only a portion of the principal sum had been received by him. GAUREVALLABA RAMCHANDRA VELLIA BOMAYA NAYIK *v.* VIRAPPA CHETTI . . **2 Mad. 174**

60. ——— *Proof of consideration stated in a deed.* S. 92 of the Evidence Act (I of 1872) prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract. Where, therefore, a deed of sale described the consideration to be R100 in ready cash received, but the evidence showed that the consideration was an old bond for R63-12-0 and R36-4-0 in cash: *Held*, that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being "ready money received." HUKUMCHAND *v.* HIRALAL . . . **I. L. R. 3 Bom. 159**

VASUDEVA BHATLU *v.* NARASAMMA **I. L. R. 5 Mad. 6**

61. ——— *Oral evidence when admissible to prove that consideration-money stated in contract to have been paid, has not been paid, but has been applied in a way agreed on between the parties—Evidence Act, I of 1872, s. 92.* A deed of putowa contained a recital of the payment of the sum of R2,000 as bonus to the plaintiff by the defendant, the mode of payment being stated to be in cash in one lump sum. The plaintiff sued to recover the sum of R1,850, alleging that only R150 had been paid, and not R2,000 as recited in the putowa. The defendant admitted that R850 was due, and as to the remaining R1,000 alleged that at the time of the transaction it was agreed that the sum of R1,000 was to be retained by him on account of a debt due by one of the plaintiff's relations to him. The plaintiff objected that the evidence of the agreement set up by the defendant was inadmissible. *Held*, that inasmuch as it was open to the plaintiff under prov. (1) of s. 92 of the Evidence Act to prove by oral evidence that the whole of the consideration-money had not been paid, it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract. *Held*, also, that the plea of the defendant substantially was that, although the consideration was fixed at R2,000, there was a separate oral

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agreement to the effect that out of that sum the plaintiff was to refund R1,000 on account of the debt due from his relative, and that on this ground the oral evidence tendered was admissible under prov. (2) of s. 92 of the Act, the stipulation as to the refund of the R1,000 not being inconsistent with the recital as to the consideration in the contract. LALA HIMMAT SAHAI SINGH *v.* LLEWHELLEN **I. L. R. 11 Calc. 486**

62. ——————— *Evidence Act (I of 1872), s. 92—Evidence to show manner in which consideration was agreed to be paid.* S. 92 of the Indian Evidence Act, 1872, will not debar a party to a contract in writing from showing, notwithstanding the recitals in the deed, that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner. *Hukum Chand* v. *Hira Lal, I. L. R. 3 Bom. 159, Lala Himmat Sahai Singh* v. *Llewhellen, I. L. R. 11 Calc. 486,* and *Ram Bakhsh* v. *Durjan, I. L. R. 9 All. 392,* referred to. INDARJIT *v.* LAL CHAND . **I. L. R. 18 All. 168**

On appeal to the Privy Council, the Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration-money and its receipt by the vendor, it is open to the latter to prove that no consideration-money was actually paid, notwithstanding anything in s. 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence. Where the consideration-money had been acknowledged to have been paid by a recital in the sale-deed to that effect: *Held,* that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration-money remained with purchaser in his hands for the purposes and under the conditions agreed upon between them. LAL CHAND *v.* INDARJIT . . . **I. L. R. 22 All. 370**
L. R. 27 I. A. 93
4 C. W. N. 485

63. ——————— **Evidence to prove contract** —*Statute of Frauds—Variance between bought and sold notes.* The defendant, a Hindu, entered into a contract of sale with the plaintiff through the medium of a broker. The broker made no entry of the contract in his book, and there was a material variance in the bought and sold notes delivered by him. The notes were accepted and retained by the plaintiff and defendant respectively. In an action for non-delivery under the contract:—*Held,* that the contract was made before the notes were written; the notes were sent by the broker to his principals merely by way of information; and the Statute of Frauds not applying, the plaintiff was

at liberty to give parol evidence of the terms of the contract. CLARTON *v.* SHAW **9 B. L. R. 245 : 16 W. R. 414**

64. ——————— *Evidence to vary written contract—Evidence Act (I of 1872), s. 92—Bought and sold notes—Oral evidence as to matter on which document is silent—Damages.* The defendants agreed to purchase (to arrive) from Messrs. Ralli Brothers, 3,000 maunds of copper, July shipment, and on the 13th August the defendants entered into a contract with the plaintiffs to sell to them 750 maunds out of this copper. The bought and sold notes, forming the contract between the plaintiffs and the defendants, corresponded one with the other, and constituted a contract for delivery of 750 maunds conditional on arrival within four months. Fifteen hundred maunds or thereabouts of this copper arrived at Ralli Brothers' godowns within the time mentioned in the contract between the plaintiffs and the defendants. The defendants delivered to the plaintiffs 375 maunds 6 chittacks of copper within time, and made no further delivery to the plaintiffs, no other shipment of the copper contracted for arriving within time at Calcutta. In a suit brought by the plaintiffs to recover damages for breach of contract to deliver, the defendants sought to show by oral evidence that the contract was for delivery of 750 maunds, if one-fourth of each of the successive arrivals at Ralli Brothers' godowns should, in the aggregate, amount to 750 maunds. *Held,* that such evidence was inadmissible under s. 92 of the Evidence Act, and that the plaintiffs were entitled to recover. JADU RAI *v.* BHUBOTARAN NUNDY **I. L. R. 17 Calc. 173**

65. ——————— *Evidence Act (I of 1872), ss. 92 and 94—Evidence to show language of document not meant to apply to existing facts—Evidence contrary to submission to arbitration.* An executor having propounded a will and applied for probate, a caveat was filed denying the execution of the alleged will, and the matter was duly registered as a suit. The executor and the caveatrix subsequently referred "the dispute" to arbitration signing a submission paper, which was as follows: "To Bhangsali Kalidas Ramji." Written by us the undersigned. By this instrument we give to you in writing as follows: In the matter of an application presented by Ghellabhai Atmaram Thambuwalla to obtain 'power' (probate) from the High Court for the administration and enjoyment between us two persons of the property of Bai Godawari, widow of Darji (tailor) Bhowan Deva Dave, I Nandubai, the wife of Mulji Mala, having raised an objection, have got a caveat registered in the High Court. In the matter thereof, we the said plaintiff (and) defendant have appointed you an arbitrator to bring about a settlement of the said dispute. As to whatever award you may make and give on arriving at a decision the same is to

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be agreed to and abided by us two persons. In this matter we each other agree and consent to act according to your 'award.' This submission paper we of our free will and pleasure and in sound mind and consciousness have made and delivered after having read and understood the same. It is agreed to and approved of by us, and our heirs and representatives in Court (and) the Darbar, Bombay. The English date the 30th of October in the year 1893." Before the arbitrator the parties were represented by solicitors, witnesses were called and examined, and the arbitrator made an award finding that the alleged will had not been executed. The executor nevertheless subsequently proceeded with his application for probate. The caveatrix contended that he was bound by the award. He alleged that the parties had never really intended to refer the question of the execution of the will to arbitration, and tendered evidence to prove this. *Held*, on appeal (FARRAN, *C.J.*, and STRACHEY, *J.*), that the evidence was admissible. The language of the submission paper was not so plain in itself, nor did it apply so accurately to existing facts as to prevent the evidence being given—s. 94 of the Evidence Act (I of 1872). GHELLABHAI ATMARAM *v.* NANDUBAI . . . **I. L. R. 21 Bom. 335**

Reversing same case in Court below (CANDY, *J.*), where it was decided on other grounds. GHELLABHAI ATMARAM *v.* NANDUBAI **I. L. R. 20 Bom. 238**

66. _____ *Contract of indemnity—Evidence Act, s. 92—Mortgage—Contemporaneous oral contract.* In a deed of mortgage executed on behalf of a minor by his guardian in favour of *T* (who did not execute it), it was recited that the mortgage was made to secure the repayment of a certain sum which *T* had undertaken to expend in liquidating certain debts due by the minor's estate, and, amongst others, a debt due to *K T* having failed to pay this debt, *K* obtained a decree against, and was paid by the minor's guardian. In a suit brought on behalf of the minor against *T* to recover the amount paid in satisfaction of *K's* decree, *T* pleaded that it had been orally agreed at the time of the mortgage that he was to obtain an indemnity either from *K* or from the minor's guardian before payment, in case the minor repudiated the debt on coming of age. The District Court rejected the evidence in support of this plea, on the ground that it was inadmissible by virtue of s. 92 of the Evidence Act, 1872. *Held*, that the evidence was admissible. TIRUVENGADA *v.* RANGASAMI . . . . **I. L. R. 7 Mad. 19**

67. _____ *Evidence Act, 1872, s. 92—Evidence—Oral agreement inconsistent with written documents.* *R*, prior to his death, was a partner with defendants in the firm of *N C & Co.* He died on 8th November 1884. On the 9th November 1885, his executors passed a release to the defendants, which recited that *R*'s share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that, after examining the books and taking accounts, etc., a balance of R8,395-11 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of *R*, etc. On the 7th April 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff, as assignee, brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release; that the amount really due to the testator's estate by the firm had not been ascertained; and that it had been agreed on by the partners at the time of the release that, in addition to the sum therein mentioned, the executors, as representing the testator's estate, should receive a one-anna share in the partnership. The defendants denied the right of the plaintiff, and contended that the interest of *R* and his estate in the partnership ceased at his death. They relied on the release and denied any agreement to give the executors a share, and contended that, under s. 92 of the Evidence Act (I of 1872), no evidence could be given of the alleged agreement. For the plaintiff it was contended that the agreement as to the one-anna share was quite independent of the release. *Held*, that evidence of the agreement that the executors should continue to have a one-anna share in the partnership was inadmissible, as being inconsistent with the written release (Evidence Act, s. 92). By the release the executors of *R* released the partners from all claims whatever in respect of *R's* share, and the consideration for that release was stated in the document to be a lump sum, on payment of which, under the writing, all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for release in respect of the past accounts, *viz.*, the continuance of a one-anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing, and was inconsistent with those terms. COWASJI RUTTONJI LIMBOOWALLA *v.* BURJORJI RUSTOMJI LIMBOOWALLA **I. L. R. 12 Bom. 335**

68. _____ *Evidence Act, s. 92—Civil Procedure Code, s. 317.* By an agreement in writing, *A*, after reciting that he bid for certain property sold in execution of a decree benami for *B* and paid the deposit amount into Court for *B* and that *B* paid the balance, promised to convey their property to *B*. In a suit by *B* to recover the property from *A*: *Held*, that, under s. 92 of the Evidence *Act*, *B* was not debarred from proving that *A* bought the property for himself, and not benami for *B*. KUMARA *v.* SRINIVASA **I. L. R. 11 Mad. 213**

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3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*contd.*

69. ——————— *Exclusion of evidence of oral agreement—Evidence Act (I of 1872), s. 92—"Between the parties."* The words in s. 92 of the Evidence Act (I of 1872) "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed from proving by oral evidence in a suit by the one against the other that the defendant was not a real, but a nominal, party only to the purchase, and that the plaintiff was solely entitled to the property to which it related. *M* conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held*, that s. 92 of the Evidence Act did not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers. MULCHAND *v.* MADHO RAM

I. L. R. 10 All. 421

70. ——————— *Custom or usage qualifying contract—Evidence Act (I of 1872), s. 92. prov. 5—Shipment, meaning of.* On the 18th April 1890, the defendant signed a contract (No. 3053) to buy from the plaintiffs 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." These goods were not supplied as they could not be obtained at the price limited. On the 24th September 1890, the defendant gave the plaintiffs an order at an increased limit of price in the following terms:—Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all-round advance of 1*d.* per pair on original limits for November, December, January shipments, in three monthly lots, about 8 bales to be shipped in each month." This order was accepted, and the goods were shipped as follows:—6 bales were handed to the carriers (the S. & N. W. Railway Co.) in Manchester on the 28th November 1890, and were shipped at Birkenhead on the 9th December 1890; 6 bales were handed to the same carriers on the 4th December 1890, and were shipped on the 13th December 1890; 10 bales were handed to the same carriers on the 23rd December and one bale on the 24th December, and these 11 bales were shipped on the 6th January 1891. The defendant refused to accept the goods. He contended that the documents of the 18th April and 24th September should be read together, and that the final contract was for November, December, January shipments, in three monthly lots, at intervals of four weeks. He also contended that the shipment on the 9th December 1890 was a late shipment, and that he was not therefore bound to accept the goods under the contract. As to this last contention, the plaintiffs alleged that by the custom of Bombay in the case of contracts made with members of the Native Piece-goods Association, the date of the carriers' weight note was to be regarded as the date of shipment, and that, under such a contract as the one in question, delivery to the Railway Company or other inland carrier was equivalent to shipment. This custom, it was alleged, originated in consequence of the above Association having agreed that all piece-goods ordered out by its members should be conveyed to Bombay by certain lines of steamers only, and by no others. It was stated that, unless some such custom existed, it would in many instances be impossible for Bombay merchants to carry out their contracts, as no steamers of the selected lines might be available. The Judge of the Court of Small Causes at the hearing found that the alleged custom existed, and was generally accepted and understood by merchants and dealers in Bombay. On reference to the High Court: *Held*, that evidence of the alleged custom or usage of trade was not admissible under s. 92, prov. (5), of the Evidence Act (I of 1872) to explain or vary the natural and ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer, and to allow evidence of a usage that delivery to a Railway Company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town, would be to allow evidence of a usage repugnant to, or inconsistent with, the express terms of the contract. SMITH *v.* LUDHA GHELLA DAMODAR

I. L. R. 17 Bom. 129

71 ——————— *Evidence Act (I of 1872), s. 92, prov. 1—Mutual mistake of facts—Equitable relief—Rectification of a deed of conveyance.* Where the plaintiffs brought a suit to recover possession of some land on the allegation that it was covered by the conveyance executed in their favour by the defendant, and the defence was to the effect that what was intended to be sold and purchased was the revenue-paying estate of the defendant, but that the land in suit which was the homestead of the defendant, though found included in the estate, was not expressly excepted, because both the parties were under the mistaken impression that it was not so included, but was lakhiraj; and it was contended that it was not open to the defendant to raise such a defence in this suit. *Held*, that it was open to the Court, having regard to prov. 1 to s. 92 of the Evidence Act, to allow oral evidence to be put in to prove the mutual mistake. *Held*, also, that, where there is a mutual mistake of fact in a case as here, a Court administering equity will interfere to have the deed rectified, so that the real intention of both parties may be carried into effect, and will

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EVIDENCE—PAROL EVIDENCE—*concld.*

3. VARYING OR CONTRADICTING WRITTEN INSTRUMENTS—*concld.*

not drive the defendant to a separate suit to rectify the instrument. *Held* by BANERJEE, *J.* that prov. 1, s. 92 of the Evidence Act, does not limit the admissibility of oral evidence to a suit to obtain a decree on the ground of mistake. MOHENDRO NATH MUKERJEE *v.* JOGENDRA NATH ROY . . . . . **2 C. W. N. 260**

72. ——— Evidence to contradict deed —*Indian Evidence Act (I of 1872), s. 92—Oral evidence to contradict the recital in a deed.* When one of the parties to a deed is, under any of the provisions of s. 92 of the Evidence Act, permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence. Where a deed recited the payment of a certain consideration, and the plaintiff denied the passing of any consideration, and adduced evidence in support of his contention, under the provisions of s. 92 of the Evidence Act, it is open to the defendants to go into oral evidence to show that there was some consideration, for the deed, though not the same as that recited in the deed. *Lala Himmat Sahai Singh* v. *Llewhellen, I. L. R. 11 Calc. 486*; *Hukum Chand* v. *Hiralal, I. L. R. 3 Bom. 159,* referred to. KAILASH CHANDRA NEOGI *v.* HARISH CHANDRA BISWAS (1900) . . **5 C. W. N. 158**

73. ——— Evidence of mere suretyship—*Act I of 1872 (Indian Evidence Act), s. 92—Construction of document—Evidence of oral agreement not excluded.* The plaintiff sued to recover money which he had been compelled to pay in virtue of a mortgage executed by his two half-sisters and himself. His claim was based on the plea that, although appearing in the bond as a co-obligor, he was in reality merely a surety. *Held,* that evidence was admissible to show that the plaintiff executed the mortgage-bond as a surety only. SHAMSH-UL-JAHAN BEGAM *v.* AHMAD WALI KHAN (1903) **I. L. R. 25 All. 337**

74. ——— Collateral agreement—*Agreement between lessor and lessee collateral to the lease—Admissibility in evidence—Registration—Evidence Act (I of 1872), s. 92—Registration Act (III of 1877), s. 17—Act IV of 1882, ss. 105, 107.* An agreement by a lessee to pay for a term of years an annual sum of money to his lessor, forming no part of the terms of his holding, and no charge on the property leased, and being a mere personal obligation collateral to the lease, which, moreover, was to take effect at a future date after the said term of years had run out, is not affected by s. 92 of the Evidence Act, and does not require registration under s. 17 of Act III of 1877, read in conjunction with the Transfer of Property Act, 1882, ss. 105, 107. SUBRAMANIAN CHATTIAR *v.* ARUNACHALAM CHETTIAR (1902) . . . **I. L. R. 25 Mad. 603: s.c. L. R. 29 I. A. 138 6 C. W. N. 865**

EVIDENCE ACT (II OF 1855).

See EVIDENCE.

——— **s. 14.**

See CHARGE TO JURY—SUMMING UP IN SPECIAL CASES—QUESTIONS OF LAW AND FACT . . **8 W. R. Cr. 60**

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESS—CROSS-EXAMINATION . . **13 W. R. Cr. 18**

——— **s. 24.**

See PRIVILEGED COMMUNICATION. **15 W. R. 340 1 B. L. R. A. Cr. 8 10 W. R. Cr. 14**

——— **s. 32.**

See CONFESSION—CONFESSIONS SUBSEQUENTLY RETRACTED **8 Bom. Cr. 103**

——— **s. 34.**

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—CROSS-EXAMINATION . . **15 W. R. Cr. 23**

——— **s. 57.**

See APPELLATE COURT—EVIDENCE AND ADDITIONAL EVIDENCE ON APPEAL. **8 W. R. 499**

EVIDENCE ACT (I OF 1872).

See BENGAL TENANCY ACT, 1885, ss. 106, 109A . . **I. L. R. 31 Calc. 380**

See BHAGDARI AND NARWADARI ACT, ss. 3, 5 . **I. L. R. 28 Bom. 399**

See CIVIL PROCEDURE CODE, 1882, s. 373. **I. L. R. 31 Calc. 965**

See CONTRACT . **I. L. R. 31 Calc. 614 I. L. R. 28 Bom. 420**

See CRIMINAL PROCEDURE CODE, ss. 162, 172 . . **I. L. R. 33 Calc. 1023**

See ESTOPPEL . **I. L. R. 28 Bom. 440 I. L. R. 35 Calc. 904**

See EVIDENCE.

See HINDU LAW . **I. L. R. 27 Mad. 32 I. L. R. 31 Calc. 262**

See OUDH ESTATES ACT, ss. 8, 10. **I. L. R. 26 All. 119**

See PROBATE . **I. L. R. 31 Calc. 357**

See PUBLIC DOCUMENT. **I. L. R. 31 Calc. 284**

——— *Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Intentionally giving false evidence in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle.* The Evi-

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EVIDENCE ACT (I OF 1872)—*contd.*

dence Act (I of 1872) does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule, which is founded on substantial justice, may well serve as a safe guide to those, who have to administer the criminal law in India. EMPEROR *v.* BAL GANGADHAR TILAK (1904) . . **I. L. R. 28 Bom. 479**

——— **s. 2**—*Oral contemporaneous agreement cannot be set up to add to a written contract —Easements Act (V of 1882), s. 13, cls. (e), (f)—Easement of necessity—No easement on the ground of convenience, when there is other means of access. Held,* that if *A* has a means of access to his property without going over *B's* land, *A* cannot claim a right of way over *B's* land on the ground that it is the most convenient means of access. The law under s. 13, cl. (*e*) of the Easements Act, is the same as the law in England. *Wutzler* v. *Sharpe, I. L. R. 15 All. 270, 281,* followed. *Esuvai* v. *Damodar Ishvardas, I. L. R. 16 Bom. 552, 559,* not followed. *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap, I. L. R. 19 Bom. 797,* not followed. To sustain a claim under s. 13, cl. (*f*) of the Easements Act, the easement claimed must be apparent and continuous. A contract in writing cannot be added to by a contemporaneous oral agreement. KRISHNAMARAZU *v.* MARRAJU (1905) . **I. L. R. 28 Mad. 495**

1. ——— **s. 3**—*"Court," meaning of.* The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purpose of the Act itself, and should not be extended beyond its legitimate scope. QUEEN-EMPRESS *v.* TULGA . . . **I. L. R. 12 Bom. 36**

2. ——— *"Court"—Registration Act (VIII of 1871), s. 82—Sub-Registrar—Penal Code, s. 228.* By s. 82 of the Registration Act a Sub-Registrar is a public officer, and proceedings before him are judicial proceedings within the meaning of s. 228 of the Penal Code; and as he is legally authorized to take evidence he is a "Court" as defined by the Evidence Act, s. 3. *In the matter of the petition of* SARDHARI LAL **13 B. L. R. Ap. 40: 22 W. R. Cr. 10**

See CONFESSION—CONFESSIONS TO POLICE OFFICERS . **I. L. R. 14 Bom. 260**

——— **s. 4**— .

See AGRA TENANCY ACT, s. 201. **I. L. R. 29 All. 148**

——— **ss. 4, 32, 90**—*Practice of Privy Council with respect to decisions as to credibility of witnesses by lower Courts—Mode of dealing with hearsay evidence—Ancient document—Discretion of Court in calling for formal proof of.* The Judicial Committee will not criticize with any strictness opinions as to the credibility of witnesses, which is eminently a question for the Courts in India. Where the Courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with s. 32

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 4, 32, 90**—*concld.*

of the Evidence Act, and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others, but the Courts had considered it from both points of view and held it inadmissible, the Judicial Committee saw no reason to differ from the estimate, which the Courts had formed, as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Courts had applied the provisions of s. 32. Notwithstanding a document was more than 30 years old and had been produced from proper custody, the Courts below, on the grounds that there were circumstances in the case and evidence as to the document itself which threw great doubt on its genuineness, exercised their discretion under s. 90 of the Evidence Act by not admitting the document in evidence without formal proof, and rejected it, when no such proof was given. The Judicial Committee considered that the discretion of the Court had been rightly exercised and declined to interfere with it. SHAFIQ-UN-NISSA *v.* SHABAN ALI KHAN (1904) **I. L. R. 26 All. 581**
s.c. L. R. 31 I. A. 217

——— **s. 6, Illus. (a)**—

See HEARSAY EVIDENCE. **11 C. W. N. 266**

——— **ss. 6, 7**—*Admissibility of questions as to circumstances under which accused was examined on two days.* In recording the examination of the accused, which was taken on two several occasions, the Magistrate made the certificate required by s. 364, Criminal Procedure Code, on the first page of the record only, although the record of the examination taken on the first day alone extended over two pages, and that taken on the second day was written entirely on the second page. *Held,* that the defect was cured by the evidence of the Magistrate. In recording this evidence the Sessions Judge disallowed the question put to the Magistrate as to the circumstances which led to the examination of the accused on the second day. *Held,* that the defect was cured by the evidence of the Magistrate. In recording this evidence the Sessions Judge disallowed the question put to the Magistrate as to the circumstances which led to the examination of the accused on the second day. *Held,* that the question was relevent and should not have been disallowed. EMPEROR *v.* RAJANI KANTO KOER (1904) . . . . **8 C. W. N. 22**

——— **ss. 6, 8**—

See CRIMINAL PROCEDURE CODE, s. 436. **5 C. W. N. 574**

1. ——— **s. 8, ill. (k)**—*Admission—Confession.* A prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta,

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 8, ill. (k)—*concld.*

discovered the loss of the property, and stated his loss to a railway police inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present. This statement was tendered in evidence and admitted under s. 8, ill. (*k*) of the Evidence Act. Evidence was also tendered of a statement made by the prisoner to the constable who arrested him, to the effect that some of the property had been given him, and that he had bought the rest, and this was admitted; the Court remarking that there was a distinction in the Evidence Act between "admission" and "confession." QUEEN *v.* MACDONALD . . . . **10 B. L. R. Ap. 2**

2. ——— ill. (g), and s. 6—*Statement made to third person by person injured.* The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person immediately after the commission of the offence. The prisoner did not, when the statement was made, deny that she had done the act complained of. *Held*, that the evidence was admissible under s. 6 and s. 8, ill. (*g*), of the Evidence Act. *In the matter of the petition of* SURAT DHOBNI . **I. L. R. 10 Calc. 302**

——— ss. 8, 24, 25, 26, 27—*Accused induced to point out the hiding place of stolen property—Conduct—Admissibility of evidence—Criminal Procedure Code, s. 163—Confession.* *M* was charged with the murder of a girl. In the hope of pardon being given to her, she took the police to a certain place and pointed out and produced certain ornaments, which the deceased was wearing at the time of her death. *Held*, that evidence was admissible to show that the accused did go to a certain place and there produced certain ornaments. Such evidence was admissible under s. 8 of the Indian Evidence Act irrespective of whether the conduct of the accused was or was not the result of inducement offered by the police. EMPEROR *v.* MISRI (1909) **I. L. R. 31 All. 592**

——— s. 9—*Copy of proceeding anterior to suit containing mention of the descent of one of the parties to the suit—Document showing parentage of party—Proof of pedigree—Civil Procedure Code, s. 568.* One of the questions in issue in a suit as to the pedigree of a certain family being whether one *G* was son of *B S*, or of one *M S*, belonging to a totally different family from that of *B S*, an attested copy of a *rubkar* in some proceedings long anterior to the suit was tendered in evidence, in which *rubkar G.* was described as the son of *B. S.* *Held*, that the *rubkar* was admissible in evidence under the provisions of s. 9 of Act I of 1872. RADHAN SINGH *v.* KUARJI DICHHIT . **I. L. R. 18 All. 98**

——— s. 10.

See ABATEMENT . **4 C. W. N. 528**

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 10—*concld.*

See CONSPIRACY . **I. L. R. 28 Calc. 797**
I. L. R. 30 Calc. 983

——— s. 11.

See CRIMINAL PROCEDURE CODE, s. 436. **5 C. W. N. 574**

See LEASE—CONSTRUCTION. **I. L. R. 30 Calc. 883**

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . **I. L. R. 6 Calc. 171**
I. L. R. 3 Bom. 3
I. L. R. 25 Calc. 522
2 C. W. N. 501

1. ——— *Fact making probable a fact in issue—Admission by one defendant relevant against other defendants.* In a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants in a lane which was the common property of himself and the defendants:—*Held*, that the admission of one of the defendants in a previous suit to which the other defendants were not parties as to the common character of the portion of the lane between his house and the plaintiff's, and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in s. 11 of the Evidence Act. NARO VINAYEK *v.* NARHARI **I. L. R. 16 Bom. 125**

2. ——— ss. 11, 21, cl. (3)—*Admissibility of petition and written statement filed in a previous proceeding.* Where the plaintiff and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence. *Held*, that the documents were admissible against those defendants under ss. 11, cl. (2), and 21, cl. (3), of the Evidence Act. *Naro Vinayek* v. *Narhari, I. L. R. 16 Bom. 125*, relied upon. GYANNESSA *v.* MOBARAKANNESSA . . . **I. L. R. 25 Calc. 210**
2 C. W. N. 91

3. ——— ss. 5, 11 and 153—*Statement that another witness was at a particular place at a particular time.* The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time and consequently could not then have been at another place where the latter states he was and saw the accused persons, is properly admissible in evidence, even

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EVIDENCE ACT (I OF 1872)—*contd.*

——— ss. 5, 11 and 153—*concld.*

though the witness for the prosecution may not himself have been cross-examined on the point: ss. 5, 11, and 153, ill. (*c*), of Act I of 1872. REG. *v.* SAKHARAM MUKUNDJI . . **11 Bom. 166**

4. ——— ss. 11, 43, 54, and 153—*Admissibility of evidence of one crime to prove existence of another—Possession of forged documents.* S. 11 of the Evidence Act should not be construed in its widest signification, but considered as limited in its effect by s. 54 of the Act. So construed, s. 11 renders inadmissible the evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected crime, even though it be cognate. Accordingly, the possession by an accused person of a number of documents suspected to be forged is no evidence to prove that he has forged the particular document with the forgery of which he is charged. *Per* WEST, *J.* Where a person charges another with having forged a promissory note, and denies having ever executed any promissory note at all, the evidence that a note, similar to the one alleged to be forged, was in fact executed by that person, is not admissible nor even would a judgment founded upon such note be so: ss. 43 and 153 of the Evidence Act. REG. *v.* PARBHUDASS AMBARAM . . . . **11 Bom. 90**

5. ——— ss. 11, 54—*Bombay Prevention of Gambling Act (IV of 1887), ss. 4, 5, 6, 7—Keeping a common gaming-house—Applicability of presumption under s. 7 to cases under s. 4—Previous conviction—Criminal Procedure Code (Act V of 1898), s. 342. Held,* that the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention. EMPEROR *v.* ALLOOMIYA HUSAN (1904) . . **I. L. R. 28 Bom. 129**

——— s. 13.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 13 . **12 C. W. N. 739**

See EVIDENCE—CIVIL CASES—DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—DECREES AND PROCEEDINGS NOT INTER PARTES.

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—CRIMINAL COURT, PROCEEDINGS IN **I. L. R. 29 Calc. 187**

See RES JUDICATA—ESTOPPEL BY JUDGMENTS . . **I. L. R. 3 Bom. 3**
I. L. R. 6 Calc. 171
I. L. R. 25 Calc. 522
2 C. W. N. 501

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—QUESTIONS OF FACT.
I. L. R. 23 Calc. 179
I. L. R. 21 Bom. 110
I. L. R. 22 Bom. 430

——— *Right—Public right.* The right mentioned in the Evidence Act, s. 13, is not a public right only. SOORJO NARAIN PANDA *v.* BISSUMBER SINGH . . . **23 W. R. 311**

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 13—*concld.*

——— ss. 13 (a), 32 (7).

See CUSTOM . . **11 C. W. N. 703**

——— ss. 13 (b), 32 (3), & (5), 6, 49, 90.

See HINDU LAW . **I. L. R. 32 Calc. 6**

——— ss. 13, 40, 43—

——— *Principles applicable to purchase—Hindus—Mahomedans—Judgment not inter partes—Admissibility in subsequent suit—Transaction—"Particular instances in which the right is claimed"—Res judicata.* The principles applicable to a purchase by one member of a joint Hindu family from another are not applicable to Mahomedans. Plaintiff, a Mahomedan, brought a suit against his brother, brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a registered sale-deed passed to the plaintiff by his deceased father. Subsequent to the sale to the plaintiff, certain mortgagees of the father brought a suit on the mortgage against the plaintiff, his father and mother. In the said suit the sale to plaintiff was held to be a sham transaction and the plaintiff had to pay off the mortgage. In the suit brought by the plaintiff for the recovery of the house on the strength of the sale-deed, the defendants relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. The first Court allowed the claim, but the Judge in appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bonâ fide.* On second appeal by the plaintiff, a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage: *Held, per* RUSSELL, *A.C.J.*, that the proceedings in the suit on the mortgage were admissible as relevant evidence because the plaintiff and defendants, either by themselves or their predecessors, were parties to that suit. The said proceedings came within the words "particular instances in which the right was claimed" in s. 13 of the Indian Evidence Act (I of 1872). *Per* BEAMAN, *J.*—The judgment in the suit on the mortgage was admissible to prove that the genuineness of the plaintiff's sale-deed was then questioned, but it cannot be used for any ulterior purpose. MAHAMAD *v.* HASAN (1906) . . **I. L. R. 31 Bom. 143**

——— s. 14.

See CRIMINAL PROCEDURE CODE, s. 436. **5 C. W. N. 574**

——— s. 14 (a).

See "CRIMINAL PROCEDURE CODE, ss. 196, 4(*b*), 537, 287, 225, 200." **I. L. R. 32 Mad. 3**

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EVIDENCE ACT (I OF 1872)—*contd.*

——— ss. 14, Expl. (1), illus. (o) : 15, illus. (a).

See CHEATING . I. L. R. 36 Calc. 573

——— ss. 14 and 15—*Admissibility of evidence—Penal Code, s. 206—Fraudulent transfers of property to different persons.* Where the accused was charged under s. 206 of the Penal Code with fraudulently transferring three properties to three different persons on a certain day in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day and apparently with the same object:—*Held*, that this evidence was admissible, under ss. 14 and 15 of the Evidence Act, to prove either that all those transfers were parts of one entire transaction or that the particular transfers which were specified in the charge were made with a fraudulent intent. *Reg.* v. *Parbhudas, 11 Bom. 90,* distinguished. QUEEN-EMPRESS *v.* VAJIRAM . . I. L. R. 16 Bom. 414

——— s. 16.

See COMPANY—WINDING UP—GENERAL CASES . . I. L. R. 9 All. 366

——— ss. 17 and 18—*Horoscope—Admission.* A horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit and was put in as an "admission" under the Indian Evidence Act, ss. 17 and 18, and was *held* to be admissible in evidence to prove the plaintiff's age. *Ram Narain Kalia* v. *Monee Bibee, I. L. R. 9 Calc. 613,* and *Satis Chunder Mukhopadya* v. *Mohendro Lal Pathuk, I. L. R. 17 Calc. 849,* distinguished. GOUNDAN *v.* GOUNDAN. I. L. R. 17 Mad. 134

——— s. 18.

See ADMISSION—ADMISSIONS IN STATEMENTS AND PLEADINGS.
22 W. R. 303, 304 note
23 W. R. 27
I. L. R. 11 Calc. 588

——— ss. 18 and 21.

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR . I. L. R. 19 All. 76
L. R. 23 I. A. 106

——— ss. 19 and 80—*Evidence—Proof of divorce and subsequent marriage—Deposition in former criminal case—Heading of deposition.* In a suit in which the appellant's success depended on her establishing her mother's divorce from a former husband (Eda) and subsequent marriage to another man (Ghulam Ali), in whose service she had been for some years and to whose property the appellant claimed to succeed as his daughter and heir, the respondents produced a deposition made after the birth of the appellant by her mother in a criminal case. The heading of the document was "Ghafooran, wife of Eda, caste Shaikh, aged 40 years, from Dewa, on solemn affirmation," and in it the witness stated, "I have lived with Ghulam Ali these 12 or 14 years. I lived with him before his wife died, two years before that event." *Held*, reversing the decision of the Judicial Commissioner's Court, that the heading was only descriptive of the witness and formed no part of the evidence given by her on solemn affirmation; it might well be, and probably was, a wrong description of her; and her statement in the deposition was not necessarily or even probably an admission of immorality. Even if admissible, therefore, the deposition was not entitled to any weight. On the rest of the evidence it was *held*, that the second marriage of the appellant's mother was a valid one, and that the appellant was legitimate and entitled to the property she claimed. MAQBULAN *v.* AHMAD HUSAIN (1904)
I. L. R. 26 All. 108
s.c. 8 C. W. N. 241
L. R. 31 I. A. 38

——— s. 21.

See BENAMI . . 9 C. W. N. 89

——— "*Representative in interest*"—*Purchaser at sale in execution of decree.* The purchaser at a sale in execution of a decree was held to be a "representative in interest" of the judgment-debtor within the meaning of the Evidence Act, I of 1872, s. 21. UNNOPOORNA DASSEE *v.* NUFUR PODDAR . 21 W. R. 148

——— ss. 21, 32 cl. (5).

See HINDU LAW . I. L. R. 36 Calc. 590

——— s. 24.

See CONFESSION—CONFESSIONS TO MAGISTRATE . . I. L. R. 2 All. 260
I. L. R. 3 All. 338
I. L. R. 22 Calc. 50
2 C. W. N. 702
I. L. R. 25 Bom. 168, 543
I. L. R. 26 Mad. 38
11 C. W. N. 904

See CONFESSION—CONFESSIONS UNDER THREAT OR PRESSURE.

——— ss. 24, 26.

See CIRCUMSTANTIAL EVIDENCE. 9 C. W. N. 474

——— ss. 24, 167—*Criminal Procedure Code (Act V of 1898), s. 162—Bombay City Police (Act IV of 1902), s. 63—Amended Letters Patent, 1865, cl. 26—Statement made by a witness to and taken down in writing by a Police Officer—Admissibility in evidence—Confession of accused, admissibility of.* One *P*, an entry clerk in the General Post Office, Bombay, was charged with having committed theft in respect of a registered letter. *S*, a friend of the accused, had made a statement to a Police Officer, which the latter

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 24**—*concld.*

had taken down in writing. At the trial *S.* denied having made the statement, whereupon the presiding Judge admitted the statement in evidence both to discredit *S* and also as evidence against *P* in that it contained statements made to the Police corroborating confessions made by *P.* These confessions were also used in evidence against *P.* On the application by *P*'s counsel, the Advocate-General certified under cl. 26 of the amended Letters Patent that the said document was wrongly admitted. On a review of the Full Bench: *Held*, that having regard to s. 162 of the Criminal Procedure Code (Act V of 1898), the said document ought not to have been admitted or used in evidence against the accused. The further question was raised by Counsel for the accused whether the confessions of the accused were irrelevant under s. 24 of the Indian Evidence Act (I of 1872). *Held*, that the confessions were rightly admitted in evidence. *Per* BATTY, *J.*—It is not sufficient to render a confession irrelevant under s. 24 that there may have been added to it a statement, which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced. *Per* DAVAR, *J.*—In the absence of the point being reserved or certified by the Advocate-General the Full Bench has no right to sit in appeal on the decision that the confession was legally admissible in evidence. EMPEROR *v.* NARAYAN RAGHUNATH PATKI (1907) . . **I. L. R. 32 Bom. 111**

——— **ss. 25 and 26.**

See CONFESSION—CONFESSIONS TO POLICE OFFICERS.

——— **s. 26 (Criminal Procedure Code, 1861, s. 149).**

See CONFESSION—CONFESSIONS TO MAGISTRATE . **I. L. R. 15 Calc. 595**
2 C. W. N. 702
I. L. R. 22 Bom. 235

See CONFESSION—CONFESSIONS TO POLICE OFFICERS . **I. L. R. 20 Bom. 165**

1. ——— **Village Munsif**—*Magistrate.* A Village Munsif in the Madras Presidency is a "Magistrate" within the meaning of s. 26 of the Evidence Act, 1872. EMPRESS *v.* RAMANJIYYA **I. L. R. 2 Mad. 5**

2. ——— **Police officer or Magistrate of a Native State.** The words "police officer" and "Magistrate" in s. 26 of the Indian Evidence Act (I of 1872) include the police officers and Magistrates of Native States as well as those of British India. QUEEN-EMPRESS *v.* NAGLA KALA **I. L. R. 22 Bom. 235**

——— **s. 27 (Criminal Procedure Code, 1861-69, s. 150).**

See CONFESSION—CONFESSIONS TO POLICE-OFFICERS.

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 27**—*concld.*

See EVIDENCE—CRIMINAL CASES—STATEMENTS TO POLICE-OFFICERS.

——— **s. 29.**

See VERDICT OF JURY—POWER TO INTERFERE WITH VERDICTS. **20 W. R. Cr. 33**

——— **s. 30.**

See CONFESSION—CONFESSION OF PRISONERS TRIED JOINTLY.

1. ——— **Retracted confession**—*Evidence—Use of retracted confession as against person making it and as against co-accused.* A retracted confession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons tried jointly with the confessing accused for the same offence. As regards the person making it, a retracted confession may, even without any corroborative evidence, form the basis of a conviction. As regards other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction; and, *semble*, that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful. *Queen-Empress* v. *Maiku Lal, I. L. R. 20 All. 483*, followed. *Empress* v. *Ashootosh Chuckerbutty, I. L. R. 4 Calc. 483*, discussed. *Queen* v. *Mohesh Biswas, 19 W. R. Cr. 16, referred to.* EMPEROR *v.* KEHRI (1907) **I. L. R. 29 All. 434**

2. ——— **Joint trial**—*Confession—Plea of guilty by one of the accused—Use of his confession against the rest—Criminal Procedure Code (Act V of 1898), ss. 271, 342.* Where an accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person, who has pleaded guilty, may technically be said to be tried jointly for the same offence with other co-accused and any statement in the nature of a confession that he may make used against them. *Queen-Empress v. Paltua, I. L. R. 23 All. 53*, followed. EMPEROR *v.* KHEORAJ (1908) **I. L. R. 30 All. 540**

3. ——— *Confession of co-accused, who pleads guilty at joint trial—Value as against the other accused.* When one of several accused on their joint trial pleads guilty, it is not always incumbent on the Court to accept the plea of guilty and remove him from the dock. The Court may for sufficient reasons refuse to accept the plea of guilty and continue to try him jointly with the other accused and then in the trial take his confession into consideration against the other accused. *Queen-Empress* v. *Pahuji, I. L. R. 19 Bom. 195, Queen-Empress* v. *Paltua, I. L. R. 23 All. 53, Emperor* v. *Kheoraj, I. L. R. 30 All. 540*, referred

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EVIDENCE ACT (I OF 1872) —*contd.*

——— **s. 30**—*concld.*

to and explained. SUKDEV TEWARI *v.* THE KING-EMPEROR (1909) . . . **13 C. W. N. 552**

——— **s. 31.**

See ESTOPPEL—ESTOPPEL BY CONDUCT. **I. L. R. 14 Bom. 312**

——— **s. 32.**

1. ——— Statement by person since dead—*Admissibility in evidence of statement in writing by person who could have been called as a witness, but was not—Statement of deceased persons.* Where a person, although alive at the time the plaintiff closed his case, was not called as a witness, statements in writing by such person, filed before his death, in support of the plaintiff's case were held by the Judicial Committee to be inadmissible in evidence as statements of a deceased person. A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person. JAGATPAL SINGH *v.* JAGESHAR BAKHSH SINGH (1902) . **I. L. R. 25 All. 143: s.c. L. R. 30 I. A. 27; 7 C. W. N. 209**

2. ——— Proof of legitimacy—*Admissibility of evidence—Statements as to heirs, made in accordance with practice of public office—Proof of legitimacy of heirs named in such statements.* A series of statements, extending from 1860 to 1890, by a *wasiqadar*, made in accordance with the practice of the *wasiqa* office, a department under Government, as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her, in reply to inquiries by the *wasiqa* officers, explaining and confirming such statements, were held to be admissible in evidence in support of the legitimacy of such heirs, and, under the circumstances, to be conclusive in their favour. BAGAR ALI KHAN *v.* ANJUMAN ARA BEGAM (1903) **I. L. R. 25 All. 236 s.c. L. R. 30 I. A. 94; 7 C. W. N. 465**

3. ——— Proof of birth of heir—*Admissibility of evidence—Document—Contemporaneous proof—New trial—Concurrent decisions on fact—Mithila law—Sister's son—Agnate—Preferable heir.* Documents which, it was contended, were inadmissible against the appellant on the ground that they were *res inter alios acta* and did not come within any of the classes of evidence enumerated in s. 32 of the Evidence Act (I of 1872) were held to be admissible against him as being clearly evidence against persons, through whom he claimed. On an issue as to whether a posthumous son had been born, to whom the respondent would, if the affirmative were proved, succeed in preference to the appellant, a document in Persian characters was produced written on two pieces of paper of very different textures fastened together, of which the lower portion (which the appellant contended was a forgery) was in a different hand-writing from that of the upper portion and was written with a different pen. It was also objected that the word in the upper portion translated "son" really meant only "child" or "offspring" without distinction of sex. *Held*, that, even if the appellant's contentions were correct, other expressions in the upper portion of the document pointed to the existence of a son, and the fact of its being expressly referred to in another document of slightly later date (the genuineness of which was not impeached) furnished contemporaneous proof by reference, and therefore the grave suspicion attaching to the document did not under the circumstances form sufficient ground for overruling the concurrent decisions of the Courts below. A new trial asked for on the grounds that a mass of evidence had been improperly received, and that the earlier document above referred to was so clearly a forgery that injustice would be done, if the decisions appealed from were allowed to stand, and consequently there had been a gross miscarriage of justice, was refused on the above findings, the Judicial Committee being of opinion that there was no reason for departing from their usual practice of declining to interfere with concurrent decisions on fact. *Semble:* Under the Mithila law an agnate in the seventh degree is a preferable heir to a sister's son. RANI SRIMATI *v.* KHAGENDRA NARAYAN SINGH (1904) **I. L. R. 31 Calc. 871 s.c. L. R. 31 I. A. 127**

4. ——— Proof of relationship—*Witnesses—Relationships.* On a question of relationship, the statements of certain witnesses, who were supposed to be speaking from information derived from others, were sought to be made admissible under s. 32 of the Evidence Act. They did not however state the persons from whom they derived that information nor at what period of time they derived it. *Held*, that the Courts in India had properly applied the provisions of s. 32 of the Evidence Act, in rejecting this evidence. SHAFIQUNNESSA *v.* SHABAN ALI KHAN (1905) . . . . **9 C. W. N. 105**

5. ——— *Admission by plaintiff, when admissible in his favour—Statement in previous depositions.* When the plaintiffs sought to establish their pedigree by proving, *inter alia*, that *A* and *B* were brothers: *Held*, that a statement to that effect made by one of the plaintiffs in a deposition given long before the controversy in suit arose was admissible in evidence. JADU NATH SARKAR *v.* MAHENDRA NATH RAI (1907) **12 C. W. N. 266**

——— **s. 32 (1).**

See EVIDENCE—CRIMINAL CASES—DYING DECLARATION . **6 C. W. N. 72**

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*contd.*

See EVIDENCE—CRIMINAL CASES—CONSIDERATION OF, AND MODE OF DEALING WITH EVIDENCE . **6 C. W. N. 921**

——— **s. 32 (2): account sales—**

See EVIDENCE—CIVIL CASES—ACCOUNT SALES . **I. L. R. 28 Calc. 209**

1. ——— **s. 32, cl. (2)—Letter of advice.** On the trial of a person charged with forging a railway receipt or bill of lading for the purpose of obtaining possession of certain goods which had been sent from Delhi to Calcutta, a letter from the consignee at Delhi to his partner in Calcutta, advising the despatch of the goods, was tendered in evidence under s. 32, cl. 2, of the Evidence Act (I of 1872), but the Court refused to receive it, and intimated a doubt whether it fell within the instances specified in the section. QUEEN *v.* TARINICHARAN DEY . . . **9 B. L. R. Ap. 42**

2. ——— **Marriage register**—*Entry in Mahomedan marriage register to prove amount of dower fixed.* A register of marriages kept by the Istahad, since deceased, who celebrated this marriage, in which register was entered the amount of the dower, was held to be admissible and revelant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within s. 2, cl. (2), of the Evidence Act, 1872. ZAKERI BEGUM *v.* SAKINA BEGUM . . **I. L. R. 19 Calc. 689 L. R. 19 I. A. 157**

3. ——— **Chowkidari register**—*Evidence Act (I of 1872), ss. 32 (3), 35—Admissibility in evidence—Chowkidari register, entry of chakran land in, if made in discharge of official duty—Made "in the ordinary course of business."* Reg. XX of 1817 does not impose on the Daroga any duty of keeping a register of chowkidari chakran lands. From the precise and uniform character of the entries as to such lands appearing in a register kept under the Regulations: *Held*, that there could be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them. That s. 35 of the Evidence Act did not cover such entries but s. 32 (2) of the Act applied and they are admissible in evidence. *Ali Nasir* v. *Manik Chand, I. L. R. 25 All. 90,* referred to. The phrase "in the course of business" does not apply to any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but to business or professional employment in which the declarant was ordinarily or habitually engaged. The "business" referred to may be of a temporary character. *Ningawa* v. *Bharmappa, I. L. R. 23 Bom. 63,* referred to. SHEONANDAN SINGH *v.* JEONANDAN DUSADH (1908) . . . . . **13 C. W. N. 71**

4. ——— **s. 32, cls. (2) and (3)—Recitals in mortgage deed**—*Description of boundary—Statement against pecuniary or proprietary interest.* The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead. *Held*, that the statement in the deed was admissible under cl. 3 of s. 32 of the Evidence Act (I of 1872) as a statement against the pecuniary or proprietary interest of the mortgagor. NINGAWA *v.* BHARMAPPA . . **I. L. R. 23 Bom. 63**

——— **ss. 32 (2), 34—Entries in accounts**—*Corroboration.* The plaintiff relied on entries in the hand-writing of her deceased husband kept in the ordinary course of his business. *Held*, that entries in accounts relevant only under s. 34 of the Indian Evidence Act (I of 1872) are not alone sufficient to charge any person with liability: corroboration is required; but where accounts are relevant also under s. 32 (2), they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under s. 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where that is so it is clear that, inasmuch as they are relevant under s. 32 (2), the necessity of corroboration prescribed by s. 34 does not arise. Though accounts, which are relevant under s. 32 (2), do not as a matter of law require corroboration, the Judge is not bound to believe them without corroboration: that is a matter on which he must exercise his own judicial discretion as a Judge of fact. RAMPYARABAI *v.* BALAJI SHRIDHAR (1904) **I. L. R. 28 Bom. 294**

1. ——— **s. 32, cl. (3)—Deed of heirship**—*Declaration of party against proprietary interest—Presumption of party being dead.* In 1847, *A*, a Hindu widow, executed in favour of *B* a varaspatra (a deed of heirship) in the following terms:—"My husband has died. We have no issue, and you are a son of my husband's cousin. Taking this into consideration, my husband expressed his wish, when he was on the point of death, that all the houses and shops situate in Poona, except the house at Benares, should be given to you, and that you should be made owner of all money-dealings connected with Poona. I therefore, in obeying his command, pass this deed of heirship to you, and make you owner of all the property mentioned above like our son. You therefore enjoy the property in your name joyfully." Under this varaspatra, *B* took possession of the property mentioned therein and enjoyed it during his lifetime. After his death, his gomasta (agent) managed it for and on behalf

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*contd.*

of *B*'s minor son *C*. In 1881, *C* filed a suit to redeem a house and a garden, part of the property covered by the varaspatra, and which had been mortgaged by *A*'s husband in 1831. One of the defences to this suit was that neither *C* nor his father was the heir of the original mortgagor, and that therefore *C* could not redeem the property in dispute. At the trial *C* produced the varaspatra of 1847 in support of his title, alleging that he had found it among the papers of the old gomasta of his father, who used to took after his affairs during his minority. *Held*, that the varaspatra was admissible under s. 32, cl. 3, of the Evidence Act (I of 1872), as it was manifestly a declaration by *A* against her proprietary interest; for by it she divested herself of her widow's estate in the property, and there being no evidence of her existence after 1847, she must be presumed to have been dead in 1881, when the suit was filed. HARI CHINTAMAN DIKSHIT *v.* MORO LAKSHMAN

I. L. R. 11 Bom. 89

2. ——— **Road-cess returns**—*Statements made by deceased tenants—Bengal Cess Act (Bengal Act IX of 1880), s. 95. Semble:* The statements made by deceased tenants in road-cess returns filed by them regarding assets of the tenancy are not admissible in evidence under s. 32 of the Evidence Act. HEM CHANDRA CHOWDHURY *v.* KALI PRASANNA BHADURI . **I. L. R. 26 Calc. 832**

——— s. 32, cls. (2), (5)—**Pedigrees**—*Evidence—Proof of pedigree—Knowledge of names of ancestors from hearing them recited on ceremonial occasions—Pedigree made post litem motam—Controversy in a different matter from that which if after suit would render statement inadmissible—Document made on particular occasion for specific purpose treated as declaration—Proof of heirship.* The plaintiffs sued to recover immoveable property as next heirs, through their father, of one Gur Sahai. The principal defendant was the sister's son of Gur Sahai. On the plaintiffs' oral evidence and on certain pedigrees produced by them, the Subordinate Judge was of opinion that Gur Sahai and the plaintiffs' father were descended from one common ancestor, from whom they were only seven degrees removed and that their claim was proved. The defendant produced a pedigree, which showed that Gur Sahai was descended from another ancestor than that stated in the plaintiffs' pedgree and was in the 15th degree from a common ancestor, and the plaintiff's father in the 16th degree, and he contended that under Hindu law heirship did not extend beyond the 14th degree, and that therefore he, though only a sister's son, was to be preferred to such remote relations as heir. The judgment of the Court of the Judicial Commissioner on appeal after a lengthy and adverse criticism of the plaintiffs' evidence, concluded as follows: "The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant (defendant), the plaintiffs are heirs of Gur Sahai, as according to it they are *samanodakas* and therefore in the absence of other nearer heirs excluded the defendant, who is the son of Gur Sahai's sister." *Held*, that the above paragraph did not under the circumstances and for the reasons stated by their Lordships of the Judicial Committee, preclude the plaintiffs from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge in their favour. *Held*, also, that the pedigree put in by the plaintiffs were not ancient family records handed down from generation to generation and added to as a member of the family died or was born; but documents drawn up on particular occasions for a specific purpose by members of the family and were accordingly to be treated as mere declarations made by the persons, who respectively drew them up or adopted them. One of the pedigrees dated in 1892 was held by the Court of the Judicial Commissioner to be inadmissible in evidence as having been made *post litem motam*, although the controversy, which originated in 1891, did not relate to the heirship to Gur Sahai, but referred to an entirely different matter. *Held*, it was wrongly rejected as evidence. To make a statement inadmissible on the ground that it was made *post litem motam* the same thing must be in controversy before and after the statement is made. *Freeman* v. *Phillips, 4 M. & S. 486, In re Shrewsbury Peerage, 7 H. L. C. 1,* and *Duke of Devonshire* v. *Neill, 2 Ir. L R. 132,* followed. The pedigree was admissible as a declaration made by a deceased member of a family touching the family reputation on the subject of its descent. A pedigree, also rejected by the Judicial Commissioner's Court as inadmissible, was one signed by a deceased member of the plaintiffs family, in the hand-writing of such deceased member's son, and was stated to have been obtained from his father as a statement of the family descent for the purpose of being given in evidence in certain criminal proceedings. *Held*, that it had been adopted by such deceased member of the family, and not being shown to be *post litem motam*, it was admissible in evidence. KALKA PRASAD *v.* MATHURA PRASAD (1908) . **I. L. R. 30 All. 510**

——— s. 32 (4).

See TRADE MARK.

I. L. R. 25 Bom. 433

——— **Proof of custom**—*Statement as to custom as to adoption by widow without authority of husband.* The lower Court having, under s. 32 of the Evidence Act, I of 1872, admitted in evidence a statement signed by several witnesses to the effect that a widow of the Kadva Kunbi caste cannot adopt, according to the custom of the caste, without the express authority of her husband:—*Held*

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*contd.*

that s. 32, cl. 4, of the Evidence Act was not applicable to the case, as the evidence was required to prove a fact in issue, and not merely a relevant fact. The statement was therefore inadmissible to prove the alleged custom. PATEL VANDRAVAN JEKISHAN *v.* PATEL MANILAL CHUNILAL
I. L. R. 15 Bom. 565

——— s. 32, cl. (5).

See EVIDENCE, ADMISSIBILITY OF.
I. L. R. 34 Calc. 1059

1. ——— **Relationship**—*Statement by deceased person as to relationship.* S. 32 (5) of the Evidence Act (I of 1872) does not apply to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents. NARAINI KUAR *v.* CHANDI DIN
I. L. R. 9 All. 467

2. ——— *Statements of family priest as to relationship—Special means of knowledge.* Evidence of statements made by a deceased family priest as to the relationship of the members of the family may be given under s. 32, cl. 5, of the Evidence Act. SHAM LALL SINGH *v.* RADHA BIBEE . . . . **4 C. L. R. 173**

3. ——— *Statement as to the existence of relationship—Special means of knowledge.* The judgment of an Appellate Court, reversing that of a Court of first instance, on a question as to the existence of a relationship, rested mainly on a statement recorded in prior settlement proceedings as made by a person, since deceased, who was employed therein as muktear by certain members of the family. This judgment was reversed on a second appeal by the Court above, on the ground that the statement was inadmissible, not coming within the meaning of Act I of 1872, s. 32, sub-s. 5, as that of a person having special means of knowledge on the question. *Held*, that the statement was inadmissible, as it appeared that his only means of knowledge were from his being instructed as such muktear, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns. *Held*, also, that the Court of second appeal had rightly declined to send the case back for evidence to be taken as to whether he had or had not other means of knowledge. SANGRAM SINGH *v.* RAJAN BAHI
I. L. R. 12 Calc. 219 : L. R. 12 I. A. 183

4. ——— **and ill. (1)**—*Hearsay evidence—Pedigree, question of—Proof of birth—Statement of deceased father.* In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, *held* to be inadmissible as evidence of the age of the defendant in support of his defence. BIPIN BEHARY DAW *v.* SREEDAM CHUNDER DEY
I. L. R. 13 Calc. 42

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*contd.*

5. ——— **Pedigrees**—*Evidence proving title by inheritance to raj estates—Proof of pedigree—Estate held as separate under the Hindu law.* A raj estate was claimed by the appellant as the nearest agnatic kinsman of the last Raja in possession, who had died without male issue, but leaving a widow and a daughter by her, both of whom died before this suit. The claimant, to prove his title, relied upon a pedigree, not stated in any document produced that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two mouzahs of the raj estate. The Raja called upon to answer in proceedings at settlement had not given a direct denial to the alleged relationship. On the contention that there were steps in the pedigree as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge, or proofs of other statements, within s. 32 of the Indian Evidence Act (I of 1872), and as to which the evidence was insufficient:—*Held*, that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased Raja, as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the raj estates on the widow's death, this opinion being founded on the documentary evidence. BEJAI BAHADUR SINGH *v.* BHUPINDAR BAHADUR SINGH. BEJAI BAHADUR SINGH *v.* KOUNSAL KISHORE PRASAD . **I. L. R. 17 All. 456**
L. R. 22 I. A. 139

6. ——— *Statements in pedigree—Statements of persons who cannot be produced as witnesses.* S. 32 of the Indian Evidence Act, which makes statements in a pedigree relevant, only applies when the statements are made by persons who cannot be produced as witnesses. Accordingly a pedigree is inadmissible in the absence of evidence to that effect. SURJAU SINGH *v.* SARDAR SINGH . . . **L. R. 27 I. A. 183**

7. ——— **Family custom**—*Evidence of existence of family custom (of primogeniture)—Statements derived from deceased persons.* A witness may state his opinion as to the existence of a family custom and (in this case a custom of primogeniture) give as the grounds thereof information derived from deceased persons. But it must be independent opinion based on hearsay, and not on mere repetition of hearsay: see Evidence Act, 1872, s. 32, sub-s. 5, ss. 49 and 60. Its weight depends on the character of the witness and of the deceased persons. GARURUDHWAJA PARSHAD SINGH *v.* SAPARAUDHWAJA PARSHAD SINGH
I. L. R. 23 All. 37
L. R. 27 I. A. 238

Reversing decision of High Court in SUPURAUDHWAJA PRASAD *v.* GURURADDHWAJA PRASAD
I. L. R. 15 All. 147

8. ——— **Date of birth, proof of**—*Statement of deceased relatives—Hearsay evidence.* For

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*contd.*

the purpose of the decision of a question of limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiffs, who were since deceased, relating to the date of the plaintiff's birth. *Held*, that such statements were admissible in evidence under s. 32, cl. 5, of the Evidence Act. *Haines* v. *Guthrie, L. R. 13 Q. B. D. 818*, not followed. RAM CHANDRA DUTT *v.* JOGESWAR NARAIN DEO . . **I. L. R. 20 Calc. 758**

9. ——— *Statements as to existence of relationship—Proof of age and order of birth of children.* Case in which the plaint in a former suit verified by a deceased member of the family, and as such having special means of knowledge, was held admissible under s. 32, sub-s. 5, of the Evidence Act (I of 1872), to prove the order in which certain persons were born and their ages. DHANMULL *v.* RAM CHUNDER GHOSE **I. L. R. 24 Calc. 265 1 C. W. N. 270**

10. ——— **Relationship, proof of**—*Statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead.* A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. 5 of s. 32 of the Evidence Act. CHANDRA NATH ROY *v.* NILMADHAB BHUTTACHARJEE **I. L. R. 26 Calc. 236 3 C. W. N. 88**

11. ——— **Age, proof of**—*Statement as to age of a member of a family by another member since deceased—Admissibility.* A statement as to plaintiff's age, made by his sister, was admissible in evidence after her deceased, under s. 32 (5) of the Evidence Act, the date of birth being the commencement of a relationship by blood, and therefore relating to the existence of such relationship within the meaning of the section. *Ram Chandra Dutt* v. *Jogeswar Narain Das, I. L. R. 20 Calc. 758*, followed. The defendant company's prospectus contained a condition that evidence of age of an assured would be required to be furnished in every case before a claim under a policy would be paid; and recommended assurers to provde evidence of age as soon as possible, as it was required on settlement of claim if not previously produced. *Semble :* That the effect of the condition was to throw upon the assured or his representatives the onus of proving the correctness of the age as warranted by the assured. ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY *v.* NARASIMHA CHARI (1901) **I. L. R. 25 Mad. 183**

——— s. 32 (5), (6).

See TITLE—EVIDENCE AND PROOF OF TITLE—GENERALLY . **L. R. 28 I. A. 1**

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*contd.*

1. ——— **s. 32, cl. (6)—Statement in will**—*Words not purporting or operating to extinguish an interest in the present or in future—Registration Act (III of 1877), s. 17, cl. (b).* S. 17, cl. (*b*), of the Registration Act (III of 1877) does not render a passage in a will inadmissible in evidence if the words of it do not purport or operate to extinguish an interest in the present or in future, but state only past facts. Such a statement would, if proved, be admissible also under s. 32, cl. 6, of the Indian Evidence Act (I of 1872). CHAMANBU JAVJE MAHOMED ALI BOHORI *v.* MULTANCHAND SHIVRAM . . . **I. L. R. 20 Bom. 562.**

2. ——— **Horoscope.** In a suit to recover possession of immoveable property, the plaintiff tendered in evidence a horoscope which he said had been given to him by his mother, and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. *Held*, that the horoscope was not admissible under s. 32, cl. 6, of the Evidence Act. RAMNARAIN KALLIA *v.* MONEE BIBEE. RAMNARAIN KALLIA *v.* GOPAL DASS SINGH **I. L. R. 9 Calc. 613**

3. ——— *Horoscope—Age, proof of.* In a suit to set aside a decree on the ground of minority, the plaintiff relied upon a horoscope to prove his age. *Held*, following *Ram Narain Kallia* v. *Monee Bibee, I. L. R. 9 Calc. 613*, that the horoscope was not admissible under s. 32, cl. 6, of the Evidence Act. SATIS CHUNDER MUKHOPADHYA *v.* MOHENDRO LAL PATHUK **I. L. R. 17 Calc. 849**

See GOUNDAN *v.* GOUNDAN **I. L. R. 17 Mad. 134**

——— **s. 32, cl. (7)—Evidence of family custom.** In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit, and, as the plaint alleged, by "a considerable majority" of the family, but the defendant was not a party to it. *Held*, that the deed, was admissible as evidence on behalf of the plaintiffs, though they could themselves be called as witnesses; but that, though admissible, the custom as against the defendant must be proved *aliunde*. HURRONATH MULLICK *v.* NITTANUND MULLICK . . . . **10 B. L. R. 263**

——— **s. 32, cl. (8)—Statement of police officer**—*Common statement by a number of persons.* The statement of a police officer who goes about from place to place and collects information from different persons, which he afterwards puts in second hand before the Court, cannot be received

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 32—*concld.*

as evidence under the Evidence Act, I of 1872, s. 32, cl. 8. The meaning of that clause is that, when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses, and is evidence. QUEEN *v.* RAM DUTT CHOWDHRY
23 W. R. Cr. 35

——— ss. 32, 91.

See DYING DECLARATION.
I. L. R. 36 Calc. 659

——— s. 33.

See COMMISSION—CRIMINAL CASES.
I. L. R. 19 Calc. 113
I. L. R. 19 Bom. 749

See EVIDENCE—CRIMINAL CASES—DEPOSITIONS.

See RECOGNIZANCE TO KEEP PEACE—SECOND APPLICATION FOR SECURITY.
22 W. R. Cr. 9, 36, 79

1. ——— **Representatives in interest.** In order to satisfy the requirements of s. 33 of the Evidence Act, the two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding and the evidence is given. SITANATH DASS *v.* MOHESH CHUNDER CHUCKERBUTTY
I. L. R. 12 Calc. 627

2. ——— **Incapacity to give evidence.** The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity. *In the matter of the petition of* ASGUR HOSSEIN. EMPRESS *v.* ASGUR HOSSEIN **I. L. R. 6 Calc. 774 : 8 C. L. R. 124**

3. ——— *"Incapable of giving evidence." Discretion of Court—Casual incapacity.* The words "incapable of giving evidence" in s. 53 of the Evidence Act, I of 1872, denote an incapacity of a permanent, not of a temporary, kind; and when a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion, if his presence cannot be obtained without an amount of delay or expense which, under the circumstances, the Court considers unreasonable. *In the matter of* PYARI LALL . **4. C. L. R. 504**

4. ——— **Deposition in former suit—***Admission.* A deposition of a person in a suit to which he was not a party is, in a subsequent suit in which he is a defendant, evidence against him and against those who claim under or purchase from him, although he is alive and has not been called as a witness. S. 33 of the Evidence Act (I of 1872) does not apply to such a deposition,

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 33—*contd.*

but it is admissible under the sections relating to admissions, although it might be shown that the facts were different from what they were stated to be in the former case. A statement in a bill of sale is evidence against those who are parties to it. SOOJAN BIBEE *v.* ACHMUT ALI
14 B. L. R. Ap. 3 : 21 W. R. 414

5. ——— *Deposition in former suit.* *H N* died on 16th May 1854 without issue, leaving a widow, *B*. *B*, on 19th May 1856, purported to adopt *S* in accordance with an alleged anumatipatra executed by *H N*. *R N*, the uncle of *H N*, died on 6th July 1855, leaving a widow, *M*, in whose favour he had executed an anumatipatra, by the terms of which she was to have the management of his property during the minority of the adopted son, in whom it was to vest on his adoption. *M* adopted *D* subsequently to the adoption of *S*. After the death of *R N*, *B*, as widow of *H N* and adoptive mother of *S*, brought a suit against *M* as the widow of *R N* and ignoring the existence of *D*. *D* died, and on his death *M* adopted *N* on 4th April 1864. In a suit brought by *M* as the mother and guardian of *N* to have the adoption of *S* declared invalid:—*Held*, that the depositions of certain witnesses who had been examined in the previous suit to establish the fact of the adoption of *S* by *B* were not, under s. 33, Act I of 1872, admissible in evidence against the plaintiff *M*. MRINMOYEE DABEA *v.* BHOOBUNMOYEE DABEA
15 B. L. R. 1 : 23 W. R. 42

6. ——— **Previous depositions**—*Evidence given in proceeding coram non judice.* The evidence of a witness given in a proceeding pronounced to be *coram non judice* cannot be used under s. 33 of the Evidence Act, if the witness is dead, on a re-trial before a competent Court. *R* charged *A* with breach of trust, and *S* gave evidence in support of the charge. *A* being acquitted, *R* was tried for making a false charge and *S* for perjury. *Held*, (i) that the depositions given by witnesses in the first case could be used against *R* in the second case, but not against *S* under s. 33, Evidence Act. (ii) That the word "questions," in s. 33, does not mean "all the questions," and that, though additional issues were involved in the second trial, yet the evidence as to the issues common to both trials was properly admitted at the second trial against *R*. *In re* RAMI REDDI . . . **I. L. R. 3 Mad. 48**

7. ——— *Deceased witness—Criminal trial, deposition in, admissibility of, in civil suit.* A prosecution was instituted by *S* against *N* at the instance and on behalf of *F* for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. *S* gave evidence at the trial in support of these charges. *F* subsequently brought a civil suit against *N* for possession of the same house under s. 9 of the Specific Relief Act. *S* died before the institution of the civil suit. At the trial of the civil suit the deposi-

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 33**—*contd.*

tion of *S* in the Criminal Court was tendered by *F* as evidence on the issue of possession. *Held*, that *S* being dead, and the proceedings being between the same parties, and the issues being substantially the same, the deposition of *S* was admissible. FOOLKISSORY DASSEE *v.* NOBIN CHUNDER BHUNJO **I. L. R. 23 Calc. 441**

8. ——— and s. 32, cl. 1—"*Questions in issue*"—*Charges added at sessions—Depositions before Magistrate—Witness dying or absconding—Qualification of Juryman.* In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. *Held*, that the evidence was admissible either under s. 32, cl. 1, or s. 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court. The question whether the proviso to s. 33 of the Evidence Act is applicable—that is, whether the questions at issue are substantially the same—depends upon whether the same evidence is applicable, although different consequences may follow from the same act. At the trial it was proved that the other witness who had been examined before the Magistrate, had disappeared, and that it had been found impossible to serve him with a summons. His deposition was put in and read. *Held*, that it was properly admitted under s. 33. *In the matter of the petition of* ROCHIA MOHATO. EMPRESS *v.* ROCHIA MOHATO . . **I. L. R. 7 Calc. 42 8 C. L. R. 273**

9. ——— *Depositions of witnesses taken by Consul at Zanzibar.* A prisoner accused of having committed murder at Zanzibar was sent by the British Consul there for trial before the High Court at Bombay. The Consul could not enforce the attendance of witnesses at Bombay, but he transmitted to the High Court the depositions which he had taken in the course of the enquiry he had held with regard to the commission of the alleged offence. In the absence of the witnesses, these depositions were tendered in evidence at the trial in Bombay. *Held*, that the British Consul at Zanzibar was authorized to take the depositions, and that they were admissible in evidence at the trial under s. 33 of the Evidence Act (I of 1872). EMPRESS *v.* DOSSAJI GULAM HUSEIN **I. L. R. 3 Bom. 334**

10. ——— Deposition of person denying he presented petition in Court. A deposition made by a person wherein he denied on oath that he had presented a certain petition in Court which purported to be from him, was held to be inadmissible as evidence under Act I of 1872, s. 33, because the person might have been brought into Court, but was not brought by those who pleaded the said deposition. BHOOBUN MOYEE DOSSEE *v.* AMBICA CHURN SETT . . **23 W. R. 343**

11. ——— Deposition of absent witness. Under s. 33 of the Evidence Act, depositions of an absent witness are only admissible when the prisoner has had the right and the opportunity to cross-examine. QUEEN *v.* ETWAREE DHAREE . . . . **21 W. R. Cr. 12**

12. ——— *Deposition of absent witness.* When the evidence of an absent witness is admitted under s. 33 of the Evidence Act, 1872, the ground for its admission should be stated fully and clearly to enable the High Court to judge of the propriety of its admission. In the present case the High Court considered that the evidence of an absent witness had been improperly admitted because there was nothing to show that by ordinary care and the use of ordinary means the witness could not have been produced. In order to make a deposition admissible under s. 33, there must be evidence that the accused person did in fact have an opportunity of cross-examining. QUEEN *v.* MOWJAN *alias* NANE KHAN . **20 W. R. Cr. 69**

13. ——— *Depositions of absent witnesses—Ground for absence.* Before a Sessions Judge can, under s. 33, Act I of 1872, admit the depositions of witnesses given in a former judicial proceeding as evidence before him instead of and in place of the oral deposition of the witnesses themselves, it ought to appear that the presence of the witnesses could not be obtained without an amount of delay or expense which the Court considers unreasonable; and if there is nothing of a special nature to stand in the way, the case should be adjourned to the next sessions to procure the attendance of the witnesses. QUEEN *v.* LAKKAN SANTHAL . . . . **21 W. R. Cr. 56**

14. ——— Inconvenience to witnesses—*Question of identification—Expense.* At the trial of a person for an offence under s. 411 of the Penal Code, the Court of Session, under s. 33 of the Evidence Act, 1872, used against the accused the evidence of the owner of the property in respect of which the accused was charged, and of his wife taken by commission during the enquiry, and the evidence of the servant of those persons taken at the enquiry, and also the evidence of the owner of the property taken during the trial under a commission issued by the Sessions Judge under s. 503 of the Criminal Procedure Code. The grounds upon which the Sessions Judge admitted the evidence taken during the enquiry were that the attendance of the witnesses could not be procured without an expense of R500, an amount which he considered unreasonable, that the witnesses would be inconvenienced, and that their evidence did not concern the accused personally, having reference only to the identification of the property in respect

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 33—*concld.*

of which the accused was charged. *Held*, that the Sessions Judge had improperly admitted such evidence. Inconvenience to witnesses is no ground allowed under s. 33 of the Evidence Act, and the question of identification was a most material one, and the evidence of the witnesses in question was of the utmost moment, the whole case resting on it; and as regards the ground of expense, it was impossible to consider the amount unreasonable, considering that the entire case rested on the evidence of those witnesses, and that the accused had not cross-examined those whose evidence had been taken by commission, nor, looking at his position, could he arrange for their cross-examination. QUEEN-EMPRESS *v.* BURKE **I. L. R. 6 All. 224**

——— s. 34.

See EVIDENCE—CIVIL CASES—ACCOUNTS AND ACCOUNT BOOKS.

See PROMISSORY NOTES—ASSIGNMENT OF, AND SUITS ON, PROMISSORY NOTES. **I. L. R. 29 Calc. 334**

——— **Account books**—*Amlahs—Furds—Accounts.* A person used to enter all his receipts and all the advances he made to his *amlahs* first in a *khata* book. The *amlahs* used to submit *furds* embodying the expenses incurred by them and these used to be regularly checked by him. He used to prepare his monthly and other accounts from the *khata* book and the *furds*. *Held*, that these accounts having been kept regularly in the course of business, were admissible under s. 34 of the Evidence Act, even though the *khata* book itself was not produced. *The Deputy Commissioner of Barabanki* v. *Ram, I. L. R. 27 Calc. 118 : 4 C. W. N. 147*, referred to. PEARY MOHON MOOKERJEA *v.* NARENDRA NATH MOOKERJEA (1905) **I. L. R. 32 Calc. 582 s.c. 9 C. W. N. 421**

——— s. 35.

See EVIDENCE—CRIMINAL CASES—POLICE EVIDENCE, ETC. **I. L. R. 28 Calc. 348**

See ante s. 32 (2) . **13 C. W. N. 71**

See WAJB-UL-ARZ . **10 C. W. N. 730**

1. ——— **Public record.** S. 35 of the Evidence Act, which provides "that any entry in an official public book which is duly made by a public servant in the execution of his duty, is of itself a relevant fact" does not make the public book evidence to show that a particular entry has not been made in it. *In the matter of* JUGGUN LALL . . . **7 C. L. R. 356**

2. ——— **Measurement papers**—*Measurement papers prepared by ameen in partition proceedings.* The measurement papers prepared by a batwara ameen deputed by the Collector to make a partition do not come within s. 35 of the Evidence Act. MOHI CHOWDHRY *v.* DHIRO MISSRAIN . . . . . **6 C. L. R. 139**

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 35—*contd.*

3. ——— "*Batwara khasra*"—*Estates Partition Act (Bengal Act VIII of 1876), s. 54—Measurement papers, sntry made in—"Record."* A batwara khasra or measurement paper prepared under s. 54 of the Estates Partition Act (Bengal Act VIII of 1876) is not a "record" within the meaning of s. 35 of the Evidence Act I of 1872. An entry made therein of the name of a tenant in possession is not admissible in evidence under that section. *Mohi Chowdhry* v. *Dhiro Missrain, 6 C. L. R. 139*, referred to. PERMA ROY *v.* KISHEN ROY . . . **I. L. R. 25 Calc. 90**

4. ——— **Entries by Survey-officer**—*Evidence of other mortgage than one sued on—Statement of a survey officer as to entry as occupant how far admissible.* Under s. 35 of the Evidence Act I of 1872, a statement by the survey officer that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such entry as facts in another case. GOVINDRAV DESHMUKH *v.* RAGHO DESHMUKH . . . . **I. L. R. 8 Bom. 543**

5. ——— **Entries by Collector**—*Land Registration Act (Bengal Act VII of 1876), s. 55—Entry in register, effect of—Question of possession.* Entries made under Bengal Act VII of 1876 by the Collector, recording the names of proprietors of revenue-paying estates, are not evidence, under s. 35 of the Evidence Act, of the fact of proprietorship. That section relates to the class of cases where a public officer has to enter in a register or other book some actual fact which is known to him, *e.g.*, the fact of a death or a marriage. The entry by the Collector in the register under Bengal Act VII of 1876 is not, properly speaking, the entry of a fact. It is a statement that the person is entitled to the property; it is the record of a right, not of a fact. *Per* GARTH, *C.J.—Semble:* That s. 55 of Bengal Act VII of 1876 constitutes the Collector a competent Court under particular circumstances for determining as between two disputants the question of possession, and his recorded decision upon that question in the register might be evidence of the fact of possession as between those two parties. *Ram Bushan Mahto* v. *Jebli Mahto, I. L. R. 6 Calc. 853*, explained. SARASWATI DASI *v* DHANPAT SINGH . **I. L. R. 9 Calc. 431 : 12 C. L. R. 12**

6. ——— **Admission**—*Statement in decree—Practice of Mofussil Courts.* In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in

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——— s. 35—*contd.*

each case. *Held*, that the statement in the decree was evidence of the admission under s. 35 of the Evidence Act (Act I of 1872). *Lekraj Kuar* v. *Mahpal Singh, I. L. R. 5 Calc. 744*, referred to. PARBUTTY DASSI *v.* PURNO CHUNDER SINGH
I. L. R. 9 Calc. 586

7. ——— *Admission—Abstract of pleadings given in a decree. Quære:* Whether an abstract of the pleadings given in a decree is legally secondary evidence of an admission alleged to have been made in such pleadings. *Parbutty Dassi* v. *Purno Chunder Singh, I. L. R. 9 Calc. 586*, doubted. SUNDER DAS *v.* FATIMULUL-NISSA . . . . . **1 C. W. N. 513**

8. ——— **Certificate of guardianship under Act XL of 1858**—*Minority, evidence of.* A certificate of guardianship under Act XL of 1858 is no evidence of minority under s. 35 of the Evidence Act (I of 1872), being neither a book nor a register nor a record kept by any officer in accordance with any law. SATIS CHUNDER MUKHOPADHYA *v.* MOHENDRO LAL PATHUK
I. L. R. 17 Calc. 849

9. ——— **Draft plaint, and order on petition.** The plaintiff sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants, who were a donee from and the descendants of a previous karnavan and their tenants. An issue was raised as to whether the rights of the parties were governed by Makkatayom or Marumakkatayom law, and an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakkatayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad. *Held*, that the order and draft plaint were admissible in evidence for the above-mentioned purposes. Observations as to documents marked as exhibits without proof. BYATHAMMA *v.* AVULLA . **I. L. R. 15 Mad. 19**

10. ——— **Judgment**—*Recital in a judgment—Admission of jenmi's title.* In a suit, by a melkanomdar to redeem a kanom, the kanom document was proved to have been lost; it appeared that a previous suit had been brought by the jenmi to redeem the same kanom, and the judgment in that suit, in which it was stated that the defendants admitted their position as kanomdars, was tendered in evidence to prove the jenmi's title. *Held*, that the judgment was admissible in evidence. THAMA *v.* KONDAN
I. L. R. 15 Mad. 378

11. ——— **Entries in Collector's register**—*Land Registration Act (Bengal Act VII of 1876)—Register of Collector as to land registration.* Entries in a register made under Bengal Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a statute, and certified copies of such entries are admissible in evidence for what they are worth. *Dictum* of GARTH, *C.J.*, in *Saraswati Dasi* v. *Dhanpat Singh, I. L. R. 9 Calc. 431*, dissented from. SHOSHI BHOOSHUN BOSE *v.* GIRISH CHUNDER MITTER
I. L. R. 20 Calc. 940

12. ——— **Teiskhana paper**—*Public record—Admissibility of evidence—Beng. Reg. XII of 1817, s. 16.* The teiskhana paper kept by patwaris under s. 16 of Bengal Regulation XII of 1817 is not a public register or record within the meaning of s. 35 of the Evidence Act, and is not admissible as evidence under that section. *Baijnath Singh* v. *Sukhu Mahton, I. L. R. 18 Calc. 534*, and *Merick* v. *Wakley, 8 A. & E. 170*, referred to. SAMAR DASADH *v.* JUGGUL KISHORE SINGH
I. L. R. 23 Calc. 366

13. ——— **Certificate of guardianship**—*Evidence of minority.* A certificate of guardianship is not evidence of minority when the question of minority is in issue. *Satis Chunder Mukhopadhya* v. *Mahendro Lal Pathuk, I. L. R. 17 Calc. 849*, followed. GUNJRA KUAR *v.* ABLAKH PANDE . . . . **I. L. R. 18 All. 478**

14. ——— **Entries by Settlement Officers**—*Statements of fact by Settlement Officer in record of case—Public record, entries in.* Statements of facts made by a settlement officer in the column of remarks in the dharepatrak, but not his remarks for the same, even though they may consist of statements of collateral facts which it was no part of his duty to inquire into, are admissible in evidence as being entries in a public record stating facts and made by a public servant in the discharge of his official duty within the meaning of s. 35 of the Evidence Act (I of 1872). MADHAVRAO APPAJI SATHE *v.* DEONAK
I. L. R. 21 Bom. 695

15. ——— Even if the word "*nadarad*" had the meaning contended for, and signified that the right of pre-emption no longer existed, it was an entry which it was in excess of the duties prescribed for Settlement Officers in the district in question to make, and therefore no evidential value whatever could be attached to it. *In the matter of Juggun Lall, 7 C. L. R. 356*, and *Queen-Empress* v. *Grees Chunder Banerjee, I. L. R. 10 Calc. 1024*, referred to. ALI NASIR KHAN *v.* MANIK CHAND (1902) . **I. L. R. 25 All. 90**

16. ——— *Regulation No. VII of 1822, s. 9—Duties of Collectors and Settlement Officers—Entries in khewat and khatauni.* Under the provisions of Regulation No. VII of 1822, settlement officers had to ascertain "the real nature and extent of the interests held, more especially where several persons may hold interests in the subject-matter of different kinds or degrees." *Held*,

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 35**—*contd.*

that this included the case of mortgagors and mortgagees. *Held*, also, that the entries in *khewats* and *khataunis* made at settlements under Regulation No. VII of 1822 are admissible in evidence under s. 35, Indian Evidence Act, 1872. ROBERT SKINNER *v.* CHANDAN SINGH (1908)
I. L. R. 31 All. 247

17. ——— **Usage**—*Management of Hindu temple—Turns of Management—Family arrangement—Scheme proved by unbroken usage for nineteen years.* The office of manager of a Hindu temple was vested by inheritance in eight male descendants of the last holder by his two wives, four by each. One member of each branch held office for one year in alternate succession until 1881-82, when the four members of the junior branch including the appellant, relinquished their claim in favour of the respondent, a member of the senior branch. In a suit by the respondent against the appellant in effect to assert his term of office under this family arrangement: *Held*, that an unbroken usage for nineteen years was, as against the appellant, conclusive evidence thereof. The parties were competent to make it, for it involved no breach of trust, and it must hold good until altered by the Court or superseded by a new arrangement. RAMANATHAN CHETTI *v.* MURUGAPPA CHETTI (1906) . **I. L. R. 29 Mad 283**
s.c. L. R. 33 I. A. 139

18. ——— **Former admissions**—*Onus probandi—Plaintiff to prove that his former admissions were untrue.* Where the defendant in an action of ejectment denied the plaintiff's title by inheritance and pleaded that although the natural son of the last holder, the plaintiff had been adopted by a third party:—*Held*, that on proof of admissions contained in a deed of gift and a power-of-attorney, to which the plaintiff, but not the defendant, was a party, that the plaintiff had described himself as such adopted son, the adoption must be taken to be established in the absence of satisfactory proof by the plaintiff that the admissions were untrue in fact. CHANDRA KUNWAR *v.* CHAUDHRI NARPAT SINGH (1906)
I. L. R. 29 All. 184
s.c. L. R. 34 I. A. 27

19. ——— **ss. 35 and 48—Wajib-ul-urz**—*Proof of custom—Admissibility of village wajib-ul-urz. Held*, on the question whether there did or did not exist a custom in the Bahrulia clan in Oudh excluding daughters from inheriting, that the wajib-ul-urz of a mouzah in the talukh, stating the custom of the Bahrulia clan as to inheritance, had been properly received in evidence under s. 35 of the Evidence Act, 1872. Further, that this custom was a usage of the kind which Regulation VII of 1822 required officers to ascertain and record; and that it was no valid objection that this wajib-ul-urz had been prepared and attested by officers subordinate to the settlement officer. *Semble:* That had it been the case

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——— **s. 35**—*concld.*

that these papers were not to be treated as records describing a custom, but as recording only the opinions of those likely to know it, the 48th section of the Act would have made them admissible. LEKRAJ KUAR *v.* MAHPAL SINGH. RAGHUBANS KUAR *v.* MAHPAL SINGH . **I. L. R. 5 Calc. 744**
L. R. 7 I. A. 63
6 C. L. R. 593

20. ——— **Entry in record kept outside British India.** *Quære:* Whether s. 35 of the Evidence Act applies to an entry in a public register or record kept outside British India. PONNAMMAL *v.* SUNDARAM PILLAI
I. L. R. 23 Mad. 499

——— **s. 36.**

See EVIDENCE—CIVIL CASES—MAPS.
7. W. N. 849

See TOPOGRAPHICAL SURVEY MAP.
11 C. W. N. 230

——— **s. 38—French law**—*Statement as to French Law—Unauthorized Translation of Code Napoleon.* A statement contained in an unauthorized translation of the Code Napoleon as to what the French law is on a particular matter is not relevant under s. 38 of the Evidence Act. CHRISTIEN *v.* DELANNEY **I. L. R. 26 Calc. 931**
3 C. W. N. 614

——— **s. 40.**

See KHOTI SETTLEMENT ACT, s. 17.
I. L. R. 20 Bom. 475

——— **ss. 40-43.**

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . **I. L. R. 6 Calc. 171**
I. L. R. 3 Bom. 3
I. L. R. 16 Mad. 480
I. L. R. 20 Calc. 888

——— **s. 41—Probate**—*Executor, power of, before Hindu Wills Act—Probate Act (V of 1881), ss. 2, 149.* S. 41 of the Evidence Act is applicable to probates granted prior to the passing of the Hindu Wills Act. GRISH CHUNDER ROY *v.* BROUGHTON . . **I. L. R. 14 Calc. 861**

——— **ss. 41, 44.**

See DIVORCE ACT, s. 17.
I. L. R. 22 A. 270

——— **s. 42.**

See TRADE MARK.
I. L. R. 25 Bom. 433

——— **Judgments**—*Judgment as to transferability of tenures in adjoining villages—Evidence of custom or usage.* In a suit by the landlords to avoid the sale of an occupancy holding in their mouzah and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the raiyat was entitled to sell such a holding. *Held*, that a judgment of the High Court as to the transferability of similar tenures in

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 42**—*concld.*

an adjoining village of the same pergunnah is admissible as evidence of such usage under s. 42 of the Evidence Act. DALGLISH *v.* GUZUFFER HASSAIN **I. L. R. 23 Calc. 427**

——— **s. 43**—*Judgments inter alios—Admissibility—Approbating and reprobating by same person, rule against—Application—Right of lessor against partner of lessee.* A lessor sued to recover his rents from his lessee as well as from a third party on the allegation that his lessee and such third party were partners and that the lease had been acquired for the purposes of the partnership business, in proof whereof he relied on a decree passed on an arbitration award made in a suit for dissolution of partnership between the lessee and the third party, declaring that the lease was acquired for partnership purposes and that the partners were equally liable for the debts and equally entitled to the outstanding dues of the partnership business. It was further proved that in a suit by the lessee to recover some of the outstanding dues, the third party, relying on the award, had claimed and recovered a share of the money sued for. *Per* GHOSE, *J.*—The judgment passed upon the award was relevant in this case upon the question whether the lease was acquired by the lessee for his own benefit or as partnership property and the plaintiff was entitled to recover rent from both the partners. *Bhitto Kunwar* v. *Kesho Pershad Misser, 1 C. W. N. 265 : s.c. I. L. R. 19 All. 277 ; Gujju Lall* v. *Fatteh Lall, I. L. R. 6 Calc. 171 ; Surender Nath Pal Chowdhuri* v. *Brojo Nath Pal Chowdhuri, I. L. R. 13 Calc. 352 ; Tepu Khan* v. *Rajoni Mohun Das, 2 C. W. N. 501 : s.c. I. L. R. 25 Calc. 522 ; Ram Ranjan Chakerbati* v. *Ram Narain Singh, I. L. R. 22 Calc. 533,* referred to. *Per* GEIDT, *J.*—Neither the award nor the conduct of the third party in the subsequent suit was admissible as evidence in this case to prove that the third party was liable to the plaintiff for rent. *Whately* v. *Menheim, 2 Esp. 608 (Mich. T. 38 Geo. III),* and *Gujju Lall* v. *Fatteh Lall, I. L. R. 6 Calc. 171,* referred to. *Tepu Khan* v. *Rajoni Mohun Das, 2 C. W. N. 501 : s.c. I. L. R. 25 Calc. 522,* and *Ram Ranjan Chakerbati* v. *Ram Narain Singh, I. L. R. 22 Calc. 533,* considered. *Per* GEIDT, *J.*—The mere existence of a judgment, its date and legal consequences are conclusively proved as against all the world by the production of the record, but it furnishes no proof whatever of collateral facts, even though as between the parties to such judgment themselves such facts must have been proved. *Per* GEIDT, *J.*—Judgments *in personam* are conclusive *against* third persons (but not in their favour) of the relationship between the parties and of the extent of the relation. In the circumstances of the case the Court made a decree against both the lessee and the third party, the liability of the latter being restricted solely to his interest in the leasehold. ABINASH CHANDRA CHATTERJEE *v.* PARESH NATH GHOSE (1905) **9 C. W. N. 402**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 44.**

See FRAUD—ALLEGING OR PLEADING FRAUD . **I. L. R. 12 Calc. 156**
I. L. R. 27 Calc. 11

See FRAUD—EFFECT OF FRAUD. **I. L. R. 6 Bom. 703**

See INSOLVENT ACT, S. 9. **I. L. R. 21 Bom. 205**

See RES JUDICATA—COMPETENT COURT—GENERAL CASES. **I. L. R. 15 Mad. 498**

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES. **I. L. R. 6 Bom. 703**

See RIGHT OF SUIT—

DECREES ; . . **5 C. W. N. 559**

FRAUD . . . **7 C. W. N. 353**

1. ——— **Competent Court.** *Per Curiam :* The words "not competent" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction. KETTILAMMA *v.* KELAPPAN **I. L. R. 12 Mad. 228**

2. ——— **Fraudulent decree**—*Res judicata—Evidence—Competence of party, against whom a former judgment is set up as constituting res judicata, to show that such judgment was obtained by fraud or collusion.* When a subsisting judgment, order or decree, which is relevant under s. 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside ; but it is open to such party, in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Nistarini Dassi* v. *Nundo Lall Bose, I. L. R. 26 Calc. 891 ; Rajib Pandu* v. *Lakhan Sendh Mahapatra, I. L. R. 27 Calc. 11 ;* and *Bansi Lal* v. *Ramji Lal, I. L. R. 20 All. 370,* referred to. BANSI LAL *v.* DHAPO (1902) . . **I. L. R. 24 All. 242**

3. ——— *Fraud—Power of Court to treat as a nullity the decree of another Court obtained by fraud—Heir of a party to a fraud not bound by the act of his ancestor.* Where by *means* of a fraud practised on the Court the owner of considerable property, both moveable and immoveable, caused a decree to be passed against himself as defendant in a collusive suit upholding a fictitious *waqf-namah,* by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *waqf* to the exclusion of his collateral heirs : *Held,* on suit by such heirs to recover possession of their share by inheritance of the property so dealt with, (i) that a Court which was otherwise competent to entertain the

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——— **s. 44**—*concld.*

suit had jurisdiction, on the finding that it had been obtained by means of fraud, to treat the previous decree as a nullity, and (ii) that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person, who practised such fraud, was their predecessor in title. *Nistarini Dassi* v. *Nundo Lal Bose, I. L. R. 26 Calc. 891; Bandon* v. *Becher, 3 Cl. & Fin. 479; Rajib Panda* v. *Lakhan Sendh Mahapatra, I. L. R. 27 Calc. 11; Ahmedbhoy Hubibhoy* v. *Vuleebhoy Cassumbhoy, I. L. R. 6 Bom. 703; Prudham* v. *Philips, 2 Ambler 763;* and *Williams* v. *Lloyd, 5 Bing. N. C. 741,* referred to. BARKATUNNISSA *v.* FAZL HAQ (1904) **I. L. R. 26 All. 272**

4. ——— **Letters of administration**—*Suit for rent by administrator—Tenants' plea that letters of administration were obtained by misrepresentation, if entertainable—Fraud—Civil Procedure Code (Act XIV of 1882), ss. 562, 566—Remand.* Plaintiff having obtained letters of administration to the estate of a deceased landlord sued a tenant for rent. The latter in his written statement objected that the letters of administration had been obtained upon a misrepresentation by the plaintiff as to his relationship with the intestate: *Held,* that assuming that the letters of administration could be regarded as an order within the meaning of s. 44 of the Evidence Act, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the letters of administration were invalid in law. That such a defence could not be successfully raised so long as the letters of administration were not revoked by a competent Court. Payment of rent to the plaintiff by the defendant would afford the latter full indemnity against the claim of any other party. *Rajib Panda* v. *Lakshan Mahapatra, I. L. R. 27 Calc. 11,* and *Pundit Prayag Raj* v. *Gaukaran Pershad Tewari, 6 C. W. N. 787,* distinguished. AMBICA CHURN DAS *v.* KALA CHANDRA DAS (1906) **10 C. W. N. 422**

——— **s. 45.**

See THUMB-IMPRESSIONS. **9 C. W. N. 520**

——— **s. 47—Handwriting, proof of**—*Document—Witness proving handwriting.* In proof of a document a witness stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question which would elicit any of the several matters indicated in the explanation to s. 47 of the Indian Evidence Act (I of 1872). The witness was not cross-examined on the point. *Held,* that the law on the point is correctly stated in Taylor on Evidence to be as follows:—"A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands." It is

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——— **s. 47**—*concld.*

within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting. SHANKARRAO *v.* RAMJI (1904) . . . . **I. L. R. 28 Bom. 58**

——— **s. 48.**

See BHALE SULTAN CHATTRI TRIBE. **I. L. R 30 All. 1**

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . . **I. L. R. 23 Calc. 427**
I. L. R. 26 Calc. 184

——— **s. 50.**

See ADULTERY . **I. L. R. 5 Calc. 566**
I. L. R. 5 All. 233

——— **s. 54.**

See EVIDENCE—CRIMINAL CASES—PREVIOUS CONVICTIONS.

See PENAL CODE, s. 400. **I. L. R. 32 Mad. 179**

——— **s. 57.**

See RELIGION, OFFENCES RELATING TO. **I. L. R. 7 All. 461**

——— **Registering officer**—*"Court"—Registered power-of-attorney—Judicial notice.* A registered power-of-attorney admitted under s. 57 of the Evidence Act without proof, the registering officer being a Court under s. 3 of the Act. KRISTO NATH KOONDOO *v.* BROWN . **I. L. R. 14 Calc. 176**

1. ——— **ss. 60 and 67—Proof of execution of deed.** To prove the execution of a bill of sale executed in their favour by the plaintiff's father, the defendants called a kazi, who deposed that the vendor came before him, accompanied by witnesses, and acknowledged the execution of the deed, which was then registered. The lower Appellate Court found it was sufficiently proved. On special appeal to the High Court it was contended that the execution was not sufficiently proved under s. 67, Act I of 1872. *Held,* that the proof of execution was sufficient; direct evidence of the hand-writing of the executant was not necessary under s. 67. It was not intended by s. 60 to exclude circumstantial evidence of things which can be seen, heard, or felt. NEEL KANTO PUNDIT *v.* JUGGOBUNDOO GHOSE **12 B. L. R. Ap. 18**

2. ——— **Writer of document and subscribing witness.** The Evidence Act does not require the writer of a document to be examined as a witness, nor does s. 67 of that Act require the subscribing witnesses to a document to be produced. ABDOOL ALI *v.* ABDOOR RAHMAN **21 W. R. 429**

——— **ss. 61, 65, 66—Secondary evidence, admissibility of**—*Objection to reception of*

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 61—*concld.*

evidence—Evidence Act (I of 1872), ss. 61, 65 and 66. No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document, which was admitted in evidence in the Court below without any objection. *Kameshwar Pershad* v. *Amanuttullu, I. L. R. 26 Calc. 53,* dissented from. KISHORI LAL GOSWAMI *v.* RAKHAL DASS BANERJEE (1904) **I. L. R. 31 Calc. 155**

——— s. 63.

See REMAND—GROUND FOR REMAND. **24 W. R. 232**

——— ss. 63, 64.

See post, SS. 90 AND 114.

——— s. 65.

See CONFESSION—CONFESSIONS TO MAGISTRATE . . **I. L. R. 9 Mad. 224**

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE.

See LIMITATION ACT, 1877, s. 19—ACKNOWLEDGMENT OF DEBTS. **I. L. R. 15 Mad. 491**

See ONUS OF PROOF—POSSESSION AND PROOF OF TITLE. **I. L. R. 18 Calc. 201**
L. R. 17 I. A. 159

——— ss. 65 cls. (e) and (g), 74.

See EVIDENCE . **I. L. R. 34 Calc. 293**

——— s. 68.

See BOND, EXECUTION OF. **I. L. R. 30 Mad. 251**

See DEED—EXECUTION. **I. L. R. 20 All. 532**
2 C. W. N. 603
5 C. W. N. 454

See "TRANSFER OF PROPERTY ACT, S. 59." **I. L. R. 32 Mad. 410**

1. ——— **Unattested document**—*Mortgage—Transfer of Property Act (IV of 1882), s. 59—Inadmissibility of the unattested document in evidence to prove the debt.* A mortgage for more than R100 which has been prepared and accepted, but which is not attested, is invalid, and it cannot be used in proof of a personal covenant to pay, being excluded by s. 68 of the Evidence Act. MADRAS DEPOSIT AND BENEFIT SOCIETY *v.* OONNAMALAI AMMAL . . **I. L. R. 18 Mad. 29**

2. ——— *Surety bond purporting to hypothecate immoveable property—Bond not properly attested—Transfer of Property Act (IV of 1882), s. 59.* Where a surety bond purported to hypothecate immoveable property, though it was not registered and attested by two witnesses, a personal decree could be passed on it against the surety inasmuch as the document was evidence of a money-debt. *Madras Deposit and Benefit Society* v. *Oonnamalai Ammal, I. L. R. 18 Mad. 29,* dissented from. SONATUN SHAHA *v.* DINONATH SHAHA . . . **I. L. R. 26 Calc. 222**
3 C. W. N. 228

3. ——— **Mortgage bond, proof of.** Where a mortgage bond, which was on the face of it attested by more than two witnesses, but was proved by only one of them, and its execution was not denied: *Held,* that, having regard to s. 68 of the Evidence Act, the document might be taken as properly proved. NAND KISHORE LAL *v.* KANU RAM TEWARY (1902) . **I. L. R. 29 Calc. 355;**
s. c. 6 C. W. N. 395

——— s. 70.

See DEED—ATTESTATION. **7 C. W. N. 384**

See DEED—EXECUTION. **I. L. R. 27 Calc. 190**

——— s. 73—**Signature, proof of.** Where certain raiyats swore that they got their pottahs, from the hands of the person who professed to sign them, this was held under the Evidence Act, s. 73, as proving to the satisfaction of the Court that the signatures were those of the lessor. TARA PERSHAD TANGEE *v.* LUKHEE NARAIN PAURAI . **21 W. R. 6**

——— s. 74.

See CONFESSION—CONFESSIONS TO MAGISTRATE . **I. L. R. 12 All. 595**

See STAMP ACT, SCH. I, ART. 22. **I. L. R. 19 All. 293**

1. ——— **Letters between District Authorities.** Letters between District Authorities are public documents forming a record of the acts of public authorities, and as such admissible as evidence under Act I of 1872, s. 74. PRITHEE SINGH *v.* COURT OF WARDS . **23 W. R. 272**

2. ——— **Compromise, record of**—*Public record—Proof by office copy.* Where a suit is compromised, and a petition is presented in the usual way, and the Court makes an order confirming the agreement, which, with the order, as well as the agreement and power-of-attorney, are all entered upon the record, these papers become as much a part of the record in the suit as if the case had been tried and judgment given between the parties in the ordinary way; and that record is a public document, and may be proved by an office copy. BHAGAIN MEGH RANE KOER *v.* GOOROOPERSHAD SINGH . . . **25 W. R. 68**

3. ——— **Jummabandi**—*Public document—Jummabandi prepared by Collector under Beng. Reg. VII of 1822—Consent, proof of.* A jummabandi prepared by a Deputy Collector, while engaged in the settlement of land under Reg. VII of 1822, is a "public document" within the meaning of s. 74 of the Evidence Act. It is not necessary

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——— s. 74—*contd.*

to show that, at the time when such document was prepared, a raiyat affected by its provisions was a consenting party to the terms therein specified. TARU PATUR *v.* ABINASH CHUNDER DUTT
I. L. R. 4 Calc. 76

4. ——— *Jummabandi—Public document. Quære*: Whether a jummabandi is a public document ? AKSHAYA COOMAR DUTT *v.* SHAMA CHARAN PATITANDA
I. L. R. 16 Calc. 586

5. ——— **Board of Trade certificate—***Public document.* A certificate granted by the Board of Trade is not a "Public document" within the meaning of s. 74 of the Evidence Act. *In the matter of a collision between* "AVA" *and* "BRENHILDA"
I. L. R. 5 Calc. 568 ; 5 C. L. R. 331

6. ——— **Record of Measurement—***Public documents* In a suit to obtain possession, under a title acquired by purchase at an auction, of certain lands, together with mesne profits, upon setting aside an alleged talukh-etmami right claimed by the defendants, the defendants, in support of their claim, produced certain documents purporting to be abstracted from, or copies of, Government measurement chittas, dated Mughi 1126-27 (1764). These documents were produced from the Collectorate, but there was nothing to show that they were the record of measurements made by any Government officer. *Held*, that they were not "public documents" within the meaning of s. 74 of the Evidence Act. NITTYANUND ROY *v.* ABDAR RAHEEM . . I. L. R. 7 Calc. 76

7. ——— **s. 74 and s. 76—Anumati-patra**—*Public document.* An anumati-patra is not a public document within the meaning of s. 74, nor, if it were, would its being on the record constitute a copy certified as required by s. 76. KRISHNA KISHORI CHAODHARANI *v.* KISHORI LAL ROY
I. L. R. 14 Calc. 486
L. R. 14 I. A. 71

8. ——— **s. 74 and s. 35—Teiskhana register**—*Public document—Beng. Reg. XII of 1817, s. 16.* A teiskhana register prepared by a patwari under rules framed by the Board of Revenue under s. 16 of Beng. Reg. XII of 1817 is not a public document, nor is the patwari preparing the same a public servant. BAIJ NATH SINGH *v.* SUKHU MAHTON . I. L. R. 18 Calc. 534

9. ——— **Police reports**—*Public documents—Evidence Act, s. 76—Right of accused person to inspect and have copies of police reports—Criminal Procedure Code (1882), ss. 157, 167, and 173. Held* by the Full Bench (SUBRAMANIA AYYAR, *J., dissentiente*), that reports made by a police-officer in compliance with ss. 157 and 158 of the Criminal Procedure Code are not public documents within the meaning of s. 74 of the Indian Evidence Act, and consequently an accused person is not entitled before trial to have copies of such reports. *Held* by COLLINS, *C.J.*, and BENSON, *J.*—The same rule applies to reports made by a police-officer in compliance with s. 173 of the Criminal Procedure Code. *Held* by SHEPHARD and SUBRAMANIA AYYAR, *JJ.*—Reports made by a police-officer in compliance with s. 173 of the Criminal Procedure Code are public documents within the meaning of s. 74 of the Indian Evidence Act, and consequently an accused person, being a person interested in such documents, is entitled, by virtue of s. 76 of the Indian Evidence Act, to have copies of such reports before trial. QUEEN-EMPRESS *v.* ARUMUGAM
I. L. R. 20 Mad. 189

10. ——— **Will, certified copy of—***Document purporting to be a certified copy of a will taken from the Protocol of record in Ceylon—No proof that it had been made from, or compared with, the original—Inadmissibility of document.* In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of a will executed by her late father at Colombo, where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon, to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered before the Subordinate Judge that the copy had been made from, and compared with, the original. On the question of the admissibility in evidence of the said document :—*Held*, that it was inadmissible ; that it was not a public document within the meaning of s. 74 (1) (iii) or (2) of the Evidence Act, and that, in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable. PONNAM MAL *v.* SUNDARAM PILLAI
I. L. R. 23 Mad. 499

11. ——— **ss. 74, 76—Loan Register of Public Debt Office**—*Inspection of document, right to certified copies—Evidence Act (I of 1872), ss. 74, 76—Bankers' Books Evidence Act (XVIII of 1891).* The Loan Register of the Public Debt Office in the Bank of Bengal is a "public document" within the meaning of s. 74 of the Evidence Act ; and under s. 76 of the Act, any person having an interest in the document is entitled to inspect the same and obtain certified copies thereof. *Queen-Empress* v. *Arumugam, I. L. R. 20 Mad. 189,* followed. *Mutter* v. *Midlands Railway Co., L. R. 38 Ch. D. 92 ; Rex* v. *Justices of Staffordshire, 6 Ad. & E. 34,* referred to. CHANDI CHARAN DHAR *v.* BOISTAB CHARAN DHAR (1904)
I. L. R. 31 Calc. 284
s.c. 8 C. W. N. 125

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EVIDENCE ACT (I of 1872)—*contd.*

12. ——— ss. 74, 77—Plaint and written statement, copies of—*Proceedings between the same parties in another suit—Public documents.* *B* instituted a suit in the Court of the Munsif of the 24-Pergunnahs against *A*, on account of an alleged trespass to a drain which *B* then alleged to be his property; that suit was dismissed on the ground that *B* had not proved his title to the drain in question. In a suit arising out of an alleged trespass to the same drain brought by *A* against *B*, in which *A* stated it was his property, certified copies of the plaint, the defendant's written statement, and the decree in the former suit were produced; and it was contended they were public documents and admissible in evidence under ss. 74 and 77 of the Evidence Act. The Court admitted the plaint and rejected the written statement. MAHOMED SHAHABOODEEN *v.* WEDGEBERRY . . . . **10 B. L. R. Ap. 31**

——— s. 76.

See ONUS OF PROOF—DOCUMENTS RELATING TO LOANS, EXECUTION OF, AND CONSIDERATION FOR.
I. L. R. 23 Calc. 950
L. R. 23 I. A. 92

See STAMP ACT, SCH. I, ART. 22.
I. L. R. 19 All. 293

——— s. 77.

See ONUS OF PROOF—DOCUMENTS RELATING TO LOANS, EXECUTION OF, AND CONSIDERATION FOR.
I. L. R. 23 Calc. 950
L. R. 23 I. A. 92

——— s. 80.

See CONFESSION—CONFESSIONS TO MAGISTRATE . . **I. L. R. 9 Mad. 224**
I. L. R. 15 Calc. 595
I. L. R. 12 All. 595
7 C. W. N. 230

See CRIMINAL PROCEDURE CODE, S. 288.
21 W. R. Cr. 5

1. ——— s. 83—Measurement chittas. Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. RAM CHUNDER SAO *v.* BUNSEEDHUR NAIK
I. L. R. 9 Calc. 741

2. ——— Resumption chittas—*Evidence of title.* Government resumption chittas, in the absence of the resumption-proceedings, are not conclusive evidence of title as against third persons. *Ram Chunder Sao* v. *Bunseedhur Naik, I. L. R. 9 Calc. 741,* followed. DWARKA NATH MISSER *v.* TARITA MOYI DABIA
I. L. R. 14 Calc. 120

GIRINDRA CHANDRA GANGULI *v.* RAJENDRA NATH CHATTERJEE . . . **1 C. W. N. 530**

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 83—*concld.*

3. ——— Maps—*Evidence Act, s. 13—Presumption as to accuracy.* A map prepared by an officer of Government while in charge of a khas mehal, Government being at the time in possession of the mehal merely as a private proprietor, is not a map purporting to have been made under the authority of Government within the meaning of s. 83 of the Evidence Act (I of 1872), the accuracy of which is to be presumed, but such a map may be admitted as evidence under s. 13 of that Act. JUNMAJOY MULLICK *v.* DWARKANATH MYTEE
I. L. R. 5 Calc. 287 : 4 C. L. R. 574

4. ——— Survey maps—*Presumption as to accuracy of Government survey map—Subsequent Government survey map.* The presumption under the Evidence Act in regard to the accuracy of a map made under the authority of Government is in no way affected by the fact that such map has been superseded by a later survey map made under the same authority and by an order of the Board of Revenue. JOGGESSUR SINGH *v.* BYCUNT NATH DUTT . **I. L. R. 5 Calc. 822 : 6 C. L. R. 519**

5. ——— Thabkust maps. A thakbust map must be presumed to be accurate under this section. NIAMUTULLAH KHADUN *v.* HIMMUT ALI KHADUN . . . . . **22 W. R. 519**

6. ——— *Thakbust map, accuracy of*—*Evidence of making of map in presence of parties.* The accuracy of a thakbust ameen's map, which is assumed in the Evidence Act, means accuracy of drawing and correctness of measurement, but certainly does not refer to the laying down of boundaries according to the rights of parties. To be binding on the parties to a suit, such a map must be supported by evidence that it was drawn in their presence or in that of their agents. OMIRTA LALL CHOWDHRY *v.* KALEE PERSHAD SHAHA . . . . . **25 W. R. 178**

——— s. 85.

See PRACTICE—CIVIL CASES—PROBATE AND LETTERS OF ADMINISTRATION.
I. L. R. 16 Calc. 776
I. L. R. 21 Mad. 492

——— ss. 85, 114.

See POWER-OF-ATTORNEY.
I. L. R. 33 Calc. 625

——— ss. 85, 114—Power-of-attorney—*Power-of-attorney executed before and authenticated by a Notary—Evidence of identification of executant, if necessary—Rules and Orders of the Calcutta High Court, Rule 748.* S. 85 of the Evidence Act is mandatory. When a document purporting to be a power-of-attorney and to have been executed before and authenticated by a Notary Public is produced before the Court, an affidavit of identification as to the person purporting to make the power-of-attorney being the person named therein is unnecessary. If the Court, however, is not satisfied as to its execution and authentication, it may,

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——— **s. 85**—*concld.*

under Rule 748 of this Court's Rules and Orders, call for further evidence. *In the goods of* W. H. MYLNE (1905) . . . **9 C. W. N. 986**

1. ——— **s. 86—Foreign judicial records**—*Execution in British India of decree passed by Courts of Cooch Behar—Civil Procedure Code, 1882, s. 434. Per* NORRIS, *J.—Quære:* Whether the notification published in the *Calcutta Gazette* of 8th April 1879, signed by the then Deputy Commissioner of Cooch Behar, and stating the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies, and which notification was published after a notification had been published by the Governor-General of India in Council under the provisions of s. 434 of the Civil Procedure Code, to the effect that the decrees of the Civil and Revenue Courts of Cooch Behar may be executed in British India, as if they had been made by the Courts of British India, was a compliance with the provision of s. 86 of the Indian Evidence Act at a time when there was a representative of the Government of India resident in Cooch Behar. *Per* NORRIS, *J.*—The notification of the 8th of April 1879 is now of no use, as there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and consequently certified copies of judicial records of that State cannot now be received in evidence in the Courts of British India under the provisions of s. 86 of the Evidence Act. GANEE MAHOMED SARKAR *v.* TARINI CHARAN CHUCKERBATI **I. L. R. 14 Calc. 546**

2. ——— **ss. 86, 65, 66 and 74**—*Foreign State, judicial proceedings in—Record not certified as specified in s. 86—Secondary evidence—Public document, contents of, s. 74.* The record of proceedings in a Court of Justice is presumed to be genuine and accurate, if it is certified as directed by s. 86 of the Evidence Act. But the proceedings may be proved by an official of the Court speaking to what takes place in his presence and also to an uncertified record thereof. The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74) admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction. HARANUND CHETLANGIA *v.* RAM GOPAL CHETLANGIA **I. L. R. 27 Calc. 639**
L. R. 27 I. A. 1
4 C. W. N. 429

——— **s. 90.**

See HINDU LAW ENDOWMENT.
I. L. R. 36 Calc. 1003

1. ——— **Ancient document**—*Proof of proper custody.* When a document is so old that the parties to it and the witnesses are in all probability dead, and evidence cannot be produced to prove the factum of its execution, the rule in England, as well as in this country, is to compel the party who relies upon the document to show that it comes from the custody in which it would

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naturally be expected to reside, were it a real and authentic document. SREEKANT BHUTTACHARJEE *v.* RAJNARAIN CHATTERJEE **10 W. R. 1**

2. ——— *Document of ancient date—Proof of custody.* Where a party offers documents of such an age as to be incapable of being proved by direct evidence, he is bound to prove their custody. GOUR PARAY *v.* WOOMA SOONDUREE DEBIA . . **12 W. R. 472**

FUREEDUNNISSA *v.* RAM ONOGRA SINGH. **21 W. R. 19**

And, if possible, acts done according to their terms. GRANT *v.* BYJNATH TEWAREE **21 W. R. 279**

3. ——— *Ancient document—Evidence of proper custody.* Although ancient documents are admissible in evidence on proof that they have been produced from proper custody, their value as evidence when admitted must depend in each case upon the corroboration derivable from external circumstances, *e.g.*, from the documents having been produced on previous occasions upon which they would naturally have been produced if in existence at the time or from acts having been done under them. BOIKUNT NATH KUNDU *v.* LUKHUN MAJHI **9 C. L. R. 425**

4. ——— *Document of ancient date.* Where a document is found on independent evidence to have been in existence long prior to the institution of the suit, and also to be genuine, it is not necessary to insist on the testimony of subscribing witnesses. MAHOMED FEDYE SIRDAR *v.* OZEEOODEEN . . **10 W. R. 340**

MOHESH ROY *v.* BOODHUN MAHTOON **18 W. R. 315**

5. ——— *Ancient documents, rule as to.* The English rule that a document more than 30 years old, if free from suspicion of dishonesty, may be admitted as evidence without proof of the execution or writing, was held to be founded on a reason which had less weight in this country, where less credit should be given to ancient documents which are unsupported by any evidence that might free them from a suspicion of being false or fabricated. Even in England such evidence unsupported was held to be of very little weight. Accordingly it was not allowed to prevail here in a case in which there was other evidence inconsistent with the title which those documents professed to create. PHOOL BIBEE *v.* GOUR SURUN DOSS. LUTEEFOONNISSA *v.* GOUR SURUN DOSS **18 W. R. 485**

6. ——— *Ancient document—Evidence of proper custody.* To establish the authenticity of a document so old that the witnesses to its execution cannot reasonably be expected to be in existence, it is not necessary to go behind the possession of the present owner. If the custody

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from which the document comes into Court has been and is the custody in which, judging from the purport of the document itself and the other circumstances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to be admissible in evidence between the parties. CHUNDER KANT MISTREE *v.* BROJONATH BYSACK **13 W. R. 109**

RAMDHUN GHOSE *v.* ESHAN CHUNDER GHOSE **17 W. R. 34**

See DEVAJI GOYAJI *v.* GODABHAI GODBHAI . . **11 W. R. P. C. 35**

VENCATASWAR YELLIAPPAH NAIKA *v.* ALAGOO MOOTTOO SERVACAREN **4 W. R. P. C. 73 : 8 Moo. I. A. 327**

7. ——— *Old document—Lease, proof of authenticity of —Possession.* Where a document which is not proved because of its great age, and of there being therefore no witnesses to prove it, is put forward as a document intended to operate as a maurasi tenure, it is necessary, in order to establish its authenticity, to show that it was accompanied by possession. BISHESHUR BHUTTACHARJEE *v.* LAMB . . **21 W. R. 22**

8. ——— *Ancient document, custody of.* Where a document purported to be 45 years old, and a mohurir swore to its having been in his custody as keeper of the plaintiff's records for the time of his service, the evidence was held to show (if credible) that the document had come from proper custody, within the meaning of Act I of 1872, s. 90, and to require no direct evidence of its genuineness. EKCOWREE SINGH ROY *v.* KYLASH CHUNDER MOOKERJEE . **21 W. R. 45**

9. ——— *Presumption as to ancient documents—Destruction of original—Presumption applied to certified copy—Evidence Act, s. 65.* The presumption allowed by s. 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno, I. L. R. 5 Calc. 886,* followed. ISHRI PRASAD SINGH *v.* LALLI JAS KUNWAR **I. L. R. 22 Al . 294**

10. ——— *Ancient document—Weight of ancient documents as evidence—Proper custody—Custody of agent.* Under a varaspatra executed in 1847 by *A*, a Hindu widow in favour of *B*, *B* took possession of the property mentioned therein, and enjoyed it during his lifetime. After his death, his gomasta (agent) managed it for and on behalf of *B*'s minor son *C*. In 1881 *C* filed a suit to redeem a house and a garden, part of the property covered by the varaspatra, and which had been mortgaged by *A*'s husband in 1831 One of the defences to this suit was that neither *C* nor his father was the heir of the original mortgagor, and that therefore *C* could not redeem the property in dispute. At the trial *C* produced the varaspatra of 1847 in support of his title, alleging that he had found it among the papers of the old gomasta of his father, who used to look after his affairs during his minority. *Held,* that the varaspatra was admissible in evidence under s. 90 of the Evidence Act (I of 1872) as a document purporting to be more than thirty years old, and produced from a custody which, under the circumstances of the case, was a proper custody, the possession of the gomasta being legally the possession of his master. The degree of credit to be given to an ancient document depends chiefly on the proof of transactions or state of affairs necessarily or at least properly or naturally referrible to it. HARI CHINTAMAN DIKSHIT *v.* MORO-LAKSHMAN . . **I. L. R. 11 Bom. 89**

As to the weight and admissibility of ancient documents.

See also TIMANGAVDA *v.* RANGANGAVDA. **I. L. R. 11 Bom. 94 note**

11. ——— *Ancient documents, Proof of—Landlord and tenant—Suit for ejectment.* In a suit for ejectment brought in 1894 the defendant contended that he held the land on permanent fazendari tenure and produced a document, dated 1848, by which his predecessor was given permission to build upon the land. The plaintiff (landlord), however, produced the counterparts of a subsequent lease to the same tenant (defendant's predecessor), dated 1851, which created a monthly tenancy, and of a later one to the defendant himself, dated 1859, creating a yearly tenancy determinable on a month's notice, under which provision this suit was brought. The defendant denied that he had executed this document, and contended that it was not proved. The lower Court held that these documents were admissible as ancient documents, and relying upon them passed a decree for the plaintiff. On appeal: *Held,* confirming the decree, that, having regard to the circumstances, the documents must be held proved, and the plaintiff was entitled to recover possession of the land. HUSAIN *v.* GOVARDHANDAS PARMANANDAS **I. L. R. 20 Bom. 1**

12. ——— *Ancient document, presumption as to—Genuineness of signature in issue—Presumption not excluded, but has to be rebutted.* It is in the discretion of a Court whether it will raise the presumption in favour of a document for which s. 90 of the Evidence Act provides, but this discretion is not to be exercised arbitrarily: it must be governed by principles which are consonant with law and justice. And while, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very great injustice may be perpetrated if an ancient document coming from proper custody

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is refuted by a Court capriciously or for inadequate reasons. When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded, but this would deprive the party producing it of the benefit of the presumption precisely in the circumstances in which he most stands in need of its aid. The presumption merely takes the place of the evidence which would, where a modern document is concerned, be necessary for the purpose of proving due execution, and it must be met and rebutted in the same way as direct evidence of execution in the case of a modern document. *Phool Bibee* v. *Goor Surun Doss, 18 W. R. 485; Boikunt Nath Kundu* v. *Lukhun Majhi, 9 C. L. R. 425; Hari Chintaman Dikshit* v. *Moro Lakshman, I. L. R. 11 Bom. 89; Trailokia Nath Nundi* v. *Shurno Chungoni, I. L. R. 11 Calc. 539,* referred to. GOVINDA HAZRA *v.* PROTAP NARAIN MUKHOPADHYA (1902)
I. L. R. 29 Calc. 740

13. ——— **Document 30 years old**—*Proper custody.* A document 30 years old does not prove itself, in the absence of evidence, that it has come from the proper custody. GURU DAS DEY *v.* SAMBHU NATH CHUCKERBUTTY
3 B. L. R. A. C. 258

14. ——— *Document 30 years old—Presumption.* In applying the presumption allowed by s. 90 of the Evidence Act, the period of 30 years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof. MINNU SIRKAR *v.* RHEDOY NATH ROY . . . . . **6 C. L. R. 135**

15. ——— *Document 30 years old.* A document more than 30 years old, although not requiring to be formally attested by the witnesses who attended at its execution, must be shown to have come from the custody of the person who would have been the proper person to keep it. THAKOOR PERSHAD *v.* BASHMUTTY KOER
24 W. R. 428

16. ——— *Document 30 years old.* The rule regarding the proof of documents more than 30 years old is that they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. HARI DHANGAR *v.* BIRU DARSA . . . . **5 Bom. A. C. 135**

17. ——— *Document 30 years old—Proof of custody.* With regard to the proof of ancient documents, the proper rule is that, if they are more than 30 years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. Application of this rule considered. VITHAL MAHADEB *v.* DAUD VALAD MUHAMMED HUSEN . . **6 Bom. A. C. 90**

18. ——— *Documents more than 30 years old.* Where the Judge is satisfied that a document is more than 30 years old and that it has come from proper custody, he may, as a rule, dispense with proof of its execution. LALDAS RAMDAS *v.* KASHIRAM . . **4 Bom. A. C. 60**

19. ——— *Document 30 years old—Proof of signature of.* A Court is not bound to accept as genuine the signature on a document upwards of 30 years old, even though it be produced from proper custody. Before accepting such documents as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at the time was entitled to grant such a document. UGGRAKANT CHOWDHY *v.* HURRO CHUNDER SHICKDAR . . . **I. L. R. 6 Calc. 209**

20. ——— *Documents more than 30 years old—Proof of execution—Evidence of authority to sign on behalf of others.* The plaintiffs sued the defendants for enhancement of rent. The defendants resisted the claim, relying, *inter alia,* on a mokurari pottah executed on 9th October 1832. This pottah purported to bear the seal of one of the then maliks of the lands, and also purported to be signed on behalf of all the maliks by *A*. *Held,* that, although the pottah might be an authentic document, it would not bind the maliks who did not affix their seals, nor those who claimed under them, unless it was shown that *A* had a special authority to sign the names of such maliks to it or a general authority to sign on their behalf documents of the same description as the pottah; and that, until such proof was given, the document was not admissible in evidence. *Held,* further, that the fact that the pottah was more than 30 years old gave rise to the presumption that the signature at the foot of it was in the handwriting of *A*, and that the pottah was executed by him; but that to make it evidence against the representatives of the maliks who had not executed it, the defendants should show that *A* had authority to sign their names. UBILACK RAI *v.* DALLIAL RAI
I. L. R. 3 Calc. 557

21. ——— *Legal presumption—Previous production of such document.* No legal presumption can arise as to the genuineness of a document more than 30 years old, merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court. GUDADHUR PAUL CHOWDHRY *v.* BHYRUB CHUNDER BHATTACHARJI . **I. L. R. 5 Calc. 918**

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——— **s. 90**—*contd.*

22. ——— *Documents 30 years old, their natural and proper custody.* Where a daughter professed to hold under a pottah more than 30 years old in favour of her father, and was found to have been in possession of the land ever since her father's death for a period of 40 years without interruption on the part of the father's heirs: *Held,* that the daughter's custody of the pottah was a natural and proper custody within the meaning of s. 90 of the Evidence Act. The rule laid down in s. 90 as to proof of execution of documents 30 years old ought to be applied in this country with special care and caution. TRAILOKIA NATH NUNDI *v.* SHURNO CHUNGONI **I. L. R. 11 Calc. 539**

23. ——— *Secondary evidence—Document more than 30 years old—Proof of execution—Evidence Act, s. 65.* Secondary evidence of the contents of a document requiring execution, which can be shown to have been last in proper custody, and to have been lost, and which is more than 30 years old, may be admitted under s. 65, cl. (*c*), and s. 90 of the Evidence Act, without proof of the execution of the original. KHETTER CHUNDER MOOKERJEE *v.* KHETTER PAUL SREETERUTNO **I. L. R. 5 Calc. 886 : 6 C. L. R. 199**

24. ——— *Documents thirty years old—Proper custody—Presumption. Per* BATTY, *J.*—S. 90 of the Evidence Act (I of 1872) admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin 'or' an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody, and not on the history of its continuance. *Per* ASTON, *J.*—S. 90 of the Evidence Act requires that a document must be produced from the proper custody. SHARFUDIN VALAD TAJUDIN *v.* GOVIND BHIKAJI BADE (1902) . . **I. L. R. 27 Bom. 452**

25. ——— *Evidence Admissibility—Hearsay evidence—Relationship, statement as to, made upon information received from others, when admissible—Document more than 30 years old—Discretion of Court to refuse to admit without formal proof—Interference by higher Court.* The Courts in India refused to admit without formal proof a document, which was more than 30 years old and which purported to come from proper custody: *Held,* on a review of circumstances, that the lower Courts had properly exercised the discretion vested in them under s. 90 of the Evidence Act. The Judicial Committee would always be extremely slow to overrule the discretion exercised by a Judge under s. 90 of the Evidence Act. SHAFIQ UNNISSA *v.* SHABAN ALI KHAN (1905) **9 C. W. N. 105**

26. ——— *Document 30 years old—Proper custody—Hindu Law—Endowment—Debutter—Alienation of endowed property—Sebait—Power to grant permanent lease of endowed property—Possession—Landlord and tenant—Possession of lessee under void lease entering into possession and continuing to pay rent—Limitation Act (XV of 1877), Sch. II, Art. 134—Purchaser for value bonâ fide—Notice—Minerals, right to.* Where a person, who had obtained possession of a document, which would naturally come into his possession, failed to restore it after his right to possess it had ceased, and the document was produced from his custody. *Held,* that his failure to do so did not make the custody improper within the meaning of s. 90 of the Evidence Act. In determining the question whether a grant is *debutter* the mere use of the word *debutter* is not conclusive. Observation of MUKERJEE, *J.*, in *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546,* approved. A permanent *mukarari* lease is an alienation of the proprietary interest *pro tanto,* and if the property is *debutter,* such an alienation by the *sebait* is beyond his legal competence and the possession of the lessee would be adverse to the lessor as from the date of the lease, although the lessee had continued to pay the rent reserved. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 271 : L. R. 27 I. A. 69 ; Attorney-General* v. *Davey, 4 De G. & J. 136 ; The President, Magdalen College, Oxford* v. *Attorney-General, 6 H. L. C. 189,* and the observations of Lord Selborne in *President and Governors of Magdalen Hospital* v. *Knotts, 4 App. Cas. 324,* referred to. Where the predecessor in title of the defendants obtained from the *sebait* a permanent lease of the *debutter* property and not merely of any interest, which the *sebait* might have therein. *Held,* that the lessee was a purchaser *pro tanto* within the meaning of Art. 134 of Sch. II of the Limitation Act, and that the fact that he had notice that the property, which he was acquiring, was *debutter* property did not preclude him from being regarded as such and that a suit to recover the property as against him must be brought within twelve years from the date of the lease. *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur, C. L. J. 546 ; Radha Nath Doss* v. *Gisborne & Co., 15 W. R. P. C. 24 ; 14 Moo. I. A. 1,* referred to, *Ram Charan Tewary* v. *Protap Chandra Dutt Jha, 2 C. L. J. 448,* doubted. A permanent lease excluding "all rights of various kinds" with the exception only of the homestead includes minerals. SHAMA CHARAN NANDI *v.* ABHIRAM GOSWAMI (1906) **I. L. R. 33 Calc. 511 s.c. 10 C. W. N. 738**

——— **s. 90 and ss. 63, 64 and 114—Copy of document**—*No evidence that original could not be produced—Secondary evidence—Presumption.* In a suit to recover possession of land, the defendent relied principally on a document which was filed in the Munsif's Court in support of his title. According to the evidence, this document had been prepared with reference to a document of

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 90—*concld.*

an earlier date. This earlier document was not produced, although it was admitted in existence, nor was it shown that it could not have been produced. The Munsif decreed in plaintiff's favour. On appeal, a copy of the earlier document was produced filed : *Held*, that, although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned ; and, inasmuch as the exhibit was a copy and not the original, the presumption which, under s. 90 of the Evidence Act, may be made where a document over thirty years old is produced, ought not to be made. *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno, I. L. R. 5 Calc. 886*, referred to. APPATHURA PATTAR *v.* GOPALA PANIKKAR (1901)
I. L. R. 25 Mad. 674

——— s. 91.

See BENGAL TENANCY ACT, s. 29 (*b*).
11 C. W. N. 62

See CONFESSION—CONFESSIONS TO MAGISTRATE . **I. L. R. 17 Calc. 862**

See ENHANCEMENT.
I. L. R. 33 Calc. 607

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.

See EVIDENCE—CRIMINAL CASES—PREVIOUS CONVICTIONS.
I. L. R. 28 Calc. 689

See LIMITATION ACT, 1877, s. 19—ACKNOWLEDGMENT OF DEBTS.
I. L. R. 12 Calc. 267
I. L. R. 15 Mad. 491

See REGISTRATION ACT, 1877, s. 49.
I. L. R. 1 All. 442
1 C. L. R. 542

——— **dying declaration, record of—**

See DYING DECLARATION.
13 C. W. N. 680

1. ——— **Contemporaneous oral agreement**—*Contract. Quære :* Whether evidence of a contemporaneous oral agreement relating to the terms of the proposed contract would be admissible under s. 91 of the Evidence Act. MAUNGH SHWE OH *v.* MAUNG TUN GYOW (1905)
I. L. R. 32 Calc. 96
s.c. 9 C. W. N. 147
L. R. 31 I. A. 188

2. ——— **Evidence of improvement**—*Evidence Act (I of 1872), s. 91—Improvement : Landlord and tenant—Lease, stringent conditions in—Occupancy raiyat—Bengal Tenancy Act (VIII of 1885), s. 29.* To justify enhancement in contravention of cl. (*b*) of s. 29 of the Bengal Tenancy Act,

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 91—*concld.*

evidence as regards the improvement effected by the landlord and evidence of the fact that enhancement was agreed to be paid in consideration of such improvement is admissible, and s. 91 of the Evidence Act does not prevent the landlord from giving such evidence, as the consideration for enhancement does not constitute a term of the contract or of the dispossession of the property. A *kabuliat* executed by an occupancy raiyat at an enhanced rate of more than 2 annas in the rupee, although executed in consideration of the avoidance of stringent conditions in a previous lease, is void. *Sheo Sahay Panday* v. *Ram Rachia Roy, I. L. R. 18 Calc. 333*, and *Nath Singh* v. *Damr Singh, I. L. R. 28 Calc. 90*, distinguished. PROBAT CHANDRA GANGAPADHYA *v.* CHIRAG ALI (1906).
I. L. R. 33 Calc. 607

3. ——— **Oral evidence**—*Oral evidence admissible to show that a contract made by a person in his own name was made on behalf of himself and his partners.* Under English Law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it. This is also the law in India as there is nothing in s. 91 of the Evidence Act to show that the Legislature intended to depart from this settled rule of English Law. VENKATASUBBIAH CHETTY *v.* GOVINDARAJULU NAIDU (1907) . **I. L. R. 31 Mad. 45**

——— **ss. 91, 65 and 22**—*Evidence—Cause of action—Suit on a promissory note—Note inadmissible in evidence—Plaintiff not allowed to set up a case outside the note.* When money is lent on terms contained in a promissory note given at the time of the loan, the lender suing to recover the money so lent must prove those terms by the promissory note. If for any reason, such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note. *Sheikh Akbar* v. *Sheikh Khan, I. L. R. 7 Calc. 256*, and *Radhakant Shaha* v. *Abhoychurn Mitter, I. L. R. 8 Calc. 721*, followed. *Pramatha Nath Sandal* v. *Dwarka Nath Dey, I. L. R. 23 Calc. 851*, dissented from. *Hira Lal* v. *Data Din, I. L. R. 4 All. 135*, referred to. PARSOTAM NARAIN *v.* TALEY SINGH (1904) . . . . **I. L. R 26 All. 178**

——— **ss. 91, 95, 97.**

See EVIDENCE . **I. L. R. 30 Mad. 397**

——— s. 92.

See BENAMI . . **10 C. W. N. 570**

See BILL OF EXCHANGE.
I. L. R. 3 Calc. 174

See CONTRACT FOR SALE OF GOODS.
8 C. W. N. 57

See EVIDENCE—PAROL EVIDENCE.

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 92—*contd.*

See PRINCIPAL AND AGENT—COMMISSION AGENTS . **I. L. R. 16 Mad. 238**

See PRINCIPAL AND AGENT—LIABILITY OF AGENTS . . **I. L. R. 5 Calc. 71**

See REGISTRATION ACT, s. 17. **I. L. R. 24 Bom. 609**

See SPECIFIC PERFORMANCE. **13 C. W. N. 326**

See TRANSFER OF PROPERTY ACT, ss. 4 AND 107 . **I. L. R. 32 Mad. 532**

1. ——— **s. 92—Oral evidence to vary written agreement—"** *Contradicting, varying, adding to or subtracting from"—Admissibility of oral evidence when question not as between parties to the instrument or their privies.* Plaintiff sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant from *M.* A document was filed, which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him. *Held*, that oral evidence was admissible in support of the contention that there had been a gift of the land to the plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of s. 92 of the Evidence Act. Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them. *Rahiman* v. *Elahi Baksh, I. L. R. 28 Calc. 70*, commented upon. PATHAMMAL *v.* SYED KALAI RAVUTHAR (1904) . . **I. L. R. 27 Mad. 329**

2. ——— *Oral evidence to show that an executant of a note of hand was only a surety, if admissible.* Oral evidence is not admissible to show that one of the executants of a note of hand signed it only as surety and that his liability was only to the extent of standing as a surety for one month. *Pogose* v. *Bank of Bengal, I. L. R. 3 Calc. 174*, distinguished. The law with regard to the admissibility of oral evidence to vary the terms of a written document is not governed by the English Law of Evidence, but by the Evidence Act, hence oral evidence to be admissible must come under one or other of the provisions of s. 92 of the Evidence Act, *Balkissen* v. *Legge, 4 C. W. N. 153 ; s.c. 27 I. A. 58*, followed. HAREK CHAND BABU *v.* BISHUN CHANDRA BANERJEE (1904) . **8 C. W. N. 101**

3. ——— *Redemption suit—Sale out-and-out—Construction—Evidence of intention. Admissibility.* Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out-and-out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption. *Held*, on second appeal by the defendant, that evidence of intention cannot be given for the purpose merely of construing a document, which purported to be a sale out-and-out and not a mortgage ; s. 92 of the Evidence Act (I of 1872), subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract grant or other disposition of property the terms of which have been reduced to writing as mentioned in that section. While there are restrictions on the admissibility of oral evidence, s. 92, in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. ABAJI *v.* LAXMAN (1906) . . **I. L. R. 30 Bom. 426**

4. ——— *Written document—Absolute conveyance—Mortgage—Contemporaneous oral agreement or statement of intention—Inference from circumstances.* The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously existing debt and not money paid at the time, that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years ; that there was no transfer of the land into the *khata* of the transferee and that the consideration was grossly inadequate. The first Court held the transaction to be an out-and-out sale and dismissed the suit. On appeal by the plaintiff, *Held*, confirming the decree, that the meaning of the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention, which must be inferred from the said several circumstances relied on, but that in questions of this kind Courts in India must be guided by s. 92 of the Evidence Act (I of 1872), and cannot have recourse to those equitable principles, which enable the Court of Chancery to give relief in those cases of which *Alderson* v. *White, 2 De G. & J. 98*, or *Lincoln* v. *Wright, 4 De G. & J. 16*, furnish examples. This, however, would not have precluded the plaintiff from relying on the provisos to the section, had any of them been applicable. DATTOO *v.* RAMCHANDRA (1905) **I. L. R. 30 Bom. 119**

——— **s. 92, proviso (1).**

See EVIDENCE . **I. L. R. 32 Calc. 467**

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 92**—*contd.*

——— **Wagering contract**—*Oral evidence—Written agreement—Agreement, validity of—Contract, real nature of.* Upon the true construction of s. 92 of the Evidence Act (I of 1872), and specially having regard to proviso (*1*) of that section, the decision in the case of *Juggernauth Sew Bux* v. *Ram Dyal, I. L. R. 9 Calc. 791,* cannot be regarded as law. In order to enable a Court to arrive at a decision, whether or not an agreement is void, on the ground that it is by way of wager, the party who sets up that it is, should be allowed to go into evidence to prove that it is so. *Kong Yee Lone & Co.* v. *Lowjee Nanjee, I. L. R. 29 Calc. 461 ; L. R. 28 I. A. 239,* referred to. *Per* WOODROFFE, *J.*—If the validity of a written agreement is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under the rule embodied in s. 92 of the Evidence Act, which exists against the contradiction and variance of the terms only of those instruments, the validity of which is not in question. The instances mentioned in proviso (*i*) of that section are illustrative and not exhaustive. BENI MADHAB DASS *v.* SADASOOK KOTARY (1905) **I. L. R. 32 Calc. 437** s.c. **9 C. W. N. 305**

——— **s. 92, proviso (2).**

See CONTRACT . **I. L. R. 32 Calc. 96**

——— **s. 92, provisos (2), (4)**—*Express Trust—Limitation Act (XV of 1877), s. 10—Effect of Limitation in cases where the person liable for payment of a legacy and the person entitled to receive the legacy are the same. L. K.* was a partner in the firm of *R. L.* As such partner he was entitled to his proportion of certain shares of the Hongkong Mill and of the commission earned by his firm as agents of such mill. On his retirement from the firm in 1900, entries were made in the firm's books from which it appeared that 35 of such shares were appropriated to the said *L. K.* and that he from the date of the entries ceased to have any interest in the firm of *R. L. Held,* that under provisos (2) and (4) of s. 92 of the Evidence Act, evidence was admissible to show that in fact the arrangement was that *L. K.* should continue to be entitled to his share in the commission. NARRONDAS *v.* NARRONDAS (1907) **I. L. R. 31 Bom. 418**

——— **s. 92, proviso 4**—

——— **Subsequent oral agreement**—*To discharge prior registered agreement not receivable, but actual discharge may be proved. A* agreed by registered deed to give *B* for her life an annual amount by way of maintenance, and subsequently it was agreed orally that *B* should enjoy certain lands in lieu of such maintenance and *B* was put in possession. In a suit by *B* to recover arrears of maintenance from *A* : *Held,* that the subsequent oral agreement was

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 92**—*concld.*

an agreement to rescind or modify the original registered agreement and was not receivable in evidence under proviso (4) to s. 92 of the Evidence Act. *Held,* further, that it was open to the defendant to prove that the arrears claimed were actually discharged by the plaintiff taking possession, although the agreement to discharge cannot be proved. KATTIKA BAPANAMMA *v.* KATTIKA KRISTANAMMA (1906) **I. L. R. 30 Mad. 231**

2. ——— *Agreement in writing registered—Oral evidence of discharge—Admissibility.* An usufructuary mortgage deed was executed in favour of *S*, who took possession of the mortgaged land. The deed was registered. *S* died and his adopted son brought the present suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mortgagor. His defence was that the equity of redemption had become vested in himself and another as the heirs of the deceased mortgagor ; that he, as a person thus entitled to a moiety of the estate, had entered into an oral agreement with plaintiff's adoptive mother and guardian for the redemption of his share only, and that in pursuance of that agreement, he had paid her moiety of the mortgage amount, and redeemed the lands in question as falling to his share. *Held,* that he was not precluded by s. 92, proviso (4) of the Evidence Act from proving his oral agreement. GOSETI SUBBAROW *v.* VARIGONDA NARASIMHAM (1904 . . **I. L. R. 27 Mad. 368**

3. ——— *Evidence of oral agreement to rescind or of subsequent conduct inadmissible—Mortgagee, right of usufructuary, to sue for part of mortgaged property.* S. 92 (4) of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract or of subsequent conduct of parties to show that such contract was treated as non-existent. An usufructuary mortgagee may sue for position of only a part of the properties mortgaged. SRINIVASASWAMI AIYANGAR *v.* ATHMARAMA AIGAR (1908) . . . **I. L. R. 32 Mad. 281**

——— **ss. 92, 99**—*Suit for recovery of haq-i-chaharum—Sale alleged to be disguised as a usufructuary mortgage—Admissibility of evidence.* The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. *Held,* that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale. *Rahiman* v. *Elahi Bakhsh, I. L. R. 28 Calc. 70,* dissented from ; *Jagat Mohini Dasi* v. *Rakhal Das Bisazi, 2 C. L. J. 338,* and *Pathammal* v. *Syed Kalai Ravuthar, I. L. R. 27 Mad 329,* followed. BAGESHRI DAYAL *v.* PANCHO (1906) . . **I. L. R. 28 All. 473**

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EVIDENCE ACT (I) OF 1872)—*contd.*

——— **s. 105.**

See PRIVATE DEFENCE, RIGHT OF.
11 C. L. R. 232

1. ——— **Onus of proof**—*Proof of circumstances, bringing offence under exception in Penal Code.* In all criminal cases tried in the mofussil, it is incumbent on the accused, since the passing of the Evidence Act (I of 1872), to prove the existence (if any) of circumstances which bring the offence charged within the general or special exceptions or provisos contained in any part of the Penal Code or in any law defining such offence. *Quære* as to the state of the law in this respect in the Presidency towns. *In the matter of petition of* SHIBO PROSAD PANDAH
I. L. R. 4 Calc. 124 : 3 C. L. R. 122

2. ——— *Penal Code (Act XLV of 1860), s. 525—Grievous hurt—Homicide—Justification—Right of private defence—Onus—Evidence Act (I of 1872), s. 105.* When one man takes away the life of another man, the onus is on him to show circumstances which justify his doing so. If the act was done in the exercise of the right of private defence, it still lies on him to show that he did not exceed that right. ASSIRUDDIN AHMAD *v.* KING EMPEROR (1904) . . . **8 C. W. N. 714**

——— **ss. 105, 132.**

See DEFAMATION . **I. L. R. 29 All. 685**

——— **s. 106.**

See ONUS OF PROOF—BAILMENTS.
I. L. R. 9 All. 398

See ONUS OF PROOF—PRE-EMPTION.
I. L. R. 5 All. 184

See ONUS OF PROOF—PROFITS, SUITS FOR.
I. L. R. 12 All. 301

See ONUS OF PROOF—SALE FOR ARREARS OF RENT . . . **21 W. R. 397**

See PENAL CODE, s. 373.
I. L. R. 22 Calc. 164

——— **ss. 107, 108.**

See HINDU LAW—PRESUMPTION OF DEATH . . **I. L. R. 8 All. 614**
I. L. R. 23 Bom. 296

See PRESUMPTION OF DEATH.
I. L. R. 33 Calc. 173

——— **Missing person**—*Presumption of death.* Ss. 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. DHARUP NATH *v.* GOBIND SARAN. GOBIND SARAN *v.* DHARUP NATH . . . . **I. L. R. 8 All. 614**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 108.**

See DEATH, PRESUMPTION OF.
11 C. W. N. 833

See HINDU LAW—PRESUMPTION OF DEATH . . **I. L. R. 1 All. 53**
I. L. R. 8 All. 614
I. L. R. 23 Bom. 296

See MAHOMEDAN LAW—PRESUMPTION OF DEATH . . **I. L. R. 2 All. 625**
I. L. R. 7 All. 297

1. ——— **Missing person**—*Hindu law—Inheritance—Presumption of death—Claim after seven years—Co-owners—Absent co-owner—Claim to his share of property a question of evidence, not of succession.* *D G* and *B* were co-owners of certain khoti villages. *B* disappeared and was unheard of for more than seven years. In his absence, *D* received his (*B*'s) share of the rents and profits, *G* claimed to be entitled to a moiety of *B*'s share therein, and brought this suit against *D*. *Held*, that *G* was entitled to such moiety. *B*, having been absent and unheard of for more than seven years, might be presumed to be dead under s. 108 of the Evidence Act (I of 1872); and *G*, as one of his two survivors, was entitled to a moiety of his property. Where the right of a party claiming to succeed to the property of another is based on the allegation that the latter has not been heard of for more than seven years, the question to be decided is one of evidence, and not a part of the substantive law of inheritance. *Parmeshar Rai* v. *Bisheshar Singh, I. L. R. 1 All. 53*, concurred in. DHONDO BHIKAJI *v.* GANESH BHIKAJI
I. L. R. 11 Bom. 433

2. ——— *Mahomedan Law—Missing heir—Proof of existence—Arbitrator's award—Burden of proof.* A Mahomedan died on the 27th January 1884, leaving a will which was disputed amongst his heirs. The dispute being ultimately referred to an arbitrator, the latter by his award, dated 21st February 1888, divided the estate amongst the "heirs and legatees" of the testator amongst whom he included his son *A*, who according to the concurrent findings of the Courts in Burma, had not been heard of since 1870. In the present suit the only son of *A* claimed a share in the estate in right of his father under the arbitrator's award. The Courts in Burma dismissed the suit holding that the plaintiff had failed to discharge the burden, which under s. 108 of the Evidence Act lay on him to establish that his father had survived his own father. It was now argued before the Judicial Committee that in arriving at this conclusion the Courts in Burma had failed to give proper effect to the circumstances of the reference to the arbitrator and to the terms of his award. The agreement of reference was not produced and there was nothing to show that *A* was a party to it. Moreover, the arbitrator was not examined as a witness: *Held*, that the proceedings in arbitration were of no value in proving the plaintiff's case, the reserving of a

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 108—*concld.*

share for *A*, by the arbitrator, being explicable on the ground that according to Mahomedan law a share ought to be reserved for a missing heir. MOOLLA CASSIM BIN MOOLLA AHMED *v.* MOOLLA ABDUL RAHIM (1905) . I. L. R. 33 Calc. 173
s.c. 10 C. W. N. 33

——— s. 110.

See BENAMI . . 9 C. W. N. 89

See ONUS OF PROOF—MORTGAGE.
I. L. R. 9 Bom. 137
I. L. R. 1 All. 194

See ONUS OF PROOF—POSSESSION AND PROOF OF TITLE . 6 N. W. 36
I. L. R. 8 Calc. 759
I. L. R. 12 All. 46
I. L. R. 25 Bom. 287

See TITLE—EVIDENCE AND PROOF OF TITLE—GENERALLY . 5 C. L. R. 278

——— s. 111.

See ATTORNEY AND CLIENT.
I. L. R. 36 Calc. 493

See ONUS OF PROOF—DECREES AND DEEDS, SUITS TO ENFORCE AND SET ASIDE . . I. L. R. 12 All. 523

See ONUS OF PROOF—PRINCIPAL AND AGENT . . I. L. R. 25 All. 358

——— *Position of active confidence—Mortgagor and mortgagee—Burden of proof—Proof of consideration for mortgage bond.* On the facts of this case, which was a suit on two mortgage bonds: *Held*, affirming the decision of the High Court, that the plaintiff was not in a "position of active confidence" towards the defendants within the meaning of s. 111 of the Evidence Act (I of 1872), and that the consideration for the bonds was fully proved. THAKUR DAS *v.* JAIRAJ SINGH (1904)
I. L. R. 26 All. 130
s.c. L. R. 31 I. A. 46

——— s. 112.

See EVIDENCE—CIVIL CASES—LEGITIMACY . . I. L. R. 24 All. 445

See ONUS OF PROOF—LEGITIMACY.
I. L. R. 25 All. 403

See WITNESS—CIVIL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES.
I. L. R. 18 Bom. 468

1. ——— **Paternity**—*Child—Presumption as to paternity of child born after death of husband—Non-access, proof of—Burden of proof—Illness of husband rendering act of begetting a child improbable.* To rebut the legal presumption under s. 112 of the Evidence Act (I of 1872), it is for those who dispute the paternity of the child to prove non-access of the husband to his wife during the period when, with respect to the

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 112—*contd.*

date of its birth, it must, in the ordinary course of nature, have been begotten. Where a wife came to her husband's house a few days before he died, and remained there up to the time of his death, and it was shown that a child, alleged to be that of her husband, was the child of the wife, and that it was born within the time necessary to give rise to the presumption under s. 112, the Judicial Committee, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him: *Held* (reversing the decision of the High Court), that the presumption as to the paternity of the child given by s. 112 must prevail. The fact that the husband was, during the period within which the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards, was held, under the circumstances, not sufficient to rebut the presumption. NARENDRA NATH PAHARI *v.* RAM GOBIND PAHARI (1901) I. L. R. 29 Calc. 111
s.c. 6 C. W. N. 146
L. R. 29 I. A. 17

2. ——— **Illegitimate son's right to maintenance**—*Presumption as to paternity applicable only to offspring of married couple—Hindu Law.* In a suit by an illegitimate son of a deceased Chetti against the adopted son and brother of his late father for a share in his father's estate, or, in the alternative, for maintenance: *Held*, that the claim for a share must fail, as it was not shown that the deceased had left any separate or self-acquired property. The family of the deceased (consisting of his father and two sons, of whom one was the deceased) was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not "represent" his father in the undivided family. *Ramalinga Muppan* v. *Pavadai Goundan, I. L. R. 25 Mad. 519*, referred to. The fact that in the present case there was a son in existence, besides the illegitimate son, made no difference, in principle, between this case and the cases already decided. *Held*, also, that plaintiff was entitled to maintenance. An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females, who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. Arrears os maintenance awarded

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 112**—*concld.*

for a period of nine years prior to the suit. The presumption as to paternity in s. 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established. GOPALASAMI CHETTI *v.* ARUNACHELLAM CHETTI (1904) **I. L. R. 27 Mad. 32**

——— **s. 113.**

See CESSION OF BRITISH TERRITORY IN INDIA . . . **10 Bom. 37**
I. L. R. 1 Bom. 367
L. R. 3 I. A. 102

——— **s. 114.**

See ante, s. 40 AND ss. 63, 64 AND 114.

See ante, s. 85 . . **9 C. W. N. 986**

See ACCOMPLICE. **I. L. R. 28 Calc. 339**
I. L. R. 26 Bom. 1
I. L. R. 25 Mad. 143

See ACT XL OF 1858, s. 3.
1 C. W. N. 453

See BENGAL CESS ACT, 1871, s. 52.
I. L. R. 13 Calc. 197

See BOMBAY DISTRICT MUNICIPAL ACT, 1873, s. 11 **I. L. R. 20 Bom. 732**

See CHARGE TO JURY—MISDIRECTION.
I. L. R. 17 Calc. 642

See COMPANY—WINDING UP—GENERAL CASES . . **I. L. R. 9 All. 366**

See DEED—ATTESTATION.
7 C. W. N. 384

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 9. All. 690

See ONUS OF PROOF—DOCUMENTS RELATING TO LOANS, EXECUTION OF, AND CONSIDERATION FOR.
I. L. R. 20 Bom. 367

See ONUS OF PROOF—NOTICE.
I. L. R. 13 Calc. 197

See RIGHT OF WAY.
I. L. R. 15 All. 270

See SALE FOR ARREARS OF REVENUE—SETTING ASIDE SALE—IRREGULARITY.
I. L. R. 30 Calc. 1

——— **Ill. (c).**

See REVENUE SALE LAW, s. 33.
10 C. W. N. 137

See WARRANT OF ARREST—CIVIL CASES.
6 C. W. N. 845

——— **Ill. (g).**

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—ROAD-CESS PAPERS **I. L. R. 30 Calc. 1030**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 114**—*contd.*

1. ——— **Presumption of guilt**—*Possession of stolen property. Held*, that the finding in the possession of a person, six months after the commission of a dacoity, of articles stolen in that dacoity, such articles consisting of jewelry of a very ordinary type and by no means of distinctive appearance, is not sufficient to form the basis of a conviction for participation in the dacoity. *Queen-Empress* v. *Burke, I. L. R. 6 All. 224*, and *Ina Sheikh* v. *Queen-Empress, I. L. R. 11 Calc. 160*, referred to. EMPEROR *v.* SUDHAR SINGH (1906) . **I. L. R. 29 All. 138**

2. ——— **s. 114** (*b*)—**Evidence of accomplice**—*Necessity for corroboration.* The case against an accused, who was tried on a charge of murder, depended entirely upon the evidence of the first witness, who deposed that he had worked for accused prior to and at the date of the murder; that the woman, whom accused was charged with murdering, had also worked for accused, and had become *enceinte* by him; that she had frequently demanded money of accused and at last threatened to disgrace him, if he did not pay her; that on the evening of the murder accused obtained a crow-bar from the witness, and later on went to where the deceased was sleeping, when the witness heard a cry, and, on secretly approaching the spot, saw accused strike the deceased on the head with a crow-bar; that witness then ran away; that accused called him; that he went to the spot, and accused asked him to put the body in an empty pit some distance off; that witness refused to help, whereupon accused dragged the body to the pit and threw it in: that next morning accused threatened to murder the witness, if he mentioned what had happened; that some fifteen days later, after a quarrel with accused, witness ran away and gave information to the brother of the deceased woman and then to the police, who with some villagers were taken by witness to the pit where the body was found and, subsequently, identified. The witness stated that he had not given information earlier because he was afraid. The only evidence adduced in corroboration of any part of this witness's evidence was that the brother and sister of the deceased had heard of the relations between accused and the deceased, that the body was found in the pit, and that death was shown to have been caused at about the time and place stated by the first witness, by fracture of the skull, which might have been caused by a blow from a crow-bar. On its being contended on behalf of the accused, that the first witness was an accomplice, or, if not an accomplice in the strict sense of the term, that he was no better than an accomplice and that his evidence should therefore be corroborated in material particulars, and that in the absence of such corroboration the accused should not be convicted: *Held* (*per* SUBRAHMANIA AYYAR, *Offg. C.J.*, and *per* BHASHYAM AYYANGAR, *J.*, on reference), that the witness was not an accomplice in the crime for which the accused was charged, inas-

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 114**—*concld.*

much as he had not been concerned in the perpetration of the murder itself. Even assuming that, after the murder had been committed, the witness had assisted in removing the body to the pit, and that he could have been charged with concealment of the body under s. 201 of the Penal Code, that was an offence perfectly independent of the murder, and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder, or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to corroboration had no application to the case. *Per* BODDAM, *J.*—Even if the witness was not an accomplice, having regard to the fact that he was cognizant of the crime for fifteen days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence, unless it was corroborated in some material particulars connecting the accused with the crime. The rule of practice as to the necessity for corroboration of the evidence of an accomplice discussed. *Queen* v. *Chando Chandalinee, 24 W. R. Cr. 55 ; Ishan Chandra Chandra* v. *Queen-Empress, I L. R. 21 Calc. 328 ;* and *Alimuddin* v. *Queen-Empress, I. L. R. 23 Calc. 361, 365,* discussed. RAMASWAMI GOUNDEN *v.* EMPEROR (1904). . . **I. L. R. 27 Mad. 271**

——— **s. 114** (*e*).

See CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF . **I. L. R. 32 Calc. 1107**

——— **ss. 114, Ill.** (*g*), **157.**

See CHARGE . **I. L. R. 36 Calc. 281**

——— **s. 115.**

See ARBITRATION—AWARDS—CONSTRUCTION AND EFFECT OF.
I. L. R. 2 All. 809
I. L. R. 6 All. 322 : L. R. 11 I. A. 20

See COMPANY—TRANSFER OF SHARES, AND RIGHTS OF TRANSFEREES.
I. L. R. 26 Mad. 79

See CONTRACT ACT, 1872, s. 11.
I. L. R. 31 All. 21

See EJECTMENT, SUIT FOR.
I. L. R. 29 Calc. 871

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 35 Calc. 904

See ESTOPPEL BY JUDGMENT.
I. L. R. 32 Calc. 357

See FORFEITURE . **9 C. W. N. 553**

See LANDLORD AND TENANT—NATURE OF TENANCY . **I. L. R. 27 Bom. 515**

See LAND-REVENUE.
I. L. R. 25 Bom. 714, 752

See PARTNERSHIP . **10 C. W. N. 313**

See TRANSFER OF PROPERTY ACT.
I. L. R. 33 Bom. 53

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 115**—*contd.*

1. ——— Representative—*Auction-purchaser—Estoppel.* A purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the Evidence Act. LALA PARBHU LAL *v.* MYLNE . . . **I. L. R. 14 Calc. 401**

2. ——— Re-grant after confiscation—*Exception of Maliahs in re-grant—Construction of exception—Title by adverse possession—Estoppel—Maliahs treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government.* Prior to 1799 the zamindari of Parlakimedi included certain tracts of forest land called "Maliahs," which were held by Bissoyees or local Chiefs on service tenures in respect of which they paid to the zamindar a sum as kattubadi or quit-rent ; their duties being (*inter alia*) to keep up an establishment of guards at certain thanas for police purposes. Besides the Maliahs they held other lands which they occupied and cultivated for their own support. In consequence of a rebellion in 1799, in which the then zamindar took part, the Government by a proclamation issued in 1800 declared that the zamindari was confiscated ; and that the Bissoyees "were henceforward to pay their revenue directly to the Collector and to be for ever under the Company's immediate authority"; but that they would in due course restore the son of the zamindar "to the lands of his ancestors with the exception of those now held by the Bissoyees, which are hereby declared separated from the zamindari for ever." This restoration was made in 1803, after the death of the rebellious zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as "the lands held by the Bissoyees," the "possessions of the Bissoyees," and "all lands or *russums* or fees heretofore appropriated to the support of police establishments." In a suit against the Government by the zamindar of Parlakimedi in 1894, claiming proprietary right in, and possession of, the Maliahs as appertaining to the zamindari : *Held*, that the proper construction of the exception was that it included the Maliahs, and not only the lands occupied and cultivated by the Bissoyees ; the Maliah therefore did not pass under the re-grant, but remained the property of Government as they had done since the forfeiture. In 1823 the Government transferred the Bissoyees, who had been placed in 1800 under the Collector, to the zamindar, and directed that they should be required to pay their quit-rents to him : *Held*, that that arrangement conferred no proprietary right in the Maliahs upon the zamindar, who incurred thereby no liability for the quit-rents of the Bissoyees, but had only to account for what he succeeded in collecting. In 1835 certain villages, not within the Maliahs, were granted to the zamindar in consideration of his undertaking liability for the quit-rents of the Bissoyees : *Held*, that such an express grant excluded the inference that the zamindar obtained any proprietary right in the Maliahs. The Courts below

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 115**—*concld.*

had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and the Judicial Committee upheld that decision. From 1861 to 1893, in consequence of the disability or incapacity of successive zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the Maliahs, as if they belonged to the zamindari, worked the forests on the Maliahs and constructed roads through them at the expense of the zamindar; and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the Maliahs as seemed good in the public interest: *Held*, affirming the decision of the High Court, that there was in that conduct no such representation as could give rise to an estoppel, which would prevent the defendant from denying the plaintiff's title. GOURA CHANDRA GAJAPATI NARAYANA DEO *v.* SECRETARY OF STATE FOR INDIA (1905) **I. L. R. 28 Mad. 130**

3. ——— **Adoption**—*Estoppel—Suit by adoptive mother to set aside an adoption made by her.* In a suit to set aside an adoption brought by the adoptive mother against her adopted son, it was found that the plaintiff had represented that she had authority to adopt and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sradh* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. *Held*, that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void. *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer, 1868, N.-W. P. H. C. 103 A*, distinguished. *Sarat Chunder Dey* v. *Gopal Chunder Laha, I. L. R. 20 Calc. 296; Sukhbasi Lal* v. *Guman Singh, I. L. R. 2 All. 366; Durga* v. *Khushalo, All. Weekly Notes (1882) 97; Kannammal* v. *Virasami, I. L. R. 15 Mad. 486; Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmigai, I. L. R. 11 Bom. 381*, and *Santappa* v. *Rangappaya, I. L. R. 18 Mad. 397*, referred to. DHARAM KUNWAR *v.* BALWANT SINGH (1908) **I. L. R. 30 All. 549**

——— **ss. 115, 116, 117.**

See EJECTMENT, SUIT FOR. **I. L. R. 33 Calc. 947**

——— **s. 116.**

See ESTOPPEL—ESTOPPEL BY CONDUCT. **I. L. R. 7 All. 511, 878**
I. L. R. 5 Calc. 669
7 C. W. N. 575

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 116**—*contd.*

See ESTOPPEL—ESTOPPEL BY JUDGMENT. **1 C. L. R. 528**
I. L. R. 24 Bom. 77

See ESTOPPEL—LANDLORD AND TENANT, DENIAL OF TITLE.

See LANDLORD AND TENANT—NATURE OF TENANCY . **I. L. R. 27 Bom. 515**

——— **Estoppel of tenant**—*Where deed executed in the name of the benamidar, the real owner is the landlord within the meaning of the section—Action on deed not maintainable by benamidar.* Where a deed is executed by a tenant in favour of a person *benami* for another, the real owner and not the *benamidar* is the landlord, whose title the tenant is estopped from denying under s. 116 of the Evidence Act. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled. *A benamidar* as such has no right to sue, unless he can show a legal right to sue under the general law. *Kuthaperumal Rajali* v. *Secretary of State for India, I. L. R. 30 Mad. 245*, followed, KUPPU KONAN *v.* THIRUGNANA SAMMANDAM PILLAI (1908) . **I. L. R. 31 Mad. 461**

——— **s. 118.**

See WITNESS—CIVIL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES. **I. L. R. 18 Bom. 468**
11 C. W. N. 51

See WITNESS—CRIMINAL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES. **I. L. R. 11 All. 183**
L. R. 16 Bom. 661
I. L. R. 23 All. 90
11 C. W. N. 51

——— **s. 120.**

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO . **I. L. R. 16 Calc. 781**

See WITNESS—CIVIL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES. **I. L. R. 16 Calc. 781**
I. L. R. 18 All. 107

——— **ss. 123, 124, 162**—*Income-tax Act, II of 1886, s. 38 and rule 15—Statements made before income-tax officer not privileged under s. 123 or 124 of the Evidence Act—And not exempt from disclosure by s. 38 of the Income-tax Act and rule 15 of the rules.* Statements made and documents produced by assessees before income-tax officers for the purpose of showing the income of such assessees, do not refer to matters of State and are not privileged under s. 123 of the Indian Evidence Act. The Collector, when summoned to produce such documents by the Court, is bound to produce them and the Court is empowered under s. 162 of the Evidence Act to inspect them to decide on the validity of any objection to their admissibility in evidence. S. 38 of the Income-tax Act and

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——— s. 123—*concld.*

rule 15 of the rules framed thereunder only forbid public servants to make public or disclose any information contained in such documents. The prohibition, however, does not extend to evidence given in Courts of Justice. Under the Income-tax Act the Collector can compel the production of documents and attendance of witnesses. Documents produced and statements made under process of law cannot be said to be made in 'official confidence' within the meaning of s. 124 of the Evidence Act and they are not privileged under that section. *Lee* v. *Birrell, 3 Camp. 337*, referred to. *Jadobram Dey* v. *Bullcram Dey, I. L. R. 26 Calc. 281*, referred to. *In re Joseph Hargreaves, [1900] 1 Ch. 347*, distinguished. VENKATACHELLA CHETTIAR *v.* SAMPATHU CHETTIAR (1908) **I. L. R. 32 Mad. 62**

——— s. 121.

See WITNESS—CRIMINAL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES. **I. L. R. 3 All. 573**

——— s. 122.

See PRIVILEGED COMMUNICATION. **I. L. R. 22 Mad. 1**

——— s. 124.

See PRIVILEGED COMMUNICATION. **7 C. W. N. 246**

——— ss. 126, 127.

See PRIVILEGED COMMUNICATION. **I. L. R. 3 Bom. 91**
I. L. R. 18 Bom. 263
I. L. R. 25 Calc. 736
I. L. R. 26 Calc. 53
2 C. W. N. 484, 649

——— s. 132.

See DEFAMATION . **I. L. R. 32 Calc. 756**

See PENAL CODE, s. 500. **9 C. W. N. 911**

1. ——— **Answers criminating witness**—*Voluntary statement—Privilege of witness answering criminating question.* In a Small Cause suit under Ch. XXXIX of the Code of Civil Procedure on a promissory note, which was alleged to have been executed jointly by *G* and his son *V*, *V* filed an affidavit in order to obtain leave to defend the suit, and, having obtained leave to defend, gave evidence at the trial on his own behalf. On a subsequent trial of *V* for forgery of his father's signature to the same promissory note, the affidavit and deposition of *V* in the Small Cause suit were admitted as evidence against *V*. *Held*, by TURNER, *C.J.*, INNES and KINDERSLEY, *JJ.*, that both the affidavit and the deposition were properly admitted. By KERNAN and MUTTUSAMI AYYAR, *JJ.*, that the affidavit was properly admitted, but not the deposition. *Per* TURNER, *C.J.*, INNES and KINDERSLEY, *JJ.*—Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the

EVIDENCE ACT (I of 1872)—*contd.*

——— s. 132—*contd.*

statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge. If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled. QUEEN *v.* GOPAL DASS . **I. L. R. 3 Mad. 271**

2. ——— *Protection given to answers which a witness is compelled to give—"Compelled to give," Meaning of the words—Indian Oaths Act (X of 1873), s. 14.* S. 132 of the Evidence Act (I of 1872) makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give. *Queen* v. *Gopal Dass, I. L. R. 3 Mad. 721*, followed. *Per* BIRDWOOD, *J.* (dissenting)—S. 132 of the Evidence Act, (I of 1872), read with s. 14 of the Indian Oaths Act (X of 1873), compels a witness to answer criminating questions, and he is protected by the proviso to s. 132 from a criminal prosecution from any offence of which he criminates himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from answering a criminating question and his request is refused that he is "compelled to give" the answer within the meaning of the proviso. The compulsion is operative, whether he asks to be excused or gives the answer without so asking. QUEEN-EMPRESS *v.* GANU SONBA . . . **I. L. R. 12 Bom. 440**

3. ——— *"Compelled"—Compelling witness to answer questions.* The word "compelled" in the proviso to s. 132 of the Evidence Act (I of 1872) applies only where the Court has compelled a witness to answer a question, and not to a case where the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused. QUEEN-EMPRESS *v.* MOSS . **I. L. R. 16 All. 88**

4. ——— ss. 132, 129, 130, 131—*Compelling witness to answer questions.* The mere subpœnaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132, and 148, Evidence Act, compared and discussed. MOHER SHEIKH *v.* QUEEN EMPRESS . . **I. L. R. 21 Calc. 392**

5. ——— **Document put in without objection.** If a document is inadmissible in

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EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 132—*concld.*

evidence, objection can be taken to its admissibility at any stage of the case, even if it has been duly proved. But an objection as to the mode of proof of a document is one which should be taken at the time when the document is attempted to be put in. *Kanto Prasad Hazari* v. *Jagat Chandra Dutta, I. L. R. 23 Calc. 335,* distinguished. MADHABI SUNDARI DASYA *v.* GAGANENDRA NATH TAGORE (1905) . . **9 C. W. N. 111**

——— s. 133.

See ACCOMPLICE . **I. L. R. 28 Calc. 339**
I. L. R. 26 Bom. 193
I. L. R. 25 Mad. 143

——— s. 137.

See CHARGE TO JURY—MISDIRECTION. **I. L. R. 17 Calc. 642**

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—CROSS-EXAMINATION . **I. L. R. 21 Calc. 401**

——— s. 138.

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—EXAMINATION BY COURT . **I. L. R. 6 Calc. 279**

——— ss. 145, 161.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 162, 172. **I. L. R. 33 Calc. 1023**

——— s. 154.

See WITNESS—CIVIL CASES—EXAMINATION OF WITNESSES—CROSS-EXAMINATION . . **6 C. W. N. 513**

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—CROSS-EXAMINATION . . **I. L. R. 13 Calc. 53**
I. L. R. 28. Calc. 594

——— ss. 154, 155, cl. (3), 157.

See ADVOCATE . **I. L. R. 34 Calc. 129**

——— s. 155.

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—CROSS-EXAMINATION . . . **11 Bom. 166**

1. ——— cl. (3)—**Evidence impeaching the credit of witness.** In a suit by one *K* claiming (*inter aliâ*) a share in a business as heiress of *A*, her father, the defendant pleading limitation, *K*, before the close of her case, put in evidence an entry in a Koran to shew that she was born in 1279, and in the cross-examination of *M*, a witness for the defence, put to him a letter purporting to have been written by *A* to *M*, supporting *K*'s case. Upon *M* denying the genuineness of the Koran and of certain words in the letter, it was proposed on behalf of *K* to give evidence in reply shewing that *M* had made statements to an attorney before the case inconsistent with his evidence, both as to the Koran and the letter. *Held,* that evidence might be given in reply as regards the Koran, but not as regards the letter; no substantive evidence having been given as to the latter before the close of the plaintiff's case. *Semble:* The expression "which is liable to be contradicted" in s. 155 (3) of the Evidence Act is equivalent to "which is relevant to the issue." KHADIJAH KHANUM *v.* ABDOOL KURREEM SHERAJI . . . **I. L. R. 17 Calc. 344**

2. ——— *Statements previously made by witnesses—Inadmissibility as substantive evidence.* Two persons made statements to the effect that *C* and another robbed them and caused hurt while doing so. One statement was made to their employer, and the other to the head constable. *C* was subsequently charged, and these two persons were called as witnesses for the prosecution, but they then denied that *C* was one of the men who had assaulted them. Their previous statements were filed, but neither the employer nor the head constable was called to depose to the terms of the statements which the witnesses were said to have made. *Held,* that the former statements referred to and which implicated the accused, could be used only under s. 155 (3) of the Evidence Act, for discrediting their evidence, and not as substantive evidence against the accused. EMPEROR *v.* CHERATH CHOYI KUTTI (1902) **I. L. R. 26 Mad. 191**

3. ——— *First information—Criminal Procedure Code (Act V of 1898), s. 154—Informant reproducing statements made by another—Admissibility—Evidence to contradict witness.* Where certain statements relating to the commission of an offence were made by one person *J* to another, *H*, and the latter took the information so obtained to an officer in charge of a police station and it was recorded. *Held,* that the statements recorded being a reproduction by the informant of the statements made to him by another person, were inadmissible as a first information. Also that, though the evidence given in the case by *J* could be contradicted by the evidence of the informant *H* proving the statements made by *J* to *H*, it could not under s. 155, sub-s. 3 of the Evidence Act be contradicted by what the Police Sub-Inspector recorded as the first information of *H*. EMPRESS *v.* DINA BANDHU MOITRA (1904) **8 C. W. N. 218**

——— s. 159—**Bonds destroyed by fire**—*Refreshing memory of witness.* The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were re-instituted, and duplicate copies of the plaints were filed. The only evidence of the contents of the bonds, from which the plaints were prepared, consisted of a register kept by the plaintiff's gomastas of the names of the executants of the bonds, the matter in respect of which the bonds had been given, the

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EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 159**—*concld.*

amounts due thereunder, and the names of the attesting witnesses. From this register the duplicate plaints had been prepared. *Held*, that, though the register was not secondary evidence of the contents of the bonds, yet it was a document which might be referred to by a witness for the purpose of refreshing his memory, under s. 159 of the Evidence Act. TARUCK NATH MULLICK *v.* JEAMAT NOSYA . . . . **I. L. R. 5 Calc. 353**

——— **ss. 159 and 160.**

See PENAL CODE, s. 124-A. **I. L. R. 32 Mad. 384**

——— **s. 165.**

See PENAL CODE, s. 179. **I. L. R. 10 Bom. 185**

See WITNESS—CRIMINAL CASES—EXAMINATION OF WITNESSES—CROSS-EXAMINATION . **I. L. R. 5 Calc. 614**
I. L. R. 24 Calc. 288

——— **s. 167.**

See CONFESSION—CONFESSIONS TO POLICE OFFICERS . **I. L. R. 1 Calc. 207**
I. L. R. 2 Bom. 61

See CRIMINAL PROCEEDINGS.
I. L. R. 8 Calc. 739
I. L. R. 9 All. 609

See WITNESS—CIVIL CASES—EXAMINATION OF WITNESSES—GENERALLY.
6 Moo. I. A. 232

1. ——— **Civil and criminal cases.** S. 167 of the Evidence Act applies as well to criminal as to civil cases. QUEEN *v.* HURRIBOLE CHUNDER GHOSE
I. L. R. 1 Calc. 207 : 25 W. R. Cr. 36

2. ——— It applies to criminal trials by jury in the High Court. REG. *v.* NAORAJI DADABHAI . . **9 Bom. 358**

3. ——— **Cases under cl. 26 of the Letters Patent, High Court.** The provisions of s. 167 of the Evidence Act apply to cases heard by the High Court when exercising its powers under cl. 26 of the Letters Patent. QUEEN-EMPRESS *v.* MCGUIRE . . . . **4 C. W. N. 433**

4. ——— **Evidence improperly admitted**—*Document improperly admitted in evidence.* Where a copy of a deposition is improperly admitted, such admission is not ground of itself for a new trial, if, independently of the evidence so admitted, there is sufficient evidence to justify the decision. WOOMA KANT BUKSHEE *v.* GUNGA NARAIN CHOWDHRY . **20 W. R. 385**

5. ——— *Evidence improperly admitted—Power of High Court on appeal—Power to deal with verdict of jury—New trial.* The provisions of s. 167 of the Evidence Act (I of 1872) apply to criminal trials by jury. When part of the evidence which has been allowed to go to the jury

EVIDENCE ACT (I OF 1872)—*concld.*

——— **s. 167**—*concld.*

is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under s 167 of the Indian Evidence Act (I of 1872) or to quash the verdict and order a re-trial. The law as settled in England by the *Queen* v. *Gibson, L. R. 18 Q. B. D. 537*, and as stated by the Privy Council in *Makin* v. *Attorney-General of New South Wales, [1894] A. C. 57*, with reference to the granting of new trials where evidence has been improperly admitted, does not apply to India. *Wafadar Khan* v. *Queen-Empress, I. L. R. 21 Calc. 955*, not followed. QUEEN-EMPRESS *v.* RAMCHANDRA GOVIND HARSHE **I. L. R. 19 Bom. 749**

EXAMINATION DE BENE ESSE.

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5 B. L. R. 252
8 B. L. R. Ap. 101

EXAMINATION FOR PLEADERSHIP OR MOOKHTEARSHIP.

See BOARD OF EXAMINERS.
I. L. R. 28 Calc. 479
I. L. R. 9 All. 611

EXAMINATION OF ACCUSED PERSON.

See CONFESSION—CONFESSIONS TO MAGISTRATE . **I. L. R. 9 Mad. 224**
I. L. R. 17 Calc. 862
I. L. R. 18 Calc. 549
I. L. R. 21 Calc. 642
I. L. R. 21 Bom. 495
2 C. W. N. 702

See CRIMINAL PROCEDURE CODE, s. 342.
I. L. R. 10 Calc. 140
I. L. R. 13 All. 345
I. L. R. 14 All. 242
I. L. R. 16 Bom. 661

See EVIDENCE—CRIMINAL CASES—PREVIOUS CONVICTIONS.
I. L. R. 28 Calc. 689

See EVIDENCE—CRIMINAL CASES—EXAMINATION AND STATEMENTS OF ACCUSED.

See TRANSFER OF CRIMINAL CASE—GROUND FOR TRANSFER
5 C. W. N. 864

1. ——— **Discretion of Magistrate in examining accused**—*Evidence insufficient to found charge.* It is a matter of discretion for the Magistrate whether, during the enquiry before him, it is right and proper that the accused should be examined or not. But it is undesirable that the accused should be examined by the Magistrate when he is satisfied that the evidence adduced by the prosecution does not disclose any proper subject of criminal charge against him. *In the matter of* SHAMA SANKAR BISWAS
1 B. L. R. S. N. 16

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EXAMINATION OF ACCUSED PERSON—*contd.*

2. ——— *Criminal Procedure Code, 1861, s. 202.* The discretion of a Magistrate under s. 202, Code of Criminal Procedure, to ask questions of an accused is entirely unfettered, though an examination under that section should not be of an inquisitorial nature, and a Magistrate should inform the accused that he is not bound to answer. Answers to questions under that section are admissible in evidence, even if the Magistrate has omitted to warn the accused he need not answer. QUEEN *v.* DINOO ROY **16 W. R. Cr. 21**

3. ——— *Criminal Procedure Code, 1898, s. 209—Examination of accused before committal—Discretion of Magistrate.* It is the duty of a Magistrate, before committing accused persons for trial, to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of s. 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate, who intends to commit, to examine the accused. He is bound to examine them and if he makes an order of commitment without such examination, the order is irregular. QUEEN-EMPRESS *v.* PANDARA TEVAN . **I. L. R. 23 Mad. 636**

4. ——— **Refusal to hear statement or examine accused**—*Power of Court.* It is not competent to the Court in a criminal trial to refuse to allow the accused to make a statement or an offer to be examined. *In the matter of* ABDOOL GUFFOOR . . . **10 C. L. R. 54**

5. ——— **Committal without examining accused**—*Power of Court.* It is not illegal for a Magistrate to commit an accused person to the Sessions without examining him or his witnesses. QUEEN *v.* HURNATH ROY . **2 W. R. Cr. 50**

6. ——— **Tender of written defence**—*Oral examination—Criminal Procedure Code, 1861, Ch. XV.* When a written defence is tendered in a case tried under Ch. XV of the Code of Criminal Procedure, the Magistrate is not bound to take down the defence of the accused by personally examining him. DILA MONDUL *v.* KALLY SAHEE **16 W. R. Cr 63**

7. ——— **Obligation of accused to give account of his movements at alleged time of offence.** An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *primâ facie* to convict him of the offence. QUEEN-EMPRESS *v.* BEPIN BISWAS . . **I. L. R. 10 Calc. 970**

8. ——— **Object of examination of prisoner.** The discretionary power given by law to examine a prisoner should be used to ascertain from him how he may explain facts in evidence appearing against him, not to drive him to make self-criminating statements. *Ex parte* VIRABUDDRA GAUD . . **1 Mad. 199**

EXAMINATION OF ACCUSED PERSON—*contd.*

9. ——— *Examination of the accused under s. 342, Criminal Procedure Code—Impropriety of cross-examining him as a hostile witness and of eliciting matters or information not related to the charge.* S. 342, Criminal Procedure Code, permits an examination to be made solely for the purpose of enabling the accused to explain facts appearing against him. It is objectionable to direct examination towards obtaining from the accused some explanation in regard to matter which he had previously mentioned in his confession and has already repudiated as untrue, or to endeavour to elicit information in regard to statements made by a witness. KING-EMPEROR *v.* BHUT NATH GHOSE (1902) . . . **7 C. W. N. 345**

10. ——— *Examination at preliminary investigation of murder—Criminal Procedure Code, ss. 164, 364.* It is improper to attempt to make an accused person, before any evidence is required, confess his guilt and admit facts that may go to incriminate him. *In re Chinibash Ghose, 1 C. L. R. 436,* and *Ex parte Virabuddra, 1 Mad. 199,* followed. If these statements are confessions, they are clearly inadmissible under s. 164, as the appended certificate does not show they were voluntarily made or that the Magistrate enquired whether they were so made; while the nature of the questions put indicates that they were not so made. And if they are statements other than confessions under s. 364, they are equally inadmissible as having been made before the case reached the stage at which the examination of the accused is authorized. QUEEN-EMPRESS *v.* BHAIRAB CHUNDER CHUCKERBUTTY . . **2 C. W. N. 702**

11. ——— **Examination by Sessions Judge**—*Criminal Procedure Code, 1872, s. 250.* Under s. 250 of the Code of Criminal Procedure, the Court may from time to time, at any stage of the case, examine the accused personally; but the Court is not competent to subject the accused to severe cross-examination. The discretion given by the law is not to be used for the purpose of driving the accused to make statements criminating himself, but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that these facts should not stand against him unexplained. *Ex parte Virabaddra Gaud, 1 Mad. 199,* followed. *In the matter of* CHINIBASH GHOSE . . **1 C. L. R. 436**

12. ——— **Cross-examination by Court**—*Criminal Procedure Code, 1872, s. 250.* The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can the Judge endeavour, by a series of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the

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EXAMINATION OF ACCUSED PERSON—*concld.*

case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence as, in the opinion of the Court, implicate the accused in the commission of the offence with which he stands charged. HOSSEIN BUKSH *v.* EMPRESS
I. L. R. 6 Calc. 96 : 6 C. L. R. 521

13. ———— *Cross-examination by Court—Criminal Procedure Code, 1872, s. 250.* It is improper for the Court to cross-examine a prisoner with the apparent object of convicting him out of his own mouth of false statements and so making him prejudice himself in respect of the matter with which he is charged. EMPRESS *v.* BEHARI LAL BOSE
6 C. L. R. 431

14. ———— **Mode of recording examination**—*Certificate of Magistrate—Criminal Procedure Code, 1872, s 346.* In recording the examinations of accused persons under s. 346 of the Code of Criminal Procedure in the language in which they are given, a Magistrate need not take down the examination in his own hand; it is enough that he append a certificate that the examination was conducted in his presence and contains accurately all that was stated by the accused person. QUEEN *v.* LUCKY NARAIN DUTT . **20 W. R. Cr. 50**

15. ———— *Act XXV of 1861, s. 205—Act X of 1872, s. 346—Attestation of Magistrate.* Under s. 205 of the Criminal Procedure Code, it is not necessary for the Magistrate to state in the body of the examination that the statement comprised every question put to the accused and every answer given by him, and that he had had liberty to add to or explain his answers. Attestation at the foot of the examination is sufficient; but in case of doubt, oral evidence should be admitted to prove the regularity of the proceedings. QUEEN *v.* GOSHTO LAL DUTT
7 B. L. R. Ap. 62, 15 W. R. Cr. 68

16. ———— *Certificate under Criminal Procedure Code, 1861, s. 205—Attestation of Magistrate.* The certificate required under s. 205, Code of Criminal Procedure, need not be in the handwriting of the presiding officer, but may be under his hand only, *i.e.*, signed by him. QUEEN *v.* REZZA HOSSEIN . **8 W. R. Cr. 55**

See QUEEN *v.* NIRUNI **7 W. R. Cr. 49**

QUEEN *v.* BHEEBEEKEE . **4 N. W. 16**

17. ———— *Attestation of Magistrate—Proof of signature.* Where a jury is satisfied as to the genuineness of an attestation by a Magistrate, it is unnecessary to call the Magistrate to swear to his signature. QUEEN *v.* REZZA HOSSEIN . . . . **8 W. R. Cr. 55**

EXCHANGE.

See CUSTOM . **I. L. R. 11 Mad. 459**

See PRE-EMPTION . **I. L. R. 31 All. 539**

EXCHANGE—*concld.*

See TRANSFER OF PROPERTY ACT, s. 118.
5 C. W. N. 724
6 C. W. N. 905

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See COURT FEES ACT (VII OF 1870), s. 34.
I. L. R. 30 Calc. 921

———— **rate of—**

See EXECUTION OF DECREE—ORDERS AND DECREES OF PRIVY COUNCIL.
I. L. R. 23 Calc. 357
I. L. R. 25 Calc. 283
2 C. W. N. 89

———— *Transfer of Property Act (IV of 1882), s. 118—Aposhnama setting off one decree against another—Registration—Admissibility in evidence—Registration Act (III of 1877), ss. 17, 49.* The plaintiff and the defendant having obtained decrees against each other settled their difference by an *aposhnama* by which the former gave up certain *jotes* to the latter, the decrees obtained by the plaintiff were set off against the decrees obtained by the defendant, and the parties gave up their claims under their respective decrees: *Held*, that the transaction embodied in the *aposhnama* did not amount to an exchange within the meaning of s. 118 of the Transfer of Property Act, the essence of such a transaction, *viz.*, the mutual transfer of two things being wanting in this case. It was therefore not necessary to register the document. That s. 49 of the Registration Act was no bar to the document which was unregistered being used as evidence to prove that the decrees had been satisfied, notwithstanding that it also purported to convey immoveable property. DINA NATH DAS. *v.* MATIMALA DASSYA (1906) . **11 C. W. N. 342**

EXCISE ACT, 1856.

See ACT XXI OF 1856.

See BENGAL EXCISE ACT, 1878.

EXCISE ACT (X OF 1871).

———— **ss. 19, 63**—*Illicit possession of liquor—Guilty knowledge—Presumption—Act XI of 1870, s. 2—"Ser."* *Held*, in a prosecution under ss. 19 and 63 of Act X of 1871, that the definition of "ser" given in s. 2 of Act XI of 1870 was not so intelligible and clear as to be capable of general application, and that it did not supersede the local customary weight of a ser. *Held*, therefore, the local customary weight of a ser being 95 tolahs (the Government ser weighing 80 tolahs), and the accused having been found in possession of 96 tolahs only, that the excess of one tolah over the local weight was not such as to warrant the presumption of the guilt of the accused. EMPRESS *v.* HAIT RAM. EMPRESS *v.* CHEDA KHAN
I. L. R. 3 All. 404

1. ———— **ss. 32, 62—License**—*Illicit sale of liquor—Conviction, validity of.* On the 30th Oc-

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EXCISE ACT (X OF 1871)—*concld.*

——— **ss. 32, 62**—*concld.*

tober 1877, *N* was granted a license for the sale of spirituous and fermented liquors by retail, terminating on the 31st December 1877. On the 11th January 1878, such license was renewed by the Collector for a period terminating on the 31st March 1878. On the 14th January 1878, *N*'s servant was convicted, under s. 62 of Act X of 1871, of the illicit sale of liquors between the 1st January 1878 and 10th January 1878, both days inclusive. *Held*, that the renewal of *N*'s license was a condonation of the offence, and the conviction was bad. *Semble*: That inasmuch as *N* had given no notice of his intention not to renew the license, nor had the Collector recalled it, the license remained in force, and the conviction was consequently bad under s. 32 of Act X of 1871. EMPRESS *v.* SEYMOUR **I. L. R. 1 All. 630**

2. ——— *Illicit sale of liquor—License.* *A* held a license for the sale of spirituous and fermented liquors by retail for a period of three months terminating on the 31st December 1877. Prior to the 8th January 1878, no notice was given by *A* of her intention not to renew the license, nor had the license been recalled by the Collector. Between the 1st January 1878 and the 8th January 1878, both days inclusive, *A*'s servants sold spirituous and fermented liquors by retail. On these facts *A*'s servants were convicted, under s. 62 of Act X of 1871, of the illicit sale of liquor. *Held*, following the opinion expressed in *Empress* v. *Seymour, I. L. R. 1 All. 630*, that the convictions were bad, as *A*'s license, under the provisions of s. 32 of that Act, remained in force until she gave notice of her intention not to renew it or it was recalled by the Collector. The principle of the decision in *Empress* v. *Seymour* dissented from. *A* should have been prosecuted under s. 57 of the Excise Act for not paying her monthly fee in advance. EMPRESS *v.* MAHINDRA LAL **I. L. R. 1 All. 638**

——— **s. 62**—*Ch. VI—Illicit sale of liquor—License.* *D* was the holder of a license for the sale of spirituous and fermented liquors by retail for a period terminating on the 31st December 1877. On the 10th January 1878, his license not having been renewed by the Collector, *D* sold certain spirits by retail. On these facts he was convicted of the illicit sale of liquor. Subsequently to his conviction his license was renewed. *Held*, that under such circumstances his conviction was good. *Empress* v. *Seymour, I. L. R. 1 All. 630*, distinguished. EMPRESS *v.* DHARAM DAS . **I. L. R. 1 All. 635**

EXCISE ACT (XXII OF 1881).

——— **s. 42.**

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY. **I. L. R. 10 All. 577**

EXCISE ACT (XII OF 1896).

See EXCISE ACTS, 1871 AND 1881.

EXCISE ACT (XII OF 1896)—*concld.*

——— **s. 21**—*Sale not for profit.* *P.*, who held no license under the Excise Act, obtained some methylated spirits from a shop for the secretary of the Jhansi Club, sent it from there to the club, but made no profit on the transaction: *Held*, that the transaction did not amount to a sale within the meaning of s. 21 of the Excise Act (XII of 1896). EMPEROR *v.* PANNA LALL (1909) **I. L. R. 31 All. 293**

——— **ss. 44 (2), 48 and 57**—*Definition—Excise officer—Jurisdiction.* *Held*, that a head constable is an Excise Officer within the meaning of s. 57 of the Excise Act, 1896. *Queen-Empress* v. *Makunda, I. L. R. 20 All. 70*, followed. EMPEROR *v.* LACHMI NARAIN (1908) . **I. L. R. 30 All. 377**

——— **s. 47 and ss. 27, 28, 29, and 32**—*Excise Act (XII of 1896), ss. 36, 37, 38, 41, 57—"Excise Officer."* *Held*, that an officer invested with power under ss. 27, 28, and 29 of Act No. XXII of 1881, who had power in certain events to take the case before a Magistrate under s. 32, was an "excise officer" within the meaning of s. 47 of the Act. *Queen-Empress* v. *Ram Charan, All. Weekly Notes (1896) 105*, overruled. QUEEN-EMPRESS *v.* MAKUNDA . **I. L. R. 20 All. 70**

——— **s. 49**—*License to sell spirits retail—Death of licensee before expiration of period of license—Right of his heir and partner in business to continue sale—Personal nature of license.* *Held*, that a license for the retail sale of liquor under the Excise Act (XII of 1896), granted in the name of one man, does not, on his death before the expiration of the period of the license, descend to his heir and partner in business so as to justify the said heir and partner in business in continuing to sell during the unexpired portion of the period named in the license. Where an order had been made for the sale of the liquor, part of which was, as above ruled, illegally sold by the accused: *Held*, that, if the said liquor had by devolution or otherwise become the property of the accused, there was no reason why it should not be attached and sold. *In the matter of* MADHO PERSHAD . . . **I. L. R. 22 All. 144**

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See BENGAL EXCISE ACT.

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See EXCISE ACTS.

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I. L. R. 8 Mad. 140

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EXECUTION.

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EXECUTION OF DECREE—*contd.*

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1. EFFECT OF CHANGE OF LAW PENDING EXECUTION.

1. ——— Execution proceedings in suit commenced before Act VIII of 1859— *Act VII of 1855.* Proceedings in execution of a decree in a suit begun under the old procedure were regulated by Act VII of 1855. *In re* SUMBHOOCHUNDER HALDER . . **Bourke O. C. 59**

2. ——— Alteration in procedure— *Retrospective effect of Act—Construction of statutes.* Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings. HAJRAT AKRAMNISSA BEGAM *v.* VALIULNISSA BEGAM . . . **I. L. R. 18 Bom. 429**

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3. ——— Effect of repeal of Act VIII of 1859—*Imprisonment for debt—Civil Procedure Code, 1877, ss. 3 and 342—General Clauses Consolidation Act (I of 1868), s. 6—Procedure. Held* by a majority of the Full Bench (SARGENT and BAYLEY, *JJ.*, dissenting) that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII of 1859, was not entitled, under Act X of 1877, to be released on the coming into operation of the latter Act, if he had then been imprisoned for more than six months, but less than two years. *Per* WESTROPP, *C.J.*—The judgment-creditor had, under Act VIII of 1859, the right (subject to be divested only under the circumstances stated) to have such judgment-debtor as the above detained in custody for two years, unless he in the meantime fully satisfied the decree. Ch. XIX of Act X of 1877, sub-division I, is essentially prospective throughout. S. 342 must therefore be construed as relating only to future imprisonment, consequent on arrests to be made under Act X of 1877. There is not in Ch. XIX of that Act any trace of an intention on the part of the Legislature to deal with imprisonment commenced before the coming into force of the Act. Notwithstanding the repeal of Act VIII of 1859 by Act X of 1877, Act I of 1868, s. 6, saves the committal under Act VIII of 1859, while that Act was in force, of a judgment-debtor, and also his consequent detention, commenced before the coming into force of Act X of 1877, if such detention is to be regarded as "procedure." The effect of Act I of 1868, s. 6, and Act X of 1877, s. 3, taken in combination, is to remove from the scope of the latter Act all proceedings after decree initiated before its coming into force, and then still pending, and to leave within its range all proceedings after decree initiated after its coming into force, though the suits and decrees, in and under which such last-mentioned proceedings may be taken, were commenced and made before Act X of 1877, came into force. Therefore, assuming the rule as

EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

to the retro-active force of enactments relating to procedure laid down in *Wright* v. *Hale, 6 H. & N. 227,* to apply, still s. 342 of Act X of 1877 is not retrospective. But the question raised by the present application being one, not merely of procedure, but of the divestment of the existing right of the judgment-creditor, the presumption is (in the absence of express legislation or direct implication to the contrary) against giving retro-active force to s. 342 of Act X of 1877. The cases relating to questions of mere procedure, whereby a retro-active force has been given to enactments, reviewed, and distinguished from those by which no such force was given, by reason of their raising questions which affected vested rights. *Per* SARGENT, *J.*—Ss. 1 and 3 of Act X of 1877, taken in connection with Act I of 1868, s. 6, show that, whilst saving all acts already done in execution of a decree in a suit instituted before Act X of 1877 came into force, all matters of procedure in execution subsequent to that date should be determined by the Act itself. The question raised by the present application is one of procedure, for the conditions and period under and for which the writ of imprisonment remains in force are as much matters relating to procedure as the issuing of the writ. Neither the wording of s. 342 or the heading to Ch. XIX of Act X of 1877 necessarily confine the "imprisonment" therein referred to to imprisonment commenced since that Act came into force. Though the judgment-creditor, by the arrest and imprisonment of his debtor, acquires a right different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, yet the rule that an Act is not to be construed retrospectively so as to defeat an existing right, is only a rule of construction, and must yield to the intention of the Legislature. It is difficult to suppose that the Legislature, when introducing a benign change into the law of debtor and creditor, in harmony with modern legislation, could have intended that two laws should continue for the next two years to operate concurrently, and that debtors imprisoned on the day before the latter Act came into force should be liable to be detained under the severer enactment. *Per* BAYLEY, *J.*—Cases on the construction of statutes relating to procedure reviewed. History of imprisonment for debt before recent legislation in England and before the abolition of the Supreme Court in Bombay. The change effected by Act VIII of 1859 in the relative positions of debtor and creditor pointed out. *Coombe* v. *Caw, 13 B. L. R. 268,* is inconsistent with the inviolable right claimed by the judgment-creditor to detain the judgment-debtor for two years. The sections of Act VIII of 1859, relating to imprisonment for debt and its duration, are concerned with procedure alone. The definitions of "decree" and "judgment-debtor" in Act X of 1877 are wide enough to include decrees passed, and judgment-debtors who have become such, before the coming into force of the Act. Ss.

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EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

341 and 342 of Act X of 1877 are applicable to proceedings pending when the Act came into force. The Legislature intended that the improvements introduced by the new Code should apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable. S. 3 of Act X of 1877 implies that the procedure after decree shall be according to the provisions of that Act. *In re Sumbhoochunder Haldar, 1 Bourke 69,* and *Williams* v. *Smith, 4 H. & N. 559,* distinguished. S. 6 of Act I of 1868 does not apply in the present case. When of two possible constructions one is in strict harmony with the improvements introduced by the Act, and with the spirit of modern legislation, while the other treats the point under consideration as not having been considered by the Legislature at all, the former is to be preferred. *Per* GREEN, *J.*—Apart from s. 1 and the proviso to s. 3, there is not in Act X of 1877 any provision as to its operation with regard to pending or past proceedings. S. 1 does not alter or abridge the legal effect, after 1st October 1877, of proceedings had and completed before that date; and in construing s. 3 regard must be had to Act I of 1868, s. 6, though the general rule of construction contained in the last-mentioned section must yield to the intention of the Legislature expressed in any subsequent Act. The proviso to s. 3, coupled with s. 1 of Act X of 1877, shows that the intention of the Legislature was that the repeal of the old Procedure Act was to affect, to some extent, the procedure, other than that prior to decree, in suits instituted before Act X of 1877 came into force. Ample effect would be given to this intention, while regard would still be had to s. 6 of Act I of 1868 by holding that in all steps and proceedings, not prior to decree, had and taken after the 1st October 1877, in suits instituted before 1st October 1877, the provisions of the new Code are to be operative. Cases giving a retro-active force to enactments relating only to procedure reviewed and distinguished. The right of an execution-creditor to detain his debtor till satisfaction of the decree for a period not exceeding two years, under a warrant issued before 1st October 1877 by virtue of Act VIII of 1859, is in nowise affected by the new Code coming into operation. *Per* WEST, *J.*—Cases on the retroactivity of enactments reviewed. Act VIII of 1859 must have clothed the Court's orders with an abiding validity, and the judgment creditors with an abiding right, or else with none at all. The ministerial officer is to act on the order of the Court according to its original purport. The order, in the absence of an express provision to the contrary, retains its validity until it is withdrawn or varied. The new procedure, therefore, does not apply, whether as touching person or property, except perhaps in matters of mere administration or provisional arrangement. It cannot, at any rate, apply so as to deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. Any change in the relations of the parties can be made only in accordance with the later and existing law, but their previously subsisting relations continue to subsist as before. It is unlikely that the Legislature intended s. 342 of Act X of 1877 to apply to cases of imprisonment other than those arising under that Act. S. 342 is simply a negative provision, and the affirmative provisions, with which it is to be read, are to be found in the same chapter of the Act, and these can only be applied to cases arising after the Act has come into force. The close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The imprisonment under Act VIII of 1859, as a "proceeding commenced" comes within the scope of s. 6 of Act I of 1868. Act VIII of 1859, therefore, and not Act X of 1877, governs the enforcement of the judgment-creditor's decree throughout the proceedings consequent on his application for the detor's imprisonment under the former Act. If the present application for discharge be a proceeding commenced since the new Act came into force, it is not integral with the previous proceedings in execution. If, on the other hand, it is integral with them, it is part of a proceeding commenced before the new Act came into force. In neither case can it bring within the new Act orders deriving their validity from another law. *In the matter of the petition of* RATANSI KALIANJI . **I. L. R. 2 Bom. 148**

4. ——————— *Change of the law pending execution—Civil Procedure Code, Act VIII of 1859 and Act X of 1877—Order setting aside sale in execution of decree for irregularity—Appeal.* Proceedings to execute a decree commenced when the former Code of Civil Procedure (Act VIII of 1859) was in force; but property belonging to the judgment-debtor was sold in pursuance of those proceedings on the 14th of November 1877 after the new Code (Act X of 1877) came into operation. Subsequently, at the instance of the applicant, the Court made an order setting aside the sale on the ground of irregularity. *Held,* that this order was governed by the former Code, and was consequently not subject to appeal. CHINTO JOSHI *v.* KRISHNAJI NARAYAN **I. L. R. 3 Bom. 214**

5. ——————— *Civil Procedure Code, 1877, s. 295—Change of the law pending execution of decree—Prior and subsequent attaching creditors—General Clauses Act (I of 1868), s. 6.* A judgment-creditor, in execution of his decree, attached certain property belonging to his judgment-debtor while Act VIII of 1859 was in force. This property was ultimately sold on the 9th of January

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EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

1879, that is, after the new Code of Civil Procedure (Act X of 1877) came into operation. Two days before the sale another judgment-creditor applied to have his decree satisfied out of the same property by a rateable distribution of the proceeds which might be realized. *Held*, that the prior attaching creditor, by his attachment under the Code of 1859, acquired, under s. 270 of that Code, a right to have his decree first satisfied in full, and that he was not deprived of this right by the change in the law introduced by s. 295 of the new Code of 1877. NARANDAS *v.* BAI MANCHHA

I. L. R. 3 Bom. 217

6. ——— *Change of law—Effect on proceedings already commenced—Civil Procedure Code, Act VIII of 1859, s. 216, and Act X of 1877, s. 266 cl. (g)—Attachment—Political pension.* On the 28th of September 1877, *i.e.*, three days before the new Code of Civil Procedure (Act X of 1877) came into operation, an application was made for the enforcement of a money-decree by attachment (*inter alia*) of a political pension enjoyed by the defendants. Under s. 216 of the former Code (Act VIII of 1859), a notice was issued on the same day to the defendants, calling upon them to show cause why the decree should not be executed. The defendants accordingly appeared on the day fixed, at which date the new Code had come into force, and contended that under s. 266, cl. (*g*), of the new Code, the pension was no longer attachable. *Held*, that all proceedings commenced and pending when Act X of 1877 became law were, under the General Clauses Act (Act I of 1868), s. 6, to be governed by the Code theretofore in force, the general rule of construction contained in that section not being affected or varied by ss. 1 and 3 of Act X of 1877; and that a *bonâ fide* application for enforcement of a decree in a particular way, coupled with an order of the Court in furtherance of that object, as much constitutes a proceeding in execution commenced and pending as the actual issue of a warrant of attachment. VIDYARAM *v.* CHANDRA SHEKHARAM . **I. L. R. 4 Bom. 163**

7. ——— **Civil Procedure Code Amendment Act (XII of 1879), s. 102—Effect of an application for execution pending at date of its enactment.** Where an application to execute a decree was made under s. 234 of the Code of Civil Procedure, 1877, before Act XII of 1879 (to amend it) was passed, but the application was not disposed of until after s. 230 was altered by that Act:—*Held*, that the rule in *Wright* v. *Hale 6, H. & N. 227*, applied, and that the Act as amended was the law to be applied. BAPASASTRIAL *v.* ANUNTARAMA SASTRIAL

I. L. R. 3 Mad. 98

8. ——— **Security bond, enforcement of, by execution**—*Security for Costs—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1888, s. 46—General Clauses Act (I of 1868), s. 6.*

EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

On the 9th June 1888, a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888, the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force. *Held*, on appeal, that the application should have been allowed. ABDUL WAHAB *v.* FAREEDOONNISSA

I. L. R. 16 Calc. 323

9. ——— **Execution under Bengal Act VIII of 1869 and Act VIII of 1885**—*Right of procedure.* Upon the death of the full owner, the mother took out probate of a will, in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked; but, while the mother was in possession of the estate as executrix, she sued and obtained a decree for rent under Bengal Act VIII of 1869. Upon the application of the minor for the execution of the decree:—*Held*, that the mode in which the decree was executed under the old Rent Act, Bengal Act VIII of 1869, was, in so far as it was a right at all that belonged to the judgment-creditor, not a private right, but a mere right of procedure, and the execution was therefore to be governed by Act VIII of 1885. UMASOONDURY DASSY *v.* BROJONATH BHUTTACHARJEE

I. L. R. 15 Calc. 347

10 ——— **Decree transferred to Collector for execution**—*Talukhdars Act (Bombay Act VI of 1888), s. 31, cl. 2—Construction of statute—Retrospective operation—Sanction to sale made necessary by new law.* A decree upon a mortgage-bond passed against part of a talukdar's estate on the 15th August 1887 was transferred, under s. 320 of the Civil Procedure Code (Act XIV of 1882), to the Collector for execution. The property was sold on the 5th August 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukhdars Act (Bombay Act VI of 1888), which came into force on the 25th March 1889, had not been obtained. *Held*, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in

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EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

the Act itself. KALIAN MOTI *v.* PATHUBHAI FALJIBHAI . . **I. L. R. 17 Bom. 289**

11. ——— Act creating new rights, effect of—*Civil Procedure Code, 1882, s. 310A—Civil Procedure Code Amendment Act (V of 1894), s. 2—Construction of statute—Sale in execution of decree held after Act V of 1894 came into operation, the execution proceedings being commenced before—Retrospective enactment when applicable to pending proceedings—General Clauses Consolidation Act (I of 1868), s. 6.* On the 30th January 1894 an application was made for execution of a decree passed on the 5th of the same month, and certain property was thereafter duly attached. On the 8th February 1894, the sale proclamation was published, and on the 26th March the sale was held. On the 17th April 1894, the judgment-debtor applied to the Court under the provisions of s. 310A of the Code of Civil Procedure (which section was added to the Code by Act V of 1894, and which came into operation on the 2nd March 1894) to have the sale set aside on payment to the auction-purchaser of 5 per cent. on the purchase money and to the decree-holder of the amount mentioned in the sale proclamation. The auction-purchaser resisted the application on the ground that the section could not affect the sale in question. *Held* (PETHERAM, *C.J.*, and O'KINEALY, *J.*, dissenting), that the section conferred a new and substantive right on the judgment-debtor, and was not merely a matter of procedure; and that, as Act V of 1894 does not clearly indicate the intention of the Legislature that it was meant to have retrospective effect, the section had no application to pending proceedings, and the judgment-debtor was not entitled to have the sale set aside under its provisions. *Held per* PETHERAM, *C.J.*, and O'KINEALY, *J.*, that the section merely dealt with a matter of procedure and applied to the sale, which the judgment-debtor was entitled to have set aside. *Per* PETHERAM, *C.J.*—All that s. 310A does, so far as the decree-holder and judgment-debtor are concerned, is to extend the period during which the latter may discharge his liability by 30 days beyond the date of the sale, and is merely a modification of the way in which the successful litigant may obtain the fruits of his decree; and even if it be considered as creating a new and substantive right in the judgment-debtor, the words used by the Legislature in Act V of 1894 must be taken to have been used with the express intention that the section should have a retrospective effect in the sense that it should take effect on sales held after the Act came into operation, though the execution-proceedings, of which the sale was a part, had been commenced before the Act came into operation. *Per* O'KINEALY, *J.*—Act XIV of 1882 is on the face of it an Act of procedure and nothing more, and what the Legislature intended to do by Act V of 1894 was to amend the rules of that Code with regard to the sale and

EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

delivery of property, and the section, both in form and substance, is merely a rule of procedure under which no party has a vested interest. In addition, as under s. 316 of the Code a purchaser has no vested interest in the property before the date of the certificate, he could not insist on the sale being confirmed and a certificate being given him if the amount due by the judgment-debtor be paid in before that date. *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy, I. L. R. 14 Calc. 636, Tupsee Singh* v. *Ram Sarun Koeri, I. L. R. 15 Calc. 376, Uzir Ali* v. *Ram Komal Shaha, I. L. R. 15 Calc. 383,* and *Debnarain Dutt* v. *Norendra Krishna, I. L. R. 16 Calc. 257,* referred to. GIRISH CHUNDRA BASU *v.* APURBA KRISHNA DASS **I. L. R. 21 Calc. 940**

12. ——— *Civil Procedure Code, 1882, s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Construction of statute—Sale in execution of decree held after Act V of 1894 came into operation, the execution-proceedings being commenced before—General Clauses Consolidation Act (I of 1868), s. 6—Bengal Tenancy Act (VIII of 1885), s. 174—Civil Procedure Code, 1882, s. 622—Superintendence of High Court.* On the 8th February 1894, a decree was obtained against *A* and others in the Small Cause Court of Calcutta, and was subsequently transferred to one *J*, who was substituted in the place of the original decree-holder. On the 26th July, *J* applied in the Small Cause Court for execution of the decree, and on the same date the decree was transferred for execution to the District Court of Bankura. On the 3rd August, a writ of attachment issued, and on the 5th it was served. Sale proclamation issued on the 11th, and was served on the 14th August, and on the 20th September the sale took place. On the 27th September 1894, the judgment-debtor applied under s. 310A of the Code of Civil Procedure, which section became part of the Code under the provisions of Act V of 1894, passed on the 2nd March 1894, to have the sale set aside. The District Judge, relying upon the case of *Grish Chundra Basu* v. *Apurba Krishna Dass, I. L. R. 21 Calc. 940,* together with the principle enunciated in the cases of *Lal Mohun Mukerjee* v. *Jogendra Chundra Roy, I. L. R. 14 Calc. 636,* and *Uzir Ali* v. *Ram Kamal Shaha, I. L. R. 15 Calc. 383,* refused to set it aside on the ground that s. 310A was not a mere matter of procedure, and Act V of 1894 had no retrospective effect, and therefore s. 310A was not applicable to proceedings in execution of a decree which had been passed before that section came into operation. In an application under s. 622 of the Civil Procedure Code to set aside this decision as wrong:—*Held*, by the full Court, that the decision in *Lal Mohun Mukerjee* v. *Jogendra Chundra Roy, I. L. R. 14 Calc. 636,* so far as it holds that s. 174 of the Bengal Tenancy Act creates a new right in a judgment-debtor, and is therefore

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EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*contd.*

inapplicable to a case in which the decree was passed before that Act became law, is wrong. The cases of *Uzir Ali* v. *Ram Komal Shaha, I. L. R. 15 Calc. 383*, and *Grish Chundra Basu* v. *Apurba Krishna Dass, I. L. R. 21 Calc. 940*, which are based upon the same principle, are also wrongly decided. *Quære:* Whether the decision in *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy, I. L. R. 14 Calc. 636*, was correct under s. 6 of the General Clauses Act by reason of the execution-proceedings having been commenced under Bengal Act VIII of 1869, an Act repealed by the Bengal Tenancy Act. That question did not arise in the present case, for though the execution-proceedings were instituted under the old law, the case is unaffected by s. 6 of the General Clauses Act, as the change in the law was brought about not by the repeal of the old Act, but by the addition to it of a new section (310A). *Held*, therefore, that s. 310A was applicable to the proceedings in execution in the present case, and in that view the Court below was bound, upon the application of the judgment-debtor, to set aside the sale, and, not having done so, it had failed to exercise jurisdiction within the meaning of s. 622 of the Code. The Court had power, therefore, to interfere under that section. JOGODANUND SINGH *v.* AMRITA LAL SIRCAR . **I. L. R. 22 Calc. 767**

13. ——— Sale in execution of decree, application to set aside—*Civil Procedure Code, 1882, s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Application of Act V of 1894 when proceedings in execution had commenced before its enactment.* A house of the judgment-debtor, having long previously been attached in execution of a decree, was bought to sale on the 9th of March 1894, that is, shortly after the enactment of Act V of 1894. The judgment-debtor now applied under the Civil Procedure Code, s. 310A, that the sale be set aside. *Held*, that the provisions of Act V of 1894, whereby the abovementioned section was added to the Civil Procedure Code, were applicable to the case. RANGASAMI NAIDU *v.* VIRASAMI CHETTI . . . **I. L. R. 18 Mad. 477**

14. ——— Sale in execution of a decree upon a mortgage before the Act—*Gujarat Talukhdars Act (Bombay Act VI of 1888), s. 31—Necessity of sanction of the Governor in Council to the sale.* Certain talukhdari estate was mortgaged under a *sankhat* executed before the Gujarat Talukhdars Act (Bombay Act VI of 1888) came into force. On the 22nd August 1889 (*i.e.*, subsequent to the Act coming into force), a decree was passed for sale of the mortgaged property. The decree was transferrred for execution to the Collector, who refused to put up the property to sale without the previous sanction of Government, as required by s. 31 of the Talukdari Act. *Held*, that s. 31 of the Act had no application to the present case. The *san-mortgage* having been executed before the Act came into force, and left with its validity untouched

EXECUTION OF DECREE—*contd.*

1. EFFECT OF CHANGE OF LAW PENDING EXECUTION—*concld.*

by cl. (1) of s. 31, the ordinary remedy of the mortgagee to bring the property to sale was not taken away by that section. The sanction of the Governor in Council was therefore not necessary to the sale in execution of the decree on the mortgage. NAGAR PRAGJI *v.* JIVABHAI BAVAJI **I. L. R. 19 Bom. 80**

See DOSHI FULCHAND *v.* MALEK DAJIRAJ **I. L. R. 20 Bom. 565**

in which the correctness of the above decision was doubted.

2. PROCEEDINGS IN EXECUTION.

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 82 . **I. L. R. 34 Calc. 13**

1. ——— Proceeding in execution—*Civil Procedure Code, 1877, s. 244—Suit. Semble:* A proceeding in execution is a proceeding which terminates in a decree as defined by s. 244 of the Civil Procedure Code (Act X of 1877), and is therefore a suit within the meaning of the Code. MANJUNATH BADRABHAT *v.* VENKATESH GOVIND **I. L. R. 6 Bom. 54**

2. ——— *Semble:* A proceeding under s. 244 of the Civil Procedure Code is not a suit within the meaning of s. 12. VENKATA CHANDRAPPA NAYANIVARU *v.* VENKATARAMA REDDI . . . . **I. L. R. 22 Mad. 256**

3. ——— *Conduct of proceedings in execution.* Observations by STRAIGHT, *J.*, as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as practicable, in accordance with the same procedure as that adopted in regular suits. SETH CHAND MAL *v.* DURGA DEI **I. L. R. 12 All. 313**

FAKIRULLAH *v.* THAKUR PRASAD **I. L. R. 12 All. 179**

4. ——— *Grounds for setting aside execution-proceedings.* In execution-proceedings the Courts will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds, when they find it is substantially right. *Bissessur Lall Sahoo* v *Luchmessur Singh, L. R. 6 I. A. 233 : 5 C. L. R 477*, followed. SHEO PERSHAD SINGH *v.* SAHEB LAL. RAJKUMAR LAL *v.* SAHEB LAL **I. L. R. 20 Calc. 453**

5. ——— *Transfer of Property Act, ss. 88, 89—Application for order absolute for sale—Mortgage.* The holder of a decree under s. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree. *Held*, that this was a good application under s. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An

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EXECUTION OF DECREE—*contd.*

2. PROCEEDINGS IN EXECUTION—*concld.*

application for an order absolute for sale under s. 89 of the Transfer of Property Act is a proceeding in execution and subject to the rules of procedure governing such matters. OUDH BEHARI LAL *v.* NAGESHAR LAL . . **I. L. R. 13 All. 278**

See CHUNI LAL *v.* HARNAM DAS **I. L. R. 20 All. 302**

and VENKATA KRISHNA AYYAR *v.* THIA GARAYA CHETTI . . . **I. L. R. 23 Mad. 521**

6. ——— *Objection to application for execution of decree by person not party to decree—Practice.* A person, not a party to a suit, is not entitled to object to the issue of an order for execution of the decree. NATHUBHAI MULCHAND *v.* NANA BABU **I. L. R. 19 Bom. 544**

7. ——— *Civil Procedure Code, 1882, s. 43.* S. 43 of the Civil Procedure Code (Act XIV of 1882) is not applicable to proceedings in execution of decree. So *held* by EDGE, *C.J.*, and TYRRELL, KNOX, BLAIR, and BURKITT, *JJ.* SADHO SARAN *v.* HAWAL PANDE **I. L. R. 19 All. 98**

8. ——— *Mortgage—Decree for sale—Civil Procedure Code (Act XIV of 1882), s. 244, cl. (c)—Jurisdiction.* A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings to the property being sold on the ground that it was not the property of the mortgagor. S. 244 (c) of the Civil Procedure Code does not apply to a case where the judgment-debtor tries to set aside the effect of a decree. *Sanwal Das* v. *Bismilla Begam, I. L. R. 19 All. 480 ; Liladhar* v. *Chaturbhuj, I. L. R. 21 All. 277 ;* and *Hiralal Sahu* v. *Parmeshwar Rai, I. L. R. 21 All. 356,* followed. *Ram Chandra Mukerjee* v. *Ranjit Singh, I. L. R. 27 Calc. 242,* distinguished. KHETRAPAL SINGH ROY *v.* SHAMA PROSAD BARMAN (1905) **I. L. R. 32 Calc. 265**

9. ——— *Civil Procedure Code (Act XIV of 1882), ss. 244 and 583—Reversal of decree on appeal, effect of—Separate suit, maintainability of.* S. 244 of the Civil Procedure Code does not apply in its entirety to proceedings had under s. 583 of the Code for restitution of property taken in execution of a decree, which is reversed in appeal. *Shama Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhury, 10 Moo. I. A. 203 ; Hurro Chunder Roy Chowdhury* v. *Shoorodhonee Debia, 9 W. R. 402 ; Shurnomoye* v. *Pattarri Sirkar, I. L. R. 4 Calc. 625 ; Jamini Nath Roy* v. *Dharma Das Sur, I. L. R. 33 Calc. 857,* referred to. MATIRAM MARWARI *v.* RAMKUMAR MARWARI (1907) **I. L. R. 35 Calc. 265**

3. APPLICATION FOR EXECUTION, AND POWERS OF COURT.

1. ——— **Proceedings in the suit**—*Civil Procedure Code Amendment Act (VI of 1882), s. 4.*

EXECUTION OF DECREE—*contd.*

3. APPLICATION FOR EXECUTION, AND POWERS OF COURT—*contd.*

Applications for execution of the decree are proceedings in the suit. SADASHIV GANPATRO *v.* VITHALDAS NANCHAND . **I. L. R. 20 Bom. 198**

2. ——— **Decrees, priority of.** A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces. GHERAN *v.* KUNJ-BEHARI . **I. L. R. 9 All. 413**

3. ——— **Decree-holder, meaning of.** A decree-holder within the meaning of the Civil Procedure Code is the person whose name appears on the record as the person in whose favour the decree was made, or some person whom the Court has by order recognized as the decree-holder from the original plaintiff or his representatives. PAUPAYYA *v.* NARASANNAH . **I. L. R. 2 Mad. 216**

4. ——— **Right to execute decree**—*Assignment of decree—Civil Procedure Code (Act XIV of 1882), s. 232.* The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person, under s. 232 of the Civil Procedure Code, that he has taken the decree-holder's place. *Khettur Mohun Chattopadhya* v. *Issur Chunder Surma, 11 W. R. 271,* relied on. JASODA DEYE *v.* KIRTIBASH DAS **I. L. R. 18 Calc. 639**

5. ——— **Necessity for application for execution**—*Civil Procedure Code, 1882, ss. 230, 235, 295, 490.* Under s. 230 of the Civil Procedure Code, all decree-holders, if desirous of enforcing their decrees, are required to apply for execution. There is no exception of cases arising under s. 490. A decree-holder who has attached before judgment and who is desirous of sharing in the distribution of sale-proceeds under s. 295 of the Code must make an application for execution under s. 235 before he can become entitled to do so. PALLONJI SHAPURJI *v.* JORDAN **I. L. R. 12 Bom. 400**

6. ——— **Application for execution irregularity in**—*Procedure—Notice of execution.* An application for execution was made by a muktear and admitted by the Judge, who ordered a notice to issue to the judgment-debtor. *Held,* that such application could not afterwards be set aside for irregularity, and that it was sufficient to keep the decree alive. DHUNPUT SINGH *v.* LILANUND SINGH . **2 B. L. R. Ap. 18 : 11 W. R. 28**

7. ——— **Application for execution, contents of**—*Practice.* An application for execution of a decree need not be accompanied by a copy of the decision of the first Court. DHUNPUT SINGH *v.* LILANUND SINGH **2 B. L. R. Ap. 18 : 11 W. R. 28**

8. ——— **Application for execution, bar to**—*Judgment of foreign Court—Merger—Civil Procedure Code, 1877, s. 12.* The judgment of a foreign Court, obtained on a decree of a Court in

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EXECUTION OF DECREE—*contd.*

3. APPLICATION FOR EXECUTION, AND POWERS OF COURT—*contd.*

British India, is no bar to the execution of the original decree. FAKURUDDIN MAHOMED ASSAN *v.* OFFICIAL TRUSTEE OF BENGAL

I. L. R. 7 Calc. 82

9. ——— Court to which application should be made—*Civil Procedure Code, 1877-82, ss. 223, 649—" Court which passed the decree."* *Per* GARTH, *C.J.*—S. 649 of the Civil Procedure Code, as amended by Act XII of 1879, which explains the meaning of the expression " the Court which passed the decree," does not exclude the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely includes another Court. When therefore a Court which had passed a decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit. *Per* FIELD, *J.*—A Court does not cease to be " the Court which passed the decree " merely by reason that the head-quarters of such Court are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered. LACHMAN PUNDEH *v.* MADDAN MOHUN SHYE

I. L. R. 6 Calc. 513 : 7 C. L. R. 521

10. ——— *Transfer of Property Act (IV of 1882), s. 93—Application for sale of mortgaged property on default of mortgagor to redeem.* In a suit for the redemption of mortgaged property, the District Munsif passed a decree, which was on appeal modified by the District Court. The mortgagor not having paid the decree amount, the mortgagee applied to the District Court, under s. 93 of the Transfer of Property Act, for an order that the mortgaged property might be sold. *Held,* that the application should have been made to the Court of the District Munsif. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278,* referred to. VENKATA KRISHNA AYYAR *v.* THIAGARAYA CHETTI . . **I. L. R. 23 Mad. 521**

11. ——— *Civil Procedure Code, s. 649, para. 2—Decree against a sirdar—Political Agent's Court—Death of the sirdar—Application for execution against the heirs—Change of status of parties—Jurisdiction.* A sirdar against whom a decree was passed in the Court of the Political Agent having died, the decree-holder applied for execution against his heirs. The Political Agent rejected the application, holding that he had no jurisdiction over the heirs, who were not sirdars. The decree-holder then applied for execution to the Court of the first class Subordinate Judge of Dharwar, who would have had jurisdiction to try the suit if the deceased defendant had not been a sirdar, but that Court also rejected the application on the ground that s. 649, para. 2, of the Civil Procedure Code (Act XIV of 1882) applies in cases where the territorial jurisdiction of the Court is changed, and where the status of the parties is changed, and that the decree-holder should obtain a declaration that the decree was binding against the heirs, who were not sirdars. *Held,* reversing the order, that the terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction. GAUSKHA *v.* ABDUL ROPKHA

I. L. R. 17 Bom. 162

12. ——— *Application to execute decree for sale of immoveable property in possession of a third party under valid title—Civil Procedure Code, 1882, ss. 278, 287—Rules of Bombay High Court under s. 287—Practice.* Under s. 287 of the Civil Procedure Code (Act XIV of 1882) and the Rules of the High Court made thereunder, a Court cannot refuse to execute its own decree ordering the sale of immoveable property in the possession of a third party under a valid title. Rule I of the High Court Rules under that section permits inquiry into the title of the judgment-debtor in respect of moveable property only. Nor can a claim set up in an investgation held under s. 287 be treated as a claim under s. 278, the latter section having reference to claims to, and objections to attachment of, property under attachment. BHIKU BAL PATIL *v.* KHEMCHAND KUBERSHET . . **I. L. R. 14 Bom. 369**

13. ——— Amendment of application—*Civil Procedure Code, 1877, s. 245—Time fixed by Court—Jurisdiction—Ultra vires.* On the 9th of April 1880, *A* applied for execution of a decree, which he had obtained against *B.* On the 20th of April 1880, the Judge of the Court, under the provisions of s. 245 of the Code of Civil Procedure, ordered the application to be amended within seven days. This order was disobeyed, but no order rejecting the application was asked for or passed. On the 11th of May 1880, the applicant prayed for leave to make the amendment, which prayer was granted. *Held,* that the order of the 11th of May 1880, granting leave to amend, was not *ultra vires* of the Judge under the provisions of s. 245 of the Code of Civil Procedure. KAMINY MOHUN SOMODDAR *v.* GOPAL

I. L. R. 8 Calc. 479 : 10 C. L. R. 519

14. ——— Practice in execution by High Court of decree of another Court. The functions of the High Court, in respect of the execution of decrees of other Courts, are limited to effecting execution, and to matters arising out of the proceedings in execution. Where a decree more than a year old had been duly sent to the High Court for execution, an application for a rule to show cause why execution should not issue was refused; such application should be made to the Court which passed the decree. JADU ROY *v.* FARRELL . . . . **6 B. L. R. Ap. 66**

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EXECUTION OF DECREE—*contd.*

3. APPLICATION FOR EXECUTION, AND POWERS OF COURT—*contd.*

15. ——— **Functions of Court executing decree.** The functions of the Court executing a decree are judicial, and not merely ministerial. GOBIND HORI WALEKAR *v.* SHIDRAM BIN SHIDMURTI . . . . . **7 Bom. A. C. 37**

16. ——— **Power of Court executing decree**—*Objection to validity of amendment—Civil Procedure Code, s. 206.* The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of R1,282. Subsequently, on application by the decree-holder and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree and made it for a sum of R1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for R1,282 and had been improperly altered. The Court executing the decree disallowed the objection on the ground that it was not such as could be entertained in the execution department. *Held*, that, when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed. ABDOOL HAYAI KHAN *v.* CHUNIA KUAR **I. L. R. 8 All. 377**

17. ——— **Questioning validity of decree.** In executing a decree of a Court of competent jurisdiction, the Court executing it cannot question the validity of any portion of it. Its duties are only of a ministerial character. AMBARAM HARIVALLABHDAS *v.* HIMAT SING KALIANJI **2 Bom. 109 : 2nd Ed. 103**

DABEE PERSHAD SING *v.* DELAWAR ALI **13 W. R. 312**

18. ——— **Authority to hear objections.** When the execution of a decree is made over to a Munsif's Court other than that which passed the decree, the Court executing the decree has authority to hear all objections and to pass such orders as if it were executing its own decree; and an appeal will lie from any order so passed in the usual course to the Judge. MUNGLE PERSHAD *v.* GUDOOREE SINGH . . **2 W. R. Mis. 17**

19. ——— **Adjustment of decree.** A Court executing a decree is bound to have regard only to the decree and to any adjustment of such decree which the parties may agree to bring to its notice. JHUNDOO *v.* HIMMUT **3 N. W. 81**

20. ——— *Civil Procedure Code, 1877, ss. 211 and 212; (1859), ss. 196 and 197.*

EXECUTION OF DECREE—*contd.*

3. APPLICATION FOR EXECUTION, AND POWERS OF COURT—*contd.*

The Court executing a decree is bound by the terms of the decree, and it is only in cases provided for by ss. 211 and 212 of Act X of 1877, corresponding with ss. 196 and 197 of Act VIII of 1859, that it is at liberty to determine the rights of the litigants in proceedings taken after decree. RAM LAPIT RAM *v.* CHOOARAM. CHOOARAM *v.* RAM LAPIT RAM **4 C. L. R. 97**

21. ——— **Uncertain decree**—*Power of Court of execution to take evidence to explain it.* When the terms of a decree are uncertain, it is not competent to the Court of execution to make any enquiries by taking oral or documentary evidence to ascertain the meaning of such terms. NUDDYAR CHAND SHAHA *v.* GOBIND CHUNDER GUHA . . . . **I. L. R. 10 Calc. 1092**

22. ——— *Uncertain decree—Evidence to explain decree.* When a decree is so uncertain that it is impossible to ascertain what is decreed, a plaintiff cannot be put into possession of any other thing by execution than that which the decree describes. Evidence cannot be given in the execution department to amend any uncertainty in the decree. The law allows certain matters to be ascertained in execution, but beyond those it is the duty of the Judge to take care that his decree is so precise that it is capable of execution, without leaving it to the Court of execution to decide what the Judge intended to decree. DWARKANATH HALDAR *v.* KAMALAKANTH HALDAR **3 B. L. R. Ap. 128 : 12 W. R. 99**

23. ——— **Evidence in execution**—*Evidence to ascertain subject of decree.* In the execution of a decree for possession of land, it was held the evidence of witnesses could be taken to ascertain the boundaries. KALEE DABEE *v.* MODHOO SOODUN CHOWDHRY . . **16 W. R. 171**

and to ascertain the subject on which the decree operates. BHUGOBAT SINGH *v.* RAMADHIN SINGH **22 W. R. 330**

24. ——— **Mesne profits**—*Decree not limiting amount of mesne profits.* A Court in execution-proceedings cannot look behind the decree when the decree does not limit the amount of *wasilat* to be awarded. JADOOMONEY DABEE *v.* HAFEZ MAHOMED ALI KHAN . . **I. L. R. 8 Calc. 295**

25. ——— *Refusal to execute decree on equitable grounds—The Court executing a decree not competent to go behind it.* The holders of a decree, made in 1866, against *K* and certain other persons jointly applied to recover mesne profits in execution thereof. *K* paid the decree-holders the mesne profits claimed, and then sued his co-judgment-debtors for contribution, and in 1878 obtained a decree against them. Subsequently the holders of the decree of 1866 again applied to recover mesne profits in execution thereof, and in the proceedings which followed it was decided that mesne profits were not recoverable

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EXECUTION OF DECREE—*contd.*

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under the decree. After this, *K*'s representatives applied for execution of the decree of 1878. The lower Courts refused to execute the decree on the ground that, as under the decree of 1866, on which the decree of 1878 was based, mesne profits were not recoverable, it would not be equitable to allow a decree for contribution passed on a contrary supposition to be executed. *Held*, that the lower Courts were not competent to go behind the decree of 1878, but must deal with it as it stood. RAMPHAL RAI *v.* RAM BARAN RAI . **I. L. R. 5 All. 53**

26. ——— *Omission to specify mesne profits—Reference to plaint to see against whom relief can be given in execution.* Where in a suit for possession and mesne profits no specific mention as to mesne profits is made in the decree (the decree merely declaring that the plaintiff's suit be decreed), the Court executing the decree must look to the plaint to see from whom the relief granted is to be obtained, and ought not to allow execution to issue against a *pro formâ* defendant against whom no relief was claimed. MONAJAN *v.* KASHI NATH PANDAY . . **5 C. L. R. 305**

27. ——— **Compromise**—*Application for execution for sum larger than amount of claim—Consent of parties—Compromise.* The parties to a suit agreed upon a compromise, the result of which was that the plaintiff obtained by the decree a greater quantity of land than he had originally claimed, and a decree was drawn up in accordance with the compromise. In the execution-proceedings, the defendant raised an objection that the plaintiff could not have execution for a greater quantity of land than he had claimed originally, and the Court executing the decree allowed the objection. No appeal from the Court's order was made, but the plaintiff brought a suit to recover possession of the larger amount of land mentioned in the compromise. *Held*, that the order of the Court executing the decree was erroneous in law, and might properly be reconsidered upon an application for review; but that the present suit came within s. 244 of the Civil Procedure Code, and therefore could not be maintained. MOHIBULLAH *v.* IMAMI **I. L. R. 9 All. 229**

28. ——— **Improvements**—*Civil Procedure Code, s. 244—Execution-proceedings—Revaluation of improvements allowed for in decree.* A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree, it was contended on behalf of the mortgagee that the improvements ought to be re-valued, as they were at the time of execution of more value than at the date of the decree. *Held*, that the mortgagee was entitled to re-valuation in the execution-proceedings. RAMUNNI *v.* SHANKU **I. L. R. 10 Mad. 367**

EXECUTION OF DECREE—*contd.*

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29. ——— **Objections to sale of property.** The holder of a money decree, which declared the liability of certain mortgaged properties to be sold in satisfaction, petitioned the Court that, as one of the properties (*B*) had been sold by the judgment-debtor to *H*, it might be exempted from sale. The judgment-debtor admitted the sale, but subsequently made an application that *B* might be sold first and the rest of the properties in succession. The Judge accordingly passed an order to that effect, to which *H* was not a party. Subsequently *H* petitioned the lower Court that *B* might not be sold. *Held*, that it was open to that Court, as far as *H* was concerned, to investigate his objections in the execution department and pass such orders as it might think fit. LALLA HEERA LALL *v.* MONEE ROY . . **11 W. R. 202**

30. ——— **Refusal of execution**—*Irregularity in instituting suit.* It is not competent to a Court executing a decree to refuse execution in a case where no fraud is suggested, on the ground that the plaintiffs were allowed improperly to institute the suit. SUBRAMANIAN PATTAR *v.* PANJAMMA KUNJIAMMA . **I. L. R. 4 Mad. 324**

31. ——— **Decree against minor**—*Question of minority—Review.* In the execution of a decree passed against a minor the Court cannot enquire whether the minor was or was not properly represented in the suit in which the decree was given. It is bound to presume that the decree was rightly passed and to execute it according to its terms. The minors remedy is either to apply for a review of judgment or to file a suit to procure an injunction to restrain the execution of the decree. MAHOMED NOOR-OOLLAH KHAN *v.* HARCHARAN RAI **6 N. W. 98**

32. ——— **Costs.** A Court executing a decree has no jurisdiction to order a judgment-debtor to pay as costs any sum not mentioned in the decree which is in course of execution or in any decree in force. NABU KRISTO MOOKERJEE *v.* PARBUTTY CHURAN BHUTTACHARJEE **13 W. R. 23**

NIL KOMUL ROY *v.* ROHINEE DOSSIA **13 W. R. 330**

33. ——— *Objection to decree for costs.* Where the lower Court has improperly awarded separate sets of costs to defendants, who have severed in their defence, the attention of the Appellate Court should be drawn to this circumstance before the decree in appeal is passed. It is too late to raise the objection when this latter decree is being executed. RAM CHUNDER SEN *v.* KOOMAR DOORGA NATH ROY . **2 C. L. R. 152**

34. ——— **Question of jurisdiction.** It is competent to the Court charged with the execution of a decree to consider the question as to whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself

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EXECUTION OF DECREE—*contd.*

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precludes that question. *Muhammad Sulaiman Khan* v. *Fatima, I. L. R. 11 All. 314*, and *Musa Haji Ahmed* v. *Purmanand Nursey, I. L. R. 15 Bom. 219*, referred to. IMDAD ALI *v.* JAGAN LAL
I. L. R. 17 All. 478

35. ——— **Limitation**—*Procedure applicable to execution of decrees—Appeal, right of—Review—Civil Procedure Code, s. 623*—It is the duty of a Court to which an application to execute a decree is presented to satisfy itself whether or no such application is barred by limitation. If the Court on such an application omits to decide the question of limitation or decides it against the judgment-debtor, and in his opinion wrongly, the judgment-debtor may either appeal or can apply under s. 623 of the Code of Civil Procedure for review of the Court's order, and this whether notice of the application for execution had been issued to him or not. A Court, in executing a decree, should look to the substance rather than to the form of applications presented to it. Where an application was made by a judgment-debtor objecting to the execution of a decree against him on the ground that it was barred by limitation, previous objections to execution having been disallowed: *Held*, that, the relief prayed for being one which could only be granted by way of review, the application should be treated as one for that purpose. RAMU RAI *v.* DAYAL SINGH . **I. L. R. 16 All. 390**

36. ——— *Jurisdiction of the Court to which a decree is sent for execution—Code of Civil Procedure, 1882, ss. 223, 228 and 239—Question of limitation.* The Court to which a decree is sent for execution under s. 223 of the Civil Procedure Code has jurisdiction to decide whether or not the execution was barred by limitation. *Leake* v. *Daniel, B. L. R. Sup. Vol. 970: 10 W. R. 10 (F. B.); Nursing Doyal* v. *Hurryhur Saha, I. L. R. 5 Calc. 897; Jassoda Koer* v. *Land Mortgage Bank of India, I. L. R. 8 Calc. 916; Srihary Mundal* v. *Murari Chowdhry, I. L. R. 13 Calc. 257*, referred to. *Soomut Dass* v. *Bhoobun Lall, 21 W. R. 292; Lutfullah* v. *Keerut Chand, 21 W. R. 330: 13 B. L. R. Ap. 30.* and *Ramu Rai* v. *Dayal Singh, I. L. R. 16 All. 390*, dissented from. CHHOTAY LALL *v.* PURAN MULL.
I. L. R. 23 Calc. 39

37. ——— *Civil Procedure Code, 1882, s. 373—Dismissal of application to execute without obtaining leave to make a fresh application—Limitation.* S. 373 of the Civil Procedure Code does not apply to applications for execution of decrees. *Tarachand Magraj* v. *Kashi Nath Trimbak, I. L. R. 10 Bom. 62*, followed, *Radha Charan* v. *Man Singh, I. L. R. 12 All. 392*, dissented from. WAJIHAN *alias* ALIJAN *v.* BISHWANATH PERSHAD . . **I. L. R. 18 Calc. 462**

38. ——— *Civil Procedure Code (Act XIV of 1882), ss. 43, 373, 374.—Separate applications to execute reliefs of a different character—Limitation.* The Code of Civil Procedure does not prevent a person from making separate and successive applications for execution of a decree, giving relief of different characters in respect to each such relief. Ss. 43, 373, and 374 do not apply to proceedings for execution of decree. *Radha Charan* v. *Man Singh, I. L. R. 12 All. 392*, dissented from. *Wajihan* v. *Bishwanath Pershad, I. L. R. 18 Calc. 462*, followed. RADHA KISHEN LALL *v.* RADHA PERSHAD SINGH
I. L. R. 18 Calc. 515

39. ——— *Civil Procedure Code, 1882, s. 43—Successive applications for execution in respect of different reliefs granted by the same decree.* S. 43 of the Code of Civil Procedure is not applicable to proceedings in execution of decree. So *held* by EDGE, *C.J.*, and TYRRELL, KNOX, BLAIR, and BURKITT, *JJ.* Where a decree grants different reliefs, as, for example, possession of land and mesne profits, it is competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief. So *held* by EDGE, *C.J.*, and TYRRELL, KNOX, BLAIR, and BURKITT, *JJ.* *Ram Baksh Singh* v. *Madat Ali, 7 N. W. 95*, and *Radha Kishen Lall* v. *Radha Pershad Singh, I. L. R. 18 Calc. 515*, cited. SADHO SARAN *v.* HAWAL PANDE
I. L. R. 19 All. 98

40. ——— **Dismissal for default**—*Application for execution dismissed for default—Power of the Court to restore such application to the file—Civil Procedure Code, 1882, ss. 103 and 647—Civil Procedure Code Amendment Act (VI of 1892), s. 4—Construction of statute.* There is nothing in the Code of Civil Procedure (XIV of 1882) as amended by Act VI of 1892, which authorizes a Court to apply to execution-proceedings any of the procedure enacted in Ch. VII of the Code. Accordingly a Court cannot, under s. 103, restore to the file an application for execution which has been dismissed for default. Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings. HAJRAT AKRAMNISSA BEGAM *v.* VALIULNISSA BEGAM
I. L. R. 18 Bom. 429

Where an application for execution has been dismissed for default, a fresh application can be made. HAJRAT AKRAMNISSA BEGAM *v.* VALIULNISSA BEGAM . . **I. L. R. 18 Bom. 429**

TIRTHASAMI *v.* ANNAPPAYYA
I. L. R. 18 Mad. 131

41. ——— *Civil Procedure Code, 1882, ss. 98, 248, and 647—Notice of execution—Dismissal of application on failure of both parties to appear on the appointed day.* A darkhast for the execution of a decree can be dismissed when on its presentation a notice is issued to the judgment-debtor under s. 348 of the Civil Procedure

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Code (Act XIV of 1882), and neither party appears on the day on which it is made returnable. TUKARAM *v.* KHANDU . . **I. L. R. 20 Bom. 541**

42. _____ **Civil Procedure Code, 1882, ss. 373, 647**—"*Suit.*" S. 647 of the Code of Civil Procedure does not operate to extend the rule laid down in respect of a suit in s. 373 to an application for execution of a decree. *Radha Charan* v. *Man Singh, I. L. R. 12 All. 392,* not followed. BUNKO BEHARY GANGOPADHYA *v.* NIL MADHUB CHUTTOPADHYA **I. L. R. 18 Calc. 635**

43. _____ *Civil Procedure Code, ss. 373, 647—Application for execution struck off for non-payment of process-fees—Subsequent application.* A decree-holder having applied for execution of his decree, notice was issued to the judgment-debtors, and their property was attached, but the applicant failed to pay the process-fees and the application was struck off, and no leave to make a fresh application was obtained under Civil Procedure Code, s. 373. *Held,* that s. 373 does not apply to applications for execution of decrees, and that the decree-holder was entitled to apply again for execution of his decree. *Radha Charan* v. *Man Singh, I. L. R. 12 All. 392,* dissented from. *Wajihan* v. *Bishwanath Pershad, I. L. R. 18 Calc. 462,* and *Shakkar Bisto Nadgir* v. *Narsingrao Ramchandra, I. L. R. 11 Bom. 467,* approved. LAKSHMI NARASIMHA *v.* ATCHANNA **I. L. R. 15 Mad. 240**

44. _____ *Application for execution withdrawn by decree-holder—Civil Procedure Code, ss. 373, 647.* The ruling in *Surja Prasad* v. *Sita Ram, I. L. R. 10 All. 71,* only decided that, where the circumstances in regard to an application for execution of decree show that it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder for execution is prohibited by s. 373 read with s. 647 of the Civil Procedure Code. But where a Court of its own motion, and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution. A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution, and upon the statement of the decree-holder's pleader "that at present the case may be struck off." No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings. *Held,* that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code. *Sarju Prasad* v. *Sita Ram, I. L. R. 10 All. 71,* explained and followed. *Ram Rup* v. *Lalji, All. Weekly Notes (1888), 253; Mahtab Kuar* v. *Sham Sundar Lal, All. Weekly Notes (1888), 272;* and *Hira Singh* v. *Joti Prasad, All. Weekly Notes (1889) 204,* distinguished Observations as to the necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits. Under s. 647 of the Civil Procedure Code, the provisions relating to proceedings in suits are to be followed and adopted in execution-proceedings, so far as they may be fairly and properly applicable thereto. FAKIR-ULLAH *v.* THAKUR PRASAD . **I. L. R. 12 All. 179**

45. _____ *Civil Procedure Code (Act XIV of 1882), s. 373—Redemption of mortgage on payment within six months—Non-payment, effect of—Foreclosure for decree—Final decree—Time allowed for redemption, computation of—Withdrawal of appeal, effect of—Limitation—Review.* The plaintiffs obtained a decree on 12th November 1886, allowing them to redeem on payment of R168-8-0 within six months. In default of payment within the prescribed time, they were to stand for ever foreclosed. Against this decree the defendant appealed to the High Court. On the 10th September 1888, the High Court passed an order allowing the defendant to withdraw the appeal. On the 17th December 1888, plaintiffs applied for execution of the decree of the 12th November 1886. The lower Court, regarding the withdrawal of the second appeal as practically a confirmation of the decree of the 12th November 1886, computed the six months allowed for redemption from the date of the order of withdrawal (10th September 1888) and granted the plaintiffs' application. On appeal to the High Court :—*Held,* reversing the decision of the lower Court, that the application was time-barred, and that the plaintiff was foreclosed. The time allowed for redemption was to be computed, not from the date of the High Court's order permitting the withdrawal of the appeal, but from the date of the decree applied from (*i.e.,* 12th November 1886). The order of withdrawal was not a decreee. The only decree which could be executed was that of the 12th November 1886. The redemption money not having been paid within six months from that date, the plaintiffs were foreclosed. The Court could not in execution-proceedings enlarge the time fixed for redemption. *Ishwargar* v. *Chudasama Manabhai, I. L. R. 13 Bom. 106,* followed. *Per* BIRDWOOD, *J.*—It was open to the plaintiffs to apply, if so advised, to the High Court for a review of the order of withdrawal of the 10th September 1888, with a view to the enlargement of the time of redemption as a condition which might equitably have been permitted when the defendant was allowed to withdraw the second appeal. PATLOJI *v.* GANU **I. L. R. 15 Bom. 370**

46. _____ *Application for execution withdrawn by decree-holder—Civil*

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EXECUTION OF DECREE—*contd.*

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Procedure Code, ss. 373, 647—" Suit "—"Appeal." S. 647 of the Civil Procedure Code makes s. 373 applicable to proceedings in execution of decree. The words " suit " and " appeal " in s. 647 apply to suits and appeals in the strict sense of those terms, and were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal. An application for execution of decree by arrest of the judgment-debtor was ordered by the Court to be struck off upon the statement of the decree-holder's pleader that the judgment-debtor was in hiding, and that the decree-holder did not desire to prosecute the application further. At that time an order for a warrant of arrest had been issued subject to the payment of fees, but those fees had not been paid, nor had the diet-money been deposited, and no steps were taken to proceed with the application. No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings. *Held*, by the Full Bench, that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Civil Procedure Code. *Sarju Prasad* v. *Sita Ram, I. L. R. 10 All. 71*, and *Fakirullah* v. *Thakur Prasad, I. L R. 12 All. 179*, approved and followed. *Bijai Singh* v. *Haiyat Begum, All. Weekly Notes (1889) 163*, distinguished. RADHA CHARAN *v.* MAN SINGH . . **I. L. R. 12 All. 392**

47. ——————— *Effect as regards limitation of striking off petition for execution of decree—Second application, without express leave granted when the first was struck off—Code of Civil Procedure, 1882, ss. 373 and 647—Civil Procedure Code Amendment Act (VI of 1882), ss. 4 and 5—Limitation.* It is clear, both from the Code of Civil Procedure itself and from the provisions of the Limitation Act of 1877, that a succession of applications for execution is contemplated. S. 647 of the Code of Civil Procedure cannot, on its true construction, be applied to execution of decree, and was inapplicable to petitions for execution before, and independently of the passing of Act VI of 1892, ss. 4 and 5. A first application for execution of a decree having been, on the decree-holder's petition, struck off the list of cases pending for hearing, a second application was made within the period of limitation. *Held*, that the first application, notwithstanding that the order striking it off had been made, was not annulled, but afforded a fresh starting point for limitation. *Held*, also, that, although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the Court, the petitioner's right to renew his petition within due time remained. The provisions of s. 373 which could only have applied through the effect of s. 647, had not been rendered applicable thereby to petitions for execution. The judgment in *Sarju Prasad* v. *Sita Ram, I. L. R. 10 All. 71*, overruled; that in *Bunko Behary Gangopadhya* v. *Nill Madhub Chuttapadhya, I. L. R. 18 Calc. 635*, approved. THAKUR PRASAD *v.*

EXECUTION OF DECREE—*contd.*

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FAKIR ULLAH . . **I. L. R. 17 All. 106**
L. R. 22 I. A. 44

Reversing on appeal FAKIR-ULLAH *v.* THAKUR PRASAD . . . **I. L. R. 12 All. 179**

48. ——————— **Laches of applicant**—*Power of Court to dismiss application for laches of applicant—Civil Procedure Code, 1882, Ch. VII (ss. 96-109), and Ch. XIII (ss. 156-158)—Civil Procedure Code Amendment Act (VI of 1892), s. 4—Striking off execution-proceedings.* Chs. VII (ss. 96-109, relating to appearance of parties and consequence of non-appearance) and XIII (ss. 156-158, relating to adjournments) of the Code of Civil Procedure cannot, in view of s. 4 of Act No. VI of 1892, be applied to proceedings in executions of decrees. But a Court has power inherent, if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application. Similarly, a Court has inherent power, if such power is not conferred upon it by statute, to proceed forthwith to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application, and that act has not been done. When an order striking an execution-case off the file of pending cases, or dismissing it on grounds other than a distinct finding that the decree is incapable of execution, that the decree-holder's right to get the decree executed is barred by limitation, or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word " dismissed " or the words " struck off the file " or any other similar words have been used in the order the decree-holder is not barred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree. DHONKAL SINGH *v.* PHAKKAR SINGH . . **I. L. R. 15 All. 84**

49. ——————— *Civil Procedure Code (Act XIV of 1882), ss. 230, 235, 237, 245—Specification of property, omission of—Application defective in form.* A decree was passed on the 6th September 1876, and on the 6th July 1888 an application for execution was made in the terms of s. 235 of the Code of Civil Procedure which did not contain a list of property as prescribed by s. 237, and the decree-holder did not produce the same till the 11th September 1888. The application having been made and admitted, any further application would be barred after the 6th September 1888. *Held*, by the Full Bench, that the application of the 6th July 1888 was one within the meaning of s. 230 of the Code of Civil Procedure. *Per* PRINSEP, PIGOT, and GHOSE, *JJ.*—*Held*, that the application was defective as not complying with the provisions of s. 237, and as it was not amended within due time or under the provisions of s. 245, the decree-holder was barred. *Per* PRINSEP and PIGOT, *JJ.*—

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EXECUTION OF DECREE—*contd.*

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Macgregor v. *Tarini Churn Sircar, I. L. R. 14 Calc. 124*, should be overruled. *Per* PETHERAM, *C.J.*—The application could not be carried out without amendment, and no amendment could be made after the application had been admitted and registered under s. 245. So much of the decision in *Macgregor* v. *Tarini Churn Sircar* as decides that an application may be amended after admission and registration, should be overruled. *Per* O'KINEALY, *J.*—The original application was defective, and the further application of the 11th September 1888 was barred. An application to execute a decree, if admitted, and order for execution made under s. 245 should be dealt with on its merits and decided accordingly. ASGAR ALI *v.* TROILOKYA NATH GHOSE . . **I. L. R. 17 Calc. 631**

50. ——— Order absolute for sale— *Civil Procedure Code, 1882, s. 235—Verification of application—Limitation—Transfer of Property Act (IV of 1882), s. 89.* An application for an order absolute for sale of mortgaged property under the provisions of s. 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree, and need not therefore be in the form prescribed by s. 235 of the Code of Civil Procedure. A decree was passed in a mortgage suit on the 13th July 1887 by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295-1304 (1888-1897) in the month of Falgoon (February) each year, and that, on default of three successive instalments, the whole amount was to become at once due and payable. The mortgagor having defaulted in payment of the instalments due in the years 1297, 1298 and 1299 (1890, 1891, and 1892), the mortgagee, on the 18th February 1893, presented an application to the Court under s. 89 of the Transfer of Property Act for an order absolute for sale. That application was not verified by the mortgagee, and the mortgagor objected that, not being so verified as required by s. 235 of the Code, it could not be granted. On the 9th May 1893, the mortgagee applied for and obtained leave to verify the application, which he did on that day. It was urged on behalf of the mortgagor that the application must be treated as made on the 9th May, and therefore not within three years of the date on which the 1297 instalment became due (7th March 1890), and that it was therefore barred by limitation. *Held*, that the application did not require to be in the form provided by s. 235, and consequently the non-verification did not affect it, and that it was not barred by limitation. AJUDHIA PERSHAD *v.* BALDEO SINGH . **I. L. R. 21 Calc. 818**

51. ——— Amendment of execution petition—*Defective application for execution of decree—Civil Procedure Code, 1882, ss. 245 and 647—Amendment of execution petition—Limitation.* One, being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of first instance. *Held*, that, under the circumstances of the case, the amendment should have been allowed to be made. SATTAPPA CHETTI *v.* JOGI SOORAPPA . **I. L. R. 17 Mad. 67**

52. ——— Step in aid of Execution— *Defect in application for execution—Civil Procedure Code, s. 235.* Where there has been in fact an application for execution made by the party entitled to make it, it is to be regarded as a step in aid of execution within the meaning of the Limitation Act, Art. 179, although by mistake a deceased judgment-debtor is named as the person against whom execution is sought. SAMIA PILLAI *v.* CHOCKALINGA CHETTIAR **I. L. R. 17 Mad. 76**

53. ——— Application defective in form—*Decree for performance of particular Acts—Civil Procedure Code, 1882, ss. 235, 260, and 539.* In a suit brought under s. 539 of the Code of Civil Procedure (Act XIV of 1882), a decree was passed appointing the defendants managing trustees of a Hindu temple and laying down certain rules for their guidance in future. The plaintiffs applied for execution of the decree, and filed a darkhast, praying that the defendants be ordered to act as directed by the decree, and that, if they failed to do so, steps be taken according to law. *Held*, that the darkhast was not in accordance with s. 235, cl. (*j*), or s. 260 of the Code, as it did not specify the mode in which the assistance of the Court was sought. KARAMCHAND GOKALDAS *v.* GHELABHAI CHAKALDAS . **I. L. R. 19 Bom. 34**

54. ——— Claim for mesne profits— *Civil Procedure Code, s. 583—Claim for mesne profits on reversal of executed decree for possession of land.* A decree for possession of immoveable property, having been executed, was reversed on appeal. The defendant applied under s. 58 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower Courts dismissed the application on the ground that the proper remedy was by suit. *Held*, that the defendant was entitled to the relief claimed. KALIANASUNDRAM *v.* EGNAVEDESWARA . . **I. L. R. 11 Mad. 261**

55. ——— *Civil Procedure Code, 1882, s. 583—Execution, power of Court to*

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EXECUTION OF DECREE—*contd.*

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award restitution of benefits on reversal of decree in—Jurisdiction of Court not limited in execution. The procedure provided by s. 583 of the Civil Procedure Code (Act XIV of 1882) for obtaining any benefit (by way of restitution or otherwise) under a decree passed on appeal is not confined to cases where the restitution desired is provided for by the decree itself. The plaintiff brought a suit for the recovery of certain timber or damages for its removal, and got a decree. The defendant appealed, and was ultimately successful in getting the plaintiff's suit dismissed, but meanwhile the timber had been taken in execution of the decree and sold. The defendant applied to the original Subordinate Judge's Court in execution of the High Court decree for restitution of the timber or R13,325 damages. The plaintiff objected that the defendant must bring a suit, and could not make this claim in execution. The Subordinate Judge overruled this objection, but held that he was limited to a grant of R5,000, the pecuniary limit to his original jurisdiction, and awarded the defendant that sum for his timber. *Held*, the matter was rightly dealt with in execution, and that the jurisdiction of the original Court in execution was neither ousted by the fact that the value of the property in dispute exceeded the pecuniary limits of the Court's jurisdiction, nor was such Court limited in its award to the sum of R5,000. BALVANTRAV OZE *v.* SADRUDIN

I. L. R. 13 Bom. 485

56. ——— Decree for enforcement of hypothecation—*Objection by judgment-debtor that property ordered to be sold is not transferable under N.-W. P. Rent Act, s. 9—Such objection not entertainable in execution.* In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable with reference to s. 9 of the N.-W. P Rent Act cannot be entertained. MADHO LAL *v.* KATWARI

I. L. R. 10 All. 130

BISHESHER RAI *v.* SUKHDEO RAI

I. L. R. 10 All. 132 note

57. ——— Decree for redemption within a specified time—*Appeal against decree—Power of Court in execution to extend time for redemption allowed by decree—Ground for enlarging time.* The plaintiffs sued for the redemption of certain mortgaged property. On the 1st March 1886, a decree was passed declaring the plaintiffs entitled to redeem on payment by them to the defendants of R649-11-0 within three months from the date of the decree. Against this decree the defendants (the mortgagees) appealed on the ground that a much larger sum than R649-11-0 was due to them on the mortgage. The plaintiffs also filed objections to this decree under s. 561 of the Civil Procedure Code (XIV of 1882) on the ground that the mortgage-debt had been long ago paid off, and that now a large sum was due to them from the mortgagees who had been in receipt of the profits of the property. Under these circumstances, the plaintiffs did not pay the R649-11-0 within three months as ordered by the decree. On the 12th October 1886, they presented an application for execution, and paid into Court the R649-11-0. The lower Court granted their application, and ordered possession of the property to be given to them. The defendants appealed to the High Court. *Held*, reversing the order of the Court below, that the Court in executing the decree had no power to alter the language of the decree, which it would virtually do if it enlarged the time mentioned in it by accepting the R649-11-0 paid into Court by the plaintiffs on the 12th October 1886. *Held*, also, that, even if the Court had power to enlarge the time in the course of execution, the mere fact that the plaintiff had lodged an appeal would afford no special ground for enlarging the time. ISHWARGAR *v.* CHUDASAMA MANABHAI

I. L. R. 13 Bom. 106

58. ——— Execution in terms of decree—*No modification of decree allowed in execution—Husband and wife—Maintenance—Practice—Procedure.* Where a decree in unconditional terms ordered maintenance to be paid by a husband to a wife: *Held*, that, on an application by her for execution of the decree, an objection by the husband that she had by her conduct forfeited her right to maintenance could not be entertained. Neither party could in execution go behind the decree or add a condition which it did not contain. No modification of a decree can be allowed in execution thereof on grounds not recognised in the decree itself as giving a right to such modification; and the same rule must apply whether the modification is claimed in applying for or in resisting execution. RANMALSANGJI BHAGWATSANGJI *v.* BAI SHRI KUNDANKUWAR (1902) . . **I. L. R. 26 Bom. 707**

59. ——— Limitation—*Civil Procedure Code, s. 230—Transfer of Property Act (IV of 1882), ss. 88 and 90. Held*, that a decree, which is a combination of a decree for sale on a mortgage under s. 88 of the Transfer of Property Act, 1882, with the decree provided for by s. 90 of the same Act, cannot be treated as a decree for money to which the provisions of s. 230 of the Code of Civil Procedure are applicable. *Jogul Kishore* v. *Cheda Lal, All. Weekly Notes (1893) 184*, followed. *Ram Charan Bhagat* v. *Sheobarat Rai, I. L. R. 16 All. 418*, and *Kartick Nath Pandey* v. *Juggernath Ram Marwari, I. L. R. 27 Calc. 285*, referred to in the judgment of AIKMAN, *J.* JADU NATH PRASAD *v.* JAGMOHAN DAS (1903)

I. L. R. 25 All. 541

60. ——— Refund—*Civil Procedure Code (Act XIV of 1882), s. 583—Jurisdiction—Refund, application for.* A mortgagee, in execution of a money decree, purchased 2 annas out of 8 annas of certain property mortgaged to him. He subse-

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EXECUTION OF DECREE—*contd.*

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quently obtained a mortgage decree, and in execution the Subordinate Judge passed an order for the sale of the 8 annas. On appeal, the District Judge directed that only 4 annas of the property should be sold. On second appeal, the High Court held that execution should have been issued after deducting an amount proportionate to the value of the 2 annas share previously purchased by the mortgagee. In the meantime, the 4 annas share had been sold as directed by the District Judge. The judgment-debtors thereupon applied to the Subordinate Judge for a refund to them of the proportionate value of the 2 annas share. *Held*, that the application fell properly within s. 583, Civil Procedure Code, and should have been made not before the Subordinate Judge, but before the District Judge who had "passed the order against which the appeal was preferred." KHEM NARAIN CHOWDHURY *v.* GANESHO KUAR (1899) . **5 C. W. N. 287**

61. ——— **"Application in accordance with law"**—*Limitation Act (XV of 1877), Sch. II, Art. 179—Application by guardian on behalf of one found to be a major at the time—Jurisdiction of Court to review its own order, when an appeal lay.* An application for execution made by *A* as guardian on behalf of *B*, who was a major at the time the application was made, is not an "application in accordance with law" within the meaning of Art. 179, Sch. II of the Limitation Act, and will not operate as a bar to limitation, though it may perhaps be a good application for other purposes. *Taqui Jan* v. *Obaidulla, I. L. R. 21 Calc. 866*, distinguished. Neither can such an application be considered an application by *B* under s. 235 of the Code of Civil Procedure. A Court can review its own order in execution, although an appeal might have been, but was not preferred. SARAMMA *v.* SESHAYYA (1905) . **I. L. R. 28. Mad. 396**

62. ——— **Set-off**—*Civil Procedure Code (Act XIV of 1882), s. 244—Execution of decree passed on usufructuary mortgage—Continuation of possession by mortgagees subsequently to decree—Claim to set off profits thus accrued from decree amount—Application for order absolute—Transfer of Property Act (IV of 1882), s. 89.* By a decree passed on a compromise in a suit for the amount due under a mortgage, defendants were ordered to pay R770 to plaintiffs within a year, and in default of payment the amount was to be recovered by sale of the mortgaged and other property. By the terms of the mortgage, possession was given in lieu of interest, but the decree was silent as to possession and interest. Upon an application being made for execution of the decree by sale of the property referred to in it, the District Judge held that, if the petitioners had continued in possession of the mortgaged property ever since the date of the decree, it would be necessary to take an account to ascertain whether the decree had been satisfied, and dismissed the petition. *Held*, that such an order was wrong, inasmuch as it went behind the decree, instead of executing it. *Held*, also, that the application, in which the decree-holder stated that there had been default in payment of the decree amount and applied for sale, was an application for an order absolute for sale. APPA RAO *v.* KRISHNA AYYANGAR (1901) . . **I. L. R. 25 Mad. 537**

63. ——— **Limitation**—*Limitation Act (XV of 1877), Sch. II, Art. 178—Obstruction to execution—Removal by decision in favour of decree-holder—Decree-holder's right to move the Court—Application to be regarded as a continuation of previous application.* A mortgage decree was obtained against the counter-petitioner on 28th February 1894. On 16th May 1895, the decree-holder assigned the decree to petitioner, who applied for execution on 6th December 1897. That application was struck off, and so was one which followed it. On 15th June 1898, petitioner again applied for execution, but counter-petitioner contended that the assignment was for his benefit and that, in consequence, petitioner was not entitled to execute the decree. The District Munsif held an enquiry under s. 232 of the Civil Procedure Code and dismissed the application, being of opinion that counter-petitioner's contention was true. Petitioner thereupon brought a suit to establish her claim that the assignment was for her own benefit. On 20th February 1901, the Appellate Court declared that petitioner had obtained a valid assignment of the decree and was entitled to execute it. On 24th November 1902, petitioner filed the present execution petition. On the question of limitation being raised :—*Held*, that the petitioner's right to execute the decree was not barred by limitation on 24th November 1902. The application should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed, as a competent Court has declared. Article 178 was therefore, applicable, and time had begun to run from the date of the appellate decree declaring petitioner's right to execute, dated 20th February 1901. *Narayana Nambi* v. *Pappi Brahmani, I. L. R. 10 Mad. 22* overruled. SUPPA REDDIAR *v.* AVUDAI AMMAL (1905) **I. L. R. 28 Mad. 50**

64. ——— *Limitation Act (XV of 1877), Sch. II, Art. 179—Mortgage—Decree for redemption—Extension of time for payment of the mortgage amount—Execution.* In a suit for redemption of the mortgage property the decree directed that upon payment of the mortgage amount within six months from its date the decree-holder should take possession of the mortgage property. The decree was affirmed on appeal on the 6th November 1896. The decree-holder failed to pay the amount within the time fixed in the decree. The present application was made on the 15th October 1902 to the Court to have the time extend-

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EXECUTION OF DECREE—*contd.*

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ed for three months. The decree-holder's last application to execute the decree was made on the 21st April 1897. *Held*, that the application was barred by limitation. Notwithstanding that time is granted to a mortgagor for payment, a decree for redemption such as that in the present case should be taken to be executable from the passing of the decree and is therefore governed by Art. 179, Sch. II of the Limitation Act. *Rungiah Goundan* v. *Nanjapya Row, I. L. R. 26 Mad. 780*, approved. ETYATI POOPARAMBIL BAVA *v.* MATALAKAT KRISHNA MENON (1905) . **I. L. R. 28 Mad. 211**

65. ———— Res judicata—*Effect of non-appearance, when notice silent as to relief claimed —Final decision.* *A* applied in execution for restitution of money with interest thereon paid to *B* under a decree, which was subsequently reversed. The notice to *B* did not specify the nature of the claim and an *ex parte* order allowing the claim was made. The application, however, was dismissed for default in payment of process fees and *A* subsequently put in a similar application. *B* appeared and objected to the interest claimed which was 12 per cent. The Subordinate Judge allowed the interest, which, however on appeal to the District Court, was reduced to 6 per cent. On appeal to the High Court: *Held*, that the order of the Subordinate Judge allowing interest was a final order, as it dealt with the only question at issue and did not contemplate a further order, and that the appeal to the District Judge was not premature. *Venkatagiri Ayyar* v. *Sadagopachariar* (Appeal No. 69 of 1900, and Civil Miscellaneous Appeals Nos. 105 and 109 of 1902, unreported), distinguished. *Held*, also, that, as the notice to *B* was silent as to the nature of the claim, the first order granting *A's* application *ex parte* had not the force of *res judicata* so as to estop *B* from disputing the claim in subsequent proceedings. Knowledge of the nature of the claim can be presumed only when the application is for execution of a decree or order directing a thing to be done. *Sheik Budan* v. *Ramchandra Bhunjgaya, I. L. R. 11 Bom. 537*, and *Vappakandu Maracayan* v. *Hamid Beevi Ammal, Civil Miscellaneous Appeal No. 25 of 1903, unreported*, referred to. NARAYANA PATTAR *v.* GOPALAKRISHNA PATTAR (1905) **I. L. R. 28 Mad. 355**

66. ———— Dismissal for default—*Execution—Mesne profits, application for assessment of—Fresh application—Limitation.* Where more than 30 days after an application for ascertainment of mesne profits was dismissed for default, a fresh application was made for that purpose: *Held*, that the application was not barred. There is no substantial distinction between an order striking off an application and one dismissing it for default. UPENDRA CHANDRA SINGH *v.* SAKHI CHAND (1907) . . . **12 C. W. N. 3**

EXECUTION OF DECREE—*contd.*

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67. ———— Decrees for separate sums —*Civil Procedure Code (Act XIV of 1882) s. 232, cl. (b)—Decree directing separate amounts with separate sets of proportionate costs to be recovered against defendants—Transfer of the decree in writing to one of the defendants—Application by the transferee to recover the amount due by the other defendant.* A decree directed that a certain sum with proportionate costs be recovered against *N* and a certain other sum with proportionate costs be recovered against *A*. Subsequently *A* took a transfer of the decree in writing and applied for execution of the decree against *N* to the extent of the sum decreed against him. The application having been rejected under s. 232, cl. (*b*), of the Civil Procedure Code (Act XIV of 1882): *Held*, reversing the order, that s. 232, cl. (*b*), of the Civil Procedure Code (Act XIV of 1882), was not applicable. Though the direction against *N* and the separate direction against *A* were contained on one and the same piece of paper and were passed in the same suit, still for all that they were decrees for separate sums of money and might equally well have been passed in separate suits. The fact of their being on one piece of paper cannot control the matter. ANANT VINAYAK *v.* NAGAPPA SUBRAYA (1907) **I. L. R. 32 Bom. 195**

68. ———— Refund of money realized in execution of a decree afterwards reversed in appeal—*Limitation—Execution of decree stayed by injunction—Procedure.* On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount R19,041. The decree was set aside on the 9th July 1904. The suit was retried; and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realised by the plaintiffs and the sum finally decreed. *Held*, (i) that the plaintiffs were at liberty to proceed either by application or by suit: *Shaman Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhry, 10 Moo. I. A. 203; Collector of Meerut* v. *Kalka Prasad, I. L. R. 289 All. 665*, and *Shiam Sundar Lal* v. *Kaisar Zamani Begam, I. L. R. 29 All. 143*, referred to; and (ii) that the application was not barred by limitation. *Harish Chandra Shaha* v. *Chandra Mohan Das, I. L. R. 28 Calc. 113*, distinguished. BITHAL DAS *v.* JAMNA PRASAD (1908) **I. L. R. 30 All. 476**

69. ———— Shebaits—*Claims to attached property by shebaits—Civil Procedure Code (Act*

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EXECUTION OF DECREE—*contd.*

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XIV of 1882), ss. 244, 278. Judgment-debtors, in their capacity as *shebaits,* can maintain an application under s. 244 of the Code of Civil Procedure and get an adjudication of the question raised by them. Where judgment-debtors make applications both under s. 244 and s. 278, they do not lose any rights *qua* their application under s. 244 because of their mistake in applying under s. 278 of the Code of Civil Procedure. *Punchanun Bundopadhya* v. *Rubia Bibi, I. L. R. 17 Calc. 711,* referred to. JOGENDRA NATH SARKAR *v.* GOBINDA CHANDRA DUTT (1908) . **I. L. R. 35 Calc. 364**

70. ———— **Redemption or foreclosure** —*Decree—Civil Procedure Code Act (XIV of 1882), s. 244—Transfer of Property Act (IV of 1882), s. 93.* An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution. Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree. *Ajudhia Pershad* v. *Boldeo Singh, 21 Calc. 818,* and *Nandram* v. *Babaji, I. L. R. 22 Bom. 771,* followed. SIR JEHANGIR COWASJI *v.* THE HOPE MILLS, LIMITED (1908) . . **I. L. R. 33 Bom. 273**

71. ———— **Fraud**—*Execution, application for—Limitation—Execution sale set aside for fraud of decree-holder—Fresh application for execution if a continuation of previous proceeding.* Where on a sale in execution of a decree being set aside on the ground of fraud on the part of the decree-holder, he again applies for execution, such application ought to be treated as a continuation of the previous execution proceeding. ABDUL KHAYAR ABDUL HUQ CHOWDHURY *v.* REAJUDDIN AHMED CHOWDHURY (1909) . **13 C. W. N. 521**

72. ———— *Civil Procedure Code (Act XIV of 1882), s. 230—Money decree—Application to execute after expiry of 12 years—Fraudulent conduct of judgment-debtor delaying execution—Frivolous application under s. 108, Civil Procedure Code—Discretion of Court.* Where pending execution of a money-decree, the judgment-debtor made a frivolous application to set it aside under s. 108, Civil Procedure Code, with a view to delay the execution proceedings: *Held,* that the conduct of the judgment-debtor was fraudulent within the meaning of the final clause of s. 230, Civil Procedure Code. The Court to which an application to execute a money-decree is made more than 12 years after the date of the decree should exercise a sound discretion in deciding whether the execution should proceed or not. If the Court should find on evidence that the decree-holder had been diligent in proceeding with the execution from the date that the decree was passed, and that the judgment-debtor's conduct was such that it caused unnecessary delay in levying execution, he or she having acted fraudulently or used force, the Court ought to allow execution. SHAM KISSEN *v.* DAMAR KUMARI DEBI (1906) . . **11 C. W. N. 440**

73. ———— **Jurisdiction**—*Limitation Act (XV of 1877), Sch. II, Arts. 173A, 179—Application in accordance with law—Civil Procedure Code (Act XIV of 1882), ss. 2, 223, 258, 649—Where a Court passes a decree for sale of property and the place where such property is situate, is transferred to the jurisdiction of another Court, former Court may still execute decree—Application made to such Court to transfer decree to the latter will save limitation-bar —Representative of judgment-debtor is judgment-debtor within the meaning of s. 258 and must certify adjustment within time fixed by Art. 173A of Sch. II of the Limitation Act.* The Court at *C* passed a decree for the sale of certain immoveable property. Subsequently the territory where such property was situate was transferred to the jurisdiction of Court *D.* The decree-holder applied to the Court at *C* to transfer his decree for execution to the Court at *D.* The decree was transferred and in execution, the purchaser of the equity of redemption from the judgment-debtor who was made a party to the execution proceedings pleaded that the application for execution was barred by limitation, and he also set up an adjustment between the judgment-debtor and the decree-holder made more than 90 days previously which was not certified to the Court. The question arose whether the application to the Court at *C* for transfer was an 'application in accordance with Law' within Art. 179 of Sch. II to the Limitation Act, and where the purchaser from the judgment-debtor could plead the uncertified adjustment:—*Held,* that the Court at *C* did not, within the meaning of s. 649 of the Code of Civil Procedure, cease to exist or to have jurisdiction to execute the decree on the transfer of territory from its jurisdiction, as such transfer did not take away the jurisdiction which it had to execute its own decree under s. 223 of the Code of Civil Procedure, and the Court at *D* consequently acquired no jurisdiction to execute the decree under s. 649, which could only arise, if the Court at *C* either ceased to exist or to have jurisdiction to execute the decree. The Court at *C* was, therefore, the Court to which the decree-holder was bound to apply under s. 223 of the Code of Civil Procedure, and his application saved the bar of limitation under Art. 179 of Sch. II of the Limitation Act. *Held,* also, that the provision of s. 258 of the Code of Civil Procedure applied not only to judgment-debtors, but to those claiming through them or in their right, and that an adjust-

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ment between the decree-holder and the judgment-debtor not certified within 90 days was barred under Art. 173 (A) of Sch. II of the Limitation Act, and cannot be set up as a bar to execution by one claiming through the judgment-debtor or in his right. PANDURANGA MUDALIAR *v.* VYTHILINGA REDDI (1907) . . . **I. L. R. 30 Mad. 537**

74. ——— Against karnavan—*Civil Procedure Code (Act XIV of 1882), ss. 244, 278—Application in execution of decree against karnavan by a member of the tarwad.* Where a decree is passed against the karnavan of a tarwad in his representative capacity, all the members of the tarwad must be held to be parties to the suit and such members in execution proceedings must proceed under s. 244 of the Civil Procedure Code and not under s. 278. MARIVITTIL MATHU AMMA *v.* PATHRAM KUNNOT CHERUKOT (1906) . . **I. L. R. 30 Mad. 215**

75. ——— Against company in liquidation—*Companies Act (VI of 1882), s. 136—Execution of decree against company in liquidation not to be prevented without making due provision for the right of judgment-creditor—Judgment-creditor attaching decree against company must be allowed to prove in the name of the decree-holder in liquidation.* It will not be equitable for Courts to prevent judgment-creditors under s. 136 of the Companies Act from executing decrees against a company in liquidation without seeing that such judgment-creditor's rights are respected in liquidation. *Klanber* v. *Weill, 17 Times L. R. 344,* referred to. Where *A* in execution of a decree against *B* attaches under s. 273 of the Code of Civil Procedure a decree which *B* holds against a company in liquidation, the Court will direct the liquidator to recognise *A* as the representative of *B* and allow him to prove for the decree debt in the name of *B*, and to receive and apply dividends payable to *B* in satisfaction of *A*'s judgment-debt subject to the rights of other attaching creditors to rateable distribution. SESHA AYYAR *v.* THE TINNEVELLY SARANGAPANY SUGAR MILL COMPANY (LIMITED) (1907) **I. L. R. 30 Mad. 533**

76. ——— Decree for sale and personal decree—*Transfer of Property Act (IV of 1882), ss. 88 and 90—Decree to be executed a combination of a decree for sale and a personal decree.* Where a decree in a suit for sale of hypothecated property is both a decree for sale of the property under s. 88 and a personal decree under s. 90 of the Transfer of Property Act, 1882, there is no need for the decree-holder to apply for a separate decree under s. 90, and if he does so and his application is rejected, this will not operate as a bar into his executing the decree against the judgment-debtor personally. SADHO SINGH *v.* THE MAHARAJA OF BENARES (1906) **I. L. R. 29 All. 12**

EXECUTION OF DECREE—*contd.*

4. ORDERS AND DECREES OF PRIVY COUNCIL.

1. ——— Powers of legislature—*Limitation affecting Privy Council decrees.* The Legislature of this country has no power to pass any law limiting the period during which decrees of Her Majesty in Council may be executed. ANANDAMAYI DASI *v.* PURNA CHANDRA RAI **B. L. R. Sup. Vol. 506 : 6 W. R. Mis. 69**

2. ——— Order or declaration of Privy Council—*Mode of application for execution—Act II of 1863, s. 14.* A party in a suit, desirous of executing an order or judgment of Her Majesty in Council, ought to apply, in conformity with s. 14, Act II of 1863, to the Court from which the appeal was finally brought to the Queen in Council, to enforce and execute the decree of Her Majesty in Council; and it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried. A declaration of Her Majesty in Council must not be considered as not being equivalent to an order. When Her Majesty in Council does make a declaration, the form in which the declaration is conceived and the words in which that order is framed amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed. If any difficulty should arise in that form, or be sought to be produced from having recourse to that non-existent ground of objection, the Privy Council will not fail to recommend Her Majesty to deal with such obstructiveness in the most serious and strongest manner. *In re* BARLOW *v.* ORDE . . . **18 W. R. 175**

3. ——— Decree affirmed by Privy Council. Decrees affirmed by an order of the Privy Council must be executed with the execution of that order, and not as separate decrees. LETHBRIDGE *v.* PROHLAD SEN . . **19 W. R. 301**

4. ——— *Order of Privy Council—Civil Procedure Code, Act X of 1877, s. 610—Procedure.* Before a decree-holder in the District Court can obtain execution of a decree which has been affirmed by the Privy Council, he must produce, on the application for execution, a certified copy of the order passed by Her Majesty in Council. *Joy Narain Giree* v. *Goluck Chunder Mytee, 20 W. R. 444,* followed. JUGGERNATH SAHOO *v.* JUDOO ROY SINGH **I. L. R. 5 Calc. 329 : 4 C. L. R. 387**

5. ——— Application for execution of decree of Privy Council—*Civil Procedure Code, Act X of 1887, s. 610—Transmission for execution of order of Her Majesty in Council—Evidence of such order.* The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to

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the Courts in India. Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy :—*Held*, that a copy, though not certified by him, might accompany a petition for execution under s. 610. HURRISH CHUNDER CHOWDHRY *v.* KALISUNDARI DEBI . **I. L. R. 9 Calc. 482 : 12 C. L. R. 511**

6. ——— *Application to Zillah Courts.* Zillah Courts ought to refer to the High Court parties applying for execution of decrees which have been appealed to England. HUBEEBOOLLAH KHAN *v.* GOWHER ALY KHAN **7 W. R. 225**

7. ——— *Act VI of 1874, s. 19.* Where application for execution of an order of Her Majesty in Council has been made elsewhere than in the High Court, the proceedings are invalid. JOY NARAIN GIREE *v.* GOLUCK CHUNDER MYTEE **22 W. R. 102**

8. ——— **Order of Privy Council disturbing possession**—*Decree of High Court—Final decree, possession under.* On appeal by *U*, the High Court set aside a decree which the sons of *K* had obtained in the Court of first instance against *U* and certain other persons, in a suit brought by them for possession of one-third of certain real property. At the same time, on appeal by two of the other persons aforesaid, it affirmed a decree which *U* had obtained against these persons and the sons of *K* for possession of two-thirds of the same property, in a suit in which he had claimed possession of the whole. It subsequently, on appeal by *U* against that portion of the decree made in the suit brought by him which dismissed his claim in respect to one-third of the property, reversed that portion and gave him a decree for the whole. The sons of *K* appealed to Her Majesty in Council only from the decree of the High Court setting aside the decree obtained by them in the Court of first instance for one-third of the property. Her Majesty in Council set aside this decree of the High Court, and restored the decree of the Court of first instance. In the meantime *U* was put into possession of the whole property in execution of the decree of the High Court which he had obtained in the suit brought by him. When the sons of *K*, in execution of the decree of Her Majesty in Council, applied for possession of one-third of the property, *U* opposed the application on the ground that he was in possession under a decree of the High Court which had become final. *Held*, by a Full Bench of the High Court, that the decree of Her Majesty in Council must be executed, notwithstanding that its execution involved the disturbance of the possession obtained by *U* under the decree of the High Court, which had become final. UDAI SINGH *v.* BHARAT SINGH **I. L. R. 1 All. 456**

EXECUTION OF DECREE—*contd.*

4. ORDERS AND DECREES OF PRIVY COUNCIL—*contd.*

9. ——— **Privy Council decree reversing decrees of Courts below where property has been made over**—*Restitution—Mesne profits—Interest.* A plaintiff, having sued for possession and obtained a decree which was affirmed in appeal, entered into possession. The mesne profits due as damages from the defendant on account of wrongful dispossession were also calculated and paid into Court. The defendant then appealed to the Privy Council, which reversed the decrees of the lower Courts, and directed the High Court to give effect to its order and declaration in the case. No orders were made by the High Court to this end, and it became the duty of the lower Courts to frame the final decree. The Judge made an order for the restitution of the property, but not an order for repayment of the rents and profits derived therefrom by the plaintiff during his possession. *Held*, that the Judge should have made this order also, and that interest should be paid on the mesne profits according to the rule that parties should be restored, as far as possible, to the same position as they were in when the Court by its erroneous action displaced them from it. HAMIDA *alias* KAJOO *v.* BHUDHAN . **20 W. R. 238**

10. ——— **Execution of order giving effect to judgment of Privy Council**—*Civil Procedure Code, ss. 211, 253, 318—Mesne profits—Cost of receiver and management—Interest on mesne profits—Sureties for execution of decree.* Land was put up for sale and purchased in execution of a decree. The sale was confirmed and the purchaser was put into possession. On appeal against the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of the High Court. While the appeal was pending, he was compelled to deliver up possession of the land, but security was furnished under an order of the Court by persons not being parties to the suit for its re-delivery to him and for the payment of mesne profits in the event of his appeal being successful. Meanwhile the land in question was placed in charge of a receiver on the motion of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land, and he applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of first instance dismissed the application as against the sureties, and limited the applicant's claim against the others to the net income of the land, less the cost of management by the receiver, and allowed him no interest. *Held*, (i) although the appeals to the High Court and the Privy Council related to the order confirming the sale, and not to that by which possession was awarded, and the order in Council did not direct payment of mesne profits, yet such payment was within its purview as

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EXECUTION OF DECREE—*contd.*

4. ORDERS AND DECREES OF PRIVY COUNCIL—*contd.*

being a benefit by way of restitution fairly and reasonably consequential upon it—*Rodger* v. *Comptoir D'Escompte de Paris, L. R. 3 P. C. 465,* followed; (ii) the application was rightly dismissed against the sureties; (iii) the charges involved by the appointment of the receiver should have not been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management; (iv) interest at 6 per cent. should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment. ARUNACHELLAM *v.* ARUNACHELLAM . . . **I. L. R. 15 Mad. 203**

11. ——— Decree of Privy Council for costs—Rate of exchange—*Civil Procedure Code, s. 610—Execution for costs—Meaning of "for the time being."* Under the last paragraph of s. 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed. The decree-holders under a decree passed by Her Majesty in Council having taken out execution for a sum of £119-11 under s. 10 of the Civil Procedure Code:—*Held,* that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to. PARAM SUKH *v.* RAM DAYAL **I. L. R. 8 All. 650**

12. ——— *Rate of exchange—Civil Procedure Code, 1882, s. 610—Meaning of "for the time being."* Under s. 610 of the Code of Civil Procedure, the amount payable must be calculated at the rate of exchange for the time being fixed by the Secretary of State for India in Council, and the words "for the time being" have reference only to the time at which the order of the Privy Council was passed, and not to the time at which execution was taken out. *Paransukh* v. *Ram Dayal, I. L. R. 8 All. 650,* dissented from. Where interest on costs is not allowed in the order of Her Majesty in Council, such interest cannot be given by any Court in this country. *Forester* v. *Secretary of State for India, I. L. R. 3 Calc. 161 : L. R. 4 I. A. 137,* referred to. DAKHINA MOHAN ROY CHOWDHRY *v.* SARODA MOHAN ROY CHOWDHRY . . . **I. L. R. 23 Calc. 357**

13. ——— *Decree for costs—Rate of Exchange.* In converting into Indian currency the amount of costs expressed in sterling in an order of Her Majesty in Council, the rate of exchange is the rate which prevailed at the time when the order was made. *Dakhina Mohun Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry, I. L. R. 23 Calc. 357,* followed. MAHOMAD ABDUL HYE *v.* GAJRAJ SAHAI . **I. L. R. 25 Calc. 283 2 C. W. N. 89**

EXECUTION OF DECREE—*contd.*

4. ORDERS AND DECREES OF PRIVY COUNCIL—*concld.*

14. ——— Reversal of decree by High Court and confirmation of original decree by Privy Council—*Appeal by some only of defendants.* On the 27th July 1864, a District Court gave the plaintiff a decree in a suit against all the defendants. All the defendants except one, *B,* appealed to the Sudder Court from that decree, and on the 6th March 1865 the Sudder Court set aside the decree and dismissed the suit; the plaintiff appealed to Her Majesty in Council, all the defendants except *B* being respondents. On the 17th March 1869, Her Majesty in Council reversed the Sudder Court's decree, and restored that of the District Court. *Held,* that, notwithstanding *B* was not a party to the appeals to the Sudder Court and to Her Majesty in Council, the decree was a valid decree and could be executed against *B.* KISHEN SAHAI *v.* COLLECTOR OF ALLAHABAD **I. L. R. 4 All. 137**

15. ——— Transfer of decree for execution—*Territorial jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 223, 610, 649.* The effect of ss. 610 and 649 of the Civil Procedure Code is that the Court which formerly had, but now no longer has, territorial jurisdiction, ought, when the decree is sent to it, to exercise, by its own motion or when applied for, the provisions of s. 223 of the Civil Procedure Code, and transfer the decree for execution to the Court which has territorial jurisdiction. GIRINDRO CHUNDER ROY *v.* JARAWA KUMARI **I. L. R. 20 Calc. 105**

16. ——— Erroneous order, effect of—*Application to receive and file order for purpose of execution—Civil Procedure Code, s. 610, function of Court under—Receiver, lien of, on estate—Alteration or amendment of decree.* On receiving and filing, under s. 610 of the Civil Procedure Code, an order of Her Majesty in Council made on appeal from an order or decree of the Court of original instance, the latter Court performs a function which is purely ministerial. *Pitts* v. *La Fontaine, L. R. 6 App. Cas. 482,* referred to. The effect of the order, however erroneous, on the suit itself cannot be discussed on an application of this nature. A receiver, however, who is divested by such order has a lien on the estate for his claims and allowances. *Bertrand* v. *Davies, 31 Beav. 429 ; Fraser* v. *Burgess, 13 Moo. P. C. 314,* and *Batten* v. *Wedgewood Coal & Iron Co., L. R. 28 Ch. D. 317,* followed. *Semble :* The proper course for the party aggrieved by the order is to apply to Her Majesty in Council to make the necessary alteration or modification in such order. PREMLALL MULLICK *v.* SUMBHOONATH ROY **I. L. R. 22 Calc. 960**

5. DECREE TO BE EXECUTED AFTER APPEAL OR REVIEW.

1. ——— Decree on appeal or review confirming former decree. Where in a review

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EXECUTION OF DECREE—*contd.*

5. DECREE TO BE EXECUTED AFTER APPEAL OR REVIEW—*contd.*

or appeal proceeding a decree is passed in affirmance of the decree appealed against, the decree of the appellate or reviewing Court is the final decree between the parties, and therefore the decree to be executed. *Bipro Doss Gossain* v. *Chunder Sikur Bhuttacharjee, B. L. R. Sup. Vol. 718 : 7 W. R. 521,* and *Ram Charan Bysack* v. *Lakhikant Bannik, 7 B. L. R. 704 : 16 W. R. (F. B.) 1,* explained. BISTOO PERSHAD CHUCKERBUTTY *v.* ISHAN CHUNDER ROY **23 W. R. 57**

2. ——— **Decree appealed from affirmed without mentioning costs**—*Error in decree of lower Court as to amount of costs. Held* that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts as such may not be referred to and applied by the Court executing such decree. SHOHRAT SINGH *v.* BRIDGMAN . . . **I. L. R. 4 All. 376**

3. ——— *Decree appealed from affirmed without stating amount of costs—Appeal only as to costs.* The defendant in a suit appealed from so much of the decree of the Court of first instance as related to the amount of costs payable by him to the plaintiff. The decree of the Appellate Court directed "that the order of the lower Court be upheld, and the appeal be dismissed : the appellant to pay the costs" *Held,* that the amount of costs awarded by the Court of first instance, although they were not specified in the Appellate Court's decree, were recoverable in execution of that decree, inasmuch as those costs were the subject-matter of the appeal, and the Appellate Court, in affirming the decision of the first Court on that point, made them the substantive portion of its decree. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376,* distinguished. HIMAYAT HUSSAIN *v.* JAI DEBI . . . **I. L. R. 5 All. 589**

4. ——— *Decree appealed from affirmed without stating amount of costs of lower Court.* The original decree in a suit dismissed the suit with costs, which were specified. On appeal the Appellate Court directed that the original decree should be affirmed and the appeal dismissed, and that the appellant should pay the respondent's cost in the Appellate Court, which were specified. The decree of the Appellate Court did not contain any specification of the costs of the original Court. *Held,* that the Court executing the appellate decree might execute it for the costs of the original Court looking to the decree of that Court to ascertain the amount thereof. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376,* referred to. BEHARI LAL *v.* KHUB CHAND **I. L. R. 6 All. 48**

5. ——— **Decree affirming and adopting decree of lower Court**—*Decree to be executed where there has been an appeal.* The effect of the decision of the Full Bench in *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376,* is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies, or confirms ; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the Appellate Court. *Kristo Kinkur Roy* v. *Burrodacaunt Roy, 14 Moo. I. A. 465,* referred to. Where the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower Appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the Appellate Court, by carrying out the mandatory part of the decree of the Court of first instance : *Held,* that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed. GOBARDHAN DAS *v.* GOPAL RAM . . **I. L. R. 7 All. 366**

6. ——— **Decree affirmed on appeal**—*Jurisdiction—Civil Procedure Code, ss. 206, 579.* The effect of s. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. The only Court which has jurisdiction to amend the appellate decree is the Court of Appeal. So *held* by the Full Bench, MAHMOOD, *J.*, dissenting. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376,* explained and followed. *Kristo Kinkur Roy* v. *Raja Burrodacaunt Roy, 14 Moo. I. A. 465,* discussed. MUHAMMAD SULAIMAN KHAN *v.* MUHAMMAD YAR KHAN **I. L. R. 11 All. 267**

7. ——— **Amendment of decree by first Court after affirmance**—*Objection by judgment-debtor to execution of amended decree.* The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed. *Held,* by the Full Bench, that the objection must prevail on the grounds that the decree sought to be executed was not that of the Appellate Court, and that the decree had been

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EXECUTION OF DECREE—*contd.*

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altered by the first Court, which had no power to alter it. *Abdul Hayai Khan* v. *Chunia Kuar, I. L. R. 8 All. 377*, referred to. MUHAMMAD SULAIMAN KHAN *v.* FATIMA **I. L. R. 11 All. 314**

8. ——— Confirmation by High Court of Decree of Lower Court—*Former dismissal of application for execution of original decree—Effect of an application for execution of appellate decree—Res judicata—Limitation.* Where the High Court confirms on appeal the decree of a subordinate Court, such confirmation has the same effect as an order of reversal would have had in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it. On 23rd July 1888, plaintiff obtained a decree for the redemption of certain lands on payment within three months of the amount due to the mortgagee, which was to be ascertained in execution proceedings. Against this decree the defendant appealed to the High Court. Pending the appeal, the plaintiff presented a darkhast for execution on the 4th October 1888. This darkhast was dismissed, as the plaintiff failed to produce a copy of the mortgage bond within the time allowed by the Court. The three months allowed by the decree for payment expired on the 23rd October 1888. On 11th February 1890, the High Court confirmed the decree, and on 11th April 1890 plaintiff presented a fresh darkhast for execution. Both the lower Courts dismissed this darkhast on the ground that the dismissal of the first darkhast operated as *res judicata. Held*, that the plaintiff was entitled to execute the decree, and that his second darkhast was not barred either by limitation or on the principle of *res judicata.* NANCHAND *v.* VITHU . . . **I. L. R. 19 Bom. 258**

9. ——— Decree to be executed where there has been an appeal. Where the Appellate Court has modified the decree of the Court below, the decree of the Appellate Court supersedes entirely that of the lower Court, and is the only decree which can be executed. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376, Gobardhan Das* v. *Gopal Ram, I. L. R. 7 All. 366*, and *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan, I. L. R. 11 All. 267*, referred to. NOURANG RAI *v.* LATIF CHAUDHRI . . . **I. L. R. 13 All. 394**

10. ——— Appeal against part of decree—Decree affirmed in appeal—*Period from which limitation runs after an appeal.* In a suit for the value of goods and for damages, the Court allowed the claim with respect only to a portion of the plaintiff's claim, and rejected the rest. The plaintiffs appealed against the latter part of the decree. The decree was confirmed in appeal. The plaintiffs applied for execution of the decree after the expiration of three years from the date of the original decree, but within three years from the date of the appellate decree. The lower Court rejected the application as time-barred, being of opinion that the original decree still existed, there having been no appeal against that part of the decree which allowed the claim. *Held*, discharging the order of rejection, that when the Appellate Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the Appellate Court, which is thenceforth the only decree to be executed. SAKHALCHAND RIKHAWDAS *v.* VELCHAND GUJAR . . . **I. L. R. 18 Bom. 203**

SHIVLAL KALIDAS *v.* JUMAKLAL NATHIZI DESAI **I. L. R. 18 Bom. 542**

HARKANT SEN *v.* BIRAJ MOHAN ROY **I. L. R. 23 Calc. 876**

11. ——— Appeal against a decree for redemption—*Transfer of Property Act, ss. 92, 93—Time fixed for redemption.* A mortgagor obtained a decree for redemption of his mortgage "within six months from the date of this decree." The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree, but more than six months from the date of the original decree. *Held*, that, though the decree of the Appellate Court became the final decree in the suit, and the only one capable of execution, yet, unless the time for payment of the redemption money has been postponed under s. 93 of the Transfer of Property Act or the decree of the original Court has been modified by an order on the appeal that the redemption money should be paid within six months of the date of the Appellate Court decree, the mortgagor may lose his right of redemption ; the Court, therefore, to which application for execution was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, s. 92. MANAVIKRAMAN *v.* UNNIAPPAN . **I. L. R. 15 Mad. 170**

12. ——— Decree for redemption of mortgage—*Payment of the mortgage amount within three months—Absence of foreclosure clause—Appeal by mortgagee—Payment by mortgagor of the decretal amount after the expiration of three months—Withdrawal of the appeal by mortgagee—Computation of time for execution.* In a redemption suit filed by the plaintiffs (the mortgagors), they obtained a decree on the 1st March 1886, whereby they were directed to pay the defendant (the mortgagee) the sum of R649-11-0 within three months, whereupon they were to get possession of the mortgaged property. The decree contained no clause of foreclosure in the event of non-payment. On the 19th April 1886, the defendants appealed to the High Court against the decree. On the 12th October 1886, long after the expiration of the three months prescribed by the decree, the plaintiff paid R649-11-0 into the lower Court, and applied for execution of the decree. The Court made an order

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EXECUTION OF DECREE—*contd.*

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allowing the payment and granted execution, holding that it had power to extend the time for payment, and that there were good grounds for doing so in this case. The defendants appealed, and the High Court discharged that order on the ground that the Court executing a decree had no power to enlarge the time. On the 15th July 1890, the defendant obtained an order from the High Court permitting him to withdraw his appeal. The plaintiff then presented an application for execution of the original decree, contending that the order for withdrawal of the appeal was equivalent to a decree of the Appellate Court, and that, where there was an appeal, the time prescribed by the original decree ran from the date of the appellate decree. At the date of this application the money which the plaintiff had paid on the 12th October 1886 was still in Court. *Held*, that the withdrawal of the appeal would not afford a fresh starting point, as the withdrawal rendered it unnecessary for any decree to be drawn up, and the only decree which could be executed was that which was passed by the original Court in March 1886. CHUDASAMA MANABHAI MADARSANG *v.* ISHWARGAR BUDHAGAR **I. L. R. 16 Bom. 243**

13. ———— Conditional decree—*Civil Procedure Code, s. 214—Pre-emption—Deposit of purchase money—Computation of time allowed for payment.* In a suit for pre-emption, the decree of the Court of first instance was conditional upon payment of the purchase money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the Appellate Court. *Held*, that the decree of the Appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the Appellate Court's decree, and that payment by the decree-holder within one month from that date was in time. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376; Luchman Prosad Singh* v. *Kisun Prosad Singh, I. L. R. 8 Calc. 218; Gobardhun Das* v. *Gopal Ram, I. L. R. 7 All. 366; Noor Ali Chowdhuri* v. *Koni Meah, I. L. R. 13 Calc. 13,* and *Daulat* v. *Bhukandas Manekchand, I. L. R. 11 Bom. 172,* referred to. RUP CHAND *v.* SHAMSHUL JEHAN **I. L. R. 11 All. 346**

14. ———— Decree of Appellate Court—*Execution of decree for rent and cancelment of lease—Computation of time for payment from "date of decree" under Chota Nagpur Landlord and Tenant Act (Bengal Act I of 1679), s. 88.* A decree under s. 88 of the Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879) provided that, on failure of the defendant (tenant) to pay the amount due under the decree within fifteen days, his lease should be cancelled. An appeal preferred against the decree was dismissed, and the defendant paid the decretal amount within fifteen days of the date of the appellate decree. Some time after, the decree-holder applied for execution of the decree and cancelment of the lease. The application was rejected by the Court below. *Held*, that in a case where the decree of the original Court was not executed pending the appeal to the higher Court, the words "date of the decree" in the latter part of s. 88 of Act I of 1879 ought to be read as the date of the final decree; that the decree of the Appellate Court was the final decree and the only decree capable of execution; and the payment of the decretal amount having been made within fifteen days of that decree, the application for execution was rightly disallowed. *Noor Ali Chowdhuri* v. *Koni Meah, I. L. R. 13 Calc. 13; Daulat* v. *Bhukandas Manekchand, I. L. R. 11 Bom. 172; Rupchand* v. *Shams-ul-Jehan, I. L. R. 11 All. 346,* followed. NAM NARAIN SING *v.* LALA ROGHUNATH SAHAI . **I. L. R. 22 Calc. 467**

15. ———— Execution where appeal is brought—*Copy of decree.* The application to execute the decree of an Appellate Court should be made to the Court which passed the first decree, upon or after the receipt by that Court of the copy of the decree certified by the Appellale Court; but *quære*, whether execution should be allowed to issue upon a certified copy procured by the parties and presented to the Judge by petition. Where the decree to be executed is that of the Zillah Court, and that decree has been affirmed in appeal by the High Court, the party applying for execution should state whether or no a further appeal to the Privy Council has been preferred. TOONDUN SINGH *v.* POKH NARAIN SINGH . . . **14 W. R. 205**

16. ———— Agreement that evidence taken in one of analogous cases should be evidence in all—*Appeal—Effect of reversal on those cases which were unappealable.* When the first of twelve suits against the same defendants was filed in the Recorder's Court at Rangoon, it was agreed between the parties, by their advocates in open Court, that all legal evidence to be taken in the first suit should be evidence in the rest. When the case came on for hearing, the advocate for the plaintiffs consented that the other cases should follow the finding of the Court in the first case, but the advocate for the defendant refused assent. Judgment was given in favour of the plaintiffs, and was also entered up in all the remaining cases. Defendant appealed from these decisions to the High Court, which reversed the Recorder's decision in the first case, and subsequently, without hearing argument, reversed the decision in such (seven) of the eleven as were appealable. *Held*, that the decrees passed by the Recorder's Court in the four unappealed suits were good decrees, on which execution could

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EXECUTION OF DECREE—*contd.*

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be issued in the usual form, provided they were not altered on review. NGA BIKE *v.* SNADDEN **9 W. R. 276**

17. ——— Execution pending appeal —*Landlord and tenant—Enhancement of rent—Decree for enhanced rent, and in default possession to be given—Possession taken pending appeal—Decree confirmed on appeal—Time for complying with decree—Application by defendants to be restored to possession on payment of amount ordered by appellate decree.* On the 13th February 1889, the plaintiffs obtained in the District Court of Satara a decree, on appeal against the defendants, who were their tenants, ordering them to pay R34 as the rent of certain land for the year 1882-83; and R50 a year as rent from the 5th April 1883, on which date the plaintiffs had given them notice of enhancement. In default of payment by the defendants, the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sums which they had paid as rent since the year 1882-83. Both parties appealed to the High Court from this decree. While these appeals were still pending, the plantiffs, on the 13th February 1890, applied for execution of the decree. They prayed for immediate possession and for R334 alleged to be the rent due under the decree, *viz.*, R34 for 1882-83, and R50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and the plaintiffs obtained possession on the 19th February 1890. On the 20th March 1890, the defendants applied to be restored to possession, stating that they had appealed to the High Court against the decree of the District Court, which had fixed their rent at the enhanced rate of R50, and that their appeal was still pending; that the sum of R334 was not due to the plaintiffs, inasmuch as they (the defendants) had continued to pay the rent at the old rate (*viz.*, R34) to the village officers together with the local fund cess R2-2-0, being a total of R36-2-0 for each of the six years. They contended that the plaintiffs were thus entitled only to R83-4-0, and not R334, and they claimed to get back the land on the ground that the plaintiffs had obtained possession on an illegal application. While this application of the 20th March 1890 was still pending, the appeals against the District Court's decree of the 13th February 1889 came on for hearing before the High Court, which confirmed that decree on the 17th July 1890. Thereupon the defendants, on the 1st August 1890, brought into Court R98 (being the difference between the old rent which they had paid and the enhanced rent payable under the confirmed decree), and applied to be restored to possession. On the 6th February 1891, the defendants' application of the 20th March 1890 came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants thereupon appealed

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to the District Court, which reversed that decision, and ordered that possession should be given to the defendants on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, *viz.*, 17th July 1890, and that by their payments made to the village officers and their payment into Court on the 1st August 1890 the defendants had obeyed the decree, and were entitled to be put back into possession. The plaintiffs appealed to the High Court. *Held* (reversing the order of the District Court and restoring that of the Subordinate Judge), that the defendants could not recover possession. The fact that they had appealed to the High Court could not prevent the decree of the District Court from being executed or enlarge the time for payment of the rent as decreed by that Court. No stay of execution was asked for, and all that the Subordinate Judge had to see in February 1890 was whether payment of rent had been made in accordance with the terms of the decree of the District Court made on the 13th February 1889. The defendants had not paid that rent when the plaintiffs executed the decree on the 19th February 1890. The decree was legally executed before the High Court's decree was passed on the 17th July 1890, and that execution could not be afterwards cancelled, because of the High Court's decree. When the decree of the District Court was passed, the defendants should at once have paid to the village officers the balance of the rent due according to that decree, or, on the second appeal to the High Court being made, they should have applied for stay of execution. They followed neither course, and the decree was legally executed. The claim in the plaintiffs' application for execution may have been excessive, but the defendants had never attempted to pay anything beyond the old rent. AMINABI *v.* SIDU . **I. L. R. 17 Bom. 547**

18. ——— Execution of High Court's order for costs—*Procedure applicable to High Court's order in revisional jurisdiction—Civil Procedure Code, 1882, s. 647.* The same procedure that applies to High Court decrees in appellate jurisdiction must also be applied, under s. 647 of the Code of Civil Procedure (XIV of 1882), to the High Court's orders in revisional jurisdiction. Application to execute the latter must be made to the Court which passed the decree against which the revisional application was preferred; and that Court must proceed to execute the decree or order passed on revision, according to the rules prescribed for the execution of its own decrees. GOLD *v.* GOLDENBERG **I. L. R. 16 Bom. 550**

6. DECREES UNDER RENT LAW.

1. ——— Mode of execution—*Sale of property other than that on which arrears are due.* A Collector was held to have acted without juris-

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EXECUTION OF DECREE—*contd.*

6. DECREES UNDER RENT LAW—*contd.*

diction in ordering the sale of an estate in execution of a decree before proceeding against the tenure upon which the arrear accrued. JOKEE LAL *v.* NURSING NARAIN SINGH . . **4 W. R., Act X, 5**

2. ——— Powers of Collector—*Decrees under Act X of 1859.* A Collector had power, under Act X of 1859, to sell, in execution of a decree for the payment of money under the Act, not being money due as arrears of rent of a saleable under-tenure, only such moveable property as was capable of being manually seized, and he could issue process against immoveable property only when recourse could not be had to the person or to the moveable property capable of being manually seized. CHANDRA KANT BHATTACHARJEE *v.* JADUPATI CHATTERJEE
1 B. L. R. A. C. 177 : 10 W. R. 224

3. ——— *Power of Collector.* *A* obtained a decree against *B* for arrears of rent in respect of a saleable tenure. In execution of the decree, the Deputy Collector of Basseerhaut requested the Collector of the 24-Pergunnahs to attach and sell any moveable property belonging to *B*. He accordingly caused "certain houses and buildings and some moveable properties" belonging to *B* to be attached. On an application by *B* to the High Court to set aside the attachment:—*Held*, that the Collector had no jurisdiction to attach the property. The decree could not be executed by the attachment of any immoveable property, except the tenure, before it was shown that satisfaction of the decree could not be obtained by execution against the person or moveable property of the debtor. DESARATULLA *v.* NAZIR ALI KHAN
1 B. L. R. A. C. 216

DEANUTOOLLAH *v.* SIDHEE NAZIR ALI KHAN
10 W. R. 341

4. ——— *Collector, power of—Act X of 1859.* *A* obtained a decree against *B* for arrears of rent. *C* was an under-tenant of *B* under an ijara lease. In executing *A*'s decree against *B*, the Collector sold the "rights and profits of the debts due for rent" from *C* to *B* for the years 1273-4-5. *A* became the purchaser in a suit brought by *D*, as assignee of *A*, of rents alleged to be due for the years 1273-4-5. *Held*, that for the purposes of Act X of 1859 rent is moveable property; and that the Collector, therefore, was competent to sell it in execution of the decree, and to effect the sale to *A*. MAHES CHANDRA CHATTAPADHYA *v.* GURUPRASAD ROY . . **5 B. L. R. 115 : 13 W. R. 401**

5. ——— Transferable tenure—*Bengal Rent Act, 1869, s. 59—Landlord and tenant—Suit for arrears of rent—Ejectment.* The term "under-tenure," as used in s. 59 of Bengal Act VIII of 1869, is not confined to a tenure intermediate between the zamindar and the raiyat, but includes any tenure which, "by title-deeds or by the custom of the country, is transferable by sale;" and therefore a zamindar who has obtained a decree for arrears of rent against a raiyat who has a transferable jote is not entitled to eject the raiyat, but his only remedy is to sell the holding under s. 59 of the Act. *Nund Lall Ghose* v. *Seedee Nazir Ally Khan, S. D. A. 1860, 382,* followed. KRISHTENDRA ROY *v.* AENA BEWA
I. L. R. 8 Calc. 675 : 10 C. L. R. 399

6. ——— *Suit for arrears of rent—Ejectment— Transferable tenure—Beng. Act VIII of 1869, ss. 22, 59.* In a suit for arrears of rent and for ejectment by a landlord against a tenant who had a right of occupancy in the holding transferable by sale,—*Held* (MITTER, *J.*, doubting), that the tenant was not liable to ejectment, and that the landlord's only remedy was to sell the holding under the provisions of s. 59, Act VIII (B.C.) of 1869. *Krishtendra Roy* v. *Aena Bewa, I. L. R. 8 Calc. 675 : 10 C. L. R. 399,* followed. *Per* MITTER, *J.*—*Quære:* whether, having regard to the provisions of s. 22, Act VIII of 1869, which is not controlled or modified by any subsequent section of the Act, all raiyats, whether they have a right of occupancy or not, and whether such right of occupancy be saleable by the custom of the country or not, are not liable to ejectment if an arrear of rent remains due at the end of the year. FAKIR CHAND *v.* FOUZDAR MISSER . **I. L. R. 10 Calc. 547**

7. ——— Sale of under-tenure—*Sale of other immoveable property of judgment-debtor—Beng. Act VIII of 1859, s. 34 and ss. 59-61.* A judgment-creditor, who has obtained a decree for arrears of rent due in respect of an under-tenure transferable by its own title-deeds or by the custom of the country, is not bound to bring that under-tenure to sale in execution before he can proceed against other immoveable property belonging to his judgment-debtor. The case of *Desaratula* v. *Nazir Ali Khan, 1 B. L. R. A. C. 216,* which was decided upon s. 105 of Act X of 1859, is not applicable to ss. 59-61 of Bengal Act VIII of 1869. *Doolar Chand Sahoo* v. *Lall Chabal Chand, 1 C. L. R. 564,* followed. KRISTO RAM ROY *v.* JANOKEE NATH ROY . **I. L. R. 7 Calc. 748 : 9 C. L. R. 324**

8. ——— *Sale for arrears of rent—Under-tenure—Bengal Act VIII of 1896, ss. 34, 59-61, and 65—Sale of property other than under-tenure.* Where a decree had been obtained for arrears of rent of an under-tenure and in execution thereof application was made for the attachment and sale of a certain property of the judgment-debtor, other than the tenure for which the arrears were due, objection was taken that the kabuliat stipulated that the tenure itself should be first sold in execution of the decree. *Held*, that, the kabuliat not being referred to or incorporated with the terms of the decree, it was not open to the judgment-debtor to go behind the decree as to the mode in which it was to be executed. But, *held*, on the construction of Bengal Act VIII of 1869, ss. 59-61 and 65, that the under-tenure should first be sold before any other

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EXECUTION OF DECREE—*contd.*

6. DECREES UNDER RENT LAW—*contd.*

immoveable property should be made available S. 34 of that Act (introducing the procedure laid down in the Civil Procedure Code into rent-suits, "save as in Act VIII of 1869 otherwise provided") made no alteration in this respect, ss. 59-61 and s. 65 specially providing for such mode of execution. LALIT MOHUN ROY *v.* BINODAI DABEE
I. L. R. 14 Calc. 14

9. ——— *Decree for arrears of rent—Under-tenure—Sale of property other than under-tenure—Arrest of judgment-debtor—Charge"—Bengal Tenancy Act (VIII of 1885), s. 65—Transfer of Property Act (IV of 1882), ss. 68, 100.* A landlord who has obtained a decree for arrears of rent of an under-tenure is not restricted by the provisions of the Bengal Tenancy Act (Act VIII of 1885) to executing such decree in the first instance by sale of the under-tenure but is at liberty to execute in the ordinary manner against the person or other property, whether moveable or immoveable, of his judgment-debtor. The provisions of s. 68 of Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section. *Semble:* The "charge" referred to in s. 65 of the Bengal Tenancy Act (VIII of 1885) is not such a "charge" as that defined by s. 100 of the Transfer of Property Act. *Lalit Mohun Roy* v. *Binodai Dabee, I. L. R. 14 Calc. 14,* explained. FOTICK CHUNDER DEY SIRCAR *v.* FOLEY
I. L. R. 15 Calc. 492

10. ——— **First charge on the tenure** —*Execution of rent-decree obtained against a patnidar—Property other than the tenure proceeded against—Bengal Tenancy Act (VIII of 1885), s. 65.* Where a landlord obtains a decree for rent against his tenant, which is on the face of it a decree for a sum of money without creating a charge upon the tenure, he is at liberty in execution to bring to sale property of his judgment-debtor other than the tenure itself. S. 65 of the Bengal Tenancy Act creates a first charge upon the tenure for its rent, and puts the landlord in the position of a first mortgagee so far as the rent is concerned, but the tenant remains personally liable for the rent, so that the landlord has a charge upon the tenure for the rent, and he has a remedy against the tenant personally for the debt to him, and he has therefore a right to avail himself of either of these remedies. TARINIPROSAD ROY *v.* NARAYAN KUMARI DEBI
I. L. R. 17 Calc. 301

See, also, SOURENDRA MOHAN TAGORE *v.* SURNOMOYI . . . **I. L. R. 26 Calc. 103**

11. ——— **Effect of partial execution.** Where a decree under ss. 22 and 78, Act X of 1859, for the ejectment of a raiyat from three plots of land was executed against two of the plots:—*Held,* that the pottah was not in force as regards the third plot also. KALEE CHURN BANERJEE *v.* MAHOMED HASHEM . . . **7 W. R. 8**

EXECUTION OF DECREE—*contd.*

6. DECREES UNDER RENT LAW—*contd.*

12. ——— **Subsequent execution against same property in hands of purchaser**—*Beng. Act VIII of 1869, s. 61.* *A,* a judgment-creditor, having obtained two decrees, one for money, the other for the rent of certain tenures, sold his debtor's right and interest in the tenures in execution of his money-decree, and afterwards in execution of his decree for rent again put up for sale the same tenures. At the second sale, *B* became the purchaser of whatever could pass under such sale. *A* subsequently sued and obtained a decree against *B* for arrears of rent that had become due in respect of the said tenure since the last supposed sale to him, and in execution of such last-mentioned decree again attached the tenures. On the intervention of third parties, the tenures were released from attachment. *A* having applied to levy execution on other immoveable properties of *B*: *Held,* that the tenures having been released from attachment, *A* was not entitled, under s. 61 of Bengal Act VIII of 1869, to proceed against the other immoveable property of *B,* it being open to him to show by a regular suit that the tenures were liable to be sold in execution of his decree; and, further, that upon the facts of the case he had disentitled himself to any equitable relief. HURRISH CHUNDER ROY *v.* COLLECTOR OF JESSORE
I. L. R. 3 Calc. 712

13. ——— **Decree for measurement of land**—*Beng. Act VIII of 1869, s. 37.* A decree under s. 37 of Bengal Act VIII of 1869, declaring the plaintiff's right to measure the lands of his tenants, is not capable of execution by a Civil Court, but entitles the plaintiff himself to proceed with the measurement, and, in the event of his being opposed by the tenants, to invoke the aid of the authorities to assist him. HAZARI KHAN *v.* RAMDHONE CHAKI
7 C. L. R. 345

14. ——— **Charge created by payment of arrears of revenue**—*Personal charge—Government revenue—Payment by lambardar of revenue due by co-sharer—N.-W. P. Rent Act XII of 1881, s. 93 (g).* In execution of a decree obtained by a lambardar under s. 93 (*g*) of the North-Western Provinces Rent Act, the decree-holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree and to remove the attachment, the decree-holder pleaded that by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors he had obtained a charge on it, and could bring it to sale to satisfy the decree: *Held,* that a charge of this nature could not be enforced in execution of a decree, which was merely a personal one, for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on

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property or to do more than pass a personal decree, and whose powers in execution were confined to realization from personal and immoveable property of the judgment-debtors. *Nugender Chunder Ghose* v. *Kaminee Dossee, 11 Moo. I. A. 258,* referred to. LACHMAN SINGH *v.* SALIG RAM **I. L. R. 8 All. 384**

7. NOTICE OF EXECUTION.

1. ——— Decree more than a year old—*Civil Procedure Code, 1859, s. 216.* A Court is not competent to execute a decree more than a year old without satisfying itself that a notice has been duly served on the parties against whom execution is applied for. RAJ BULLUB SHAHA *v.* GOSSAIN DASS SHAHA . . . . **13 W. R. 400**

2. ——— Execution of decree against illegal representative—*Civil Procedure Code, s. 248—Condition precedent.* The issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of a decree against the legal representative of a deceased judgment-debtor. GOPAL CHUNDER CHATTERJEE *v.* GUNAMONI DASI . **I. L. R. 20 Calc. 370**

3. ——— Omission to give notice of execution—*Civil Procedure Code, 1877, s. 248—Death of judgment-debtor after decree—Execution against legal representative.* When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings. A judgment having been obtained by *A* against *B*, and *B* having died before application was made for execution, *A* applied for execution of his decree upon a tabular statement in which the judgment-debtor was stated to be *C*, widow of *B*, and *C* was also described as the person against whom execution was sought. Upon this application the property mentioned in the tabular statement was directed to be attached and sold, and it was accordingly sold in execution and purchased by *A*. No notice under s. 248 of the Civil Procedure Code had been served upon *C* before issue of execution. *Held*, that the application was improper; that the order for attachment and sale should not have been made; and that the Court which made it should have set the execution aside as soon as it became aware that no notice had issued previous to its issue. The fact of there being in the Code of Civil Procedure no section expressly authorizing a Court to set aside its proceedings is immaterial, as every Court has an inherent right to see that its process is not abused or does not irregularly issue, and may set aside all irregular proceedings as a matter of course, provided that the interests of third parties are not affected. *Semble:* Under s. 248, the fact that application to execute the decree had been made in the lifetime of *B* would make no difference, unless an order had been made and the property actually attached under it; as whenever an application is made for execution against a legal representative of the judgment-debtor, the notice required by the section must be issued to him, unless the Court has already ordered execution to issue against him on a previous application. *In the matter of the petition of* RAMESUREE DASSEE *v.* DOORGADASS CHATTERJI **I. L. R. 6 Calc. 103 : 7 C. L. R. 85**

IMAMUNNISSA BIBI *v.* LIAKAT HUSSAIN **I. L. R. 3 All. 424**

4. ——— *Civil Procedure Code (Act XIV of 1882), s. 248.—Auction-purchaser.* Where in execution of a decree, for the execution of which a notice to the judgment-debtor was necessary under s. 248 of the Civil Procedure Code, certain moveable property was attached and sold without any such notice having been given: *Held* that the proceedings in execution were void and of no effect, and it made no difference that the auction-purchaser was a third party, and not the decree-holder. *Imamunnissa Bibi* v. *Liakat Hussain, I. L. R. 3 All. 424,* followed. *Ramessuri Dassee* v. *Doorgadass Chatterjee, I. L. R. 6 Calc. 103,* referred to. SAHDEO PANDEY *v.* GHASIRAM GYAWAL . . . **I. L. R. 21 Calc. 19**

5. ——— Application for notice of execution—*Power to proceed in execution on application for notice—Civil Procedure Code, 1859, s. 212.* Although a Judge should, when necessary, direct notices to be served on judgment-debtors, he cannot proceed in execution on a mere application to issue such notices over the parties who are bound to apply under s. 212 of Act VIII of 1859. PURNA CHUNDRA MOOKERJEE *v.* SARADA CHURN ROY . . **3 B. L. R. Ap. 21 : 11 W. R. 241**

6. ——— Presumption of service of notice of execution—*Civil Procedure Code, 1859, s. 216—Omnia præsumuntur rite esse acta.* A notice under s. 216 stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice where required by law to do so. BIMOLA SOONDUREE DASSEE *v.* KALEE KISHEN MOJOOMDAR **22 W. R. 5**

7. ——— Objection to sufficiency of notice of execution—*Time for taking objection.* An objection to the sufficiency of the notice of execution should be taken at the earliest opportunity. REWUT KONWUR *v.* OMRAO BAHADOOR SINGH . . . . . **21 W. R. 148**

8. ——— "Order passed on previous application for execution"—*Civil Procedure Code, 1859, s. 216—Previous proceedings for execution—Interlocutory suit.* A suit brought by a judgment-creditor against his judgment-debtors and

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a third party may be of such a nature as to count as previous proceedings in execution for the purpose of saving time in regard to the operation of the statute of limitation ; but it cannot in any sense be considered as an " order passed on a previous application for execution " within the meaning of Act VIII of 1859, s. 216. PEAREE SOONDURI DEBIA *v.* BHUBO SOONDURRE DEBIA . . **23 W. R. 32**

9. ——— Service of notice of execution—*Civil Procedure Code, 1859, s. 216—Limitation—Act XIV of 1859, s. 20—Proceeding to enforce decree.* The service of a notice under s. 216 of Act VIII of 1859, if made *bonâ fide* with a view take further proceedings, is sufficient to keep a decree alive. DHIRAJ MAHTAB CHAND BAHADOOR *v.* LAKHI BIBEE . . **6 B. L. R. Ap. 146**

Also under the Limitation Act, 1871. *See* KOONJ BEHAREE LAL *v.* GIRDHARI LAL . **22 W. R. 484**

10. ——— Service of notice of application for execution. Service of notice of application for execution of decree by affixing a copy of it on the wall of the house where defendant was residing, is sufficient. CHILICANY BHASKARARAYENIN GARU *v.* PILLARY SETTY RAGAVALU NAIDU **5 Mad. 100**

See MAKOONDONATH BHADOORY *v.* SHIB CHUNDER BHADOORY . . **19 W. R. 102**

11. ——— *Application for execution—Service of notice on the judgment-debtor after the decree was barred—Limitation. Held,* that a mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution, merely because the judgment-debtor did not come in and oppose it. *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R. 8 Calc. 51,* and *Norendra Nath Pahari* v. *Bhopendra Narain Roy, I. L. R. 23 Calc. 374,* distinguished. *Bisseshur Mallick* v. *Maharajah Mahatab Chundra Bahadoor, 10 W. R. (F. B.) 8,* referred to. UMED ALI *v.* ABDUL KARIM CHAPRASHI (1908) **I. L. R. 35 Calc. 1060**

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION.

1. ——— Meaning of the words " a copy of any order for the execution of the decree " —*Civil Procedure Code, 1882, s. 224. cl. (c).* The words " a copy of any order for the execution of a decree " in s. 224, cl. (c), of the Code of Civil Procedure (Act XIV of 1882), mean a copy of any subsisting order. HATHIBHAI NAHANSA *v.* PATEL BECHAR PRAGJI . **I. L. R. 13 Bom. 371**

2. ——— British Courts in India, power of, to send their decrees for execution to Courts not in British India—*Practice.* The Courts of British India have no authority to send their decrees for execution to Courts not in

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8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

British India. KASTURCHAND GUJAR *v.* PARSHA MAHAR . . . **I. L. R. 12 Bom. 230**

3. ——— Transfer of decree for execution, effect of. A decree transmitted to a Court for execution is to be regarded as a decree of that Court for purposes of execution. MOBARUCK ALI *v.* SOOMEE KUNJA CHAREE **3 N. W. 168**

4. ——— ——— *Power of Court to which decree is transferred—Notice under s. 216, Civil Procedure Code.* The Court to which a decree is sent for execution by another Court has the power to take the same steps, including the issue of a notice under s. 216 of the Code of Civil Procedure, which it could take in execution of its own decree. CHHAGAN LALL NARBHERAM *v.* JAMNADAS MANCHARAM . . . . **11 Bom. 19**

5. ——— Separate applications to execute same decree. Separate applications to execute the same decree do not constitute separate causes or suits. Thus, when a Judge *ex necessitate rei,* executes a decree of a Principal Sudder Ameen, he is at liberty to carry out that execution to whatever extent may be necessary. SHARODA MOYEE BURMONEE *v.* WOOMA MOYEE BURMONEE **8 W. R.**

6. ——— Transmission of record. Where a Subordinate Judge's Court in one district executes the decree of a Subordinate Judge's Court of another district, it is bound by s. 292, Act VIII of 1859, to comply with a requisition from the latter Court to transmit to it the record of the case INDUR CHUNDER DOOGAR *v.* GOPAL CHAND SATIA **11 W. R. 230**

7. ——— Procedure—*Order transferring decree for execution—Code of Civil Procedure, 1882, ss. 224 and 226—Whether an order forwarding a decree by a District Judge to a Subordinate Judge for execution requires his signature.* An order forwarding a decree for execution to a subordinate Court by the Court of the District Judge, where the decree has been transmitted under s. 226 of the Code of Civil Procedure, need not be signed by the District Judge himself. If the order is issued under his authority, the absence of his signature does not vitiate the proceeding. JOGENDRA CHANDRA GHOSE *v.* MAHESH CHANDRA DUTTA **I. L. R. 23 Calc. 480**

8. ——— Jurisdiction—*Civil Procedure Code, 1882, ss. 223 and 226—Execution of decree passed in another district—Jurisdiction of Munsif.* On the application of the decree-holder, a decree for money passed by a Munsif in one district was sent for execution to the Court of a Munsif in another district, and not to the District Court as provided for in s. 223 of the Civil Procedure Code. *Held,* that the Munsif's Court, to which the decree

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was sent for execution, had no jurisdiction to execute it without an express order of the District Judge under s. 226. DEBI DIAL SAHU *v.* MOHARAJ SINGH . . . **I. L. R. 22 Calc. 764**

9. ——— Striking off case for default —*Procedure.* When a case is transferred by the Court which passed the original decree to another Court in order that the decree may be executed, and the proceedings on the application for execution have been struck off the file for default, the proper Court to apply to for a fresh issue of execution is the Court which passed the original decree, and not the Court to which the case was transferred to be executed. BHOOP SINGH *v.* SUNKER DUTT JHA . . . . . **6 W. R. Mis. 47**

10. ——— Application by assignee of decree—*Power of the Court in executing transmitted decree.* Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferree applied for the execution of the decree to the Court to which the decree was sent for execution :—*Held,* that such application should be made not to such Court, but to the Court which passed the decree. KADIR BUKSH *v.* ILAHI BUKSH . **I. L R. 2 All. 283**

11. ——— Substitution of name of transferree—*Civil Procedure Code, 1882, ss. 232 and 578—Jurisdiction of a Court where a decree has been transferred for execution to substitute the name of the transferee of the decree—Whether an order passed without jurisdiction can be cured by the provisions of s. 578 of the Civil Procedure Code.* An application by the transferree of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred has no jurisdiction to entertain it. *Sheo Narayan Singh* v. *Harbans Lall, 5 B. L. R. 49 : 14 W. R. 65 ; Ismail* v. *Kassam, 9 Bom. H. C. 46 ;* and *Kadir Bakhsh* v. *Ilahi Bakhsh, I. L. R. 2 All. 283,* referred to. In a case where a decree has been transferred to another Court for execution, and that Court orders the execution to proceed after substitution of the name of the transferee of the decree, the said order is one passed without jurisdiction, and can be set aside on appeal, notwithstanding the provisions of s. 578 of the Civil Procedure Code. *Sham Lal Pal* v. *Modhu Sudan Sircar, I. L. R. 22 Calc. 558,* distinguished. AMAR CHUNDRA BANERJEE *v.* GURU PROSUNNO MUKERJEE **I. L. R. 27 Calc. 488**

12. ——— Assistant Judge, power of—*Power of Assistant Judge where case is sent to District Judge.* When an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, the Court of the Assistant Judge must be considered, equally with the

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Court of the District Judge, the principal Civil Court of original jurisdiction, and a decree sent for execution in such part of the district is properly executed by or under the directions of such Assistant Judge. GOBIND HARI WALEKAR *v.* SHIDRAM BIN SHIDMURTI . . . **7 Bom. A. C. 37**

13. ——— Striking off case—*Power of Court as to striking off case—Act VIII of 1859, s. 284.* Where a decree of one Court has been transmitted to another for execution under s. 284 of Act VIII of 1859, the latter Court has jurisdiction to entertain an application to cancel its own order for striking off the case, whatever "striking off" amounts to. BAGRAM *v.* WISE **1 B. L. R. F. B. 91 : 10 W. R. F. B. 46**

14. ——— *Power of Court executing decree to strike off the application for execution—Civil Procedure Code (Act XIV of 1882), s. 223.* The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution. *Bagram v. Wise, 1 B. L. R. F. B. 91,* followed. ABDA BEGAM *v.* MUZAFFAR HUSEN KHAN **I. L. R. 20 All. 129**

15. ——— Alteration of decree—*Power of Court to alter decree.* Where a decree is transmitted by one Court to another for the purpose of execution, the latter Court has no jurisdiction to alter the decree or the amount mentioned in the order for execution. ALLY HOSSEIN *v.* JOOGULKISHORE . . **Marsh. 244 : 2 Hay 113**

NUFFER CHUNDER PAUL *v.* NADOOROONISSA BEEBEE . . . . . **9 W. R. 387**

TEJA SING *v.* POKHAN SINGH . **10 W. R. 95**
1 B. L. R. A. C. 62

16. ——— Notice of execution—*Civil Procedure Code, 1859, s. 285.* Where a decree had been obtained in a Zillah Court and sent to Calcutta for execution, the Court made an order directing a notice to issue, calling on the defendant to show cause why the decree should not be executed by the High Court. On appeal the order was upheld. RAMDOSS *v.* LALLAH NUNDOCOOMAR **1 Ind. Jur. N. S. 189**

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8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

KHODA BUKSH *v.* HURREE RAM . **2 N. W. 399**

17. ——— **Practice**—*Civil Procedure Code, 1859, s. 287.* When a copy of a decree or order for execution is transmitted by the Judge of one district A to the Judge of another B for the purpose specified in Act VIII of 1859, s. 287, the Judge of B has no authority to transfer it to a third district. If complete execution cannot be had in district B, it is the business of the decree-holder to have his decree re-transmitted to the Court whose duty it is to execute it and there to obtain a fresh certificate for transmission to any other district where execution may be practicable. DHUNPUT SINGH *v.* WOOMA SUNKUREE GOOPTA **21 W. R. 337**

18. ——— *Power of Court to which decree has been transferred—Civil Procedure Code, 1859, ss. 285, 286, certificate under.* The jurisdiction of a Court to which a decree has been transferred for execution is strictly limited to carrying out such execution. Such Court has no power to issue a certificate under ss. 285, 286 of Act VIII of 1859, transferring the decree already transferred to it to another Court for execution. The Court to which a decree has been properly transferred for execution having struck the case off the file, a subsequent application for a further transfer of the case to another Court for execution should be made to the Court which originally passed the decree sought to be executed. SHIB NARAIN SHAHA *v.* BIPIN BEHARY BISWAS **I. L. R. 3 Calc. 512 1 C. L. R. 539**

19. ——— *Order passed in Court to which proceedings are transferred—Civil Procedure Code, 1877, s. 239.* Under s. 239 of Act X of 1877, a Court to which a decree has been transferred may refer the objector to the Court which passed the decree. JASSODA KOER *v.* LAND MORTGAGE BANK OF INDIA **I. L. R. 9 Calc. 916 : 11 C. L. R. 348**

20. ——— **Propriety of the order**—*Jurisdiction of Court executing such decree—Code of Civil Procedure (Act X of 1877), s. 239.* Where a Court in one district transfers a decree for execution to a Court situate in another district, it is beyond the jurisdiction of the Court executing the decree to question the correctness or propriety of the order under which the decree was sent to such Court for execution. BEERCHUNDER MANIKYA *v.* MYMANA BIBEE . . **I. L. R. 5 Calc. 736**

RAM CHUNDER *v.* MOHENDRO NATH BOSE **21 W. R. 141**

DHUNESH KOEREE *v.* OOLFUT HOSSEIN **21 W. R. 219**

21. ——— *Civil Procedure Code, 1882, ss. 223 and 239—Power of Court executing a decree sent for execution to question propriety of order transferring it.* Where a decree is passed by one Court and sent to another Court for execution, the Court executing the decree cannot question the propriety of the order transferring the decree to such Court for execution. MULLA ABDUL HUSSEIN *v.* SAKHINABOO . **I. L. R. 21 Bom. 456**

22. ——— *Duty of a Court to which a decree is transferred for execution.* A Court to which a decree has been sent for execution cannot refuse execution on the ground that questions are raised between the parties that cannot properly be dealt with in execution. RAJERAV CHANDRARAO *v.* NANARAV KRISHNA JAHAGIRDAR **I. L. R. 11 Bom. 528**

23. ——— **Procedure**—*Civil Procedure Code, 1877, s. 293.* Where, in the opinion of the Court, sufficient cause has been shown against the execution of a decree transferred for execution, the Court executing the decree should follow the procedure prescribed by s. 239 of the Code of Civil Procedure. BEERCHUNDER MANIKYA *v.* MYMANA BIBEE . . **I. L. R. 5 Calc. 736**

24. ——— *Jurisdiction of Court transferring decree—Question of jurisdiction.* Where a decree passed by a Court governed by the Code of Civil Procedure is sent for execution to another Court in British territory likewise governed by the Code, it is not open to the latter to refuse to execute it on the ground that the former had no jurisdiction. In case of doubt, the Court where execution is sought may adjourn the execution-proceedings in order to enable the party interested to make an application to the Court passing the decree, and thence, if necessary, to the higher Courts of the same province in their turn. CHOGALAL *v.* TRUEMAN **I. L. R. 7 Bom. 481**

25. ——— *Procedure in execution of decree of High Court on appeal from mofussil.* Where the High Court passes a decree on appeal from a mofussil Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees. KISTO KINKUR GHOSE ROY *v.* BURODAKANT SINGH ROY . . **10 B. L. R. 101 17 W. R. 292 : 14 Moo. I. A. 465**

s.o. in High Court. KISHEN KINKUR GHOSE *v.* BURODAKANT ROY . . . **8 W. R. 470**

26. ——— **Limitation**—*Law governing transferred case.* Execution is a proceeding to enforce a decree of a Court, and comes under the head of purely adjective law. Such being the case, the law of limitation prevailing at the time of the application must govern it. PASUPATI LUTCHMIA *v.* PASUPATI MUTHAMBHATLU **I. L. R. 1 Mad. 52**

27. ——— *Act VIII of 1859, s. 284—Question of limitation.* When a

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EXECUTION OF DECREE—*contd.*

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decree has been transmitted by the Court which passed it to another Court for execution, the latter Court has jurisdiction to try whether or not execution of the decree is barred by the law of limitation. *Per* PEACOCK, *C.J.*—When there are different laws of limitation in force in the two Courts, the law applicable to the proceedings in execution of the decree should be the law of the Court to which the decree is transmitted for execution. LEAKE *v.* DANIEL
B. L. R. Sup. Vol. 970 : 10 W. R. F. B. 10

BUZUR BIBEE *v.* JACKSON . **5 W. R. Mis. 14**

CHOTI LAL *v.* MANICK CHAND . **7 N. W. 115**

BYKUNTNATH MULLICK *v.* JOYGOPAL CHATTERJEE
7 W. R. 19

28. ——— *Power of Court —Question of limitation.* The Court to which a decree has been transferred can take cognizance of a question of limitation, but the question must be one arising from facts which are legitimately before the Court in the course of execution, and not a matter of limitation arising antecedent to transfer. *In the matter of the petition of* SUMAT DAS
13 B. L. R. Ap. 27

SOOMUT DAS *v.* BHOOBUN LALL . **21 W. R. 292**

29. ——— *Power of Court —Question of limitation—Civil Procedure Code, 1859, s. 284.* The transfer of a decree from one Court to another under s. 284 and the following sections of the Civil Procedure Code, does not give the latter Court a jurisdiction to entertain and determine any question with regard to limitation or otherwise which arose between the parties antecedent to the date of transfer. LUTFULLAH *v.* KIRAT CHAND
13 B. L. R. Ap. 30
21 W. R. 330

30. ——— *Power of Court to decide whether execution is barred by limitation —Question of limitation—Civil Procedure Code (Act XIV of 1882), s. 223 et seq.* Where a Court makes an order for execution of a decree and transmits the decree for execution to another Court, the latter Court has no power to determine whether execution is barred by limitation. The order for execution made by the transmitting Court is binding on the parties until reversed on appeal. It is otherwise, however, where the transmitting Court has made no order for execution, but has merely transmitted the decree and the certificate of non-satisfaction. HUSEIN AHMED KAKA *v.* SAJU MAHAMAD SAHID . . **I. L. R. 15 Bom. 28**

31. ——— *Agreement for satisfaction of judgment-debt by instalments—Civil Procedure Code, ss. 210, 230, 257A—Limitation Act (XV of 1877), Sch. II, Art. 179.* A simple money-decree was passed in 1871, and was transferred to another Court for execution, and in June 1882 an application was made for execution; and

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shortly afterwards the Court to which the decree had been transferred sanctioned an agreement between the parties for satisfaction of the decree by instalments. In June 1885, an application was made to the Court which passed the decree to again transfer it for execution, and this application recited the previous agreement and certain payments which had been made, and it was granted. A further application for execution for the remaining instalments was made in April 1888. *Held*, by EDGE, *C. J.*, that the Court to which the decree was transferred had no power, in 1882, to sanction the agreement under s. 257A of the Civil Procedure Code; that if the order in June 1885 of the Court passing the decree were regarded as a sanction (which it would be very difficult to hold), that order nevertheless could not operate as one under s. 210 altering the decree; that if any decree in the case were capable of execution, it was the decree of 1871, which had never been altered by a Court; and that, inasmuch as a previous application for execution had been made in June 1882, that decree was dead, as well under s. 230 of the Code as under Art. 179, Sch. ii of the Limitation Act (XV of 1877). *Held*, by STRAIGHT, *J.*, that the order of June 1885 was not, and could not be, an order sanctioning the agreement of June 1882, and the decree consequently stood unaltered; and, an application to execute it having been made and granted since Act XIV of 1882 came into operation, the decree was now dead under s. 230 of the Code. *Per* EDGE, *C.J.*—The Court to which a decree has been transferred for execution has no power to sanction an agreement under s. 257A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by the Court which passed the decree. An agreement sanctioned under s. 257A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under s. 210, though an order under s. 210 would operate as a sanction under s. 257A. The decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as, *e.g.*, by an order under s. 210. GANDHARAP SINGH *v.* SHEODARSHAN SINGH
I. L. R. 12 All. 571

32. ——— **Release of judgment-debtor** —*Power of Court which passed decree.* A Judge has no jurisdiction to entertain a petition from, and order the release of, a judgment-debtor imprisoned in execution of a decree, while the execution-proceedings are before the Subordinate Judge. MODHOOSUDUN GHOSE *v.* ROMANATH GHOSE **12 W. R. 65**

33. ——— **Reasons for transfer.**— Every Court is bound to execute its own decree, if it can, by process (when necessary) issued against the property or person of the judgment-debtor: it is only when the decree cannot be executed within the jurisdiction of the Court whose decree it

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EXECUTION OF DECREE—*contd.*

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is that it may be sent to another Court for execution. There is no intermediate procedure between these two executions. MAHARAJAH OF BURDWAN *v.* SREE NARAIN MITTER **19 W. R. 346**

34. ——— *Civil Procedure Code, 1859, s. 384.* Act VIII of 1859, s. 284, does not restrict the granting of a certificate transferring a decree for execution to another Court to cases where such decree cannot be executed within the jurisdiction of the Court whose duty it is to execute the same. A certificate may be granted upon its appearing to the latter Court that the decree could not have been completely executed by the sale of the property in its own district; but that it could be so executed by the sale of the property in the other district. KALEE DASS GHOSE *v.* LALL MOHUN GHOSE . . . . . **19 W. R. 307**

35. ——— *Transfer of suit from subordinate Courts—Civil Procedure Code, 1859, s. 6.* S. 6 of Act VIII of 1859, authorizing "a District Court to withdraw any suit instituted in any Court subordinate to such District Court and to try such suit itself, or to refer it for trial," etc., does not justify an order by the District Court for the calling up of execution cases from the files of the subordinate Court and for the appointment of a manager. LUCHMEEPUT DOKUR *v.* JUGUTINDER BUNWARY LALL . **Marsh. 195 : 1 Hay 459**

36. ——— **Recall of order of transfer.** Where a Judge had made an *ex parte* order for transfer of a case in execution, it was held he had power to recall it. SHEO PROSUNNO SING *v.* BULDHAREE LALL . . . . **13 W. R. 232**

37. ——— **District Judge, power of—** *Act XVI of 1868, s. 19—Civil Procedure Code, 1859, s. 362—Bengal Civil Courts Act, VI of 1871, ss. 26 and 27.* A District Judge is not competent to transfer a case of execution of a decree which has been passed by his own Court to the file of the Subordinate Judge for disposal. Such a case is not one of the "civil proceedings" referred to in s. 19, Act XVI of 1868, read with s. 362, Civil Procedure Code, and interpreted by ss. 26 and 27, Act VI of 1871. CHOWDRY HAMEDOOLLAH *v.* MUTEEOONISSA BIBEE . . . . . **15 W. R. 574**

38. ——— *Act XVI of 1868, s. 19.* A Zillah Judge has no power to transfer proceedings in execution of a decree to a subordinate Court, unless duly authorized under s. 19 of Act XVI of 1868. MAHOMED KUMROODEEN *v.* UJOOBOONISSA . . **1 N. W. 113 : Ed. 1873, 199**

39. ——— *Transfer of case under Act IX of 1861—Act XVI of 1868, s. 19.* The Judge had power, under Act XVI of 1868, s. 19, to transfer to the Subordinate Judge a case under Act IX of 1861, an application under the latter Act

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not being a suit. SONAMONEE DOSSEE *v.* JOY DOORGA DOSSEE . . . **17 W. R. 551**

40. ——— **Decree for rent by Collector** —*Execution of decrees for rent—Act X of 1859, ss. 25, 77, and 160—Civil Procedure Code (Act VIII of 1859) ss. 284, 294; (Act X of 1877), ss. 223, 228.* Decrees for rent made by the Collector under s. 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil Procedure relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed." NILMONI SINGH DEO *v.* TARANATH MUKERJEE **I. L. R. 9 Calc. 295 : 12 C. L. R. 361 L. R. 9 I. A. 174**

41. ——— **Transfer to Collector**—*Power of Collector—Withdrawal by transferring Court of transferred decree—Civil Procedure Code, 1877, ss. 320, 321.* A Collector, to whom a decree for sale of mortgaged property has been transferred for execution under s. 320 of the Civil Procedure Code, is limited to one of the three courses specified in s. 321, and may not depart from them; much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments. A Collector, to whom a decree has been so transferred for execution, acts ministerially, and when he delegates his functions to an assistant or a Mamlatdar, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgment; and this risk attaches independently of malice or negligence. The Court that has made a decree or judicial order, which has been transmitted to the Collector for execution, is not deprived of the judicial powers with respect to it which may still at any particular time be competent to such Court, and which it would have had, had the order been placed in the hands of its own ordinary officer, the nazir. In the exercise of such powers, the Court has authority to recall its own record transmitted to the Collector. MAHADAJI KARANDIKAR *v.* HARI D. CHIKNE **I. L. R. 7 Bom. 332**

42. ——— *Transfer to Collector—Irregularities in execution-sale—Power of a Civil Court to interfere.* When a decree is sent to a Collector for execution, the Civil Court ought not to control his proceedings, unless it is set in motion by one of the parties to the execution-proceedings. *Quære:* Whether a Civil Court can, of its own motion, control the proceedings of the Collector to whom a decree has been sent for execution. HARGOVAN *v.* HIRA HARIBHAI **I. L. R. 8 Bom. 301**

43. ——— *Civil Procedure Code, s. 320—Transfer to Collector—Jurisdiction —Rules made by Local Government.* A decree

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passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution. A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree. *Held*, that, with reference to the second paragraph of Rule 19 of the Rules framed by the Local Government under s. 320 of the Civil Procedure Code, regarding the transmission, execution, and retransmission of decrees, and published in the *North-Western Provinces and Oudh Gazette* of the 4th September 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320, and notwithstanding the ruling of the Full Bench in *Madho Prasad* v. *Hansa Kuar, I. L. R. 5 All. 314.* SUNDAR DAS *v.* MANSA RAM **I. L. R. 7 All. 407**

44. _____ *Civil Procedure Code, ss. 320, 325—Decree transferred to the Collector for execution—Collector's duties and powers in execution—Civil Court's jurisdiction to revise Collector's proceedings in execution.* A decree was transferred to the Collector for execution. The Mamlatdar, under the orders of the Collector, put up for sale certain immoveable property belonging to the judgment-debtors. The sale was confirmed by the Mamlatdar with the sanction of the Collector. Some time afterwards the auction-purchaser applied to the Collector for a certificate of sale, but the Collector refused the certificate, and set aside the sale on the ground that the purchaser was a relative of the decree-holder, and had really purchased the property on his behalf without the permission of the Court. Against this proceeding of the Collector the purchaser made an application, first to the Subordinate Judge who had transferred the decree to the Collector for execution, and then to the District Court. But both Courts declined to entertain his application, on the ground of want of jurisdiction. *Held*, on an application to the High Court, that the Subordinate Judge had jurisdiction to deal with the application and to revise the Collector's proceedings in execution. *Held*, also, that the Collector, having through his subordinate put up for sale the judgment-debtor's property and confirmed the sale, had in that way completely executed the decree so far as he could, and was so far *functus officio*. His duty was to make a return to the Court of what he had done. After confirmation of the sale, he could not set it aside. *Per* WEST, *J.*—The Collector, like the Nazir in India, is a ministerial officer when he executes a decree. He, like the Nazir, must carry out the decree of a Civil Court in general subjection to the judicial direction of the Court on whose authority the coercive power exercised by him rests, and which alone can deal judicially with the questions that arise in execution. His proceedings and orders are subject, accordingly, to revision and correction on the application of a party aggrieved, whenever he misconceives the decree or acts illegally in giving effect to it. He is limited strictly to the precise line of activity laid down for him in the Code and the orders under it; and in cases of error or doubt it is the Court that must determine whether he, as its ministerial officer, has or has not transgressed his powers. *Per* BIRDWOOD, *J.*—A sale made by a Collector under Ch. XIX of the Civil Procedure Code is subject to confirmation by the Civil Court under s. 312. As soon as the Collector has exercised or performed the powers or duties conferred or imposed upon him by ss. 321 to 325 of the Code, he is *functus officio*. If he has sold the property or re-sold it under the power given by cl. (*c*) of s. 325, he has completed the execution of the decree so far as he can legally complete it, and it is then his duty to retransmit the decree to the Court, under rules prescribed in that behalf by Government under the second paragraph of s. 320. Where the property has been sold or re-sold, the sale or re-sale cannot be set aside by the Collector. Any application for setting it aside must be made to the Civil Court under s. 311, and dealt with by it under s. 312; and if no application is made to the Court, the sale must be confirmed by it under that section. LALLU TRIKAM *v.* BHAVLA MITHIA **I. L. R. 11 Bom. 478**

See, however, KESHABDEO *v.* RADHA PRASAD **I. L. R. 11 A. 94**

MADHO PRASAD *v.* HANSA KUAR **I. L. R. 5 All. 314**

and NATHU MAL *v.* LACHMI NARAIN **I. L. R. 9 All. 43**

45. _____ **Decree by Court of Scheduled District**—*Execution of decree passed by Court of Scheduled District in Court of a Regulation District—Civil Procedure Code (Act VIII of 1859), s. 284—Civil Procedure Code (Act XIV of 1882), ss. 223, 229—Scheduled Districts Act (XIV of 1874), s. 5.* On the 15th May 1876, a judgment-creditor obtained a decree in the Civil Court of the Chittagong Hill Tracts, which are included amongst the Scheduled Districts, and on or about the 15th May 1876, at his instance, it was sent with a certificate of non-satisfaction to the Court of a Munsif in the Regulation District of Chittagong for execution.

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After sundry unsuccessful attempts to execute the decree, an application was made on the 17th September 1886 for its execution. The judgment-debtor objected that under s. 229 of the Code of Civil Procedure (Act XIV of 1882) the Munsif's Court had no jurisdiction to execute the decree, as it could only act under that section, and the Code had never been extended to the Chittagong Hill Tracts. *Held*, that, as at the time the decree was passed and sent to the Munsif for execution Act VIII of 1859 was in force, and by s. 284 of that Act the judgment-creditor had a right to have his decree sent to any Civil Court for execution, he was entitled now to have it executed, as neither Act X of 1877 or XIV of 1882 by express words or implication deprived him of that right. *Held*, further, that the intention of the Legislature was, with regard to decrees obtained in scheduled districts after the Code of 1877 came into force, that such decrees should not be executed by Courts in British India unless and until, under the provisions of s. 5 of the Scheduled Districts Act (XIV of 1874), the Government had issued the notification therein referred to applying to the scheduled districts such portion of the Code of Civil Procedure as they thought proper to apply. *Quære:* Whether a decree passed by a Court in a scheduled district and sent for execution to a Court in a regulation district after Act X of 1877 came into force can be executed by the latter Court in the absence of such a notification extending the provisions of the Code of Civil Procedure to the scheduled districts. KASHI MOHUN BORUA *v.* BISHNOO PRIA **I. L. R. 15 Calc. 365**

46. ——— Jurisdiction of Court executing a decree—*Jurisdiction as between District Judge and Subordinate Judge of a Court making a decree to execute it notwithstanding certain special matters.* The sale of mortgaged property was decreed by a Subordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees, in both suits, in the District Court, it was objected that execution could not proceed therein, on the ground that the decree for sale was that of the Subordinate Court. *Held*, that the decree (which affected the whole property mortgaged) was that of the District Court, which accordingly had jurisdiction to execute it. To have enabled the Subordinate Court so to do, an order by the District Court would have been necessary. Matter which had no bearing on the question raised on this appeal having been introduced into the record, it was ordered that all such costs as might have been so occasioned should be disallowed by the Registrar, on the taxation of costs. BISHENMUN SINGH *v.* LAND MORTGAGE BANK OF INDIA **I. L. R. 11 Calc. 244 : L. R. 12 I. A. 7**

47. ——— Power of transfer—*Civil Procedure Code, 1859, s. 362.* A Zillah Judge must execute his own decrees, and had no power to direct the Principal Sudder Ameen to take up and dispose of an application for execution. RAJEEB RAM DASS *v.* MAHOMED HOSSEIN **6 W. R. Mis. 51**

This ruling refers entirely to execution under Act VIII of 1859, but not to proceedings before that year, when Judges were competent to refer cases of execution to the Principal Sudder Ameen. NIL KOMUL GHOSE *v.* NOBIN CHUNDER BOSE **9 W. R. 463**

48. ——— *Civil Procedure Code, 1859, s. 6—Act XXIII of 1861, s. 38.* A District Court is competent, under s. 6 of Act VIII of 1859 and s. 38 of Act XXIII of 1861, to transfer to its own file proceedings in execution of decree pending in a Court subordinate to it. GAYA PARSHAD *v.* BHUP SINGH . . **I. L. R. 1 All. 180**

49. ——— Power of withdrawal of application—*Power of the District Court to withdraw applications for execution—Mofussil Courts of Small Causes—Jurisdiction—Civil Procedure Code (Act X of 1877), ss. 25 and 647, Sch. II.* Ss. 25 and 647 of the Civil Procedure Code, Act X of 1877, are both applicable to Courts of Small Causes in the mofussil, and the former section is extended by the latter to execution-proceedings in such Courts. Under s. 25 of the Civil Procedure Code, Act X of 1877, the District Judge has power to withdraw an application for execution of a decree from a subordinate Court (such as a Mofussil Court of Small Causes) and to dispose of it himself, or to transfer it to another subordinate Court competent to deal with it. BALAJI RANCHODDAS *v.* MOHANLAL DALSUKRAM **I. L. R. 5 Bom. 680**

50. ——— Munsif, jurisdiction of—*Civil Procedure Code, 1882, s. 223—Madras Civil Court Act (III of 1873)—Jurisdiction of Munsif's Court—Execution of decree of superior Court.* Although by the Madras Civil Courts Act, 1871, the ordinary jurisdiction of Munsifs is limited in suits and applications of a civil nature to those in which the subject-matter does not exceed in value R2,500, s. 223 of the Code of Civil Procedure gives jurisdiction to a Munsif's Court to execute a decree in a suit beyond its jurisdiction which has been transferred to it for execution by a District Court. NARASAYYA *v.* VENKATAKRISHNAYYA **I. L. R. 7 Mad. 397**

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51. ——— *Code of Civil Procedure (Act XIV of 1882), ss. 223 and 649—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 13—Redistribution of local areas, Effect of—Jurisdiction of Munsif.* *A* obtained a decree against *B* in the Court of the First Munsif of Howrah. After the decree, the local area, within which the cause of action arose and the judgment-debtor resided, was transferred from the First to the Second Munsif. On an application by *A* for the execution of his decree in the Court of the Second Munsif, which allowed execution: *Held*, that the Second Munsif had no jurisdiction to entertain the application and allow execution, and that the application ought to have been made in the Court of the First Munsif which passed the decree. KALIPADO MUKERJEE *v.* DINO NATH MUKERJEE **I. L. R. 25 Calc. 315**

52. ——— **District Judge, power of**—*Power of District Judge to transfer execution-proceedings to another Court—Civil Procedure Code, ss. 25, 647.* A District Judge has no power to transfer execution-proceedings to a subordinate Court. *In the matter of Balaji Ranchoddas, I. L. R. 5 Bom. 680,* and *Gaya Pershad* v. *Bhup Singh, I. L. R. 1 All. 180,* dissented from. KISHORI MOHUN SETT *v.* GUL MOHAMED SHAHA **I. L. R. 15 Calc. 177**

53. ——— **Jurisdiction**—*Civil Procedure Code (Act XIV of 1882), ss. 6 and 223.* Having regard to the provisions of s. 6 of the Code of Civil Procedure, a Civil Court has no jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code, when the decree has been passed in a suit the value of subject-matter of which is in excess of the pecuniary limits of its ordinary jurisdiction. *Narasayya* v. *Venkata Krishnayya, I. L. R. 7 Mad. 397,* dissented from. *Sidheshwar Pandit* v. *Harikar Pundit, I. L. R. 12 Bom. 155; Balaji Ranchoddas* v. *Mohanlal Dulsukram, I. L. R. 5 Bom. 680;* and *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R. 8 Calc. 51,* referred to. GOKUL KRISTO CHUNDER *v.* AUKIL CHUNDER CHATTERJEE. *In the matter of the petition of* ISHAN CHUNDER DAS. RASHARAJ BOSE *v.* GOVINDA RANI CHOWDHRANI. MOOLA KUMARI BIBEE *v.* MOOL CHAND DHAMANT. BEESUN CHAND DOODHURIA *v.* MOOL CHAND DHAMANT . . . . **I. L. R. 16 Calc. 457**

54. ——— *Civil Procedure Code, 1882, s. 223—Jurisdiction.* S. 223 of the Code of Civil Procedure, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to another Court should be interpreted to mean another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. *Narasayya* v. *Venkata Krishnayya, I. L. R. 7 Mad. 397,* dissented from. DURGA CHARAN MOJUMDAR *v.* UMATARA GUPTA . **I. L. R. 16 Calc. 465**

55. ——— *Civil Procedure Code, s. 223—Transfer not through District Court.* Two decrees were passed against the same defendant in the Court of a District Munsif and on the Small Cause side of a subordinate Court in the same District, respectively. The holder of the decree in the Small Cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the subordinate Court directly, and not through the District Court. *Held*, (1) that the direct transfer of the decree of the District Munsif was not illegal; (2) that the Subordinate Judge had inherent jurisdiction to execute the decree of the District Munsif. KELU *v.* VIKRISHA **I. L. R. 15 Mad. 345**

56. ——— *Civil Procedure Code, 1882, ss. 25, 223—Madras Civil Courts Act, s. 12—Jurisdiction of Munsif's Court—Execution of decree of superior Court.* As in suits, so in execution-proceedings, the competent forum is ordinarily that indicated by s. 12 of the Civil Courts Act, but in the five cases mentioned in s. 223 of the Civil Procedure Code, special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience. The condition as to the jurisdiction of the subordinate Court to which a suit can be transferred under s. 25 of the Code of Civil Procedure is not laid down in s. 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein. *Narasayya* v. *Venkatakrishnayya, I. L. R. 7 Mad. 397,* followed. *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee, I. L. R. 16 Calc. 457,* and *Durga Charan Mojumdar* v. *Umatara Gupta, I. L. R. 16 Calc. 465,* dissented from. SHANMUGA PILLAI *v.* RAMANATHAN CHETTI **I. L. R. 17 Mad. 309**

57. ——— **Decree of Small Cause Court**—*Civil Procedure Code, 1882, s. 223 (d).* Under s. 223 (*d*) of the Civil Procedure Code, in the case of a Subordinate Judge exercising Small Cause Court powers, the Court which has passed a decree in its Small Cause Court jurisdiction may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court, as it might to a different Court, for execution, without requiring a certificate under s. 20 of Act XI of 1865. For this purpose the two branches or sides of the Subordinate Judge's Court

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

may be regarded as different Courts. BHAGVAN DAYALJI *v.* BALU . **I. L. R. 8 Bom. 230**

58. ——— *Decree of Small Cause Court—Documents to be transmitted with decree—Civil Procedure Code, 1859, ss. 286, 287.* Process of execution against the person or personal property of a judgment-debtor may be issued on the decree of a Court of Small Causes by a Court in another district. Before issuing such process of execution, the Court receiving the decree is bound to see that the provisions in ss. 286 and 287 of the Civil Procedure Code have been strictly complied with. The documents required to be transmitted for the purpose of obtaining execution are a copy of the decree and a certificate of any sum remaining due under it, together with a copy of any order for execution that may have been passed. VENKATA SURIA *v.* SIVARAMAPPA . . . . **4 Mad. 331**

59. ——— *Officer with jurisdiction both of Munsif and Small Cause Court.*—A certificate of non-satisfaction under Act XI of 1865, s. 20, having been obtained from the Court of Small Causes at Arrah, the decree was transferred to the Munsif's Court there, when the judgment-creditor objected that execution was barred by limitation. *Held*, that, though the Munsif was not competent to adjudicate upon the question of limitation as a Munsif, yet, as a successor in power of the abolished Court of Small Causes at Arrah (whose jurisdiction was transferred to the Munsif's Court), he had jurisdiction to decide the objection. SOOMUT DOSS *v.* BHOOBUN LALL . **24 W. R. 151**

60. ——— *Decree of Small Cause Court—Civil Procedure Code, 1859, s. 287—Act IX of 1850, s. 78.* Although the Court of Small Causes at Bombay has power to enforce its decree against moveable property only, yet if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can under s. 287 of that Code, enforce it against immoveable property also. *Quære:* Whether a Court executing the decree of a Small Cause Court under s. 78 of Act IX of 1850 could enforce it against immoveable property. *In re* JAGJIVAN NANABHAI . **I. L. R. 1 Bom. 82**

61. ——— *Decree of Small Cause Court—Act XI of 1865, s. 20.* Under s. 20 of Act XI of 1865, a Court of Small Causes may transfer a decree for execution to another Court not only when there has been a sale of such moveables of the debtor as the judgment-creditor has been able to discover and the proceeds of such sale have not been sufficient to satisfy the decree, but also when no sale has taken place at all and the decree remains unsatisfied by reason of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold. *In the matter of* CHANDRA KANTO BISWAS **3 C. L. R. 558**

EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

62. ——— *Jurisdiction of Small Cause Court—Act XI of 1865, s. 20.* Except in the manner allowed by s. 20, Act XI of 1865, the Judge of a Small Cause Court could not send a decree of his own Court for execution by another Court, nor could he issue an order under s. 268, Act X of 1877, out of his own jurisdiction. HOSSEIN ALLY *v.* ASHOTOSH GANGOOLY . . **3 C. L. R. 30**

PARBATI CHARAN *v.* PANCHANAND **I. L. R. 6 All. 243**

63. ——— *Change of jurisdiction in districts. Held*, that after the orders of Government of 1867, dividing the whole of the jurisdiction of the Principal Sudder Ameen of Rajshahye into two portions, the Small Cause Court Judge of Pubna alone had jurisdiction to perform in the district of Pubna the duties which, but for those orders, would have been performed by the Principal Sudder Ameen of Rajshahye. SHAMASOONDUREE DEBIA *v.* BINODE LALL PAKRASHEE . **14 W. R. 396**

64. ——— *Power of Court executing decree—Procedure—Decree of Small Cause Court sent for execution to Court of Subordinate Judge—Mofussil Small Cause Court Act, XI of 1865, s. 20, Certificate under—Civil Procedure Code (Act XIV of 1882), s. 239—Stay of execution.* The plaintiff, having obtained a decree against the defendant in the Court of Small Causes at Poona, applied, under s. 20 of Act XI of 1865 to the Court of the Subordinate Judge at the same place for execution against the immoveable property of the defendant. Notice having been issued to the defendant under s. 248 of the Civil Procedure Code (Act XIV of 1882) calling upon him to show cause why execution should not issue against him, he appeared and applied to be allowed to pay the judgment-debt by instalments, alleging that he was an agriculturist, and pleading his inability to pay in a lump sum. The plaintiff denied that the defendant was an agriculturist. The Subordinate Judge raised an issue as to whether the defendant was an agriculturist, and, having after enquiry found the issue in the affirmative, was of opinion that the decree should be considered a nullity and should not be executed, inasmuch as, the defendant being an agriculturist, the Court of Small Causes had no jurisdiction to pass it. On reference to the High Court: *Held*, that the Subordinate Judge was not competent to question the validity of the Small Cause Court decree, his duty being confined to enforcing it, on the "presentation of a copy of it and certificate," as provided by s. 20 of Act XI of 1865. Nor could he take any notice of the status of the defendant as an agriculturist. The only course open to the defendant was to apply to the Small Cause Court for a review of its judgment, for which purpose the Subordinate Judge might stay the execution of the decree as provided by s. 239 of the Civil Procedure Code

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

(Act XIV of 1882). KASTURSHET JAVERSHET *v.* RAMA KANHOJI . . **I. L. R. 10 Bom. 65**

65. ——— *Transfer of execution-proceedings by District Judge from one Small Cause Court to subordinate Court—Civil Procedure Code Amendment Act (VI of 1892), s. 4—Rateable distribution—Civil Procedure Code, 1882, ss. 25, 223 (d), 295, and 647—District Judge, power of—Subordinate Judge, power of.* A District Judge has power under s. 25 of the Civil Procedure Code (XIV of 1812), or under that section read with s. 647, to transfer execution-proceedings in a Small Cause Court to the Court of a Subordinate Judge. The ruling in the case of *Balaji Ranchoddas* v. *Mohunlal Dulsukram, I. L. R. 5 Bom. 680,* that these sections apply to execution-proceedings in Small Cause Courts, is not effected by the explanation to s. 4 of Act VI of 1892. Execution proceedings under a decree against *A* in a Small Cause Court were transferred by a District Judge to a Subordinate Judge's Court where execution was proceeding against *A* under another decree, and it was objected that, as by the concluding paragraph of s. 25 of the Civil Procedure Code the attachments under the two decrees would be in different Courts, s. 295 of the Code would not apply, and rateable distribution could not be granted. *Held,* that the last paragraph of s. 25 did not convert the Subordinate Judge's Court into a Small Cause Court, but only provided for the trial of the suit, which had been transferred, being conducted by the Subordinate Judge's Court as a Small Cause suit. *Quære:* Whether a Subordinate Judge, under cl. (*d*) of s. 223 of the Civil Procedure Code (XIV of 1882), can transfer a decree for execution to a Court of Small Causes when the property attached is situate within the local jurisdiction of the Subordinate Judge. KRISHNA VELJI MARWADI *v.* BHAU MANSARAM **I. L. R. 18 Bom. 61**

66. ——— **Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 13, cl. 2**—*Transfer of Property Act (IV of 1882), ss. 88, 90—Sale in execution of mortgage decree.* When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a district, the District Judge is not competent, under s. 13 (*2*) of the Bengal, N.-W. P. and Assam Civil Courts Act, to assign to them different areas so as to limit or define their respective jurisdictions. The Court of such a Subordinate Judge which passed a mortgage-decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property lying within the district, but outside the area assigned to it by the District Judge. BACHU KOER *v.* GOLAB CHAND **I. L. R. 27 Calc. 272**

67. ——— **Court abolished after passing decree.** The Court of the Principal Sudder Ameen at *K* having been abolished after a decree was passed by it, and the case having been transferred to the Court of the Judge of the Zillah by which execution was regularly issued:—*Held,* that the Judge's Court had jurisdiction to entertain a subsequent application for execution, though made after the re-establishment of a Principal Sudder Ameen's Court at *K.* BIROJA MONEE BARMONEA *v.* WOOMA MOYEE BARMONEA **7 W. R. 124**

68. ——— **District of North Canara**—*Decree passed by Principal Sudder Ameen.* A decree passed by a Principal Sudder Ameen of the district of North Canara before that district was transferred to the Bombay Presidency, should be executed by the first class Subordinate Judge who has succeeded to the Court and functions of such Principal Sudder Ameen, and cannot by him be delegated for execution by a second class Subordinate Judge, though the amount of such decree be less than R5,000. The provisions in the Bombay Courts Act (XIV of 1869) that in suits under R5,000 the second class Subordinate Judges only shall have jurisdiction, does not affect the execution of decrees passed before that Act came into force. PIRJADA NASARUDIN *v.* VENKAT PRABHU **9 Bom. 113**

69. ——— **Certificate of right to execution**—*Civil Procedure Code, 1859, s. 286.* A certificate under s. 286 was given to a decree-holder by a District Court for possession and mesne profits, under which he got possession, after which the case was struck off on account of his delay. He appealed to the Privy Council and was successful, and applied within three years of the Privy Council decree to complete the execution. *Held,* though 11 years had elapsed since the case was struck off, he was entitled to have the mesne profits ascertained without any fresh certificate. BURORIA AHUN BASEE KOER *v.* JOOBRAJ SINGH **23 W. R. 225**

70. ——— **Court of Agent for Sirdars**—*Civil Procedure Code, 1859, s. 284—Decree against Sirdar's son.* Under the authority of s. 284 *et seq.,* the Court of the Agent for Sirdars, not having jurisdiction over a Sirdar's son who is not himself a Sirdar, cannot transfer a decree passed against the Sirdar to a Civil Court for execution against the son. To obtain enforcement in such a case against his heir of a decree against the Sirdar, the decree-holder may file a suit in the ordinary Civil Court on his decree. KHUSALDAS *v.* SAKHARAM RAMCHANDRA DIKSHIT . **12 Bom. 212**

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

71. ——— *Execution of a decree of the Agent for Sirdars—Rights of transferee of a decree—Jurisdiction.* *A* in 1839 obtained a decree against *B*, a Sirdar, in the Court of the Agent for Sirdars. The decree was executed in the Agent's Court until *B's* death in 1868. *B's* status as a Sirdar under the exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the first class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution of the decree by that Court, but none on the ground that the Agent's decree could not be executed by a mere transfer to an ordinary Civil Court. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of *A's* representatives against the estate of *B's* sons. In 1885, one of *A's* representatives assigned his interest under the decree to *C* and *D*. Thereupon the transferees, *C* and *D*, applied to the first class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution-proceedings. The Subordinate Judge rejected this application on the ground that execution had been going on for several years contrary to the ruling in *Khusaldas* v. *Sakharam Ramchandra, 12 Bom. 212*, which laid down that the Agent's decree could not be executed by a mere transfer to an ordinary Court, the remedy in such cases being by a suit on the decree. On this ground also he refused to recognize the transfer of the decree. *Held*, that, though the execution-proceedings in this case had been for many years irregularly conducted by a mere transfer of the Agent's decree to an ordinary Civil Court, still, as the Court which carried on the execution had jurisdiction to grant the same relief if a suit had been brought upon the decree, the irregularity, having been acquiesced in, did not vitiate the former proceedings in execution. VISHNU SAKHARAM NAGARKAR *v.* KRISHNARAO MALHAR

I. L. R. 11 Bom. 153

NARO HARI *v.* ANPURNABAI

I. L. R. 11 Bom. 160 note

72. ——— **Assessment of decree after transfer, and irregular payments made under it to purchaser.** Where a decree-holder, who had obtained a decree in the Civil Court of Loodhiana, which had been transmitted to Saharunpore for execution, assigned his decree before the Saharunpore Court to a third party, without the knowledge or consent of the Loodhiana Court, and moneys were paid to the purchaser by the judgment-debtor on such assignment, and the assignment was subsequently, on objection being taken, sanctioned by the Civil Court of Loodhiana :—*Held*, on a suit for the refund of such moneys, that, although they were paid under an irregular sanction of the Saharunpore Court, yet, as at the time of payment the purchaser was undoubtedly entitled to receive them, and the irregularity of the procedure of the Saharunpore Court had since been cured, and the purchaser was now in a position to execute the decree, that it would be clearly inequitable to order the refund of the money on the score of irregularities. MOHUN LALL *v.* BAROO MULL **6 N. W. 69**

73. ——— **Concurrent orders for execution in different districts**—*Power of Court.* A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power. SARODA PRASAD MULLICK *v.* LUCHMIPUT SINGH DOOGUR

10 B. L. R. 214 : 17 W. R. 289
14 Moo. I. A. 529

74. ——— *Execution simultaneously in two or more districts.* A decree may be executed simultaneously in two or more districts. *Saroda Prasad Mullick* v. *Luchmiput Singh Doogur, 10 B. L. R. 214*, followed. KRISTO KISHORE DUTT *v.* ROOPLALL DASS

I. L. R. 8 Calc. 687 : 10 C. L. R. 609

75. ——— **Simultaneous execution**—*Simultaneous attachments under same decree.* Two executions of the same decree, so far as attachment of different properties of the judgment-debtor is concerned, may proceed simultaneously, though ordinarily the sale in execution should not take place simultaneously. AHMED CHOWDHRY *v.* KHATOON . . . . **7 C. L. R. 537**

76. *Simultaneous execution of decree by rival decree-holders.* The rights of rival decree-holders taking out execution against the same judgment-debtor considered. LALU MULJI THAKAR *v.* KASHIBAI

I. L. R. 10 Bom. 400

77. ——— **Limitation**—*Limitation Act (XV of 1877), Sch. II, Art. 179—Decree—Transfer—Application for execution by transferee in Court to which decree transferred, if made to "proper Court," and "in accordance with law"—Amended certificate subsequently produced from original Court, effect of—Court to which decree transferred if may entertain successive applications for execution.* Where after a decree was transferred for execution to another Court the interest of the judgment-creditor became vested by operation of law in another person, and the latter applied for execution in the usual form to the Court to which the decree was transferred, without previously obtaining a certificate from the Court which made the decree authorising him to proceed with the execution, but subsequently produced such a certificate :—*Held*, that once the amended certificate was obtained from the Court which made the decree, it would relate back not merely to the time of the application, but to the time when by

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

operation of law the rights under the decree had become vested in the applicant, and it became competent to the Court to proceed with the execution at once on the basis of the original application. That the application was, therefore, made to "the proper Court" and "in accordance with law" within the meaning of Art. 179 of Sch. II of Act XV of 1877. *Chattar* v. *Newal Singh, I. L. R. 12 All. 64, Munawar Husan* v. *Jani Bijai, I. L. R. 27 All. 619,* distinguished. The language of Art. 179 ought not to be strained in favour of the judgment-debtor who has not paid his just debt. *Adhar Chandra* v. *Lal Mohan, 1 C. W. N. 626,* followed. Till the Court to which a decree has been sent for execution has made its return to the Court which made the decree, it has jurisdiction to entertain successive applications for execution. *Rajah Bhoop Singh* v. *Sunkur Dutt, 5 W. R. Mis. 47,* has been impliedly overruled by the Full Bench in *Bagram* v. *Wise, 1 B. L. R. (F.B.) 91.* The mere fact that execution proceedings have been struck off, does not indicate the final determination of the execution proceedings in that Court. *Puddomonee* v. *Muthooranath, 20 W. R. 133 : 12 B. L. R. 411, Muhesh Narain* v. *Kishanund, 9 Moo. I. A. 328,* relied on. *Quære :* Whether the ruling in *Amar Chandra Banerjee* v. *Guru Prosunna Mukerjee, I. L. R. 28 Calc. 488,* that an application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree and that the Court to which the decree has been transferred has no jurisdiction to entertain it, is consistent with decision in *Sham Lal Pal* v. *Modhu Sudan, I. L. R. 22 Calc. 558.* MANORATH DAS *v.* AMBIKA KANT BOSE (1909)

13 C. W. N. 533

78. ——— Power of Court as to execution out of its jurisdiction—*Execution of decree of Revenue Court by Civil Court.* Where execution was sought of a decree which was passed in 1850, and which could not be executed by the revenue authorities in consequence of the transfer of its jurisdiction in such matters to the Civil Courts : —*Held,* that the Civil Courts had jurisdiction to entertain the application. LUCHMEE KANT GHOSE *v.* BAMUN DASS MOOKERJEE . **17 W. R. 472**

79. ——— *Purchase of decree obtained by judgment-debtor.—Act VIII of 1859, s. 288.* *A* obtained a decree in the Nuddea Court against *B,* who had obtained a decree against *C* in the Beerbhoom Court. The latter was attached by the Nuddea Court, and sold to *A* in execution of his decree. *A* then petitioned the Beerbhoom Court for execution against *C. Held,* that the Nuddea Court had jurisdiction to attach and sell *B's* decree against *C,* and *A* had a right to apply to the Beerbhoom Court for execution thereof. RAMBAKSH CHETLANGI *v.* BANWARI GOBIND BAHADUR

2 B. L. R. A. C. 65 : 10 W. R. 357

EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

80. ——— *Ground of transfer for execution.* A decree of the Court of the Subordinate Judge of Moorshedabad was sent to the Court of the Subordinate Judge of Rajshahye for execution, and certain property was attached in that district. A claimant of the attached property then obtained from the former Court an order on the second Court to send the record back again to Moorshedabad, for the purpose of executing the decree there, on the ground that the judgment-debtor had property in that district ; and also on the allegation, unsupported by oath, that the property sought to be attached in Rajshahye was his. *Held,* that the Subordinate Judge of Moorshedabad had acted without jurisdiction, and the record must be sent back to the Court of the Subordinate Judge of Rajshahye for execution. *Held,* also, that the claimant had no *locus standi* in the Moorshedabad Court to make such application. INDRA CHAND DUGAR *v.* GOPAL CHANDRA SHETIA

3 B. L. R. A. C. 181 : 11 W. R. 557

81. ——— *Sale of estate partly within and partly without the jurisdiction —Civil Procedure Code, ss. 249, 284, 285, and 286 —Certificate of non-execution.* A money-decree was made by the Judge of the 24-Pergunnahs against a mortgagor who was possessed of property in the 24-Pergunnahs, and also of an estate called Kismat Kosdaha, 18 mouzahs of which lay in Zillah 24-Pergunnahs and 42 mouzahs in Zillah Nuddea. The whole estate was entered in the tauji of, and the Government revenue was payable in, the Collectorate of Nuddea. The Judge of the 24-Pergunnahs, without selling the property of the judgment-debtor which was within his jurisdiction, transmitted a certificate under s. 285 of the Civil Procedure Code to the Judge of Nuddea, stating that no portion of the amount of the decree had been realized by the Court of the 24-Pergunnahs. Thereupon Kismut Kosdaha was attached and sold by order of the Nuddea Court. In a suit brought against the purchaser for possession of the 18 mouzahs lying in the 24-Pergunnahs by a person who claimed to have bought the right, title, and interest of the judgment-debtor in those mouzahs, but who, in fact, was not the real purchaser :—*Held,* that, although the Court of the 24-Pergunnahs strictly ought not to have granted the certificate until the property in the 24-Pergunnahs had been sold the error in so doing did not make the certificate void, or avoid the proceeding in the Nuddea Court, Kismut Kosdaha being substantially in the Nudea District. KALLY PROSONO BOSE *v.* DINONATH MULLICK

11 B. L. R. 56 : 19 W. R. 434

82. ——— *Decree on mortgage—Sale in execution of decree—Property in different districts—Civil Procedure Code (Act X of 1877), s. 19.* A suit was instituted on a mortgage

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

of a single revenue-paying estate in the Court of the Subordinate Judge of the district of Backergunge under the provisions of s. 19, Act X of 1877, and a decree was obtained for the sale of the mortgaged property. On an application for execution of the decree to the Court which passed it:—*Held*, that the Court was competent to order a sale of the whole of the mortgaged property, though only a portion of it was situated in the district of Backergunge, *Kally Prosunno Bose* v. *Dinonath Mullick, 11 B. L. R. 56*, followed. SHURROOP CHUNDER GOOHO *v.* AMEERRUNNISSA KHATOON . **I. L. R. 8 Calc. 703**

83. ——— *Power of Munsif's Court to execute decree against property out of its local jurisdiction.* In execution of a decree, property situate in three Munsifis—*viz.*, Serajgunge, Pubna, and Nattore, all three being at that time portions of the district and subordinate to the Court of Rajshahye—was attached and sold by order of the Court of the Munsif of Serajgunge. *Held*, by analogy to the principle on which the case of *Kalli Prosunno Bose* v. *Dinonath Mullick, 11 B. L. R. 56 : 19 W. R. 434*, was decided, that the sale was not necessarily limited only to the portion of the property situate in the Munsifi of Serajgunge, but that that Court might have jurisdiction to make a valid sale of the whole estate, although it might be more convenient in such a case that the sale should be held by a superior Court having jurisdiction over the entire district. RAM LALL MOITRA *v.* BAMA SUNDARI DABIA . **I. L. R. 12 Calc. 307**

84. ——— *Power of local Court to sell portion of estate in execution of decree outside its jurisdiction.* A Court having local jurisdiction is competent to sell in execution of a decree one or more outlying portions of an estate, even though the greater portion of that estate is not within its jurisdiction. SHIB NARAIN SINGH *v.* GOBIND DASS BHUKUT . . **23 W. R. 154**

85. ——— *Civil Procedure Code, 1859, s. 286—Munsif—Power of execution of decree out of local jurisdiction.* A Munsif is not competent, under Act VIII of 1859, s. 286, to bring to sale property lying without his own jurisdiction, without reference to any other Court. NAWAB ALI *v.* UZIR MAHOMED . . . **23 W. R. 233**

86. ——— *Power of Munsif to attach and sell property, part of which is out of his jurisdiction.* Where a Munsif orders the attachment and sale of a talukh, part of which lies outside the jurisdiction of his Court, the order is, as regards this latter portion, a nullity, and an attachment and a sale pursuant to the order are void. The order of a Court which is not empowered to make any order at all does not stand on the same footing as an erroneous order by a Court empowered to deal with the subject-matter of that order. The failure to object to a sale, if the Court had no power at all

EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

to hold it, does not make the confirmation thereof conclusive. The limitation of the remedy by separate suit contained in Act VIII of 1859, s. 257, applies to cases where a Court acts wrongfully within its jurisdiction, and not to cases where a Court has gone wholly out of its jurisdiction. *Kalee Prosunno Bose* v. *Deno Nath Mullick, 11 B. L. R. 56 : 19 W. R. 434*, and *Nawab Ali* v. *Uzir Mahomed, 23 W. R. 233*, considered. UNNOCOOL CHUNDER CHOWDHRY *v.* HURRY NATH KOONDOO **2 C. L. R. 334**

87. ——— *Sale by local Court of property, a portion of which is not within its jurisdiction.* Where an estate consisting of 18 mouzahs, 3 of which were situate in the district of *P* and 15 in the district of *G*, was sold in the Court of the latter district in execution of a decree, it appeared that although no notice had been issued in the district of *P*, the whole of the land revenue and local rates were paid into the treasury in the district of *G*. *Held*, that under the circumstances the sale of the estate in the district of *G* was not without jurisdiction. See *Unnocool Chunder Chowdhry* v. *Hurry Nath Koondoo, 2 C. L. R. 334*, and *Kally Prosono Bose* v. *Denonath Mullick, 11 B. L. R. 56 : 19 W. R. 434*. GUNGA NARAIN GUPTA *v.* ANNADA MOYEE BURROOANEE . **12 C. L. R. 404**

88. ——— *Mortgage-decree for sale of properties in different districts and jurisdictions—Civil Procedure Code (Act XIV of 1882), ss. 19, 223 (c), Sch. IV, Form 128—Jurisdiction.* A decree obtained in a suit brought under the provision of s. 19 of the Code of Civil Procedure in the Court of the Subordinate Judge of Rajshahye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshahye and Nyadumka, directed that the properties mentioned in the mortgage should be sold and the proceeds applied in payment of the mortgage-debt. The properties were sold by the Court of Rajshahye. *Held*, that the authority given by s. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshahye Court was within its jurisdiction in directing and carrying out the sale. *Quære:* Whether, where a sale takes place under a money-decree of property partly within the local limits of the Court whose decree is being executed, and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Code of Civil Procedure. *Per* GHOSE, *J.*—S. 223 of the Code of Civil Procedure merely provides that, when it may be necessary for a Court to send a decree for execution to another Court by reason of the property being situate beyond its local jurisdiction, it ought to do so; and the words of sub-s. (c), "sale of immoveable property situate without the local limits of the

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

jurisdiction of the Court which passed it," contemplate a case where the whole of the property, and not any portion of it, is situate beyond the local limits of the Court which passes the decree. MASEYK *v.* STEEL & CO. . **I. L. R. 14 Calc. 661**

89. ——— *Sale of property covered by decree by Court which passed decree when property is situate outside its local jurisdiction at time of application—Civil Procedure Code (Act XIV of 1882), s. 223 (c)—Jurisdiction.* A mortgage-decree was passed directing the sale of certain property wholly situate within the local limits of the jurisdiction of the Court which passed the decree. After the decree, the district within which the property was situate was transferred and placed under the local jurisdiction of another Court. The judgment-debtor then applied to the first Court for execution of the decree, and thereupon the judgment-debtor objected that that Court had no jurisdiction to entertain the application or to direct the sale of the property. *Held*, that that Court had authority to execute its own decree and bring the property to sale. *Held*, further, that s. 223 (c) of the Code of Civil Procedure does not curtail the power of a Court to execute its own decree, but gives it a discretion either to execute the decree itself, or, on the application of the decree-holder, to send it to another Court for execution, and thereby extends, rather than limits, the Court's power. KARTICK NATH PANDEY *v.* TILUKDHARI LALL . . . . **I. L. R. 15 Calc. 667**

90. ——— *Power of Court passing decree to execute it—Portion of property out of jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 223.* The Court that has the power to pass a decree for sale of a property has also power to carry out its decree by selling that property, whether any portion of that property be within the local limits of its jurisdiction or not. *Per* GHOSE, *J.*—S. 223, cl. (c), of the Civil Procedure Code leaves it to the discretion of the Court to send the decree for execution to the Court having local jurisdiction. *Maseyk* v. *Steel & Co., I. L. R. 14 Calc. 661*, commented on. GOPI MOHAN ROY *v.* DOYBAKI NUNDUN SEN . **I. L. R. 19 Calc. 13**

91. ——— *Property outside jurisdiiction of Court—Mortgage-decree—Civil Procedure Code, 1882, ss. 19 and 223.* A Court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion of the property be situate outside the local limits of its jurisdiction. *Gopi Mohan Roy* v. *Doybaki Nundun Sen, I. L. R. 19 Calc. 13*, followed. *Prem Chand Dey* v. *Mokhoda Debi, I. L. R. 17 Calc. 699*, distinguished. TINCOURI DEBYA *v.* SHIB CHANDRA PAL CHOWDHURY **I. L. R. 21 Calc. 639**

EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

JAGERNATH SAHAI *v.* DIP RANI KOER **I. L. R. 22 Calc. 871**

92. ——— *Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Procedure.* The plaintiff, having obtained a decree against the defendant in the Court at Bhusaval, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusaval and Nagpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusaval Court to the defendant's disbursing officer at Nagpur, a moiety of the defendant's pay having been withheld by that officer, the defendant applied to the Bhusaval Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusaval. On reference to the High Court:—*Held*, that the order of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusaval Court.—The proper procedure was to send the decree of the Bhusaval Court for execution to Nagpur, where the disbursing officer resided, and where the defendant's pay was available for satisfaction of the decree. RANGO JAIRAM *v.* BALKRISHNA VITHAL **I. L. R. 12 Bom. 44**

GOPAL v. LAVET . **I. L. R. 12 Bom. 45 note**

93. ——— **Foreign Court**—*Civil Procedure Code (Act XIV of 1882), ss. 223, 224, 229A and 229B—British Courts in India, power of, to send their decrees for execution to Foreign Courts.* The Tributary Mahals of Orissa do not form part of British India; therefore, in the absence of a prior notification in the *India Gazette*, as specified in ss. 229A and 229B of the Civil Procedure Code, no decree by a Court in British India can be sent for execution into a territory such as Mayoorbhunj, which is a Tributary Mahal. *Kastur Chand Gujar* v. *Parsha Mahar, I. L. R. 12 Bom. 230*, referred to. RATAN MAHANTI *v.* KHATOO SAHOO (1902) **I. L. R. 29 Calc. 400**

94. ——— **Surety**—*Civil Procedure Code (Act XIV of 1882), ss. 223, 336—Surety for presentation of insolvency petition by judgment-debtor—Failure to apply—Transfer of decree—Application by transferee for decree to be sent to another Court for execution against judgment-debtor and surety.* A transferee decree-holder is entitled to apply, under s. 223 of the Code of Civil Procedure, to the Court which passed the decree, to send it for execution to another Court; and where a person has become surety for the judgment-debtor, under s. 336, and the judgment-debtor has failed to apply to be declared an insolvent, the transferee-decree-holder is entitled to have his decree sent for execution against the surety as well as against the judgment-

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EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*contd.*

debtor, if his transfer has been recognized. CHATHOTH KUNHI PAKKI *v.* SAIDINDAVIDE KUNHAMNAD (1902) . . . **I. L. R. 26 Mad. 258**

95. ———— Transfer of jurisdiction— *Civil Procedure Code (Act XIV of 1882), ss. 223, 649—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss. 13, 17—Execution of decree —Jurisdiction of Court, transfer of—Limitation Act (XV of 1877), s. 14.* Execution of a decree of the Court of the Munsif of Nawabgunge having been taken out in the Court of the Munsif of Maldah by reason of transfer of the local jurisdiction of the former by the Local Government under Act XII of 1887, a sum of money was paid in part satisfaction. A second application was objected to on the ground that the Maldah Court had no jurisdiction. A fresh application, with a certificate transferring the decree from the Nawabgunge Court, was resisted on the ground of limitation. *Held*, that the Nawabgunge Court did not cease to have jurisdiction, but that the decree could also be executed by the Maldah Court. *Lutchman Pandeh* v. *Maddun Mahun Shye, I. L. R. 6 Calc. 315*, referred to. *Kalipado Mukerjee* v. *Deno Nath Mukerjee, I. L. R. 25 Calc. 315*, distinguished. *Held*, further, that proceedings to enforce a decreee taken *bonâ fide* before a Court which the party *bonâ fide* believes to have jurisdiction is a proceeding within the meaning of s. 14 of the Limitation Act. *Hira Lal* v. *Badri Dass, I. L. R. 2 All. 792*, referred to. JAFAR *v.* KAMALINI DEBI (1900)
I. L. R. 28 Calc. 238 ; s.c. 5 C. W. N. 150

96. ———— Practice—*Transfer of decree from one district to another—Rules of execution different in the two districts—Procedure.* Where in different districts, different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another of such districts, is to be executed, the executing Court must be guided by the rules in force in its own district. MARTAND *v.* VINAYAK (1906) **I. L. R. 31 Bom. 5**

97. ———— Court of Subordinate Judge, Kondh—*Transfer of decree for execution—Decree of Court in British India—Benares, Family Domains of Maharaja of—Foreign Court—Court established by authority of Governor-General—Benares Family Domains Regulation (VII of 1828) —Benares Family Domains Act (XIV of 1881) —Civil Procedure Code (Act XIV of 1882), ss. 223, 229, 229B.* The family domains of the Maharaja of Benares are situated within British India as defined in Act X of 1897, s. 3, cl. 7, and s. 4, cl. 1 ; and the Court of the Native Commissioner or Subordinate Judge of Kondh within those domains, established under Regulation VII of 1828 amended by Act XIV of 1881, is a Court established by the

EXECUTION OF DECREE—*contd.*

8. TRANSFER OF DECREE FOR EXECUTION, AND POWER OF COURT AS TO EXECUTION OUT OF ITS JURISDICTION —*concld.*

authority of the Governor-General in Council ; consequently neither s. 229 nor s. 229B of the Code of Civil Procedure applies to the execution of decree passed by it. To make s. 223 of the Code of Civil Procedure relating to the transmission of decrees of one Court to another for execution applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts. The Code having become applicable to the Court of the Subordinate Judge of Kondh by virtue of rules made by the Lieutenant-Governor of the North-Western Provinces on 2nd April 1888 under s. 22, Regulation VIII of 1828 and the notification by the Governor-General in Council, dated 1st June 1882, a decree of that Court may be transferred to, and executed by, the Civil Court in the district of Saran. The Scheduled Districts Act (XIV of 1874) and the Laws Local Extent Act (XV of 1874) referred to. *Kashi Mohun Borua* v. *Bishnoo Pria, I. L. R. 15 Calc. 365*, and *Kasturchand Gujar* v. *Parsha Mahar, I. L. R. 12 Bom. 230*, referred to. PRABHU NARAIN SINGH *v.* SALIGRAM SINGH (1907)
I. L. R. 34 Calc. 576

9. EXECUTION BY COLLECTOR.

1. ———— Right of creditor under a simple money-decree obtained after property has been taken over by the Collector to be entered in list of creditors prepared under s. 322B—*Civil Procedure Code, 1882, ss. 322, 322A, 322B, 325, and 326—Civil Procedure Code, 1877, s. 326.* *Held*, that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under s. 326 of Act X of 1877, whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under s. 322 of Act XIV of 1882 ; and that, in any case, application to be placed on the said list of creditors should have been made to the Collector, and not to the District Judge. MURARI DAS *v.* COLLECTOR OF GHAZIPUR
I. L. R. 18 All. 313

2. ———— Decree transferred for execution to Collector—*Civil Procedure Code (1882), ss. 320 and 322A—Collector not authorized to hear objections to execution of decree so transferred.* Where a decree for money has been transferred for execution to the Collector under the provisions of s. 300 of the Code of Civil Procedure, the Collector is not authorized under s. 322A to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached. ONKAR SINGH *v.* MOHAN KUAR
I. L. R. 20 All. 428

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EXECUTION OF DECREE—*contd.*

9. EXECUTION BY COLLECTOR—*contd.*

3. ——————— *Civil Procedure Code, ss. 310A, 320—S. 310A not applicable to proceedings in execution held by a Collector under s. 320. Held,* that the provisions of s. 310A of the Code of Civil Procedure have no application to execution proceedings taken by a Collector under s. 320 of the Code, and the rules framed by the Local Government thereunder, governing such proceedings. SHEO PRASAD *v.* MUHAMMAD MOHSIN KHAN (1902) **I. L. R. 25 All. 167**

4. ——— **Pending execution, revival of**—*Limitation Act (XV of 1877), Sch. II, Art. 179—Suspension of execution proceedings —Revival of pending execution suspended not by act or default of the decree-holder.* On 24th August 1888 an application was made for execution of a decree, and on 18th December 1888 execution was allowed to proceed. On 29th November 1889 it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On 23rd December an order was made that, as the decree-holder had not made a deposit on account of the transfer to the Collector, "therefore in default of prosecution on the part of the decree-holder, the record be not sent to the Collector's Court." On 15th February 1889 an appeal had been preferred to the High Court from the order of 18th December 1888 allowing execution to proceed, and the High Court reversed that order on 7th January 1890, but on appeal to the Privy Council the order allowing execution was restored on 12th December 1894. *Held,* by the Judicial Committee (affirming the decision of the High Court), that an application for execution made on 23rd November 1897 was one to revive and carry through a pending execution suspended by no act or default of the decree-holder, and not an application to initiate a new one, and was therefore not barred by limitation. The order of 29th November 1889 was one in aid of execution and that of 23rd December was in no sense a final order; if the appeal from the order of 18th December 1888 and the proceedings up to the order of the Privy Council of 12th December 1894 had not intervened there was nothing in its terms to preclude the decree-holder from coming again to the Court and, after satisfying the conditions indicated in the order, obtaining the transmission of the case to the Collector's Court. KAMAR-UD-DIN AHMAD *v.* JAWAHIR LAL (1905) . **I. L. R. 27 All. 334**
s.c. L. R. 32 I. A. 102

5. ——— **Procedure**—*Postponement of sale by Assistant Collector—Power of Assistant Collector to cancel his own order of postponement—Clerical error—Irregularity.* An application, purporting to be made by a decree-holder, was presented to an Assistant Collector on the day fixed by the latter for the sale of certain immoveable property. The applicant stated that the decretal money had been paid

EXECUTION OF DECREE—*contd.*

9. EXECUTION BY COLLECTOR—*concld.*

and asked for the postponement of the sale. The Assistant Collector thereupon granted the application and struck off the execution proceedings, but discovering his error immediately afterwards, cancelled his order and held the auction a few hours later. *Held,* that the Assistant Collector could cancel his original order and that the subsequent sale was not thereby rendered illegal. *Syed Tuffazal Hossein Khan* v. *Raghu Nath Prasad, 7 B. L. R. 186,* referred to. WAZIR ALI *v.* JANKI PRASAD (1906) . . . . **I. L. R. 28 All. 671**

6. ——— **Material irregularity**—*Sale of ancestral property—Civil Procedure Code (Act XIV of 1882), s. 320—Rules framed by Local Government —Application under Rule 17 (XIII A).* One of several co-owners of ancestral property, which has been sold by the Collector under the Rules framed by the Local Government under s. 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIIIA) to have the sale set aside making at the same time the necessary payments into Court required by the rule. *Held,* that upon the presentation of the latter application under Rule 17 (XIIIA) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). *Net Lall Sahoo* v. *Kareem Bux, I. L. R. 23 Calc. 686,* and *Paresh Nath Singha* v. *Nabogopal Chattopadhya, I. L. R. 29 Calc. 1,* referred to. TUHI RAM *v.* IZZAT ALI (1908)
I. L. R. 30 All. 192

10. DECREES OF COURTS OF NATIVE STATES.

1. ——— **Foreign judgment—Execution in British India of foreign judgment**—*Civil Procedure Code (Act XIV of 1882), ss. 229A and B and 245B—Decree obtained without jurisdiction and by fraud—Jurisdiction.* The plaintiff obtained a decree against the defendant in the Zillah Court of Angikarmal, in the State of Cochin. The defendant was a resident in Bombay, and the plaintiff sought to execute the decree against him in Bombay. Notice under s. 245B of the Civil Procedure Code (Act XIV of 1882) was served upon the defendant calling upon him to show cause why he should not be committed to jail in execution. The plaintiff relied upon s. 229B of the Civil Procedure Code. The defendant, as cause against the execution of the decree, alleged that the decree was passed by the Cochin Court without jurisdiction, and that it had been fraudulently obtained by the plaintiff. The Court refused to commit the defendant. *Held,* on the facts as presented in the affidavit, that the Court in Cochin had no jurisdiction over the defendant, and that the plaintiff obtained the decree by

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EXECUTION OF DECREE—*contd.*

10. DECREES OF COURTS OF NATIVE STATES—*concld.*

misrepresentation and concealment of essential facts. *Held*, also, that the Court was entitled to exercise a judicial discretion as to whether it would put into force the provisions of s. 229B of the Civil Procedure Code. No duty is cast upon the Court to execute a decree which can be shown to have been passed without jurisdiction or obtained by fraud. S. 229B of the Civil Procedure Code does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. The Court is not bound to execute the decree of a foreign Court which has been obtained by the fraud of the plaintiff. Where execution of such a decree is sought, relief can only be obtained by pointing out the fraud to the executing Court and asking that Court to refrain from executing the decree. The Court will not send British subjects subject to its territorial jurisdiction into a foreign country to seek to be relieved from a fraudulently obtained decree, but will itself refuse to give effect to such a decree. MUSA HAJI AHMED *v.* PURMANUND NURSEY . **I. L. R. 15 Bom. 216**

11. MODE OF EXECUTION.

(*a*) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION.

1. ——— **Decree how constructed for purposes of execution.** A decree cannot be extended in execution beyond the real meaning of its terms. BUDAN *v.* RAMCHANDRA BHUNJGAYA **I. L. R. 11 Bom. 537**

2. ——— **Division of decree**—*Execution in portions.* A decree cannot be executed, nor can it be seized and sold, in portions. HARO SANKER SANDYAL *v.* TARAK CHANDRA BHUTTACHARJEE **3 B. L. R. A. C. 114 : 11 W. R. 488**

See NUND COOMAR FUTTEHDAR *v.* BUNSO GOPAL SAHOY . . . . . **23 W. R. 242**

and GOODUR SAHOY *v.* DHONESSUR KOER **7 C. L. R. 117**

3. ——— *Severance of right under decree.* The right under a decree cannot be severed so that the remedy against the person can remain in or pass to one, and the alternative remedy against the property pass to another. PADMANABHA *v.* THANAKOTI . **I. L. R. 2 Mad. 119**

4. ——— *Decree for land and for certain papers—Splitting execution.* Where a judgment-creditor, proceeding to execute a decree for land and certain papers, failed to find the papers, and then instituted further proceedings, either to get them or the money payable in default :—

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*a*) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION—*contd.*

Held, that he had adopted the only course open to him, and there was no splitting up of the decree into different executions. WOOMA CHURN CHOWDHRY *v.* KUMOLAY KAMINEE DABEE **25 W. R. 58**

5. ——— **Decree having continuous operation**—*Decree needing yearly execution.* Where a decree is one of continuous operation, taking effect as each year furnishes proceeds for its satisfaction, it must be executed each year according to the law of procedure then in force. VISHNU SAKHARAM NAGARKAR *v.* KRISHNARAO MALHAR **I. L. R. 11 Bom. 153**

6. ——— **Adaptation of mode of execution to nature of case**—*Civil Procedure Code (Act VIII of 1859), s. 212.* The words "otherwise as the case may be" in s. 212 meant that the mode of execution was to be adapted in each case to the nature of the particular relief sought to be enforced under the decree. DENONATH RUCKIT *v.* MUTTY LALL PAUL **1 Ind. Jur. O. S. 135 : 1 Hyde 158**

7. ——— **Former mode of execution in High Court**—*Practice of High Court—Civil Procedure Code, 1859, s. 250.* The practice of the High Court under the Civil Procedure Code, on the execution of decrees for money, either against immoveable or moveable estate, has been, in the first instance, to issue a writ of attachment, and subsequently, on its return by the Sheriff duly executed, to issue a writ directing a sale. The writ of *fi. fa.* which issued from the Supreme Court was an authority to the Sheriff not only to seize, but also to sell. S. 250 of the Civil Procedure Code applied neither to executions against immoveable property nor to executions against debts due to the defendant; and in order to give to third parties full opportunity of vindicating their right before sale and also to give the defendant an opportunity of paying, it has not been usual to issue process of attachment and sale simultaneously even against personal property, and it would not seem to be proper to do so, except under special circumstances. FINANCIAL ASSOCIATION OF INDIA AND CHINA *v.* PRANJIVANDAS HARJIVANDAS . **3 Bom. O. C. 25**

8. ——— **Execution against person or property**—*Decree for sale of hypothecated property and against judgment-debtor personally—Execution against judgment-debtor's person—Decree-holder entitled to proceed against property or person as he might think fit.* Where a decree upon a hypothecation-bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally and contains no condition that execution shall first be enforced against the property, and where there is no question of fraud being perpetrated on the judgment-debtor, there is no principle of equity which prevents the decree-holder from enforcing

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*a*) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION—*contd.*

his decree against the judgment-debtor's person or property, whichever he may think best. *Wali Muhammad* v. *Turab Ali, I. L. R. 4 All. 497,* explained. JOHARI MAL *v.* SANT LAL **I. L. R. 9 All. 484**

9. ——— Decree of Appellate Court—*Decree referring to judgment.* Where the judgment of an Appellate Court directed that a certain sum over and above what had been decreed to him in the Court of first instance should be decreed to the appellant, but the decree of the Appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based and to the decree of the Court of first instance:—*Held,* that, though the decree as thus drawn was informal, yet, as the amount due to the decree-holder was ascertainable from the record, and the decree was thus practically capable of execution, execution should, as a matter of equity, be granted to the decree-holder. JAWAHIR MAL *v.* KISTUR CHAND **I. L. R. 13 All. 343**

10. ——— Against what property decree may be executed—*Property hypothecated to debtor. Held,* that a decree-holder is entitled to execute his decree against any property devolving on the judgment-debtor before the decree has been fully executed, and this without reference to whether the property was hypothecated to him; and that the denial of the judgment-debtor that he is interested in the property which it is sought to make subject to execution can have no effect. BULDEO SINGH *v.* DWARKA DOSS . **1 Agra 169**

11. ——— Execution of decree against party holding another decree—*Collector's Court—Sale of decree—Appointment of manager.* Where a Deputy Collector executes a decree against a party holding another decree from his own Court, he ought, instead of selling that other decree to appoint a manager under the provisions of Act VIII of 1859 to realize the judgment-debt due thereon. RAMCHUNDER ROY *v.* RAM CHURN BUKSHEE . . . . . **9 W. R. 372**

12. ——— Decree declaring lien on property without power to sell—*Civil Procedure Code, 1859, s. 243.* Where a decree declares a decree-holder's lien on certain property without distinctly declaring his right to sell the same, it may be executed as against that property specially; but the usual course of attachment and sale on one hand, or of attachment and management under s. 243, Code of Civil Procedure, on the other hand, must still take place. NUDDYABASHEE DASS *v.* REZA CHOWDHRY . . . **15 W. R. 337**

13. ——— Decree against railway servant for salary—*Consent of debtor to particular mode.* The order of a judgment-debtor being a railway servant, upon the paymaster to

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*a*) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION—*contd.*

satisfy the decree out of his salary, does not alter the case as regards the mode in which the Court should execute its decree, which should be as directed by law and not according to the consent of the judgment-debtor. *In re* MACFARLANE . **11 W. R. 69**

14. ——— Decree for specific property—*Order for production of property by defendant after decree.* There is no provision of the Civil Procedure Code authorizing a Court to call upon a defendant to appear in Court and produce property decreed to plaintiff. The decree must be executed in the ordinary course. BHOZA RUGHBUR SINGH *v.* BHOZA RAJ SINGH . . **3 N. W. 319**

15. ——— Informality in mode of execution—*Ground for setting aside execution.* In execution-proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right. BISSESSUR LALL SAHOO *v.* LUCHMESSUR SINGH **L. R. 6 I. A. 233**

16. ——— Warrant of arrest, power of Sheriff's officer in executing—*Breaking open door—Assault and false imprisonment.* A Sheriff's officer in execution of a bailable writ peaceably obtained entrance by the outer door, but, before he could make an actual arrest, was forcibly expelled from the house and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest. *Held,* that the officer was justified in so doing. *Held,* also, that demand of re-entry under such circumstances was not requisite to justify his breaking open the outer door. *Quære:* If indictment for assault and false imprisonment will under such circumstances lie against the Sheriff's officer. AGA KURBOOLIE MAHOMED *v.* QUEEN . . **3 Moo. I. A. 164**

17. ——— Power of officer in executing decree—*Mamlatdar's Court—Bombay Act V of 1864.* A Mamlatdar's Court, authorized under Act V of 1864 (Bombay) to give immediate possession of lands and premises, has the power to direct the breaking open of a door when necessary to give effect to its decree. BAJI DEV *v.* SADASHIV BHAISHANKAR . . . . **5 Bom. A. C. 158**

18. ——— Right to remove lock—*Breaking open inside door of house.* A person executing a process directing a general attachment of moveable property, having gained access to a house, has a right to remove the lock from the door of a room in which he has reasonable ground for believing moveable property to be lodged. KONDASAWMY PILLAY *v.* KRISTNA SWAMY PILLAY **5 Mad. 189**

19. ——— *Civil Procedure Code, 1859, s. 233—Execution of warrant against moveable property—Attachment—Removing*

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*a*) GENERALLY, AND POWERS OF OFFICERS IN EXECUTION—*contd.*

locks. Under s. 233, Act VIII of 1859, a nazir, authorized to execute a warrant by attachment of moveable property, has power to remove locks put by the judgment-debtor on the doors of godowns or other places where his property is stored, and put his own locks thereon for the purpose of attachment and safe custody of the property. SODAMINI DASI *v.* JAGESWAR SUR **5 B. L. R. Ap. 27 : 13 W. R. 339**

20. ——— Breaking open doors. A Civil Court's bailiff, in executing a process against the moveable property of a judgment-debtor, has no authority to use force and break open a door or gate. ANDERSON *v.* MCQUEEN . **7 W. R. Cr. 12**

21. ——— *Bailiff or Nazir —Writ of attachment.* A bailiff or nazir has authority to break open the door of a shop in order to execute a writ of attachment, the previously existing law on the subject not being altered by s. 271 of the new Code of Civil Procedure (Act X of 1877). DAMODAR PARSOTAM *v.* ISHVAR JETHA **I. L. R. 3 Bom. 89**

See SODAMINI DASI *v.* JAGESWAR SUR **5 B. L. R. Ap. 27**

22. ——— *Process of attachment against person or goods—Breaking open doors.* A Nazir or Sheriff cannot, under a writ of attachment, break open a defendant's dwelling-house to execute civil process against his person or goods if the outer door is closed and locked, even when he finds that the defendant has absconded to evade such execution. The privilege extends to a man's dwelling-house or out-house or any office annexed to the dwelling-house, but not to a building standing at a distance from the dwelling-house and not forming parcel of it. If, however, the outer door of the defendant's dwelling-house be open and the Sheriff or Nazir enter, he may afterwards break an inner door to take the goods. BAI KUVAR *v.* VENDIDAS GANGARAM **8 Bom. A. C. 127**

23. ——— *Madras Reg. IV of 1816, s. 30—Personal property only liable to attachment in execution of Village Munsif's decree.* Under Regulation IV of 1816, the decrees of Village Munsifs cannot be executed against other than personal property. Such decrees can be executed by a transferee of the decree and against the representative of a deceased judgment-debtor. KALANDAN *v.* PAKRICHI . **I. L. R. 9 Mad. 378**

24. ——— Proceedings of Court of Revenue—*Restitution due in virtue of the modification in appeal of the decree of a Rent Court —Procedure—Civil Procedure Code, ss. 583 and 244.* *Held*, that, although s. 583 of the Code of Civil Procedure might be applied by analogy to proceedings before a Court of Revenue under Act XII of 1881, s. 244, could not be applied to such proceedings. The remedy, therefore, of a person entitled to a refund in consequence of the reversal or modification in appeal of a decree passed under Act XII of 1881 by a Court of Revenue is two-fold, both by means of an application in execution and by a separate suit. *Durga Purshad Roy Chowdry* v. *Tara Prosad Roy Chowdry, 8 W. R., P. C. 11*, referred to. MASHI-ULLAH KHAN *v.* MAJIBUN-NISSA (1904) . . **I. L. R. 26 All. 149**

25. ——— Payment of rent to prevent sale—*Bengal Tenancy Act (VIII of 1885), ss. 3, 171.* Where a decree made in a suit for rent was in the main one for rent, although it included other sum which were not strictly rent, within the meaning of the Bengal Tenancy Act, and in execution thereof the tenure in area was ordered to be sold under Chapter XIV of the Act and advertised. *Held*, that the holder of an under-tenure liable to be avoided would be justified in making a payment to prevent the sale of the superior tenure, and having made the payment, would be entitled to the rights, which are given to a person who makes a payment under s. 171 of the Bengal Tenancy Act. A lease provided that a certain sum was payable by a tenant direct to the landlord as *malikana* and certain other sums were payable by the tenant for Government revenue and other demands, which the landlord was himself bound to pay. *Held*, that the latter sums, though not actually payable to the landlord, were payable for the use and occupation of the land held by the tenant, and might have been made payable to the landlord direct, although for convenience it was arranged that the tenant should pay them for the landlord, and came within the definition of rent in s. 3 of the Bengal Tenancy Act. JNANADA SUNDARI CHOWDHRANI *v.* ATUL CHANDRA CHAKRAVARTI (1905) . . **I. L. R. 32 Calc. 972**

(*b*) ALTERNATIVE DECREE.

26. ——— Decree for delivery of moveable property—*Specific alternative amount payable in money.* Where a decree is for the delivery of moveable property and states the amount to be paid as an alternative if delivery cannot be had, the goods must be delivered if capable of delivery, but, if not capable of delivery, then assessed damages should be paid. KASHEE NATH KOOER *v.* DEBKRISTO RAMANOOJ DOSS **16 W. R. 240**

(*c*) ATTACHMENT.

27. ——— Decree declaring attachment should be removed. A decree declaring that an attachment should be removed cannot be executed for money. BOYDO NATH SHAW *v.* SHUMBHOO RAMNUTEE . . . **25 W. R. 59**

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(c) ATTACHMENT—*contd.*

28. ——— Debts due to judgment-debtor, attachment of—*Civil Procedure Code, s. 244—Attachment of decree held by the judgment-debtor against a third party—Objection by judgment-debtor under the attached decree—Objection disallowed—Appeal.* Mewa Lal and another held a money decree against Ram Singh. In execution thereof they attached a mortgage decree held by Ram Singh against one Ishri Dat. They next applied for the sale of the mortgage decree, which they had attached in execution of their own money decree. To this Ishri Dat objected that the decree has been already satisfied. His objection was disallowed, and on appeal by Ishri Dat from the order disallowing the objection: *Held*, that no appeal would lie. ISHRI DAT *v.* MEWA LAL (1904)

I. L. R. 26 All. 136

29. ——— *Attachment of debts due to judgment-debtors—Improper realization of such debts by third party—Application to compel third party to disgorge—Limitation—Contempt of Court.* Certain plaintiffs attached before judgment some debts due to the defendants. The defendants sold the right to collect those debts to third parties, who, in defiance of the attachment, proceeded to collect some of them for their own benefit. The plaintiffs, having obtained a decree in their suit, applied to the Court to compel the third parties to pay into Court the money which they had improperly collected in defiance of the Court's order. *Held*, that this was not an application in execution of their decree, but an application to the Court to exercise its inherent power of punishing for contempt of Court, and that the limitation rules provided for applications to execute decrees did not apply to it. GODU RAM *v.* SURAJMAL (1905)

I. L. R. 27 All. 378

30. ——— *Application for attachment of debts said to be due to judgment-debtor—Denial of debts by alleged debtors—Procedure.* Where a Court is asked in execution of a decree to attach debts alleged by the decree-holder to be due by third persons to the judgment-debtor, it is no business of the Court to determine in the first instance whether the debts are really due or not, or to refuse execution, if the parties alleged to be debtors to the judgment debtor deny that they are so. But after attachment the Court may either sell the debts after giving notice to the intending purchasers that the existence of some of them is denied by the alleged debtors, or may appoint a receiver to realize the debts by bringing suits against the debtors. MAHARAJA OF BENARES *v.* PATRAJ KUNWAR (1905) . . . **I. L. R. 28 All. 262**

31. ——— Fraud upon the Court—*Fraudulent sale.* *B* (defendant) obtained two decrees against *R*, one for R150 and the other for R750, the latter amount being payable by yearly instalments of R250 each. About the same time, *K* obtained a decree against *R* for R47. *B* presented a *darkhast* for the recovery of R182-7-9 under this first decree; and *K* also about that time presented his *darkhast* to execute his decree. *B* then presented another *darkhast* in respect of money due under his second decree, in which he prayed for rateable distribution under s. 294 of the Civil Procedure Code (Act XIV of 1882). In his first *darkhast* *B* prayed for attachment and sale of the property belonging to *R*: and the property was accordingly placed under attachment. Subsequently *R* made an application to the Court to allow him one month's time to raise money in order to satisfy *K*'s decree and also the first decree of the defendant. The Court granted him one month's time and issued to him a certificate, as required by s. 305 of the Civil Procedure Code (Act XIV of 1882), which expressly directd that the amount realized by sale or mortgage of the property should be paid into Court and not to the judgment-debtor. The property in dispute was sold by *R* to the plaintiff privately; and the plaintiff made two applications to the Court, in which he stated that he had produced before the Nazir an amount of purchase money sufficient to satisfy *K*'s decree and the first decree of *B*, and prayed that the property might be released from attachment. The Court granted the applications; but *B* on the same day applied to the Court asking the Court not to confirm the sale and withdraw the attachment, as the sale to the plaintiff was made to defeat his later decree. The Court held the sale to be fictitious and fraudulent. *B* then got the property attached, and sold in execution of his later decree and purchased it himself with the permission of the Court. The plaintiff, shortly after this, filed a suit against *B* to recover possession of the property. *Held*, that under the circumstances it was clear that a fraud was practised upon the Court, and that therefore the purchase by the plaintiff was vitiated by the fraud. A purchase, which has received the sanction of the Court, will not be set aside upon slight grounds, but if the approval of the Court is obtained by misrepresentation, or by withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud and act accordingly. *Boswell* v. *Coaks, 27 Ch. D. 424, 454,* followed. ATMARAM GANOJI *v.* BALKRISHNA MAHADJI (1905)

I. L. R. 29 Bom. 615

32. ——— Fresh attachment—*Dismissal of execution case—Sale proclamation.* It cannot be laid down as a general proposition of law that, because an execution case has been dismissed by reason of no steps having been taken by the decree-holder to bring, within a certain time limited, the property to sale, the attachment already put upon it necessarily falls through. The question is one of intention. *Held*, having regard

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*c*) ATTACHMENT—*concld.*

to the scope of the order dismissing the previous application, that no fresh attachment is necessary before issuing a sale proclamation. GOBINDA CHANDRA PAL *v.* DWARKA NATH PAL AND OTHERS (1906) . . . **I. L. R. 33 Calc. 666**

(*d*) BOUNDARIES.

33. ——— Declaratory decree as to boundaries—*Proclamation of decree.* The holder of a decree which declares that the boundary-line laid down in the survey map as the boundary-line of the plaintiff's permanently-settled estate is not the true boundary-line is not entitled either to have the decree proclaimed on the spot or to have the line erased from the survey map. RAJKRISHNA SINGH *v.* COLLECTOR OF MYMENSINGH **19 W. R. 232**

(*e*) CANCELMENT OF LEASE.

34. ——— Decree for cancelment of lease. A decree for cancelment of a lease is virtually one for possession in supersession of that lease, and may be so executed by a Court under Act X of 1859, by which it has been passed. MAHOMED FAEZ CHOWDHRY *v.* SHIB DOOLAREE TEWAREE **16 W. R. 103**

(*f*) CONDITIONAL DECREE.

35. ——— Default of defendant—*Execution of decrees—Absolute and conditional decrees—Notice—Ex parte orders, inherent power of Court to set aside—Application to set aside ex parte order for execution of conditional decree—Limitation.* The Court has an inherent power to deal with an application to set aside an order made *ex parte* on a proper case being substantiated. *Bibee Tulsiman* v. *Harihar Mahato, 9 C. W. N. 81,* followed. When a conditional decree is made, the plaintiff on the default of the defendant should apply to the Court, which passed the decree, on notice to the defendant by motion on notice or by rule for an order absolute. Then, if and when such an order is obtained, application may be made in the usual way for execution of the order according to the provisions of the Civil Procedure Code. On the plaintiff applying on notice for such order, the Court will determine the question, if necessary, directing the issue to be tried in evidence, whether there has been default of the condition or not. If the Court finds that there has been such default then the plaintiff will be entitled to an order absolute and should thereafter apply to execute that order. The plaintiff obtained a conditional decree on the 21st of June 1905, which provided that she would be entitled to eject the defendant from her premises, unless the latter performed certain conditions. Disputes arose between the plaintiff and the defendant *re* the performance of the conditions and the plaintiff on the 31st of August 1905, without notice to the defendant, applied for and obtained an order for ejectment of the defendant. The defendant was ejected on the 25th September 1905. The defendant applied and obtained a rule on the 1st of December 1905 for setting aside, modifying or reviewing the order of 31st of August. *Held,* that the defendant's application was not barred by limitation. SUDEVI DEVI *v.* SOVARAM AGARWALLA (1906) . . . . . **10 C. W. N. 306**

36. ——— *Conditional decree—Smaller sum payable if payment made within a time fixed by Court—Decree of first court fixing time for deposit of money—Decree affirmed by High Court and by Privy Council—Money not paid within time fixed by first Court—No extension allowed.* A plaintiff claimed the principal sum of money due on a bond with interest at 30 per cent. per annum and the decree of the court of first instance directed that if the defendant deposited the money within three months from the date of its decree, he would be liable to pay interest at the rate of 12 per cent. per annum and would be exempted from further liability. This decree was affirmed by the High Court and finally by the Privy Council, but the time for payment was not extended. *Held,* that the defendant having made default in the payment of the money within the time allowed by the first court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 12 per cent. from the date of the Privy Council decree. GHANSHYAM LAL *v.* RAM NARAIN (1909) . . . . **I. L. R. 31 All. 379**

(*g*) COSTS.

37. ——— Costs against guardian of minor or manager of lunatic's estate. The Courts have discretion to allow, if the circumstances of the case require it, execution of a decree for costs to be taken out against a guardian of a minor, or a manager of a lunatic's estate. OMRAO SINGH *v.* PREMNARAIN SINGH . . **24 W. R. 264**

See, however, TARA SUNDUREE *v.* RASH MUNJAREE . . . . . **12 W. R. 78**

BROJO MOHUN MOJOOMDAR *v.* ROODRA NATH SURMAH MOJOOMDAR . . **15 W. R. 192**

KOMUL CHUNDER SEN *v.* SURBESSUR DOSS GOOPTO . . . . . **21 W. R. 298**

and SHERAFUTOOLLAH CHOWDHRY *v.* ABEDOONISSA BIBEE . . . . . **17 W. R. 374**

BREJESSUREE DOSSEE *v.* KISHORE DOSS **25 W. R. 316**

38. ——— Decree for costs in rent suit—*Charge on land—Liability for costs of pur-*

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*g*) COSTS—*contd.*

chaser. A decree for costs incurred in a rent suit is no charge upon a talukh in respect of which the suit was instituted, and cannot be executed against it. A subsequent purchaser of a share of such talukh does not become liable as such for any portion of the costs due under such decree. ROMA PROSUNNO SINGHEE *v.* BOYKANTO NATH GHOSAL **3 C. L. R. 504**

39. ——— Order made by a Judge in chambers on client to pay taxed costs of his attorney—*Civil Procedure Code, s. 267—Right of attorney to execute such order as a decree—Rule 183 of rules of High Court, Bombay.* An order obtained from a Judge in chambers by an attorney against his client for the payment of costs is a decree or order to the execution of which the provisions of Ch. XIX of the Civil Procedure Code (XIV of 1882) apply. S. 267 of the Civil Procedure Code is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale. The words "liable to be seized" contained in s. 267 of the Civil Procedure Code are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree. Property of a judgment-debtor which he has mortgaged is *primâ facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt. A person may be examined, under s. 267, in respect of property which is *primâ facie* the property of the judgment-debtor, even although such person may allege that he is a mortgagee in possession of the attached property. *In re* PREMJI TRIKUMDAS . **I. L. R. 17 Bom. 514**

See ASSUR PURSHOTAM *v.* RUTTONBAI **I. L. R. 16 Bom. 152**

40. ——— Security for costs—*Sale of properties given as security—Mortgage—Transfer of Property Act (IV of 1882), ss. 67, 99—Costs—Interests on costs.* As security for the costs of the respondents in appeal to the Privy Council the appellants executed a duly attested and registered bond, whereby they "put certain immoveable properties in security" for such costs. The Privy Council in dismissing the appeal awarded the respondents their costs, who thereupon in execution applied for the sale of the properties comprised in the bond: *Held*, that the effect of the bond was to create a mortgage, and that having regard to s. 99 of the Transfer of Property Act, the properties could not be sold without instituting a suit under s. 67 of the Act, *Girindra Nath Mukherjee* v. *Bejoy Gopal Mukherjee, I. L. R. 26 Calc. 246; Abdul Karim* v. *Salimun, I. L. R. 27 Calc. 190*, and *Gokul Mandar* v. *Padmanand Singh, I. L. R. 29 Calc. 707*, referred to. *Ramji Haribhai* v. *Bai Parvati, I. L. R. 27 Bom. 91; Ganga Dei* v. *Shiam Sundar, (1903) All. W. N. 201, and Janki Kuar* v. *Sarup Ram, I. L. R. 17 All. 99*, dissented from. *Bans Bahadur Singh* v. *Mughla Begum, I. L. R. 2 All. 604*, and *Shyam Sundar Lal* v. *Bajpai Jainarayan, I. L. R. 30 Calc. 1060*, distinguished. When the order of the Privy Council awards costs, but is silent as to interest on the costs so awarded, it is not competent for the Court executing the order to direct payment of the costs with interest. *Forester* v. *Secretary of State for India, I. L. R. 3 Calc. 161: L. R. 4 I. A. 137; Dakhina Mohan Roy* v. *Saroda Mohan Roy, I. L. R. 23 Calc. 347*, followed. TOKHAN SINGH *v.* GIRWAR SINGH (1905) . **I. L. R. 32 Calc. 494**

(*h*) DAMAGES.

41. ——— Decree for damages. Procedure laid down for working out an incomplete decree for damages. MUNEERUN *v.* MUSEEHUN **13 W. R. 139**

(*i*) DECLARATORY DECREE.

42. ——— Execution—*Declaratory decree.* Execution cannot be obtained on a merely declaratory decree. MUNIYAN *v.* PERIYA KULANDAI AMMAL **1 Mad. 184**

JEORA KHAN SINGH *v.* THAKOOREE SINGH **2 N. W. 303**

43. ——— *Decree giving party a right to a recurring payment of uncertain sums.* A decree declaring a party entitled to a constantly recurring right to receive certain payments in kind, valued at a certain annual sum, cannot be executed according to the provisions of the Code of Civil Procedure. TATA CHARIAR *v.* SINGARA CHARIAR . . . **I. L. R. 4 Mad. 219**

44. ——— Mesne profits—*Separate suit—Mesne profits, meaning of—Decree awarding mesne profits—Construction.* In 1878 the plaintiff obtained a decree declaring that he was entitled to receive every year from the defendant 12 per cent. of the rents and profits of a certain inam village. The decree also awarded mesne profits from the date of the institution of the suit. In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84. *Held*, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum*. The very word "mesne" implied a terminus *ad quem* as well as *à quo*, and in the absence of a special order the

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*i*) DECLARATORY DECREE—*concld.*

terminus was the date of the decree. VINAYAK AMRIT DESHPANDE *v.* ABAJI HAIBATRAV
I. L. R. 12 Bom. 416

45. ———— Decree directing performance of specific acts—*Decree under s. 260, Civil Procedure Code, 1882—Held,* that a decree under s. 260 of the Civil Procedure Code which directed the judgment-debtor to perform certain specific acts, and which also declared rights on the part of the decree-holders against him, was not incapable of being executed under s. 260 on the objection that it was only declaratory. KISORE BUN MOHUNT *v.* DWARKANATH ADHIKARI. KISHORE BUN MOHUNT *v.* PROSONNO COOMAR ADHIKARI
I. L. R. 21 Calc. 784
L. R. 21 I. A. 89

(*j*) IMMOVEABLE PROPERTY.

46. ———— Execution of decree against judgment-debtor's person—*Decree for sale of immoveable property—Purchase of property by decree-holder's brother—Equity, justice, and good conscience. W,* the holder of a decree for money, which ordered the sale of certain immoveable property in satisfaction of its amount, applied for execution of the decree, praying for the arrest of the judgment-debtor. *W*'s brother had previously purchased such property at a sale in execution of another decree against the judgment-debtor, paying a small amount for it, in consequence of the existence of his brother's decree. *Held,* that, under these circumstances, applying equity, the decree should in the first place be executed against such property, and not against the person of the judgment-debtor. WALI MUHAMMAD *v.* TURAB ALI
I. L. R. 4 All. 497

47. ———— Purchase by decree-holder at sale in execution of his decree—*Suit for land and mesne profits—Decree modified in second appeal—Attachment and sale of lands for mesne profits pending appeal—Sale under attachment—Purchase by judgment-creditor and suit to recover lands purchased—Maintainability. K* obtained a decree against *R,* on a hypothecation bond, purchased the hypothecated property in execution and assigned his right under the purchase to the present plaintiff. Plaintiff sued the present defendant and others for the recovery of the lands and obtained a decree for possession and mesne profits. The High Court, in second appeal, held that plaintiff was entitled to recover possession of only three-fourths of the lands and mesne profits of such three-fourths, and that defendant's share in the lands, namely, one-fourth, was affected neither by the decree obtained by *K,* nor by the execution proceedings under it. While that second appeal was pending, plaintiff had attached other lands belonging to the defendant on

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*j*) IMMOVEABLE PROPERTY—*concld.*

account of the mesne profits awarded to him by the decree then under appeal, caused them to be sold and became the purchaser thereof for R70, the amount of the total mesne profits being R100. The present suit was to recover the lands so purchased and it was contended for the plaintiff that, though the decree under which the sale in question had taken place had been modified subsequently, yet, inasmuch as the purchase was for an amount less than the three-fourths of the mesne profits, the defendant was bound by the sale. *Held,* that the plaintiff was not entitled to succeed. The rule is that, where a decree-holder purchases at a sale in execution of his decree, the purchase is subject to the final result of the litigation between him and his judgment-debtor (though where a third party purchases, the subsequent modification of the decree does not affect his rights). The rules still applies, where the property is sold for a sum equal to, or less than, that eventually found to be due. The object of the rule is to prevent the interests of judgment-debtors from suffering by sales of their property before their liability is finally determined, and to prevent judgment-creditors from profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal. *Quære:* Whether a decree-holder purchaser might, in a suit properly framed, be treated as if he held a charge on what he purchased for what was ultimately found due to him, where the decree was not altogether reversed, but only modified. *Babu Gowree Boyyonat Pershad* v. *Jodha Sing, 19 W. R. 416,* referred to. NATHADU SÂHIB *v.* NALLU MUDALY (1904)
I. L. R. 27 Mad. 98

(*k*) INJUNCTION.

48. ———— Limitation—*Limitation Act (XV of 1877), Sch. II, Art. 179—Decree granting an injunction—Civil Procedure Code, s. 260.* Article 179 of the second schedule to the Limitation Act, 1877, does not apply to an application asking the Court to enforce a decree granting an injunction to abstain from some particular act. All that the Court has to see is whether the party bound by the decree has had an opportunity of obeying the decree or injunction, and has wilfully failed to obey it. *Ram Saran* v. *Chhatar Singh, I. L. R. 23 All. 465,* followed. BHAGWAN DAS *v.* SUKHDEI (1905)
I. L. R. 28 All. 300

(*l*) INSTALMENTS.

49. ———— Decree payable by instalments—Waiver of default in payment—*Right to execute for whole decree.* Where a judgment-debtor, by the terms of a decree, was ordered to pay the amount decreed by instalments, and failed to pay two of such instalments, but subsequently paid them in together with a third :—*Held,* that as

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*l*) INSTALMENTS—*concld.*

the decree-holder had taken out the amount paid in, he had lost his right to execute the unpaid balance of the decree till a fresh default had been made. HUR PERSHAD *v.* KHOWANEE . **5 N. W. 18**

50. ———— *Ground for making default in payment of instalment under decree—Arrest by another creditor.* It is not a valid reason for the non-payment of an instalment of a judgment-debt when due that the judgment-debtor was prevented from paying it by having been arrested by his judgment-creditors for another debt three days before the date on which the instalment was payable. KALEE CHURN SINGH *v.* BOODH RAM **5 N. W. 77**

51. ———— **Payment by money-order** —*Decree payable by instalments—Tender—Payment by money-order where creditor had to send to the Post Office for the money—Implied authority to pay in a certain manner.* A judgment-debtor under instalment decree remitted the amount payable on account of one instalment, to one of the decree-holders, by money-order. The decree-holder payee was at the time living in a village where he would have had to go himself or send someone to take the money from the Post Office; but, on the other hand, two previous instalments had been paid in a similar manner without objection on the part of the decree-holder. On this occasion the decree-holder payee temporized, so that the money was not at once returned by the Post Office to the sender, and subsequently applied for execution of the whole decree on the ground that there had been no valid payment of this instalment. *Held,* that the decree-holder, by not refusing the money-order at once, had prevented the judgment-debtor from having an opportunity to pay the instalment within time: he had not acted in good faith, and ought not to be allowed to take advantage of his action, even in the previous acceptance of payments made in the same manner did not amount to an implied authority to the judgment-debtor to pay by money-order. *Polglass* v. *Oliver, 37 R. R. 623,* referred to. KISHAN PRASAD *v.* BENI RAM (1901) . **I. L. R. 24 All. 85**

(*m*) JOINT PROPERTY.

52. ———— **Decree in a suit for immoveable property sold in execution for debt of one member of joint family**—*Declaration of lien in decree.* In a suit by certain members of a joint Hindu family to recover from the auction-purchaser certain immoveable property which had been sold in execution of a decree against one member of the family, a decree was obtained for possession subject to a lien in favour of the defendant for the repayment of the debt for which the original decree had been made, with interest at 6 per cent. up to date of realization. *Held,* that the condition in favour of the defendant was not a decree, and could not be treated as such so as to be capable of being put in execution. RAMANAGRA SINGH *v.* RAMYAD SINGH . **5 C. L. R. 176**

53. ———— **Decree against joint immoveable property**—*Sale of undivided share.* Where an execution-debtor is jointly interested with another person in immoveable property which the execution-creditor seeks to sell in execution of his decree, the ordinary procedure for a Court executing the decree to adopt is to put up for sale the right, title, and interest of the judgment-debtor in his undivided share of the property to be sold. MATHURADAS GOVARDHANDAS *v.* FATMAULKA BEGUM **5 Bom. A. C. 63**

54. ———— **Decree naming no specific shares.** In execution of a decree which merely declared that the right of a judgment-debtor in certain property extended to two-thirds of it, the lower Court divided the property before selling the debtor's share. *Held,* that, as the decree did not specify that any particlar portion of the property belonged to the debtor as his share, his right, title, and interest in the property could only be sold, and that the determination of this right must be left for future adjudication between the purchaser and the co-sharer of the debtor, unless an arrangement could be arrived at. ATMARAM KALIANDAS *v.* FATMA BEGAM . **5 Bom A. C. 67**

55. ———— **Family dwelling-house**— *Joint property—Act VIII of 1859, s. 224.* A decree-holder purchased, in execution of his decree, the right, title, and interest of the judgment-debtor, a member of a joint Hindu family, in the family dwelling-house and land attached. *Held per* NORMAN, TREVOR, LOCH, and BAYLEY, *JJ.,* that s. 224 of Act VIII of 1859 did not apply; that *A* was entitled to actual possession of the share of his judgment-debtor in the house as well as in the land, but his share must be marked out so as to cause the least possible inconvenience to the other members of the family. *Per* KEMP, *J.* An equivalent in value of the share in the house should be apportioned to him out of the land, which greatly exceeded the dwelling-house in value. BIJOI KESAL ROY *v.* SAMASUNDARI **B. L. R. Sup. Vol. 172 : 2 W. R. Mis. 30**

ESHAN CHANDER BANERJEE *v.* NUND COOMER BANERJEE . . . . **8 W. R. 239**

See RUGHOONATH PANJAH *v.* LUCKHUN CHANDER DULLAL CHOWDHRY . . . **18 W. R. 23**

56. ———— *Family dwelling-house.* Suit by purchaser of a decree for the debtor's share in a family dwelling-house, with gardens and tanks. *Held,* that as the suit was for a share of the house and ground, however worthless the land might appear without the residence, or however inconvenient might be the intrusion of a

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*m*) JOINT PROPERTY—*contd.*

stranger, the plaintiff was entitled to an adjudication of his claim to the land. BUDDUN CHUNDER MADUCK *v.* CHUNDER COOMAR SHAHA **5 W. R. 218**

57. ——— *Family dwelling-house.* In a suit for possession by the auction-purchaser of a judgment-debtor's share in a family residence, possession was ordered to be given to him so as not to annoy or insult the inmates of the house; and as the plaintiff could not use the family staircase without exposing the ladies of the family to annoyance, and was obliged to build a separate staircase, he was held entitled to compensation to the value of his share in the family staircase. OODHOY CHUNDER MULLICK *v.* PITAMBER PYNE **6 W. R. Mis. 75**

58. ——— *Family dwelling-house—Sale in execution of decree—Share in joint family property—Service rents—Right of purchaser.* Where the interest of one of several joint tenants in a family dwelling-house and in certain lands let out on service tenure is sold in execution, the purchaser is entitled to joint possession of the dwelling-house with the other shareholders, and also to a right to share in the service rents. *Bijoi Kesal Roy* v. *Samasundari, B. L. R. Sup. Vol. 172,* commented on. RAJANIKANTH BISWAS *v.* RAM NATH NEOGY . **I. L. R. 10 Calc. 244**

59. ——— **Decree against an undivided brother**—*Mortgage of joint property.* *A*, an undivided member of a Hindu family, mortgaged part of the family property by way of conditional sale to *B* to secure a loan. *B* having sued *A* personally for the amount due, *A* admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. *A*'s undivided brothers intervened in execution. *Held*, that the decree, not being passed against the joint family or its representative, and not describing the property which it directed to be delivered to the plaintiff by way of absolute sale to be family property, could not be executed against the family property. GURUVAPPPA *v.* THIMMA **I. L. R. 10 Mad. 316**

60. ——— **Execution against tarwad property**—*Decree for maintenance against karnavan.* A member of a Malabar tarwad, having obtained a decree for maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected, and his claim was allowed. In a suit by plaintiff to have it declared that he was entitled to execute the decree against tarwad property:—*Held*, that the plaintiff was entitled to execute the decree against the tarwad property. CHANDU *v.* RAMAN **I. L. R. 11 Mad. 378**

61. ——— **Money-decree against deceased member**—*Joint Hindu family—Execution after judgment-debtor's death against joint family property not allowed.* The mere obtaining of a simple money-decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment-debtor had in the joint family property. *Suraj Bunsi Koer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148; Rai Balkishen* v. *Rai Sitaram, I. L R. 7 All. 731;* and *Balbhadar* v. *Bisheshar, I. L. R. 8 All. 695;* referred to. JAGANNATH PRASAD *v.* SITA RAM **I. L. R. 11 All. 302**

62. ——— **Money-decree against father**—*Joint Hindu family—Money-decree against father sought to be executed after his death against joint family property in the hands of the son—Civil Procedure Code, ss. 234 and 244.* A creditor of a father in a joint Hindu family governed by the law of the Mitakshara, who has obtained a simple decree for money in a suit against the father alone, cannot obtain execution of that decree against the joint family property or any part of it in the hands of the son in a proceeding against the son in execution of that decree instituted after the death of the father, and not being a proceeding in continuation of an attachment of the property effected during the lifetime of the father; the proceeding in execution not being barred by the law of limitation, and the son not being precluded by any estoppel from proving that the property was joint family property at the time of his father's death, and is in his hands ancestral property, and not assets representing what was at the time of his father's death separate property of his father. But in such a case, if the creditor desires to obtain a remedy against the ancestral property or any part of it in the hands of the son, he must seek that remedy in a suit against the son, in answer to which suit, when brought, the son will be entitled to prove that the suit is barred by limitation, that the debt was tainted by immorality, or any other matter that would be a defence against the son. *Suraj Bunsi Koer* v. *Sheo Proshad Singh, I. L. R. 5 Calc. 148: L. R. 6 I. A. 88; Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21: L. R. 13 I. A. 1; Badri Prasad* v. *Madan Lal, I. L. R. 15 All. 751; Seth Chand Mal* v. *Durga Dei, I. L. R. 12 All. 313; Cregg* v. *Rowlands, L. R. 3 Eq. 373; Payne* v. *Parker, L. R. 1 Ch. App. 327; Chowdry Wahid Ali* v. *Jumaee, 11 B. L. R. 149: 18 W. R. 185; Raghubar Dyal* v. *Hamid Jan, I. L. R. 12 All. 73; Sangili Virapandia Chinnathambiar* v. *Alwar Ayyangar, I. L. R. 3 Mad. 42; Karnataka Hanumantha* v. *Andukuri Hanumayya, I. L. R. 5 Mad. 232; Muthia* v. *Virammal, I. L. R. 10 Mad. 283; Ariabudra v. Dorasami, I. L. R. 11 Mad. 413; Venkatarama* v. *Senthivelu, I. L. R. 13 Mad. 265; Balbir Singh* v. *Ajudia Prasad, I.*

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*m*) JOINT PROPERTY—*concld.*

L. R. 9 All. 142 ; Jagannath Prasad v. *Sita Ram, I. L. R. 11 All. 302 ;* and *Beni Pershad* v. *Parbati Koer, I. L. R. 20 Calc. 895,* referred to. LACHMI NARAIN *v.* KUNJI LAL. LACHMI NARAIN *v.* CHOTE LAL . . . . **I. L. R. 16 All. 449**

63. ——————— *Money decree against father—Execution against son after the death of the father—Ancestral property in the hands of the son—Civil Procedure Code, 1882, s. 234.* A money-decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property, that has come into their hands even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality. If the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under s. 244 of the Civil Procedure Code (Act XIV of 1882). *Ariabudra* v. *Dorasami, I. L. R. 11 Mad. 413,* and *Lachmi Narayan* v. *Kunjilal, I. L. R. 16 All. 449,* not followed. UMED HATHISING *v.* GOMAN BHAIJI . . **I. L. R. 20 Bom. 385**

64. ——————— *Hindu law—Joint Hindu family—Money decree against father—Liability of sons who were not parties to decree—Suit for declaration of son's liability.* The plaintiff, in a suit upon a bond executed by one Sarju Prasad, obtained a simple money decree against Sarju Prasad. In execution of the decree so obtained, the decree-holder attached certain property as that of his judgment-debtor; but the sons of the judgment-debtor raised objections, and the property was released from attachment. The decree-holder thereupon sued the objectors, seeking to obtain a declaration that the property in question was liable to attachment and sale in execution of his decree. *Held,* that the suit would lie, and that it was no bar thereto that the plaintiff had omitted to make the sons parties to his original suit. *Mahummad Askari* v. *Radhe Ram Singh, I. L. R. 22 All. 307 ; Dharam Singh* v. *Angan Lal, I. L. R. 21 All. 301 ;* and *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha, I. L. R. 26 Calc. 677,* followed. *Nuthoe Lall Chowdhry* v. *Shoukee Lall, 10 B. L. R. 200,* referred to. MATHURA PRASAD *v.* RAMCHANDRA RAO (1902) **I. L. R. 25 All. 57**

(*n*) MAINTENANCE.

65. ——————— **Decree for future maintenance**—*Arrears of maintenance.* Arrears of maintenance can be recovered by process of execution in a suit in which a decree is passed providing for the payment of future maintenance. Where they can be so recovered, they cannot be made the subject of a fresh suit. SINTHAYEE *v.* THANAKARUDAYEN *alias* PONDILY UDAYAN . **4 Mad. 183**

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*n*) MAINTENANCE—*contd.*

66. ——————— **Future maintenance, right to recover, in execution of decree awarding maintenance.** Future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit. ASHUTOSH BANNERJEE *v.* LUKHIMONI DEBYA **I. L. R. 19 Calc. 139**

67. ——————— **Decree for monthly maintenance**—*Civil Procedure Code, 1859, ss. 201, 212.—Act XXIII of 1861, s. 15.* A decree for maintenance to be paid at a certain rate per mont stands on the same footing as a decree ordering payment by instalments where the decree-holder may apply for execution from time to time as the instalments fall due, and the Court may issue execution under ss. 201 and 212 of Act VIII of 1859 and s. 15 of Act XXIII of 1861. PEAREENATH BROHMO *v.* JUGGESSUREE *alias* RAKHALEE DOSSEE **15 W. R. 128**

68. ——————— **Decree directing payment of a certain sum every month for life**—*Declaratory decree.* Where a decree ordered the defendants to pay to the plaintiff the sum of R15 per mensem by way of maintenance during her lifetime, and directed that such maintenance should be charged on certain zamindari property :—*Held,* that the decree-holder could obtain the amount ordered in execution of the decree, which was more than a mere declaration of right, and which, by allowance of a fixed rate per mensem, stood exactly on the footing of a decree ordering payment by instalments. *Peareenath Brohmo* v. *Juggessuree, 15 W. R. 128,* referred to. MANSA DEBI *v.* JIWAN LAL . . . . **I. L. R. 9 All. 33**

69. ——————— **Decree declaring right to maintenance and directing payment of arrears**—*Order for future payments—Maintenance subsequently falling due and enforced by fresh suit or by execution of decree.* Where the Civil Court, upon the suit of a Hindu widow for maintenance, makes a decree containing an order in express terms to the defendant to pay to the plaintiff the amount claimed by her for maintenance during a past period, but as to the future merely declares her right to receive maintenance at an annual rate from the defendant, the proper way of enforcing the right thus declared is not by executing the decree, but by bringing a fresh suit. Decrees declaring a right to maintenance and directing payment of arrears should contain an order directing payment of future maintenance. VISNHU SHAMBOG *v.* MANJAMMA **I. L. R. 9 Bom. 108**

70. ——————— **Decree for maintenance of widow**—*Liability of ancestral estate.* Maintenance decreed to a co-parcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate, or the decree treated as a decree against the managing

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*n*) MAINTENANCE—*contd.*

member of the family for the time being. *A*, the widow of an undivided member of a joint Hindu family, obtained a decree for maintenance against *B*, the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. *B* died, and *C*, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate. *Held*, that the family estate was not liable. *Per Curiam.*—In a regular suit, *C* might clearly be held liable to pay maintenance to *A*, and a decree might be passed against him; but in execution proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings. *Karpakambal* v. *Subbayyan, I. L. R. 5 Mad. 234*, approved and followed. MUTTIA *v.* VERAMMAL

I. L. R. 10 Mad. 283

71. ———— Enforcement of decree for maintenance—*Right of suit.* Where a decree in a suit for maintenance gave the plaintiffs a right to recover maintenance for the year previous to the suit and also declared their right to maintenance in future, but omitted to specify any precise date on which such maintenance should become payable: —*Held*, that such decree was one which could be enforced from time to time by suit. *Vishnu Shambhog* v. *Manjamma, I. L. R. 9 Bom. 108*, approved. *Ashutosh Bannerjee* v. *Lukhimoni Debya, I. L. R. 19 Calc. 139*, distinguished. RAM DIAL *v.* INDAR KUAR . . **I. L. R. 16 All. 179**

72. ———— Decree for partition awarding allowance until minor member of family come of age—*Suit by his widow for allowance after his death.* On the 21st February 1894, a decree in a partition suit provided as follows: "Plaintiff is a minor twelve years old; until he attains twenty-one years, Narayan (defendant) should for the next nine years annually deliver to him twenty maunds of paddy, and for this year ten maunds; after that plaintiff should be given one-sixth of the family lands; until then defendant is not to alienate the lands." The minor died, and in 1897 his widow, Sundri, as his heir, applied for execution of the decree, claiming seventy maunds of paddy, being the amount due at the rate specified in the decree. *Held*, that in execution of the decree she was only entitled to recover the arrears of the allowance up to the date of her husband's death. When he died, he was still a minor, and the allowance ceased, and the share went to his heirs by right of inheritance, and was recoverable only by a separate suit, and not in execution. LAKSHMAN DARKU *v.* NARAYAN LAKSHMAN

I. L. R. 24 Bom. 182

73. ———— Enforcement of money charge created by decree, by application,

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*n*) MAINTENANCE—*concld.*

by suit—*Practice—Transfer of Property Act (IV of 1882), s. 99—Subsequent tender—Costs.* Where a decree creates a charge and contains a direction for its payment and default is made with respect to it, the proper course for its enforcement is not simply to make an application, but either to apply for an order in the nature of a decree for an account and sale or else to institute a suit for the purpose of enforcing the charge. *Abhoyessury Dabee* v. *Gour Sunker Panday, I. L. R. 22 Calc. 859*, and *Matanginee Dasi* v. *Chooney Monee Dasi, I. L. R. 22 Calc. 903*, referred to. CHUNDRA MONI DASSEE *v.* MUTTY LAL MULLICK . **2 C. W. N. 33**

See HEMANGINEE DASSEE *v.* KUMODE CHANDER DASS . . . . **I. L. R. 26 Calc. 441**
3 C. W. N. 139

(*o*) MARRIED WOMEN.

74. ———— Liability of married women—*Arrest—Stridhan.* *R*, as surety for her husband, joined with him in executing a bond for R90. In a suit brought upon the bond, a decree was passed against both. *R* was arrested in execution of the decree, and brought before the Court. She was then asked if she desired to apply to be declared an insolvent under the insolvency sections of the Civil Procedure Code (Act XIV of 1882), but, not doing so, she was committed to jail. Subsequently, however, she applied to be declared an insolvent, but her application was rejected. She then claimed to be released, on the ground of her coverture. The Judge rejected her application as being too late. On reference to the High Court:—*Held*, that, although the decree was absolute in its terms and contained no express limitation of *R*'s liability, nevertheless the law being clear that she could only be liable to the extent of her stridhan, it was to be assumed that the direction to pay, contained in the decree, had reference to that fund only. *In re the petition of* RADHI

I. L. R. 12 Bom. 228

(*p*) MORTGAGE.

75. ———— Decree on mortgage—*Collateral security—Money-decree on bond.* The defendants mortgaged certain property in the mofussil to the plaintiffs in April 1866, and at the same time, as a collateral security to the mortgage, executed a bond in favour of the plaintiffs and a warrant of attorney to enter up judgment on the bond. Judgment was entered up, and a decree obtained thereon soon after the bond was executed. In accordance with a covenant in the mortgage-deed, the mortgagees entered into possession and receipt of the rents and profits of the estate, which they were authorized to receive for five years from the date of the mortgage. They remained in possession for six years, and then, more than one year having elapsed since any proceedings in execution had been taken,

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

they applied for execution of their decree against the mortgaged property. The property was out of the jurisdiction of the Court. *Held*, that, if the application were granted, the execution of the decree must be limited to property other than that which was the subject of the mortgage. There being evidence to show that the parties had entered into an agreement for a fresh mortgage of the property for twenty-two years, the application for execution was refused. BRAJANATH KUNDU CHOWDHRY *v.* GOBINDMANI DASI . . **4 B. L. R. O. C. 83**

76. ———— **Decree establishing a mortgage and directing sale**—*Attachment.* In order to enforce a decree which establishes a mortgage and directs a sale of the mortgaged premises in satisfaction of the mortgage, it is not necessary to issue an attachment. If the decree contains, as it ought to contain, a direction for sale of the mortgaged premises, the proceeding under such a decree by attachment is unnecessary as well as expensive and dilatory. The direction for sale in the decree is in itself sufficient authority for the sale. That direction is founded on the specific lien or charge on the mortgaged premises created by the contract of mortgage, and not on the executon clauses in the Codes of Civil Procedure. DAYACHAND *v.* HEMCHAND DHARAMCHAND **I. L. R. 4 Bom. 515**

77. ———— **Decree for enforcement of mortgage**—*Execution limited to mortgaged property—Equity.* *K* brought to sale in execution of a simple decree for money which he held against *P* certain property, and purchased it himself. The property was subject to a mortgage at the time it was sold. Subsequently a decree was obtained against *P* enforcing this mortgage, of which *K* became the holder. *K* sought to have this decree executed, not against the mortgaged property, but against other property belonging to *P*. *Held*, that, if *K* purchased the property knowing that it was mortgaged, or if in consequence of the mortgage he purchased it for a less sum than it would otherwise have fetched, it would be inequitable to allow him to obtain satisfaction of the decree out of the other property of *P*. GULAB SINGH *v.* PEMIAN **I. L. R. 5 All. 342**

78. ———— **Decree for sale of mortgaged property**—*Application for execution before time allowed for payment—Act IV of 1882, ss. 86, 88.* An application for execution of a decree for sale of mortgaged property passed under s. 88 of Act IV of 1882 (Transfer of Property Act), and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided. HAR DAYAL *v.* CHADAMI LAL . . . . **I. L. R. 7 All. 194**

79. ———— *Beng. Act VII of 1868—Surplus sale-proceeds—Attachment of surplus sale-proceeds.* The purchaser of property sold subject to the incumbrances thereon at a sale under Bengal Act VII of 1868 subsequently became the purchaser of a decree passed prior to the sale in a suit upon a mortgage of the property, such decree being declared not only a charge on the mortgaged property, but also personal against the mortgagor. *Held*, that the purchaser was not entitled to execute the decree against the surplus sale-proceeds under such sale, although he abandoned his lien on the property. GOLUK CHUNDER MAHINTA *v.* SURBOMANGALA DEBI **I. L. R. 6 Calc. 711: 8 C. L. R. 189**

80. ———— *Decree against mortgaged property—Liability of judgment-debtor to arrest under such decree—Decree not to be extended in execution beyond its terms.* A decree cannot be extended in execution beyond the real meaning of its terms. A decree obtained on a mortgage directed that the judgment-debtor should pay the sum adjudged out of the property mortgaged. After executing the decree against the mortgaged property, the decree-holder made an application for execution against the person of the judgment-debtor. A notice was issued calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the application for the arrest of his person. He did not appear, and, in his absence, an order was made for his personal arrest; but the order was not executed, as the decree-holder did not pay the process fee. Subsequently a fresh application was made for execution against the person of the judgment-debtor. *Held*, that, as the decree merely provided for the satisfaction of the judgment-debt out of the property mortgaged, the decree could not be executed against the person of the judgment-debtor. BUDAN *v.* RAMCHANDRA BHUNJGAYA **I. L. R. 11 Bom. 537**

81. ———— *Decree for enforcement of hypothecation—Decree limiting judgment-debtor's liability to the hypothecated property.* A decree upon a hypothecation-bond which only provides for its enforcement against the hypothecated property, cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed. PRAN KUAR *v.* DURGA PRASAD **I. L. R. 10 All. 127**

82. ———— *Mortgage by one owner of undivided share of estate—Rights of mortgagee on partition where the undivided share is allotted to a sharer other than the mortgagor—Execution not against mortgaged property, but against property allotted to mortgagor.* Where *A* mortgaged to the plaintiff his undivided share in certain land which he held jointly with *B*, and subsequently to the mortgage, by a decree in a partition-suit to which the plaintiff was not a party, the

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

mortgaged property was allotted to *B*, other property in substitution being allotted to *A*:—*Held*, in a suit against *B* and the representatives of *A* to recover the sum due on the mortgage by sale of the mortgaged property, that the plaintiff could not proceed against the mortgaged property, which had been allotted on partition to *B*, but should be allowed to proceed against that which had been allotted in substitution to *A*, his mortgagor. *Byjnath Lall* v. *Ramoodeen Chowdhry, L. R. 1 I. A. 106 : 21 W. R. 233*, followed in principle. HEM CHUNDER GHOSE *v.* THAKO MONI DEBI

I. L. R. 20 Calc. 533

83. ——— *Mortgage by owner of undivided share of estate—Rights of mortgagee on partition where share is allotted to a sharer other than the mortgagor.* Land having been granted to several persons jointly, disputes arose among them with reference to its allotment. The disputes having been settled by arbitration, one of the grantees sold his share to the plaintiff. Before the arbitration, another of the grantees mortgaged seven acres of the land to *A*, who did not become a party to the arbitration. *A* subsequently obtained a decree on his mortgage, and proceeded to execute it by attachment. The plaintiff intervened in execution, but in 1884 the Court passed an order stating that the plaintiff's land was not attached, and in fact his possession then remained undisturbed. *A* subsequently executed his decree, and purchased the land brought to sale by the Court. The plaintiff's possession was disturbed under colour of his purchase, and he now sued in 1889 to recover the land sold to him. *Held*, that *A* could not execute his decree against the share sold to the plaintiff, but was limited in execution to the share allotted to his mortgagor: the plaintiff's vendor had therefore, after the arbitration, a good title against both *A* and his mortgagor, and the plaintiff was entitled to recover. *Hem Chunder Ghose* v. *Thako Moni Debi, I. L. R. 20 Calc. 533.* and *Byjnath Lall* v. *Ramoodeen Chowdhry, L. R. 1 I. A. 106 : 21 W. R. 233*, referred to. PULLAMMA *v.* PRADOSHAM . . **I. L. R. 18 Mad. 316**

84. ——— *Transfer of Property Act (IV of 1882), s. 43—Right to execute decree against subsequently acquired interest of mortgagor—Decree against mortgagor's unascertained share—Subsequent inheritance by the mortgagors of the share of a co-owner.* A Mahomedan woman, together with her eldest son, executed a mortgage comprising the whole of an estate in which her younger children were also entitled to certain shares. The mortgagee brought his suit on the mortgage, joining as defendants the younger children as well as the mortgagors, and obtained a decree, whereby the mortgage amount was made payable "on the responsibility of the shares" of the co-mortgagors; the suit was otherwise dismissed, and no personal decree was passed. Subsequently the shares of the co-mortgagors were increased by inheritance from one of the other defendants who died before the decree was executed. *Held*, that the increased shares of the mortgagors were liable to be sold in execution of the decree. AJIJUDDIN SAHIB *v.* BUDAN SAHIB . . **I. L. R. 18 Mad. 492**

85. ——— *Transfer of Property Act (IV of 1882), ss. 87, 88, 89, and 93—Mortgage—Default in payment on the date fixed in the decree—Power to enlarge the time.* In a suit brought by a mortgagee for sale of the mortgaged property, a decree was passed on 27th July 1895, directing that the mortgagor should pay the mortgage-debt within six months, and that in default his right of redempton should be foreclosed, and the mortgagee should be at liberty to sell the property. On the 27th July 1898, the mortgagee applied for an order absolute for sale. On the 11th October 1898, the mortgagor applied for permission to pay into Court the amount of the decree. *Held*, that the application could not be granted. The case fell within ss. 88 and 89, and not within s. 87 or 93, of the Transfer of Property Act. The money not having been paid within the appointed time, the Court was bound to pass an order absolute for sale; it had no power to enlarge the time for payment. *Nandram* v. *Babaji, I. L. R. 22 Bom. 771*, distinguished. TANIRAM *v.* GAJANAN

I. L. R. 24 Bom. 300

86. ——— *Money-decree—Transfer of Property Act (IV of 1882), ss. 88, 89, 90.* A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89, and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance. GOPAL DAS *v.* ALI MUHAMMAD

I. L. R. 10 All. 632

87. ——— *Transfer of Property Act (IV of 1882), ss. 88, 90,—Decree unsatisfied by sale of mortgaged property—Right to decree for sale of other than mortgaged property.* The holder of a decree on mortgage obtained an order under s. 88 of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this, when sold, being insufficient to satisfy the decree, he applied for a decree under s. 90 for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under s. 88. *Held*, that the decree-holder was entitled to the decree asked for. The terms of s. 90 contemplate a decree in the suit for recovery of the mortgage-money after

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under s. 90 for realization of the balance from other properties of the debtor. SONATUN SHAW *v.* ALI NEWAZ KHAN

I. L. R. 16 Calc. 423

88. ——————————— *Transfer of Property Act (IV of 1882), ss. 88, 89, 90—Decree not satisfied by sale—Recovery of balance due on mortgage.* The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree. RAJ SINGH *v.* PARMANAND

I. L. R. 11 All. 486

89. ——————————— *Conditional decree for sale not made absolute.* A conditional decree for the sale of mortgaged property under s. 88 of the Transfer of Property Act cannot be executed unless and until it is made absolute by an order passed under s. 89. RAM LAL *v.* NARAIN

I. L. R. 12 All. 539

90. ——————————— *Transfer of Property Act (IV of 1882), s. 90—Execution of decree—Mortgaged property sold in execution of a decree held by a different mortgagee—S. 90 not applicable.* In order to make the remedy provided by s. 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under s. 90. S. 90 does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar* v. *Munshi Ram, All. Weekly Notes (1899) 208,* followed. BADRI DAS *v.* INAYAT KHAN . **I. L. R. 22 All. 404**

91. ——————————— *Transfer of Property Act (IV of 1882), s. 90—Nature of decree contemplated by that section.* The plaintiff obtained a decree on a hypothecation-bond, the decree providing that the money secured by the bond was to be realized by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment-debtor. The hypothecated property was sold, and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied for enforcement of that portion of the decree which related to the other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under s. 90 of the Transfer of Property Act. This objection was allowed, and the decree-holder applied for and obtained a decree under the said section. The judgment-debtor then appealed

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

against that decree on the ground, amongst others, that, looking to the terms of the original decree, the application under s. 90 was superfluous. *Held,* that the decree contemplated by s. 90 of the Transfer of Property Act is, in fact, an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. *Miller* v. *Digambari Debya, All. Weekly Notes (1890) 142,* distinguished. *Hafiz-ud-din Ahmad* v. *Damodar Das, All. Weekly Notes (1899) 149,* and *Raj Singh* v. *Parmanand, I. L. R. 11 All. 486,* referred to. DURGA DAI *v.* BHAGWAT PRASAD

I. L. R. 13 All. 356

92. ——————————— *Transfer of Property Act (IV of 1882), s. 90—Decree against the person and other property of the judgment-debtor as well as against the property mortgaged.* In a suit for enforcement of a mortgage-security the plaintiff prayed for a decree both as against the mortgaged property and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realize sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment-debtors were to be liable. *Held,* that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree-holder to obtain a separate decree under s. 90 of the Transfer of Property Act. *Miller* v. *Digambari Debya, All. Weekly Notes (1890) 142,* referred to. BATAK NATH *v.* PITAMBAR DAS

I. L. R. 13 All. 360

93. ——————————— *Rights of mortgagee in respect of non-hypothecated property of the mortgagor—Res Judicata—Transfer of Property Act (IV of 1882), ss. 68, 88, 89, and 90—Civil Procedure Code, Sch. IV, Forms Nos. 109 and 128.* Where there is nothing to show a contrary intention of the parties, every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief against non-hypothecated property. Unless in exceptional cases, he can obtain such relief only under the provisions of s. 90 of the Transfer of Property Act, and if such relief is refused, the refusal will not bar a subsequent application under s. 90. *Hafiz-ud-din Ahmad* v. *Damodar Das, All. Weekly Notes (1889) 149,* approved. *Batak Nath* v. *Pitambar Das, I. L. R. 13 All. 360,* distinguished. *Sutton* v.

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

Sutton, L. R. 22 Ch. D. 515; Raj Singh v. *Parmanand, I. L. R. 11 All. 486; Miller* v. *Digambari Debya, All. Weekly Notes (1890) 142;* and *Durga Dai* v. *Bhagwat Prasad, I. L. R. 13 All. 356,* referred to. Observations on the meaning and application of ss. 88, 89, and 90 of the Transfer of Property Act. Explanation of the term "legally recoverable" in s. 90. *Sonatun Shah* v. *Ali Newaz Khan, I. L. R. 16 Calc. 423,* discussed. MUSAHEB ZAMAN KHAN *v.* INAYAT-UL-LAH **I. L. R. 14 All. 513**

94. ——— *Transfer of Property Act, s. 90—Meaning of the term "legally recoverable."* A decree-holder having obtained separate decrees against his judgment-debtor on two unregistered bonds, each for a sum of less than R100, hypothecating one and the same property, took out execution on one bond and brought to sale the hypothecated property, which was purchased by a third party. The sum for which that property was sold was only sufficient to satisfy one decree, and the decree-holder accordingly, within three years from the date when the latter of the two bonds fell due, applied for a decree under s. 90 of the Transfer of Property Act. *Held,* that under the above circumstances, there was a balance legally recoverable otherwise than out of the property sold, and that the decree-holder was therefore entitled to a decree under s. 90. *Musaheb Zaman Khan* v. *Inayat-ul-lah, I. L. R. 14 All. 513,* referred to. BAGESHRI DIAL *v.* MUHAMMAD NAQI **I. L. R. 15 All. 331**

95. ——— *Transfer of Property Act (IV of 1882), s. 90—Application for decree over against non-hypothecated property—Balance legally recoverable—Limitation.* On an application under s. 90 of the Transfer of Property Act, 1882, the time to be looked at in considering whether the balance ought to be recovered is legally recoverable from the mortgagor, is the date of the institution of the suit and not the date of the making of the application under s. 90. *Bageshri Dial* v. *Muhammad Naqi, I. L. R. 15 All. 331,* referred to. HAMID-UD-DIN *v.* KEDAR NATH **I. L. R. 20 All. 386**

96. ——— *Court executing decree not competent to go behind its terms—Transfer of Property Act (IV of 1882), ss. 88, 90.* Where a decree on a hypothecation-bond, besides decreeing sale of the hypothecated property, purported also to grant relief against the person and non-hypothecated property of the judgment-debtor, and such decree remaining unchallenged became final in its entirety:—*Held,* that it was competent to the decree-holder by application for execution of the decree to proceed against the non-hypothecated property of his judgment-debtor, and it was not necessary for him to apply to the Court for a decree under s. 90 of the Transfer of Property Act. *Musaheb Zaman Khan* v. *Inayat-ul-lah, I. L. R. 14 All. 513,* distinguished. LALJI LAL *v.* BARBER **I. L. R. 15 All. 334**

97. ——— *Transfer of Property Act, ss. 88, 90—Decree not satisfied after sale of mortgaged property—Procedure necessary to obtain balance of decree.* Where a decree-holder has obtained a decree under s. 88 of the Transfer of Property Act and on sale of the mortgage property the proceeds of sale are insufficient to satisfy the decree, he must, unless the decree gives him the right to proceed against other property or against the person of his judgment-debtor, apply under s. 90 of the Act for a decree for the balance remaining unsatisfied. LALLA TIRHINI SAHAI *v.* LALLA HURRUK NARAIN . . **I. L. R. 21 Calc. 26**

98. ——— *Land Acquisition Act (X of 1870), s. 9—Acquisition by Government of land subject to a mortgage—Neglect of mortgagees to claim compensation—Assessment of compensation in favour of mortgagor—Subsequent remedy of mortgagee—Transfer of Property Act (IV of 1882), ss. 88 and 90.* B M and others, mortgagees, obtained a decree under s. 88 of the Transfer of Property Act, 1882, for the sale of the mortgaged property. Before execution of that decree, some of the mortgaged property was taken up by Government under the provisions of the Land Acquisition Act, 1870. The mortgagees never put in any claim with regard to the mortgaged property in response to the notification made under s. 9 of the last-mentioned Act, but subsequently sought to attach in the hands of the Collector the compensation money about to be paid to the mortgagor. On these facts, it was *held,* that the mortgagees were not entitled to attach such money in execution of their decree under the Transfer of Property Act, 1882. Their remedy was to proceed against the mortgaged property not taken up, and if the proceeds of sale of that were insufficient, then to apply to the Court under s. 90 of the Transfer of Property Act for a decree for the balance. BASA MAL *v.* TAJAMMAL HUSAIN . . . . **I. L. R. 16 All. 78**

99. ——— *Transfer of Property Act (IV of 1882), ss. 88 and 89—Suit for sale on a mortgage—Future interest.* A decree for sale under s. 88 of the Transfer of Property Act, 1882, in a suit for sale on a mortgage declared a certain sum including principle and interest up to date of decree, to be payable to the plaintiff within a stated time, and also provided that the decree should carry future interest. The judgment-debtor did not pay within the specified time, and subsequently the decree-holder applied for an order absolute for sale, under s. 89 of the above-mentioned Act. *Held,* that the amount which could be realized by the decree-holder by sale of the mortgaged property would include future interest from the date of the decree, under s. 88 to the date of sale, and that it was not

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

necessary that specific mention of future interest should be contained in the order under s. 89 of the Act. RAJ KUMAR *v.* BISHESHAR NATH
I. L. R. 16 All. 270

See also BHAWANI PRASAD *v.* BRIJ LAL
I. L. R. 16 All. 269

100. ——— *Transfer of Property Act (IV of 1882), ss. 88 and 89.* A decree on a simple mortgage directing the sale of the mortgaged property on default of payment within a fixed period is substantially a decree *nisi* or conditional decree under s. 88 of the Transfer of Property Act, and cannot be executed unless it is made absolute by an order under s. 89 of that Act. *Ram Lal* v. *Narain, I. L. R. 12 All. 539,* followed. *Siva Pershad Maity* v. *Nundo Lal Kar Mahapatra, I. L. R. 18 Calc. 139,* distinguished. *Poresh Nath Majumdar* v. *Ram Jodu Mojumdar, I. L. R. 16 Calc. 246,* referred to. TARA PROSAD ROY *v.* BHOBODEB ROY . . **I. L. R. 22 Calc. 931**

101. ——— *Transfer of Property Act (IV of 1882), s. 90—Personal covenant in mortgage to pay—Application to sell non-hypothecated property—"Balance legally recoverable"—Cause of action—Limitation.* A mortgage-bond securing a debt payable on demand provided that for the payment of the amount of the mortgage-debt the immovable property mentioned in it should be held as collateral security, and that, "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." *Held,* that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgaged debt, but that the cause of action for both remedies was one and the same, and accrued when the covenant to pay was broken. Hence, the suit for sale of the mortgaged property having been brought more than ten years after the date of the mortgage, the balance due upon the mortgage was not legally recoverable otherwise than out of the property sold, and an application for a decree under s. 90 of the Transfer of Property Act was not maintainable. *Musaheb Zaman Khan* v. *Inayat-ul-lah, I. L. R. 14 All. 513; In re McHenry: McDermott* v. *Boyd, L. R. 3 Ch. 290;* and *Miller* v. *Runga Nath Moulick, I. L. R. 12 Calc. 389,* referred to. CHATTAR MAL *v.* THAKURI . **I. L. R. 20 All. 512**

102. ——— *Mortgage-decree—Transfer of Property Act (IV of 1882), Decree regarded as mortgage decree under.* In a suit for recovery of mortgage-money by sale, brought after the Transfer of Property Act (IV of 1882) had come into force, the decree of the Court was: "That a decree be passed in favour of the plaintiffs in respect of R5,387-10-13, together with costs and interest at the rate of 6 per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae band kea jae*) for realization of the decretal money." *Held,* that the decree was to be regarded as a mortgage-decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act; and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter, and without obtaining an order under s. 90 of the said Act. *Jogemaya Dassi* v. *Thackomoni Dassi, I. L. R. 24 Calc. 473,* and *Fazil Howladar* v. *Krishna Bandhoo Roy, I. L. R. 25 Calc. 580,* referred to. *Chundra Nath Day* v. *Burroda Soondury Ghose, I. L. R. 22 Calc. 813,* distinguished. LAL BEHARY SINGH *v.* HABIBUR RAHMAN . . **I. L. R. 26 Calc. 166**
3 C. W. N. 8

103. ——— *Puisne mortgagee—Execution against properties outside the local jurisdiction of the High Court—Leave to sue—Letters Patent, High Court, 1865, cl. 12—Application of restrictive words of that clause.* Properties within Calcutta were mortgaged to the plaintiff, and these properties, together with other properties out of Calcutta, were mortgaged to a second mortgagee. In a suit against the mortgagor and the second mortgagee: *Held,* that, after the usual mortgage decree was made, the second mortgagee had the right to proceed against the properties out of Calcutta for the realization of any balance of the mortgage-money that might remain due to him. The restrictive words of cl. 12 of the Letters Patent, 1865, apply to the case of a plaintiff; but there is no similar restraining provision applicable to a case where the person seeking the exercise of the Court's jurisdiction is the defendant. KISSORY MOHUN ROY *v.* KALI CHURN GHOSE
I. L. R. 24 Calc. 190
1 C. W. N. 156

104. ——— *Execution of mortgage-decree by sale of properties in the possession of the Receiver—Attachment.* A judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage-decree, although he cannot execute a decree against such properties by way of attachment and sale. *Semble:* A proceeding by way of attachment is an interference with the possession of the Receiver. *Hem Chunder Chunder* v. *Prankristo Chunder, I. L. R. 1. Calc. 403,* distinguished. JOGENDRA NATH GOSSAIN *v.* DEBENDRA NATH GOSSAIN
I. L. R. 26 Calc. 127

105. ——— *Sale of mortgaged property—Order absolute for sale—Transfer of Property Act (IV of 1882), s. 89.* An order absolute for sale under the provisions of the Transfer of Property Act is not indispensably necessary as a condition precedent for the sale of a mortgaged

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

property in execution of a mortgage decree; it is sufficient that there is an order for sale passed on the application of the decree-holder. *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra, I. L. R. 18 Calc. 139,* and *Tara Prosad Roy* v. *Bhobodeb Roy, I. L. R. 22 Calc. 931,* referred to. PHUL CHAND RAM *v.* NURSINGH PERSHAD MISSER (1899) . . . **I. L. R. 28 Calc. 73**

106. ——— *Transfer of Property Act (IV of 1882), ss. 88, 89—Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment.* In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court. *Held,* that, the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. *Nihali* v. *Mittar Sen, I. L. R. 20 All. 446; Raham Ilahi Khan* v. *Ghasita, I. L. R. 20 All. 375;* and *Sita Ram* v. *Madho Lal, I. L. R. 24 All. 44,* referred to. *Ram Lal* v. *Tulsa Kuar, I. L. R. 19 All. 180,* distinguished. DEBI PRASAD *v.* JAI KARAN SINGH (1902) **I. L. R. 24 All. 479**

107. ——— *Transfer of Property Act (IV of 1882), ss. 89, 90—Decree for sale of part only of the mortgaged property—Property sold insufficient to satisfy the mortgage debt—Application for decree over, under s. 90.* A mortgagee holding a simple mortgage, by which certain immovable property was hypothecated, sued for and obtained a decree for the sale of part only of the mortgaged property. Such portion having been sold, and the nett proceeds of the sale having proved insufficient to satisfy the mortgage-debt, the decree-holder applied for a decree over, under s. 90 of the Transfer of Property Act, against the unhypothecated property of the mortgagor. *Held,* that, the original decree having been in fact passed, whether rightly or wrongly, for sale of a part only of the mortgaged property and the sale of that part having realized an amount not sufficient to satisfy the mortgage-debt, there was, under the circumstances, no objection to the mortgagee obtaining a decree over, under s. 90. *Semble:* That there is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property, and if the sale of the remaining portion proves insufficient to satisfy the mortgage-debt, obtaining a decree under s. 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor. SHEO PRASAD *v.* BEHARI LAL (1902) **I. L. R. 25 All. 79**

108. ——— *Transfer of Property Act (IV of 1882), s. 89—Order absolute for sale of a portion of the mortgaged property only—Proceeds of sale of such portion insufficient to satisfy decree—Application for further order absolute for sale of other property.* If an order absolute for the sale of a portion only of the mortgaged property has been obtained by the mortgagee decree-holder, and the proceeds of the sale of that portion prove insufficient to satisfy the decretal debt, there is nothing in law to prevent the decree-holder from obtaining a further order to sell another portion of the mortgaged property, provided that his application is within limitation. BALKISHANJI MAHARAJ *v.* MITHU LAL (1902) . . **I. L. R. 25 All. 212**

109. ——— *Transfer of Property Act (IV of 1882), ss. 88, 89—Order absolute for sale of part of property mortgaged—Appeal from decree—Application for further order for sale of entire property for an amount including interest accrued pending the appeal.* Certain mortgagees, in whose favour a decree for sale of the mortgaged property has been passed, obtained an order absolute for sale of a portion of the mortgaged property. The judgment-debtors appealed from the decree for sale, and pending the appeal the amount realizable by sale of the mortgaged property was increased by the accrual of interest. The judgment-debtors' appeal was dismissed. *Held,* that under these circumstances, there was no objection to the decree-holders, after the dismissal of the judgment-debtors' appeal, applying for and obtaining a further order absolute for sale of the whole of the mortgaged property for an amount including the interest accrued due subsequently to the passing of the first order. SAT NARAIN *v.* RADHA KISHAN (1903) **I. L. R. 25 All. 264**

110. ——— *Sale not set aside within one year—Civil Procedure Code (Act XIV of 1882), s. 311—Limitation Act (XV of 1877), Sch. II, Arts. 12, 144, 148—Title of purchaser as against mortgagor — Adverse possession — Redemption — Right of judgment-creditor, purchase by.* The lands in suit were held by the plaintiffs under leases granted by Government for terms of seven years, and renewed from time to time. To a suit brought in 1897 for redemption of the lands, which had been mortgaged in 1878 by usufructuary mortgages, the defence was that the defendants were not mortgagees of the property, but had purchased it at sales in execution of decrees in 1880-81, which could not be set aside, and that the suit was barred by lapse of time:—*Held,* that the purchasers at the sales were mere agents or benamidars of the mortgagees; and that the possession of the property had been that of the mortgagees throughout. No such possession short of the statutory period of 60 years, nor any acquiescence of the mortgagors not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem. Nor did the renewal of the leases or the making of a

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*contd.*

new settlement in the names of nominees of the mortgagees alter the real title to the lands. There had been no possession adverse to the plaintiffs, and the suit was, therefore, not barred by limitation. It appeared that there had been errors and defects in procedure both previous to the decrees of 1880-81 and in the execution proceedings and some of the parties had not been properly represented :—*Held*, that though the sales could not now be set aside or treated as void by reason of mere irregularities of procedure in obtaining the decrees or in execution of them, yet the Court had no jurisdiction to sell the property of perons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees or sales under them were void without any proceedings to set them aside. *Kishen Chunder Ghose* v. *Ashoorun, 1 Marsh. 647*, followed. The question whether an estate is or is not properly represented in a suit is not a mere question of form, but one of substance. One of the decrees, in execution of which the sales took place, was made on an award after reference of the suit to arbitration and the other was a decree on a compromise of the suit :—*Held*, that there had been no erroneous decision, ruling, or exercise of the discretion of the Court in a matter in which it had jurisdiction. *Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337 : L. R. 27 I. A. 216*, distinguished. The lower Appellate Court having given a decree for redemption of the whole of the property : —*Held*, that under the above circumstances and the fact that the suit, which was compromised, was one for a debt not secured by a mortgage, redemption should be allowed only of the shares of those parties who had not been properly represented in the suits. KHIARAJMAL *v.* DAIM (1905)

I. L. R. 32 Calc. 296

111. ——————— *Decree on mortgage against minors—Sale in execution—Reversal of decree in appeal—Attachment in execution of a money-decree—Title of the purchaser in execution of the decree on the mortgage—Lis pendens—Stay of execution.* A certain house belonged to a joint family consisting of two brothers Nathubhai and Dayabhai and their cousin Bhagubhai. A mortgage of the house was said to have been effected by Bhagubhai during the minority of his two cousins. The mortgagee got a decree for the recovery of the mortgage-debt from the mortgaged property. An appeal was presented on behalf of the minors on the ground that they were not bound by the decree and pending the appeal the mortgaged property was sold in execution of the decree and purchased by the defendant's father. Then the appeal came on and the decree was varied as to the minors by dismissing the suit against them and their property. Subsequently the plaintiff obtained a money-decree against Nathubhai and attached in execution thereof what he claimed to be his judgment-debtor's ¼th share in the house. The

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*p*) MORTGAGE—*concld.*

attachment was, however, raised at the instance of the defendants, who relied on their father's Court-purchase and contended that the judgment-debtor Nathubhai had no claim to the house. The plaintiff thereupon brought the present suit for a declaration, affirming his right to attach. *Held*, confirming the decree, which dismissed the suit, that the title of the defendant's father as purchaser at the Court-sale must prevail. Though the decree on the mortgage was varied in appeal by dismissing the suit as against the minors and their property, still as the defendant's father purchased in execution of the decree pending the appeal, his title could not be impugned in the absence of fraud, collusion or any other disqualifying circumstances. *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan, I. L. R. 10 All. 166 ; Tommy* v. *White, 3 H. L. C. 49*, referred to. The doctrine of *lis pendens* does not defeat a purchaser under a decree or order for sale, when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine rests on the principle that law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party. *Bellamy* v. *Sabine, 1 De G. & J. 566 ; Wigram* v. *Buckley, 3 Ch. 483*, referred to. Where an appeal is presented from a decree directing the sale of property in dispute in a suit, then the only course is to take such steps as will secure that, by stay or otherwise, no detriment shall be suffered by the appellant in case the appeal succeeds. SHIVLAL BHAGVAN *v.* SHAMBHUPRASAD (1905)

I. L. R. 29 Bom. 435

(*q*) PARTITION.

112. ——————— **Decree for partition of property partly ascertained and partly unascertained**—*Part-execution.* In the course of a suit for declaration of right to property and for partition, a compromise was entered into, by which it was agreed that certain property already ascertained should be divided in certain proportions, and that certain other property not yet ascertained should, on being ascertained, be partitioned on the same basis. The Court merely recorded the compromise and declared that the decree should be according to terms therein set out. *Held*, that this decree could only be executed as to the property which had been ascertained as divisible, and that, as to the other property, the decree must be taken as declaratory only. RAM LAPIT RAM *v.* CHOOARAM. CHOOARAM *v.* RAM LAPIT RAM . **4 C. L. R. 97**

113. ——————— **Decree for share of undivided plot of land and removal of trees thereon**—*Separation of share—Civil Procedure Code, s. 265—Act XIX of 1873, ss. 107-110—Partition of mahal.* *M* obtained against *R* a decree for possession of "a one-fourth share of the two fallow lands, Nos. 490 and 541, measuring 7 bighas and

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*q*) PARTITION—*concld.*

2 bighas 16 biswas respectively, after removal of the trees planted thereon." The Court in executing the decree, placed the decree-holder in joint possession of the two plots to the extent of the one-fourth share decreed to him, but declined to remove the trees until the said share had been specifically ascertaind and partitioned by the Collector in reference to s. 265 of the Civil Procedure Code. *Held*, that the decree could not be understood to entitle the plaintiff to remove the trees from a larger area than that to which he was entitled under that decree; and that, so long as that area remained joint and unascertained, the plaintiff could not execute the decree in the manner sought. *Held*, also, that the decree in the present case could not be called a "decree for the partition or for the separate possession of a share of an undivided estate paying revenue to Government" within the meaning of s. 265 of the Civil Procedure Code, so as to require the intervention of the Collector for the purpose of executing the decree; and that the Court of first instance in order to meet the exigencies of the decree, should have separated the one-fourth to which the plaintiff was declared entitled, and, in executing the decree, should have ordered that the trees standing on the one-fourth area should be uprooted. RAM DAYAL *v.* MEGU LALL . **I. L. R. 6 All. 452**

114. ——— Powers of Court executing a decree for partition—*Civil Procedure Code, 1882, s. 396—Party wall. Held*, that a Court has no power, under s. 396 of the Code of Civil Procedure to order its Amin to cause a wall to be built separating portions of property of which partition has been decreed. SOHAN LAL *v.* HARDEO SAHAI **I. L. R. 19 All. 194**

115. ——— *Partition suit—Decree—Application for execution by defendant—Order for execution subject to payment of Court fees.* A defendant to a partition suit applied for execution in his favour of the decree therein. The Judge ruled that on the defendant's "paying the Court-fees, the matter will be sent to the Collector for partition." The decree itself imposed no such term as to Court-fees. The defendant having appealed against the said order: *Held*, reversing the order, that the executing Court having regard to the terms of the decree was not justified in requiring payment of an additional Court-fee on the plaint. MIR SADRUDIN *v.* NURUDIN (1905) **I. L. R. 29 Bom. 79**

(*r*) PARTNERS.

116. ——— Decree against one of several partners in firm. It is an improper way of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property, to sell that part, and then distribute the proceeds between the execution-creditor and the other partners of the firm. KESHAV GOPAL GINDE *v.* RAYAPA . . **12 Bom. 165**

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*r*) PARTNERS—*concld.*

(*s*) POSSESSION.

117. ——— Order for delivery of possession—*Civil Procedure Code, 1859, s. 223, Semble:* A decree which is not a decree for possession cannot, under s. 223, be executed by an order for delivery of possession of property in the possession of a third party who has acquired a title subsequently to the institution of the suit. AMEEROONISSA KHATOON *v.* ABEDOONISSA KHATOON **16 W. R. 307**

118. ——— Decree for khas possession—*Civil Procedure Code, 1859, s. 223—Removal of building.* If in executing a decree for khas possession it is necessary to remove any of the defendants from the land covered by the decree, the Court, on application, is authorized under Act VIII of 1859, s. 223, to remove such person; but if the decree is silent as to a building situated on the land, it is not within the province of the Court which executes to direct that the building be pulled down. RADHA GOBIND SHAHA *v.* BRIJENDRO COOMAR ROY CHOWDHRY . . . . **18 W. R. 527**

119. ——— Decree for possession of house—*Civil Procedure Code, 1859, s. 223—Possession of house locked up by judgment-debtor.* In a case in which the officers of a Munsif's Court were unable to give a decree-holder possession of a house, because the judgment-debtor had bolted and locked the doors, and the Munsif struck the case off the file, the High Court held that the Munsif was bound, under the Code of Civil Procedure, s. 223, to remove the locks and to place the decree-holder in possession of the house. GUNESH CHUNDER SHAH *v.* RAM DHUNEE DOSSEE **22 W. R. 283**

120. ——— Decrees generally—*Civil Procedure Code, 1859, s. 223.* Act VIII of 1859, s. 223, refers to decrees generally whenever they may be passed, and provides that, being so passed, they are to be effectual from the time the suit was instituted, so far as parties claiming under a title made by the judgment-debtor are concerned, even when such title was created before an appeal was filed from the order dismissing the suit, and when no decree existed. *Per* GLOVER, *J.* (MITTER, *J.*, *dissentiente*)—When a Court of competent jurisdition has pronounced its judgment in a suit, that suit is for the time at an end. Where a suit is dismissed and no petition of appeal is filed, the suit has no legal existence, and there is no suit pending. CHUNDER COOMAR LAHOOREE *v.* GOPEE KRISTO GOSSAMEE . . **20 W. R. 204**

121. ——— *Decree partly in occupation of defendants' raiyats—Civil Procc-*

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*s*) POSSESSION—*contd.*

dure Code, 1859, ss. 223, 224. Where a decree is partly for a share of land in the occupancy or khas possession of the defendants and partly for a share of land in the occupancy of raiyats, the decree as to the former can only be executed according to s. 223, Act VIII of 1859; and as to the latter, according to s. 224. SHAMA SOONDERY DEBEA *v.* JARDINE SKINNER & Co. . . . . **7 W. R. 376**

Reversing on review, s.c. . **3 W. R. 144**

122. ——— Decree for ijmali property—*Civil Procedure Code, 1859, ss. 223, 224.* Where in a suit against certain sutputtees and patnidars to recover possession of a share of an ijmali family talukh plaintiff obtained a decree, it was held that the Court executing was bound, under s. 233, Act VIII of 1859, to put her in possession of the immoveable property adjudged, and, if necessary, to remove any person who might refuse to vacate; and that her having already been put in possession under the provisions of s. 224 was no bar to her being put into the more direct and actual possession contemplated by s. 223. ADOREMONEE DASSEE *v.* PREMCHUND MUSSANT **9 W. R. 454**

123. ——— Delivery of shares and interest in property—*Civil Procedure Code, 1859, s. 224.* Plaintiff, having only partially succeeded in a suit against *R*, *G*, and others for possession of certain land with mesne profits, appealed to the High Court, who gave him a decree with costs. Upon this, all the defendants except *R* and *G* applied for a review, and obtained a modification of the High Court's judgment, such as left the lower Court's decree standing against *R* and *G* alone. Plaintiff then applied for execution. *Held*, that the only thing that the plaintiff could do in these circumstances was to ask for delivery, in the mode prescribed in s. 224, Code of Civil Procedure, of the shares and interest of *R* and *G*, but that the Court in execution was not authorized to make any enquiry into the extent or amount of these shares in relation to the other defendants. ANNODA PERSHAD MOOKERJEE *v.* TROYLUCKHNATH PAUL CHOWDHRY . . . . **13 W. R. 123**

124. ——— *Civil Procedure Code, 1859, s 224.* An application for execution of a decree for possession, asking for the eviction of the defendant, is quite different from an application for possession under s. 224, Act VIII of 1859. Although the lower Court rightly refused to grant the former application:—*Held*, that there no grounds for refusing the latter application, except as to that part in which the decre-holder asked for an order to issue to the raiyats to pay rent to him, which order would be beyond the purview of that section. GIBBON *v.* SHEO PURSHUN MISSER . . **17 W. R. 236**

125. ——— Khas possession—*Civil Procedure Code, 1859, ss. 223, 224.* Where a decree-holder, who had received possession under s. 224, Code of Civil Procedure, and gave the usual acknowledgment, was refused khas possession of part of the land which defendants claimed to hold as raiyats, it was held that his proper course was an application under s. 223, although the case had been struck off the execution file, and that defendant's allegation of purchase (their sole plea at the trial) having failed, they could not afterwards set up a raiyati title. BANEE MUHTOON *v.* GOPEE BHUGGUT **12 W. R. 285**

126. ——— *Civil Procedure Code, ss. 263, 264.* Applying the principle laid down in *Adoremonee Dossee* v. *Prem Chand Mussant, 9 W. R. 454*, and *Banee Muhtoon* v. *Gopee Bhuggut, 12 W. R. 285*, it was held that a Munsif had jurisdiction to issue an order for khas possession under s. 263, Act VIII of 1859, although in the first instance he had ordered possession to be given under s. 264. HUR KISHORE AUDHIKARY *v.* SUDOY CHUNDER NUNDEE . . . . **17 W. R. 80**

127. ——— Reversal of decree—*Reversal of decree giving mortgagors possession—Execution of decree made on reversal.* Where a decree under which mortgagors obtained possession of mortgaged property is reversed, the mortgagees are entitled to be replaced in possession and to get complete restitution, and to be placed in the same position as they were in before the erroneous decree was made, even if the decree reversing the erroneous decree does not provide that the mortgagees should recover possession. KOONDUN LALL *v.* RAM RUCHA SINGH . . . **14 W. R. 465**

128. ——— Decree for possession of lands of which plaintiff is partly in possession. In a suit for possession of certain plots of land, where plaintiff appeared to be in exclusive possession of other lands devolving by the same title, the Munsif compelled the plaintiff to alter her claim into one for a third of the whole of the lands of which she was entitled to a share, and gave her a decree accordingly. When she sought to execute the decree, the defendants objected that she ought first to execute it in respect of the lands in her possession which were alleged to exceed the one-third decree. *Held*, that the decree-holder was entitled to execute her decree in respect of the lands in the hands of the defendant. RADHA KRISTO PANJAH *v.* BAMASOONDUREE DOSSEE **13 W. R. 9**

129. ——— Decree for specified property. Where it was ordered in execution that a decree-holder should get possession of a specified plot out of three into which certain property had been divided for purposes of valuation, and if that did not satisfy the decree, other property should be added from the other plots:—*Held*, that, so long as any portion of the specified plot remained, the decree-holder could not touch the remaining plots. JOGENDRO NATH MULLICK *v.* BIJOY KESHUB ROY **19 W. R. 161**

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*s*) POSSESSION—*contd.*

130. ——— Decree in partition suit— *Civil Procedure Code, 1882, s. 263—Delivery of possession to decree-holder in execution—Dispossession of third party—Partition, suit for.* The delivery of possession under s. 263 of the Civil Procedure Code contemplates the decree-holder being placed in actual possession by possibly dispossessing in the eye of law a third person who is not affected by the decree. The mere formal delivery of possession cannot of itself effect such dispossession unless the deprivation of possession be complete as a fact, a conclusion which the Court has to form on the whole of the evidence. It does not make any difference if such a decree is in a partition suit. RAMCHANDRA SUBRAO *v.* RAVJI . **I. L. R. 20 Bom. 351**

131. ——— Decree for possession of a village—Possession of account-books—*Right of the holders of such a decree to the possession of village account-books and other papers relating to the management of the village—Title-deeds.* The plaintiffs, as managers of a temple, obtained a decree for the possession of a certain inam village. After taking possession of the village they called upon the defendants to hand over to them the village account-books and other documents relating to the management of the village. The defendants refused. Thereupon the plaintiffs presented a darkhast in execution, praying (*inter alia*) for the delivery of those books and documents. The Subordinate Judge rejected this application on the ground that it was beyond the terms of the decree. *Held*, on appeal to the High Court, that the plaintiffs were entitled to the possession of the account books and documents in question as being essential to the proper and effectual enjoyment and management of the village awarded by the decree. Such books and documents were properly to be regarded as accessory to the estate and as claimable by those to whom it had been awarded. The title-deeds of an estate, counter part leases, and other documents of the like kind, such as kabuliats in India, ought to be regarded as accessory to the estate, and to pass with it, whether the transfer is made by a conveyance, a decree or a certificate of sale. BHAWANI DEVI *v.* DEVRAV MADHAVRAV . **I. L. R. 11 Bom. 485**

132. ——— Sale in execution of property not belonging to the judgment-debtor —*Suit by owner of property so sold to recover possession—Limitation Act (XV of 1877), Sch. II, Arts. 12 and 144.* Where in execution of an order under s. 412 of the Code of Civil Procedure for payment of Court-fees certain immoveable property was sold as the property of the persons liable under such order, which in fact did not belong to them, but to a third person, who had no notice of the sale: *Held*, that the true owner of the property so sold was competent to treat the sale as a nullity and to bring his suit for recovery of possession at any time within 12 years from the date, when he lost possession. *Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337*, distinguished. *Nathu* v. *Badri Das, I. L. R. 5 All. 614, Balwant Rao* v. *Muhammad Husain, I. L. R. 15 All. 324*, and *Sukhdeo Prasad* v. *Jamna, I. L. R. 23 All. 60*, referred to. JWALA SAHAI *v.* MASIAT KHAN (1904) **I. L. R. 26 All. 346**

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*s*) POSSESSION—*concld.*

133. ——— Execution in excess of decree—*Court's inherent power to make restitution upon application—Regular suit not necessary.* Plaintiff obtained a decree in the Court of first instance for confirmation of possession, and this decree was reversed on appeal. In the meantime in proceedings taken to execute the decree of the first Court, plaintiff had obtained possession. On defendant applying for restitution of possession plaintiff contended that in putting plaintiff in possession the Court had gone beyond the terms of the decree and the defendant's remedy was by bringing a regular suit. *Held*, overruling the contention, that the Court, which was induced to wrongly give possession, had inherent power to order restitution. *Raja Singh* v. *Kooldip Singh, I. L. R. 21 Calc. 989*, and *Mookoond Lal* v. *Mahomed Sami Meah, I. L. R. 14 Calc. 484*, relied on. DINESH PROSHAD *v.* SHANKAR CHOWDHRY (1905) **9 C. W. N. 381**

134. ——— *Sale of property not included in decree—Sale confirmed without objection on part of judgment-debtor—Private sale by heirs of judgment-debtor to a third party—Rights of purchasers inter se.* In execution of a decree for sale on a mortgage the interest of the judgment-debtor in the whole of certain property, instead of in half only, which was all that was mortgaged, was sold. The sale was confirmed, possession was delivered and mutation proceedings took place in favour of the purchaser. The judgment-debtor, though having full knowledge of these proceedings, took no objection, but allowed the purchaser's name to be recorded in respect of the whole property. Subsequently the heirs of the judgment-debtor sold half of the property in question to one *F*, who brought a suit to recover possession thereof from the auction-purchaser. *Held*, that *F*, inasmuch as, if he had made any sort of inquiry, he would have become aware of the true state of the title to the property, which he was purchasing, could not be regarded as a *bonâ fide* purchaser, and was not in equity entitled to succeed as against the auction-purchaser. BALDEO PRASAD *v.* FAKIR-UD-DIN (1905) **I. L. R. 27 All. 62.**

(*t*) PRINCIPAL AND SURETY.

135. ——— Decree against principal and surety—*Interest.* *R* sued *M, B, C,* and *P* for money due for goods supplied. Separate solehnamas were filed by each of the four defendants, in

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*t*) PRINCIPAL AND SURETY—*concld.*

which they admitted the debt, and each undertook to pay one-fourth thereof, with interest, by instalments; and each further agreed that, if the other three should make default and the amount due by them should not be realized by the sale of their property, then he should be liable to make good the deficiency. A decree was passed by the Court in accordance with the terms of the solehnamas. *C* and *P* each paid up their fourth shares, but *M* and *B*, having failed to pay, *R* applied for execution against *C* and *P* in respect of the liability of *M* and *B*. *Held*, that, in the absence of proof that the whole property of *B* had been exhausted, *R*'s application could not be allowed. Where a decree for payment of a certain sum with interest was passed against certain defendants as principal debtors and against other defendants as sureties, and it appeared that the decree-holder had allowed time to the principal debtors for the purpose of increasing the amount of interest:—*Held*, that the decree-holder was not entitled to interest after the time when he might and ought to have put up the property of the principal debtors for sale, when possibly it might have realized the whole of the debt then due. RAMANUND KOONDOO *v.* CHOWDHRY SOONDER NARAIN SARUNGY

I. L. R. 4 Calc. 331

136. ——————— *Stay of execution on giving security—Default of judgment-debtor—Liability of surety in execution—Decree how to be satisfied when property brought into Court by judgment-debtor and payment made by surety.* The execution of a decree for partition was stayed pending appeal on the defendant giving security that he would satisfy such decree as might ultimately be passed against him by the Appellate Court. That Court confirmed the decree of the lower Court. In obedience to the decree, the judgment-debtor deposited in Court certain property in his possession consisting of bonds, decrees, and other articles. But as he did not produce the whole of the property as ordered by the decree, the Court directed execution to proceed against his surety. The surety paid into Court the full sum stipulated in the surety-bond. Thereupon the judgment-debtor applied that the property deposited by him in Court should be valued and made over to the decree-holder in part satisfaction of the decree *pro tanto*, and that only the balance then remaining due should be paid out of the money paid in by the surety. The Court refused, holding that the decree-holder was entitled to be paid over the whole sum paid in by the surety. On appeal: *Held* (reversing the order of the lower Court), that the property already produced in Court by the judgment-debtor should be first applied towards the satisfaction of the partition-decree, and if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available. GOPAL NANA SHET *v.* JOHARMAL

I. L. R. 19 Bom. 578

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*u*) PRODUCE OF LAND.

137. ——————— **Decree for produce of land**—*Execution for future produce—Decree before Civil Procedure Code, 1859.* In the execution of a decree for land passed prior to the enactment of the Code of Civil Procedure, in which the value of the produce of the land was given to the plaintiff up to the date of the decree, it is not competent to the Court executing the decree to grant further produce up to the date of execution. CHINNAIYA CHETTY *v.* NARANAPAIYA . **6 Mad. 15**

(*v*) REMOVAL OF BUILDINGS.

138. ——————— **Decree ordering removal of wall**—*Civil Procedure Code (Act X of 1877), ss. 235 and 260—Special appeal, power of High Court in.* Upon an application under s. 235 of the Civil Procedure Code (Act X of 1877) for the execution of a decree, which directed the judgment-debtor forthwith to pull down and remove such portion of a wall as had been erected by him upon the wall of the decree-holder, the mode in which the assistance of the Court was required to be given was stated in column (*j*) of such application to be by giving the decree-holder possession of his wall by pulling down the wall erected thereon. The Court directed an order to issue to the nazir to remove the judgment-debtor's wall from the top of the decree-holder's wall. *Held*, that the decree-holder's application could not be granted in that form, and that he should have asked the assistance of the Court to be given in the way provided for by s. 260 of Act X of 1877 by the imprisonment of the judgment-debtor, or the attachment of his property, or both. *Held*, also, that the Court was wrong in passing the order it had, but that it should have pointed out to the decree-holder the manner in which he should have asked the assistance of the Court to be given and the remedy to which he was entitled; and that, upon such amended application being made, the proper course to pursue was to serve a notice on the judgment-debtor, directing him to comply with the order contained in the decree within a time to be fixed by such notice; and that, if he fail to comply with such order within the time so limited, the Court might then, at the instance of the decree-holder, make an order either for the judgment-debtor's imprisonment or for the attachment of his property, due regard being had to the provisions of s. 260 in the latter case. *Held*, further, that the High Court in special appeal should not vary the order for execution which had been passed in such a way as to give the decree-holder that relief for which he did not ask. PROTAP CHUNDER DOSS *v.* PEARY CHOWDHRAIN

I. L. R. 8 Calc. 174 : 9 C. L. R. 453

(*w*) RIGHT OF WAY.

139. ——————— **Decree giving passage through doorway**—*Removal of door.* Where a

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EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*contd.*

(*w*) RIGHT OF WAY—*concld.*

decree only declared plaintiffs' right of passage through a doorway and to remove the brick-work with which it was filled :—*Held*, that in executing it the decree-holder was not authorized to remove a wooden door in existence there. ROOKNEE KANT CHOWDHRY *v.* NOND LALL CHOWDHRY **25 W. R. 120**

(*x*) SIRDAR, HEIR OF, DECREE AGAINST.

140. ——— Decree against heir of Sirdar—*Suit on decree.* The mode of enforcing against a Sirdar's heir (who is not a Sirdar) a decree passed by the Agent's Court against that Sirdar is by a suit founded upon the decree. GOVIND VAMAN *v.* SAKHARAM RAMCHANDRA . **I. L. R. 3 Bom. 42**

(*y*) TEMPLE, SCHEME FOR MANAGEMENT OF.

141. ——— Failure of trustees to carry out scheme—*Mode of enforcing proper management—Removal of trustees—Civil Procedure Code (Act XIV of 1882), ss. 539 and 260—Separate suit.* A decree was passed in a suit under s. 539 of the Civil Procedure Code (Act XIV of 1882) settling a scheme of management of a certain temple. The scheme provided that the defendants and their heirs were, during their good conduct, to be retained as trustees and managers of the temple, and as such to maintain a proper system of worship, and to keep regular accounts, etc., etc. Subsequently plaintiffs applied for execution of the decree specifically setting forth various clauses of the scheme which had been infringed by the defendants. The plaintiffs prayed that the defendants should be removed from their office, and that the decree be enforced by their imprisonment and the attachment of their property. The Judge dismissed the application on the ground that the defendants could not be removed from the managership in execution-proceedings, the plaintiff's remedy lying in a regular suit. *Held*, that, in order to obtain the removal of the trustees, the procedure would be to amend the scheme of management so as to include a provision for the removal of the trustees necessary, and not to file a separate suit. *Held*, also, that, in so far as the decree ordered particular acts to be performed by the defendants in the management of the temple, it might be enforced by the imprisonment of the defendants, or by the attachment of their property, or by both. DAMODARBHAT *v.* BHOGILALL **I. L. R. 24 Bom. 45**

(*z*) VALIDITY OF DECREE.

142. ——— Objection to validity of decree—*Civil Procedure Code (Act XIV of 1882), s. 244 (e)—Objection to validity of decree cannot be raised in execution proceedings.* An objection

EXECUTION OF DECREE—*contd.*

11. MODE OF EXECUTION—*concld.*

(*z*) VALIDITY OF DECREE—*concld.*

by the defendant in a mortgage suit to the sale of properties directed to be sold by the decree in such suit, on the ground that such property is not liable for the decree, is not an objection relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 (*e*) of the Code of Civil Procedure but one questioning the validity of the decree itself and cannot be entertained in execution proceedings. KUMARETTA SERVAIGRAN *v.* SABAPATHY CHETTIAR (1906) . . . . **I. L. R. 30 Mad. 26**

12. EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES.

1. ——— Agreement of parties not embodied in a decree. Execution cannot be issued upon a razinamah, unless the terms of it are embodied in a decree of the Court. DARBBA VENKATTA SASTRI *v.* VURELLA GANGAIA. EX PARTE VURELLA GANGAIA . . . **2 Mad. 305**

2. ——— Compromise of suit—*Decree made on razinamah after lapse of five years—Execution of decree on razinamah.* A suit was compromised by a razinamah which required that a decree should be passed in conformity with its terms. The Munsif, instead of passing a regular decree, endorsed an informal order on the razinamah, and five years afterwards, upon an application for execution, the Munsif made a formal decree and ordered its execution. The Civil Judge considered this procedure erroneous, and ordered that the decree should not be acted on. *Held*, that it was competent to the Munsif to make a decree in pursuance of the razinamah upon the application of the party interested, even after an interval of five years ; and that, the decree having been properly made, the Judge had no authority to direct that it should not be acted on. VENKATARAMANA HODAI *v.* BAPANNA PAI **7 Mad. 103**

3. ——— Application to execute solenamah made after decree. Where parties to a suit which had been decreed entered after remand into a compromise and filed a solenamah in accordance with which the case was decided :—*Held*, that an application to execute the solenamah was not a proceeding taken on the basis of the decree, and was illegal. PREO MADHUB SIRCAR *v.* BISSUMBHUR SIRCAR . . . **15 W. R. 514**

4. ——— Agreement not to execute decree—*Injunction to restrain execution—Civil Procedure Code, 1859, s. 206.* Where a decree-holder agrees for a good consideration not to enforce his decree, the Court may legitimately, on the suit of the opposite party, issue an injunction against the former not to do what he had agreed not to do, s. 206 notwithstanding. NUBO KISHEN MOOKERJEE *v.* DEBNATH ROY CHOWDRY . . **22 W. R. 194**

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EXECUTION OF DECREE—*contd.*

12. EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES—*contd.*

5. ——— **Agreement not to execute unless on a contingency**—*Agreement to give good title.* Certain property was handed over by a judgment-debtor to the decree-holder for the purpose of satisfying the decree, and an arrangement was made between them, under which it was stipulated, that, if within a given interval, there should hereafter be found to be a defect in the title of the judgment-debtor, and the decree-holder should be dispossessed, then whatever the unrealized portion of the amount of the decree, the decree-holder should be at liberty to realize it by execution of the decree. *Held*, that the reasonable construction to be put upon this agreement was that, if there appeared to be a defect of title to any portion of the property handed over, and the decree-holder should be dispossessed of it by reason of such defect, then the transaction was to be put an end to, and he was to revert to his original right. As a part of the agreement, the judgment-debtor was held to have waived the benefit of the law of limitation if the event should happen upon which the decree-holder was entitled to fall back upon and execute his decree. ROY LUCHMEEPUT SINGH *v.* JOWAHUR ALI . . . . . **18 W. R. 497**

6. ——— **Agreement for execution in a particular manner**—*Agreement made before decree* An agreement entered into before decree between a person who subsequently became the decree-holder and the defendant, his debtor, stipulating that the decree should be enforced in a particular manner, is no bar to the execution of that decree according to its terms. SAKHARAM RAM CHANDRA DIKSHIT *v.* GOVIND VAMAN DIKSHIT **10 Bom. 361**

7. ——— **Second execution after debt has been realised under the first and misapplied**—*Agent not authorized to receive amount of decree.* Execution was issued upon a decree, and the proceeds of the execution paid over by the officer of the Court to the mooktear of the execution-creditor, and misapplied by him. A second execution was afterwards issued under the same decree in ignorance of the first. *Held*, that, although the mooktear may not have had authority to receive the proceeds of the first execution, the receipt of such proceeds by the Court officer absolved the execution-debtor from all further liability; and that the second execution was illegal, and the execution-creditor was responsible in respect of it. PURTAB CHUNDER BOROOAH *v.* BHUGGOBUTTY DABEA . . **Marsh. 59; 1 Hay 131**

8. ——— **Judgment-debtor acquiring interest in property after sale in execution**—*Right to second execution for balance of decree.* If a judgment-debtor, whose property has been once sold in execution of decree, again acquires an interest in the same property, there is no law which prohibits the decree-holder from applying for a second sale of the property to satisfy a balance due on his decree. GANESH PERSHAD *v.* SHEO CHURUN LALL . . . . . **6 N. W. 197**

9. ——— **Execution after satisfaction**—*Decree for possession.* A decree for possession, once satisfied by the plaintiff's being put in actual possession, cannot afterwards be revived or re-executed on the plaintiff being dispossessed. KHATOO BIBEE *v.* FURUKH ALI **6 W. R. Mis. 108**

10. ——— *Mistake, Agreement under—Agreeing to interest at certain rate unpaid—Subsequent execution.* Where a decree-holder, under a misconception of the law, asked to receive interest, calculating that he was not entitled to more on account of interest than the principal sum decreed, and the judgment-debtor did not pay in the money:—*Held*, that the decree-holder was entitled to fall back upon the original decree, and execute it according to its terms. ABED HOSSEIN *v.* ASSUD ALY . . . . **11 W. R. 29**

11. ——— **Execution after adjustment out of Court**—*Certificates of part satisfaction—Act X of 1877, s. 258.* Where a judgment-debtor has out of Court partly satisfied his decree-holder subsequent to the transmission of the decree for execution to another Court, but before actual execution has been applied for, he is entitled, on execution in full being demanded, to an order from the Court to which the decree is transferred for execution, calling upon the decree-holder to certify the fact of such part payment. RAJENDRONATH ROY BAHADOOR *v.* CHUNNOOMUL **I. L. R. 5 Calc. 448**

12. ——— *Civil Procedure Code, 1877, s. 235.* S. 235 of the Civil Procedure Code puts on the party applying for execution the obligation of stating any adjustment between the parties after decree, that is, any matter not done through the Court as well as any agreement through the Court. PAUPAYYA *v.* NARASANNAH **I. L. R. 2 Mad. 216**

13. ——— *Civil Procedure Code, 1877, s. 258.* An adjustment of a decree not certified to the Court by either party within the time limited by law cannot be recognized as a bar to execution. CHEDUMBARA PILLAI *v.* RATNA AMMAL **I. L. R. 3 Mad. 113**

14. ——— **Satisfaction of decree**—*Subsequent application for execution.* After a decree had been satisfied and the case struck out at the request of the decree-holder, he discovered that, by resorting to a different mode of calculation, he might have recovered more under the decree. The Court refused to re-open the matter or to allow execution for the difference. COLONAS *v.* BULAJAN **Marsh. 211 : 1 Hay 587**

15. ——— *Satisfaction of decrees by agreement—One decree afterwards set aside.* By mutual agreement two decree-holders entered up satisfaction in respect of their cross-

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EXECUTION OF DECREE—*contd.*

12. EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES—*contd.*

decrees. Nevertheless, one of them appealed from the decree passed against him and obtained its reversal. He then applied to issue execution on his cross-decree. *Held*, that the application could not be entertained, as satisfaction had been entered. The grounds upon which the application could have been entertained discussed. GUPINATH ROY *v.* DINABANDHU NANDI . . **3 B. L. R. Ap. 62**

16. ——— *Settlement of case—Subsequent application for execution.* A suit having been decreed, defendants appealed, but on both parties petitioning to the Court to the effect that they had come to a settlement of their differences, the appeal was struck off the file. The plaintiffs then applied to execute the original decree. *Held*, that, as the Appellate Court did not reverse the decision of the first Court, the decree stood good, except so far as the plaintiffs, judgment-creditors, were debarred from executing it by their own agreement. MEWA SING *v.* AZEEZOODDEEN KHAN **13 W. R. 311**

17. ——— *Intended satisfaction—Striking off execution—Failure to complete satisfaction.* An intimation to the Court of a contemplated satisfaction of the decree by arbitration, on which intimation the execution-case was removed from the file, would not preclude the decree-holder from suing out execution again, unless it be proved on enquiry that the result of the private arbitration was a satisfaction of the decree in the mode contemplated by the parties. CHOONNEE LALL *v.* DOORGA PERSHAD . . **3 Agra 252**

18. ——— *Application by assignee of decree-holder after satisfaction entered.* A share of a decree was mortgaged by the decree-holder's vendor, who sold his rights and interests to petitioner, who then sought to execute the decree as against the judgment-debtor with reference to that share. The judgment-debtor having paid in the money by order of the Court, and the mortgagee having entered up satisfaction of this decree against the judgment-debtor :—*Held*, that there was an end to that decree as against any person liable under it for the mortgagee's share. KRISTO DOSS KOONDOO *v.* WILKINSON . . . . **17 W. R. 159**

19. ——— **Service of idol**—*Deed of compromise.* Two brothers executed and filed a deed of compromise, dividing between them the family property, and a decree was passed in terms thereof. Under this decree, the elder was to hold possession of certain lands, the rents of which were to go to perform the worship of the family idol. The younger, however, kept the elder out of possession of the lands, who, therefore, performed the worship at his own charges, and then took out execution for possession and mesne profits, in order to coup his own expenditure on the family idols. The elder brother having died without executing his decree, his widow applied to execute it for the amount of the mesne profits due under it. *Held*, that the widow was entitled to execute the decree for mesne profits of the idol lands, without showing that the ceremonies had been performed by her husband out of his own private funds. RADHAJIBUN MUSTAFI *v.* TARAMONEE DASSEE **2 B. L. R. P. C. 79 : 11 W. R. P. C. 31 12 Moo. I. A. 380**

20. ——— **Refund decreed—Application for further execution.** A decree-holder attached certain money deposited to the credit of a suit in another Court, to which suit the judgment-debtor was a party, in the belief that the said money belonged to the judgment-debtor. The money having been remitted from the Court in which it was deposited to the Court executing the decree, a claim was made in that Court by the party entitled to the money. The claim was rejected, and the money was paid out to the decree-holder, and satisfaction of the decree was entered in the register. A suit was then brought against the decree-holder, and it was decreed that he should refund the sum obtained by him on the ground that it did not belong to his judgment-debtor. Having refunded the money, the decree-holder applied for execution of his decree. *Held*, that the fact of satisfaction being entered in the register was no bar to the application being granted. LAKSHMANA CHETTI *v.* NARASIMHASAMI . **I. L. R. 7 Mad. 167**

21. ——— **Limitation**—*Partial satisfaction under arrangements made by Court—Subsequent application for execution.* In execution of a decree, an order was made by the Court directing the payment of the rents of certain property which had been attached as they became due from the mokuraridar to the judgment-debtors, to be made to the decree-holder to satisfy his decree ; and afterwards the execution-case was struck off the file. Subsequently, default having been made by the mokuraridar in the payment of the rents of certain years, and the decree not having been fully satisfied, the decree-holder applied for an order directing the payment of the rents which were in arrear to be made by the mokuraridar in accordance with the previous order. Notice having been directed to be served on the judgment-debtors, they came in and pleaded limitation. *Held*, that, as the application was not strictly one for fresh execution, limitation could not apply ; and that, as the effect of the order in the execution-proceedings was virtually to appoint the decree-holder receiver under the provisions of s. 243 of Act VIII of 1859, and as the attachment was still in force, his proper course was to file a regular suit *qua* receiver against the mokuraridar. RADHA KISSORE BOSE *v.* AFTAB CHUNDRA MAHTAB . . . **I. L. R. 7 Calc. 61**

22. ——— **Partial satisfaction**—*Compromise—Further application for execution—Surety.* *A*, having obtained a decree against *B* and *C* (the former being made primarily liable), took out execution, and, on obtaining partial pay-

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EXECUTION OF DECREE—*contd*

12. EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES—*contd.*

ment of the amount due to him by the sale of certain property belonging to *B*, entered up satisfaction as to that amount. Subsequently, *D*, another judgment-creditor of *B*'s (who had a lien on the properties sold in execution of *A*'s decree), brought a suit against *B* and *A*, seeking for a refund of the moneys received by the latter; this suit (to which *C* was not made a party) was compromised by *A*, who agreed to make a partial refund. *Held*, on *A*'s applying for execution a second time against the representatives of *C*, that the partial satisfaction of the decree entered up was binding upon *A*, so as to prevent a second application for execution for the same amount being made; and that, even were it not so, the refund made on a private understanding between them by *A* to *D* in the suit brought by *D* against *B* and *A* could not be binding upon *B*, unless he were a party to the compromise, and much less would it be so as against the representatives of *C*, who was not a party to that suit, and therefore the application could not be entertained. WAHIDOONNISSA *v.* ROY MOHABEER PERSHAD SAHOO . . **I. L. R. 5 Calc. 128**

23. ———— *Acquiescence.* Certain property was attached in execution of a decree against the judgment-debtor in the year 1847. This attachment was set aside on the application of persons claiming the property as their own. These persons were sued with the judgment-debtor by the judgment-creditor, and another decree was passed in 1855, declaring the said property liable to sale in execution of the decree o 1847. The decree of 1847 had been satisfied in part in execution-proceedings taken under the decree of 1855 against the heirs of the judgment-debtor. *Held*, that the balance of the decree of 1847 could not be recovered in execution under the decree of 1855 against the heirs of the judgment-debtor, and that no acquiescence in the past on the part of the judgment-debtor under the decree of 1847 could render such execution valid. BINDA PRASAD *v.* AHMAD ALI **I. L. R. 1 All. 368**

24. ———— **Claims to attached property.** *A* obtained a money-decree against *B* declaring certain properties belonging to *B* liable to be sold in satisfaction of it. Other decrees were subsequently obtained against *B*, in execution of one of which certain of these properties were sold (subject to the lien) and purchased by *A* himself, and in execution of another certain others were sold also (subject to the lien) and purchased by *C*. On *A* proceeding to execute his own decree against *B*, *C* sought to have it declared that satisfaction should be entered upon it to the extent of the value of the property purchased by *A*. *Held*, that *C* was not entitled to appear in the execution-proceeding following upon a case to which he was no party. GREEJA BHOOSUN MITTER *v.* KISHEN KISHORE GHOSE . . . . . **7 W. R. 221**

25. ———— **Forfeiture, stipulation for—** *Landlord and tenant—Relief against forfeiture for non-payment of rent though stipulation for payment contained in compromise decree—Civil Procedure Code (Act XIV of 1882), s. 244—Decree containing general stipulation—Power of Court to relieve against penalty in execution proceedings.* Certain lands were held on lease, and the rent fell into arrears. A suit was then brought for the arrears and for possession, but the parties arrived at a compromise, and a decree was passed in terms of that compromise. The decree contained a stipulation that, if default should be made in payment of rent within the time fixed for payment each year, the lease should be forfeited. Default was made, and possession of the lands and the arrears of rent were sought for in execution of the decree, when it was objected that the stipulation for forfeiture for non-payment of rent was a penal one, and should not be given effect to, even though it was contained in a decree which was capable of execution. *Held*, that, inasmuch as the decree passed by the Court was a mere adoption of the contract which existed between the parties to it, the Court must be taken to have adopted the contract with all its incidents. It was therefore competent to the Court to relieve against the forfeiture. *Shirekuli Timapa Hegda* v. *Mahablya, I. L. R. 10 Bom. 435*, dissented from. *Rai Balkishen Das* v. *Raja Run Bahadoor Singh, L. R. 10 I. A. 162*, referred to. NAGAPPA *v.* VENKAT RAO (1900) . **I. L. R. 24 Mad. 265**

26. ———— **Instalment decree—***Agreement before decree not to enforce payment of an instalment—Part payment—Civil Procedure Code (Act XIV of 1882), s. 244—Limitation.* A decree being once made, it must be taken to be conclusive between the parties. When an instalment decree was duly made, neither an agreement that the payment of a certain instalment would not be enforced, alleged to have been come to between the parties before the decree was made, nor a plea of payment of a part of the claim, alleged to have been made before the decree for the full claim was made, can be given effect to. *Laldas Narandas* v. *Kishordas Devidas, I. L. R. 22 Bom. 463*, distinguished. BENODE LAL PAKRASHI *v.* BRAJENDRA KUMAR SHAHA (1902)

I. L. R. 29 Calc. 810
s.c. 6 C. W. N. 838

27. ———— **Specific performance—** *Practice—Procedure—Decree upon a compromise for execution of a conveyance—Execution of decree.* Where a decree based upon a compromise directed that one party should execute a *kobala* in favour of another within a certain time after the date of the decree: *Held*, that the proper course for the parties would be to proceed regularly as if a decree for specific performance was made. The procedure in such a case laid down. HARE KRISHNA SAMANTA *v.* PRIYA NATH KHAMROI (1905) . . . . **10 C. W. N. 345**

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EXECUTION OF DECREE—*contd.*

12. EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES—*concld.*

28. ——— Adjournment of sale for compromise—*Time, the essence of the agreement of parties—Failure to pay on the final date—Part-payment, refusal to accept—Jurisdiction of Court to extend time—Civil Procedure Code (XIV of 1882) ss. 244, 311.* Where time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with the consent of all the parties: *Held*, that the Court had no jurisdiction subsequently to vary the terms of the final agreement, at the instance of the judgment-debtor in spite of the protest of the decree-holder. *Harakh Singh* v. *Sdheb Singh, 6 C. L. J. 176*, explained and followed. *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya, I. L. R. 29 Calc. 577*, referred to. *Held*, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding. *Behary Lal Pundit* v. *Kedar Nath Mullick, I. L. R. 18 Calc. 469*, followed. *Held*, also, that it is open to the party aggrieved to challenge by an appeal against the final order, which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. CHANDRABALA DEBI *v.* PRABODH CHANDRA RAY (1909) . . . **I. L. R. 36 Calc. 422**

13. EXECUTION BY AND AGAINST REPRESENTATIVES.

1. ——— Right of execution—*Illegitimacy of decree-holder declared after decree.* Where a decree was made in favour of persons on the presumption that they were legitimate, and by a subsequent High Court decision they were found to be illegitimate:—*Held*, that they were not precluded from executing the decree. HIMMUT BAHADOOR *v.* SOLANO . . . . **17 W. R. 428**

2. ——— Execution by representative—*Illegitimacy, Question of—Civil Procedure Code, 1859, ss. 102, 103, and 208—Act XXIII of 1861, s. 11.* The questions which, under s. 11, Act XXIII of 1861, may be determined by a Court executing a decree, must be between parties to the suit in which the decree was passed, and must relate to the execution of the decree. A person who was not on the record when the decree was made does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is consequently not one which the Court executing the decree is competent to entertain. Ss. 102 and 103 of Act VIII of 1859 relate only to proceedings prior to decree, and not to proceedings in execution. S. 208 of the same Act does not apply where the person seeking to execute is not a transferee from the original decree-holder, either by assignment or operation of law. The section does not apply to cases where the right to an equitable interest in a decree is seriously contested, and was not intended to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir. Since proceedings under s. 208, Act VIII of 1859 were, by s. 364 of the Act, not liable to appeal, a suit would probably lie to reverse an order passed therein. ABIDUNNISSA KHATOON *v.* AMIRUNNISSA KHATOON . **I. L. R. 2 Calc. 327**
L. R. 4 I. A. 66

Affirming the decision of the High Court in
s.c. 20 W. R. 305

3. ——— Purchaser from decree-holder—*Act XXIII of 1861, s. 11—Civil Procedure Code, 1859, s. 208—Right of appeal.* Where a decree had been purchased benami, and the party alleging herself to be the real purchaser had not been put upon the record as a party, and an application for execution made by her under s. 208 of Act VIII of 1859 had been refused, and there was a dispute as to who was the real purchaser of the decree:—*Held*, that the applicant was not a party to the suit within the meaning of s. 11 of Act XXIII of 1861, and had no right of appeal against the order refusing her application. *Abidunnissa Khatoon* v. *Amirunnissa Khatoon, I. L. R. 2 Calc. 327*, followed. SOBHA BIBEE *v.* SAKHAMUT ALI
I. L. R. 3 Calc. 371 : 1 C. L. R. 331

4. ——— Death of decree-holder—*Injunction to restrain execution—Revival of proceedings.* Where a decree-holder, whose right of execution has been, by injunction restraining him pending another suit from executing the decree, temporarily suspended, dies, his representative has the same rights as he had himself to apply for and obtain a revival of the proceedings. KALYANBHAI DIPCHAND *v.* GHANOSHAMLAL JADUNATHJI
I. L. R. 5 Bom. 29

5. ——— *Civil Procedure Code, ss. 207-208—Representative of decree-holder.* Where application is made for execution of a decree standing in the name of a deceased person, the Judge ought, under s. 208 of the Code of Civil Procedure, in exercise of his judicial discretion, to put one of the applicants at least on the record, and to take such steps as to him may seem right and proper for protecting the interests of other claimants. If the deceased died while the suit was pending in appeal, the first amendment in the record must be to put in place of the deceased the names of those persons who were allowed by the court to carry on the appeal in his name. ABDOOLLAH *v.* REASUT HOSSEIN . . . . **20 W. R. 51**

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EXECUTION OF DECREE—*contd.*

13. EXECUTION BY AND AGAINST REPRESENTATIVES—*contd.*

6. ——————— *Representative of deceased decree-holder—Civil Procedure Code, 1859, s. 103.* The claim of a petitioner to represent a deceased person for the purpose of executing a decree made in favour of the deceased, ought not to be rejected, but the Judge should, in accordance with the principle of s. 103, Act VIII of 1859, call upon the plaintiff to establish his right to represent the deceased. WOOMA CHURN MOOKERJEE *v.* LUCKHEE NARAIN ROY CHOWDHRY **1 W. R. Mis. 10**

7. ——— **Right of representative of decree-holder to execution**—*Civil Procedure Code, 1859, s. 210.* The representative of a deceased person in whose favour a decree has been made cannot claim execution as a matter of strict right, but must satisfy the Court, under s. 210, Civil Procedure Code, that it is proper that he should be allowed satisfaction of the decree; and the Court cannot determine the question without hearing the opposite side. UMRITH NAUTH CHOWDHRY *v.* CHUNDER KISHORE SINGH . . **21 W. R. 31**

8. ——————— *Representative of decree-holder—Attachment of decree—Civil Procedure Code (Act XIV of 1882), ss. 232, 244, 273.* A person attaching a decree is a representative of the decree-holder within the meaning of that term as used in s. 244, cl. (*c*), of the Civil Procedure Code, and in every case is entitled to enforce execution of the decree which he has attached. When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the Court has jurisdiction to execute the attached decree on the application of the attaching creditor. PEARY MOHUN CHOWDHRY *v.* ROMESH CHUNDER NUNDY **I. L. R. 15 Calc. 371**

9. ——————— *Judgment-creditor who has attached a decree—Right to execute-decree—Civil Procedure Code, 1882, s. 244.* A judgment-creditor who attaches a decree is, as being a representative of the judgment-debtor within the meaning of s. 244, cl. (*c*), of the Civil Procedure Code, competent to execute it. *Peari Mohun Chowdhry* v. *Romesh Chunder Nundy, I. L. R. 15 Calc. 371,* followed. RANGASAMI CHETTI *v.* PERIASAMI MUDALI . . **I. L. R. 17 Mad. 58**

10. ——— **Death of Judgment-debtor**—*Civil Procedure Code, 1859, s. 210 and s. 204—Application to make hire or surety of deceased liable—Delay.* An application under s. 210, Civil Procedure Code, cannot be allowed to succeed upon the ground which would support an application under s. 204, and an application under s. 204 must be disposed of on a state of facts which would give the Judge power to issue the order under s. 204. Where a judgment-creditor delays long after the death of the judgment-debtor in following such debtor's property into the hands of his heir, it is incumbent on him to explain the reason of the delay. AMEEN AHMED *v.* VELAET ALI KHAN **20 W. R. 422**

11. ——————— *Civil Procedure Code, 1859, s. 210—Right to execute decree against representative where certificate of administration has been obtained.* A decree-holder is at liberty, under s. 210, Act VIII of 1859, to follow his deceased judgment-debtor's property in the hands of the parties in possession, notwithstanding a certificate under Act XXVII of 1860 has been obtained by a third party. DUNPUT SINGH BAHADOOR *v.* RAJESSUREE . . . **15 W. R. 476**

12. ——— **Right of representative of co-sharer to execute decree**—*Personal right.* The right of one of several co-sharers in an endowment to recover possession of the land from which he has been ousted by the other co-sharers is a personal one, and does not descend to his heirs A decree for that purpose obtained by him, if not executed by him in his life time, will become infructuous after his death. His widow, however, can recover in a regular suit whatever sums he pad out of his own funds for keeping up the service of the idols. RADHA JEEBUN MUSTOFEE *v.* TARA MONEE DOSSEE . . . **3 W. R Mis. 25**

13. ——— **Judgment-debtor purchasing share in decree.** *A* mortgaged certain property to *B*, and afterwards sold a two-annas share thereof to *C*, and gave him an ijara of a portion. *B* obtained a decree on his mortgage, which decree was purchased by *C*, who then applied for execution. The judgment-debtor *A* objected that *C* was not competent to take out execution, being a co-sharer and an ijaradar, but this contention was overruled. KALLY DOSS BHADURY *v.* GOLAM ALI CHOWDHRY . . **3 C. L. R. 237**

14. ——— **Representative of minor**—*Execution by guardian—Death of minor.* When a party applies to execute a decree on behalf of a minor, his representative capacity comes to an end by the death of that minor; and further steps in execution, or otherwise, must be taken by the legal representative of the deceased, whoever that may be. HULODHUR ROY CHOWDHRY *v.* JUDDONATH MOOKERJEE . . . **14 W. R. 162**

15. ——— **Decree passed against dead man**—*Civil Procedure Code, 1859, s. 119.* Where the sole defendant to a suit dies before decree, a decree passed against him on the supposition of his being still alive is incapable of being executed. Cases falling under Act VIII of 1859, s. 119, stated. ROOPNARAIN SINGH *v.* RAMAYEE SINGH **3 C. L. R. 192**

16. ——— **Representative of debtor**—*Procedure.* Exposition of the procedure to be observed for the execution of a decree against the legal representative of a deceased person. ROODRO NARAIN ROY *v.* NITTYANUND DOSS . **8 W. R. 195**

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EXECUTION OF DECREE—*contd.*

13. EXECUTION BY AND AGAINST REPRESENTATIVES—*contd.*

17. ——— **Execution of decree against deceased judgment-debtor**—*Civil Procedure Code, 1882, s. 234—Probate and Administration Act (V of 1881), s. 104—Equal and rateable distribution.* The right of a decree-holder, under s. 234 of the Civil Procedure Code, to have his decree executed against the legal representative of a deceased judgment-debtor is not affected by s. 104 of the Probate and Administration Act, which directs debts to be paid equally and rateably out of the assets. VENKATARANGAYAN CHETTI *v.* KRISHNASAMI AYANGAR . . **I. L. R. 22 Mad. 194**

18. ——— *Execution of decree where judgment-debtor is dead.* Execution cannot issue against the estate of a deceased person until there is some one on the record as representing the estate. LEKRAJ ROY *v.* BECHARAM MISSER **7 W. R. 52**

19. ——— *Execution against person as representative.* If execution has once been duly issued against a person as representative of one who is deceased, this person cannot dispute his representative character on the occasion of any subsequent issue of execution against him as representative. DHERAJ MAHATAB CHUND *v.* PEAREE DOSSEE . . . **6 W. R. Mis. 61**

20. ——— **Execution against person personally after failure to execute against him as representative.** Where successive applications for execution had been made for years against a party merely as the representative of a deceased defendant: *Held*, that execution could not be taken out against him personally as one of the original defendants, even if he were liable in both capacities. PREM LALL GOSSAMEE *v.* HOSSEEINOODEEN . . . . . **13 W. R. 36**

21. ——— **Decree against deceased person, effect on representatives**—*Civil Procedure Code, 1859, ss. 104, 203, 210, 249.* When a decree has been obtained against *A* in his lifetime, and *A* dies before execution, *A*'s estate is properly described in the proceedings in execution as the estate of *A* (s. 210, Code of Civil Procedure); and in the certificate of sale the purchaser is properly declared to have purchased the right, title and interest of *A* in the property sold; but this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (ss. 104 and 203); and in the notification of sale (s. 249) and in the certificate of sale (s. 259) it ought to be set forth that what is sold is the right, title, and interest of the representative on the record. NATHI HARI *v.* JAMNI . . **8 Bom. A. C. 37**

22. ——— **Representative of debtor**—*Civil Procedure Code, 1859, s. 203.* S. 203, Act VIII of 1859, although it primarily refers to a party who has been substituted before decree for the original debtor, is equally applicable to a person who has become representative of the original debtor in execution-proceedings, his liability being limited to the extent of the property of the original debtor which may have come into his hands. JAFUR HOSSEIN *v.* HINGUN JAN . . **8 W. R. 161**

23. ——— *Execution against representative where he has assets, but fails to satisfy decree.* If a decree-holder can show that assets of a deceased judgment-debtor have come into the hands of such debtor's legal representative, and if the representative fails to satisfy the Court that he has duly applied such assets, the latter may be arrested in execution of the decree. DHERAJ MAHTAB CHUND BAHADOOR *v.* MUNMOHINEE DASSEE . . . . . **12 W. R. 517**

24. ——— *Civil Procedure Code, 1859, s. 203.* When a decree-holder wishes to execute his decree against the heirs of his judgment-debtor to the extent of property inherited from the debtor and not duly applied by the heirs, he must, before he can put s. 203, Act VIII of 1859, in force, satisfy the Court that no such property of the deceased can be found as he can sell in execution. INDRO NARAIN MISSER *v.* KRISTO CHUNDER MAHTO **4 W. R. 362**

25. ——— **Death of judgment-debtor after appellate decree**—*Civil Procedure Code, 1882, ss. 234, 248, 361 to 372 and 583—Parties, substitution of—Subordinate Judge, Jurisdiction of.* The Civil Procedure Code (Act XIV of 1882) does not contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. There is no express provision for it in the sections relating to execution. Ss. 361 to 372 relate to changes during suit, and speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree and not to proceedings in execution between the judgment-creditor and judgment-debtor. A Court of appeal having confirmed the decree of a second class Subordinate Judge, the decree was transferred for execution to the first class Subordinate Judge. After the transfer, the judgment-debtor died. The judgment-creditor then applied to the first class Subordinate Judge to substitute on the record the name of the representative of the deceased. The first class Subordinate Judge rejected the application and referred the judgment-creditor to the second class Subordinate Judge, who also rejected the application on the ground that the decree which was being executed was the appellate decree in which his decree was merged and therefore he had no jurisdiction to entertain the application. *Held*, that the course open to the judgment-creditor was by way of application to execute the decree against the legal representative of the deceased as provided by s. 234 of the Civil Procedure Code (Act XIV of 1882),

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in which case the application to execute the decree, having regard to s. 583, would be to the second class Subordinate Judge, although by s. 248 the notice to the party against whom execution was applied for would be issued by the first class Subordinate Judge to whom the decree was transferred for execution. HIRACHAND HARJIVANDAS *v.* KASTURCHAND KASIDAS . **I. L. R. 18 Bom. 224**

26. ——— Transfer of decree for execution—*Execution against representative of debtor—Civil Procedure Code, 1882, ss. 234, 248, 249, and 578—Application by decree-holder for execution of decree by substitution on death of the judgment-debtor to the Court where the decree has been transferred.* A decree was transferred to another Court for execution. Pending the proceedings, one of the judgment-debtors died. On an application to that Court by the judgment-creditor to execute the decree against the legal representative of the deceased judgment-debtor, a notice was issued under s. 248 of the Code of Civil Procedure. The legal representative objected that the Court had no jurisdiction to entertain the application, and that the application should have been made under s. 234 of the Code to the Court that passed the decree. *Held*, that the power of the Court executing a decree to order execution under s. 249 against the legal representative of a deceased judgment-debtor, after the issue of notice under s. 248, is not cut down by the provisions of s. 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal representative of a judgment-debtor who is dead, and that the Court to which the decree has been transferred has full jurisdiction to allow execution to proceed against the legal representative. *Held*, also, that, even assuming that an application under s. 234 to the Court which passed the decree was a necessary preliminary to proceedings under s. 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and, under s. 578, the order of the Court of first instance should not have been reversed on account of such irregularity. SHAM LAL PAL *v.* MODHU SUDAN SIRCAR **I. L. R. 22 Calc. 558**

27. ——— Attachment during lifetime of judgment-debtor—*Civil Procedure Code, 1882, s. 234—Application after death of judgment-debtor to bring his representatives on the record of the execution-proceedings—Procedure.* In execution-proceedings, if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of Act XIV of 1882; but if the property has been attached during the lifetime of the judgment-debtor, it then comes into the hands of the law, and attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property, it is not necessary to implead any one as a legal representative. ABDUR RAHMAN *v.* SHANKAR DAT DUBE . . . **I. L. R. 17 All. 162**

28. ——— Alleged representative, execution against—*Civil Procedure Code, 1882, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.* In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor, it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. *Srihary Mundul* v. *Murari Chowdhry, I. L. R. 13 Calc. 257*, referred to. SETH SHAPURJI NANA BHAI *v.* SHANKAR DAT DUBE **I. L. R. 17 All. 431**

29. ——— Widow's estate—*Civil Procedure Code, 1882, s. 234—Execution against representatives of deceased person—Hindu widow, relinquishment by—Deed of release, Condition in, to pay the widow's debt—Reversioners, Money-decree against widow enforced against.* Under the terms of a deed of release executed by a Hindu widow relinquishing the estate inherited by her from her husband in favour of reversioners, the latter bound themselves to pay off a judgment-debt due from the widow to a third party. On the death of the widow, the reversioners were brought upon the record as heirs of the widow, and the judgment-creditors applied to execute their decree against the reversioners by attaching the surplus proceeds of sale of one of the properties relinquished by the widow. *Held*, that the widow might have sued the reversioners for recovery of the money that they had undertaken to pay for her, and that being so there was clearly a debt due from them to the widow, the extent of which was precisely that of the judgment-debt now sought to be recovered. The reversioners being on the record as representatives of the widow, and they not having shown that they applied this portion of the assets of the widow which was in their hands, they were, under s. 234 of the Code of Civil Procedure, liable to have execution taken out, against them to the extent of those assets. *Davenport* v. *Bishopp, 2 Y. & C. 460*, referred to. *Kameshwar Persad* v. *Ram Bahadur Singh, I. L. R. 12 Calc. 458*, distinguished. CHINTAMONY DUTT *v.* MOHESH CHUNDRA BANERJEE **I. L. R. 23 Calc. 454**

30. ——— Death of a party before delivery of judgment—*Execution against the heirs of deceased judgment-debtor—Civil Procedure Code, 1882, ss. 234 and 248-250.* On the 30th November 1892 an appeal in the High Court was argued, and the

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case adjourned for judgment. On the 12th June 1893, one of the defendant-respondents died. On the 6th July 1893, the High Court pronounced its judgment and a decree was drawn up as if the deceased respondent was still living. On the 15th December 1893, the decree-holder applied for execution of the decree, but the application was rejected by the Court of first instance on the ground that, as the heirs of the deceased defendant had not been placed on the record before the judgment of the High Court was delivered, the decree was incapable of execution. *Held*, reversing the lower Court's decision, that the decree was on its face a good decree and it could be executed against the heirs of the deceased defendant under ss. 234 and 248-250 of the Civil Procedure Code (Act XIV of 1882) without placing them on the record of the suit. RAMACHARYA *v.* ANANTACHARYA **I. L. R. 21 Bom. 314**

31. ——— *Death of plaintiff after hearing, but before judgment—Judgment given by Court in ignorance of plaintiff's death—Judgment and decree valid—Doctrine of nunc pro tunc.* The successful plaintiff in a suit died a few days after the hearing of the suit had been concluded and judgment reserved. Unaware of the death of the plaintiff, the Court proceeded to deliver judgment and pass a decree in favour of the deceased plaintiff. *Held*, that nothing remaining to be done by the parties on the day when judgment was reserved the judgment should read as from that date, and the decree was a valid decree. *Cumber* v. *Wane, 1 Smith's L. C. 10th Ed. 325 : Ramacharya* v. *Anantacharya, I. L. R. 21 Bom. 314 ;* and *Surendro Keshub Roy* v. *Doorgasoondery Dossee, I. L. R. 19 Calc. 513*, followed. CHETAN CHARAN DAS *v.* BALBHADRA DAS . . **I. L. R. 21 All. 314**

32. ——— **Death of legal representative**—*Execution—Execution against one of several representatives of a sole debtor—Death of such representative—Subsequent application for execution against other representatives—Practice.* An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative. Accordingly, where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June, 1881, under a darkhast No. 718 of 1878, against *V*, one of the three sons of the debtor, and the execution proceedings continued till the death of *V* in March 1884, whereupon the plaintiff applied on the 28th May 1884 to put *M* and *N*, the brothers of *V*, on the record as his representatives :—*Held*, that the application was not too late against *M* and *N* regarded as joint representatives, with their brother *V*, of their father, the original judgment-debtor. KRISHNAJI JANARDAN *v.* MURARRAV **I. L. R. 12 Bom. 48**

33. ——— *Civil Procedure Code, 1882, s. 234—Successive deaths of judgment-debtor and his legal representative—Execution against legal representative of the legal representative.* The judgment-debtor under a simple money-decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of the deceased judgment-debtor had come ; but before anything was recovered, the legal representative in turn died. *Held*, that the decree-holder was entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession. JAFRI BEGAM *v.* SAIRA BIBI . . . . **I. L. R. 22 All. 367**

34. ——— **Legal representative, liability of**—*Civil Procedure Code, 1882, s. 234.* Under s. 234 of the Civil Procedure Code, the legal representative of a deceased judgment-debtor is liable summarily only in respect of property actually received by him, or taken into his disposition. On the 27th March 1878 one *B* obtained a decree for R2,100 against one *P*, who died in July of that year, leaving his son *H* his legal representative. Subsequently, one Homjibhai sued *H* as the legal representative of *P* upon a mortgage executed by the latter in his lifetime, and obtained a decree, in execution of which he sold the mortgaged property by auction, and bought it in himself for R810. On appeal, this decree was reversed on the 3rd August 1883. Instead of thereupon recovering the property which had been sold in execution, *H*, on the 16th November 1883, agreed with Homjibhai that the latter should retain it on payment of R240 as costs of the suit. Shortly before this compromise was effected, *B* sold her decree to the appellant *K*, who in 1884 applied for execution against *H*. The Subordinate Judge made an order for execution against *H* personally to the extent of R810, holding that *H* had fraudulently adjusted the decree in Homjibhai's suit, and that, even if there was no fraud, he, as administrator of *P*'s estate, ought to have recovered back the money realized by the sale, instead of accepting a compromise. On appeal, the order of the Subordinate Judge was reversed by the District Judge. On appeal to the High Court: *Held* confirming the order of the District Judge, that *H* was not personally liable. Under s. 234 of the Civil Code Procedure (Act XIV of 1882), a representative of a deceased judgment-debtor, who has failed purposely or negligently to recover some debt due to the estate of the deceased, or some property belonging to it, is not liable in the same way as for property of the deceased which has come to his hands. In that section, property is not defined as identical with assets, and so to include mere rights of action. Nor is it provided that in an execution-proceeding the representative shall be made answerable as well for what with diligence on his part would have come to his hands as what actually has come to his

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hands. It may well be that, while the Legislature intended to bring the representative under the control of a summary inquiry where he had actually received property, it did not intend to make him answerable in other cases except through the medium of a suit for administration or other regular action. KHUSHROBHAI NASARVANJI *v.* HORMAZSHA PHIROZSHA . **I. L. R. 11 Bom. 727**

35. ———— Representation of estate by mother—*Decree against mother when adopted son in existence.* Plaintiff obtained a decree on a bond executed by *S* against the mother of *S*, whom he believed to be the heiress of *S*. In attempting to execute this decree against the estate of *S*, plaintiff was obstructed by the defendant, who was the adopted son of *S*. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of *S* in the hands of the defendant. *Held*, that the suit must fail, inasmuch as the estate of *S* was not properly represented in the former suit. *Sotish Chunder Lahiry* v. *Nil Komul Lahiry, I. L. R. 11 Calc. 45*, distinguished. SUBBANNA *v.* VENKATAKRISHNAN . . . **I. L. R. 11 Mad. 408**

36. ———— Decree against executors—*Debts incurred by executors while acting under a will afterwards found invalid—The heir's liability under the decree—The remedy of the decree-holder.* Certain executors, acting under an order of the Court, borrowed a sum of money from *K M* for the funeral expenses of *J D*, the testator. *K M* obtained a decree for the amount against the executors and the adopted son of *J D*. Afterwards *F D* got a decree, whereby both the will and the adoption were set aside, and he was declared the legal heir of *J D*. *K M* then sought to enforce his decree against *F D* by the sale of the property which now formed part of the estate of *F D*, who objected to the proceedings. *Held*, that, as *F D* was not the legal representative of the judgment-debtors, the decree could not bind the estate in his hands; but, in order to make the estate liable for the debt, the proper course of the decree-holder was to bring a regular suit against *F D*. FANINDRO DEB RAIKUT *v.* JUGDISHWARI DABI . **I. L. R. 14 Calc. 316**

37. ———— Decree for maintenance of widow—*Liability of ancestral estate in execution—Civil Procedure Code, s. 234.* *A*, the widow of an undivided member of joint Hindu family, obtained a decree for maintenance against *B*, the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. *B* died, and *C*, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate. *Held*, that the family estate was not liable. *Per Curiam:* In a regular suit, *C* might clearly be held liable to pay maintenance to *A*, and a decree might be passed against him; but in execution-proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings. *Karpakambal* v. *Subbayyan, I. L. R. 5 Mad. 234*, approved and followed. MUTTIA *v.* VERAMMAL **I. L. R. 10 Mad. 283**

38. ———— Decree against widow's estate—*Maintenance—Arrears of maintenance due to a Hindu widow at her death—Liability of such arrears to satisfy a decree against her assets.* Where sums due for a widow's maintenance have become a debt such a debt should be regarded as assets of the widow after her death liable to be taken in execution of a decree against her. *A* sued upon a bond executed in his favour by *R*, a Hindu widow, and after her death obtained a decree against *N*, as her legal representative, directing "that the judgment-creditor should be satisfied out of such assets of the deceased widow as may in course of execution be proved to have come into the possession of the defendant *N*." *A* sought in execution to obtain satisfaction out of arrears of an annuity due by *N* to the deceased on account of her maintenance for fifteen years before her death. The Subordinate Judge held that the right to recover these arrears was one personal to the widow *R*, and though it could be enforced by her, would not pass to her creditor. He therefore dismissed the darkhast. *Held*, reversing the order of the Subordinate Judge, that the arrears of the annuity due by *N* to *R* as maintenance were properly to be regarded as the assets of the widow, and as such were available in execution to satisfy the decree. *N*, owing money in his individual capacity to *R*, would, in the interest of creditors and justice, be assumed to have paid it to himself as her legal representative. *N* should therefore be held accountable for sums due by him to *R*, subject to such objections as he might be able to ground on limitation or other legal excuse. RAJERAV CHANDRARAO *v.* NANARAV KRISHNA JAHAGIRDAR **I. L. R. 11 Bom. 528**

39. ———— Decree against ancestral property—Survivorship—*Civil Procedure Code, 1882, s. 234—Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt.* In execution of a money-decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed. *Held*, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death he cannot be considered as executing the decree against the property of the deceased judg-

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ment-debtor within the meaning of s. 234 of the Code of Civil Procedure. VENKATARAMA *v.* SENTHIVELU . . **I. L. R. 13 Mad. 265**

40. ——— *Legal representative of a joint undivided Hindu in respect of ancestral immoveable property attached in execution—Civil Procedure Code, s. 248—Notice of execution.* The plaintiff and his brother were joint undivided brothers possessed of certain immoveable property. This property was attached in execution, but before a warrant for sale of the property was obtained, the plaintiff died. The attaching creditor issued a notice, under s. 248 of the Civil Procedure Code (XIV of 1882), addressed to the brother and widows of the plaintiff as his "legal representatives" within the meaning of that section, calling on them to show cause why execution should not proceed against them. *Held*, that his widows, and not his brother, were the plaintiff's legal representatives for this purpose, for it must be as quasi-separate property of the deceased plaintiff that the attaching creditor had a claim to it. If it were to be treated as joint property, he could have none, for the deceased's interest would then have disappeared, having gone by survivorship to his brother. NANABHAI GANPATRAO *v.* JANARDHAN VASUDEVJI . . . **I. L. R. 16 Bom. 636**

41. ——— **Decree for mesne profits—** *Ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees and effect, in execution of his representatives not being parties to the operative one—Non-joinder of parties.* An operative decree, obtained after the death of a defendant, ascertaining for the first time the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced. The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution-proceedings were taken against the present plaintiff's attributing to them the character of heirs of the original judgment-debtors. *Held*, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits or determine whether the then defendants were liable, jointly or severally, in respect of the wrongful possession. Before the issue of a money-decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it. RADHA PRASAD SINGH *v.* LAL SAHAB RAI **I. L. R. 13 All. 53 L. R. 17 I. A. 150**

42. ——— **Party in possession of property of deceased.** An order was made under s. 210 of Act VIII of 1859, making the legal representatives of a deceased judgment-debtor parties to a suit in execution of a decree obtained against the deceased in his lifetime. Subsequently, the decree-holder discovered that certain property which he claimed to be the property of the deceased was in the possession of a third person, *C*, and he applied to have *C's* name put upon the record and to be allowed to execute the decree against him. *Held*, that the Court had no power to put *C's* name on the record. NADIR HOSSEIN *v.* BISSEN CHAND BASSARAT . . . . **3 C. L. R. 437**

43. ——— *Civil Procedure Code, 1882, s. 234—Claim by judgment-debtors to property seized in execution of a decree against them as representatives of original debtor—Burden of proof.* Where, in execution of a decree against the representatives of a deceased debtor, specific property was seized as the property of the deceased debtor and as being in the possession of his representatives, and the judgment-debtors claimed the property so seized as their own:—*Held*, that the burden of proof lay on the decree-holder who asserted that the property seized in execution of his decree was the property of the deceased debtor, and was as such in the possession of the judgment-debtor. ABDUL RAHMAN *v.* MAHOMED AZIM **4 C. W. N. 151**

44. ——— **Marriage of party pending execution—** *"Judgment"—Civil Procedure Code, 1859, s. 105.* A party having died while a suit against him was pending, his widow was brought upon the record as defendant, and judgment was given against her, which was subsequently affirmed on appeal. The original decree embraced an award of certain wasilat (accruing after the husband's death) for which the widow was personally liable. Between the original and final judgments she married again, and execution of the decree was accordingly sought against her second husband. *Held*, that he was not liable to summary proceedings in execution, and that the term "judgment" in s. 105, Act VIII of 1859, did not include the judgment in appeal. BINDABUN CHUNDER SIRCAR *v.* MACKINTOSH . . . . . **9 W. R. 442**

45. ——— **Decree for an account—** *Personal decree.* Where a decree ordered a defendant to give in certain accounts within a specified period, and the defendant survived the period without any proceedings being ever taken against him, it was held that the decree was binding upon him personally, and could not, after his death, be exe-

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cuted against his widow and representative. BIDHOO MOOKHEE DASSEE *v.* BEEJOY KESHUB ROY **12 W. R. 495**

46. ——— Decree for damages—*Civil Procedure Code, 1859, ss. 102, 103—Liability of purchaser for personal debt.* A defendant, against whom a Principal Sudder Ameen had decreed damages on account of certain malicious and wrongful conduct towards plaintiff, appealed to the High Court; but before the appeal came on for hearing, he died. Upon this a party (*M*) sought to be substituted for the deceased appellant, not as his legal representative otherwise than as having purchased a share in his property, and in consequence liable to be injuriously affected if the plaintiff proceeded to execute the decree which he had obtained in the lower Court. *Held*, that the *dena-pauna* clause in *M's* deed of purchase from deceased did not make *M* liable to pay so purely personal a debt of deceased as that which the decree created, and consequently *M's* only title to be the appellant's legal representative failed. MACLEOD *v.* KUNHOJE SAHOO **9 W. R. 271**

47. ——— Effect on decree of judgment-debtor becoming by inheritance one of decree-holders. Where a judgment-debtor becomes by inheritance one of the decree-holders in respect of the same property, or a share in it, the effect of the inheritance, either as to a part or as to the whole of the decree, is to extinguish it *pro tanto*. POGOSE *v.* FUKUROODDEEN MAHOMED AHSAN *alias* ALIMOODDEEN CHOWDHRY **25 W. R. 343**

48. ——— Judgment-debtor acquiring interest in decree as representative A plaintiff who had obtained a decree having died and the defendant in the suit being one of the representatives of the deceased plaintiff, and as such entitled to succeed to a share in his estate:—*Held*, that the mere fact of the defendant being one of the representatives of the deceased did not debar the other representatives from executing the decree according to their rights. WISE *v.* ABDOOL ALI **7 W. R. 136**

49. ——— Decree for possession of immoveable property—*Joint-decree—Purchase by judgment-debtor of rights of some of the decree-holders—Decrees extinguished pro tanto.* Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only, and where it is for immoveable property. The rule of law against breaking up the integrity of a mortgage-security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. *Benarsi Das* v. *Maharani Kuar, I. L. R. 5 All. 27; Wise* v. *Abdool Ali, 7 W. R., 136*; and *Pogose* v. *Fukurooddeen Mahomed Ahsan, 25 W. R. 343*, referred to. KUDHAI *v.* SHEO DAYAL . **I. L. R. 10 All. 570**

50. ——— Right to raise question as to validity of decree. *Execution against sons of deceased judgment-debtor.* Where the sons of a deceased judgment-debtor, whose state is declared by the decree to be liable to sale, are admitted on the record as his representatives, they are not entitled, in the execution stage, to re-open the whole case and to ask for a decision as to whether the debt incurred by the father was not for the benefit of the estate or was in some other way invalid under the Hindu law and not binding on the joint family. SHEO SAHOY PANDEY *v.* RAM BHUNJUN SINGH **23 W. R. 127**

RAMANUGRA SINGH *v.* KISHEN KISHORE NARAIN SINGH . . . . . **23 W. R. 265**

BURTOO SINGH *v.* RAM PURMESSUR SINGH **24 W. R. 364**

51. ——— Impeachment of the decree by a legal representative—*Power of Court to review its order of sanction for transfer—Mofussil Small Cause Court Act (XI of 1865), s. 21—Civil Procedure Code (Act XIV of 1882), s. 623.* On 4th June 1879, one *A* obtained a Small Cause Court decree against *B*, the widow of the opponent's separated brother, and on the 17th November 1881 assigned it to the applicant. Immediately after the assignment, the applicant applied to the Court for execution, which was ordered under s. 232 of the Civil Procedure Code (Act XIV of 1882)—neither *A* nor *B* having appeared to object to it, though notice of the applicant's application was given to them. The applicant accordingly, on 6th February 1882, recovered R10 from *B* in execution. Shortly afterwards *B* died, and the applicant applied for further execution of the decree against the opponent as her legal representative. The opponent admitted that he was her heir, but objected to the execution on two grounds, *viz.*, (i) that the decree had already been satisfied, and (ii) that the transfer of the decree was fraudulent and collusive. The lower Court rejected the application for execution, holding, as to the alleged satisfaction, that it could not be recognized as it was made out of Court; but, as to the second objection, that, though the sale was duly effected there was fraud and collusion in the assignment of the decree. The applicant thereupon applied to the High Court. *Held*, that the applicant was entitled to execution. As to the first objection, the decision of the lower Court was right. As to the second objection, there was no evidence of fraud or collusion; and the Court having found that the sale was duly effected, the applicant had the same right to execute the decree as the transferor *A* had.

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If the judgment-debtor had been alive, she could not have resisted the execution, and, as her legal representative, the opponent did not stand in any better position. The Court was bound to execute its own decree, it being unreversed and in full force. MULCHAND RANCHODDAS *v.* CHHAGAN NARAN **I. L. R. 10 Bom. 74**

52. ———— **Defendant**—*Injunction—Light and air—Decree in light and air suit—Death of defendant after decree—Decree ordered to be executed against the deceased defendant's legal representative—Execution—Mode of enforcing decree—Civil Procedure Code (Act XIV of 1882), ss. 234 and 260.* Plaintiff obtained a decree against defendant, restraining the latter from obstructing the access of light and air to her windows. The plaintiff applied for execution, praying that the portion of the defendant's house which obstructed her windows should be pulled down. While this application was pending, the defendant died, and his son and heir (the appellant) was brought on the record. The lower Courts directed that the decree should be executed as prayed for, and directed the appellant (the son and heir of the deceased defendant) to pull down the obstructing portion of the house in question within a given time, and, in case of his falling to do so, empowered an officer of the Court to have it pulled down. On second appeal to the High Court it was contended (i) that, as the judgment-debtor had died after the commencement of the proceedings, a fresh application should have been made, instead of continuing the *darkhast* issued against him against his son (the present appellant), and that no notice had been issued under s. 248 of the Civil Procedure Code (XIV of 1882); (ii) that the lower Courts should have made their orders under s. 260 of the Civil Procedure Code (XIV of 1882); and (iii) that, the original defendant having died, the injunction could not be enforced against his son (the appellant), as an injunction does not run with the land. *Held*, as to the first objection, that, as it was not raised in the lower Courts, it could not be entertained on second appeal. As to the second objection: *held*, that the order passed by the lower Courts was wrong. Their order should have been made under s. 260 of the Code of Civil Procedure (XIV of 1882). The application for execution was not in proper form, but the High Court allowed it to be amended. As to the third objection: *held* that, having regard to the provisions of s. 234 of the Civil Procedure Code, 1882, the injunction ordered against the deceased defendant might be enforced against his son as his legal representative. *Dahyabhai* v. *Bapalal, I. L. R. 26 Bom. 140*, distinguished. SAKARLAL JASWANTRAI *v.* BAI PARVATIBAI (1901) **I. L. R. 26 Bom. 283**

53. ———— **Defendant Company**—*Civil Procedure Code (Act XIV of 1882), ss. 234, 372—Decree for money—Limited Company, debts and liabilities of—Transfer of the properties of the Company to a third party—Dissolution of Limited Company—Legal representative.* *A* obtained a decree for money against a certain limited Company. The Company had sold all their properties to a third person, who again sold his rights to another limited Company. On an application for execution of the decree against the latter Company, substituting them on the record as the legal representatives of the former Company on their dissolution: *Held*, that the decree could not be enforced against the latter Company, ss. 234 and 372 of the Code of Civil Procedure not being applicable to the present case. HARISH CHANDRA TEWARY *v.* CHANDPORE COMPANY, LD. (1903) . . . . **I. L. R. 30 Calc. 961**

54. ———— **Father**—*Hindu law—Mitakshara family—Decree against father—Execution against son—Civil Procedure Code (Act XIV of 1882), ss. 234, 244—Separate suit.* The interest of the father in a Mitakshara family in the joint ancestral properties is not assets in the hands of the son when he dies, and consequently proceedings cannot be taken against the son as the legal representative of the father under s. 234, Civil Procedure Code. If, after the death of the father, the creditor wishes to proceed against the son, it must be, not because he is the heir or the legal representative, but upon the ground of his obligation to pay his father's debts; but the question whether, having regard to the character of the debt, the obligation can be enforced against the son, cannot be determined in a proceeding either under s. 234 or s. 244, Civil Procedure Code, but ought to be determined by a separate suit. *Umed Hathising* v. *Goman Bhaije, I. L. R. 20 Bom. 385*, dissented from. *Venkatarama* v. *Senthivelu, I. L. R. 13 Mad. 265; Luchmi Narain* v. *Kunji Lal, I. L. R. 16 All. 449;* and *Bysaphi Lal* v. *Gopal Lal, (Unreported)* [MACPHERSON and GHOSE, *JJ.*] relied upon. The question whether the decree was obtained against the father in his representative capacity cannot be gone into in the course of execution of the decree. JUGA LAL CHAUDHURI *v.* AUDH BEHARI PROSAD SINGH (1900) . . . . . **6 C. W. N. 223**

55. ———— **Widow**—*Parties—Decree against widow, whether binding upon person to whom the estate passes after widow's death.* *B* executed a deed, under which he gave his adoptive mother, *J*, during her lifetime, full power to enjoy possession of certain properties. Some alluvial lands formed on the bank of one of these properties, and were taken possession of by *J*, as re-formation *in situ*; the neighbouring zamindar claimed these lands as his, and obtained a decree for possession, with mesne profits and costs. While the decree was in execution, *J* died, and it was sought to make *D*, to whom, as the widow of *B*, the estate had passed, a party to the proceedings and

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EXECUTION OF DECREE—*contd.*

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liable for the mesne profits and costs. *Held*, that the lower Court had rightly made *D* a party; and that, having regard to the position occupied by *J* under the deed, she must be regarded as acting on behalf of the estate. *Ram Kishore Chuckerbutty* v. *Kally Kanto Chuckerbutty, I. L. R., 6 Calc., 479*, relied upon. DINAMONI CHAUDHURANI *v.* ELAHUDAD KHAN (1903) . . . **7 C. W. N. 678**

56. ——— **Suit by representative**—*Sale of judgment-debtor's rights and interests as against representative of judgment-debtors—Sale not objected to at the time—Subsequent suit by representatives against auction-purchaser to recover property alleged to have been sold in excess of the share of judgment-debtors.* A decree having been obtained by mortgagees for the sale of the rights and interests of the mortgagors in a 10-biswa share in a certain village, both mortgagors died. One Annu was substituted on the record of the case as the representative of both the mortgagors. The decree-holders, estimating the interest of the mortgagors to amount to 5 biswas 16 biswansis, caused such interest to be sold as against Annu, who at the time took no objection to the extent of the share sold. Some years afterwards Annu brought a suit against the auction-purchaser to recover 1 biswa 11 biswansis upon the allegation that the judgment-debtors' share had not amounted to more than 4 biswas 5 biswansis. *Held*, that such a suit was not maintainable. *Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337*, referred to. *Sanwal Das* v. *Bismillah Begam, I. L. R. 19 All. 480*, distinguished. ANNU *v.* DEBI DAS (1904). **I. L. R. 26 All. 152**

14. JOINT DECREES, EXECUTION OF, AND LIABILITY UNDER.

1. ——— **Unchanging character of joint decree**—When once a joint decree has been given, that decree ever after remains a joint decree, any act or conduct of the decree-holder not withstanding. JUGGURNATH SINGH *v.* AHMEDOOLLAH . . . . . **8 W. R. 132**

OUDH BEHARI LAL *v.* BROJO MOHUN LAL **4 B. L. R. Ap. 41; 13 W. R. 128**

2. ——— *Unchanging character of.* A joint decree remains a joint decree, notwithstanding the acts of the decree-holder in realizing his money from one or more of the judgment-debtors separately, for he is entitled to realize his debt from any one of the debtors, and by proceeding against one he does not relieve the other debtors from their joint liability to him. NUNKOO LALL *v.* DHUNESH KOOER . **17 W. R. 479**

3. ——— **Joint and several liability**—On 29th November 1861, *A* obtained a decree against *B, C, D*, and others in the following terms:—That "the suit be decreed with mesne profits as far as they can be ascertained to be

EXECUTION OF DECREE—*contd.*

14. JOINT DECREES, EXECUTION OF, AND LIABILITY UNDER—*contd.*

charged upon all the defendants jointly and severally; the costs of the plaintiff to be paid by the defendants, and each of the defendants to pay his or her own costs." On 6th October 1866, *C* instituted a suit against *A* to have the sale of certain mouzahs, which had taken place in execution of *A's* decree, set aside. This suit was decided by the High Court in favour of *C*, and the decision was confirmed by the Privy Council on 14th June 1872. In the meanwhile, *A* proceeded to execute his decree as against *B* and *D*; *D* objected; the lower Court allowed her objections; and the High Court on appeal, on 12th December 1866, affirmed that decision. The lower Court allowed *A* to proceed to execute his decree as against *B*, and on 2nd June 1866 certain property belonging to *B* was sold in execution of *A's* decree, and purchased by *A*. On 8th August 1866, the Court duly confirmed the sale, and ordered the suit to be struck off the file. On 5th July 1869, *A*, stating that there was still a sum of money due to him under the decree of 29th November 1861, made an application, praying that the suit might be restored to the file, and that the rights of *B* in certain property might be put up for sale. *Held*, that, *A's* decree being a joint one, he was entitled to execute it against any of the defendants he might select. WAHED ALI *v.* MULLICK ENAYET HOSSEIN ALI . . **12 B. L. R. 500: 20 W. R. 31**

SREENATH GHOSE *v.* SAHIB RAM ROY **12 B. L. R. 504 note: 12 W. R. 304**

KRISTO KISHORE CHUCKERBUTTX *v.* RAM LOCHUN BURDHUN . . . . . **2 W. R. Mis. 49**

GOPAL PERSHAD *v.* RAMANOOGRA SINGH **8 W. R. 201**

ROGHOONATH DOSS *v.* ALLADEEN PATTUCK **5 W. R. 9**

4. ——— *Joint judgment-debtors, Liability of.* In executing a joint decree against several debtors, it is not open to a Court to stay the sale of the property of certain of the debtors, upon their offering to pay what they consider their share of the amount due under the decree; nor can a Court, in such a case, upon proper action taken by the judgment-creditor, refuse to attach and sell the property of any one of the judgment-debtors in satisfaction of the entire judgment-debt. The liabilities of joint debtors as amongst themselves, if not settled privately, can be determined only in another suit. KALLY MOHUN PAL *v.* DINO NATH CHUCKERBUTTY **8 C. L. R. 34**

5. ——— *Joint and several decree for mesne profits.* On an appeal from an order passed in execution of a decree for possession and mesne profits, the High Court laid down the principle that, though the decree was in words a joint and several decree for mesne profits, yet where it could be proved incontestably that out of a number of defendants any one had been in possession only of particular lands or a distinct

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EXECUTION OF DECREE—*contd.*

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mouzah or lease, his liability to satisfy the decree would in equity extend no further than two such particular land, mouzah, or lease, and for such land the decree-holder could take out execution as against lessor and lessee ; the principle was then applied to the case under appeal. *Held*, in explanation of that opinion, that as the appellant was the lessee of one village, he could be held jointly and severally liable with the proprietors (co-defendants), and the decree-holder could proceed against him either severally or jointly with those defendants, and realize the wasilat due on that village. GUNESH DUTT *v.* BULWUNT SINGH . **14 W. R. 175**

6. ——— *Liability of judgment-debtors.* When the judgment-debtors are jointly and severally liable to pay the decreed amount, the fact that one has paid his quota of an instalment will not modify his joint liability if default be made by the other judgment-debtor, and on order protecting the estate of the former from proceedings to realize the whole sum decreed is improper. SALIG RAM *v.* RAM SEWUK **1 Agra, Mis. 14**

7. ——— **Release of some debtors on payment of part**—When a decree-holder having a joint decree against several persons, deals with some of them as severally liable for certain respective shares, he cannot execute the same decree as a joint one against the remaining judgment-debtors. BISSONAUTH TEWARRY *v.* KOYLASHBANY NARAIN SINGH . . . . **2 Hay, 297**

8. ——— **Release of one debtor, effect of**—The fact of a decree-holder giving a release to one or more of the judgment-debtors who were jointly and severally liable cannot prevent his proceeding against the others for the balance due. SHEO CHURN LALL *v.* RAM SURUN SAHOO **16 W. R. 49**

9. ——— *Release of one of several joint debtors.* Having regard to s. 44 of the Contract Act, a release of one of two judgment-debtors who are made jointly liable for the amount of the decree does not discharge the other from liability ; execution can be taken out against him. KIAM ALI *v.* KAYAMADDI . . **6 C. L. R. 212**

10. ——— **Part satisfaction of decree**—*Representatives of decree-holder.* Where two joint decree-holders, each interested in an eight-anna share in a money-decree, issued joint execution, and one of them, after the death of the other, received the whole amount due under the decree : *Held*, that this was only satisfaction as respects half of the decree, and that the representatives of the deceased were entitled to issue execution for the remaining half. MAHIMA CHUNDRA ROY *v.* PYARI MOHUN CHOWDHRY **2 B. L. R. Ap. 43 : 11 W. R. 262**

11. ——— **Joint shareholder, lien of**—*Joint share-holders, debt due to, on mortgaged property.* A mortgaged property, burdened with the payment of an entire debt to two shareholders, is liable to sale at the instance of both creditors separately so long as their claims remain unsatisfied. The act of one of two holders of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt. INDURJEET KOONWAR *v.* BRIJ BILAS LALL . **3 W. R. 130**

12. ——— **Agreement by one decree-holder to take by instalments**—One of several joint decree-holders is not bound by the acts of another who has compromised with the judgment-debtor and agreed to receive payment by instalments. BALGOBIND *v.* BHAWANEE DEEN SAHOO . **1 Agra, Mis. 16**

See INDURJEET *v.* SEWARAM *alias* MUNEERAM **5 N. W. 16**

13. ——— **Discharge by one of several joint decree-holders**—The representatives of one of several decree-holders conveyed his interest in the decree to *A*. Some time afterwards *A* filed a petition in Court, stating that the decree had been satisfied out of Court, and the case was thereupon struck out as far as he was concerned. Subsequently, the other decree-holders applied for execution of their share of the decree, but it was objected that the decree had already been satisfied by payment to *A*. *Held*, that the other decree-holders were entitled to proceed with execution for the amount of their share, a joint decree-holder having no power to give a discharge out of Court to a judgment-debtor for more than his own share in the decree. BUDHUN *v.* HAFEZAH . **4 C. L. R. 70**

14. ——— **Separate executions**—*Execution of share of decree.* Joint decree-holders are not entitled to apply separately for execution of the decree limited to what they consider their respective interests in it. PRANNATH MITTER *v.* MOTHOORNAUTH CHUCKERBUTTY **6 W. R. Mis. 65**

INDURJEET KOONWAR *v.* MAZUM ALI KHAN **6 W. R. Mis. 76**

RAE DAMODHUR DOSS *v.* BHOLANATH **2 N. W. 413**

15. ——— *Application by one decree-holder for execution of share of decree.* There is no provision of law which allows a decree-holder to apply for partial execution of a decree nor any which allows several joint decree-holders to put in separate applications for execution of a decree in respect of their several shares. An application made by one of several joint holders of a decree enures for the benefit of all. BALKISHOON *v.* MAHOMMED TAZAM ALLEE . . **4 N. W. 90**

(*Contra*) CHOOA SAHOO *v.* TRIPOORA DUTT **13 W. R. 244**

16. ——— **Complex decree**—*Application for execution of portion of decree.* When a decree is of a complex nature and grants different kinds

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of relief to be obtained by process of different kinds, there is no valid objection to separate applications for partial execution of the decree. RAM BAKSH SINGH *v.* MADAT ALI . **7 N. W. 9**

17. ——— **Partial satisfaction**—*Execution for remainder.* The rule of law which forbids application for execution of part of a decree does not bar application for all that remains due upon a decree where the rest has been previously satisfied. TEJ NARAIN CHATTERJEE *v.* RAM TUNOO MOJOOMDAR . . . . **12 W. R. 370**

18. ——— *Execution of portion of decree.* One out of several decree-holders cannot execute a decree in respect of his own separate interest, or otherwise than the decree as a whole. In this case, however, the decree-holder was allowed to amend his application to execute the decree for his own share and to convert it into an application to execute the whole decree. JUDOONATH ROY *v.* RAM BUKSH CHUTTANGEE **7 W. R. 535**

19. ——— *Application by joint decree-holder for execution of their share of a decree—Notice of execution.* Two out of several co-decree-holders applied to the Judge's Court to execute their share of a decree. *Held*, that this was not an application upon which the Court would proceed in execution, and that it could not in appeal be changed into an application for an execution of their whole decree. PURNOO CHUNDRA MOOKERJEE *v.* SARADA CHURN ROY **3 B. L. R. Ap. 21 : 11 W. R. 241**

NUBO KISHORE MOJOOMDAR *v.* ANNUND MOHUN MOJOOMDAR . . . **17 W. R. 19**

NUND COOMAR FOUTEHDAR *v.* BUNSO GOPAL SAHOY . . . . . **23 W. R. 342**

20. ——— *Civil Procedure Code, 1859, s. 207—Execution of share of decree.* Though one of two or more decree-holders may, with the permission of the Court, take out execution of a joint decree under s. 207, the execution must be for the whole decree, and not for any fractional share to which the decree-holder may consider himself entitled, the Court making such orders as may be necessary for protecting the interest of other decree-holders. THAKOOR DOSS SINGH *v.* LUCHMEPUT DOOGUR . . . . **7 W. R. 10**

JUGJEEBUN GOOPTO *v.* GOLOCK MONEE DEBIA **22 W. R. 354**

21. ——— *Civil Procedure Code, 1859, s. 207—Parties.* Where one of several persons entitled to the benefit of a decree seeks to have it executed without joining the others interested, his proper course is to apply to the Court under s. 207 of the Civil Procedure Code, 1859. AMATOOL RASSOOL *v.* LUTEEFUN **19 W. R. 302**

22. ——— *Right of one of joint decree-holders to execution—Civil Procedure Code, 1859, s. 207.* A co-decree-holder has no right to claim execution unless he satisfies the Court, within the provisions of s. 207, that there was sufficient cause for his asking to have execution alone; and in order to do this, the Court must hear all that the judgment-debtors have to urge against the application. UMRITH NAUTH CHOWDHRY *v.* CHUNDER KISHORE SINGH . . . . **21 W. R. 31**

23. ——— *Application by some of joint decree-holders for execution—Civil Procedure Code, 1859, s. 206.* All the judgment-creditors except one (*H*) having applied for execution of a decree for costs against one of the judgment-debtors, the answer was that she (the judgment-debtor) had paid all that was due from her under the decree to *H*, who had, under Act VIII of 1859, s. 206, certified the fact to the Court. The Subordinate Judge, without enquiring into the allegation, allowed execution to issue. *Held*, that the applicants, not being the whole of the decree-holders, had no right to make the application without showing sufficient cause for such a course, *viz.*, either that they did not know of the alleged payment to *H*, and that, if made, it had been made to defraud them, or that the defendant was privy to the fraud. NYNA KOOER *v.* DOOLEE CHUND **22 W. R. 77**

24. ——— *Joint decree-holders—Civil Procedure Code, 1859, s. 207.* Where more persons than one are interested in a decree, any one or more of them may apply for execution of it under s. 207, but the Court, in passing an order in execution of such decree, ought to protect the interests of other decree-holders, and such other person ought not to apply for second attachment of the same property under the same decree, but should apply to share in the proceeds realized by the sale in the execution which has been ordered. ABID ALI *v.* MUNNOO BYAS **2 Agra, 183**

25. ——— *Civil Procedure Code, 1859, s. 207.* Where one of several holders of the same decree wishes to take out execution, his proper course is to apply under s. 207, Act VIII of 1859, to execute the whole decree, and the Court, if it sees sufficient cause, may admit the application, passing such order as may be necessary for protecting the interests of the other decree-holders. INDRO COOMAR DOSS *v.* MOHIMA MOHUN ROY **15 W. R. 159**

AUSEEMOONISSA KHATOON *v.* AMEEROONISSA KHATOON . . . . **22 W. R. 204**

FAEZ BUKSH CHOWDHRY *v.* SADUT ALI KHAN **23 W. R. 282**

26. ——— *Absence of some decree-holders—Protection of interests of absent.* Where some of the decree-holders in a joint decree apply for execution, the application may be refused or granted at the discretion of the Court, which is

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bound to see that injury is not done to the rights of absent decree-holders ; but whether the Court does so or not, all recoveries in execution so made must be for the benefit of all the decree-holders. SHIB CHUNDER DASS *v.* RAM CHUNDER PODDAR
16 W. R. 29

27. ——— *Execution by one creditor.* *A* and *B* obtained a decree against *C*. *A* obtained an order for execution of his share in the amount of the decree. *C* pledged immoveable property as security to *A*, who caused it to be sold. *B* applied to the Court for her share of the sale-proceeds. The Principal Sudder Ameen refused the application. On appeal : *Held*, that the order for execution ought in express terms to have reserved the rights of the other decree-holders to share in the proceeds of the execution. The case was sent back that the Principal Sudder Ameen might apportion the amount realized amongst all the decree-holders. TARASUNDARI BURMONI *v.* BEHARI LAL ROY . . **1 B. L. R. A. C. 28**

28. ——— *Execution of portion of decree according to extent of the applicants' interest.* The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a moiety of a talukh in the possession of the defendant, who then purchased the interest of one of them : *Held* that the other co-plaintiff could obtain execution according to the extent of her interest in the estate. HURRISH CHUNDER CHOWDHRY *v.* KALI SUNDERI DEBI
I. L. R. 9 Calc. 482 : 12 C. L. R. 511
L. R. 10 I. A. 4

29. ——— *Civil Procedure Code, 1859, s. 207—Execution of portion of decree.* A joint decree was passed in favour of *A* and *B*, and *A* subsequently applied for execution alone, alleging that *B* would not join with him in the application. The judgment-debtor stated, and *B* admitted, that more than half of the decretal money had been paid to the latter (out of Court), but the Court disbelieved the statement, and ordered execution to issue for the full amount of the decree. *Held*, that the Court should, under s. 207 of Act VIII of 1859, have allowed execution for half the amount of the decree only. BROJESWARI CHOWDHRANEE *v.* TRIPOORA SOONDAREE DEBI . **3 C. L. R. 513**

30. ——— *Civil Procedure Code, 1882, s. 231—Application for partial execution of joint decree.* A decree provided that the plaintiff should pay R304 for the costs of thirteen out of eighteen defendants. Two of the defendants now sought to execute the decree in respect of their proportionate share of the sum so awarded. Besides the plaintiff, two only of the other defendants were joined as parties to these proceedings. *Held*, that the application was not maintainable, and should be dismissed. MUTHUSAMI AYYAR *v.* NATESA AYYAR . . **I. L. R. 18 Mad. 464**

EXECUTION OF DECREE—*contd.*

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31. ——— *Application by one joint decree-holder for execution in respect of his own share—Transfer of decree to judgment-debtor—Civil Procedure Code, 1877, ss. 231, 232.* A joint decree cannot be executed by one of the several joint holders in respect only of his share of the decree. *Ram Autar* v. *Ajudhia Singh, I. L. R. 1 All. 231 ; Collector of Shahjahanpur* v. *Surjan Singh, I. L. R. 4 All. 72 ;* and *Haro Sanker Sandyal* v. *Tarak Chandra Bhuttacharjee, 3 B. L. R. A. C. 114*, followed. When by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them. But when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. *Wise* v. *Abdool Ali, 7 W. R. 136 ; Pogose* v. *Fukurooddeen Mahomed Ahsan, 25 W. R. 343 ; In re Degumburee Dabee B. L. R. Sup. Vol. 938 ;* and *Khoshalee* v. *Nund Lall, 6 N. W. 1*, referred to. *Held*, therefore, where one of several joint decree-holders applied for execution in respect of his own share only and the joint judgment-debtors under the decree had inherited the right therein of one of the joint decree-holders, that the application was contrary to law ; that so much of the judgment-debt as had devolved upon such persons had been extinguished ; and that application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt. *Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi, 3 C. L. R. 513*, and *Bibee Budhun* v. *Hafezah, 4 C. L. R. 70*, followed. BANARSI DAS *v.* MAHARANI KUAR
I. L. R. 5 All. 27

32. ——— **Payment out of Court**—*Payment out of Court to one of several joint judgment-creditors—Part satisfaction certified to the Court—Application for execution of full amount of decree—Civil Procedure Code (Act XIV of 1882), ss. 231, 244, 258.* On an application for execution for the full amount due under a decree by some of several joint decree-holders, the judgment-debtor objected to execution being granted for the full amount of the decree on the ground that he had already paid off a large portion of the money due under the decree to *B*, one of the joint decree-holders. The payment was made out of Court, but *B*, who claimed to be entitled to a 12½ annas share in the decree, certified the payment in the manner prescribed by s. 258 of the Civil Procedure Code (Act XIV of 1882), and represented that his claim had been satisfied in full. The other joint decree-holders denied *B's* right to the 12½ annas share claimed by him, and refused to recognize the payment said to have been made to him. The lower Court disallowed the objection, and granted execution for the full amount of the decree. *Held*, that, regard being had to the provi-

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sions of the General Clauses Act (Act I of 1868), the word "decree-holder" in s. 258 of Act XIV of 1882 should be read in the plural, and looking at the provisions of s. 231 of the later Act, the Court ought not to recognize payments made out of Court, unless made and certified for the benefit of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled. *Held*, also, that a judgment-debtor is entitled to credit for any sum paid *bonâ fide* to one of several joint decree-holders, and duly certified to the Court by the latter, and that the other joint decree-holders cannot execute the decree for more than their own share. *Held*, further, that in this case the lower Court was wrong in wholly ignoring the payment certified by the decree-holder *B*, and that it should have determined, *first*, whether the payment to *B* was a fraud on the other joint decree-holders; and, *secondly*, what amount the latter were entitled to have out of the whole decree, the latter being the main question between the applicants for execution and the judgment-debtor, and as such clearly within the scope of s. 244 of the Civil Procedure Code. *Nyna Kooer* v. *Doolee Chund, 22 W. R. 77; Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi, 3 C. L. R. 539*; and *Mahima Chundra Roy* v. *Pyari Mohan Chowdhry, 2 B. L. R. Ap. 43.* TARUCK CHUNDER BHUTTACHARJEE *v.* DIVENDRO NATH SANYAL
I. L. R. 9 Calc. 831: 12 C. L. R. 566

33. ——— *Civil Procedure Code, ss. 231, 258—Application for uncertified payment to one decree-holder.* One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified. *Held*, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance. SULTAN MOIDEEN *v.* SAVALAYAMMAL
I. L. R. 15 Mad. 343

34. ——— **Conditional decree**—*Joint decree-holders—Refusal of some to join in applying for execution—Civil Procedure Code, s. 231.* The provisions of s. 231 of the Civil Procedure Code are not applicable to the case of joint decree-holders the execution of whose decree is conditional on their joint performance of a particular act. FARZAND *v.* ABDULLAH **I. L. R. 6 All. 69**

35. ——— **Execution of portion of decree—Application by some of joint decree-holders.** Where two out of several decree-holders petitioned the Court to execute their share of the decree (which was for possession and mesne profits), and the other decree-holders, though they virtually joined in the application by signifying their consent, subsequently retracted their consent, and the original applicants declined to proceed with the execution of the decree for mesne profits: *Held*, that there was no application on the part of all the decree-holders to execute the decree for mesne profits, nor any application by some of them for execution of the whole decree, and that the Court's order directing realization of the unpaid portion of mesne profits was passed without any proper application. *Quære:* Can the purchasers of a share in a decree be added upon the record under Act VIII of 1859, s. 208, as co-decree-holders? SEETAPUT ROY *v.* ALI HOSSEIN . **24 W. R. 11**

36. ——— *Civil Procedure Code, 1859, ss. 207, 208.* When a decree is in favour of several persons and out of those persons some transfer their interest to a third party, the Court would be competent to allow the purchaser to appear as co-decree-holder under Act VIII of 1859, s. 208, or under ss. 207 and 208 together, to allow him alone to execute the whole decree, if the Court were satisfied that the interests of justice required it. BYJNATH SAHOO *v.* DOOLAR CHAND SAHOO
24 W. R. 245

37. ——— **Right to execute decree**—*Civil Procedure Code (Act XIV of 1882), s. 544—Appeal by one of several plaintiffs claiming under a joint right—Decree in such appeal binds other co-plaintiffs, although not parties to the appeal—Procedure.* *A* and *B* brought a suit against *C*, and obtained a decree awarding a part of their claim. *B* appealed, and the Appellate Court reversed the decree, and rejected the plaintiff's claim altogether. Subsequently *A*, who had not joined in the appeal, applied for execution of the original decree. *Held*, that, although *A* had not been a party to the appeal, he was bound by the decision of the Appellate Court, and was not entitled to take out execution. BABAJI DHONDSHET *v.* COLLECTOR OF SALT REVENUE
I. L. R. 11 Bom. 596

38. ——— *Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro tanto.* Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property. The rule of law against breaking up the integrity of a mortgaged security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. *Benarsi Das* v. *Maharani Kuar, I. L. R. 5 All. 27; Wise* v. *Abdool Ali,*

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EXECUTION OF DECREE—*contd.*

14. JOINT DECREES, EXECUTION OF, AND LIABILITY UNDER—*concld.*

7 W. R. 136 ; and *Pogose* v. *Fukurooddeen Mahomed Ahsan, 25 W. R. 343,* referred to. KUDHAI *v.* SHEO DAYAL . . . **I. L. R. 10 All. 570**

39. ——— Decree for rent—*Tenure or holding, sale of—Landlord and tenant—Bengal Tenancy Act (VIII of 1885), s. 165.* A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarari* tenure in a suit brought against all the tenants is entitled under s. 165 of the Bengal Tenancy Act to sell the tenure in execution of the decree, although he recognized the fact that the tenants had sub-divided the tenure and chose to accept a decree making each of them separately liable for his own share of the rent. *Tarini Prosad Roy* v. *Narayan Kumari Debi, I. L. R. 17 Calc. 301,* referred to and explained. SURBO LAL *v.* WILSON (1905) . . . . **I. L. R. 32 Calc. 680**

15. LIABILITY FOR WRONGFUL EXECUTION.

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.

See DAMAGES—SUITS FOR DAMAGES—TORTS.

1. ——— Seizure in Execution—*Trespass—Liability of judgment-creditor.* Seizure of personal property in execution of a decree is not an act of the Court, but one of the party himself seeking execution, for which he is liable if any trespass be committed on the property of a stranger. SUBJAN BIBI *v.* SARIATULLA
3 B. L. R. A. C. 413 : 12 W. R. 329

RASH BEHARY LALL *v.* WAJAN
12 B. L. R. 208 note : 11 W. R. 516

2. ——— *Liability of execution-creditor in damages for wrongful seizure—Attachment of stranger's property—Measure of damages.* Certain unthreshed rice belonging to the plaintiff was wrongfully attached by the defendants under a money-decree obtained by them against a third party. The attachment had been made under a warrant which specified the rice in question and which had been issued upon a darkhast presented by the defendants in which they prayed for the attachment of this particular rice as their judgment-debtor's property. The rice, while in the custody of a bailiff of the Court-nazir in the place where it had been attached, was clandestinely threshed and carried off by thieves who left the straw. In a suit brought by the plaintiff to recover the value of the unthreshed rice from the defendants, both the lower Courts dismissed the plaintiff's claim on the ground that the theft was not the immediate or probable result of the attachment, and that the conduct of the defendants had not in any way conduced to the loss of the rice. *Held,* by the High Court, reversing the decrees of the lower Courts, that the defendants were liable. When the wrongful seizure was made at the instance of the defendants, the plaintiff's cause of action was complete, and was independent of the subsequent occurrence. The theft might have rendered the defendants unable to restore the rice in specie, but could not purge, and was no satisfaction of, the previous trespass which rendered the defendants liable for the full value of the rice. GOMA MAHAD PATIL *v.* GOKALDAS KHIMJI
I. L. R. 3 Bom. 74

16. REFUSAL OF EXECUTION.

1. ——— Execution—*Decree restraining defendant in user of land—Sale of land in execution of another decree—Purchaser at such sale in possession—No execution granted of former decree.* The plaintiff obtained a decree restraining the defendant in his user of certain land, and applied for execution. Meanwhile the land had been sold in execution of another decree against the defendant, and the purchaser at the Court-sale obtained possession. The plaintiff thereupon applied that the purchaser should be made a party to the execution proceedings, and that execution should go against him as well as against the defendant. *Held,* that no order for execution could be made. It could not go against the defendant, as all his interest in the land had been sold in execution of a decree, and it could not go against the purchaser, as an injunction does not run with the land. DAHYABHAI *v.* BAPALAL (1901) . . . . **I. L. R. 26 Bom. 140**

2. ——— Sale in execution of decree—*Setting aside sale—Invalid sales—Want of jurisdiction—Effect on validity of sale—Civil Procedure Code (Act XIV of 1882), s. 273.* Where a Court executing its own decree on receiving from another Court an order attaching the decree returned the notice of attachment to the latter Court on the ground that it did not state the amount for which the attachment had been issued and proceeded with the execution and sold certain properties :—*Held,* that the Court on receiving the order was bound to comply therewith, and under s. 273 of the Civil Procedure Code it was debarred from proceeding with the execution, unless the bar was removed in one of the ways specified in the section and that the sale was invalid. MANIK LAL SEAL *v.* BANAMALI MUKERJEE (1905) . . **I. L. R. 32 Calc. 1104**

17. STAY OF EXECUTION.

1. ——— Application for stay of execution—*Civil Procedure Code, 1859, s. 338.* Application for stay of execution of a decree, an appeal from which has been filed, should, under Act VIII of 1859, s. 338, be made to the Court of appeal, and not to the Court which passed the order under appeal. ABBASSEE BEGUM *v.* RAJ ROOP KOOER
1 C. L. R. 368

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EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

2. ——— **Power to stay execution** —*Civil Procedure Code, ss. 284, 290—Decree transferred for execution.* Where a decree of the High Court is transmitted to a Judge for execution under s. 284, Act VIII of 1859, and the judgment-debtor contends that the balance due on the decree is less than that for which execution is sought, the Judge has no jurisdiction to enquire into the question, but may, on cause shown under s. 290, stay execution, pending a reference to the High Court. KISHUB CHUNDER PAUL CHOWDHRY *v.* KHELAT CHUNDER GHOSE . . . . . **9 W. R. 361**

3. ——— **Decree for arrears of rent is decree for money**—*Code of Civil Procedure (Act XIV of 1882), s. 546.* A decree for arrears of rent is a "decree for money" within the meaning of s. 546 of the Code of Civil Procedure, and execution of such decree may therefore be stayed under that section. BANKU BEHARY SANYAL *v.* SYAMA CHURN BHUTTACHARJEE . **I. L. R. 25 Calc. 322**

4. ——— **Power of Court executing decree to go behind decree**—*Question of service of notice.* Where an application is made by a judgment-debtor for stay of execution of an Appellate Court's decree, the Court executing the decree cannot enquire into the question whether any notice was served upon the applicant before the appeal judgment was passed. MUKHDOOMUN *v.* BHUGWAN DASS . . . . . **24 W. R. 33**

5. ——— **Application by person not party to suit**—*Civil Procedure Code, 1859, s. 230.* The Court will not interfere to stay execution upon the application of a person not a party to the suit who claims immoveable property liable to be taken under the decree. The remedy of such a person under s. 230 of Act VIII of 1859. KHELAT CHUNDER GHOSE *v.* PROSUNNOMOYEE DASSEE **Marsh. 478**

6. ——— **Security**—*Consent.* Execution will be stayed only on security being given or by consent. SAGORE CHUNDER CHUCKERBUTTY *v.* SHERBOURNE . . . **Bourke O. C. 103**

7. ——— *Civil Procedure Code, 1859, s. 338—Stay of execution pending appeal—Act XXIII of 1861, s. 38.* Pending the determination of the appeal against an order passed in execution of decree, the Appellate Court has power, under s. 338 of Act VIII of 1859 and s. 38 of Act XXIII of 1861, to stay execution. *In the matter of the petition of* HAR SHANKAR PARSHAD **I. L. R. 1 All. 178**

8. ——— *Civil Procedure Code, s. 338—Stay of execution.* A party applying to stay execution of a decree under s. 338 on giving security is bound to show sufficient grounds to the Court for staying it, whether the decree is in respect of moveable or immoveable property. *In the matter of the petition of* ISMAIL KOOER **B. L. R. Sup. Vol. 1007 : 9 W. R. 448**

EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

9. ——— *Act XXIII of 1861, s. 36—Security for restitution of money.* Before staying execution of a decree and preventing the decree-holder from receiving the fruits of his decree, or before requiring him under s. 36, Act XXIII of 1861, to give security for its restitution, probable cause must be shown of the judgment-debtor's inability to recover the money if the decree be reversed. SUKHEE MONEE DEBIA *v.* BROJORAJ MOOKERJEE . . . . . **17 W. R. 69**

10. ——— *Act XXIII of 1861, s. 36—Security in execution of decree—Decree against which no appeal brought.* The High Court could not, under s. 36, Act XXIII of 1861, direct the lower Courts to take security in the execution of a decree against which no appeal has been referred to it. *In re* BHUGWAN CHUNDER GHOSE . . . . **6 W. R. Mis. 15**

11. ——— **Ground for staying execution**—*Appeal, refusal to execute pending.* Execution of a decree for enhanced rent should not be refused merely because the decree has been appealed against on a point of law. THEODORUS *v.* ABDOOL BURKUT AMEENOOLLAH **W. R. 1864, Act X, 106**

12. ——— The Court declined to stay the execution of a decree (i) because the applicant has not shown, as he was bound to show, something beyond the mere fact of an appeal having been preferred against it, and (ii) because there seemed to have been great delay on his part. LESLIE *v.* LAND MORTGAGE BANK OF INDIA **17 W. R. 160**

13. ——— *Expiry of time for appeal—Power of Court to stay execution—Code of Civil Procedure (Act XIV of 1882), ss. 239, 230, 243, and 246.* It is not open to the Court to refuse to execute a decree against which no appeal has been preferred and the time for appealing against which has expired. ISHAN CHUNDER ROY *v.* ASHANOOLLAH KHAN . **I. L. R. 10 Calc. 817**

14. ——— *Person sued as Government servant ceasing to hold that position.* A decree was passed by the Principal Sudder Ameen against the defendant declaring him personally liable to the claim. No appeal was preferred. *Held,* that an order by the Judge staying execution because the defendant, who was sued as a servant of Government, has ceased to fill that position, was illegal. MAHOMED TOQUE BEG *v.* WALLIS **2 Agra Mis. 5**

15. ——— *Refusal to pay costs of advertising sale.* It is not within the discretion of a Court charged with the execution of a decree to withhold execution and abstain from selling because the decree-holder refuses to pay the costs of advertising. The Code does not require the decree-holder to pay such costs in advance. KISTO KISHORE GHOSE *v.* SOORJONATH SIRCAR **10 W. R. 354**

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EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

16. ——— *Civil Procedure Code, 1859, s. 290—Ex parte decree.* A principal Sudder Ameen is competent under s. 290, Act VIII of 1859, to allow the stay of execution of a decree of the High Court on its original side for a sufficient time to enable the judgment-debtor to make his application to the High Court for a new trial, on the ground that the decree had been obtained *ex parte* without his knowledge. MIRTOONJOY CHUCKERBUTTY *v.* COCHRANE . **8 W. R. 202**

17. ——— *Likelihood of injury from immediate sale.* Where a judgment-debtor proved that a sale in execution might be stayed, as material injury would otherwise be caused to him from the circumstance that the day fixed for the sale was so near to the latest safe day for the payment of the Government revnue :—*Held,* that good and sufficient cause was not shown for staying the sale. AHMED REZA *v.* KHUJOORUNISSA **13 W. R. 281**

18. ——— *Allegation of a private purchase by the decree-holder.* While a decree for money was being executed by the sale of immoveable property, the judgment-creditor petitioned the Court to stay the sale for two days, as the defendants, the judgment-debtors, had entered into a razinamah with him. On the same day the judgment-debtors petitioned the Court to continue the sale for three days. Two days afterwards the judgment-creditor presented a petition to the Court, stating that the judgment-debtors had executed a note in his favour for R8,500 in part-payment of the decree, and promising to execute a deed of sale on a stamp; but a sum of R9,600 having been subsequently offered, the judgment-debtors failed to execute the deed of sale; and he prayed that the judgment-debtors might be examined in respect of the sale for R8,500, and that the sale to him be confirmed. The Civil Judge made an order refusing to accede to the prayer of the judgment-creditor. *Held* (INNES, *J.*, dissenting), that the order of the Civil Judge was right, as he had no power to order stay of execution on the ground of a private purchase having been made by the decree-holder. VENKATA NARASIMAHA APPAROW *v.* VENKATA-KRISTNIAI NAIDU . . . **5 Mad. 410**

19. ——— *Pendency of cross-suit—Power of Court to which decree is transmitted for execution—Civil Procedure Code, 1859, s. 290.* S. 290 of Act VIII of 1859 provides that, whenever a suit shall be pending in any Court against the holder of a decree of such Court by the judgment-debtor, the Court may, if it appears just and reasonable to do so, stay execution of the decree, either absolutely or on such terms as it may think proper, until a decree shall be passed in the pending suit. Any Court to which a decree is transmitted for execution can under the section stay execution, notwithstanding that the suit pending between the judgment-debtor and the holder of the decree is pending in such Court, and not in the Court which transmitted the decree. COOKE *v.* HISEEBA BEEBEE . . . . . **6 N. W. 181**

EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

20. ——— *Appeal pending in another suit—Civil Procedure Code (Act XIV of 1882), s. 546.* *A* brought a suit and obtained a decree against *B* on a mortgage-bond in the Court of a Subordinate Judge, which decree was confirmed by the High Court on appeal. *A* then applied for execution. In the execution-proceedings the sons of *B* intervened claiming a portion of the properties attached; this claim was dismissed, and the sons of *B* brought a regular suit before the same Subordinate Judge to have their rights to the property declared, and obtained an *interim* injunction restraining *A* from executing his decree pending the decision of their suit. This suit was dismissed, and the sons of *B* appealed to the High Court. *A* again applied for execution of his mortgage-decree, whereupon the sons of *B* applied for a further injunction restraining *A* from executing his decree pending their appeal to the High Court: this application was granted. *Held,* that the Subordinate Judge had no right to restrain the decree-holder from executing his decree, merely on the possibility of the Appellate Court reversing his decision. GOSSAIN MONEY PUREE *v.* GURU PERSHAD SINGH . **I. L. R. 11 Calc. 146**

21. ——— *Civil Procedure Code, 1882, s. 546—Application for stay of sale of immoveable property in execution of money-decree under appeal.* An application under the third paragraph of s. 546 of the Code of Civil Procedure to stay the sale of immoveable property in execution of a decree for money against which an appeal has been filed must be made to the Court which passed the decree, and not to the Appellate Court. *Gossain Money Puree v. Guru Pershad Singh, I. L. R. 11 Calc. 146,* referred to. *In the matter of the petition of* MURAD-UN-NISSA **I. L. R. 15 All. 196**

22. ——— *Civil Procedure Code, ss. 545, 646, 547—Stay of execution pending application for review—Jurisdiction.* S. 647 of the Civil Procedure Code provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with ss. 545 and 546, give no power to the Court or a Judge, after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree. No such power exists under the Code. On the 29th July 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree, dated the 18th March 1886, for review of judgment. On the 28th August, the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex parte* granting this application. Subsequently, the opposite party applied under s. 623 of the Civil Procedure Code for a review of the *ex parte* order on the grounds (i) that the Court had no jurisdiction to make it; and (ii) that the applica-

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EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

tion of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review. *Held*, that the decree of 18th March being final and unappealable, and no application for review of judgment having been granted within the meaning of s. 630 of the Code, the application for stay of execution did not fall within s. 545 or s. 546, nor did s. 647 apply to it, nor any other provision of the Code. AMIR HASAN *v.* AHMAD ALI **I. L. R. 9 All. 36**

23. ——— *Stay of execution pending suit between decree-holder and judgment-debtor—Civil Procedure Code, ss. 235 (d), 581, 583.* The words "such Court" in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decree passed by the Court in which the suit is pending, but with reference to ss. 235 (*d*), 581, and 583, that Court is empowered to stay execution of decree transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of Appeal. The plaintiff instituted a suit against defendant for recovery of money and other reliefs, which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant R1,000 as costs of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and, while it was pending, defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court but granted by the District Court. On appeal by defendant to the High Court: *Held*, that the Judge's order was correct. *Mithun Bibi* v. *Buzloor Khan, 8 W. R. 392,* disapproved. KASSA MAL *v.* GOPI . . . . **I. L. R. 10 All. 389**

24. ——— **Powers as to stay of execution of Court executing transferred decree**—*Civil Procedure Code, ss. 228, 239.* The powers which the foreign Court has under s. 228 of the Civil Procedure Code are confined to the execution of the decree, and the Court cannot question the propriety or correctness of the order directing execution, nor can it, with reference to s. 239 of the Code, stay execution except temporarily. *Held*, therefore, where the drawers of a hundi, against whom the indorsee from the payee had obtained a decree on the hundi, objected in the Court to which the decree had been transmitted for execution that execution should not be allowed, because the payee had paid the amount of the hundi to the decree-holder, after the decree had been passed, and such Court refused to entertain the objection, that the order of the lower Appellate Court, directing that the parties should be allowed to produce evidence in regard to the alleged payment, and that, should the Court of first instance find that the decree-holder had received satisfaction to the full amount of the decree, the judgment-debtors should be absolved from all liability under the decree, could not be maintained. RAM LAL *v.* RADHEY LAL . . **I. L. R. 7 All. 330**

EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

25. ——— **Injunction to stay execution**—*Relief asked for in accordance with statements in plaint not forming a separate prayer in the plaint—General prayer for relief—Control of execution.* *A*, a joint owner of an estate with *B*, saved the joint estate from sale for arrears of Government revenue, in payment of which *B* had made default, for such purpose mortgaging her share in the estate to *E*. *A* then sued *B* for contribution. Pending that suit, *B* again made default, and the estate was sold and purchased by *C*, subject to incumbrances. Subsequently *A* obtained her decree against *B* and assigned her decree to *D*, who obtained an order for execution, and attached certain property belonging to *B*. *D* and *E* then entered into an agreement with *C* that they would release *C* and the share charged with payment of *A's* decree from all liability, and that they would entrust the whole conduct of the execution-proceedings to *C* in consideration of his granting a perpetual lease of part of the property to *D* and *E*. In pursuance of this agreement, *D* and *E* granted a release to *C*, and *C* granted a lease to *E* for himself, and it was contended also as benamidar of *D*. The agreement contained a proviso that should the Court in which the decree should be executed, of its own accord or on the petition of *B* or his legal representative, notwithstanding objection on the part of *D* and *E*, make any order directing the decree to be executed against the estate, then in such case *D* and *E* should not be bound by the release, and that it should be open to *C* to cancel the agreement. *D* applied for execution against the estate of the adopted son of *B* (who had died), but subsequently abandoned all proceedings, and transferred his decree to the High Court to obtain execution against a house belonging to *C* in Calcutta. The adopted son and widow of *B*, in a suit brought against *C* and *D*, objected to the execution-proceedings, and after paying the sum due to *D* into Court, asked for an injunction staying all further proceedings in execution until the hearing of the suit. *Held*, that *D* had obtained, out of the lien directed by the decree, some benefit or advantage which the plaintiffs might have a right to have valued at the hearing, and that, notwithstanding this did not form the subject of a separate prayer in the plaint, the Court would grant the injunction. KRISTO MOHINY DOSSEE *v.* KALLY PROSONNO GHOSE **I. L. R. 6 Calc. 485 : 8 C. L. R. 43**

26. ——— **Administration decree**—*Civil Procedure Code, ss. 213, 276, 295—Attachment after date of institution of administration suit under decree obtained prior to such suit.* On the 22nd July 1886, one *R L* obtained a money-decree against one *P C*. On the 5th November 1886, *P C* died; and on the 18th December 1886 *R L* applied to attach certain properties belonging to the estate of his judgment-debtor, which properties were actually attached on the 8th and 12th January 1887. On the 21st December

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EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

1886 one *S* filed a suit to administer the estate of the deceased, and on the 20th January 1887 obtained the usual administration decree. On the 5th May 1887, *S* applied for an order staying all proceedings taken by *R L* against the estate of *P C*, and directing him to come in should he think fit so to do, and prove his claim in the administration suit. *Held*, that the attachment did not create any interest in or charge upon, the properties in favour of the attaching creditor as against other creditors, and that the order asked for ought to be granted. *In the matter of the application of* SOOBUL CHUNDER LAW. SOOBUL CHUNDER LAW *v.* RUSSICK LALL MITTER . . **I. L. R. 15 Calc. 202**

27. ———— Appeal—*Decree for injunction—Damages and costs—Stay of execution as to costs.* A party appealing against a decree, which directs him to pay money, may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted. DHUNJIBHOY COWASJI UMRIGAR *v.* LISBOA . . . **I. L. R. 13 Bom. 241**

28. ———— Decree made by mistake and without jurisdiction—*Decree in suit against Sovereign Prince.* A suit was brought against the Thakur of Palitana (his title being omitted from the plaint), and an *ex parte* decree was obtained against him. An application on the part of the Thakur to have the decree set aside was dismissed, and the plaintiff then sued out an attachment, but, failing to execute it within a year, was compelled to apply to the Court, under s. 216 of the Code, for leave to execute it. The defendant at the same time applied to have the attachment and all proceedings under it declared null and set aside on the ground that it had been made by mistake and without jurisdiction. The Court (without expressing an opinion as to whether the order dismissing the application to have the decree set aside would have prevented it from declaring the decree void *ab initio*) *held* that, as the decree was made erroneously and without jurisdiction, it would not, when apprised of the error, assist the plaintiff in carrying it into execution in a case in which lapse of time made it incumbent on the plaintiff specially to invoke the aid of the Court for that purpose. LADKUVARBAI *v.* SARSANGI PARTABSANJI . . . **7 Bom. O. C. 150**

29. ———— Modification or cancellation of security-bond—*Civil Procedure Code, s. 338.* *K* sued *R* for a sum of money due on promissory notes, and obtained a decree in the Judge's Court. *R* appealed to the High Court, and prayed that execution might be stayed till the appeal was disposed of, The Court, under the provisions of s. 338, Code of Civil Procedure, ordered that execution might be stayed, provided good and sufficient security were given. Accordingly *A* appeared before the Judge, and executed a security-bond binding himself, in the event of the appeal being dismissed, to liquidate the debt. The appeal was heard by a Division Bench, and, the Judges differing, the opinion of the Senior Judge prevailed under s. 36 of the Letters Patent, and the appeal was decreed. From this judgment an appeal was preferred under s. 15 to a Full Bench. After the opinion of the Division Bench was pronounced, *A* applied to the Judge for the return of his security-bond ; but his application was refused pending the final decree of the High Court in the matter. He then moved the High Court for the cancellation or return of the bond. *Held*, that, as the High Court had authority under s. 338, Act VIII of 1859, to make an order calling for security, it had authority at any time to modify or cancel such order, or to direct the restoration of the security when no longer required, and that in carrying out the Court's order to take security and enquire into its validity, the Judge was acting, not judicially, but ministerially. *Held*, also, that, as the decree of the Judge had been reveresd by the Bench who tried the appeal, there was no decree of the Judge to execute, and the Judge's order refusing to return the security-bond was passed without jurisdiction, and was therefore null and void. On the reversal of the decree, the liability of the surety ceased, and the security-bond became a dead-letter. AMEER ALI *v.* KASSIM ALI KHAN . . . . . **13 W. R. 403**

30. ———— Decree directing sale of land in pursuance of a contract specifically affecting it—*Civil Procedure Code, 1877, s. 326—Stay of sale.* S. 326 of Act X of 1877 does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court therefore cannot authorize the Collector to stay the sale in such a case under s. 326. BHAGWAN PRASAD *v.* SHEO SAHAI . . . . **I. L. R. 2 All. 858**

31. ———— Scheme for satisfying decree—*Civil Procedure Code, Act X of 1877, s. 326—Stay of public sale of attached property.* Where the Collector has applied to the Court under s. 326 of the Civil Procedure Code proposing a scheme for the payment of decretal money in order to avoid a sale of attached property, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed ; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered in support of those objections ; and if after hearing the decree-holders' objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can, in all reasonable probability, be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction. HURO PROSAD ROY *v.* KALI PROSAD ROY **I. L. R. 9 Calc. 290**

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EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

32. ——— Security for restitution of property—*Act XXIII of 1861, s. 36.* After property, the subject of litigation, has been given over in execution of a decree to the plaintiff, it is not within the scope of s. 36 of Act XXIII of 1861 to exact security from the plaintiff for restitution of such property in the event of a successful appeal. MANSUKHRAM PURSHOTAM *v.* JAVAREVOHU **7 Bom. A. C. 122**

33. ——— Reversal of decree in favour of plaintiff—*Civil Procedure Code, 1859, s. 338—Duty of Appellate Court.* When an Appellate Court reverses a decree in favour of the plaintiff in a suit, it ought not to stay execution of its own decree under s. 338 of Act VIII of 1859. Order of District Court staying execution under such circumstances set aside. KAVASJI BHUNJI *v.* DHONDIRAJ VINAYAK **10 Bom. 411**

34. ——— Reversal of decree on appeal, effect of—*Security by decree-holder on being allowed to execute decree appealed from.* Where a decree-holder, pending appeal, gives a security-bond whereby he undertakes that, if the decision of the first Court is reversed or modified by the Appellate Court, he will make good any property taken by him in execution, the effect of such an undertaking is to bind him, in the event of the Appellate Court deciding that the claim of the creditor was in whole or in part untrue, to make good to the other party anything taken in respect of the amount so found not due. The bond would not bind the decree-holder to conform to a mere direction as to the manner in which the decree was to be executed when that direction came too late, but would need to be construed equitably, and the other party, if still a debtor to the decree-holder, would not be entitled to recover anything unless it were shown that he had sustained damage. SHURYUTOOLLEAH MIRDHA *v.* TEETA GAZEE HOWLADAR . . **21 W. R. 82**

35. ——— Execution completed by appointment of manager—*Civil Procedure Code, 1877, s. 545.* It having been directed by a decree that, pending an appeal, managers should be appointed to take charge of certain property, managers were appointed and they took possession of the property in question. On a rule to show cause why execution should not be stayed and the managers removed :—*Held,* that under s. 545 of the Civil Procedure Code the Court had power only to stay execution, and that the words "stay execution" in that section could not be extended to a case in which execution was completed, as in the case before it. DHARRAM SINGH *v.* KISHEN SINGH **12 C. L. R. 532**

36. ——— Setting aside proceedings giving possession under decree—*Civil Procedure Code, 1882, s. 243—Possession given under decree.* There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Prcedure Code (providing for stay of execution) have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him. GHAZIDIN *v.* FAKIR BAKHSH . **I. L. R. 7 All. 73**

37. ——— Right of judgment-debtor in giving security—*Amount of security.* Where a judgment-debtor asks for stay of execution-proceedings pending appeal and his request is granted on condition of his giving security, he is entitled to have a reasonable opportunity for showing that the sum demanded as security is considerably more than the amount awarded by the decree. BAHOORIA DOOHMA KOWAR *v.* LALLA JUWAHUR LALL PAUREY . . . . . **20 W. R. 52**

38. ——— Security bond—*Amount of security—Order staying execution pending appeal—Civil Procedure Code (Act XIV of 1882), ss. 545, 588.* The Court which passed a certain decree for specific performance of a contract to execute a mortgage on property worth 4½ lakhs of rupees ordered execution thereof to be stayed pending appeal on the debtor's furnishing security to the amount of R70,000, under the provisions of s. 545 of the Code of Civil Procedure. The debtor objected to the amount of security required, and appealed to the High Court on that ground. *Held,* on the facts, that the security required was excessive, and it was reduced to R7,000. UDEYADETA DEB *v.* GREGSON . . **I. L. R. 12 Calc. 624**

39. ——— Notice to decree-holder—*Civil Procedure Code, 1882, s. 545—Practice—Affidavit.* A final order for staying the execution of a decree should not be made without giving the decree-holder notice of the judgment-debtor's application. The application should be supported by an affidavit. MULTANCHAND SHIVRAM *v.* KHARSEDJI NASARVANJI **I. L. R. 15 Bom. 536**

40. ——— Practice—*Appeal—Civil Procedure Code (Act XIV of 1882), ss. 545, 346.* In order to obtain a stay of execution of a decree directing the payment of money, the applicant must satisfy the Court on affidavit that substantial loss may result to him unless execution is stayed. GAIKWAR SIRKAR OF BARODA *v.* GHANDI KATCHARABHAI KASTURCHAND (1899) **I. L. R. 25 Bom. 243**

41. ——— Appellate Court, power of—*Stay of execution when an appeal from an order in execution-proceedings is pending before the Court—Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 545 and 647.* The Appellate Court has power to stay execution, when an appeal from an order in execution-proceedings is pending before that Court. PASUPATI NATH BOSE *v.* NANDA LAL BOSE (1901) . . . **I. L. R. 28 Calc. 734**

42. ——— *Civil Procedure Code (Act XIV of 1882), ss. 244, 545—Execution of decree—Order refusing stay—Appeal—Deliberate*

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EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*contd.*

exercise of discretion by lower Court. An order refusing to stay execution of a decree under s. 545 of the Civil Procedure Code (Act XIV of 1882) is not appealable. *Musaji Abdulla* v. *Damodardas, I. L. R. 12 Bom. 279,* doubted. Courts of appeal should not lighty interfere with a discretion deliberately exercised by a lower Court. RAMCHANDRA *v.* BALMUKUND (1905) . **I. L. R. 29 Bom. 71**

43. ———— *Stay of execution—Appeal—Sale of immoveable property in execution of decree for money—Appellate Court, power of, to stay sale—Practice—Civil Procedure Code (Act XIV of 1882), s. 546, para. 3. Held,* by the Full Bench (RAMPINI, *A.C.J.*, expressing no opinion), that when an appeal has been filed against a decree for money, the Appellate Court has jurisdiction to stay the sale of immoveable property of the judgment-debtor in execution of that decree, pending the disposal of the appeal. *Per* RAMPINI, *A.C.J.*, WOODROFFE and MOOKERJEE, *JJ.* : An Appellate Court cannot pass orders, under s. 546, para. 3, of the Code of Civil Procedure, staying a sale of immoveable property. *Per* BRETT and MITRA, *JJ.* An Appellate Court has power to pass an order under the *third* paragraph of s. 546 of the Code, staying execution. *Kunj Lal Marwari* v. *Bahitram Marwari, 8 C. W. N. 381,* discussed. TRIBENI SAHU *v.* BHAGWAT BUX (1907) **I. L. R. 34 Calc. 1037**

44. ———— *Order refusing to stay order for discharge of Receiver—Execution of decree, order refusing to stay—Civil Procedure Code (Act XIV of 1882), s. 545—Appeal—"Execution," meaning of—Judicial discretion, appeal from exercise of—Principle upon which execution is stayed—Stay of execution, terms upon which granted.* When there still remains something substantial to be done under a decree before it can become thoroughly effectual, that decree has to be "executed," within the meaning of s. 545, Civil Procedure Code. A decree directing the issue of a grant of probate to the propounder of a will is one that is capable of execution, and stay of execution of such a decree can be granted under s. 545 of the Civil Procedure Code. An Appellate Court ought to be extremely chary of interfering in matters dependent upon the exercise of the judicial discretion of the Court below ; but it can interfere, and sometimes has to interfere, if it thinks the facts warrant such interference. The principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success. *Polini* v. *Grey, L. R. 12 Ch. D. 438,* and *Wilson* v. *Church, L. R. 12 Ch. D. 454,* followed. Terms upon which stay of execution pending an appeal was granted. BRIJ COOMAREE *v.* RAMRICK DASS (1901) **5 C. W. N. 781**

45. ———— *Practice—Decree—Execution—Civil Procedure Code (Act XIV of 1882), ss. 545 and 546.* An Appellate Court cannot pass an order under s. 546 of the Civil Procedure Code (Act XIV of 1882) for a stay of execution of a decree under appeal, until an order has been made for the execution of the decree. JANARDAN *v.* NILKANTH (1901) . **I. L. R. 25 Bom. 583**

EXECUTION OF DECREE—*contd.*

17. STAY OF EXECUTION—*concld.*

18. STEP IN AID OF EXECUTION.

1. ———— **Limitation Act (XV of 1877), Sch. II, Art. 179**—*Step in aid of execution—Application by decree-holder purchaser for confirmation of sale, if valid—Civil Procedure Code (Act XIV of 1882), s. 312.* An application by a decree-holder who has purchased a property in execution of his own decree for confirmation of sale, is not an application to take some step in aid of the execution of the decree within the meaning of Art. 179, Sch. II of the Limitation Act. UMESH CHANDRA DAS *v.* SHIB NARAIN MONDUL (1905) **9 C. W. N. 193**

2. ———— *Limitation Act (XV of 1877), Sch. II, Art. 179—Application for execution, not accompanied by copy of decree sufficient to save bar—Step in aid of execution—Construction of statute.* An application for execution presented on behalf of a party entitled to present it, but not accompanied by a copy of the decree as required by the Civil Rules of Practice, is an application in accordance with law, within the meaning of Art. 179, Sch. II of the Limitation Act, as the defect has reference only to an extraneous circumstance. *Sadashiva Raghunath* v. *Ramchandra Chintaman, 5 B. L. R. 394,* dissented from. The provisions of the Limitation Act should receive a fair and not too technical construction. Observation son the construction of statutes. Where the decree is more than one year old and the application prays for the issue of notice under s. 248 of the Code of Civil Procedure to the judgment-debtor, such application in the absence of any provisions prescribing the form, contents or accompaniments of an application for issuing notice, will be a step in aid of execution within the meaning of Art. 179, Sch. II of the Limitation Act. PACHIAPPA ACHARI *v.* POOJALI SEENAN (1905) **I. L. R. 28 Mad. 557**

3. ———— *Limitation Act (XV of 1877), Sch. II, Art. 179—Application to take a step in aid of execution—Execution petition—Adjournment of sale on application of judgment-debtor consented to by decree-holder—Subsequent application within three years of date of adjournment, but more than three years from previous application—Limitation.* A decree-holder applied for execution of his decree. The last preceding application had been made more than three years before the present one. In that application the decree-holder asked that the properties of the judgment-debtor might be sold. The judgment-debtor then applied for a postponement of the sale, to which

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EXECUTION OF DECREE—*contd.*

18. STEP IN AID OF EXECUTION—*contd.*

the decree-holder consented. The present application was made within three years from the date of the judgment-debtor's application for a postponement of the sale. The sale had, in fact, not been carried out. *Held*, that the application was barred by limitation. The mere consent by a decree-holder to the application made by the judgment-debtor was not "an application" by the decree-holder, within the meaning of Art. 179 of Sch. II to the Limitation Act. *Held*, also, that the acknowledgment of indebtedness in the application of the judgment-debtor for a postponement of the sale did not give a fresh starting point for limitation under s. 19 of the Act: nor could a part payment of the principal be relied upon under s. 20, as the same principle applied to ss. 19 and 20. *Kuppusami Chetty* v. *Rengasami Pillai, I. L. R. 27 Mad. 608*, followed. SREENIVASA CHARIAR *v.* PONNUSAWMY NADAR (1905) . **I. L. R. 28 Mad. 40**

4. ———— *Limitation Act (XV of 1877), Sch. II, Art. 179—Step in aid of execution—A "batta memorandum" praying for issue of sale proclamation.* A so-called "batta memorandum," which applies for the issue of a sale proclamation and on which a sale proclamation is issued accordingly, is a "step in aid of execution" within the meaning of Art. 179, Sch. II of the Limitation Act, although, an order for the issue of such proclamation might have been made previously. *Moluk Chand* v. *Bechar Natha, I. L. R. 25 Bom. 639*, distinguished. *Ambica Pershad Singh* v. *Surdhari Lal, I. L. R. 10 Calc. 851*, followed. VIJIARAGHAVALU NAIDU *v.* SRINIVASALU NAIDU (1905) . . **I. L. R. 28 Mad. 399**

5. ———— *Limitation Act (XV of 1877), Sch. II, Art. 179—Execution of decree—Limitation—Step in aid of execution.*" *Held*, that an application made by the transferee of a decree asking that his name might be substituted on the record for that of the original decree-holder, and a further application asking for time to serve one of the judgment-debtors, whose address was not then known, with notice of the application for substitution were both applications made to the proper Court to take some step in aid of execution within the meaning of Art. 179 of the second Schedule to the Indan Limitation Act, 1877. PITAM SINGH *v.* TOTA SINGH (1907) **I. L. R. 29 All. 301**

6 ———— *Step in aid of execution—Limitation Act (XV of 1877), Sch. II, Art. 179—Application to bring on record representative of deceased judgment-debtor is a step in aid of execution—Civil Procedure Code (Act XIV of 1882), ss. 232, 368—Application under s. 368 not prohibited by s. 232.* Under the proviso to s. 232 of the Code of Civil Procedure, the transferee of a decree cannot obtain execution without notice to the judgment-debtor, and where the judgment-debtor is dead, no such notice can be sent until his representatives are brought on record. There is nothing in s. 232 to

EXECUTION OF DECREE—*contd.*

18. STEP IN AID OF EXECUTION—*concld.*

prohibit the transferee from applying under s. 368 to bring the representative on record and such an application must be regarded as a step in aid of execution within the meaning of Sch. II of Art. 179 of the Limitation Act. MAHALINGA MOOPANAR *v.* KUPPANACHARIAR (1907) . **I. L. R. 30 Mad. 541**

7. ———— **Mistake**—*Step in aid of execution—Limitation Act (XV of 1877), Art. 179—Application against a dead person—Bonâ fide mistake.* If an application for execution of a decree be made under the influence of a *bonâ fide* mistake against a dead person, though that application cannot be acted upon, still it is an application in aid of execution within the meaning of Art. 179, cl. 4 of the Limitation Act (XV of 1877), which saves the execution of the decree from being time barred. *Samia Pillai* v. *Chockalinga Chettiar. I. L. R. 17 Mad. 76*, and *Balkishen Das* v. *Bedmati Koer, I. L. R. 20 Calc. 388*, followed. *Madho Prasad* v. *Kesho Prasad, I. L. R. 19 All. 337*, dissented from. BIPIN BEHARI MITTER *v.* BIBI ZOHRA (1908) . . **I. L. R. 35 Calc. 1047**

8. ———— **Application for delivery of possession**—*Execution proceeding, struck off as partly satisfied, no bar to fresh application for execution—Application for delivery of possession under Civil Procedure Code (Act XIV of 1882), s. 319, if step in aid of execution—Limitation Act (XV of 1877), Sch. II, Art. 179—Judicial or ministerial act.* An order under s. 319 of the Civil Procedure Code (Act XIV of 1882), can only be passed by the presiding officer of the Court and is a judicial act. Consequently an application by a decree-holder, who has purchased property in execution of his decree, for delivery of possession under that section is a step in aid of execution within the meaning of Art. 179 of Sch. II of the Limitation Act (XV of 1877). *Sadananda* v. *Kali Sankar, 10 C. W. N. 28*, followed. *Sariatoolla* v. *Raj Kumar, I. L. R. 27 Calc. 709*, referred to. An order striking off proceedings in execution as partly satisfied which is made merely to avoid cases appearing in arrears in the quarterly returns has no particular judicial value and does not preclude the decree-holder from pursuing his remedy until the decree is satisfied. PREM KRISHNA DHUR *v.* JURAMONI CHAUKIDAR (1909) **13 C. W. N. 694**

19. STRIKING OFF EXECUTION-PROCEEDINGS.

1. ———— **Striking off execution-order, effect of**—*Abandonment of proceedings.* Striking off an execution-order from the file is an act which may admit of different interpretations according to the circumstances of the case, and is not conclusive proof that such execution-proceedings were intended to be abandoned. HURRONATH BHUNJO *v.* CHUNNI LALL GHOSE **I. L. R. 4 Calc. 877 : 3 C. L. R. 161**

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EXECUTION OF DECREE—*contd.*

19. STRIKING OFF EXECUTION-PROCEEDINGS—*contd.*

RADHAKISSORE BOSE *v.* AFTAB CHUNDRA MAHATAB
I. L. R. 7 Calc. 61

2. ——— **Striking execution case off the file**—*Act VIII of 1859, ss. 110 and 114.* There is no particular law authorizing the Court to strike cases for execution of decrees off the file. This can only be done under the provisions of ss. 110 and 114 of Act VIII of 1859. The practice of striking off execution-cases from the file, in order to clear it and enable judicial officers to make their quarterly returns, strongly condemned, as productive of the greatest hardship and injustice to the suitors. GOUR MOHAN BANDOPADHYA *v.* TARACHUND BANDOPADHYA
3 B. L. R. Ap. 17 : 11 W. R. 567

(*Contra*) *see* RAJPAL *v.* CHOOAMUN **4 N. W. 10** where s. 110 of Act VIII of 1859 was held to apply to proceedings in execution of a decree.

3. ——— *Effect of, as to continuance of suit.* It is contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure to hold that when, for any reason satisfactory or not, the execution of a final decree in a suit fails or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. MOHESH NARAIN SINGH *v.* KISHRAMUND MISSER
5 W. R. P. C. 7
2 Ind. Jur. O. S. 1
Marsh. 592 : 9 Moo. I. A. 324

4. ——— *Effect of, on rights of parties.* Striking off execution-proceedings not being in accordance with the provisions of the Code, but merely for the convenience of the Court, when such proceedings are struck off on the motion of the Court, the rights of the parties to the proceedings are in no way affected. BARODA SUNDARI DABIA *v.* FERGUSSON . . **11 C. L. R. 17**

SYAM SINGH *v.* BAIDYANATH RAI
13 C. L. R. 176

5. ——— *Effect of, on rights of parties.* The rights of the parties to execution-proceedings are not affected in any way by the case being "struck off" by the Court, there being no provision in the Civil Procedure Code for such a course. *Baroda Soondari Dabi* v. *Fergusson, 11 C. L. R. 17,* followed. The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding when the parties do not appear, is to dismiss it. A case so dismissed can be restored on application under s. 108, which is by s. 647 applicable as well to execution-proceedings as to suits and appeals. BISWA SONAN CHUNDER GOSSYAMY *v.* BINANDA CHUNDER DIBINGAR ADHIKAR GOSSYAMY . . . **I. L. R. 10 Calc. 416**

6. ——— *Jurisdiction of Principal Sudder Ameen—Act V of 1836.* The jurisdiction of a Principal Sudder Ameen to deal with a decree referred to him for execution by the Zillah Judge under Act V of 1836 did not cease by his striking the case off his file after partial execution, so as to render necessary a subsequent reference by the Judge to enable the Principal Sudder Ameen, upon a fresh application being made for execution, to restore the case to the file. GOURMONEE DASSEE *v.* JOGUTINDRONARAIN . . **18 W. R. 319**

Affirming decision of lower Court in
2 W. R. Mis. 2

7. ——— *Order of sale—Application for execution struck off—Application for restoration—Finality of order.* A decree for money was passed on the 19th March 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to the execution of the decree on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July 1879, the case was struck off, because the decree-holder had not deposited certain process-fees, without the disposal of the objection. On the 1st October 1879, the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February, the judgment-debtor presented a petition repeating the objection, which, on the 13th March 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile, the Munsif had struck off the case from the file of execution cases pending in his Court on the ground that the records had been despatched to the Appellate Court. On the 18th September 1882, the decree-holder again applied for execution of the decree, praying that "the suit might be restored to its number, and that the judgment-debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule." *Held,* that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made, and that the sale ought to have taken place. *Held,* also, that the proper application for the decree-holder to have made in September 1882 was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because the prayer contained therein referred to the number of the proceedings of October 1879 and to the schedule of the property then ordered to be sold. JAWAHIR SINGH *v.* JADU NATH
I. L. R. 7 All. 439

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EXECUTION OF DECREE—*contd.*

19. STRIKING OFF EXECUTION-PROCEEDINGS—*contd.*

8. ——— *Order striking off execution-proceedings and maintaining attachment.* An order on an application for execution striking off the application, but maintaining attachment effected in pursuance thereof, is an order not warranted by law. RAM NEWAZ *v.* RAM CHARAN . . . . **I. L. R. 18 All. 49**

9. ——— *Mitakshara family—Decree for mesne profits against father—Attachment—Execution proceeding struck off whilst attachment continued—Validity—Fresh proceeding in execution without attachment—Sale order—Death of judgment-debtor before sale—Sons and grandsons if bound—"Representatives" for purposes of execution—Civil Procedure Code (Act XIV of 1882), s. 24—Debt not illegal or immoral—Son's pious obligation to pay.* When an execution-proceeding is struck off, it does not necessarily put an end to the attachment. It is competent for the Court to make an order striking off an execution-proceeding and at the same time continuing the attachment. *Ram Newaz* v. *Ram Charan, I. L. R. 18 All. 49,* dissented from. *Shaikh Kumaruddin* v. *Jawahir Lal, 9 C. W. N. 601 : L. R. 32 I. A. 102 : 1 C. L. J. 381,* relied on. When an executing Court in striking off an execution proceeding ordered the attachment to subsist for three months, and before that period expired, the decree-holder made a fresh application for execution and the Court ordered sale-proclamation to issue in respect of properties attached in the previous proceeding, but the proclamation could not be served on the judgment-debtor, a member of a joint Mitakshara Hindu family, owing to his death. *Held,* that there being a subsisting attachment followed by an order for sale made in the lifetime of the judgment-debtor, the decree-holder was entitled to proceed with the sale and realise his decree. *Suraj Bunsi Koer* v. *Sheo Prosad Singh, L. R. 6 I. A. 88,* followed. *Madho Prasad* v. *Mehrban Singh, L. R. 17 I. A. 194,* distinguished. *Sheo Prosad* v. *Hiralal, I. L. R. 12 All. 440,* referred to. *Held,* further, that the persons who took the judgment-debtor's share in the joint family property by survivorship were representatives of the judgment-debtor within s. 244, Civil Procedure Code, and that it was not open to them to object that the debt for the recovery of which the decree had been obtained was tainted with immorality and illegality. Principle of *Ishan Chunder* v. *Bani Madhob, I. L. R. 24 Calc. 62,* applied. *Azgar Ali* v. *Asaboddin Kogi, 9 C. W. N. 134,* referred to. PEARY LAL SINGH *v.* CHANDI CHARAN SINGH (1906) . . . **11 C. W. N. 163**

10. ——— *Limitation—Application in continuation of previous proceedings in execution.* On the 7th December 1903, the sale of certain immoveable property which had been attached, was ordered. On the 30th January 1904, the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder, and

EXECUTION OF DECREE—*contd.*

19. STRIKING OFF EXECUTION-PROCEEDINGS—*concld.*

he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906 the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held,* that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Jogendra Chandra Sen, 5 C. W. N. 347,* distinguished. *Rahim Ali Khan* v. *Phul Chand, I. L. R. 18 All. 482,* referred to. MUAJIB-ULLAH *v.* UMED BIBI (1908) **I. L. R. 30 All. 499**

20. EXECUTOR, LIABILITY OF.

1. ——— *Failure to produce fund at appointed time—Advisory duty—Appointment of an agent—Degree of care in the appointment—Want of diligence—Breach of duty—Loss caused to the estate—Liability of executor—Trusts Act (II of 1882), s. 30.* When those entrusted with a fund for the benefit of another cannot produce it at the appointed time, *primâ facie* they are liable for the loss which thereby accrues. One who undertakes a duty is bound to know what his duty requires. Where a testator by his will committed the management of the property to his widow along with two out of the five executors including the widow, it is not open to one of the executors, who was not specifically entrusted with the management, to contend for the purpose of avoiding liability as executor that his duties were purely advisory, that he was but one of many, that votes of the majority of the executors governed, and that the real management was entrusted to two of the executors in co-operation with the widow. In the appointment of an agent to carry on business it is incumbent on an executor to act with the same decree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and supervision of the agent, and the loss sustained by the estate can reasonably be connected with the want of such diligence, the loss must fall on the executor. The indemnity clause of s. 30 of the Trusts Act (II of 1882) casts the onus of proof on those who seek to charge a trustee with loss arising from the default of an agent, when the propriety of employing an agent has been established. But where there is a clear breach of duty in the employment and supervision of the agent, the liability of the trustee for breach of trust arises. LAKHMICHAND *v.* JAI KUVARBAI (1905) . **I. L. R. 29 Bom. 170**

2. ——— *Hindu Law—Ancestral property—Trust by the father—Trusts Act (II of 1882), s. 6—Will—Legatees.* Certain legacies

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EXECUTION OF DECREE—*contd.*

20. EXECUTOR, LIABILITY OF—*concld.*

were devised by the will to relatives of the testator and others. *Held*, that, as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies. HARILAL BAPUJI *v.* BAI MANI (1905) . . **I. L. R. 29 Bom. 351**

3. ——— *Executor de son tort, liability of, under Hindu Law, when there is a legal representative—Power of, to pay own debt out of assets—Consent of heir to such payment, how far a defence to creditor's action—Creditor, form of suit by.* When *A* on the death of *B* pays off a debt due to *C* by *B*, which he had guaranteed, and later on in the same day, removes goods belonging to *B's* estate, *A* becomes liable as *executor de son tort*. The rule of English Law that no liability as *executor de son tort* can arise, when there is another personal representative, does not apply in India. *Magaluri Garudiah* v. *Narayana Rungiah, I. L. R. 3 Mad. 359*, referred to. An *executor de son tort* cannot plead *plene administravit*, if he retains the assets for his own use or pays his own debt. In this case *A* became a creditor of the estate, when he paid off the debt, and when he removed the goods he paid a debt due to himself and not to *C*. The consent by the heir to the appropriation by the *executor de son tort* will not be a defence to a creditor's action. Where there is an *executor de son tort*, a creditor may sue for his debt and is not confined to an administration action. NARAYANASAMI PILLAI *v.* ESA ABBAYI SAIT (1905) . **I. L. R. 28 Mad. 351**

4. ——— *Administrator General's Act (V of 1902), s. 4, cl. 2—Indian Trusts Act (II of 1882), s. 72—Discharge by Court of an executor—Vesting of property in the continuing executor.* The Court has power to discharge an executor on his own application, if a proper case be made out. An executor so discharged remains liable for anything he has done or left undone while an executor, it only relieves him from the duties of his office from the date of the discharge. *Ex parte* AMERCHAND MADHOWJI (1905) . **I. L. R. 29 Bom. 188**

21. IRREGULARITY IN CONDUCT OF SALE.

1. ——— *Material irregularity in conduct of sale—No proof of substantial injury—Postponement of sale—Order staying sale withdrawn and sale held without issue of fresh proclamation—Civil Procedure Code, ss. 290, 291, 244 and 311, 312.* A proclamation of sale in execution of a decree fixed the sale for 20th February 1897. By an order of the Subordinate Judge of Gorakhpur, made *ex parte* on 11th February, the sale was stayed, and on 16th the Collector acting on that order, struck the proceedings off the pending file. On 22nd February, in consequence of notice received from the Subordinate Judge that the order staying the sale had been set aside, the sale was brought on in continuation of the sales listed for the

EXECUTION OF DECREE—*concld.*

21. IRREGULARITY IN CONDUCT OF SALE—*concld.*

20th which had not been finished, and on the 23rd, the property of the judgment-debtors was sold to the decree-holder who had obtained leave to bid. On application for confirmation of the sale, the judgment-debtors applied under s. 311 of the Civil Procedure Code to have the sale set aside; but the Subordinate Judge confirmed the sale finding that, although there were irregularities in the conduct of the sale, the judgment-debtors had not sustained any damage and that decision was upheld by the High Court. In a suit to have the sale annulled on the grounds stated in the application under s. 311, one of which was that the sale was illegal without the issue of a fresh proclamation of sale: *Held*, by the Judicial Committee, that the suit was not maintainable. Assuming that a fresh proclamation should have been issued, the omission was an irregularity which had involved no loss to the judgment-debtors, whose only course was to object, as they did, to the confirmation of the sale, which they could not afterwards impeach by regular suit. GAJRAJMATI TEORAIN *v.* AKBAR HUSAIN (1906)
I. L. R. 29 All. 196 : L. R. 34 I. A. 37

22. MISCELLANEOUS CASES.

1. ——— *Execution of decree—Civil Procedure Code (Act XIV of 1882), s. 317—Certified purchaser—Interpretation.* The expression "certified purchaser" in s. 317 of the Civil Procedure Code (Act XIV of 1882) includes the person standing in the shoes of the Court-purchaser. HARI GOVIND *v.* RAMCHANDRA (1906)
I. L. R. 31 Bom. 61

2. ——— *Sale in execution—Purchase of share in property to some extent incumbered—Presumption—Civil Procedure Code, s. 318—Limitation Act (XV of 1877), Sch. II, Art. 138—Suit for possession.* Where in execution of a simple money-decree an undivided share in immoveable property, part of which was subject to mortgages, was sold: *Held*, that in the absence of specific indications to the contrary it must be presumed that the share sold was, as far as might be, the share which was not incumbered. *Held*, also, that the fact that an application under s. 318 of the Code of Civil Procedure made by an auction-purchaser has been rejected as made beyond time is no bar to a suit for possession of the property purchased. *Seru Mohan Bania* v. *Bhagoban Din Pandey, I. L. R. 9 Calc. 602*, and *Kishori Mohan Roy Chowdhry* v. *Chander Nath Pal, I. L. R. 14 Calc. 644*, followed. SHEO NARAIN *v.* NUR MUHAMMAD (1907) . . . . **I. L. R. 29 All. 463**

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——— **by purdanashin lady—**

See TRANSFER OF PROPERTY ACT, s. 59.
13 C. W. N. 40

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EXECUTION OF WILL.

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See DECREE-HOLDER.

EXECUTION-PROCEEDINGS.

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——— statutory powers of—

See TRESPASS . I. L. R. 36 Calc. 433

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13 C. W. N. 188

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See ADMINISTRATOR GENERAL'S ACT.
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12 C. W. N. 237

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3 B. L. R. O. C. 96

See COSTS—SPECIAL CASES—ATTORNEY AND CLIENT . 6 C. W. N. 306

See EVIDENCE . I. L. R. 32 Calc. 710

See EVIDENCE ACT, s. 41.
I. L. R. 14 Calc. 861

See EXPRESS TRUST.
I. L. R. 31 Bom. 418

See HINDU LAW—WILL—CONSTRUCTION OF WILL—GENERAL RULES.
I. L. R. 2 Bom. 388
I. L. R. 23 Calc. 446
10 C. W. N. 566

See LIMITATION ACT.
I. L. R. 31 Calc. 519
10 C. W. N. 874

See MAHOMEDAN LAW—WILL.
4 N. W. 106

See MORTGAGE . 12 C. W. N. 993

See PARTIES—PARTIES TO SUITS—EXECUTORS.

See PROBATE.

See PROBATE AND ADMINISTRATION ACT, s. 3 . . . 10 C. W. N. 232

EXECUTOR—*contd.*

See PROBATE AND ADMINISTRATION ACT ss. 90, 98 . I. L. R. 31 Calc. 628
8 C. W. N. 362

See REPRESENTATIVE of DECEASED PERSON . I. L. R. 4 Calc. 342

See TRUST . I. L. R. 30 Calc. 369

See TRUST ACT, 1882, s. 34.
I. L. R. 33 Bom. 429

See WILL—CONSTRUCTION.
I. L. R. 25 Bom. 429
10 C. W. N. 662

——— by implication.

See WILL—CONSTRUCTION.
I. L. R. 20 Mad. 467
6 C. W. N. 310

——— commission to—

See MAHOMEDAN LAW—WILL.
I. L. R. 25 Calc. 9
L. R. 24 I. A. 196

——— death of—

See HINDU LAW—ADOPTION—REQUISITES OF ADOPTION—AUTHORITY.
I. L. R. 24 Calc. 589

——— de son tort—

See ADMINISTRATOR GENERAL'S ACT.
10 C. W. N. 566

See LIMITATION ACT, 1877, ART. 123.
I. L. R. 12 Mad. 487

See REPRESENTATIVE OF DECEASED PERSON . . I. L. R. 30 Calc. 1044
2 Ind. Jur. N. S. 234

See RIGHT OF SUIT—INTESTACY.
I. L. R. 18 Bom. 337

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——— nature of liability of—

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——— negligence of—

See MORTGAGE—REDEMPTION—REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM . I. L. R. 26 Bom. 643

——— obtaining second grant of probate—

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——— of Mahomedan will—

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I. L. R. 20 Bom. 238
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——— removal of, ground for—

See MAHOMEDAN LAW—WILL.
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EXECUTOR—*contd.*

——— **renunciation by—**

See LETTERS OF ADMINISTRATION.
I. L. R. 19 Bom. 123

See WILL—RENUNCIATION BY EXECUTOR.
I. L. R. 4 Calc. 508

——— **rights of—**

See HINDU LAW—WILL—CONSTRUCTION OF WILL—VESTED AND CONTINGENT INTERESTS . **I. L. R. 1 Bom. 269**
1 Ind. Jur. O. S. 37 : 4 W. R. P. C. 114
6 Moo. I. A. 526

——— **transfer by, to Administrator General.**

See ADMINISTRATOR GENERAL'S ACT, s. 31.
I. L. R. 21 Calc. 732
I. L. R. 22 Calc. 788
L. R. 22 I. A. 107

See APPEAL TO PRIVY COUNCIL—EFFECT OF PRIVY COUNCIL DECREE OR ORDER.
I. L. R. 22 Calc. 1011
L. R. 22 I. A. 208

1. ——— Position and rights of executors—*Contract—Consideration—Gratuitous contract—Contract to pay remuneration to executor for performance of his duties—Remuneration not coming out of assets of estate—Administrator General's Act (II of 1874), s. 56—Illegal contract as being opposed to public policy—Contract Act (IX of 1872), s. 23.* The defendant's brother appointed as executrix and executors of his will his wife, *K*, together with the plaintiff and another, and the plaintiff being unwilling to undertake the duties of executor without remuneration, *K* offered him, and he accepted, a sum of R125 a month for acting as executor; but before any formal agreement was entered into, the defendant's dewan on her behalf proposed to the plaintiff that he should accept a parwana for R125 a month from the defendant instead of from *K*, to which the plaintiff agreed, and he accordingly received from the defendant a parwana, in which she agreed to pay him from her own pocket the above sum monthly as long as he continued to perform the duties of executor of the estate of her brother, in which she was interested. In pursuance of this agreement the plaintiff, in conjunction with the other executor, took out probate of the will, and the stipulated remuneration was paid for some time and then ceased. In a suit for his salary for the portion of the time during which he had acted as executor and had not been paid : *Held*, that there was good consideration for the agreement. Such an agreement, moreover, was not unlawful by reason of s. 56 of the Administrator General's Act (II of 1874), the words "receive and retain" in that section referring to the receipt or retention by an executor or administrator of commission or agency charges from the assets of the estate, and not to remuneration paid to him by a third person. *Held*, also, that the agrement was not void under s. 23 of the Contract Act as being illegal or contrary to public policy, and a suit upon it was, under the circumstances, maintainable. NARAYAN COOMARI DEBI *v.* SHAJANI KANTA CHATTERJEE
I. L. R. 22 Calc. 14

2. ——— *Position of an executor under a Hindu will before the Hindu Wills Act (XXI of 1870) came into force—Difference in position between an executor under a Hindu will and an executor under an English will.* An executor under a Hindu will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English will, and the property does not vest in him ; he holds it only as manager. SARAT CHANDRA BANERJEE *v.* BHUPENDRA NATH BASU . **I. L. R. 25 Calc. 103**

3. ——— Rules and decisions of Court of Chancery as to executor—*Omission in will of directions as to conversion by executor—Liability of executor.* The rules and decisions of the Court of Chancery in England, relative to the duty of an executor to convert, in the absence of any special direction to that effect in the will, do not, without great qualifications, apply in the High Court of Bombay, and the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in his administration of the estate. Therefore, where the Will of a Portuguese testator contained no special direction for conversion, nor any sufficient indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively in specie, so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to their testator, which subsequently became much depreciated in value :—*Held*, that the executors were not liable for the loss so occasioned to the estate of the testator. DESOUZA *v.* DESOUZA . **12 Bom. 184**

4. ——— Derivative executor—*Succession Act (X of 1865).* Under the succession Act, the executor of an executor is not derivative executor of the original testator, even though such testator died before 1866. DESOUZA *v.* SECRETARY OF STATE FOR INDIA **12 B. L. R. 423**

5. ——— Express trustee—*Limitation Act, XIV of 1859, s. 2—Trustee for heirs.* An executor, who by the will is made an expess trustee for certain purposes, is, as to the undisposed-of residue, a trustee within the scope of s. 2 of Act XIV of 1859 for the heir or heirs of the testator. LALLUBHAI BAPUBHAI *v.* MANKUVARBAI
I. L. R. 2 Bom. 388

6. ——— Executor also legatee under will. An executor of a will is not obliged in this country, as in England, to shed his character of executor before he can appear in the new character of legatee. BAGOO JAN *v.* CHOWDHRY ZUHOORUL HUQ . . . . . **13 W. R. 69**

7. ——— Appointment of executor—*Administrator General's Act (II of 1874), ss. 18, 26,*

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EXECUTOR—*contd.*

27, 29, 52, 54. When a testator has omitted to appoint an executor under his will, the Court will appoint as executor the person whom it would appear from the tenor of the will the testator contemplated should be executor. *In the goods of Punchard, L. R. 2 P. & D. 169,* and *In the goods of Adamson, L. R. 3 P. & D. 253,* followed. *In the goods of* COURJON . **I. L. R. 25 Calc. 65**

8. ——— Liability of executor for devastavit by co-executor—*Held per* NORMAN, *J.* (PHEAR, *J.*, dissenting), that an executor who takes no share in the administration of his testatrix's estate is nevertheless liable for the loss occasioned by his co-executor neglecting to get in the assets. *Per* PHEAR, *J.*—In order to make one executor liable for devastavit committed by his co-executor, there must be a distinct allegation in the plaint that the devastavit has been committed by the co-executor to the knowledge of the executor. GREENWAY *v.* HOGG

Bourke A. O. C. 111 : Cor. 97

In the same case in the Court below it was held by LEVINGE, *J.*, that an executor will not be held liable for devastavit if the will was so framed as to mislead him, and he was not called upon to act differently from his own views by any parties taking an interest under the will. HOGG *v.* GREENWAY . **2 Hyde 3**

9. ——— Power of executor of Hindu will. The executor of a Hindu will has no power by acknowledgment to revive a debt barred by limitation except as against himself. GOPALNARAIN MOZOOMDAR *v.* MUDDOMUTTY GUPTEE

14 B. L. R. 21

10. ——— Power of executor to pay barred debt. An executor may pay a debt justly due by his testator, though barred by the Statute of Limitation, and will in equity be allowed credit for such payment. TILLAKCHAND HINDUMAL *v.* TILAMAL SUDARAM . . . **10 Bom. 206**

11. ——— Renunciation of executorship—*Fiduciary relationship—Administration suit—Suit against purchaser from executor to set aside sale.* *D*, a Hindu, died leaving three sons, *S, SC,* and *R*, who on his death made a partition of his estate, and *S* covenanted with *SC* to discharge all claims made against the estate of *D*. In 1828 *B*, who claimed a portion of the share taken by *SC*, on partition with mesne profits, filed a bill in the Supreme Court against *SC* and others as representatives of *D*, and obtained a decree for R2,00,000. Pending this litigation, *SC* died, leaving six sons, *J, M, H, P, C,* and *SM*, and a will made before the birth of *SM*, by which he left all his property to his sons other than *SM*. On the death of *SC*, *J*, as one of the executors of his will, compromised *B's* suit, so far as it related to the estate of *SC*, for R80,000, and afterwards, in the same capacity, sued the representatives of *S* to recover that amount and the costs in the suit brought by *B*, and obtained a decree for R1,70,000. In the meantime *H* died, leaving the plaintiffs, his sons and heirs, and his brothers *J* and *M*, his executors. *J* renounced the executorship. *M*, on the 3rd June 1854, as executor of *H* executed a deed of assignment, by which he conveyed to *J* and *SM*, for R5,000, the interest of the plaintiffs in the decree obtained by *J*, and subsequently, at a sale of property belonging to the representatives of *S* in execution of the decree, *J* himself became the purchaser. In 1857, in an administration suit which had been brought by the plaintiffs to compel *M* to account for the assets received by him from the estate of *H*, the master was directed to take an account, which was accordingly done. In a suit brought by the plaintiffs, the sons of *H*, against *J*, *M* and *SM* to set side the deed of 23rd June 1854 :—*Held*, that, notwithstanding the renunciation of executorship by *J*, he stood in a fiduciary relation to the plaintiffs, and the assignment, being found to have been made for an inadequate consideration, was ordered to be set aside on the plaintiffs paying the purchaser *J* the amount of the purchase-money. A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside. DHONENDER CHUNDER MOOKERJEE *v.* MUTTY LALL MOOKERJEE

14 B. L. R. 276 : 23 W. R. 6 : L. R. 2 I. A. 18

12. ——— Liability of executor for funeral of testator. Although the executor defendants first gave orders for a third class funeral for the deceased, yet, as they by their conduct induced the plaintiff to furnish a second class funeral, they were held liable to pay for the same, whether they had assets or not. PAUL *v.* DONOHOY

6 W. R. Civ. Ref. 27

13. ——— Power of executor to mortgage—*Hindu will. Per* MARKBY, *J.*—The executors of the will of a Hindu cannot, by virtue of their character as executors, mortgage the estate of the testator, in the absence of any power, express or implied, contained in the will. NILKANT CHATTERJEE *v.* PEARY MOHAN DAS

3 B. L. R. O. C. 7 : 11 W. R. O. C. 21

14. ——— *Hindu will—Mortgage—Liability of estate for loan.* When, in order to save an estate from sale in execution of a decree against the testator, his executor raised a loan from the plaintiff giving him a mortgage of the testator's property :—*Held*, that, even if the executor had funds to pay the plaintiff the debt without raising a loan, that fact would not invalidate the plaintiff's claim against the estate unless there was good reason to infer that he knew of those funds or might have known of them if he had used ordinary diligence in making enquiries on the point. KALEE NARAIN ROY CHOWDHRY *v.* RAM COOMAR CHAND

W. R. 1864, 99

15. ——— *Executors, power of, to mortgage under Act V of 1881—Probate and Administration Act (V of 1881), s. 90—Probate*

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EXECUTOR—*contd.*

and Administration Act (VI of 1889), s. 19, effect of, on a mortgage executed by executors between 1881 and 1889—Act VI of 1889, retrospective effect of—Construction of will. One *A* died in 1883, after having executed a will and leaving two minor and three major sons. The major sons, who were the executors, mortgaged a portion of the estate in favour of the plaintiff for the purpose of purchasing other properties, but they did not obtain the sanction of the District Judge required under s. 90 of Act V of 1881. The two material clauses of the will were as follows:—"(2) I have certain personal debt, and I have some debt also which is joint with my brothers. In order to pay off the said debt, the executors shall sell, mortgage, or pledge moveable or immoveable properties of my estate or shall let out in patni or mourasi-mokurari the immoveable properties of my estate, and they shall pay off the said debt from the proceeds. (3) If the executors desire to sell the immoveable properties which I own and hold in order to purchase more profitable properties than those, they shall be competent to do that even." This suit was brought on that mortgage. *Held*, that, although under Act V of 1881, which was in force at the time the mortgage was executed, an executor had no power to sell immoveable property without the sanction of the Court, s. 19 of the Probate and Administration Act (VI of 1889) had made valid all invalid alienations that had been effected since 1881. That upon a construction of cls. 2 and 3 of the will, those clauses do not imply a limitation on the powers of the executors, and there is nothing in those clauses that interferes with the power of the executors under the law. RAJANI NATH MUKHOPADHYAYA *v.* RAMANATH MUKHERJI

3 C. W. N. 483

16. ——————— *Power of executors to mortgage testator's properties—How far restricted by necessary implication.* Where a will contained the following provision, *viz.*—"The executor shall pay all my debts which are due to money-lenders, and to Babu Radheka Charan Sen as shown by his khattas; if there be any difficulty in paying off the debts from the money due to me, the executor shall either sell the whole or a portion of my estate, or make any other settlement of the estate such as patni or dar-patni, etc., and shall pay off my debts from the consideration-money thus acquired." *Held*, that upon such authority the executor had no power to mortgage any portion of the testator's estate. KANTI CHANDRA CHATTOPADHYA *v.* KRISTO CHURN ACHARJEE . . **3 C. W. N. 515**

17. ——————— *Manager under Hindu will—Power of mortgage and borrowing money.* *R R D* died possessed of certain property in Calcutta, and left him surviving *S D*, widow of his son *J C*, deceased, and three granddaughters, upon whose marriages he directed *H P*, his executor, to expend R1,600, and to pay his debts, etc., and further directed that, if there should not be money forthcoming for the purpose specified in the will, the property should be sold to make up the deficit. *HP* expended on the marriages much more than was limited by the will, and for this purpose mortgaged the property to *T C* and others, who were proceeding to foreclose when S *D* sued to have the mortgage-deed set aside as against the heir of *R R D*, which she claimed to be, through *U S*, deceased, whom she had adopted under a direction in the will of her husband that she should adopt three sons in succession, a direction which *H P* was enjoined by *R R D's* will to see carried out. The mortgagee resisted her claim on the grounds that she had not adopted a second son, that the powers of sale to *H P* included a power of mortgage, and that the property was necessarily mortgaged for family purposes. Judgment was given for the plaintiff. *Held*, that *R R D* had no power to mortgage the property; that an attorney or executor under a Hindu will has not the same power over a testator's estate as an executor would have over leasehold estate according to English Law; that according to Hindu Law, a manager or an executor under a will has only a limited and qualified power over the immoveable estate of the testator; that the general power of a manager under a will may be restricted by the will; that a manager under a will is bound to act according to the directions in the will; and that where an attorney or manager under a will has power to mortgage for specific purposes, it is the duty of the mortgagee to enquire into the circumstances under which, and the authority upon which, the mortgage was effected that when a will directs a certain sum to be expended for marriage purposes, the manager or executor had no power to expend a larger sum thereon; that a mortgagee having notice of such a bequest is not justified in lending a larger sum for that purpose; that a direction in a will to sell houses and invest the surplus proceeds in Government securities does not authorize the executor to borrow money at a high interest, and amounts to a direction not to mortgage the houses; that when a plaintiff seeks to set aside a mortgage, on the ground that the mortgagor had no power to mortgage, and that the mortgagees had acted fraudulently, the Court can grant relief even if the fraud be not made out the issue as to the mortgagor's power to mortgage being found in favour of the plaintiff. SREEMUTTY DOSSEE *v.* TARACHURN COONDOO CHOWDHRY

Bourke A. O. C. 48 : 3 W. R. Mis. 7 note

18. ——————— **Power of sale**—*Succession Act (X of 1865), s. 269—Mortgage.* Certain persons, being executors of the will of an Englishman domiciled in India, such will having been made after the Succession Act came into operation, and charging the testator's estate with the payment of his debts, having as such executors borrowed certain moneys from a bank wherewith to discharge debts incurred by them in the administration of the estate of the testator, gave as such executors to such bank a bond for the payment of such moneys on a certain date. By a second instrument, bearing the same date as the bond, they mortgaged as such executors aforesaid to the manager of such bank all their right, title, and interest in certain real estate of the

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EXECUTOR—*contd.*

testator as security for the payment of the moneys authorizing and empowering, in default of payment of the same, the manager, his successors or assigns, absolutely to sell such real estate, either by private sale or public auction, for the realization of the moneys, and to sign a conveyance or conveyances, and a receipt or receipts for the purchase-money and declaring that such conveyance or conveyances, receipt or receipts, should be as valid as if the same were signed by them. By a third instrument bearing the same date as the other two, they as such executors aforesaid constituted the manager of the bank for the time being their true and lawful attorney for them, and in their names and as their act and deed to sell such real estate and to do all acts necessary for effecting the premises. Default having been made in payment of the moneys by an instrument in writing which recited the instruments already mentioned, the manager of the bank for the time being, described as such, in the exercise of the power of sale and for the purpose of reimbursing to the bank the moneys, granted and conveyed to *B* such real estate and all the estate and interest therein of the executors freed from the mortgage above recited, and the manager for the executors executed the usual covenants for title and further assurance. *B*, having been resisted in obtaining possession of such real estate under such conveyance by a legatee of the testator, sued the legatee and the executors for a declaration of right to, and for possession of, such real estate in virtue of such conveyance. The legatee contended that the executors had no authority to confer a power of sale. *Held* (STUART, *C.J.*, dissenting), that the executors had such authority under s. 269 of the Succession Act, and that the conveyance was accordingly valid and operated to transfer the property to *B*. SEALE *v.* BROWN

I. L. R. 1 All. 710

19. ——— *Power of, to charge estate of testator.* *H K* died on the 5th July 1871, leaving two widows, *J* and *A*, and one son (the defendant) him surviving. By his will he appointed *D* his executor, and named the defendant his residuary legatee. At the time of his death, *H K* was indebted to *M* in a large amount, for which *M* held mortgages on his property. On the 5th March 1873, *M's* debt amounted to R1,33,631, and it was agreed between *M* and *D* as executor that the mortgaged property (estimated at one lakh in value) should be made over to *M* absolutely in part payment, and that *D* should become personally liable to her for the balance of R33,631 wth interest at 9 per cent. payable within twelve months. In consideration thereof, *M* was to release *D* as executor and the defendant from liability for the sum of R1,33,631. An indenture carrying out this agreement was executed on the same day, and *D* gave a bond making himself personally liable to *M* for R33,631. Shortly afterwards a new arrangement was made. *M* agreed to abandon R10,631 of the R33,631 due under the bond and to accept R23,000 payable in yearly instalments of R3,000 in satisfaction of her whole claim. In pursuance of this agreement, *D*, as executor, paid the first instalment, *J* paid the second instalment, *D* having made over the estate of *H K* to the Administrator-General under the provisions of Act II of 1874. *M* died in October 1874, and the plaintiff as her executrix sued the defendant for the instalments due in 1876, 1877, and 1878. *Held*, that, the estate of *H K* having been released by *M* by the deed executed on the 5th March 1873, it was not competent for *D* as executor by a new contract to charge it with any liability in respect of the amount due to *M*. *Childs* v. *Monins, 1 B. & B. 460; Rose* v. *Bowles, 1 H. B. 109;* and *Powell* v. *Graham, 7 Taunt. 581*, followed. CASSIBAI *v.* RANSORDAS HANSRAJ

I. L. R. 4 Bom. 5

20. ——— *Power to sell property—Probate and Administration Act (V of 1881), s. 90.* No one but an executor or administrator has power to apply to the Court under s. 90 of the Probate and Administration Act (V of 1881). Where a testator directed his executor to manage the whole of his estate through the Court of Wards :— *Held*, that there was no restriction on the executor's power of sale, and that the provisions of s. 90 of the Probate and Administration Act did not apply to his case. *Held*, also, that an order on an application under s. 90 of the Probate and Administration Act, at the instance of a beneficiary, where there was no restriction on the power of the executor to sell was without jurisdiction, and appealable under s. 15 of the Letters Patent. *Hurish Chunder Chowdhry* v. *Kali Sundari Debi, I. L. R. 9 Calc. 482*, applied. *In the goods of* INDRA CHANDRA SINGH. SARASWATI DASSI *v.* ADMINISTRATOR-GENERAL OF BENGAL . . . **I. L. R. 23 Calc. 580**

21. ——— *Powers of executor to sell—Probate and Administration Act (V of 1881), s. 90, as amended by Act VI of 1889, s. 14.* S. 90 of the Probate and Administration Act, V of 1881, as amended by Act VI of 1889, s. 14, gives an executor merely the ordinary powers of sale that an ordinary owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity. BEHARILALJI BHAGWATPRASADJI *v.* BAI RAJBAI

I. L. R. 23 Bom. 342

22. ——— **Power of disposition—** *Probate and Administration Act (V of 1881), s. 90.* Under s. 90 of the Probate and Administration Act, the power of an executor to dispose of any property is subject to any restriction imposed by the will appointing him. Where there is no such restriction, the power to dispose is not dependent on the permission of the Court, and the Court has no jurisdiction in the matter. *In the goods of* NUNDO LALL MULLICK . **I. L. R. 23 Calc. 908**

23. ——— **Power of executor to lease.** The executors of the will of a Hindu, to which neither the Hindu Wills Act, 1870, nor the Probate and Administration Act, 1881, apply, have

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such authority only to deal with the estate as the terms of the will confer on them. Neither a power to "manage the estate as they may deem proper," nor a power to sell it, will authorize executors to lease any part of it for 999 years, or (*semble*) for any period exceeding 21 years. JUGMOHANDAS VUNDRAWANDAS *v.* PALLONJEE EDULJEE MOBEDINA **I. L. R. 22 Bom. 1**

24. ——— Power of executor to borrow money—*Probate and Administration Act (V of 1881), ss. 82 and 92—Direction in the will that all the executors will act jointly —Act of an executor who has taken out probate and the others not having done so, how far binding on the estate of the testator.* Where by a will more than one person are appointed executors, and all of them jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate of the testator, s.92 of the Probate and Administration Act (V of 1881), by the reason of any such direction in the will, does not disqualify one of the several executors, who alone has obtained probate to act singly, the others having refused to accept service. Where such an executor renewed *hat-chittas* which were originally executed by the testator, in the same terms as the testator did, and a suit was brought upon these *hat-chittas* against the heirs of the testator :—*Held*, that the debt was binding on the estate of the testator. *Farhall* v. *Farhall, L. R. 7 Ch. App. 123*, referred to, and *Nurul Hossein* v. *Sheo Sahai Lal, I. L. R. 20 Calc. 1, L. R. 19 I. A. 221*, distinguished. SATYA PRASHAD PAL CHOWDHRY *v.* MOTILAL PAL CHOWDHRY . **I. L. R. 27 Calc. 683**

25. ——— *Right of executors to have sums lent to the estate allowed them on account—Limitation.* The right of executors who have used their own moneys for the purposes of the estate to be allowed them in their accounts cannot be affected by limitation before such accounts are taken. KRISHNARAO RAMCHANDRA *v.* BENABAI **I. L. R. 20 Bom. 571**

26. ——— Sale of right, title, and interest of executor under will—*Liability of, for costs—Charge on estate of testator—Gift to executors—Trust—Construction of will.* *K* died leaving a will, which directed, among other dispositions of her property, that her executors should collect the rent of a house belonging to her, and after payment of revenue, taxes, and other expenses, should lay out every month R30 for the worship of a thakoor, and should enjoy what remained in equal shares during their lives. One of the executors, *B*, having been sued by one of the legatees because he had not paid one of the legacies under the will, a decree was made by consent, in execution of which the right, title, and interest of *B* in the said house were sold by the Sheriff and purchased by *D*, who was put in possession of the whole house. The other executor who proved the will subsequently to *B's* having done so then brought a suit against *D*, praying that the will might be construed, the rights of the plaintiff and the defendant ascertained, and the portion she might be entitled to decreed. *Held*, that the intention of the decree against *B* was to make the costs payable, not by the estate of the testatrix, but by *B* himself, and the execution-sale was valid so far only as it conveyed such beneficial interest in the house as he took under the will. *Held*, also, that the property was not a mere gift to the executors subject to a charge, but a trust, and that *B's* interest was in the surplus rents and profits after satisfying the purposes of the will. DEBNARAYAN BOSE *v.* COMULMONEE DOSSEE **20 W. R. 39**

27. ——— Executor de son tort, liability of, in Hindu law—*Assets of deceased's estate —Onus probandi—Award of interest as damages.* In a suit upon a registered bond, payable in eleven yearly instalments, to recover instalments 5-10 from the representatives of two deceased co-debtors, who, as managing members of an undivided Hindu family, had contracted the debt for family purposes, the plaintiff impleaded *G*, the son-in-law of one of the deceased co-debtors, and his brothers, on the ground that they, in collusion with the widow of such deceased co-debtor, had, as volunteers, intermeddled with, and possessed themselves of, substantially the whole property of the family of the deceased co-debtor. *Held*, that *G* and his brothers were properly joined as co-defendants, and were liable for the debt of the deceased to the extent of the assets received by them. *Held*, also, that, as the plaintiff had shown that some property of the deceased co-debtors had passed to *G* and his brothers, the burden of proof lay on *G* and his brothers to show that they had not received so much of the deceased debtor's property as would satisfy the debt. *Held*, also, that interest in the nature of damages, from the date of suit was properly awarded. MAGALURI GURUDIAH *v.* NARAYANA RUNGIAH . **I. L. R. 3 Mad. 359**

28. ——— Executor de son tort—*What constitutes an executor de son tort—Liability of such executor to creditors of deceased—Intermeddling with estate after order for probate made, but before issue of probate—Receipt of assets with consent of person appointed executor—Succession Act (X of 1865), s. 255—Consent-decree—Parties.* Probate is necessary to complete the title of a rightful executor, and until it is actually taken out, a person intermeddling with the assets constitutes himself executor *de son tort*. *R*, the executrix appointed by the will of one *J*, applied to the High Court for probate of the will, and *N*, the widow of *J*, entered a caveat. By a consent-decree, dated 25th February 1892, it was ordered that probate should issue to *R*, and by the same decree it was declared that *R*, as executrix, was not entitled to a sum of R4,178-10-0 or any other sum or sums of money to be received from the B., B. & C. I. Railway Co. In that same year, *N* obtained payment from the Railway Co. of the said sum of R4,178-10-0 and of another sum of R166 due to the deceased. On the 3rd February 1893, probate was issued to *R*. In 1894, the plaintiff sued *N* and *R* for R165 due to him by the deceased *J*. He claimed against *N* as executrix

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de son tort. Held, that, probate not having actually issued to *R* at the time that *N* received the money from the Railway Co., although an order for probate had been made, she had, by receiving it, constituted herself executrix *de son tort*, and was therefore liable to the plaintiff, and could be joined as co-defendant with *R* in the suit. *Held*, also, that the fact that by the terms of the consent-decree of the 25th February 1892 she was allowed to receive the money and retain it, was no defence. The consent-decree did not bind the creditors or free her from her responsibility to them to the extent of the assets which she received. NAVAZBAI *v.* PESTONJI RATANJI . **I. L. R. 21 Bom. 400**

29. ——— Executor who has administered the estate without probate required to lodge will in Court and obtain probate. One *T V* died in 1883, and by his will appointed his brother *T* sole residuary legatee and also his executor, and he directed that, in case of *T's* death, *D* (*T's* son) should be executor. *T* accordingly acted as executor until his death in May 1886, and then his son *D* continued to administer the estate, but neither of them obtained probate of the will. *T* left a will whereby he appointed his two sons, *D* and the applicant, his executors and also his residuary legatees. In June 1895, the applicant, stating that he was one of the residuary legatees of *T*, applied for a citation to be issued to *D* directing him to bring in and prove the will of *T V*. In reply, *D* submitted that there was no necessity to prove the will; that the estate was fully administered, and that he had no funds left in his hands out of which to pay the costs of probate. *Held*, that the executor, *D*, must lodge the will in Court, and that, on the applicant paying half the estimated cost of obtaining probate (including probate duty), *D* should take out probate of the will. DAYABHAI TAPIDAS *v.* DAMODAR TAPIDAS . . **I. L. R. 20 Bom. 227**

30. ——— Death of executor—*Will—Substituted executor—Executor according to the tenor.* Kheraj Lalji, a Hindu, by a codicil to his will, appointed his wife Parvatibai to be his sole executrix, and directed that she should carry on all his affairs, distribute certain moneys annually, and defray certain *sadavarat* expenses in Cutch. He then provided as follows. "In case of the death of my wife Parvatibai, the said affairs and distribution of money mentioned above to be paid by my second wife, Bai Mithibai." Parvatibai proved the will and died, and the plaintiff Mithibai thereupon applied for probate of the will. *Held*, that she was entitled to probate, being executrix according to the tenor of the will. Where a testator appoints an executor and provides that in case of his death another should be substituted, then, on the death of the original executor, though he has proved the will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on that event, whether happening in the testator's lifetime or afterwards. Where a testator by his will names a person to discharge any duties under the will, without expressly appointing him executor, the rule is that, unless it can be gathered from the will that the testator intended such person to pay the debts and legacies under the will, such person cannot be held to be the executor: MITHIBAI *v.* CANJI KHERAJ (1901) **I. L. R. 26 Bom. 571**

31. ——— Debtor executor—*Limitation Act, 1877, Sch. II, Art. 120—Debtor taking possession of the estate of his creditor as executor—Death of such executor—Appointment of new administrator—New cause of action.* A debtor, taking possession of the estate of his creditor as executor, is accountable for the amount of his debts to the estate as assets. On the appointment of a new administrator after the death of such debtor executor, a new cause of action arises, rendering the estate of the said debtor executor accountable both as regards his own said debt as also regarding the general estate of the said deceased creditor remaining in his hands at the time of his death; and a suit by the new administrator to recover, from the executor of the deceased debtor's estate, the property and effects of the deceased creditor—to which Art. 120, Sch. II, of the Limitation Act applies—would not be barred within six years of the death of such debtor executor. KRISTO KAMINI DASSI *v.* ADMINISTRATOR-GENERAL OF BENGAL (1903) . . . **7 C. W. N. 476**

32. ——— Executors who have not proved—*Will—Probate—Probate granted to some of the executors—Executors who have not proved may call for inventory and account from executors who have proved and are managing the estate.* One Ardeshir R. Divecha, a Parsi inhabitant of Bombay, died in 1900. By his will he appointed his wife, his eldest son, and two other persons of whom the applicant was one, to be his executors, his wife and eldest son being named as managing executors. In 1901 the two latter applied for probate. The other two executors, though called on to join in the application, did not do so. The Court granted probate to the wife and the son, and reserved leave to the other executors to apply. No application was, however, made by them. In 1902 the applicant called upon the managing executors for an inventory and account of the deceased's estate. The applicant had no beneficial interest in the estate. It was contended for the managing executors that the applicant had no right to require an inventory and account from them. *Held*, that the applicant was entitled to an inventory and account. The facts that under s. 179 of the Indian Succession Act (X of 1865) the property of the deceased vested in the applicant as executor of the will, and that he might at any time apply for probate, gave him an interest sufficient to justify his application. JEHANGIR RUSTOMJI DIVECHA *v.* BAI KUKIBAI (1903) **I. L. R. 27 Bom. 281**

33. ——— Parties to suit for legacy—*Legacy—Suit by one legatee for a legacy—Right of*

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executor to have other legatees made parties to the suit—Civil Procedure Code (Act XIV of 1882), ss. 32 and 34—Form of suit—Practice—Procedure Liability of executor for breach of trust—Trust Act (II of 1882), s. 23. A legatee is entitled to sue an executor for a legacy bequeathed to him by a Hindu testator in the mofussil. In case such a suit is brought by one legatee, the executor may apply for his own protection that other legatees shall be made parties so that if any rateable abatement is requisite the extent of such abatement may be ascertained in a manner binding on all parties interested. But any such application must be made at the earliest possible opportunity, having regard to the provisions of s. 34 of the Civil Procedure Code (Act XIV of 1882); and in any case it is within the discretion of the Court to decide whether the addition of such parties is necessary "in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit" (see s. 32). If an executor commits breach of trust in respect of trust property that has come to his hands, he is liable, under s. 23 of the Indian Trusts Act (II of 1882), to make good the loss to the beneficiaries or legatees. PURSHOTTAM DEVJISHET THAKAR *v.* KALA GOVINDJI THAKAR (1901)
I. L. R. 26 Bom. 301

34. ——— **Loan by executor**—*Promissory note—Utilisation of loan for estate purposes—Whether loan chargeable on estate.* Apart from any special power given by a Will to an executor, money borrowed by him on a promissory note for the benefit of an estate is not a charge upon the estate. *Farhall* v. *Farhall (1871), L. R. 7 Ch. 123,* referred to. ROMANATH PAUL *v.* KANAI LAL DEY (1894) . . . . **7 C. W. N. 104**

35. ——— *Debt contracted by executor—Co-executor, liability of—Liability of estate for debt incurred by executor.* The estate of a testator is not liable for debts contracted by one of the several executors for goods apparently supplied to the estate. The executor, who contracted the debt, is personally liable for it. *Farhall* v. *Farhall, L. R. 7 Ch. 123,* and *Labouchere* v. *Tupper, 11 Moo. P. C. 198,* referred to. DEBENDRA NATH BISWAS *v.* HEM CHANDRA ROY (1904)
I. L. R. 31 Calc. 253

36. ——— *Personal liability upon a contract of borrowing—Estate not liable.* Upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator. *Farhall* v. *Farhall, L. R. 7 Ch. App. Cas. 123; Labouchere* v. *Tupper, 11 Moo. P. C. App. Cas. 198,* followed. DEBENDRA NATH BISWAS. *v.* RADHIKA CHARAN SEN (1904) **8 C. W. N. 135**

37. ——— **Co-executors—Joint decree-holders**—*Act V of 1881, s. 92—Execution of decree—One of several joint decree-holders not competent to give a discharge for the full amount of the decree—Executors. Held,* that one out of several joint decree-holders is not competent to give a valid discharge for the amount of the joint decree, and his position in this respect is not affected by the fact that he and his fellow-decree holders are co-executors. *Tamman Singh* v. *Lachmin Kunwari, I. L. R. 26 All. 318,* and *Moti Ram* v. *Hannu Prasad, I. L. R. 26 All. 334,* followed. LACHMAN DAS *v.* CHATURBHUJ DAS (1905)
I. L. R. 28 All. 252

38. ——— **Claims by or against**—*Civil Procedure Code (Act XIV of 1882), s. 44, rule (b)—Meaning of the rule.* Those to whom rule (*b*) of s. 44 of the Code relates have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, as for instance legatees or next-of-kin who are not named in rule (*b*). Executors, administrators and heirs have this characteristic in common, not shared by legatees and next-of-kin, namely, that not only do they acquire title from the deceased, but they may represent him. In this is to be found the clue to the meaning of the rule. HAFIZABOO *v.* MAHOMED CASSUM (1906) . . **I. L. R. 31 Bom. 105**

39. ——— **Suit for account**—*Will—Intermeddling with estate—Decree of interference necessary to charge executor—Suit for account against executor—Account on footing of wilful default—Practice—Limitation—Limitation Act (XV of 1877), s. 10, Sch. II, Art. 120.* In law a very small interference or intermeddling with the estate of his testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor. An executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it and having once acted, the subsequent renunciation is void, and he continues liable to be sued in the character of an executor. *Rogers* v. *Frank, (1827) 1 Y. & J. 409,* followed. Modern practice allows of an order charging wilful default being made at any time during the action on a proper case being shown. The plaintiff brought a suit against the executors of the will of her grandfather, praying for a declaration that she was absolutely entitled to the property of her grandfather and for an account of the property in the hands of the executors. The plaintiff claimed as heir and not under the will. *Held,* she was only entitled to accounts for six years preceding the suit as she took no interest in the property under the will, and the executors were not trustees for *her* and the property did not vest in them for any specific purpose in her favour. Such a suit is not a suit for the purpose of *following such property in the hands of the executors and trustees.* AYESHABAI *v.* EBRAHIM (1908) . **I. L. R. 32 Bom. 364**

40. ——— *Probate and Administration Act (V of 1881), ss. 11, 91, 102—Probate action—Successful objector if entitled to costs out of estate as of right—Executor or administrator purchasing property from legatee at auction sale—Validity—Right to perform religious ceremonies given to executors if survives in their heirs on*

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death—Prospective trustee, purchase by—Validity—Administrator de bonis non, if bound to take account from predecessor—Liability to account on failure—Suit for accounts against executor—Limitation—Limitation Act (XV of 1877), s. 10—Sch. II, Art. 120—Delay—Aquiescence. An executor cannot, as a general rule, be allowed either immediately or by means of a trustee to be a purchaser from himself of any part of the assets. Such a purchase is treated as a breach of trust without enquiry whether the transaction was beneficial or not. The position, however, is somewhat different when the executor or administrator purchases from a legatee. Such a purchase may be a perfectly justifiable one, though if challenged in proper time a Court of equity will enquire into it, ascertain the value that was paid by the trustee and throw upon him the onus of proving that he gave full value and that all information was laid before the *cestui que trust* when the property was sold. *Cook* v. *Collingridge, Jacob 607 ; 23 R. R. 155, 767 ; Thompson* v. *Eastwood, L. R. 2 A. C. 216, 236* followed. The purchase at an execution sale of a legatee's interest by the administratrix *durante minoritate* was in this case upheld as not made in contravention of s. 91 of the Probate and Administration Act. A sale is not to be avoided merely because when entered upon the purchaser had the power to become the trustee of the property purchased. It is immaterial whether the purchaser subsequently does in fact become the trustee or not. The true test to be applied in such cases is, has the purchaser used his position in such a way as to render it inequitable that the sale should be upheld. *Clark* v. *Clark, 9 App. Cas. 733,* applied. The right to perform certain religious ceremonies, conferred by the will exclusively on the executors, passed on the death of one of them to the remaining executors, and was not transmitted to the heir of the deceased executor. Upon the death or termination of authority by operation of law of an administration *durante minoritate* it is the duty of the executor, or other person who succeeds him in the administration, to recover and take possession of the un-administered assets of the deceased, to call upon his predecessor or his personal representative to render account of the estate and to recover damages, if necessary, for waste and misappropriation by his predecessor, and if required, by the institution of appropriate judicial proceedings. If he fails to do so, he must be held liable to the extent to which the estate would have been benefited if he had faithfully performed his duty. In order to see whether s. 10 of the Limitation Act applies to a suit against an executor, it must be determined, *first,* whether upon the terms of the will there was a trust under which the property had become vested in the executors for a specific purpose, and, *secondly,* with reference to the frame and scope of the suit, whether its purpose was to follow in the hands of the trustee or his legal representative property which had become vested in trust for a specific purpose. An executor as such is not an express trustee for a legatee. *Evans* v. *Moore, [1891] 3 Ch. 119 ; Ramdhan* v. *Manibai, I. L. R. 25 Bom. 429,* followed. A suit for accounts pure and simple against an executor cannot be treated as a suit against a trustee for the purpose of following trust property. *Saroda* v. *Brojonath, I. L. R. 5 Calc. 910,* followed. Such a suit would be governed by Art. 120 of Sch. II of Act XV of 1877. How far delay on the part of the person interested, in instituting a suit for accounts against an executor may disentitle him to relief in equity, apart from the law of limitation, discussed. BARADA PROSHAD BANERJEE *v.* GAJENDRA NATH BANERJEE (1909)
13 C. W. N. 557

EXECUTORY CONTRACT.

See ASSIGNMENT . **10 C. W. N. 755**

EXECUTRIX.

See POWER OF ATTORNEY.
13 C. W. N. 1191

——— **position of—**

See TRESPASS . **I. L. R. 36 Calc. 28**

——— **Maladministration**—*Creditor—Suit—Maladministration, charge of, cannot be gone into in an application under s. 244—Civil Procedure Code (Act XIV of 1882), ss. 234, 244—Suit, right to bring, by creditor of estate to have estate administered.* Where the real question involved in a suit is in substance whether or not the defendant, in administering the debtor's estate has been guilty of maladministration, and whether the plaintiffs, as creditors of that estate, are entitled to have the estate administered on that footing: *Held,* that this is a much wider question than one merely relating to the execution of the decree, and a regular suit must lie. *Held,* further, that it lies on the defendant to substantiate that the plaintiff's *primâ facie* right to bring such a suit is barred by s. 244 of the Civil Procedure Code. *Kushrobhai Nasarvanji* v. *Hormazsha Phirozsha, I. L. R. 11 Bom. 727, Jogemaya Dassi* v. *Thackomoni Dassi, I. L. R. 24 Calc. 473,* referred to. S. 234 of the Civil Procedure Code only applies to an account of the property, which has actually come to the hands of the executor. SARATMANI DEBEE *v.* BATA KRISHNA BANERJEE (1908)
I. L. R. 35 Calc. 1100
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——— **application to alter endorsement on—**

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE.
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——— **without objection—**

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EX-PARTE DECREE.

See APPEAL—EX PARTE CASES.

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EX PARTE DECREE—*contd.*

See CIVIL PROCEDURE CODE, 1882, s. 108 (1859, s. 119).

See DECREE.

See EVIDENCE—CIVIL CASES—DECREES, JUDGMENTS, AND PROCEEDINGS IN FORMER SUITS—UNEXECUTED, BARRED, AND EX PARTE DECREES.

See FRAUD . **I. L. R. 29 Calc. 395**

See LIMITATION ACT, 1877, ART. 164 (1871, ART. 157). **I. L. R. 31 Bom. 303**

See LIMITATION ACT, 1877, SCH. II, ARTS. 178, 179 . **I. L. R. 28 Calc. 113**

See PRACTICE . **I. L. R. 32 Bom. 534**

See RIGHT OF SUIT—DECREES. **I. L. R. 28 Calc. 475**

See SMALL CAUSE COURT, PRESIDENCY TOWNS—PRACTICE AND PROCEDURE—NEW TRIAL . **I. L. R. 30 Calc. 588**

1.——— **Appeal—Remand**—*Civil Procedure Code (Act XIV of 1882), ss. 108, 540, 562, 564, 588 (9)—On appeal against ex parte decree, Court may reverse decree on the ground that it was wrongly decided ex parte and remand the case.* When a suit is decided *ex parte* an Appellate Court to which an appeal from the decree is preferred under s. 540 of the Code of Civil Procedure, has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for re-hearing. *Jonardan Dobey* v. *Ramdhone Singh, I. L. R. 23 Calc. 738,* not followed. *Parvatishankar Durgashankar* v. *Bai Naval, I. L. R. 17 Bom. 733,* and *Caussanel* v. *Soures, I. L. R. 23 Mad. 260,* dissented from. *Perumbara Nayar* v. *Subrahmanian Patta, I. L. R. 23 Mad. 445,* followed. SADHU KRISHNA AYYAR *v.* KUPPAN AYYANGAR (1906) **I. L. R. 30 Mad. 54**

2.——— **Execution of decree**—*Civil Procedure Code, s. 108—Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Limitation.* A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August 1900 and made absolute on the 21st December 1901. As against one defendant, however, the decree was *ex parte,* and it was set aside as against her on appeal on the 11th March 1902. Subsequently a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November 1904. As against this defendant the decree was made absolute on the 27th of November 1905. *Held,* that the orders of the 25th August 1900 and the 16th November 1904, between them, operated as one decree for the sale of the mortgaged property; that the joint effect of the orders of the 21st December 1901 and the 27th November 1905 was to make absolute this decree, and

EX PARTE DECREE—*concld.*

that an application for execution made on the 21st December 1905, was not barred by limitation. *Bhura Mal* v. *Har Kishan Das, I. L. R. 24 All. 383; Sham Sundar* v. *Muhammad Ihtisham Ali, I. L. R. 27 All. 501,* and *Shaida Hussain* v. *Hub Hussain, All. Weekly Notes (1902) 184,* referred to. GAURI SAHAI *v.* ASHFAK HUSSIN (1907) **I. L. R. 29 All. 623**

EX PARTE ORDER.

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 11 . **I. L. R. 31 Mad. 5**

See PRACTICE . . **12 C. W. N. 65**

See SMALL CAUSE COURTS ACT, 1882, CHAP. VII . **I. L. R. 31 Bom. 45**

EX PARTE PROCEEDING.

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—CASES IN WHICH MAGISTRATE CAN DECIDE AS TO POSSESSION . . **6 C. W. N. 925**

EXPECTANCY.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—EXPECTANCY.

See HINDU LAW—REVERSIONERS—POWER OF REVERSIONERS TO ALIENATE REVERSIONARY INTEREST. **I. L. R. 17 All. 125**

See ONUS OF PROOF—HINDU LAW—ALIENATION . **I. L. R. 17 All. 125**

EXPERT AGENT.

——— **negligence of—**

See CONTRACT . . **13 C. W. N. 59**

EXPERT OPINION.

See VALUATION OF LAND. **I. L. R. 32 Calc. 343**

EXPLOSIVE SUBSTANCES ACT (VI OF 1908).

——— **ss. 4, 4A, 4B, 5, 6—**

——— *Conspiracy, charge of—Ingredients necessary to support charge—Possession or control of an explosive substance within the meaning of the Act—Conduct, evidentiary value of.* In regard to a criminal charge, when an article is found in a room to which several persons have access, it cannot be held to be in the possession of any one of them. Where a bomb was found in one of the rooms of a house to which all the inmates of the house had access: *Held,* that it could not be held that a particular inmate was in possession of the bomb within the meaning of the Explosives Substances Act, although the finding of the bomb in a room assigned to one of the inmates, might be fair ground for imputing to him possession or control of the bomb within the meaning of the Act. *Queen-Empress* v. *Sangam Lal, I. L. R. 15*

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EXPLOSIVE SUBSTANCES ACT (VI OF 1908)—*concld.*

——— **ss. 4. 4A, 4B, 5, 6**—*concld.*

All. 129, 131, followed. The evidence of conduct of an accused person unless it is incompatible with his innocence, is in fact a makeweight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperament, surroundings and other circumstances as to how a man would act in a particular situation and all these combine to form a most fallacious basis for assured conclusions. It is dangerous to convict on a charge which covers a wide period of time and which is supported by evidence indefinite as to the point of time when the offence was committed. Where a charge of conspiracy against the accused was framed in these words :—" That you . . . on or between the 8th of June 1908 and 31st July 1908, at Midnapur, unlawfully and maliciously conspired to cause by an explosive substance, *viz.*, a bomb, an explosion in British India of a nature likely to endanger life and thereby committed an offence, etc. . . ." *Semble :* That the charge should have specified with what other persons the accused had conspired. In a criminal trial, two documents were made exhibits, one of which purported to be a record of contemporaneous statements made to the Police by an informer in their service and the other a document written up by a police-officer for the purpose of assisting the informer in connection with the evidence, which the Police, then expected he would give : *Held,* that the statements contained in the documents were not evidence against the accused, but they were useful in so far as they tended to expose the methods employed in getting up the prosecution case. Their evidentiary value was in no sense constructive, but if anything, destructive of the case against the accused. JOGJIBAN GHOSH *v.* THE KING-EMPEROR (1909)
13 C. W. N. 861

EXPRESS MALICE.

See LIBEL . **I. L. R. 32 Calc. 318**

EXPRESS TRUST

See LIMITATION ACT (XV OF 1877), s. 10.
I. L. R. 32 Bom. 394

See TRUSTS ACT 1882, ss. 81, 83.
I. L. R. 31 Bom. 222

See WILL . **I. L. R. 31 Mad. 283**

——— *Limitation Act (XV of 1877), s. 10—Effect of limitation in cases where the person liable for payment of a legacy and the person entitled to receive the legacy are the same.* *L K* was a partner in the firm of *R L.* As such partner he was entitled to his proportion of certain shares of the Hongkong Mill and of the commission earned by his firm as agents of such mill. On his retirement from the firm in 1900 entries were made in the firm's books from which it appeared that 35 of such shares

EXPRESS TRUST—*concld.*

were appropriated to the said *L K* and that he from the date of the entries ceased to have any interest in the firm of *R L. Held,* that under provisos 2 and 4 of s. 92 of the Evidence Act evidence was admissible to show that in fact the arrangement was that *L K* should continue to be entitled to his share in the commission. The suit was brought by the executors of *L K's* will against the executors of *R L's* will. The first plaintiff was an executor of both wills. *Held,* (i) that *R L* was an express trustee in respect of *L K's* share of the commission, and that s. 10 of the Limitation Act was no bar to the plaintiff's suit. *Soar* v. *Ashwell, [1893] 2 Q. B. 390,* followed and applied. (ii) That the executors of *R L's* will could not rely on the Statute of Limitation when the non-payment of *L K's* share of the commission within three years of the receipt thereof was occasioned by their own default. (iii) That when the person liable for the payment of a legacy and the person entitled to receive it are the same, no question of limitation can arise. *Binns* v. *Nichols, L. R. 2 Eq. 257,* followed. NARRONDAS *v.* NARRONDAS (1907)
I. L. R. 31 Bom. 418

EXTENSION OF TIME.

See APPEAL TO PRIVY COUNCIL.
11 C.W. N. 1104

See EXECUTION **I. L. R. 36 Calc. 422**

EXTINGUISHMENT OF RIGHT.

See LIMITATION ACT, 1877, s. 28.
5 C. W. N. 545

EXTORTION.

See CRIMINAL PROCEDURE CODE, s. 233.
13 C. W. N. 507

See SENTENCE—CUMULATIVE SENTENCES.
I. L. R. 10 All. 58

1. ——— **Feigning attempt to commit offence**—*Penal Code, s. 387.* The feigning of an attempt to commit suicide in order to extort money is an offence under s. 387 of the Penal Code. REG. *v.* GREGORY . . **1 Ind. Jur. N. S. 423**

2. ——— **Intentionally putting person in fear of injury.** To amount to the offence of extortion, property must be obtained by intentionally putting a person in fear of injury and thereby dishonestly inducing him to part with his property. QUEEN *v.* MEAJAN . **4 W. R. Cr. 5**

3. ——— **Putting person in fear of his life and taking property**—*Robbery.* When a person through fear offers no resistance to the carrying off of his property, but does not deliver any of the property to those who carry it off, the offence committed is robbery, and not extortion. QUEEN *v.* DULEELOODDEEN SHEIKH
5 W. R. Cr. 19

4. ——— **Requisites for offence**—*Penal Code, s. 384—Abetment. Held,* that it is not necessary in a case of extortion under the Penal Code that the threat should be used and the property

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EXTORTION—*contd.*

received by one and the same individual, nor that the receiver should be charged with abetment, although that might be done. REG. *v.* SANKER BHAGVAT **2 Bom. 417 : 2nd Ed. 394**

5. ——— *Penal Code, s. 383—Belief of right to property.* A conviction of extortion by a full-power Magistrate, and an order on a Sessions Judge rejecting an appeal therein, reversed by the High Court under s. 404 of the Criminal Procedure Code, as there was no such fear of injury as is contemplated by s. 383 of the Penal Code, nor was the delivery of money by the complainants thereby induced, nor did it appear from the evidence that the money was obtained dishonestly by the prisoner who might have demanded it, believing in good faith that he was entitled to it. REG. *v.* ABDUL KADAR . **3 Bom. Cr. 45**

6. ——— **Wrongful Confinement**—*Money lent in ordinary course of business to pay amount extorted—Lender—Penal Code (Act XLV of 1860), ss. 213, 342, and 384—Accomplice.* The accused, as sub-inspector of police, arrested one *J*, wrongfully confined him, and extorted from him R200 under a threat that he, the accused, would not release *J* unless the money were paid. This money was paid on this account by *P*, a money-lender, who lent *J* the money for this purpose. Accused was convicted under ss. 342 and 384 of the Penal Code, In appeal the Sessions Judge held that *P* was not an accomplice, and having considered his evidence accordingly, dismissed the appeal. *Held*, that it was sufficiently shown that the money was not voluntarily given, that it was given by *J* to obtain his release from police custody, in which he was detained on no reasonable or sufficient ground, and it was extorted, because the sub-inspector refused to release *J*, as he was bound to do, unless he were paid that money. That *P*, paying such money under such circumstances, could not be regarded as an accomplice of the sub-inspector in such misconduct. AKHOY KUMAR CHUCKERBUTTY *v.* JAGAT CHUNDER CHUCKERBUTTY . . **I. L. R. 27 Calc. 925 4 C. W. N. 755**

7. ——— **Obtaining money by threatening not to conduct case.** The defendant was junior vakil for the complainant (the defendant in a case before the Magistrate), and was instructed by his senior to apply for an adjournment, but the defendant obtained a bond from the complainant and conducted his defence. The defendant was convicted of extortion. *Held*, that the conviction was bad. ANONYMOUS . . . **5 Mad. Ap. 14**

8. ——— **Terror of criminal charge**—*Fear of injury—Penal Code, s. 383.* The terror of a criminal charge is a fear of injury within the meaning of those words in s. 383 of the Penal Code. Extortion may be equally committed, whether the charge threatened is true or false. QUEEN *v.* MOBARICK . . . . . **7 W. R. Cr. 28**

9. ——— **Making use of influence, supposed or real, to obtain money.** The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal, of loss of appointment is extortion within the meaning of s. 384 of the Penal Code. *In the matter of* ABBAS ALI . **18 W. R. Cr. 17**

EXTORTION—*concld.*

10. ——— **Abetment**—*Confinement—Evidence—Appeal Court—Misjoinder—Penal Code (Act XLV of 1860), s. 347—Criminal Procedure Code (Act V of 1898), s. 428.* A head constable in charge of a police out-post agreed to drop proceedings against *K*, who had been arrested on a certain charge, on condition that *K* paid to him a sum of money. The head constable sent away *K* in charge of two chaukidars to procure the money. In order to effect this object, the chowkidars subsequently confined *K* at various places and maltreated him. *Held*, that it would be impossible to hold the head constable guilty of abetting an offence under s. 347 of the Penal Code in the absence of proof that he gave definite orders to that end. Where in an appeal a Sessions Judge is of opinion that the evidence of witnesses, who were not examined in the lower Court, is necessary, he should proceed under s. 428 of the Criminal Procedure Code. Where in showing cause against a rule obtained by a petitioner, an objection as to misjoinder, which formed no portion of the rule was taken by the Crown for the first time, the High Court declined to give effect to it. EMPEROR *v.* LUCHMAN SINGH (1904) . **I. L. R. 31 Calc. 710**

EXTRADITION.

See CHARGE—ALTERATION OR AMENDMENT OF CHARGE. **I. L. R. 17 Bom. 369**

See WARRANT OF ARREST—CRIMINAL CASES . . **I. L. R. 1 Bom. 340**

——— **Act VII of 1854 (Fugitive Foreign Offender), s. 23**—*Act XVII of 1862—Warrant under the Extradition Act.* S. 23 of Act VII of 1854 is not repealed by the Schedule to Act XVII of 1862. The treaty of the 6th of November 1817 between His Highness the Gaekwar of Baroda and the East India Company provides for the delivery upon requisition of accused persons to His Highness the Gaekwar in a manner other than in accordance with the provisions of the sections of Act VII of 1854 prior to the 23rd section. The latter section is therefore applicable in such a case. *Semble :* That Government would not be justified in delivering up an accused person to His Highness the Gaikwar without holding a preliminary enquiry into the guilt of such accused. Where a warrant issued under s. 23 of Act VII of 1854 directed the accused person to be delivered up to the Resident at Baroda, without showing either that an enquiry had been made or was about to be made, the Court held that it was not therefore invalid, as the presumption was that the accused was to be delivered up to the Resident in order that that officer might institute such an enquiry as is required by the Act. A warrant issued under s. 23 of the Act should recite either that an

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EXTRADITION—*concld.*

enquiry has been held, or is about to be held, with reference to the guilt of the accused. REG. *v.* SOUTER. *In re* RAVJI BIN KESHAV **8 Bom. Cr. 13**

EXTRADITION ACT (XXI OF 1879).

See HIGH COURT, JURISDICTION OF—MADRAS—CRIMINAL.
I. L. R. 12 Mad. 39

1. ———— s. 8—**European British subjects in Native States**—*Law applicable to British subjects in Native States—Act III of 1884.* Act XXI of 1879, s. 8 (which corresponds with s. 8 of Act XI of 1872, now repealed), extends to all British subjects, European or native, in Native States in alliance with Her Majesty the law relating to offences and criminal procedure for the time being in British India. The Code of Criminal Procedure (Act X of 1882), with the amendments introduced by Act III of 1884, is thus, by virtue of that section, applicable to such British subjects, native or European. QUEEN-EMPRESS *v.* EDWARDS
I. L. R. 9 Bom. 333

2. ———— s. 9 (and Act XI of 1872)—*Jurisdiction of Criminal Court—Offence in foreign territory—Native Indian subject.* A Native Indian subject of Her Majesty committed an offence (*viz.*, theft in a dwelling-house) in the territory of a Native State in alliance with Her Majesty, and was discovered in the territory of another Native State in alliance with Her Majesty, and from there brought down or came of his own accord to Ahmedabad. A certificate was granted by the Political Agent that the offence ought, in his opinion, to be enquired into in British India. At Ahmedabad a preliminary enquiry was held by a Magistrate who committed the accused for trial by the Court of Session. *Held*, that the Sessions Court at Ahmedabad was competent to try the offence committed in foreign territory as if it had been committed in the Ahmedabad District under s. 9 of the Foreign Jurisdiction and Extradition Act, XXI of 1879, for when the accused was brought, from foreign territory to Ahmedabad, he was "found" at a place in British India within the meaning of the section. The expression "was found" used in this section must be taken to mean not where a person is discovered, but where he is actually present. EMPRESS *v.* MAGANLAL
I. L. R. 6 Bom. 622

EXTRADITION ACT (XV OF 1903).

———— ss. 7 and 8—*Power of Magistrate to hold to bail the person arrested to appear before a tribunal in a Foreign State.* There is no provision in the Criminal Procedure Code (Act V of 1898) or in the Extradition Act (XV of 1903) authorizing a Magistrate to hold a person to bail to appear before a tribunal in a State, to which the Extradition Act applies, unless the warrant is endorsed under the provisions of s. 8 of the Act. BALTHASAR *v.* EMPEROR (1906)
I. L. R. 33 Calc. 1032

EXTRAORDINARY CRIMINAL JURISDICTION, HIGH COURT.

See SPECIAL TRIBUNAL.
13 C. W. N. 605

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION OF HIGH COURT.

See TRESPASS . **I. L. R. 36 Calc. 433**

F

FABRICATING FALSE EVIDENCE.

1. ———— **Necessity of finding the intention**—*Penal Code (Act XLV of 1860), ss. 192, 193—Causing false entry of a marriage in the marriage register —Mahomedan marriage register.* In order to convict a person of fabricating false evidence under s. 193, Indian Penal Code, it is necessary to find that the person intended that the fabrication may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant as such or before an arbitrator. Where the accused by falsely representing to the marriage registrar that a certain marriage had been solemnised, induced the registrar to make a false entry of the registration of the marriage: *Held*, that the accused cannot be convicted of the offence of fabricating false evidence under s. 193, Indian Penal Code, in the absence of a finding that the intention of the accused was that the false entry in the marriage register might appear in evidence in a judicial proceeding or some other proceeding of a like nature as contemplated by s. 192, Indian Penal Code. MOHAMED SIDDIQ *v.* EMPEROR (1907)
11 C. W. N. 911

2. ———— *Penal Code (Act XLV of 1860), s. 192.* One Cheda Lal, whose brother Debi was an accused person, applied to the Court on behalf of Debi asking that the witnesses for the prosecution might first of all be made to identify Debi. The Court assenting to this request, Cheda Lal produced before the Court ten or twelve men, none of whom could be identified as Debi by any of the prosecution witnesses. Upon being asked by the Court where Debi was, Cheda Lal pointed out a man who, upon further investigation, was discovered to be wearing a false moustache and to be not Debi at all, but one Chimman. *Held*, upon these facts, that Cheda was rightly convicted of fabricating false evidence having regard to the definition contained in s. 192 of the Indian Penal Code. EMPEROR *v.* CHEDA LAL (1907)
I. L. R. 29 All. 351

FACT.

———— **finding of**—

See SECOND APPEAL . **11 C. W. N. 83**

———— **mis-statement of**—

See LIBEL . **I. L. R. 36 Calc. 883**

———— **questions of**—

See CONCURRENT JUDGMENTS ON FACTS.

See PRIVY COUNCIL . **13 C. W. N. 830**

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FACT—*concld.*

——— **questions of**—*concld.*

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—QUESTIONS OF FACT.

FACTORIES ACT (XV OF 1881).

——— **ss. 12, 15 (1) (e)**—*Fencing machinery—Manager—Occupier—Liability.* The accused, who was the manager of a ginning factory at Dhulia, resided in a part of the premises on which the factory stood. He was charged under s. 15 (*1*) (*e*) of the Indian Factories Act (XV of 1881) with having neglected to fence certain machinery in the factory; and he was convicted and sentenced by the Magistrate. On appeal the Sessions Judge reversed the conviction and sentence and acquitted the accused. On appeal by the Government of Bombay against this order of acquittal: *Held*, that the accused was not liable to conviction under s. 15 (*1*) (*e*) of the Indian Factories Act (XV of 1881), since the manager of a factory cannot be said with truth to have been the occupier thereof. EMPEROR *v.* RAMPRATAP (1905) . **I. L. R. 29 Bom. 423**

——— **ss. 15 (g) and 17, prov. 1**—*Factories Act Amendment Act (XI of 1891)—Bengal Municipal Act (Bengal Act III of 1884), ss. 320, 321—Liability for neglecting to keep a factory in a cleaning state.* The Inspector of Factories, having found the latrines of the Hastings Mill within the Serampore Municipality in a filthy state, instituted a prosecution against the manager of the mill, but the prosecution failed. He then prosecuted as representing the Municipal Commissioners of Serampore the Chairman of the Municipality, who, on conviction, was fined R200 for "neglecting to keep the factory free from effluvia arising from a privy" under the provisions of the Factories Act and of the Bengal Municipal Act, s. 320. *Held*, that the conviction of the Chairman was unsustainable on the finding that the Municipality and the occupier of the factory were jointly responsible. *Held*, further, that it lay upon the occupier of the factory, as being primarily liable for breach of any of the provisions of the Factories Act, to give the strictest proof of circumstances exonerating himself from the liability in order to fix it on any other person. CHAIRMAN OF THE SERAMPORE MUNICIPALITY *v.* INSPECTOR OF FACTORIES, HOOGHLY **I. L. R. 25 Calc. 454**

FACTORS.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . **4 W. R. P. C. 1**
10 Moo. I. A. 229

See PRINCIPAL AND AGENT—COMMISSION AGENTS . **I. L. R. 17 Bom. 520**

FACTORS' ACT (XX OF 1844).

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS **1 Ind. Jur. O. S. 17**
1 W. R. P. C. 43 : 9 Moo. I. A. 140

FACTUM VALET.

——— **doctrine of**—

See HINDU LAW—ADOPTION—FACTUM VALET, DOCTRINE OF.

See HINDU LAW—FAMILY DWELLING-HOUSE . **4 B. L. R. O. C. 72**

FAIR COMMENT.

See DEFAMATION **I. L. R. 31 Bom. 293**

See LIBEL . **I. L. R. 36 Calc. 883**

See PENAL CODE, ss. 499, EXCEP. 3, 6, 9; 500, 52 . **I. L. R. 31 Bom. 29**

FALSE CHARGE.

See COMPENSATION—CRIMINAL CASES—TO ACCUSED, ON DISMISSAL OF COMPLAINT . **I. L. R. 30 Calc. 123**
I. L. R. 33 Calc. 1

See COMPLAINT—INSTITUTION OF COMPLAINT, AND NECESSARY PRELIMINARIES: **I. L. R. 30 Calc. 415**

See CRIMINAL PROCEDURE CODE, s. 195.
I. L. R. 32 Calc. 180
I. L. R. 33 Calc. 30

DISMISSAL OF COMPLAINT—POWER OF, AND PRELIMINARIES TO, DISMISSAL . . **6 C. W. N. 295**

See HINDU LAW—MARRIAGE—RIGHT TO GIVE IN MARRIAGE AND CONSENT.
I. L. R. 11 Bom. 247
I. L. R. 22 Bom. 812

See PENAL CODE, s. 211.

See PENAL CODE, ss. 182, 211.
I. L. R. 31 Bom. 204
I. L. R. 34 Calc. 42

See SANCTION FOR PROSECUTION—WHEN SANCTION MAY BE GRANTED.
5 C. W. N. 254

——— **giving evidence in support of**—

See ABETMENT . **9 B. L. R. Ap. 16**
10 C. L. R. 4

1. ——— **Penal Code, s. 211**—*Knowledge by accused of offence.* To establish a charge under s. 211 of the Penal Code, it is necessary to show that the accused knew or had reason to believe that an offence had been committed. QUEEN *v.* BHITTO KAHAR . . **1 Ind. Jur. O. S. 123**

2. ——— ——— *Knowledge that charge is false.* A person may in good faith institute a charge which is subsequently found to be false, or he may, with intent to cause injury to an enemy, institute criminal proceedings against him, believing there are good grounds for them, but in neither case has he committed an offence under s. 211 of the Penal Code. To constitute this offence, it must be shown that the person instituting criminal proceedings knew there was no just or lawful ground for such proceedings. The averment that the accused knew that there was no lawful

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FALSE CHARGE—*contd.*

ground for the charge instituted is a most material one. QUEEN *v.* CHIDDA . . **3 N. W. 327**

3. ——— *False charge by police officer.* S. 211 of the Penal Code applies not only to a private individual, but also to a police officer who brings a false charge of an offence with intent to injure. *In the matter of the petition of* NABODEEP CHUNDER SIRKAR . **11 W. R. Cr. 2**

4. ——— *False charge in petition of complaint.* If the charge of voluntarily causing hurt, contained in a petition of complaint is wilfully false, and made with intent to injure, then the complainant is legally chargeable with the offence described in s. 211 of the Penal Code. QUEEN *v.* MATA DYAL . . **4 N. W. 6**

5. ——— *False charge—False information—Penal Code, s. 182.* Where a person specifically complains that another man has committed an offence, and does so falsely with the object of causing injury to that person, he is guilty of making a false charge of an offence under s. 211 of the Penal Code, and not under s. 182. EMPRESS *v.* ARJUN . . . **I. L. R. 7 Bom. 184**

6. ——— *Compounding offence—Discharge of accused charged under s. 211 upon plea of original charge having been compounded.* The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211 of the Penal Code. *A* laid a charge against *M* for wrongful confinement. The police reported the case as a false one, and, *A* not appearing to prove his complaint, the District Magistrate ordered him to be prosecuted under s. 211 of the Penal Code, and made over the case to a Deputy Magistrate. Upon the hearing of such charge, *A* pleaded that he had compounded the original charge laid by him against *M*, and that therefore the charge against him under s. 211 could not lie. The Deputy Magistrate, without hearing any evidence, dismissed the case. *Held*, that the course so taken was illegal, as such plea was no conclusive answer to a charge under s. 211. QUEEN-EMPRESS *v.* ATAR ALI . . . . **I. L. R. 11 Calc. 79**

7. ——— *Specific false charge.* Where a specific false charge is made, the proper section for proceedings to be adopted under is s. 211 of the Penal Code. QUEEN-EMPRESS *v.* JUGAL KISHORE . . **I. L. R. 8 All. 382**

8. ——— *Requisites for offence—Making false charge.* To constitute the offence of making a false charge under s. 211 of the Penal Code, it is enough that the false charge is made, though no prosecution is instituted thereon, provided that the charge is not pending at the time of the offender's trial. *Queen* v. *Subbanna Gaundan, 1 Mad. 30*, followed. *Queen* v. *Bishoo Karik, 16 W. R. Cr. 77*, distinguished. EMPRESS *v.* ABUL HASAN . . . **I. L. R. 1 All. 497**

EMPRESS *v.* SALIK . **I. L. R. 1 All. 527**

9. ——— *Requisites to sustain offence.* To constitute the offence of preferring a false charge under s. 211 of the Penal Code, the charge need not be made before a Magistrate. Nor need the charge have been fully heard and dismissed ; it is enough if it is not pending at the time of trial. QUEEN *v.* SUBBANNA GAUNDAN **1 Mad. 30**

S.C. QUEEN *v.* TOOBANA GAUNDAN **1 Ind. Jur. O. S. 136**

10. ——— *Code of Criminal Procedure (Act V of 1898), s. 203—Order directing issue of process against a person for an offence of bringing a false complaint before final determination of the complaint, propriety of.* So long as a complaint is not dismissed under s. 203 of the Code of Criminal Procedure or otherwise judicially determined, no proceedings can be instituted under s. 211 of the Penal Code against the person lodging that complaint. The original complaint must be first disposed of, according to law, before such proceedings can be taken. GUNAMANY SAPUI *v.* QUEEN EMPRESS . . . . **3 C. W. N. 758**

11. ——— *Making false charge to Court or officer having no jurisdiction.* It is necessary for a conviction under s. 211 of the Penal Code that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial. *In the matter of the petition of* JAMOONA. EMPRESS *v.* JAMOONA . **I. L. R. 6 Calc. 620 : 8 C. L. R. 215**

12. ——— *Charge laid before police officer.* There is nothing in s. 211 of the Penal Code which limits the penalty there imposed to cases in which attempts have been made to substantiate false charges in a Court of Justice. A false charge made before the police is therefore punishable under this section. ASHROF ALI *v.* EMPRESS **I. L. R. 5 Calc. 281**

13. ——— *Complaint to police.* To prefer a complaint to the police in respect of an offence which they are competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the meaning of s. 211 of the Penal Code. QUEEN *v.* BONOMALLY SOHAI . . . . **5 W. R. Cr. 32**

14. ——— *Charge made to police—Penal Code, s. 182.* Ss. 182 and 211 of the Penal Code distinguished. The latter held to apply to a case of false charge in which the accused in the present case had appeared before the police, and charged the now complainant with having caused the death of the accused's child by poisoning. RAFFEE MAHOMED *v.* ABBAS KHAN **8 W. R. Cr. 67**

15. ——— *Charge made to police.* Where a person who is interested in the matter or has a certain official responsibility says to a police officer—"*A* tells me that *X* has committed a certain offence and *B* and *C* confirm the statement, and I accordingly suspect *X*," and follows up that statement by an application to have *X*'s house searched, he prefers a charge against *X*, and

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FALSE CHARGE—*contd.*

if such charge be false, he may be convicted under s. 211, Penal Code. QUEEN *v.* HANOOMAN LAL **19 W. R. Cr. 5**

16. ——— *Statement made to police as to suspicion of offence—Institution of criminal proceedings.* A statement made to the police of a suspicion that a particular person had committed an offence is not a "charge" within the meaning of s. 211 of the Penal Code, nor does it amount to the institution of a criminal proceeding, and the person making the statement cannot, on the suspicion being proved to be unfounded, be convicted under that section. *In the matter of* BRAMANUND BHUTTACHARJEE . **8 C. L. R. 233**

17. ——— *Charge on insufficient evidence.* It is not sufficient ground for a charge under s. 211 of the Penal Code that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge or complaint upon evidence or a statement which is not or ought not to be sufficient to satisfy a reasonable mind, if in truth he did not know at the time he made the complaint that there was no just and lawful ground for making it. QUEEN *v.* PRAN KISSEN BID . . . **6 W. R. Cr. 15**

18. ——— *False charge of burning house.* Where a man burns his own house and charges another with the offence of doing so, he should be convicted and sentenced under s. 211 (and not under s. 195) of the Penal Code. QUEEN *v.* BHUGWAN AHIR . . . **8 W. R. Cr. 65**

19. ——— *Charge of refusal to give stamped receipt.* The refusal to give a stamped receipt for money paid not being in itself an offence at law, to make a false charge against a party of refusing to give such a stamped receipt is not an indictable offence. REG. *v.* GAPAU KOM KUSAJI . . . . . **1 Bom. 92**

20. *Instituting criminal proceeding.* Under s. 211, Penal Code, "instituting a criminal proceeding" may be treated as an offence in itself apart from "falsely charging" a person with having committed an offence. Where a person is charged with instituting a criminal proceeding, with intent to cause injury, knowing that there was no just or lawful ground for such proceeding, it is for the prosecution to make out a distinct case against him, not for the prisoner in the first instance to show that he had just or lawful ground. QUEEN *v.* NOBOKRISTO GHOSE . **8 W. R. Cr. 87**

21. ——— *Institution of criminal proceedings.* The actual institution of criminal proceedings on a false charge is essential to the application of the latter part of s. 211 of the Penal Code, and if a person only makes a false charge, his case falls under the first part of the section, irrespective of the fact that the false charge relates to "an offence punishable with death, transportation for life, or imprisonment for seven years or upwards." EMPERSS *v.* PITAM RAI **I. L. R. 5 All. 215**

FALSE CHARGE—*contd.*

22. ——— *Institution of criminal proceedings.* Where no criminal proceeding is instituted on a false charge of an offence of the nature described in the latter part of s. 211 of the Penal Code, the person making such charge is punishable only under the first part of that section. EMPRESS *v.* PARAHU . **I. L. R. 5 All. 598**

23. ——— A false charge before the police is a false charge falling within the first portion of s. 211 of the Penal Code. The latter portion of s. 211 of the Penal Code is confined to cases in which criminal proceedings have been instituted, and does not apply to false charges merely. *Empress of India* v. *Pitam Rai, I. L. R. 5 All. 215,* and *Empress* v. *Parahu, I. L. R. 5 All. 598,* followed. QUEEN-EMPRESS *v.* KARIM BUKSH **I. L. R. 14 Calc. 633**

24. ——— *False charge made to police—Institution of criminal proceedings—Penal Code, s. 211.* A person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of s. 211 of the Penal Code; and if the offence fall within the description in the latter part of the section, he is liable to the punishment there provided. KARIM BUKSH *v.* QUEEN-EMPRESS . **I. L. R. 17 Calc. 574**

25. ——— *False charge of offence punishable with death—Criminal proceedings, necessity for institution of.* To constitute the offence defined in the second paragraph of s. 211 of Act XLV of 1860, it is necessary that criminal proceedings should be instituted. Where the offence committed does not go further than the making of a false charge to the police, the making of such charge does not amount to the institution of criminal proceedings, and the offence committed will fall within the first paragraph of s. 211, notwithstanding that the offence so falsely charged may be one of those referred to in the second paragraph of that section. *Queen-Empress* v. *Pitam Rai, I. L. R. 5 All. 215,* and *Queen-Empress* v. *Parahu, I. L. R. 5 All. 598,* followed. *Karim Buksh* v. *Queen-Empress, I. L. R. 17 Calc. 574,* dissented from. QUEEN-EMPRESS *v.* BISHESHAR . . . **I. L. R. 16 All. 124**

26. ——— *False charge of dacoity made to a police station-house officer—Institution of criminal proceedings.* A false charge of dacoity was made to a police station-house officer, who, after some investigation, referred it to the Magistrate as false, and the Magistrate ordered the charge to be dismissed without taking any action against the parties implicated. The person who preferred the charge was now tried under Penal Code, s. 211, and was found to have acted with the intent and the knowledge therein mentioned, and he was convicted and sentenced to four years' rigorous imprisonment. *Held,* that the prisoner had instituted criminal proceedings within the meaning of that section, and that the conviction and sentence were in accordance with law. QUEEN-EMPRESS *v.* NANJUNDA RAU . **I. L. R. 20 Mad. 79**

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FALSE CHARGE—*contd.*

27. ——————— *False report by a police-officer—Criminal Procedure Code (Act V of 1898), s. 195—Sanction.* Where a police-officer made a false report regarding a certain offence which the Magistrate found, after hearing the evidence, to be false, and thereupon sanction was given for the prosecution of the police-officer under s. 211 of the Penal Code:—*Held*, that it could not be said that the police-officer instituted or caused to be instituted any criminal proceedings against any person, and therefore the sanction for the prosecution of the police-officer under s. 211, Penal Code, was bad in law. THAKUR TEWARY *v.* QUEEN-EMPRESS . . **4 C. W. N. 347**

28. ——————— *Penal Code, ss. 211, 499, and 500—Falsely charging a person with an offence—Defamatory statement made by a person examined in the course of an official or departmental inquiry—Witness—Privilege—Qualified privilege—Criminal Procedure Code (1882), ss. 191 and 197.* The complainant was Deputy Collector and first class Magistrate of Bijapur. Certain petitions said to emanate from the accused were received by Government charging the complainant with bribery and corruption. Government thereupon ordered Mr. Monteath, Collector and Magistrate of the district, to inquire into the matter. Mr. Monteath enforced the attendance of the accused by writing to the police, who brought the accused before him. In answer to questions put to him, the accused denied having sent any petition to Government, but stated that he had paid a bribe to the complainant to secure the acquittal of his son, who was then on his trial on a charge of theft before him. Mr. Monteath examined other witnesses, and reported the result of his inquiry to Government. Government permitted the Deputy Collector to prosecute the accused, and he accordingly lodged a complaint against the accused for defamation under s. 500 of the Penal Code (XLV of 1860) in having stated to Mr. Monteath, in the course of the inquiry, that he (the complainant) had accepted a bribe from him. The trying Magistrate was of opinion that the offence fell under s. 211 of the Penal Code. He at first framed charges both under ss. 211 and 500. But subsequently he struck out the charge of defamation under s. 500, and convicted the accused under s. 211 of making a false charge. On appeal, the Joint Sessions Judge was of opinion that the charge under s. 211 could not be maintained, as the accused had not made any "false charge" to a Court or officer having jurisdiction to investigate it. As regards the charge of defamation, he was of opinion that the fact of bribery was not proved. But he held that in making the statement to Mr. Monteath the accused had acted in good faith, and that his case fell under excep. 8 to s. 499 of the Penal Code. He therefore reversed the conviction under s. 211, and acquitted the accused of defamation under s. 500 of the Code. Against this order of acquittal, Government appealed to the High Court. *Held*, that the accused was guilty of defamation. *Held*, also, that s. 211 of the Penal Code had no application to the present case. The accused was brought before Mr. Monteath against his will. He did not make any complaint before that officer; and though what he stated, in answer to questions put to him, was defamatory, the imputations did not constitute a "false charge" within the meaning of s. 211, as he did not intend to set the criminal law in motion. *Per* RANADE, *J.*—The words "falsely charging" in s. 211 must be construed along with the words which speak of the "institution of proceedings." These latter words are obviously used in a technical and exclusive sense, and the same restricted sense must be given to the words which relate to a false charge as implying a false complaint. *Karim Buksh* v. *Queen-Empress, I. L. R. 17 Calc. 574*, followed. *Held*, also, that, in the absence of sanction from Government, the inquiry held by Mr. Monteath, the District Magistrate, was not a taking cognizance of the offence. QUEEN-EMPRESS *v.* KARIGOWDA **I. L. R. 19 Bom. 51**

29. ——————— *Prosecution under s. 182—Rejection of complaint with reference to police report.* *K* made a report at a police-station accusing *R* of a certain offence. The police having reported to the Magistrate having jurisdiction in the matter that in their opinion the offence was not established, the Magistrate ordered the case to be "shelved." *K* then preferred a complaint to the Magistrate, again accusing *R* of the offence. The Magistrate rejected the complaint with reference to the police report. Subsequently *R*, with the sanction of the police authorities, instituted criminal proceedings against *K* under s. 182 of the Penal Code in respect of the report which he had made at the police station, and *K* was convicted under that section. *Held*, that, before proceeding against *K*, the Magistrate should have fully investigated and shifted his complaint for himself, and should not have abrogated the functions imposed on him by law, because the police had reported against the entertainment of the case. The views expressed in *Government* v. *Karimdad, I. L. R. 6 Calc. 496*, concurred in. EMPRESS *v.* RADHA KISHAN . . . . **I. L. R. 5 All. 36**

30. ——————— *Report of police—Absence of judicial proceeding—Criminal Procedure Code (Act V of 1898), ss. 157, 159.* Where the petitioner laid information to the police charging a certain person with criminal trespass in his house to commit a particular offence and the police reported that they did not believe the object was to commit the offence stated, but that they were not disinclined to believe the charge of trespass, whereupon the Magistrate called upon the petitioner to prove his case, and the latter appeared and declined to take any further proceedings; the Magistrate then took evidence and directed the prosecution of the petitioner under s. 211, Penal Code:—*Held*, that there was no judicial proceeding before the Magistrate, and the order under s. 476, Criminal Procedure Code, directing the prosecution of the peti-

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FALSE CHARGE—*contd.*

tioner was bad. That s. 159, Civil Procedure Code, had no application to the present case; an inquiry can only be made under that section only on a report submitted within the terms of s. 157 and the police report, and this case was not of that description. MOULI DURZI *v.* NAURANGI LALL
4 C. W. N. 351

31. ——— *Charge made on report of police that case was false—Charge of giving false information.* A commitment for trial under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons accused, is not illegal merely because the complaint which the accused made has not been judicially enquired into, but is based on the report of the police that the case was a false one. EMPRESS *v.* SALIK ROY . **I. L. R. 6 Calc. 582**
8 C. L. R. 255

32. ——— *Enquiry into truth of charge—Criminal Procedure Code, 1872, s. 471.* A petition was presented to the Joint Magistrate charging the police with having made a false report of an investigation which they had been directed to make at the instance of the petitioner. The Joint Magistrate, after reading the police report, rejected the petition, and directed the petitioner to be prosecuted under s. 211 of the Penal Code for having made a false charge. *Held,* that the Joint Magistrate should not have made the order without first instituting an enquiry into the truth of the complaint such as is required by s. 471 of the Code of Criminal Procedure. *Queen* v. *Gour Mohun Sing, 16 W. R. 44:* and *In the matter of Nissar Hossein, 25 W. R. 10,* considered. *In the matter of* CHOOLHAIE TELEE . . **2 C. L. R. 315**

33. ——— *Dismissal of complaint—Criminal Procedure Code (Act X of 1872), ss. 470 and 471.* Where a charge had been preferred against a person, and the Magistrate before whom it was heard, after hearing the statement of the complainant, but not those of the witnesses, dismissed the complaint; and subsequently, on the application of the person charged, granted him leave under s. 470 to prosecute the complainant for bringing a false charge:—*Held,* that the proceedings were not irregular, and that the Magistrate was justified in acting as he had done. *Held,* also, that there is a distinction in the proceedings to be adopted when a sanction is given under s. 470, and the institution by the Court of its own motion of proceedings under s. 471. *Nissar Hossein* v. *Ramgolam Singh, 25 W. R. Cr. 10,* dissented from. *In the matter of* GYAN CHUNDER ROY *v.* PROTAP CHUNDER DASS . . **I. L. R. 7 Calc. 208**
8 C. L. R. 267

34. ——— *Allowing opportunity to show grounds for charge.* Where a person is charged under s. 211 of the Penal Code with having, with intent to injure, falsely charged another with an offence knowing that there is no ust and lawful grounds for the same, the party accused should be allowed to show the information on which he acted, and the Judge ought not only to be satisfied that the facts alleged as the ground for making the charge are in themselves untrue and insufficient, but also that they were known to be such to the accused when the charge was made by him. REG. *v.* NEVALMAL VALAD UMEDMAL
3 Bom. Cr. 16

35. ——— *False charge—Criminal Procedure Code (Act X of 1872), ss. 146, 147.* Where a Magistrate dismisses a complaint as a false one under s. 147 of the Criminal Procedure Code and decides to proceed against the complainant under s. 471 for making a false charge, he is not bound before so proceeding to give the complainant an opportunity of substantiating the truth of the complaint, by being allowed to produce evidence before him. EMPRESS *v.* BHAWANI PRASAD
I. L. R. 4 All. 182

36. ——— *Prosecution for making a false charge—Opportunity to accused to prove the truth of charge.* Before a person can be put upon his trial for making a false charge under s. 211 of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him; and such an opportunity should be afforded to him, if he desires to take advantage of it, not before the police, but before the Magistrate. GOVERNMENT *v.* KARIMDAD **I. L. R. 6 Calc. 496**
7 C. L. R. 467

37. ——— *Sanction to prosecution for making false charge.* A sanction for a prosecution for making a false charge under s. 211 of the Penal Code, without hearing all the witnesses whom the person accused of making the false charge wishes to produce, is illegal. The Hight Court has power to quash an illegal commitment at any stage of the case. EMPRESS *v.* SHIBO BEHARA
I. L. R. 6 Calc. 584
8 C. L. R. 265

38. ——— ——— *Opportunity of substantiating charge.* Upon a trial for bringing a false charge with intent to injure, it appeared that the original complaint was lodged in the Court of the Extra Assistant Commissioner, and a local inquiry by a competent police officer was directed. The officer reported that the charge was false, and recommended that the prisoner should be prosecuted. The Extra Assistant Commissioner ordered the papers to be sent to the Deputy Commissioner who ordered the prosecution, and the prisoner was convicted. *Held,* that the conviction was bad. The Extra Assistant Commissioner should, on receipt of the report of the police, have communicated its contents to the prisoner and afforded her an opportunity of substantiating her complaint, and should then have decided the case. *In the matter of the petition of* SOKHINA BIBI. EMPRESS *v.* GRISH CHUNDER NUNDI . . **I. L. R. 7 Calc. 87**
8 C. L. R. 387

39. ——— *Opportunity of substantiating charge.* A Magistrate should not direct a prosecutor to be put upon his trial under

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FALSE CHARGE—*contd.*

s. 211 of the Penal Code without first giving him an opportunity of obtaining a judicial enquiry into the charge originally preferred by him. *In the matter of the petition of* GIRIDHARI MUNDAL. GIRIDHARI MUNDUL *v.* UCHIT JHA
I. L. R. 8 Calc. 435
10 C. L. R. 46

NISSAR HOSSEIN *v.* RAMGOLUM SINGH
25 W. R. Cr. 10

See QUEEN *v.* GOUR MOHUN SINGH
16 W. R. Cr. 44

40. ——— *Enquiry into truth of charge.* Where a charge of theft was reported by the police to be false:—*Held*, that the Magistrate ought first to have enquired into the charge of theft and passed some orders upon it before proceeding under s. 211 of the Penal Code to enquire into the offence of false charge. *In the matter of* BISHOO BARIK . **16 W. R. Cr. 77**

41. ——— *Enquiry into truth of charge—Penal Code, s. 182.* *J* complained to the police that she had been raped by *R*. The police having reported the charge to be false, criminal proceedings were instituted against her under s. 182 of the Penal Code. In the meantime *J* made a complaint in Court, again charging *R* with rape. This complaint was not disposed of, but the proceedings against her under s. 182 of the Penal Code were continued, and she was eventually convicted under that section. *Held*, setting aside the conviction and directing that *J's* complaint should be disposed of, that such complaint should have been disposed of under s. 211 before proceedings were taken against her under s. 182. EMPRESS *s.* JAMNI
I. L. R. 5 All. 387

42. ——— *Preliminary enquiry—Criminal Procedure Code, 1872, s. 471—Penal Code, s. 182.* An offence under s. 211 of the Penal Code includes an offence under s. 182; it is therefore open to a Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211. BHOKTERAM *v.* HEERA KOLITA
I. L. R. 5 Calc. 184

43. ——— *False information to police—Penal Code, s. 182—Charge found false by police.* Where a person has instituted a charge found to be false by the police, a Magistrate, except under exceptional circumstances, is not justified merely on a perusal of a police report, which has found the charge made to be false, in prosecuting the person by whom such charge was preferred, summarily under s. 182 of the Penal Code, but should proceed under s. 211. When a charge is pronounced false by the police, no proceedings should be taken by a Magistrate *suo motu*, until a reasonable interval has shown that the complainant accepts the result of the investigation. *In the matter of* RUSSIC LALL MULLICK . **7 C. L. R. 382**

In the matter of BIYOGI BHAGUT **4 C. L. R. 134**

FALSE CHARGE—*contd.*

44. ——— *Dismissal of complaint without giving complainant opportunity to prove it true.* A charge laid against certain persons before the police having been reported false by that body, the person who made the charge complained to the Magistrate of the district who directed a fresh investigation. The charge was again reported false. The complainant thereupon filed a petition, in which he alleged that the second investigation had not been properly conducted, and asked that further evidence might be taken by a specified officer. No further investigation having taken place, the complainant was ordered to be prosecuted under s. 211 of the Penal Code, and on trial was convicted and sentenced. On appeal to the High Court, it was *held* that the conviction was illegal, inasmuch as an opportunity had not been afforded to the accused of producing all his evidence in support of the charge made by him. *In the matter of Russick Lall Mullick, 7 C. L. R. 382,* and *In the matter of Biyogi Bhagut, 4 C. L. R. 134,* followed. *Per* MACLEAN, *J.* The proper principle which should guide a Magistrate is that, if no complaint is made before him after a reasonable time has elapsed from the conclusion of a police enquiry, he would be justified in proceeding against a person who has made a complaint to the police which has been found to be false; but if a complaint is made, that complaint must be dealt with judicially. It is unfair even then to proceed against the complainant without hearing any witnesses whom he may wish to examine. *Per* MITTER, *J.* Although a Magistrate has power under s. 147 of the Criminal Procedure Code to dismiss a complaint without examining witnesses, yet in such a case no sanction for prosecution under s. 211 of the Penal Code should be granted. See *In the matter of Gyan Chunder Roy, 8 C. L. R. 267.* *In the matter of* CHUKRADAR POTTI . . . . . **8 C. L. R. 289**

45. ——— *Conviction by Sessions Court—Opportunity not given to accused to prove charge before Magistrate.* *R* made a complaint of theft against *S* to the police. The police referred the case as false to the Magistrate. The Magistrate summoned *R* and examined him, but gave him no opportunity to prove the charge by calling the witnesses named by him. The Magistrate then ordered the case to be struck off the file and gave sanction to prosecute *R*. *R* was subsequently brought before the same Magistrate and committed to the Sessions, and convicted by the Sessions Court under s. 211 of the Penal Code. *Held*, that, although *R* had no opportunity of proving this case before he was himself tried, the conviction was not illegal. *Government* v. *Karimdad, I. L. R. 6 Calc. 496,* distinguished. RAMASAMI *v.* QUEEN-EMPRESS
I. L. R. 7 Mad. 292

46. ——— *Prosecution for making a false charge—Opportunity to accused to prove the truth of charge—Criminal Procedure Code s. 195.* A complaint of offences under ss. 323 and 379 of the Penal Code was referred to the police for enquiry. The police reported that the charge was

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FALSE CHARGE—*contd.*

a false one, and thereupon the Magistrate of the district passed an order under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge under s. 211 of the Penal Code. *Held*, that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *Government* v. *Karimdad, I. L. R. 6 Calc. 496*, referred to. QUEEN-EMPRESS *v.* GANGA RAM **I. L. R. 8 All. 38**

47. ——————— *Criminal Procedure Code (Act X of 1882), s. 191—Cognizance of an offence on suspicion—Police report—False charge, Prosecution for, without first enquiring into truth of original complaint.* A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate, asking that his case might be investigated and his witnesses summoned. This application was refused, and the Magistrate, after perusing the police report, passed an order directing him to be prosecuted under s. 211 of the Penal Code. *Held*, that the application to the Magistrate was "a complaint" within the meaning of s. 191 of the Criminal Procedure Code into which the Magistrate was bound to have enquired. A Magistrate may take cognizance under s. 191 of the Criminal Procedure Code of an offence brought to his notice by a police report which affords ground for a suspicion that an offence has been committed; but as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a police report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or abandoning it. QUEEN-EMPRESS *v.* SHAM LALL . . **I. L. R. 14 Calc. 707**

48. ——————— *False complaint to police.* The accused complained to the police that *A* and *B* had robbed him. After inquiry the police reported to the Magistrate that the charge was false. The Magistrate thereupon struck off the case without holding any further inquiry himself. The accused was subsequently charged and convicted under s. 211 of the Penal Code of making a false charge. On appeal it was contended that, as the accused had not been given an opportunity of substantiating his complaint before a Magistrate, his prosecution was illegal, or at the most he ought to have been charged under s. 182, and not s. 211. *Held*, that, in order to constitute an offence under s. 211, it was not necessary that the complaint should be made to a Magistrate. It was enough that it was made to the police authorities and related to a cognizable offence, and that action was thereupon taken by the police. *Held*, also, that the fact that no opportunity was allowed to the accused by the Magistrate to substantiate his complaint before striking it off was not a circumstance which invalidated the commitment duly made, and the conviction otherwise good could not be set aside on account of such omission. The trial before the committing Magistrate and in the Sessions Court give ample opportunity to the accused to substantiate his complaint, and he was not prejudiced by the omission. QUEEN-EMPRESS *v.* JIJIBHAI GOVIND **I. L. R. 22 Bom. 596**

49. ——————— *Procedure before framing charge.* Procedure before framing a charge, under s. 211 of the Penal Code, of the offence of making a false charge with intent to injure considered. *In the matter of the petition of* GAUR MOHUN SINGH . . . **8 B. L. R. Ap. 11**

S.C. QUEEN *v.* GOUR MOHUN SINGH. **16 W. R. Cr. 44**

50. ——————— *False charge, conviction on—Entry of, in calendar.* When a prisoner is convicted of having made a false charge of an offence, the nature of the false charge should be stated in the finding and entered in the calendar. REG. *v.* ARJUN . . . . **1 Bom. 87**

51. ——————— *Information given to police—Record.* Where the charge is one of instituting a false charge of an offence with intent to injure, the actual information which the prisoner made at the thannah ought to be given in evidence and form part of the record. QUEEN *v.* HOOLASE. **23 W. R. Cr. 32**

52. ——————— *Penal Code (Act XLV of 1860), s. 211—Code of Criminal Procedure (Act V of 1898), ss. 4 (h), 195, 476—Giving false information to police of an offence, order for prosecution for—"Complaint," meaning of—Judicial proceeding—Jurisdiction of Magistrate—Procedure.* Where, upon a police-report that a complaint is false, the complainant is called upon to show cause why he should not be prosecuted under s. 211 of the Penal Code, he appears, and the Magistrate examines him and his witnesses, and upon that evidence comes to the conclusion that the charge is false, he can then proceed under s. 476 of the Code of Criminal Procedure and direct a prosecution. *Mouli Durzi* v. *Naurangi Lall, 4. C. W. N. 35*, distinguished. The Magistrate does not exercise a proper discretion when, on receipt of a police-report that the complaint is false, he forthwith orders the complainant to be prosecuted under s. 311 of the Penal Code. The complainant should be given a reasonable time and full opportunity to prove his case before sanction is given for his prosecution. The presentation of a petition by the complainant that his complaint should be inquired into, is in effect a complaint within the meaning of s. 4, cl. (*h*), of the Code of Criminal Procedure; and the Magistrate is bound to hold a full judicial in-

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FALSE CHARGE—*contd.*

quiry into the matter before proceeding further. LALJI GOPE *v.* GIRIDHARI CHAUDHURI (1900) **5 C. W. N. 106**

53. ——— It is improper for a Magistrate to convict a person of an offence under s. 211 of the Penal Code in a summary proceeding. PARSI HAJRA *v.* BANDHI DHANUK (1900) **I. L. R. 28 Calc. 251**

54. ——— *Penal Code (Act XLV of 1860), ss. 182, 211—False charge to police of cognizable offence—False information to public servant with intent to use his lawful power to the injury of another—Charge partly true and partly false—Charge if maintainable—Reference by Presidency Magistrate—Criminal Procedure Code (Act V of 1898), s. 432.* When a false charge is made to the police of a cognizable offence, the offence committed by the person making the false charge falls within the meaning of s. 211 of the Penal Code, and not s. 182. *Karim Buksh v. Queen-Empress, I. L. R. 17 Calc. 574,* followed. Section 211 of the Penal Code contemplates a charge which is indivisible in its nature. To judge whether a complaint, part of which is true and part of which is false, falls under the section, the nature of the complaint or charge made by the accused has to be considered; in other words, whether the complaint is substantially true or whether it is substantially false. No precise rule or principle can be laid down in respect of the question, and each case must depend upon its own circumstances. GIRIDHARI NAIK *v.* EMPRESS (1901) . **5 C. W. N. 727**

55. ——— *Complaint—Dismissal of complaint as false, vexatious and malicious—False charge with intent to injure—Prosecution—Compensation—Criminal Procedure Code (Act V of 1898), s. 250.* Where, in a criminal trial, it is found by the Magistrate that, owing to the previous relations between the principles of the complainant and the accused, the complaint made was both false and malicious and made with some deliberation, and that the complainant, with intent to cause injury to the accused, instituted criminal proceedings against him, knowing that there was no just and lawful ground for such proceedings: *Held,* that it was a case in which proceedings under s. 211 of the Penal Code should have been instituted against the complainant, and that the Magistrate, in passing an order under s. 250 of the Criminal Procedure Code, directing the complainant to pay compensation to the accused, did not exercise a proper discretion. KINA KARMAKAR *v.* PREO NATH DUTT (1901) . . . **I. L. R. 29 Calc. 479**

56. ——— *False charge before Police.* The making of a false charge before the Police falls within the first portion of s. 211, Indian Penal Code, *Queen-Empress* v. *Karim Buksh, I. L. R. 14 Calc. 633,* followed. RAM LOGAN LAL *v.* EMPEROR (1903) . **7 C. W. N. 556**

57. ——— *Penal Code (Act XLV of 1860), ss. 211, 182—Instituting false complaint—Giving false information.* The word "charges," as it is used in s. 211 of the Indian Penal Code, means something different from "gives information." The words "false charge," as there used, must be construed with reference to the words which speak of the institution of proceedings. *Semble:* The true test is—Does the person who makes the statement, which is alleged to constitute the charge, do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made. A petition was presented with the object (as the High Court *held* from its terms) of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings: *Held,* that the petition did not amount to a "charge" within the meaning of s. 211 of the Indian Penal Code. To constitute an offence under s. 182, it must be shown that the person giving the information knew or believed it to be false, or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false. RAYAN KUTTI *v.* EMPEROR (1903) . . **I. L. R. 26 Mad. 640**

58. ——— *Penal Code, s. 211—Preferring a false charge—"Charge" made to Village Magistrate—Sustainability.* An accusation of murder made to a Village Magistrate (who, under s. 13 of Regulation XI of 1816, has authority to arrest any person, whom he suspects of having committed the murder of a person, whose body is found within his jurisdiction) is a "charge" within the meaning of s. 211 of the Indian Penal Code, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police referring it as false on investigation. CHENNA MALI GOWDA *v.* EMPEROR (1904) . . **I. L. R. 27 Mad. 129**

59. ——— *Preferring a false charge—Statement not reduced to writing by police officer.* A person was convicted, under s. 211 of the Penal Code, of having preferred a false charge. It appeared that the accused had stated to a police officer that certain of the prosecution witnesses had stolen his goats, and that he had made this statement intending to set the criminal law in motion against those persons. The statement had not been reduced to writing in accordance with the requirements of s. 154 of the Code of Criminal Procedure. On its being contended that there was no evidence of a false charge within the meaning of

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FALSE CHARGE—*concld.*

s. 211 : *Held*, (i) that the test is—did the person, who makes the charge, intend to set the criminal law in motion against the person against whom the charge is made ; (ii) that (it being clear from the evidence that the accused did so intend) the fact that the statement made by the accused to the police officer had not been reduced to writing in accordance with s. 154 of the Code of Criminal Procedure did not prevent the statement made from being a false charge within the meaning of that section. MALLAPPA REDDI *v.* EMPEROR (1904) **I. L. R. 27 Mad. 127**

60. ——————— *Police—Deputy Magistrate—Order by the District Magistrate sanctioning a prosecution—Legality of order—Offence not brought to his notice in the course of a judicial proceeding—Criminal Procedure Code (Act V of 1898), s. 476.* Where the petitioner laid a charge of mischief by fire at the thana, which was reported to be false, and the District Magistrate, upon the receipt of a report to the same effect from a Deputy Magistrate, to whom he had sent the matter for a judicial inquiry, passed the final order in the police report in these terms—" Enter false, s. 436, Penal Code. Prosecution under s. 211, Penal Code, sanctioned. To Babu M. N. Mukerjee for trial "—*Held*, that the order of the District Magistrate was made under s. 476 and not under s. 195 of the Criminal Procedure Code, and was bad as the matter of the false charge had not come before him in the course of a judicial proceeding. *Semble :* That, if the District Magistrate had made an inquiry into the truth or falsity of the charge, he might have had power under s. 476 of the Code ; or the Deputy Magistrate, who held the inquiry, might have ordered the prosecution of the petitioner. HAIBAT KHAN *v.* EMPEROR (1905) . . . . **I. L. R. 33 Calc. 30**

61. ——————— *Penal Code, s. 211—Practice—Opportunity to be given to prove charge before prosecuting.* Where it is intended to prosecute any person under s. 211 of the Indian Penal Code such person ought to be given an opportunity of substantiating, if he can, the charge which he has brought before he is prosecuted. *Queen-Empress* v. *Ganga Ram, I. L. R. 8 All. 38*, and *Queen-Empress* v. *Raghu Tiwari, I. L. R. 15 All. 336*, followed. EMPEROR *v.* TULA (1907) **I. L. R. 29 All. 587**

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1. GENERAL CASES.

1. ——— **Requisites for legal conviction of false evidence**—*Attestation of record by Magistrate.* Before criminating a man upon his own statement under examination, it is necessary to see that such statement has been deliberately made and recorded ; that after being recorded it has been shown or read to the accused ; and that the examination has been attested by the signature of the Magistrate, following a certificate to be given under his own hand. QUEEN *v.* NERUNI **7 W. R. Cr. 49**

See QUEEN *v.* MUNGUL DASS **23 W. R. Cr. 28**

2. ——— **Requisites for conviction of giving false evidence.** The true rule in a case of giving false evidence is that no man can be convicted of such offence except on proof of facts which, if accepted as true, show not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true. QUEEN *v.* AHMED ALY . **11 W. R. Cr. 25**

3. ——— **False statement under affirmation criminating witness himself.** Where a party makes a false statement when legally bound by a solemn affirmation, the fact that the statement

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

was one tending to criminate himself will not justify his acquittal on a charge of giving false evidence. ANONYMOUS . . . **3 Mad. Ap. 29**

4. ——— False statement of witness criminating himself—*Penal Code, s. 191.* Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the state of the law, to deny the existence of facts for fear of penal consequences. Although without such a warning he may make a false denial and thereby become guilty of the offence of intentionally giving false evidence his offence will not be deserving of severe punishment. JADDOO NATH DUTT *v.* EMPRESS **2 C. L. R. 181**

5. ——— Evidence of corrupt intention—*Statement known by accused to be false.* Upon a prosecution for giving false evidence, the law does not require proof of a corrupt intention. It is sufficient that there is proof of intention, and if the statement was false, and known by the accused to be false, it may be presumed that in making it the accused intentionally gave false evidence. QUEEN *v.* AMERE ALI KHAN . **3 N. W. 133**

6. ——— Contradictory statements in cross-examination. Intention is the essential ingredient in the constitution of an offence under s. 193, Indian Penal Code. Where a person made contradictory statements in the course of cross-examination, and he was convicted under s. 193, Indian Penal Code: *Held,* that the Magistrate should have taken into consideration the fact that the statements were made in course of cross-examination when possibly he may have been either confused, or under some mistake regarding the question put to him. *In the matter of* MUNNI BUKSH **3 C. W. N. 81**

7. ——— Proof that accused knew statement to be false—*Penal Code, s. 193.* To support a charge of giving false evidence under s. 193, it must be shown that the accused intentionally made a particular statement false to his own knowledge. QUEEN *v.* MAHARAJ MISSER **7 B. L. R. Ap. 66: 16 W. R. Cr. 47**

8. ——— Proof of deposition alleged to be false. In a case of false evidence it is necessary to prove the deposition alleged to contain the false statement. QUEEN *v.* BHAKOAS TUTUM **7 W. R. Cr. 13**

9. ——— Proper Court to direct prosecution for giving false evidence—*Criminal Procedure Code, 1861, s. 169—Specific charge.* There is nothing in s. 169 of the Code of Criminal Procedure which gives a Judge, not sitting in appeal, any original jurisdiction to entertain a charge of giving false evidence before another Court. No other Court than that before which false evidence is given can direct a prosecution in respect thereof. In a prosecution for false evidence, there must be some specific charge of making some particular and specific false statement, and some direct evidence that such specific statement was false. ASMEDH KOONWAR *v.* TAYLER. KHORSHED ALI *v.* TAYLER . . . . **W. R. 1864, 15**

10. ——— Affirmation for cases during one day, not for each case as called on—*Penal Code, s. 193.* Where a witness was, at the beginning of the day, solemnly affirmed once for all to speak the truth in all the cases coming before the Court that day: *Held,* that he might be convicted, under s. 193 of the Penal Code, of giving false evidence in a suit which came on that day, although he was not affirmed to speak the truth in that suit after it was called on for hearing, and the names of the cases in the day's list were not mentioned when the affirmation was administered. QUEEN *v.* VENKATACHALAM PILLAI . . . **2 Mad. 43**

11. ——— Evidence not given on oath—*Hindu convert—False statement—Penal Code, ss. 191, 193, 199.* A Hindu who has become a convert to Christianity is not under a legal obligation to speak the truth unless his evidence be given under the sanction of an oath on the Holy Gospels, so as to justify a conviction under s. 193 of the Penal Code. A statement made by a witness in a criminal trial not upon oath or solemn affirmation is not a declaration within the meaning of s. 199 of the Penal Code, nor is the witness bound to make a declaration under s. 191. QUEEN *v.* VEDAMUTTU **4 Mad. 185**

12. ——— *Penal Code, s. 193—Giving false evidence—Omission to prove that accused was sworn or affirmed—Oaths Act (X of 1873), ss. 6, 13, 14.* The offence of intentionally giving false evidence, referred to in s. 193 of the Penal Code may be committed, although the person giving evidence has neither been sworn nor affirmed. GOBIND CHANDRA SEAL *v.* QUEEN-EMPRESS **I. L. R. 19 Calc. 355**

13. ——— Materiality of statement—*Penal Code, ss. 191, 193.* The materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence in a judicial proceeding, and an indictment under ss. 191, 193 of the Penal Code, though it does not allege materiality, is good if it alleges sufficiently the substance of the offence. QUEEN *v.* AIDRUS SAHIB **1 Mad. 38**

14. ——— *Penal Code, ss. 191 and 192.* To constitute the offence of giving false evidence under s. 191 of the Penal Code, it is not necessary that the false evidence given should be material to the case in which it is given. *Aliter,* under s. 192. REG. *v.* DAMODHAR RAMCHANDRA **5 Bom. Cr. 68**

15. ——— *Pena s. 191—Intention.* The words of s. 191 of the Penal

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

Code are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within that section if the false evidence is intentionally given,—that is to say, if the person making the statement makes it adivisedly, knowing it to be false, and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true. QUEEN *v.* MAHOMED HOSSENI . . **16 W. R. Cr. 37**

16. ——— *Untrue statement immaterial to case before Court.* A statement untrue to the prisoner's knowledge made upon oath in the course of a judicial proceeding amounts to perjury, notwithstanding the fact that the statement itself is immaterial to the matter before the Court. QUEEN *v.* SHIB PROSAD GIRI **19 W. R. Cr. 69**

17. ——— **Judicial proceeding**—*Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate—Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), ss. 195, 476.* At a preliminary enquiry held by a Sub-divisional Magistrate at the direction of the District Magistrate into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under s. 193 of the Penal Code: *Held,* that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of s. 193 of the Penal Code, and the witness could not be convicted under that section. QUEEN-EMPRESS *v.* VENKATARAMANNA . **I. L. R. 23 Mad. 223**

18. ——— **Judicial proceeding, statement made in**—*Penal Code, s. 193—Form of charge.* It is essential in order to sustain a charge under s. 193 of the Penal Code that it should be proved that there was a judicial proceeding, and that the false statement alleged to have been made in the course of that proceeding was made. QUEEN *v.* FATIK BISWAS . . **1 B. L. R. A. Cr. 13**
s. c. QUEEN *v.* FUTTEAH BISWAS **10 W. R. Cr. 37**

19. ——— **Preliminary enquiry, statement made in**—*Penal Code, ss. 193 and 457—Criminal Procedure Code (Act X of 1882), s. 337—Evidence of accused illegally pardoned.* In cases not of the kind contemplated in s. 337 of the Criminal Procedure Code (Act X of 1882), it is not competent to a Magistrate holding a preliminary enquiry to tender a pardon to the accused or to examine him as a witness. Statements made by the accused in the course of such examination are irrelevant; and if subsequently retracted, they cannot be used against him, or subject him to a prosecution for giving false evidence, under s. 193 of the Penal Code. *Reg.* v. *Hanmanta, I. L. R. 1 Bom. 610,* followed. QUEEN-EMPRESS *v.* DALA JIVA **I. L. R. 10 Bom. 190**

20. ——— **Enquiry by Magistrate**—*Penal Code, s. 193—Judicial enquiry.* An enquiry by an Assistant Magistrate, with a view to tracing the writer of an anonymous letter addressed to him charging certain persons with murder, and without reference to the truth or otherwise of the charge of murder, is not a stage of a judicial proceeding in which the giving of false evidence is punishable under s. 193 of the Penal Code. QUEEN *v.* BYKANT NATH BANERJEE . **5 W. R. Cr. 72**

21. ——— **Examination of complainant**—*Statement in petition of complainant—Judicial proceeding—Investigation—Penal Code, s. 193.* The examination of a complainant in reference to the matter of his petition of complaint is an investigation directed by law, and therefore a stage of a judicial proceeding. Consequently, if in the course of that examination false evidence is intentionally given by the complainant, he is legally chargeable with the offence described in s. 193 of the Penal Code. QUEEN *v.* MATA DYAL . **4 N. W. 6**

22. ——— **Examination on oath without jurisdiction**—*Criminal Procedure Code, 1861, ss. 168, 169—Judicial proceeding.* When a plaintiff before a Munsif came and petitioned the Judge complaining that the Munsif had improperly refused to examine his witnesses and had dismissed his suit, although informed that witnesses were in attendance, and the Judge, upon examining the petitioner upon solemn affirmation and finding the charge unproved, ordered proceedings to be taken against the petitioner for giving false evidence: *Held,* that the Judge had no authority to examine the petitioner upon oath in such a case, and that the oath having been made, and the evidence given *coram non judice,* could not form the subject of a prosecution for false evidence. QUEEN *v.* JADUB CHUNDER BISWAS . . . . **W. R. 1864 Cr. 15**

23. ——— **Affidavit affirmed before a Deputy Magistrate**—*Prosecution on facts stated in an affidavit affirmed before a Deputy Magistrate—Penal Code (Act XLV of 1860), ss. 193, 199—Declaration by law receivable as evidence.* A Deputy Magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit; and such person cannot, on the facts stated in such declaration, be prosecuted for committing an offence either under s. 193 or s. 199 of the Penal Code. *In the matter of the petition of* ISWAR CHUNDER GUHO . . **I. L. R. 14 Calc. 653**

24. ——— **False statement made by a convict in an affidavit in support of an application for revision of the order by which he was convicted**—*Criminal Procedure Code, 1882, s. 342—Penal Code, s. 193. Held,* that a person seeking by an application in revision to get

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application, and consequently that, if he did tender such an affidavit, he could not be prosecuted for false statements which might be contained therein. *Queen-Empress* v. *Subhayya, I. L. R. 12 Mad. 200*, referred to. *In the matter of the petition of* BARKAT . . . **I. L. R. 19 All. 200**

25. ——— Annulment of proceedings in trial at which false evidence was given—*Judicial proceeding.* The accused was convicted of intentionally giving false evidence in a judicial proceeding, in having, as a witness therein, made on solemn affirmation a false statement. The proceedings in the trial at which the alleged false evidence was given were subsequently annulled, in consequence of the sanction for the prosecution being insufficient. *Held*, that the conviction of the accused must be reversed, as the false statement was not made in a stage of a judicial proceeding. REG. *v.* RAVJI VALAD TAGU . . **8 Bom. Cr. 37**

26. ——— Proceeding in which Judge had no authority to administer oath—*Penal Code, ss. 191, 193—Criminal Procedure Code, s. 477—"Judicial proceeding."* A man died leaving some money due to him in the hands of the telegraph authorities. *P* wrote a letter to those authorities claiming the money as the sole heir of the deceased. This letter was sent to the District Judge for verification and orders. *P* supported his claim before the Judge by the evidence on oath of *C*. *C's* evidence being in the opinion of the District Judge false, the District Judge, in his capacity as Sessions Judge, tried him for giving false evidence, and convicted him of that offence. *Held*, that, as the reference to the District Judge by the telegraph authorities of *P's* letter for verification and the subsequent action in regard thereto did not constitute a "judicial proceeding," and as the District Judge had not any authority to administer an oath to *C*, the conviction was illegal. EMPRESS *v.* CHAIT RAM . . . **I. L. R. 6 All. 103**

27. ——— Examination on oath of person by Magistrate for purpose of obtaining information in order to take proceedings—*Whether such person a witness—Contradictory statement made by such person at trial as witness—Code of Criminal Procedure (Act V of 1898), s. 190, cl. (c)—Indian Oaths Act (X of 1873), s. 5—Penal Code (Act XLV of 1860), ss. 191 and 193. Held*, that, where an accused person was examined by a Magistrate for the sake of obtaining information on which proceedings could be taken, the Magistrate, although he might examine him to obtain information, could not legally examine him on oath, nor could the accused be said at that stage of the proceedings to be a witness, even though he were examined on oath. There was no authority that, being so examined, the accused was bound by any express provision of law to state the truth. Consequently any charge for giving false evidence

FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

founded on this statement was bad, and it therefore followed that a conviction and sentence founded on this statement as being contrary to another statement made by the accused when examined as a witness at the trial, without any proof of finding that the second statement was false, could not be maintained. HARI CHARAN SINGH *v.* QUEEN-EMPRESS . . . **I. L. R. 27 Calc. 455 4 C. W. N. 249**

28. ——— Proceedings by District Judge without jurisdiction—*Penal Code, ss. 193, 199—Bengal Tenancy Act, 1885, s. 95.* The Bengal Tenancy Act does not authorize a proceeding calling upon a person to show cause why he should not make over documents and papers belonging to an estate of which a common manager has been appointed. A person giving false evidence in such proceeding cannot be convicted under s. 193 or s. 199 of the Penal Code ABDUL MAJID *v.* KRISHNA LAL NAG . **I. L. R. 20 Calc. 724**

29. ——— Collector under Land Acquisition Act whether "a Court"—*Power of such Collector to administer oath or require verification—Deputy Collector under Land Acquisition Act—Judicial officer—Revenue Court—Over-estimate of value of land—False statement—Criminal Procedure Code (Act V of 1898), ss. 195, 476—Penal Code (Act XLV of 1860), s. 193—Land Acquisition Act (I of 1894), s. 53.* The expression "the Court" in the Land Acquisition Act does not include a Collector, nor is there any authority given to the Collector to administer an oath or to require a verification. It is a false statement made under a verification that constitutes an offence under s. 193 of the Penal Code, not a verification oath or solemn affirmation. The Deputy Collector acting under the Land Acquisition Act is not a judicial officer, he cannot properly be regarded as a Revenue Court within the terms of s. 476 of the Code of Criminal Procedure, his proceedings under the former Act are not regulated by the Code of Civil Procedure, nor is he right in requiring a petition put in before him to be verified in accordance with that Code, so as to make any false statement punishable as perjury. The Deputy Collector is not in a position to pass any final order in the matter of value of the land or the right to claim the price fixed; a party dissatisfied can claim a reference to the Civil Court, whose duty it is to settle the matter in dispute judicially; therefore, to subject parties who claimed the right to such a reference to a criminal prosecution, when the matters on which the Deputy Collector had formed an opinion as a revenue officer under the Land Acquisition Act must be submitted to the determination of a Court, is obviously premature and improper, and is almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matter. In proceedings under the Land Acquisition Act what may be found to be an exaggeration or over-estimate of the value of land cannot properly constitute a false statement, which would demand a prosecution for perjury, and

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

the fact that some years before the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence. DURGA DAS RUKHIT *v.* QUEEN-EMPRESS . **I. L. R. 27 Calc. 820**

30. ——— Enquiry under Legal Practitioners' Act—*Penal Code, ss. 181, 193—Legal Practitioners' Act, XVIII of 1879—Judicial proceeding—Examination of accused on solemn affirmation.* Where three persons, of whom one was a pleader, were tried together and convicted under s. 181 of the Penal Code of having made false statements on solemn affirmation about the same matter in the course of an enquiry into the conduct of the pleader under the provisions of the Legal Practitioners' Act: *Held*, that the conviction of the pleader was bad, as his statement was improperly taken from him on solemn affirmation. *Held*, further, that an enquiry under the Legal Practitioners' Act being a judicial proceeding, false statements on solemn affirmation made by the witnesses therein should be charged and tried separately under s. 193 of the Penal Code. KOTHA SUBBA CHETTI *v.* QUEEN **I. L. R. 6 Mad. 252**

31. ——— Penal Code, ss. 191 and 193—*Giving false evidence before a police patel—Bombay Act VIII of 1867 (Village Police), s. 13.* A person who makes a false statement upon oath before a police patel, acting under s., 3 of Bombay Act VIII of 1867, gives false evidence within the meaning of s. 191 of the Penal Code, and is punishable under s. 193. EMPRESS *v.* IRBASAPA **I. L. R. 4 Bom. 479**

32. ——— Evidence not given in Court of Justice—*Penal Code, ss. 191, 194—Statement made to police officer.* It is not necessary under s. 194, Penal Code, that the false evidence which is given should be evidence given in a Court of Justice. Such statement, if made to a police officer, would amount to the offence of giving false evidence as defined in s. 191, taking s. 118 of the Code into consideration. QUEEN *v.* NIM CHAND MOOKERJEE . . . **20 W. R. Cr. 41**

In the matter of JUGGERNATH SAHAI **8 C. L. R. 236**

33. ——— Police investigation—*Penal Code, s. 191—Criminal Procedure Code, 1872, ss. 118, 119.* Neither the words "shall answer all questions" in s. 118 of the Code of Criminal Procedure, nor the words "shall be bound to answer all questions" in s. 119 of the same Code, constitute "an express provision of the law to state the truth" within the meaning of s. 191 of the Penal Code. Ss. 118 and 119 are merely intended to oblige persons to give such information as they can to the police, in answer to the questions which may be put to them, and they impose no legal obligation on those persons to speak the truth. EMPRESS *v.* KASSIM KHAN. EMPRESS *v.* DAHIA **I. L. R. 7 Calc. 121 : 8 C. L. R. 300**

FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

34. ——— *Criminal Procedure Code, 1898, s. 161—Examination of witnesses by the police—Legal obligation to speak the truth—Refusal to answer questions—Liability to punishment under ss. 176, 179 and 187 of the Penal Code.* A refusal to answer questions asked by a police-officer under s. 161 of the Code of Criminal Procedure is not punishable under ss. 176, 179 and 187, of the Penal Code. QUEEN-EMPRESS *v.* SANKARALINGA KONE . . . **I. L. R. 23 Mad. 544**

QUEEN-EMPRESS *v.* APPIGADU **I. L. R. 23 Mad. 544 note**

35. ——— *Judicial proceeding—Code of Criminal Procedure, Act X of 1882, ss. 155 and 161—Penal Code (Act XLV of 1860), s. 193.* S. 161 of the Code of Criminal Procedure, Act X of 1882 makes it obligatory on a person examined in the course of a police investigation under Ch. XIV to answer truly all questions put to him (other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture), and such person, if he knowingly answers falsely, commits the offence of giving false evidence in a stage of a judicial proceeding under s. 193 of the Penal Code. QUEEN-EMPRESS *v.* PARSHRAM RAYSING **I. L. R. 8 Bom. 216**

36. ——— *Criminal Procedure Code, 1882, s. 161—Penal Code, s. 193—False statement to police officer.* The law laid down by the Full Bench in the case of *Empress* v. *Kassim Khan, I. L. R. 7 Calc. 121,* has been altered by the provisions of s. 161 of the Code of Criminal Procedure (Act X of 1882), and a witness who makes a false statement to a police officer in reply to a question which he is bound to answer would be guilty of intentionally giving false evidence. NATHU SHEIK *v.* QUEEN-EMPRESS . . **I. L. R. 10 Calc. 405**

37. ——— *Penal Code, ss. 191, 193—Statements to police officers investigating under Criminal Procedure Code, s. 161.* The provisions of ss. 191 and 193 of the Penal Code do apply to the case of false statements made under s. 161 of the Code of Criminal Procedure, 1882. QUEEN-EMPRESS *v.* BHAGWANTIA **I. L. R. 15 All. 11**

38. ——— Statement made in Judicial proceeding before Magistrate—*Penal Code, ss. 181, 193.* Where a false statement is made in a stage of a judicial proceeding before a Magistrate, he ought not to convict under s. 181 of the Penal Code, but should commit to the Sessions under s. 193 of that Code. QUEEN *v.* NUSSUROODDEEN SHAZWAL . . . . **11 W. R. Cr. 24**

39. ——— Statement made in the course of a "judicial proceeding"—*Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code, s. 164—Statements made before a Magistrate under s. 164. Held,* that where a witness had made one statement on oath or solemn affirmation

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

before a third class Magistrate under s. 164 of the Code of Criminal Procedure, and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class, he might properly be convicted under the second—if not under the first—paragraph of s. 193 of the Penal Code. *Queen-Empress* v. *Bharma, I. L. R. 11 Bom. 702,* considered and distinguished. QUEEN-EMPRESS *v.* KHEM . . **I. L. R. 22 All. 115**

40. ——— *Oaths Act (X of 1873), ss. 5, 14—Criminal Procedure Code (Act X of 1882), s. 164—Magistrate, power of.* A Magistrate, acting under Criminal Procedure Code, s. 164, has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting. QUEEN-EMPRESS *v.* ALAGU KONE **I. L. R. 16 Mad. 421**

41. ——— *Falsely denying possession of document—Witness.* Where a witness denies on oath that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding. *In re* PREMCHAND DOWLATRAM **I. L. R. 12 Bom. 63**

42. ——— *Penal Code (Act XLV of 1860), ss. 191 and 193—Witness in trial which had to be heard de novo owing to incompetence of juror—Oaths Act (X of 1873), s. 14.* On the trial of certain prisoners on a charge of dacoity, a witness gave false evidence, and was committed under s. 477 of the Criminal Procedure Code, for trial on a charge under s. 193, Penal Code. After such committal, it was discovered that one of the jurors empanelled in the dacoity case was deaf and partly blind ; and thereupon, under s. 282, Criminal Procedure Code, the case was tried *de novo* before a competent jury. *Held,* that the fact that the trial for dacoity had to be commenced *de novo* did not exonerate the prisoner from the obligation to speak the truth imposed by s. 14 of the Indian Oaths Act X of 1873 in the first trial, which became abortive owing to the incompetency of one of the jurors, nor prevent the statement made by the witness at the first trial from being made the subject of an offence under s. 191 or 193 of the Penal Code. QUEEN-EMPRESS *v.* VIRASAMI **I. L. R. 19 Mad. 375**

43. ——— **Statement made in proceedings without jurisdiction**—*Penal Code, ss. 181, 193.* A conviction under s. 181 of the Penal Code is good, though the offence falls within s. 193. ANONYMOUS . . . **4 Mad. Ap. 18**

44. ——— **False statement before Income-Tax Commissioner**—*Penal Code, ss. 181, 193.* When an offence under s. 193 of the Penal Code is established, a conviction under s. 181 is illegal. When the accused made on solemn affirmation a statement before an Income-Tax Commissioner, which statement the accused knew, or had reason to believe, to be incorrect, it was *held* that such statement amounted to the offence of giving false evidence in a judicial proceeding under s. 193 of the Penal Code, and was therefore not cognizable by a full power Magistrate, as it could not be treated as constituting an offence triable under s. 181 of the Penal Code, making a false statement to a public servant. REG. *v.* DAYALJI ENDARJI . . . . **8 Bom. Cr. 21**

45. ——— **False statement in verified petition under s. 19 of the Income-Tax Act (IX of 1869).** The prisoner was convicted of perjury by wilfully making a false statement in a verified petition presented under s. 19 of the Income Tax Act (Act IX of 1869) to a tahsildar. *Held,* that the tahsildar was not an officer competent to receive such a petition, and that no offence was committed. MOONEAPPA OODIAN *v.* QUEEN. SUBRAYA OODIAN *v.* QUEEN . . . . **5 Mad. 326**

46. ——— **Making false return of service of summons**—*Penal Code, s. 193.* The making of a false return of service of summons is an offence punishable, not under s. 181, but under s. 193 of the Penal Code, and is cognizable by the Court of Session alone. QUEEN *v.* SHAMA CHURN ROY . . . . . **8 W. R. Cr. 27**

47. ——— **Statement before Collector as Revenue officer**—*Penal Code, s. 193—Judicial enquiry.* A conviction may be had for giving false evidence under s. 193, Penal Code, even if the evidence be given in matters not judicial (such as before the Collector acting in his fiscal capacity under Reg. XIX of 1814), but it must be proved that the false statement was made under the sanction of the law. QUEEN *v.* AUDHUN ROY . . . . **14 W. R. Cr. 24**

48. ——— **Enquiry into application for allowance for spoiled stamps**—*Enquiry made by Deputy Collector—Stamp Act, 1879, s. 51—Penal Code, ss. 181, 193.* The Collector himself is the officer, and no other, to whom power is given by law to make enquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications, and he cannot delegate his authority in the matter. *Held,* therefore, where a person had applied for a refund under Ch. VI of Act I of 1879, and the Collector made over the application for enquiry to a Deputy Collector, that the Deputy Collector was not entitled to put the witnesses produced by the applicant on their oaths, and consequently, in reference to the statements of such witnesses, no charge under s. 181 or s. 193 of the Penal Code was sustainable. EMPRESS *v.* NIAZ ALI **I. L. R. 5 All. 17**

49. ——— **False statement made before Registrar**—*Proceedings under the Registration Act, 1866.* A Sub-Registrar is competent, for any purpose contemplated by Act XX of 1866, to examine any person ; and any statement made by such person before an officer in any proceedings or enquiries under the Act, if intentionally false, renders such person liable to a criminal prosecution, QUEEN *v.* JUGGUT CHUNDER DUTT **6 W. R. Cr. 81**

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

50. ——— *Petitions not verified—Prosecution under the Registration Act (III of 1877), s. 82, cl. (a), and s. 83, ss. 72 and 73.* Where the accused was tried for intentionally making a false statement in the course of certain proceedings taken before a Registrar :—*Held,* that, even assuming that such proceedings were taken under s. 72 of the Registration Act, and not as they should have been, under s. 73, the appearance of the accused before the Registrar and his taking no objection to the form of the proceedings will cure the irregularity for the purposes of a criminal trial under the provisions of the Registration Act. Nor under similar circumstances will the want of verification of a petition of appeal on the part of the applicant, as provided by s. 73 of the Act, oust the jurisdiction of the Criminal Court. *Reg. v. Berry, 28 L. J. M. C. 86, Queen* v. *Fletcher, L. R. 1 C. C. R. 320 ; Turner* v. *Post Master General, 5 B. & S. 756 ; Queen* v. *Hughes, L. R. 4 Q. B. D. 614. Queen* v. *Smith, L. R. 1 C. C. R. 110,* followed. *Held,* also, that, except as directed by s. 82 of Act III of 1877, the Magistrate has no authority on his own mere motion to frame a charge against the accused in consequence of evidence given in the course of the trial by the registering officer in respect of certain statements made before him during registration proceedings. QUEEN-EMPRESS *v.* BATESAR MANDAL **I. L. R. 10 Calc. 604**

51. ——— *Registration Act (III of 1877), s. 82—Penal Code (Act XLV of 1860), s. 193—"Judicial proceedings"—Delegation of powers by District Registrar.* It is no offence to make a false statement before a person purporting to act in execution of the Registration Act, but not legally authorized so to do. RADHIKA MOHAN KURI *v.* LAL MOHAN SHA . **I. L. R. 20 Calc. 719**

52. ——— **Statement in unsigned petition**—*Penal Code, ss. 193, 190.* A petition not bearing the signature of the accused, and therefore not a declaration made or subscribed by him, cannot be made the foundation of a charge or conviction under s. 199 of the Penal Code, but a deposition on oath supporting such a petition, if false, justifies a charge under s. 193 of the Code. *In the matter of* RAM RAWAZ KOOWAR **7 C. L. R. 536**

53. ——— **Statement in petition not requiring verification**—*Unnecessary verification. Semble :* A petition represented under Reg. XVII of 1806 not requiring verification cannot, from the fact of its being verified unnecessarily, be made the subject of a prosecution for giving false evidence. *In the matter of the petition of* KASI CHUNDER MOZUMDAR. JUGGUT CHUNDAR MOZUMDAR *v.* KASI CHUNDER MOZUMDAR **I. L. R. 6 Calc. 440 : 7 C. L. R. 330**

54. ——— **False statement in vakalatnamah**—*Penal Code, s. 193.* The prisoner, a vakil, presented a vakalatnamah in the District Munsif's Court signed by the defendant in a civil suit authorizing the prisoner to appear for the defendant. The vakalatnamah falsely purported to have been executed before the Adighari of the village and to bear the signature of the Adighari. The prisoner was convicted under s. 193 of the Penal Code. *Held,* that the case was not brought within the section, and that the prisoner was entitled to his discharge from custody. QUEEN *v.* KEILASUM PUTTER . . . . . **5 Mad. 373**

55. ——— **Statement in document not requiring verification**—*Civil Procedure Code, 1859, ss. 119, 120.* The verification of an application filed in the Civil Court, in which it was stated that the applicant did not sign an alleged deed of compromise, does not subject him to punishment for giving false evidence. Such an application falls not under s. 120, Act VIII of 1859, but under s. 119 of that Act and need not, therefore, be verified. QUEEN *v.* KARTICK CHUNDER HALDAR **9 W. R. Cr. 58**

56. ——— **Statement in application for new trial**—*Penal Code, ss. 191, 192—Verification of document as a plaint.* *A* made an application for a new trial under s. 21 of Act XI of 1865. He filed a memorandum of his grounds verified as a plaint, and therein knowingly made a false statement. *Held* (GLOVER, *J.*, dissenting), that he had not thereby committed an offence under s. 191 or 192 of the Penal Code. *In re* HARAN MANDAL **2 B. L. R. A. Cr. 1 : 10 W. R. Cr. 31**

57. ——— **False verification of written statement**—*Civil Procedure Code, ss. 51, 115 Penal Code (Act XLV of 1860), s. 191.* A person filing a written statement in a suit is bound by law to state the truth, and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence within the meaning of s. 191 of the Penal Code. QUEEN-EMPRESS *v.* MEHRBAN SINGH **I. L. R. 6 All. 626**

58. ——— **Witness deposing falsely in another's name**—*Penal Code, s. 193, and ss. 416, 419.* A witness falsely deposing in another's name should be charged with giving false evidence under s. 193, and not with cheating by personation under s. 419 of the Penal Code. REG. *v.* PREMA BHIKA . . . . . **1 Bom. 89**

59. ——— **Putting forward person knowing him to be some one else**—*Abetment of false evidence.* Where *C* falsely represented himself to be *U* and the writer of a document signed by *U*, and *T*, knowing that *C* was not *U*, and had not written such document, adduced *C* as *U*, and as the writer of that document : *Held,* that *T* ought to have been convicted not of intentionally giving false evidence in a judicial proceeding, but on a charge of abetting the giving of false evidence. QUEEN *v.* CHUNDI CHURN NAUTH **8 W. R. Cr. 5**

60. ——— **Statement unintentionally causing conviction of murder**—*Penal Code, ss. 193, 194—Power of Sessions Judge.* The Ses-

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

sions Judge has no power to commit a man for having given false evidence before the Magistrate, but he can commit him for having given false evidence in his own Court. In the trial of a prisoner for murder, a witness stated on oath before the Sessions Court that another had committed the murder, whereas before the Magistrate he had stated, as was the fact, that the prisoner had committed the murder. *Held*, that such witness was guilty under s. 193, and not under s. 194, of the Penal Code, as he did not know that he would cause a conviction for murder. QUEEN *v.* HARDYAL **3 B. L. R. A. Cr. 35**

61. ——— Subornation of perjury—*Penal Code, s. 196.* The provision of the Penal Code (s. 196) against using false evidence is not ordinarily intended to apply to subornation of perjury. To establish an offence under s. 196, it must be shown that the accused made some use of the false evidence after it was in existence. QUEEN *v.* SUFFURUDEE . . **1 Ind. Jur. O. S. 122**

62. ——— Intentional omission to mention adjustment of decree in application for execution—*Penal Code, ss. 193, 199—Civil Procedure Code, s. 235—Intentional omission.* Under s. 235 of the Code of Civil Procedure (XIV of 1882), the decree-holder, or the party who applies for execution, is bound to state in his application any adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court. *Paupayya* v. *Narasannah, I. L. R. 2 Mad. 216,* followed. Intentional omission to make such statement amounts to an offence under s. 193 of the Penal Code (XLV of 1860). S. 199 of the Penal Code (XLV of 1860) does not apply to applications for execution containing false averments. QUEEN-EMPRESS *v.* BAPUJI DAYARAM **I. L. R. 10 Bom. 288**

63. ——— Charge—*Criminal Procedure Code (Act V of 1898), ss. 195, 477—Bail, order for, before commitment—Preliminary inquiry—Charge, framing of, if absolutely necessary—Jurisdiction—Penal Code (Act XLV of 1860), s. 193—False evidence, giving of.* S. 477 of the Code of Criminal Procedure contemplates that there should be a charge upon which the commitment is based; in other words, the person accused of having committed the offence should know the specific nature of the accusation against him, so as to be able to answer it. Where an order was made, directing a witness to give bail before a Court of Session and to appear, when called upon, before such Court, to answer charges under s. 193, Indian Penal Code, without any reference to the specific false statements alleged to have been made by the witness in the course of a judicial proceeding, it was *held* that the order could not be regarded as a commitment under s. 477, Criminal Procedure Code. Such an order is not warranted by law, and is without jurisdiction. MOHIM CHUNDER MOZUMDAR *v.* KING-EMPEROR (1901) . . . **5 C. W. N. 615**

FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*contd.*

64. ——— Commitment—*Criminal Procedure Code (Act V of 1898), ss. 476, 477—Commitment to Court of Session for giving false evidence—Preliminary inquiry, if necessary—Sessions Judge, jurisdiction or power of, as a Court of appeal to order commitment—Difference in procedure between the provisions of ss. 476 and 477—Applicability of the sections—Penal Code (Act XLV of 1860), s. 193—False evidence, giving of.* S. 477 of the Code of Criminal Procedure deals with cases which transpire before the Court of Session itself, and in which the Sessions Judge is in a position to declare, without any further inquiry, that the person against whom action is necessary under that section has in fact committed an offence mentioned in s. 193, Criminal Procedure Code. *The Queen* v. *Nomal, 12 W. R. Cr. 69,* referred to. Where evidence was given by a witness before a Deputy Magistrate, which was in conflict with the statements of certain other witnesses, and the Deputy Magistrate did not believe the statements of that witness, and the Sessions Judge, on appeal, was inclined to take the same view, and committed that person to take his trial before the Court of Session on a charge of giving false evidence in a judicial proceeding: *Held*, that there was no fact before the Sessions Judge upon which he could come to the conclusion that the offence of giving false evidence had been committed, either before him or before the Deputy Magistrate. *Held*, also, that the only conclusion to which he could come was that the offence of giving false evidence might have been committed before the Deputy Magistrate, and that the case could not be ripe for commitment until a further inquiry was made in the matter and an opportunity given to the person to show that his statements were not untrue to his knowledge. *Held*, also, that the section applicable to the facts of the present case was s. 476, and that the commitment of the petitioner under s. 477 was illegal. *In the matter of* UMESH CHANDRA CHAKRAVARTI (1901) . **5 C. W. N. 630**

65. ——— Security for appearance—*False evidence, giving of—Criminal Procedure Code (Act V of 1898), s. 477—Security to appear when called upon, to answer charges yet to be framed.* There is no warrant in law for an order by a Sessions Judge directing a witness, alleged to have given false evidence in a judicial proceeding before him, to give security to appear before him, when called upon, to answer charges yet to be framed under s. 193 of the Indian Penal Code. KRISTA CHANDRA BHADRA *v.* KING-EMPEROR (1901) . . **5 C. W. N. 630**

66. ——— Stay of proceeding pending civil suit—*Registration Act (III of 1877), s. 82—Refusal to register deed denying execution, prosecution for—Stay of proceeding pending civil suit to declare deed a forgery.* Petitioner denied execution and refused to register a mortgage-deed. On appeal, the special Sub-Registrar found the deed to be genuine, and ordered registration and sanctioned prosecution of the petitioner under s. 82 of the Registration Act, subject to the approval of the

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FALSE EVIDENCE—*contd.*

1. GENERAL CASES—*concld.*

District Registrar. The sanction was given, but the petitioner applied for stay of proceedings pending decision in a suit he had filed in the Civil Court for having the deed declared a forgery, and, on the refusal of the Magistrate to stay proceedings : *Held*, that the Magistrate should have stayed proceedings pending the decision in the civil suit. GOBERDHONE PRAMANICK *v.* ISWAR CHUNDER PRAMANICK (1900) . . . . . **5 C. W. N. 44**

67. ——— **Assignment of perjury**—*Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Evidence Act (I of 1872)—Intentionally giving false evidence in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Proof—Misreading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction.* According to the Criminal Law in England from which the Indian system is largely drawn, the assignment of perjury must be proved by two witnesses or by one witness and the proof of other material and relevant facts confirming his testimony. This " is not a mere technical rule, but a rule founded on substantial justice." The Indian Evidence Act (I of 1872) does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those, who have to administer the criminal law in India. Where with reference to an adoption the accused made a statement, and where no other expression would with equal propriety have been used to express the corporal act (of giving and taking in adoption), it is antagonistic to the first principles of criminal jurisdiction to explain away to the prejudice of the accused that statement, which in its legitimate sense indicated a corporal giving and taking. *Per* JENKINS, *C.J.*—A conviction for perjury cannot stand where the onus has been wrongly placed ; explanations have been demanded from the accused, when no occasion for them existed ; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied. For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration, which is said to be absent. EMPEROR *v.* BAL GANGADHAR TILAK (1904) **I. L. R. 28 Bom. 497**

2. FABRICATING FALSE EVIDENCE.

1. ——— **Fabrication of false evidence**—*Penal Code, s. 193 and s. 120—Illegal concealment to fabricate evidence.* The term " fabrication " in s. 193 of the Penal Code refers to the fabrication of false documentary evidence to be used in a suit, so that to convict under this section it is

FALSE EVIDENCE—*contd.*

2. FABRICATING FALSE EVIDENCE—*contd.*

essential to aver and to prove that the fabricated documents were intended for that purpose. The illegal concealment, by act or omission, contemplated by s. 120 of the Code, has reference to the existence of a design on the part of third persons to fabricate evidence. QUEEN *v.* RAJCOOMAR BANERJEE . . . . **1 Ind. Jur. O. S. 105**

2. ——— **False verification**—*Verification of statement in suit for rent—Act X of 1859, s. 37.* The plaintiff brought a suit for rent claimed to be due for three years ; he failed to prove his claim, and the suit was dismissed for want of evidence. He afterwards sued to recover rent for one of the same years, and recovered the amount. The Judge on appeal reversed the decree, and made an order remitting the case to the Deputy Collector to enquire under Act X of 1859, s. 37, whether the plaintiff had committed perjury in the first suit, the plaint in which was verified by his agent. The 37th section of the Act requires that the statement of claim shall be verified by the plaintiff or his agent, and enacts that, if the statement shall contain any averment which the person making the verification shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment according to the law for the time being in force for the punishment of giving or fabricating false evidence. *Held*, that there was no foundation for the order, the averment having been made by the agent, and not by the plaintiff ; and besides, there was no evidence that it was untrue, there having been no finding in the first suit that the rent was not due. TARAPERSAD ROY CHOWDHRY *v.* GOPAL DASS DUTT **Marsh. 72 : W. R. F. B. 24 1 Ind. Jur. O. S. 79 : 1 Hay 235**

3. ——— **False accounts**—*Penal Code, s. 193—Making up false accounts to produce before forest officer.* The making up falsely of accounts, with the intention of producing them before a forest officer not empowered by law to hold an investigation and take evidence, is not a fabrication of false evidence within the meaning of s. 193 of the Penal Code. REG. *v.* RAMAJIRAV JIVBAJIRAV **12 Bom. 1**

4. ——— **Intention to procure conviction**—*Penal Code, s. 195.* The prisoner was convicted under s. 195 of the Penal Code of fabricating false evidence with intent to procure the conviction of a certain person of an offence. The prisoner's act was committed in a most public manner, and was not calculated to lead to the conviction of the person, nor did it appear that the prisoner took any steps to secure his conviction. *Held*, that the conviction of the prisoner could not be sustained. QUEEN *v.* SHIB DYAL . . . . . **5 N. W. 188**

5. ——— *Making it appear offence had been committed—Failure to lay charge—Penal Code, s. 193.* A person having made a hole in the wall of his own house, broke open a

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FALSE EVIDENCE—*contd.*

2. FABRICATING FALSE EVIDENCE—*contd.*

box and removed the contents to which he believed himself entitled, but as to which there was a dispute, making the removal appear to have been the act of thieves from the outside, was charged with fabricating false evidence for the purpose of its being used in a stage of a judicial proceeding under s. 193 of the Penal Code. It did not appear that any charge had been laid by the accused against any one in respect of the removal of the contents of the box. *Held*, that the crircumstances did not warrant the charge under s. 193 of the Penal Code of fabricating false evidence. THEWA RAM *v.* EMPRESS . . . . **10 C. L. R. 187**

6. ——— **Statement (in petition) of payment on account of tenure after tenure had been set aside**—*Penal Code, s. 193.* A certain alleged mokurari tenure having been set aside by a Civil Court, the person who had claimed to hold such tenure in depositing money in Court, in a petition stated that the deposit was in respect of the mokurari tenure, whereupon he was charged and convicted under s. 193 of the Penal Code with fabricating false evidence. *Held*, that the conviction was bad. DABEE MAHTO *v.* RAM MOHUN MOOKHOPADHYA . . . **10 C. L. R. 433**

7. ——— **Attempt to commit offence**—*Penal Code, s. 193.* *M* instigated *Z* to personate *C*, and to purchase in *C's* name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed *C's* name on such paper as the purchaser of it. *M* acted with the intention that such endorsement might be used against *C* in a judicial proceeding. *Held*, that the offence of fabricating false evidence had been actually committed, and that *M* was properly convicted of abetting the commission of such offence. *Queen* v. *Ramsaran Chowbey, 4 N. W. 46*, distinguished and observed on. EMPRESS *v.* MULA **I. L. R. 2 All. 105**

8. ——— **Fabricated letter**—*Intention to use before Registrar—Use before Court—Penal Code, s. 196.* *L* brought a suit upon a bond, and at the trial sought to support his claim by a letter fabricated probably for the purpose of enabling *L* to get the bond registered. *L* was convicted under s. 196 of the Penal Code. *Held*, that, if the letter was fabricated for use before the Registrar, it was no valid objection to the conviction. LAKSHMAJI *v.* QUEEN-EMPRESS **I. L. R. 7 Mad. 289**

9. ——— **Framing incorrect record**—*Public servant making false entry—Penal Code, s. 218.* When a Police Superintendent called for the report from the constable on information that a theft had been committed and reported owing to the constable's negligence, and the constable produced a false report to the effect that no theft had been committed and no information given to him: *Held*, that he was not guilty under s. 218 of the Penal Code. GOVERNMENT *v.* ABDOOL HUQ **3 Agra Cr. 1**

FALSE EVIDENCE—*contd.*

2. FABRICATING FALSE EVIDENCE—*contd.*

10. ——— **False report**—*Penal Code, s. 218.* A kulkarni who makes a false report with reference to an offence committed in his village, with intent, etc., is punishable under s. 218 of the Penal Code. REG. *v.* MALHAR RAM CHANDRA . . . . **7 Bom. Cr. 64**

11. ——— **Fabricating documents by public servant**—*Penal Code, s. 218.* A public servant in charge as such of certain documents, having been required to produce them and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. *Held*, that, such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under s. 218 of the Penal Code. EMPRESS *v.* MAZHAR HUSAIN . . . **I. L. R. 5 All. 553**

12. ——— *Public servant—Forgery—Penal Code, s. 218—Abetment.* *S* was charged with the preparation of a certain record and was in the habit of preparing it from certain abstracts made and read to them by *D*. *D* made and read false abstracts whereby an incorrect record was prepared. The Court was of opinion that *D* could not strictly be held to have committed the offence described in s. 218 of the Penal Code. He was guilty, however, of abetment of the offence described in that section, and not the less so that *S* had no guilty knowledge or intention in the matter. QUEEN *v.* BRIJ MOHAN LAL **7 N. W. 134**

13. ——— *Penal Code, s. 218—Intention.* The intention is an essential ingredient in the offence contemplated by s. 218, Penal Code. QUEEN *v.* SHAMA CHURN ROY **8 W. R. Cr. 27**

14. ——— *False entry in chowkidari book—Penal Code, s. 218.* Where a chowkidar was charged under s. 218, Penal Code, with having made a false entry in a chowkidari attendance book with a view to support a charge which was made against a Sub-Inspector of having made a false report regarding the length of absence from duty of another chowkidar, and thereby to cause loss or injury to the Sub-Inspector, it was *held* that the intention was too remote to fall within s. 218. QUEEN *v.* JUNGLE LALL **19 W. R. Cr. 40**

15. ——— *Penal Code, ss. 192, 218—Public servant.* A police officer, who had suppressed a document intrusted to him to forward to his superior officer, made a false entry in his official diary that the document had been so forwarded, intending that, if he were prosecuted under the Police Act for suppressing the document, such entry might be used as evidence in his behalf that he had so forwarded the document. *Held*, that, inasmuch as to constitute the offence of fabricating false evidence defined in s. 192 of the Penal Code, the evidence fabricated must be admissible evidence, and as, if such police officer had been

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FALSE EVIDENCE—*contd.*

2. FABRICATING FALSE EVIDENCE—*contd.*

prosecuted under the Police Act, the entry in the diary would not have been admissible in his behalf, though, contrary to this intention, it might have been used against him, such police officer was improperly convicted, in respect of such entry, of fabricating false evidence punishable under s. 193 of the Penal Code. *Held*, also, that such police officer's intention in making such entry being to screen himself from punishment, he was not punishable under s. 218 of the Code. EMPRESS *v.* GAURI SHANKAR . . . . . **I. L. R. 6 All. 42**

16. ——— *Penal Code, s. 218—Public servant.* A treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances: A sum of R500, which was in the treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the R500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then, upon two occasions, wrote reports to the effect that the R500 in question then stood at the payee's credit as a revenue deposit, and that it was about to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the treasury officer for the transfer of the money to the Civil Court concerned, and to effect such transfer, a cheque was prepared by the sale-mohurrir, which as originally drawn up related to the sum of R500 already mentioned. The signature of the cheque by the treasury officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of R500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's R500 to the Civil Court, as if it had been the first R500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to. *Held*, that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that, having prepared the reports in a manner which he knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code. *Held*, further, that, as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code. QUEEN-EMPRESS *v.* GIRIDHARI LAL **I. L. R. 8 All. 653**

FALSE EVIDENCE—*contd.*

2. FABRICATING FALSE EVIDENCE—*contd.*

17. ——— *Penal Code, (Act XLV of 1860), s. 218—Public servant framing an incorrect record to save himself from legal punishment.* A public servant who does that which, if done to save another from legal punishment, would bring the public servant within s. 218 of the Penal Code, has equally committed the offence punishable under s. 218 if the person whom he intends to save from legal punishment is himself. *Queen-Empress* v. *Gauri Shankar, I. L. R. 6 All. 42, quoad hoc,* overruled. *Queen-Empress* v. *Giridhari Lal, I. L. R. 8 All. 653,* referred to. QUEEN-EMPRESS *v.* NAND KISHORE **I. L. R. 19 All. 305**

18. ——— *Penal Code (Act XLV of 1860), s. 218—Public servant framing incorrect Record—Injury to the public—Police officer framing a false report.* A report of the commission of a dacoity was made at a thana. The police officer in charge of the thana at first took down the report which was made to him, but subsequently destroyed that report and framed another and a false report—of the commission of a totally different offence—to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant. *Held*, that on the above facts, the police officer was guilty of the offences punishable under s. 204 and s. 218 of the Penal Code. QUEEN-EMPRESS *v.* MUHAMMAD SHAH KHAN **I. L. R. 20 All. 307**

19. ——— *Penal Code (Act XLV of 1860), s. 192—Fabricating false evidence—False entry made by a police officer in a special diary.* *Held*, that a police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted, therefore, of the offence of fabricating false evidence as defined in s. 192 of the Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress* v. *Gauri Shankar, I. L. R. 6 All. 42,* and *Queen* v. *Keilasum Putter, 5 Mad. 373,* referred to. QUEEN-EMPRESS *v.* ZAKIR HUSAIN . . . . **I. L. R. 21 All. 159**

20. ——— *Penal Code (Act XLV of 1860), s. 218—"Charged," meaning of, in that section—Criminal Procedure Code (Act V of 1898), s. 4, cl. (f)—Cognizable offence—Offence under Gambling Act (Bengal Act II of 1867).* The District Superintendent of Police gave a warrant under the Gambling Act (Bengal Act II of 1897) to *D*, a sub-inspector, to arrest persons found gambling in a certain house. In order to save two persons from legal punishment for having committed an offence under the Gambling Act in that house, *D* framed a first information and a special diary incorrectly. *Held*, that he was properly charged with, and found guilty of, having committed an offence under s. 218 of the Penal Code. The word "charged" in that section is not restricted to the narrow meaning of

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FALSE EVIDENCE—*contd.*

2. FABRICATING FALSE EVIDENCE—*concld.*

"enjoyed by a special provision of law." An offence under the Gambling Act being an offence for which the District Superintendent of Police may arrest or by warrant direct an arrest is a cognizable offence within the meaning of s. 4, cl. (*f*), of the Criminal Procedure Code. The words "a police-officer" in that clause do not mean "any and every police-officer"; it is sufficient if the Legislature by any law limits the power of arrest to any particular class of police-officers. QUEEN-EMPRESS *v.* DEODHAR SINGH . **I. L. R. 27 Calc. 144**

21. ——— Putting whole of long statement bodily to witness. It is very irregular, in a charge of intentionally giving false evidence, to put the whole of a long statement bodily to a witness at once. A conviction on such a charge could properly be had only on proof that the accused person had made to the police-officer each and every statement contained in the document. ISAB MANDAL *v.* QUEEN-EMPRESS (1900) **I. L. R. 28 Calc. 348 s.c. 5 C. W. N. 65**

3. CONTRADICTORY STATEMENTS.

1. ——— Circumstances and intention of contradictory statement – *Penal Code, s. 193.* The mere fact that a person has made a statement which contradicts a previous statement is not itself necessarily sufficient to bring him within s. 193 of the Penal Code. The circumstances under which, and the intention with which, the particular statement relied on by the prosecution is made, must in each case be considered before it can be held that the offence has been committed. QUEEN *v.* SOONDUR MOOHOOREE **9 W. R. Cr. 25**
QUEEN *v.* DENONATH BUJJUR **9 W. R. Cr. 52**

2. ——— Weight to be given to contradictory statements. To establish the offence of giving false evidence, direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged, although not made on oath. Such a statement, when satisfactorily proved, is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence, and on precisely the same ground,—that it is an admission of the accused person inconsistent with his innocence. As to the weight to be given to contradictory statements, the sound rule is that a charge of perjury is not maintainable upon proof of one such statement not on oath, or more than one if proved by a single witness only, unless supported by confirmatory evidence tending to show the falsity of the statement in the charge. With respect to the kind or amount of confirmatory proof required, it must be considered in each case

FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*contd.*

whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony. QUEEN *v.* ROSS **6 Mad. 342**

3. ——— Alternative charge—*Statements made before Civil and Criminal Courts.* Where a person makes one statement before the Magistrate and a directly different statement before the Civil Court, his commitment on an alternative charge, after the consent of the Civil Court has been obtained under s. 169 of the Code of Criminal Procedure, is strictly legal. QUEEN *v.* OOTTUR NARAIN SINGH . . . **8 W. R. Cr. 79**

4. ——— *Inconsistent statements in judicial proceeding.* Where a person makes two contradictory statements in the course of a judicial proceedings, he may be tried and convicted of giving false evidence on a single charge if there is evidence to show which statement is false. REG. *v.* GANGOJIBIN PANDJI . **5 Bom. Cr. 49**

5. ——— *Penal Code, s. 72—Alternative finding.* Proof of contradictory statement on oath or solemn affirmation, without evidence as to which of them is false, is sufficient to justify a conviction, upon an alternative finding of the offence of giving false evidence, under s. 72 of the Penal Code and ss. 242, 381, and 382 of the Criminal Procedure Code. The English law upon the subject stated. QUEEN *v.* PALANY CHETTY **4 Mad. 51**

6. ——— *Statement inconsistent with previous one—Criminal Procedure Code (Act XXV of 1861), s. 172.* Where a witness makes a statement before the Sessions Court which contradicts that made by him before the committing officer, and no evidence is given to show which statement is true, it cannot, under s. 172, Act XXV of 1861, be said that an offence has been committed under the cognizance of the Sessions Court. A Judge's duty in dealing with the contradictory statements of a witness discussed. QUEEN *v.* NOMAL **4 B. L. R. A. Cr. 9 : 12 W. R. Cr. 69**

7. ——— *Statements inconsistent with previous one—Penal Code, s. 193.* The statement made by a witness before the Magistrate was opposed to the statement made by him before the Sessions Court. On a charge of perjury being made:—*Held*, that as statement made by the accused before one Court was no evidence of the falsity of a contrary statement before another Court to support a conviction of giving false evidence. *Held*, also, that neither the Judge nor jury had any right to assume that an explanation could not have been given consistent with both the statements. QUEEN *v.* KOLA **4 B. L. R. A. Cr. 4 : 12 W. R. Cr. 66**

8. ——— *Plea of guilty on one charge, effect of.* Where a prisoner is charged separately for having given false evidence with regard to two statements directly opposed to each other, a plea of guilty on one of the charges

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FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*contd.*

does not involve an acquittal on the other. A Sessions Court is bound to take evidence and try a charge before it can acquit a prisoner of that charge. QUEEN *v.* HOSSEIN ALI . **8 B. L. R. Ap. 25**

9. _____ *Legality of conviction.* The prisoner, who, as a witness in a former case, had made one statement before the Magistrate and a contrary one before the Sessions Judge, was tried and convicted of having either given false evidence before the Judge or given false evidence before the Magistrate. *Held* (NORMAN and CAMPBELL, *JJ.*, doubting), that the conviction was right. *Held*, also (CAMPBELL, *J.*, differing), the evidence taken before the Judge was admissible on the charge of having given false evidence before the Magistrate. QUEEN *v.* ZAMIRAN
B. L. R. Sup. Vol. 521
6 W. R. Cr. 65

10. _____ *Alternative statements—Perjury. Per* NORMAN, *J.—Quære:* Notwithstanding the decision of the Full Bench in *Queen* v. *Zamiran, B. L. R. Sup. Vol. 521 : 6 W. R. Cr. 35*, as to the correctness of conviction for perjury upon alternative statements. QUEEN *v.* MATI KHOWA . . . **3 B. L. R. A. Cr. 36**
12 W. R. Cr. 31

11. _____ *Criminal Procedure Code (Act X of 1872), s. 455, sch. iii—Penal Code (Act XLV of 1860), s. 193.* Where a person was convicted of giving false evidence upon an alternative charge in the form given in Sch. III of the Criminal Procedure Code: *Held* by the majority of the Court (JACKSON and PHEAR, *J.J.*, dissenting), that the conviction was good, notwithstanding the jury had not distinctly found which of the two statements charged was false. *Held per* JACKSON, *J.*, that such a charge is bad, and further that an alternative finding upon such charge is invalid *Held per* PHEAR, *J.*, that although a person may be lawfully tried upon such a charge, still the Court or jury must, for a conviction, find specially which branch of the alternative is true. QUEEN *v.* MAHOMED HOOMAYOON SHAW
13 B. L. R. F. B. 324 : 21 W. R. Cr. 72

(*Contra*) QUEEN *v.* BIDU NOSHYO
13 B. L. R. 325 note : 11 W. R. Cr. 37
12 W. R. Cr. 11

12. _____ *Proof of truth of each branch of charge.* To support a finding upon an alternative charge of perjury, there must be legal evidence of the truth of each branch of the charge. QUEEN *v.* GONOWRI . **22 W. R. Cr. 2**

13. _____ In order to sustain any conviction for giving false evidence upon an alternative charge when no evidence is offered to prove the falsity of either statement in particular, it must be clear that the two statements are contradictory. NATHU SHEIKH *v.* QUEEN-EMPRESS . . . . **I. L. R. 10 Calc. 405**

FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*contd.*

14. _____ *Intentionally giving false evidence by contradictory statements.* A conviction and sentence founded on one statement as being contrary to another without any proof or finding that the second statement was false, cannot be maintained. HARI CHARAN SINGH *v.* QUEEN-EMPRESS
I. L. R. 27 Calc. 455 : 4 C. W. N. 249

15. _____ *Validity of conviction—Statements which cannot both be true.* It is not of itself sufficient to warrant a conviction for giving false evidence that an accused person has made one statement on oath at one time and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue. *Reg.* v. *Jackson, 1 Lewis. C. C. 270; Reg.* v. *Wheatland, 8 C. & P. 238;* and *Rex.* v. *Harris, 5 B. & Ald. 926*, referred to. S. 455 of Act X of 1872 (Criminal Procedure Code) is no authority for framing against a person accused of giving false evidence who has made one statement on oath on one occasion, and a directly contradictory one on oath on another occasion, a charge in the "alternative," that word, as used in that section, meaning that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as to guard against his escaping conviction through technical difficulties. *Held*, therefore, where three persons were committed for trial jointly charged with "having on or about the 26th September 1881, or the 18th October 1881, being legally bound upon oath to state the truth, knowingly on those days, regarding the same subject, made contradictory statements upon oath," and thereby committed an offence punishable under s. 193 of the Penal Code, and such persons were jointly tried on such charge, that such charge was bad for being single and joint against the three accused persons instead of several and specific in regard to each of them; that it was further bad because it did not distinctly and in terms allege which of the statements was false; that, assuming a committal upon so faulty a charge should be allowed to stand, the Court of Session should have prepared a fresh charge against each of the accused persons specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately; and that, there being no evidence that either of the statements made by two of such persons was false except that it was contradicted by the other, the charge against such persons was not sustainable, there being no sufficient evidence that either of the statements was false. EMPRESS *v.* NIAZ ALI
I. L. R. 5 All. 17

16. _____ *Charge in alternative of two different offences under two different*

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FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*contd.*

sections of Penal Code—False information to public servant—Criminal Procedure Code, ss. 225, 232, 233, 537—Penal Code (XLV of 1860), ss. 182 and 193—Forest Act, VII of 1878. The accused was charged, in the alternative, by the trying Magistrate as follows: I, W. W. Drew, Magistrate, first class, hereby charge you, Ramji Sajabarao, as follows: That you, on or about the 13th day of October 1882, at Nandarpada, stated that you had seen Vishnu Vaman and Mahadu Lakshman carrying teakwood from Gohe Forest to Narayan Ramchandra, range forest officer, and on 14th February 1885 you stated on oath before the first class Magistrate at Pen, at the trial of these persons, that you did not see where they had brought the wood from, and thereby committed an offence punishable under s. 182 or s. 193 of the Penal Code (XLV of 1860) and within my cognizance; and I hereby direct that you, Ramji Sajabarao, be tried by the said Court on the same charge." At the trial the accused asserted the truth of the former of these two statements, and denied having made the other. The Magistrate was unable to find which of them was false, and convicted the accused, in the alternative, either under s. 182 or s. 193 of the Penal Code (XLV of 1860). *Held*, that the charge was bad in law, being an alternative charge in a form forbidden by s. 233 of the Criminal Procedure Code (X of 1882), which directs that for every distinct offence of which any person is charged there shall be a separate charge. Nor could the accused be tried upon a charge framed in the alternative as in the form given in Sch. V-XXVIII-(4) of the Criminal Procedure Code (X of 1882); for, upon the facts alleged, there was no way of charging him with one distinct offence on the ground of self-contradiction. He could not successfully be charged under s. 193 of the Penal Code (XLV of 1860) on contradictory statements because he only made one deposition in which there was no discrepancies; and, similarly, he could not be charged under s. 182 of the the Penal Code, for he only once gave information to a public servant. *Held*, also, that having regard to ss. 225, 232, and 537 of the Criminal Procedure Code (X of 1882), the accused, convicted upon such a charge, must be held to have been misled in his defence, and his conviction and sentence reversed. In charges founded upon supposed contradictory statements every presumption in favour of the possible reconciliation of the statements must be made. QUEEN-EMPRESS *v.* RAMJI SAJABARAO **I. L. R. 10 Bom. 124**

17. ——— *Validity of—Conviction on—Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act X of 1882), ss. 233, 544, and Sch. 5, No. xxvii-ii-(4).* A prisoner was convicted on an alternative charge in the form provided by Sch. 5, No. xxviii-ii-(4) of the Criminal Procedure Code (Act X of 1882) of having given false evidence, such evidence consisting of contradictory statements contained in one deposition while he was under cross-examination and re-examination as a witness in a judicial proceeding. There was no finding as to which of the contradictory statements was false. *Held* (NORRIS, *J.*, dissenting), that s. 283 of the Criminal Procedure Code did not affect the matter, and that the conviction was good. *Semble per* WILSON, *J.*: The deciison in *Queen* v. *Noshyo, 12 W. R. Cr. 11*, though a guide to the discretion of Courts in framing and dealing with charges, was not intended to, and does not, affect the law applicable to the matter. HABIBULLAH *v.* QUEEN-EMPRESS **I. L. R. 10 Calc. 937**

18. ——— *Penal Code, s. 193—Criminal Procedure Code, Sch. V, No. xxviii-(4)—Assignment of false statement not necessary—English law.* In a charge under s. 193 of the Penal Code, it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient (unless some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contradictory statement at another. *Queen* v. *Zamiran, B. L. R. Sup. Vol. 521 : 6 W. R. Cr. 65; Queen* v. *Palany Chetty, 4 Mad. 51;* and *Queen* v. *Mahomed Hoomayoon Shah, 13 B. L. R. 324*, followed. *Empress* v. *Niaz Ali, I. L. R. 5 All. 17*, overruled. *Per* DUTHOIT, *J.*—Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcileable before a conviction can be had upon the ground that one of them is necessarily false. The English cases upon this subject are irrelevant to the interpretation of the law of India, since the Indian Legislature has not followed the law of England in regard to perjury. *Trimble* v. *Hill, L. R. 5 Ap. Cas. 342*, and *Kathama Natchiar* v. *Dorasinga Tever, L. R. 2 I. A. 159*, referred to. QUEEN-EMPRESS *v.* GHULET . **I. L. R. 7 All. 44**

19. ——— **Statement made to police-officer investigating case**—*Penal Code (Act XLV of 1860), ss. 191, 193—Criminal Procedure Code (Act X of 1882), s. 161.* An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police-officer investigating a case of arson and the other having been made when he was examined as a witness before the Joint Magistrate when the case was being enquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police-officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the enquiry upon which the police-officer was engaged was to the effect that an enquiry was being made about the burning of a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge, who disagreed with

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FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*contd.*

the verdict of acquittal. *Held*, that the verdict was right. Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police-officer was a statement in answer to questions put to the accused by the investigating police-officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained. *Held*, further, that in such a case it is also necessary for the prosecution to establish that the police-constable was making an investigation under Ch. XIV of the Criminal Procedure Code. QUEEN-EMPRESS *v.* BAIKANTA BAURI . . **I. L. R. 16 Calc. 349**

20. ——— Form of charge—*Statement made to a police-officer during a police-investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Penal Code (Act XLV of 1860), s. 193—Separate charges.* Where a person has made two contradictory statements, one to a police-officer making an investigation under Ch. XIV of the Code of Criminal Procedure (Act X of 1882) and the other to a Magistrate holding a preliminary inquiry, he cannot be charged, and still less convicted, on an alternative charge. In such a case, if there is no other evidence at the trial but the contradictory statements made by the accused, separate charges cannot be framed. QUEEN-EMPRESS *v.* MUGAPA **I. L. R. 18 Bom. 377**

21. ——— Penal Code, *(Act XLV of 1860), s. 193—Fabricating false evidence—Report made by amin executing Civil Court's decree that he had been obstructed—Similar report to police—Subsequent contradictory deposition in Court—Alternate charges—Form of charge. Held*, that a report made by an amin of a Civil Court deputed to give possession of certain property in execution of a decree as to his having been obstructed in so doing to the Court executing the decree, and a similar report made to the police, would not, even if false, amount to the fabrication of false evidence within the meaning of s. 193 of the Indian Penal Code, and consequently, where such amin was charged in the alternative with making the two reports as above, and also a third and inconsistent statement in respect of which he might have been charged under s. 193, that he was wrongly charged, and that it was necessary to prove the falsity of the third statement. QUEEN-EMPRESS *v.* AJUDHIA PRASAD . . . . **I. L. R. 17 All. 436**

22. ——— Irregularity—*Code of Criminal Procedure (Act V of 1898), ss. 200, 533, 537—Complainant, examination of—Signature of complainant, if necessary—Irregularity, if curable—Penal Code, s. 193.* A conviction cannot be had under s. 193 of the Indian Penal Code, in respect of two contradictory statements, where one of those statements has been made by the accused in the course of examination as a complainant under s. 200 of the Code of Criminal Procedure, but does not bear his signature in accordance with the provisions of that section. The record, not being made in accordance with the law, cannot be used as evidence of the statment made. There is no provision, with regard to complaints, analogous to that contained in s. 533 of the Code of Criminal Procedure with reference to confessions or other statements of an accused person. The law requiring the record under s. 200 to be made in a particular way, non-compliance with its directions does not constitute a defect which is curable under s. 537 of the Code of Criminal Procedure. BAIJOO MANDAL *v.* EMPEROR (1902) **6 C. W. N. 840**

23. ——— Contradictory statements by witness before same Magistrate in the course of one and the same trial, on two different days—*Indian Penal Code (Act XLV of 1860), s. 193—Charge of giving false evidence—Conviction—Legality.* On the 18th January 1900, the accused deposed before a Magistrate that he had seen *P* and others gambling in a certain place. The deposition was read over to the accused, and acknowledged by him to be correct. On the 1st February, he was cross-examined, in the same case, before the same Magistrate, and he then deposed that he did not know *P* and had never seen him gambling. He was charged and convicted under s. 193 of the Penal Code of having intentionally given false evidence in that he made two contradictory statements one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal or whether it was illegal by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial: *Held per* BENSON, *J.* (to whom the case was referred)—That the conviction was legal. *Per* MOORE, *J.*—As no rule can be laid down to the effect that the contradictory statements must have been made at different inquiries or trials (to render a person liable to conviction), the conviction could not be held to be illegal, and should consequently not be interferred with in revision. *Per* BHASHYAM AYYANGAR, *J.*—The conviction was bad in law. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected, if necessary; for, till then, every statement is liable to be retracted, corrected, varied or qualified, and, until his *viva voce* examination is finished, neither the whole nor any portion of his deposition becomes evidence. The whole deposition must be read and construed as one; and if a later statement in it is contradictory to, or at variance with, a prior statement, the statement, made by the witness must be taken to be the earlier statement as subsequently modified, or the subsequent statement itself, if it intentionally contradicts and thus retracts the earlies. *Habibullah* v. *Queen-Empress, I. L. R. 10 Calc.*

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FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*contd.*

937, considered. *In the matter of* PALANI PALAGAN (1902) . . . . **I. L. R. 26 Mad. 55**

24. ———— **Practice**—*Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Perjury—Contradictory statements—Power of the High Court to interfere in revisional jurisdiction.* Where the accused was convicted and sentenced under s. 193 of the Penal Code (Act XLV of 1860) of giving false evidence in a judicial proceeding and where the charge was based on the allegation that in two depositions, one given on the 3rd December 1896 and the other on the 23rd March 1901, the accused had made two contradictory statements, and the case for the prosecution was that on that ground, though it could not be proved which of the alleged contradictory statements was false, the accused's conviction should be upheld: *Held*, by JENKINS, *C.J.*, reversing the conviction and setting aside the sentence in revisional jurisdiction, that to convict an accused of giving false evidence, it is necessary to show not only that he has made a statement, which is false, but that he also either knew or believed it to be false or did not believe it to be true. Where it is sought to establish guilt solely on contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time." Where the conviction is based on merely the statements contained in the charge without examining the whole of the depositions, the conviction is an error of law. Where the conviction of the accused for perjury in such a case was sustained by additional evidence, namely, the statements of the brother of the accused not made on oath at the trial of the case: *Held*, that the statements were inadmissible and, if relied on, would vitiate the judgment. The admission in evidence of a statement made by the accused having no real bearing on the case, but showing only at the most that the accused in other matters had been untruthful, would be highly improper. The controlling power of the High Court "is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case." *Per* CHANDAVARKAR, *J.*—In the case of perjury

FALSE EVIDENCE—*contd.*

3. CONTRADICTORY STATEMENTS—*concld.*

arising out of contradictory statements, the Court dealing with them should not convict, unless fully satisfied that the statements are from every point of view irreconcileable, and if the contradiction consists in two statements opposed to each other as to matter inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless on oath he has stated facts on which his first statement was based and then denied those facts on oath on a subsequent occasion. Where the sole and whole question is—are the statements forming the subject of the charge so contrary that one or the other of them must be necessarily false?—the answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law, not of fact. It is not correct to say that the law as laid down in the Criminal Procedure Code (Act V of 1898) gives the High Court no power to go into evidence in revision. The Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule, but will interfere only under special circumstances, or where there is an error of law. The accused in a criminal case is merely on the defensive and, unless there is any positive admission of a fact by him, any omission, on his part, to explain what indeed can be explained without his explanation should not be pressed against him. *Per* ASTON, *J.* (*contra*)—The rule of practice is that the High Court ordinarily refrains from opening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice. Where the question before the High Court exercising its powers of revision under s. 439 of the Criminal Procedure Code (Act V of 1898) is one of appreciation of evidence, the rule of practice adopted is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it. "Under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless indeed some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement at another." It is not the duty of the Court of first instance (and far less of a Court on appeal or revision) to supply *ab extra* an explanation, which the accused himself has not suggested or an intention or knowledge which the accused has not claimed. EMPEROR *v.* BANKATRAM LACHIRAM (1904) . . **I. L. R. 28 Bom. 533**

4. PROOF OF CHARGE.

1. ———— **Retractation of statements** *Locus pœnitentiæ for witness. Held* by the majority of the Court (*dissentiente* JACKSON, *J.*),

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FALSE EVIDENCE—*contd.*

4. PROOF OF CHARGE—*concld.*

that there ought to be a *locus pœnitentiæ* for witnesses who have deposed falsely to retract their false statements. QUEEN *v.* GULLIE MULLICK
W. R. 1864, Cr. 10

2. ——— **Uncorroborated evidence of single witness**—*Penal Code (Act XLV of 1860), s. 193.* A person cannot be convicted in the mofussil of giving false evidence upon the uncorroborated evidence of a single witness. CAMPBELL, *J.*, dissenting. QUEEN *v.* LALCHAND KOWRAH . . **B. L. R. Sup. Vol. 417**
1 Ind. Jur. N. S. 83 : 5 W. R. Cr. 23

QUEEN *v.* MOHIMA CHUNDER CHUCKERBUTTY
5 W. R. Cr. 77

3. ——— *Uncorroborated evidence of single witness.* A conviction for perjury should not be sustained on the bare testimony of one witness. QUEEN *v.* KHOAB LALL
9 W. R. Cr. 66

4. ——— *Evidence of single witness—Evidence to establish fact of statement.* The evidence of one witness in cases of perjury is sufficient to establish the factum of the statement which is charged as being false. QUEEN *v.* ISSUR CHUNDER GHOSE . . **14 W. R. Cr. 53**

5. ——— *Comparison of signatures—Testimony of single witness.* Comparison of signatures is one kind of corroboration which would justify a conviction on the testimony of a single witness in a case of false evidence. QUEEN *v.* BAKHOREE CHOWBEY . **5 W. R. Cr. 98**

5. TRIAL OF CHARGE.

1. ——— **Joint trial**—*Penal Code, ss. 193, 196—Using evidence known to be false—Separate trial.* Where several persons are accused of having given false evidence in the same proceeding, they should be tried separately. *A, S, B, D,* and *P* were jointly tried: *A* in respect of three receipts for the payments of money, produced by him in evidence in a judicial proceeding, on three charges of falsely using as genuine a forged document and on three charges of using evidence known to be false; *S, B, D,* and *P* on charges of giving false evidence in the same judicial proceeding as to such payments. The Court (STRAIGHT, *J.*), being unable to say that the accused persons had not been prejudiced in their defence by having been improperly tried together, set aside the convictions and ordered a fresh trial of each of the accused separately. EMPRESS *v.* ANANT RAM
I. L. R. 4 All. 293

2. ——— *Examining witnesses only once in four cases.* When four persons were accused of having given false evidence in the same proceeding, and the Sessions Judge, while professing to try each accused separately, heard the evdence of the witnesses only once: *Held,* that this was substantially trying the four prisoners together, and was an improper mode of procedure. NATHU SHEIKH *v.* QUEEN-EMPRESS
I. L. R. 10 Calc. 405

FALSE EVIDENCE—*concld.*

5. TRIAL OF CHARGE—*concld.*

FALSE IMPRISONMENT.

See DAMAGES, SUIT FOR.
I. L. R. 29 All. 44

See WRONGFUL CONFINEMENT.
8 Mad. 38

1. ——— **Wrongful arrest under decree already satisfied**—*Mistake of officers of the Court—Cause of action—Good faith—Limitation Act, XV of 1877, s. 22 and sch. II, Art. 19.*—On the 27th June 1883, the plaintiff was arrested by a bailiff of the Small Cause Court at Bombay under a writ of arrest for the amount of a decree obtained by the defendant on the 2nd May 1883 against the plaintiff. On arrest, the plaintiff informed the bailiff that the money due under the decree had already been paid, as was the fact. Plaintiff could not produce the receipt of payment, and the bailiff refused to raise the arrest until payment was made. The plaintiff thereupon paid the money under protest, and was set at liberty. The mistake was subsequently discovered, and the money was refunded to the plaintiff. It appeared that, prior to plaintiff's arrest, defendant's clerk had enquired of the head cashier of the Small Cause Court if the amount of the decree had been paid, but was told it was not, and a certificate of non-payment was issued. In conformity with the usual practice of the Court, the chief clerk of the Court, on receipt of the certificate, issued the writ of arrest under the seal of the Small Cause Court, and the plaintiff was arrested. In March 1884, the plaintiff presented a petition to the High Court for leave to sue as pauper and claimed R25,000 from first defendant as damages for the wrongful arrest. When the petition came on for enquiry into the pauperism of the plaintiff, the presiding Judge was of opinion that it disclosed no cause of action, and the plaint was returned to the plaintiff to be amended, but at the same time allowed to be filed. The plaintiff subsequently desired to add as party-defendants the cashier and the chief clerk of the Small Cause Court, and on 5th July 1884 took out a summons calling upon the defendants to show cause why his amended plaint should not be received on the file of the Court in place of his first petition. It was contended for the cashier and the chief clerk of the Small Cause Court that the suit against them was barred by limitation. *Held,* as regards the first defendant, that the plaint should be rejected, as there was no bad faith, fault or irregularity on the part of the first defendant so as to make him responsible for the wrongful arrest. The plaintiff's imprisonment having taken place under a warrant of the Court issued in regular manner, and such Court being of competent jurisdiction, the plaintiff had no cause of action as against the first defendant; the error was wholly and entirely the error of the officers of the

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FALSE IMPRISONMENT—*concld.*

Small Cause Court. *Held*, also, as regards the cashier and the chief clerk of the Small Cause Court, that the plaintiff's suit was barred, as more than one year had elapsed from the date of the termination of the plaintiff's imprisonment. FISHER *v.* PEARSE . . . . **I. L. R. 9 Bom. 1**

2. ——— **False imprisonment, suit for**—*Limitation Act (XV of 1877), Sch. II, Art. 19—"Imprisonment"—Release on bail—Period from which limitation runs.* To support an action for false imprisonment, nothing short of actual detention and complete loss of freedom is sufficient. *Bird* v. *Jones, 7 Q. B. 742,* followed. A person is not under imprisonment, after his release on bail. Limitation therefore runs from the date of such release, and a suit for false imprisonment is barred (under Art. 19 of Sch. II of the Limitation Act) unless brought within one year from that date. MAHAMMAD YUSUFUDDIN *v.* SECRETARY OF STATE FOR INDIA (1903) . . . . **I. L. R. 30 Calc. 872**
s.c. 7 C. W. N. 729 ; L. R. 30 I. A. 154

FALSE INFORMATION.

See CRIMINAL PROCEDURE CODE.
I. L. R. 26 All. 512
I. L. R. 32 Calc. 180

See PENAL CODE, s. 177.

See PENAL CODE, ss. 182, 211.
I. L. R. 31 Bom. 204

See PENAL CODE, s. 211.
I. L. R. 27 Mad. 127

——— **in road-cess returns**—

See PENAL CODE, s. 177.
13 C. W. N. 191

FALSE PERSONATION.

1. ——— **Personation before Registrar**—*Registration Act (XX of 1866), ss. 93 and 94—Penal Code, s. 419.* A vendor proceeded in company with three persons to Dacca to register her deed of sale. Falling ill on the way, the three companions went to the Registrar's office ; one of them there personated the vendor, and got registry of the deed. She was convicted of clothing by false personation, and the other two of abetting that offence. *Held*, on revision, that, as there was no intention apparent on the part of the accused to injure or defraud any one, the convictions should have been under ss. 93 and 94 of Act XX of 1866, and not under s. 419 of the Penal Code. QUEEN *v.* LUTHI BEWA . . **2 B. L. R. A. Cr. 25**

In re LUTHI BEWA . **11. W. R. Cr. 24**

2. ——— *Personating party required to complete conveyance.* Three persons who put up a fourth to personate one whose authority was required to complete a conveyance of immoveable property were held guilty under s. 94 of the Registration Act XX of 1866. QUEEN *v.* SOLEEMOODEEN . . . **7 W. R. Cr. 99**

FALSE PERSONATION—*concld.*

3. ——— **Personating imaginary person**—*Penal Code, s. 205.* Under s. 205 of the Penal Code, it is criminal to personate an imaginary person. QUEEN *v.* BITTOO KAHAR
11nd. Jur. O. S. 123

4. ——— *Personating imaginary persons.* To constitute the offence of false personation under s. 205 of the Penal Code, it is not enough to show the assumption of a fictitious name ; it must also appear that the assumed name was used as a means of falsely representing some other individual. *Reg.* v. *Bittoo Kahar, 1 Ind. Jur. O. S. 123,* dissented from. QUEEN *v.* KADAR RAVATTAN . . . **4 Mad. 18**

5. ——— **Fraudulent gain.** Fraudulent gain or benefit to the offender is not an essential element of the offence of false personation under s. 205 of the Penal Code and a conviction for such offence may be upheld, even where the personation is with the consent of the person personated. *Ex parte* SUPPAKON . **1 Mad. 450**

6. ——— **Intention of falsely personating.** It is necessary to a conviction for false personation, under s. 205 of the Penal Code that the accused should have assumed the name and character of the person he is charged with having personated. The fact that he presented a petition in Court in the name of that individual held, under the circumstances of the case, to be insufficient to show any intention of falsely personating such person. QUEEN *v.* NARAIN ACHARJ
8 W. R. Cr. 80

7. ——— **Evidence as to identity of heirs of estate.** Where the main question was whether, in fact, the heir to an estate, a minor in possession through the manager under the Court of Wards, had been, as the plaintiff alleged him to have been, put forward by false personation, a Divisional Court of appeal decided in favour of the defence, and dismissed the suit. Pending this decision, a Full Bench disposed of questions of law as to the admissibility in evidence in this suit of the judgment and record in a prior suit ; in which it had been found, as a fact, that there had been at one time in existence an heir born of the parentage which the defence in this suit alleged to be that of the minor defendant. It was disputed in the present suit whether the minor defendant was the same individual whom his alleged mother, the defendant in the former suit (there being the same plaintiff in both suits), stated to be her son ; also whether, if that identity were proved, the suit would be barred as *res judicata.* This latter question was decided in the negative by the Full Bench, which *held* the judgment in the former suit not to be conclusive upon the present one, but also *held* the record to be admissible. There was no appeal from that decision ; and on an appeal from the decree of the Divisional Court, the Judicial Committee affirmed on the facts the decree made. PALAKDHARI SINGH *v.* COLLECTOR OF GORAKHPUR
I. L. R. 15 All. 261

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FALSE STATEMENT.

——— **in application for license—**

See BENGAL MUNICIPAL ACT, 1884, s. 133. **I. L. R. 22 Calc. 131**

——— **False statement in sale-deed—** *Penal Code (Act XLV of 1860), s. 423—"Dishonestly"—"Fraudulently"—False statement of price in a sale-deed with the view of defeating claims of pre-emptors. Held,* that the making of a false statement in a sale-deed of immoveable property, as to the consideration for the sale, such statement being made for the purpose of preventing any person who might have a right of pre-emption in respect of property sold from coming forward to assert his right of pre-emption, is an offence which falls within the definition contained in s. 423 of the Indian Penal Code. EMPEROR *v.* MAHABIR SINGH (1902) . . . . **I. L. R. 25 All. 31**

FALSIFICATION OF ACCOUNTS.

——— **Intention to defraud—***False entries made to conceal previous embezzlement—Penal Code (Act XLV of 1860), s. 477A.* The making of false entries in a book or register by any person in order to conceal a previous fraudulent or dishonest act falls within the purview of s. 477A of the Penal Code, inasmuch as the intention is to defraud. *Lolit Mohan Sarkar* v. *Queen-Empress, I. L. R. 22 Calc. 313; In re Annasami Ayyangar, 1 Weir 554,* followed. *Empress* v. *Jiwanand, I. L. R. 5 All. 221, Queen-Empress* v. *Girdhari Lal, I. L. R. 8 All. 653,* and *Abdul Hamid* v. *Empress, I. L. R. 13 Calc. 349,* dissented from. EMPEROR *v.* RASH BEHARI DAS (1908) . **I. L. R. 35 Calc. 450**

FAMILY ARRANGEMENTS.

See HINDU LAW—JOINT FAMILY. **12 C. W. N. 793**

FAMILY CUSTOM.

See BABUANA GRANT.

See CUSTOM.

See EVIDENCE ACT, s. 32, CL. 7. **10 B. L. R. 263**

See HINDU LAW—CUSTOM.

See HINDU LAW . **10 C. W. N. 825**

See PRACTICE . **10 C. W. N. 230**

See SUCCESSION . **L. R. 30 I. A. 190**

——— **adoption of daughter's son—**

See HINDU LAW . **13 C. W. N. 920**

FAMILY DWELLING-HOUSE.

See CRIMINAL TRESPASS. **6 B. L. R. Ap. 80**

See EXECUTION OF DECREE—MODE OF EXECUTION—JOINT PROPERTY. **B. L. R. Sup. Vol. 172**
5 W. R. 218
6 W. R. Mis. 275
8 W. R. 239
I. L. R. 10 Calc. 244

FAMILY DWELLING-HOUSE—*concld.*

See HINDU LAW—FAMILY DWELLING-HOUSE.

See INJUNCTION—UNDER CIVIL PROCEDURE CODES . **6 B. L. R. 571**

See LIMITATION ACT, 1877, ART. 127 (1859, s. 1, CL. 13) . **12 B. L. R. 349**
25 W. R. 37

See PARTITION—MODE OF EFFECTING PARTITION . . **I. L. R. 3 Calc. 514**
I. L. R. 26 Calc. 516

"FASLI" YEAR.

See DEED—CONSTRUCTION. **I. L. R. 18 All. 388**

FATAL ACCIDENTS ACT (XIII OF 1855).

——— **'Representatives of the deceased,' who are—***The right under the Act is distinct in each and is a several, not joint, right—Limitation Act (XV of 1877), ss. 7, 8, Art. 21, Sch. II—Representatives under Act XIII of 1855 not persons entitled to sue within the meaning of s. 7 nor 'joint creditor' or joint claimants within the meaning of s. 8 of the Limitation Act—Construction of statute.* The word 'representative' in Act XIII of 1855 does not mean only executors or administrators but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian. Under Art. 21, Sch. II of the Limitation Act, the suit must be brought within one year from death, unless the bar is saved s. 7 or 8 of that Act. The right of the beneficiaries under Act XIII of 1855 is not a joint right, but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest. *Pym* v. *The Great Northern Railway Co., 4 B. & S. 396.* The beneficiaries are in the position of joint decree-holders and the right of suit conferred by Act XIII of 1885 is analogous to the right to apply for execution conferred on one or more of several joint decree-holders by s. 231 of the Code of Civil Procedure. The beneficiaries therefore are not persons 'entitled to sue' within the meaning of s. 7 of the Limitation Act and limitation will run against all when any one is competent to bring the suit. The principle in *Periasami* v. *Krishna Ayyan, I. L. R. 25 Mad. 431,* followed. They are also not joint creditors, nor joint claimants under s. 8 of the Limitation Act. Joint claimants are persons whose substantive rights are identical and not those who are permitted to enforce distinct and different rights under one judicial process. *Ahinsa Bibi* v. *Abdul Kader Saheb, I. L. R. 25 Mad. 26,* distinguished. Ss. 7 and 8 of the Limitation Act must be held to apply to suits under Art. 21, if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding, in the absence of

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FATAL ACCIDENTS ACT (XIII OF 1855)—*concld.*

express words, that they do not so apply. JOHNSON *v.* MADRAS RAILWAY COMPANY (1905) **I. L. R. 28 Mad. 479**

FATHER.

——— **liability of—**

See HINDU LAW . . **13 C. W. N. 9**

FATHER AND SON.

See HINDU LAW . **13 C. W. N. 396**

FEES.

See COURT FEES.

See COURT-FEES ACT.

See PLEADER—REMUNERATION. **7 C. W. N. 300**
I. L. R. 26 Mad. 654

——— **of Counsel, receipt for—**

See STAMP ACT, SCH. II, ART. 15. **I. L. R. 16 All. 132**

——— **landlord's fee, on transfer of tenure—**

See BENGAL TENANCY ACT, S. 13. **6 C. W. N. 190**
7 C. W. N. 388 ; 591

——— **on succession, non-payment of—**

See BENGAL TENANCY ACT, S. 16. **I. L. R. 24 Calc. 241**

FERÆ NATURÆ.

See PENAL CODE, S. 378. **I. L. R. 27 Mad. 551**

FERGUSON'S ACT (9 GEO. IV, C. 33).

See LAND TENURE IN BOMBAY. **4 Bom. O. C. 1**

FERRIES ACT (BOM. XXXV OF 1850).

——— **Illegal conviction under.** On a reference by a Sessions Judge, a conviction and sentence by a District Magistrate under the Bombay Ferries Act for conveying passengers for hire from Uran to Bombay was reversed, as the act charged did not constitute an offence under any section of the Act. REG. *v.* MALHARI BIN SHIVJI **3 Bom. Cr. 41**

FERRY.

See CO-SHARERS—GENERAL RIGHTS IN JOINT PROPERTY. **I. L. R. 19 Calc. 253**
L. R. 19 I. A. 48

See FERRIES ACT (BOMBAY).

See JURISDICTION OF CIVIL COURT—FERRIES.

FERRY—*contd.*

——— **compensation for—**

See COMPENSATION. **I. L. R. 34 Calc. 470**

——— **infringement of right of—**

See RIGHT OF SUIT—FERRY, SUIT RELATING TO . **I. L. R. 4 Calc. 599**

——— **lease of Government—**

See CONTRACT ACT, S. 23—ILLEGAL CONTRACTS—GENERALLY. **I. L. R. 2 All. 411**

——— **meaning of—**

See BENGAL MUNICIPAL ACT, 1884, SS. 155, 156 . . **I. L. R. 27 Calc. 317**

——— **plying boat for hire near public—**

See CRIMINAL TRESPASS. **I. L. R. 1 All. 527**

See PENAL CODE, S. 188. **I. L. R. 1 All. 527**

——— **plying unsound boat on—**

See CAUSING DEATH BY NEGLIGENCE. **I. L. R. 16 All. 472**

——— **right of—**

See FISHERY, RIGHT OF . **5 N. W. 95**

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—CASES WHICH MAGISTRATE CAN DECIDE AS TO POSSESSION. **I. L. R. 26 Calc. 188**
3 C. W. N. 49, 148
4 C. W. N. 613

See SPECIFIC RELIEF ACT, S. 9. **I. L. R. 13 Mad. 54**

1. ——— **Right of ferry**—*Right of private ferry.* The right of establishing a private ferry and levying tolls is recognized in British India. PARMESHARI PROSHAD NARAIN SINGH *v.* MAHOMED SYUD . **I. L. R. 6 Calc. 608 : 7 C. L. R. 504**

2. ——— *Right of owner of both banks of a river.* The mere fact of being the owner of both banks of a river does not give the right of ferry. SOFIR MERDHA *v.* NOBO KISHORE **2 W. R. 286**

3. ——— *Right to establish new ferry—Right to cross river or jhil in other way than by ferry.* A stream, if navigable, is of itself a public highway. In the case of a stream, therefore, a riparian proprietor might start in a boat from any point on his own side and proceed to any point at which he would have a right to land on the other side. But in the case of a jhil, the soil and freehold of which is probably vested in some particular individual, persons might be in the habit of crossing it from point to point by means of a ferry-boat belonging to the owner, and indeed might have a right to do so. But such right, if it existed, would not lead to any inference that any proprietor of lands on the banks of the jhil would have any right

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FERRY—*contd.*

to cross either way to the terminus of a public highway in any other manner than between the ascertained points and by the accustomed means, *viz.*, the owner's ferry boat. HUNOOMAN DOSS *v.* SHAMACHURN BHUTTA . . . **1 Hay 426**

4. ——— *Change in starting point owing to change in course of river.* The right to a ferry-ghaut cannot follow the starting point of the ferry wherever it may be carried by a change in the course of the river, unless the new position is within the possessor's own land. GORDON *v.* GOPEE SOONDUREE DOSSEE **25 W. R. 53**

5. ——— *Right to land at a ghaut as part of right of ferry—Form of suit.* A plaintiff may recover possession of a ferry of which he has been dispossessed by the defendant, though the form of his action may have been for obtaining possession of a ghaut. The right to ply the ferry may include also a right at certain seasons of the year to land upon or start from a part of the river bank not included in the land taken for the ferry. BROJO KISHOREE CHOWDHRAIN *v.* BILASH MONEE CHOWDHRAIN . . . **5 W. R. 195**

6. ——— **Dispute concerning ferry including land and water over which it plies**—*Possession, Order of Criminal Court as to.* The right to a ferry, *i.e.*, the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. It is a proper case to be dealt with under s. 145 of the Criminal Procedure Code (Act V of 1898) where the subject-matter of dispute is a ferry including the land and water upon which the right of ferry is exercised. HURBULLUBH NARAIN SINGH *v.* LUCHMESWAR PROSAD SINGH . **I. L. R. 26 Calc. 188**
3 C. W. N. 49

But *see* HURBULLUBH NARAIN SINGH *v.* BAJRANG DASS . . . . . **3 C. W. N. 148**

7. ——— **Rights of private ferry**—*Invasion of right of ferry by order of Magistrate—Beng. Reg. VI of 1819.* In a suit to maintain the old boundaries of a feryr which had been invaded by an order of the Magistrate extending the boundaries of a public ferry, the plaintiffs asserted that they had theretofore, without charging toll, transported in their own boats or in boats hired by them their labourers and cultivators and implements of husbandry, and that, in the exercise of this right, the order of the Magistrate was injurious to them. *Held*, that the order of the Magistrate extending the boundaries of the public ferry was an invasion of their ancient right to cross in whatever ferry boat they liked, as by s. 6 of the Regulation (VI of 1819) persons are prohibited from employing ferry boats plying for hire at, or in the vicinity of, a public ferry, without the previous sanction of the Magistrate or Joint Magistrate, thus making persons dependent on the public ferry and liable to whatever toll may be levied on the public ferry. RAM GOBIND SINGH *v.* MAGISTRATE OF GHAZEEPORE . . . **4 N. W. 146**

FERRY—*contd.*

8. ——— **Infringement of rights of ferry**—*Right to restrain party starting second ferry—Crown grant—User—Limitation Act (XV of 1877), ss. 23, 26, 27, 28—Nuisance—Cause of action.* In a suit brought to establish the right to a ferry franchise and to restrain the working of a rival ferry :—*Held*, that there is nothing in the law of Bengal as it was before the acquisition by the British Government or in the Regulations before or after 1793 to show that any person is entitled to claim a monopoly of a right of ferry by prescription or by any other means than a grant from the Crown. To such a monopoly Part IV (ss. 26, 27, 28) of the Limitation Act of 1877 relating to the acquisition of ownership by prescription is not applicable. The franchise of a ferry is not necessarily appurtenant to land, but where a right of ferry was claimed as appurtenant to certain villages :—*Held*, that the grant of such right by the Crown would not be destroyed by mere non-user without waiver, nor by the running of an opposition ferry. The franchise would continue as long as the grant continued, and until the person who set up an opposition ferry could show a Crown grant or give evidence from which a Crown grant could be presumed, the cause of action would remain. The disturbance of a right of ferry is in the nature of a nuisance (*Yard* v. *Ford, 2 Saunders 172*), and the cause of action in the case of the violation of this right is a continuing wrong within s. 23 of the Limitation Act. NITYAHARI ROY *v.* DUNNE **I. L. R. 18 Calc. 652**

9. ——— **Management of ferry**—*Beng. Reg. VI of 1819, s. 13, cl. 2.* Cl. 2, s. 13, Regulation VI of 1819, only applies where there has been an accident. Where the Magistrate thinks that a ferry is improperly kept and is in a dangerous condition, he should proceed under s. 4. QUEEN *v.* DEEYANUTOOLLAH . . . **7 W. R. Cr. 32**

10. ——— **Proprietary rights, interference with**—*Dispossession.* There are proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom by running a boat, if not exactly on the same line, at least within such a distance as for all practical purposes would be the same as if it were on the same line. Preventing parties from crossing in a person's ferry and driving his men away amount to dispossession. KISHOREE LAL ROY *v.* GOKOOL MONEE CHOWDHRAIN **16 W. R. 281**

11. ——— **Suit to re-open ferry**—*Bengal Act I of 1866, s. 2.* A suit to re-open a ferry which had been included in a settlement of an estate obtained by plaintiff from Government, but which had been closed by orders of the Assistant Magistrate, was *held* not to be maintainable, the ghaut where plaintiff wished to re-open it being within two miles of the place at which a public ferry was established. RAM JEWAN SINGH *v.* COLLECTOR AND MAGISTRATE OF SHAHABAD . . **15 W. R. 132**

12. ——— **Rival ferry**—*Interference with existing ferry.* A rival ferry cannot be set up so as to interfere with proprietary rights in an existing

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FERRY—*concld.*

ferry, that is to say, under circumstances involving direct competition with such ferry. NARAIN SINGH ROY *v.* NURENDRO NARAIN ROY. NURENDRO NARAIN ROY *v.* NARAIN SINGH ROY . **22 W. R. 269**

13. ———— Stipulation in lease of land that no ferry is to be made—*Right of private ferry.* It is quite competent to a lessor, when granting a lease of his land, to stipulate that no ferry shall be established thereupon to the prejudice of his own ferry (existent or possible), and it is quite competent to a lessee to agree to such a stipulation. JUGGUT CHUNDER CHOWDHRY *v.* BHURUT CHUNDER CHOWDHRY . . . . **23 W. R. 237**

14. ———— Transfer of license to collect ferry charges—*Contract—Validity, as between renter and transferee, where transfer is contrary to terms of license.* Where, by the terms of a lease of a ferry, the renter should not transfer or sub-rent the ferry, but such a transfer or sub-lease is not prohibited by Statute, or by a rule framed under a Statute, a transfer of it will be valid as between the renter and his transferee, though it may be invalid as against the Government. ABDULLA *v.* MAMMOD (1902) **I. L. R. 26 Mad. 156**

FIDUCIARY RELATIONSHIP.

See ATTORNEY AND CLIENT . **4 W. R. 86**
2 Ind. Jur. N. S. 160
1 N. W. 1
11 B. L. R. 60 note
I. L. R. 3 Calc. 473
I. L. R. 26 Bom. 689
I. L. R. 29 Calc. 595
I. L. R. 36 Calc. 493

See FRAUD—WHAT CONSTITUTES FRAUD AND PROOF OF FRAUD.
I. L. R. 11 Bom. 78

See HUSBAND AND WIFE **6 C. W. N. 809**

See ONUS OF PROOF—DEEDS, SUIT TO ENFORCE OR TO SET ASIDE.
I. L. R. 18 Calc. 545
L. R. 18 I. A. 144
I. L. R. 12 All. 523

See TRUSTEE . . **Bourke O. C. 292**
6 Mad. 293

See VENDOR AND PURCHASER—INVALID SALES . . **1 B. L. R. A. C. 95**
2 N. W. 153
Cor. 57

1. ———— Parent and child, transaction between—*Undue influence—Parent and even strangers claiming benefit bound to show that the child was a free agent and had independent advice—Delay and acquiescence, when a bar to equitable relief—Limitation Act (XV of 1877), Sch. II, Art. 91—Does not apply to defences.* A parent stands in a fiduciary relation towards his child ; and any transaction between them by which any benefit is procured by the parent to himself or to a third party at

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the expense of the child will be viewed with jealousy by Courts of Equity and the burden will lie on the parent or third party claiming the benefit of showing that the child in entering into the transaction had the independent advice of persons who acted in his interests, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made. *Huguenin* v. *Baseley, 14 Ves. 299,* referred to. *Allcard* v. *Skinner, 36 Ch. D. 145 at pp. 181, 182,* referred to. Delay and acquiescence will not bar the defendant's right to equitable relief unless he knew that he had the right or being a free agent at the time, he deliberately determined not to inquire what his rights were or to act upon them. Where beyond signing the deed the defendant does not do anything to show that he considered the deed effectual he will not be barred by mere lapse of time from setting up the invalidity of the deed. Art. 91 of Sch. II of the Limitation Act applies only to suits by plaintiffs to have instruments avoided. A defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a suit has become time barred. *Jugaldas* v. *Ambashankar, I. L. R. 12 Bom. 501,* distinguished. *Ranganath Sakharam* v. *Govind Narasinv, I. L. R. 20 Bom. 639,* referred to and followed. LAKSHMI DOSS *v.* ROOP LAUL (1906) **I. L. R. 30 Mad. 169**

FIERI FACIAS, WRIT OF SALE UNDER—

See HIGH COURT, JURISDICTION OF—CALCUTTA—CIVIL . **24 W. R. 366**
8 C. L. R. 4

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . . **I. L. R. 1 Calc. 55**
I. L. R. 3 Calc. 806
L. R. 5 I. A. 116

FINAL DECREE.

See APPEAL TO PRIVY COUNCIL
I. L. R. 35 Calc. 618

See ATTORNEY AND CLIENT.
I. L. R. 36 Calc. 493

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 595.
I. L. R. 35 Calc. 618
12 C. W. N. 545

FINANCIAL RESOLUTION, 2004, 14th JULY 1871.

See COURT FEES ACT, SCH. I. ART. 11.
11 B. L. R. Ap. 39

FINE.

See APPEAL IN CRIMINAL CASE—CRIMINAL PROCEDURE CODE, 1882, ss. 413, 423.
I. L. R. 23 All. 497
I. L. R. 20 Calc. 687

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FINE—*contd.*

See ARMS ACT, 1860 . **5 Mad. Ap. 24**
I. L. R. 1 Bom. 308

See BOMBAY DISTRICT MUNICIPAL ACT, 1884, s. 49 . **I. L. R. 18 Bom. 400**

See CATTLE TRESPASS ACT (I OF 1871), s. 22 . . . **5 C. W. N. 32**

See COMPENSATION—CRIMINAL CASES—FOR LOSS OR INJURY CAUSED BY OFFENCE.

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—COMPANIES ACT.
I. L. R. 20 Calc. 676

See RAILWAYS ACT, s. 113.
I. L. R. 18 Bom. 440
I. L. R. 20 Mad. 385

See RIGHT OF SUIT—TORTS **3 Agra 390**

See SENTENCE—FINE.

See SENTENCE—IMPRISONMENT—IMPRISONMENT AND FINE.

See SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.

See VILLAGE CHOWKIDARS ACT, s. 8.
I. L. R. 23 Calc. 421

See WHIPPING . **I. L. R. 12 Bom. 63**
I. L. R. 16 Bom. 357
3 C. W. N. 307

——— continuing—

See CALCUTTA MUNICIPAL ACT (BEN. ACT III OF 1899), SS. 449, 580 AND 631.
7 C. W. N. 853

See N.-W. P. AND OUDH MUNICIPAL ACT, 1900, s. 147 **I. L. R. 24 All. 309**

——— distribution of—

See ACT XIII OF 1867 . **8 B. L. R. Ap. 7**

See WITNESS—CIVIL CASES—DEFAULTING WITNESSES . **1 B. L. R. A. C. 186**

——— for continuing offence—

See BOMBAY MUNICIPAL ACT, 1888, s. 472.
I. L. R. 22 Bom. 766

——— for neglect to take out certificate—

See TAX . . **2 B. L. R. Ap. 40**

——— for non-attendance before Collector in partition-proceedings.

See SALE FOR ARREARS OF REVENUE—SETTING ASIDE SALE—IRREGULARITY.
8 B. L. R. 230

——— for suffering premises to be in a filthy state.

See BENGAL MUNICIPAL ACT, 1864, s. 67.
8 B. L. R. Ap. 9 : 16 W. R. Cr. 70

FINE—*contd.*

——— realization of—

See ACT XXI OF 1856 **8 B. L. R. Ap. 47**

See CATTLE TRESPASS ACT, s. 22.
I. L. R. 22 Calc. 139

1. **——— Compensation**—*Criminal Procedure Code, 1861, Ch. XIV.* A fine cannot be awarded as compensation in a case falling under Ch. XIV, Code of Criminal Procedure. QUEEN *v.* NIJANUND . . . . . **3 W. R. Cr. 60**

2. **——— Excise Act XXI of 1856**—*Power of Magistrate—Criminal Procedure Code, 1861, s. 22.* A Magistrate may impose a fine exceeding R1,000 under the Excise Act, XXI of 1856, s. 22 of the Code of Criminal Procedure notwithstanding. QUEEN *v.* SUROOP CHUNDER DUTT
7 W. R. Cr. 29

3. **——— Cattle Trespass Act, 1857**—*Fine levied by pound-keeper under—Punishment on conviction of offence—Act XXVI of 1850.* A fine levied by a pound-keeper is not a punishment imposed on conviction for an offence, and it is an error to hold that a person cannot be tried for an offence under Act XXVI of 1850 because he has paid a fine under s. 6 of the Cattle Trespass Act III of 1857. REG. *v.* DURGARAM MADHAVRAM . **7 Bom. Cr. 55**

4. **——— Cattle Trespass Act, I of 1871, s. 22**—*Fine besides compensation.* S. 22 of Act I of 1871 does not provide for a fine in addition to compensation. ANONYMOUS . . **7 Mad. Ap. 24**

BHAGIRATHI NAIK *v.* GANGADHAR MAHANTY
I. L. R. 27 Calc. 992

5. **——— Death caused by rash and negligent act—Compensation to widow of deceased**—*Criminal Procedure Code, s. 545.* An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased, is illegal. *In re* LUTCHMAKA
I. L. R. 12 Mad. 352

6. **——— License tax**—*Act XXIX of 1867, s. 15—Amount of fine.* Under s. 15, Act XXIX of 1867, the fine to be imposed for non-payment of the tax could not be less than the amount stated in the notice. QUEEN *v.* BISSESSUR SEIN
9 W. R. Cr. 62

7. **———** *Act XXIX of 1867, s. 3—Previous fine.* Under s. 3, Act XXIX of 1867, a person once fined for not taking out a license was not liable to a second fine or to any further demand for the tax. *In the matter of* DOORGA CHURN GIREE . . **9 W. R. Cr. 64**

8. **——— Omission to give notice to party against whom order is made**—*Order to repair fence.* No order fining a party for not repairing a fence ought to be passed without an information against him and a hearing. QUEEN *v.* SHADHU CHURN GHOSE . . **23 W. R. Cr. 63**

9. **——— Levy of fine**—*Compensation to complainant—Civil Procedure Code, 1872, s. 308*—

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FINE—*contd.*

Levy of fine—Procedure. The proper course of procedure under s. 308 of the Code of Criminal Procedure was to impose a fine, and out of the fine realized to direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of the section. MOHESH MUNDUL *v.* BHOLA NATH MUNDUL . **3 C. L. R. 404**

10. ——— **Costs, order for**—*Compensation to complainant—Criminal Procedure Code, 1872, s. 308—Court Fees Act, 1870, s. 31.* *A*, *B*, and *C* having been convicted of mischief, the Joint Magistrate sentenced *A* to one month's imprisonment, and *B* and *C* each to pay a fine of R10. He also directed that R12 should be paid to the complainant. *Held*, that the order for costs was not a fine to be applied under the provisions of s. 308, Criminal Procedure Code; that what portion of the R12 was payable by each of the accused being undetermined, it could not be said that *A* was sentenced to fine and imprisonment, and therefore no appeal lay; and that, as the case was one in which the police could not arrest without warrant, the Magistrate had power to award costs under s. 31 of the Court Fees Act, 1870, but that these costs must be limited to costs out of pocket. MOHESH MUNDUL *v.* BHOLANATH BISWAS **3 C. L. R. 405 note**

11. ——— **Fine, amount of**—*Criminal Procedure Code, 1861, s. 63—Fines inflicted by Magistrate.* The description of fine which it was the object of s. 63 of the Criminal Procedure Code to prohibit was a fine which it would be impossible or very difficult for the accused person to pay or wholly disproportioned to the character of the offence. *Quære:* Whether s. 63 has any application to fines inflicted by a Magistrate. *In the matter of the petition of* ABDOOR RUHMAN . **7 W. R. Cr. 37**

12. ——— **Fine for continuing offence**—*Beng. Act VI of 1866.* Sagur Dutt was convicted before a Justice of the Peace for using a warehouse, etc., in the town of Calcutta for the keeping and storing of jute other than jute screwed for shipment, without a license, and for his said offence was fined R300, and adjudged to pay a further fine of R25 for every day after the conviction on which the offence was continued. *Held*, that the conviction was bad. *In the matter of* SAGUR DUTT. QUEEN *v.* JUSTICES OF THE PEACE FOR CALCUTTA
1 B. L. R. O. Cr. 41 : 18 W. R. Cr. 44 note

In re LOVE . . . **9 B. L. R. Ap. 35**
18 W. R. Cr. 44

In the matter of the petition of the CHAIRMAN OF THE MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA *v.* ANEESOODDEEN MEAH
12 B. L. R. Ap. 2
20 W. R. Cr. 64

QUEEN *v.* TARINEE CHURN BOSE .
21 W. R. Cr. 31

KRISTODHONE DUTT *v.* CHAIRMAN OF COMMISSIONERS FOR SUBURBS OF CALCUTTA
25 W. R. Cr. 6

FINE—*contd.*

13. ——— *Daily payment of fine, order of—Illegality of such order.* An order for payment of a daily fine is illegal, inasmuch as it is an adjudication in respect of an offence which has not been committed when such order is passed. *In the matter of Sugar Dutt, 1 B. L. R. O. Cr. 41; In re Love, 9 B. L. R. Ap. 35 : 18 W. R. Cr. 44; Kristodhone Dutt* v. *Chairman of the Municipal Commissioners for the Suburbs of Calcutta, 25 W. R. Cr. 6*, referred to. RAM KRISHNA BISWAS *v.* MOHENDRA NATH MOZUMDAR
I. L. R. 27 Calc. 565

14. ——— *Offence under Act XXVI of 1850.* Where accused was convicted under Act XXVI of 1850 of disobedience of an order made by the Municipal Commissioners of Puna and was sentenced to pay a fine of twenty rupees and (eight days' time being allowed him within which to comply with the order) a further fine of two rupees each day during which he should continue wilfully to disobey such order, the latter part of the sentence was reversed by the High Court as being illegal. REG. *v.* JAGUNNATH BHAT BIN APPA BHAT
5 Bom. Cr. 103

15. ——— **Fine for future default**—*Order for payment of monthly maintenance.* Where the Magistrate's order directed the defendant to pay a monthly sum for the maintenance of his wife, and directed that the defendant be rigorously imprisoned for the term of fifteen days for every breach of the order, under s. 316 of the Code of Criminal Procedure, the High Court quashed the latter part of the order as being irregular and bad in substance. ANONYMOUS . . . . **5 Mad. Ap. 34**

16. ——— **Power of Court to dispose of fine.** The Court had no power to dispose of fines inflicted upon prisoners; such power existed in Government alone. QUEEN *v.* GOLUCK DASS
1 Hyde 282

17. ——— **Power of High Court to award fine to prosecutor on conviction for felony**—*Felony.* The High Court had power to award, by way of satisfaction to a prosecutor, the whole or any portion of a fine imposed upon conviction of a felony before the Court, in the exercise of its original criminal jurisdiction. REG. *v.* HOSSEIN JAN . . . **2 Ind. Jur. N. S. 190**

18. ——— **Order of part of fine to witness**—*Proof of loss.* An order directing the payment to a witness of a portion of the amount of fine levied on an accused held to be illegal in the absence of proof that the witness suffered any loss owing to the conduct of the accused. QUEEN *v.* KARTICK CHUNDER HALDAR . . . **9 W. R. Cr. 58**

19. ——— **Order for part of fine to ameen**—*Deputation to restore land marks.* The Joint Magistrate was held not competent to direct, under s. 44 of the Code of Criminal Procedure, that a portion of a fine inflicted under s. 434 of the Penal Code be paid to an ameen for the purpose of paying the expense of his deputation to restore the landmarks which had been destroyed by the opposite party. QUEEN *v.* MOORUT LALL **6 W. R. Cr. 93**

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FINE—*contd.*

20. ——— **Order for payment of municipal taxes out of fine**—*Power of Magistrate.* A Deputy Magistrate had no authority to order arrears of municipal tax due by a person to be paid out of a fine levied on him. QUEEN *v.* BROJO KISHORE DUTT . . . . . **8 W. R. Cr. 17**

21. ——— **Fine for contempt of Court**—*Omission to state reasons for.* A Criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt with any statement the offender may make, as well as the finding and sentence. Where this course was not adopted, the High Court set aside the order inflicting a fine. *In the matter of the petition of* PANCHANADA TAMBIRAN **4 Mad. 229**

22. ——— **Procedure to enforce fine**—*Madras Act V of 1865.* The procedure to be followed in enforcing the fines from persons convicted under Act XXIV of 1859 (Police Act) was that laid down in Madras Act V of 1865. ANONYMOUS **3 Mad. Ap. 9**

23. ——— **Levy of fine**—*Distress—Criminal Procedure Code, 1861, s. 61—"Court."* In every case in which an offender is sentenced to fine, the Court which sentences the offender may issue a warrant for the levy of the amount by distress and sale. The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor; but the Court which levies the fine must be the same as the Court which imposed it. CHUNDER COOMAR MITTER *v.* MODHOOSOODUN DEY . **9 W. R. Cr. 50**

24. ——— *Liability for fine after imprisonment in default.* An offender who has undergone the full term of imprisonment to which he was sentenced in default of the payment of a fine is still liable to have the amount levied by distress and sale of any moveable property belonging to him which may be found within the jurisdiction of the Magistrate of the District, whether the officer who inflicted the fine issued any special directions on the subject or not (SETON-KARR, *J., dissentiente*). QUEEN *v.* MODOOSOODUN DEY . . . . . **3 W. R. Cr. 61**

25. ——— *Recovery of, from immoveable property—Criminal Procedure Code, 1861, s. 61—Penal Code, s. 70.* On a reference as to whether the restriction for the recovery of fines to moveable property (Criminal Procedure Code, s. 61) applied only during the lifetime of the offender, and whether the fine could after his death be recovered, under s. 70 of the Penal Code, from his immoveable property, the Court was of opinion that the law had only provided for the distress and sale of the moveable property, and that there was no way in which immoveable property could be made liable. REG. *v.* LALLU KARWAR **5 Bom. Cr. 63**

26. ——— *Realization of fine after death of person fined—Moveable property—Immoveable property—Penal Code (Act XLV of 1860), s. 70—Criminal Procedure Code (Act XXV of 1861), s. 6—Criminal Procedure Code (Act X of 1882), s. 386.* Where a person was fined under the Penal Code and died before the fine was paid, and the Magistrate ordered the fine to be realized by sale of his joint moveable property, and that being found insufficient to cover the fine, his immoveable property was also attached under the order:—*Held,* that the liability of the immoveable property of the deceased could not be enforced by distress. *Reg.* v. *Lallu Karwar, 5 Bom. H. C. 63,* followed. S. 386 of the Criminal Procedure Code is not applicable to such a case. QUEEN-EMPRESS *v.* SITA NATH MITRA **I. L. R. 20 Calc. 478**

FINE—*concld.*

27. ——— **Refund of fine**—*Imprisonment after payment of fine.* A prisoner was sentenced to imprisonment and fine, and in default of payment of the latter, to a further time of imprisonment. He paid a portion of the fine, but, that fact not having been communicated to the jailor, underwent the entire further term of imprisonment. *Held,* that, under these circumstances, the Court had no power to order the fine to be refunded. REG. *v.* NATHA MULA . . . . . **4 Bom. Cr. 37**

28. ——— *Recovery of fine when ordered to be refunded—Portion of fine paid as compensation to complainant—Sentence of fine set aside—Recovery of compensation from complainant—Procedure—Criminal Procedure Code, 1882, ss. 545 and 547.* On a sentence of fine being passed, it was ordered, under s. 545 of the Code of Criminal Procedure, that a portion of the fine should be paid as the compensation to the complainant, and it was so paid. Subsequently the sentence was set aside in revision by an order of the High Court, which directed that the fines should be refunded. *Held,* that the sum which had been paid to the complainant was recoverable under this order as part of the original fine, and that it was recoverable by process under s. 547 of the Code, and not by suit in a Civil Court. MUTASADDI *v.* MANI RAM **I. L. R. 19 All. 112**

FINGER IMPRESSION.

See THUMB IMPRESSION.

FIRE.

——— **caused by spark from engine.**

See RAILWAY COMPANY . **14 B. L. R. 1**

——— ——— **loss by—**

See BILL OF LADING . **6 Bom. O. C. 71**
7 Bom. O. C. 186
I. L. R. 4 Calc. 736

See CARRIERS ACT, s. 6.
I. L. R. 24 Calc. 786
I. L. R. 26 Calc. 398

FIRE-BALL.

——— **possession of—**

See ATTEMPT TO COMMIT OFFENCE.
3 B. L. R. A. Cr. 55

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FIRM.

——— **liability to tax.**

See MADRAS MUNICIPAL ACT, 1884, s. 103. **I. L. R. 14 Mad. 140**

——— **members of—**

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—PERSONS BY WHOM RIGHT MAY BE ACQUIRED . **25 W. R. 117**
I. L. R. 4 Calc. 957
I. L. R. 11 Calc. 501

——— **suit against—**

See PLAINT—FORM AND CONTENTS OF PLAINT—DEFENDANTS . **1 Bom. 85**

——— **suit by—**

See LIMITATION ACT, 1877, s. 22. **I. L. R. 17 Bom. 413**

See PARTIES—ADDING PARTIES TO SUITS —PLAINTIFFS . **I. L. R. 17 Bom. 413**
I. L. R. 14 All. 524

See PLAINT—FORM AND CONTENTS OF PLAINT—PLAINTIFFS. **B. L. R. Sup. Vol. 904**
25 W. R. 118

FIRST CHARGE.

See BENGAL TENANCY ACT, ss. 170, 148, 65 . . **I. L. R. 31 Calc. 550**
I. L. R. 33 Calc. 566
10 C. W. N. 547

FIRST INFORMATION.

See CRIMINAL PROCEDURE CODE, s. 190 (*b*). **8 C. W. N. 864**

See INFORMATION OF COMMISSION OF OFFENCE.

——— *First information when to be recorded—Object of recording—Investigation by Police commenced without a first information —Criminal Procedure Code (Act V of 1898), s. 154—Irregularity. A* finding his brother *M* to be missing gave information to the Sub-Inspector of Police, but the latter did not record it under s. 154, Code of Criminal Procedure. Nevertheless he commenced investigation and after four days when the matter had so developed that there was some reason to believe that *M* had been murdered, he for the first time recorded a statement by *A* as the first information. *Held*, that such a practice is altogether contrary to the provisions of s. 154, Code of Criminal Procedure, and a statement recorded under such circumstances cannot be regarded as a first information. The first information if recorded as directed by s. 154 at the time it is made is of considerable value at the trial because it shows on what materials the investigation commenced and what was the story then told. Any statement recorded, as in this case, several days after the commencement of the investigation and after there had been some development, is not only

FIRST INFORMATION—*concld.*

no first information, but has very little or no value at all as the original story, because it can be made to fit into the case as then developed. EMPEROR *v.* KAMPU KUKI (1902) . **11 C. W. N. 554**

FIRST OFFENDERS.

——— *Criminal Procedure Code, s. 562—Powers conferred by s. 562 exerciseable by a Court of Appeal—Criminal Procedure Code, s. 523 (d). Held*, that the powers conferred by s. 562 of the Code of Criminal Procedure upon a Court by which a first offender is convicted are, by virtue of s. 423 (*d*) of the Code, exercisable by the High Court sitting as a Court of Appeal. EMPEROR *v.* BIRCH (1902) . **I. L. R. 24 All. 306**

FISHERY.

See JALKAR.

See JOINDER OF CAUSES OF ACTION. **I. L. R. 33 Calc. 601**

See JURISDICTION . **I. L. R. 31 Calc. 937**

See PENAL CODE, s. 426. **I. L. R. 28 All. 204**

See TANK . **I. L. R. 31 Calc. 937**

——— **infringement of—**

See CRIMINAL TRESPASS. **9 B. L. R. Ap. 19**
I. L. R. 2 Calc. 354

See JURISDICTION OF CIVIL COURT—FISHERY RIGHTS . **I. L. R. 2 Bom. 19**

——— **rent of, suit for—**

See JURISDICTION—SUITS FOR LAND—PROPERTY IN DIFFERENT DISTRICTS. **I. L. R. 24 Calc. 449**

——— **right of—**

See BENGAL PRIVATE FISHERIES PROTECTION ACT.

See BENGAL PRIVATE FISHERIES PROTECTION ACT, s. 3 . **4 C. W. N. 247**

See JALKAR.

See LAND ACQUISITION ACT (I of 1894), s. 3 . . **I. L. R. 35 Calc. 525**

See LAND ACQUISITION ACT (I OF 1894), s. 23 . . **I. L. R. 28 Calc. 152**

See LIMITATION ACT, 1877, s. 26 (1871, s. 27) . . **I. L. R. 3 Calc. 276**
I. L. R. 5 Calc. 945
I. L. R. 9 Calc. 698

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—CASES WHICH MAGISTRATE MAY DECIDE AS TO POSSESSION. **I. L. R. 12 Calc. 537**
I. L. R. 13 Calc. 179

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FISHERY—*contd.*

——— **right of**—*concld.*

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DISPUTES AS TO RIGHT OF WAY, WATER, ETC.
I. L. R. 23 Calc. 55; 557
6 C. W. N. 161

See RESUMPTION—RIGHT TO RESUME.
1 W. R. 116

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—SUBJECTS OF ACQUISITION.
I. L. R. 4 Calc. 797; 961
2 W. R., Act X, 19
23 W. R. 432

See SALE CERTIFICATE.
I. L. R. 35 Calc. 614

See SPECIFIC RELIEF ACT, s. 9.
I. L. R. 12 Bom. 221
I. L. R. 18 Calc. 80
I. L. R. 19 Calc. 544

See THEFT . . **19 W. R. Cr. 47**
20 W. R. Cr. 15
I. L. R. 5 Mad. 390
I. L. R. 10 Bom. 193
I. L. R. 15 Calc. 338; 390 note; 392 note; 402
I. L. R. 24 Mad. 81

1. ——— **Nature of right**—*Incorporeal hereditament.* Jalkar, or the right of fishery, may exist in India as an incorporeal hereditament, and as a right to be exercised upon the land of another. FORBES *v.* MIR MUHAMMAD HOSSEIN
12 B. L. R. P. C. 210: 20 W. R. 44

2. ——— **Immoveable property**—*General Clauses Consolidation Act (I of 1868), s. 3—Transfer of Property Act (IV of 1882), s. 106.* A jalkar, or right of fishery, as being a benefit arising out of land covered by water, comes within the definition of "immoveable property" set out in the General Clauses Act (I of 1868), and is therefore immoveable property under s. 106 of the Transfer of Property Act (IV of 1882). RAM GOPAL BYSACK *v.* NURUMUDDIN *alias* NOOR MAHAMED MUNDUL . **I. L. R. 20 Calc. 446**

3. ——— **Right to soil beneath water**—*Right to jalkar.* The right to a jalkar by no means involves a right to the soil when the jalkar is either dried or filled up by accumulation of soil. RADHA MOHUN MUNDUL *v.* NEEL MADHAB MUNDUL . . . . . **24 W. R. 200**

4. ——— **Right to soil and water in one person**—*Interest in the soil.* Though the right of jalkar does not imply any interest in the soil, yet where it is found as a fact that both water and land are the property of the zamindar as such, the two rights are not to be separated. CHUNDER COOMAR ROY *v.* BURODA KANT ROY
W. R. 1864, 63

5. ——— **Right to tank**—*Fishing ni tank.* The exercise of the right of fishing in a tank is no proof of ownership in the tank. ERTOZAH HOSSEIN *v.* HUREE PERSHAD SINGH **5 W. R. 281**

FISHERY—*contd.*

6. ——— **Right in the soil**—"*Interest in land*"—*Road Cess Act (Beng. Act X of 1871).* A jalkar does not impart any interest in the soil itself, and therefore a patni of a jalkar is not an "interest in land" within the meaning of the definition in the District Road Cess Act. DAVID *v.* GIRISH CHUNDER GUHA
I. L. R. 9 Calc. 183: 11 C. L. R. 305

7. ——— *Settlement of jalkar.* There is no such broad proposition of law as that the settlement of a jalkar implies no right in the soil. RAKHAL CHURN MUNDUL *v.* WATSON & Co. . . **I. L. R. 10 Calc. 50**

8. ——— *Jalkar drying up—Right of holder of jalkar.* When a jalkar dries up, the dried land does not, as a matter of course, become the right of the holder of the jalkar. BISSEN LALL DOSS *v* KHYRUNISSA BEGUM . **1 W. R. 79**

9. ——— *Drying up of jhil.* By pottah certain land was leased, and a right of jalkar or fishery in a bhil or lake was granted on payment of certain jamma. The bhil became permanently dried up. *Held,* that the grant being merely of the fishery, the lessee acquired no interest in the soil, and the lessor was entitled to re-enter on the land formerly covered with the water of the bhil. SUROOP CHUNDER MOZOOMDAR *v.* JARDINE, SKINNER & Co. . **Marsh. 334: 2 Hay 468**

10. ——— **Change in course of river**—*Right of owner of soil.* If a river merely changes its course, the old dry course of the river must be taken to have become private property; and as incident to and part of the same, the owner of the soil is entitled to all bhils or ponds, gulfs or damoores in which water remains, but which do not communicate with the river except in the time of floods, and he can claim a settlement with the Government in respect of any jalkar in the same. GRAY *v.* ANUND MOHUN MOITRO . . . **W. R. 1864, 108**

11. ——— *Jalkar—Navigable river.* The jalkar, or right of fishing, in a navigable river is not affected by reason of the river having merely changed its course. *Gray* v. *Anund Mohun Moitro, W. R. 1864, 108,* followed. *Sibessury Dabee* v. *Lukhy Dabee, 1 W. R. 88,* distinguished. TARINI CHURN SINHA *v.* WATSON & Co. . . . . **I. L. R. 17 Calc. 963**

12. ——— *Joint right of fishery.* A co-proprietor cannot be sued for trespass for fishing in a jalkar in which he and the other proprietors were entitled to fish, merely because the jalkar, by a change in the course of the river, ran over the land which was allotted to the plaintiff under a butwara. In such a suit the plaintiff cannot obtain a share of the fish on the ground that he had a share in the jalkar. GOBIND CHUNDER SHAHA *v.* ABDOOL GUNNY . . **6 W. R. 41**

13. ——— **Drying up of river**—*Land accreting subject to right of fishery.* In a suit to establish a right of fishery in a river, where the right was not opposed and the plaintiffs obtained a decree the lower Appellate Court, which also found that the

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FISHERY—*contd.*

disputed body of water south of the river occupied what was once its bed and was connected with the river by a narrow inlet, reversed the decree on the ground that it was possible this communication might silt up later in the year. *Held*, that the lower Appellate Court's decision was wrong in law, and that on the finding the plaintiffs were entitled to a decree. *Held*, also, that, if the flowing stream dried up and the defendants acquired a right to the land by the law of accretion, that right would be subject to the exercise by the plaintiffs of their prior right of fishery. KALEE SOONDUR ROY *v.* DWARKANATH MOJOOMDAR . . . . . **18 W. R. 460**

14. ———— Diversion of flow of stream —*Increase and decrease in flow of water.* It matters not whence the water in which *A* has a right of fishery comes. *A*'s right is not lessened, nor *B*'s increased, because a portion of the water formerly flowing in *A*'s channel has been diverted from it, and because the water of *B*'s river now flows through it. NOBIN CHUNDER ROY CHOWDHRY *v.* RADHA PERAEE DEBIA . . . . . **6 W. R. 17**

15. ———— Rights of jalkar in flooded lands. The gradual flooding of a talukh may destroy the talukhdar's right of ownership in that portion of it which is so covered with water and vest the rights of fishery therein in the owner of the adjoining jalkar. But if by a sudden irruption of the river a definite and ascertainable area is submerged at once, that area does not become lost to the talukhdar, nor does the owner of the adjoining jalkar become entitled to extend his fishery rights over it. SIBESSURY DABEE *v.* LUKHY DABEE **1 W. R. 88**

16. ———— Restriction on fishery rights by owners of bed of river—*Limiting area of water.* The owners of the bed of a river when dry are not entitled so to use that bed as to injure the jalkar rights which others have in it when full by restricting the area over which the water may flow. SRIKANT BHUTTACHARJI *v.* KEDAR NATH MOOKERJEE . . . . . **6 C. L. R. 242**

17. ———— Interference with right—*Erection of bund.* *A* has no right to erect a bund on his own land so as to intercept the passage of fish in a natural stream, and thereby render *B*'s right of fishery less profitable. But if the bund has existed for many years without complaint, *B*'s right of fishery must be deemed subject to *A*'s right to keep up the bund. RAM DASS SURMAH v. SONATUN GOOHOO **W. R. 1864, 275**

18. ———— Jalkar rights in pergunnah —*Right of owner of pergunnah.* A proprietor of the entire jalkar rights of a pergunnah is entitled to fish in any natural water-course, or any jhil or pond not made by human agency. KHOOROONAMOYE CHOWDHRAIN *v.* JOY SUNKER CHOWDHRY **W. R. 1864, 267**

19. ———— Presumption of right of fishery from long possession of tank. Where a person is found to have been from of old in possession of a tank, it may be presumed that he is entitled to the fish therein, although there be no actual proof that he has asserted his property in the fish by fishing. HUR PERSHAD ROY *v.* BADREE NARAIN GIR **1 N. W. 14**

20. ———— Exercise of right of fishery from permanent settlement—*Open channels in river.* A party owning the right of fishery in a river from the time of the permanent settlement is at liberty to exercise that right in the open channels and also in all closing or closed channels abandoned by the river up to the time when the channels become finally closed at both ends, *i.e.*, so long as fish can pass to and fro. KRISHNENDRO CHOWDHRY *v.* SURNOMOYI . . **21 W. R. 27**

21. ———— Adverse right of—*Exercise of right of fishery—Right to possession.* When a person exercises the right of fishing in a tank adversely for twelve years, his right to fish becomes absolute and indefeasible. LUCKHIMONY DASSEE *v.* KORUNA KANT MOITRO . . **3 C. L. R. 509**

22. ———— Dispute as to fishery rights —*Possession—Title.* In a dispute about jalkars between the proprietors of a neighbouring estate, where the title-deeds of the two parties do not specially mention the particular pieces of land or water in contest, the title of the parties must depend on the fact as to which of them has been in possession. SHAMA SOONDUREE DEBIA *v.* COLLECTOR OF MALDAH **12 W. R. 164**

23. ———— Right of fishery in navigable river, proof of—*Private against public right.* When the exclusive jalkar right in a navigable river is set up against the ordinary rights of the State and the community, it must be established by clear and strong proof. BAGRAM *v.* COLLECTOR OF BHULLOOA. COLLECTOR OF RUNGPORE *v.* RAMJADUB SEIN . . . **W. R. 1864, 243**

24. ———————— *Right of fishery in navigable river.* The right of fishing in a navigable river does not belong to the public, nor is the Government prohibited by any law from granting to individuals the exclusive right of fishing in such a river. CHUNDER JALEAH *v.* RAM CHURN MOOKERJEE . . . **15 W. R. 212**

25. ———————— *Right of Government.* *Semble:* The Government may have an exclusive right of fishery in a navigable river. ACHUMBIT JHA *v.* JEWUN . . **11 C. L. R. 11**

26. ———————— *Jalkar—Private and public rights.* A private right of fishery in a tidal navigable river must, if it exists at all, be derived from the Crown and established by very clear evidence, as the presumption is against any such private right. *Quære:* Whether such right can be created at all. A mere recital in quinquennial papers that a person is the owner of jalkar rights in a zamindari permanently settled with him by Government, is not sufficient to give to such person a right of fishery in a public navigable river; any right granted under such word "jalkar" would be perfectly satisfied if construed to apply exclusively to a right to

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fish within enclosed water, such as a jhil. PROSUNNO COOMAR SIRCAR *v.* RAM COOMAR PAROOEY **I. L. R. 4 Calc. 53**

27. ——— *Right of fishery in tidal river—Prescription.* The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits. Such an exclusive privilege, being an infringement of the general rights of the public, could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown. VIRESA *v.* TATAYYA . . **I. L. R. 8 Mad. 467**

28. ——— *Right of fishery in tidal navigable river—Grant of rights by Crown—Grant, where there is no title by prescription, must be proved—Evidence as to nature and extent of grant.* The exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals. Such a right must ordinarily be proved either by proof of a direct grant from the Crown or by prescription. In the absence of title by grant or prescription in persons alleging themselves to be the holders of a jalkar under an ijara, the mere payment of rent by fishermen to former ijaradars does not estop such fishermen from disputing the rights of the alleged holders; but such payment for the use of the jalkar right is strong evidence of the rights of the alleged holders of the ijara, and of acquiescence in their title. In the case of a grant of a jalkar, in ascertaining what the boundaries of the jalkar are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in tidal navigable rivers or not, the Courts should be guided by the same rules of evidence as would be applicable for the purpose of determining the nature and extent of any other grant. *Per* PRINSEP and PIGOT, *JJ.*—Unless the boundaries given in a grant of a jalkar clearly indicate to the contrary, a grant of a jalkar would not ordinarily include the right of fishery in tidal navigable rivers. HORI DAS MAL *v.* MAHOMED JAKI **I. L. R. 11 Calc. 434**

29. ——— *User—Prescription.* Plaintiffs claimed right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defendants, and user for thirty years was proved. The claim was decreed. *Held*, that plaintiffs were not bound to prove sixty years' exclusive use to support their claim. NARASAYYA *v.* SAMI **I. L. R. 12 Mad. 43**

30. ——— *Right of Government in navigable rivers and fishery therein—Grant by Government of right to private individuals.* As regards this side of India, the bed of a tidal navigable river is vested in the Crown; and the right of fishery in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown or as representing the public) to private individuals to be held by them as private property

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subject to the right of navigation and such other rights as the public has in such rivers. *Doe d. Seebkristo* v. *East India Co., 6 Moo. I. A. 267; Gureeb Hossein Chowdhree* v. *Lamb, S. D. A. 1859, 1357; Bagram* v. *Collector of Bhulloa, Gap Number W. R. (1864), 243; Chunder Jaleah* v. *Ram Churn Mookerjee, 15 W. R. 212; Baban Mayacha* v. *Naya Shravucha, I. L. R. 2 Bom. 19; Prosunno Coomar Sircar* v. *Ramcoomar Paroee, I. L. R. 4 Calc. 53;* and *Hari Das Mal* v. *Mahomed Jaki, I. L. R. 11 Calc. 434,* referred to. Value as evidence of the thakbast map in such a case discussed. *Syam Lal Sahu* v. *Luchman Chowdhry, I. L. R. 15 Calc. 353,* and *Syama Sunderi Dassya* v. *Jagobundhu Sootar, I. L. R. 16 Calc. 186,* referred to. SATCOWRI GHOSE MONDAL *v.* SECRETARY OF STATE FOR INDIA. . . . **I. L. R. 22 Calc. 252**

31. ——— *Fishery in navigable river—Doba left by recession of river—Grantees of fishery, rights of—Communication with main channel at all seasons.* If a navigable river shifts its course leaving lakes, *dobas,* or sheets of water, in its old bed, the grantee of the exclusive right of fishery in the river retains that right over such lakes, *dobas,* etc., so long as these latter remain in communication with the main channel at all seasons of the year. *J. J. Grey* v. *Anund Mohan Moitra, W. R. Gap No. 108,* relied on. *Krishnendro Ray Chowdhry* v. *Surnomoyee, 21 W. R. 27;* and *Tarini Charan Sinha* v. *Watson & Co., I. L. R. 17 Calc. 963,* referred to. HEM CHANDRA CHOWDHURY *v.* JAGADINDRA NATH RAY (1905) **9 C. W. N. 934**

32. ——— *Jalkar rights—Grant by Government, presumption of—Right of fishery by prescription—Fishing in navigable river.* Though there may not be any express grant a right of fishery in a navigable river running through land permanently settled with the plaintiffs may still be presumed in their favour, as included in the settlement, from a long continued user of such right. *Hari Dass Mal* v. *Mahomed Jaki, I. L. R. 11 Calc. 434,* referred to. SARAT CHANDRA ROY *v.* KALARAM MALO (1906) **I. L. R. 33 Calc. 1349**

33. ——— *Fishery right in tidal and navigable river when the river changes its course—Right of Government.* When a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course. Government has the right to lease fishery rights in tidal and navigable rivers. *Narendro Chandra Lahiri* v. *Nripendra Chandra Lahiri, 10 C. W. N. 540; s.c. 4 C. L. J. 51,* distinguished. AYUB ALI CHOWDHURY *v.* DAYA BIBI (1907) **12 C. W. N. 105**

34. ——— *Fishery—Independent jalkar—Proof—Navigable river—Survey map—Map for private purposes—Comparative value.* Unless a person can establish his right to a fishery independent of his right to his estate he can have no title to any such right in a navigable river or any part thereof lying outside the boundaries of

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his estate. What evidence is necessary to prove the grant of an independent right of fishery in a navigable river discussed. MATHURA NATH CHATTOPADHYA *v.* SIB CHANDRA BOSE (1907) **12 C. W. N. 334**

35. ——— *Public navigable river, fishery in—Arm of the river ceasing to be an arm of a flowing river, effect of.* When on account of a change in the course of a public navigable river an arm of the river ceases to be an arm of the flowing river, the person, who had a right of fishery in the river, ceases to have any right to it; it becomes the property of the adjacent owner. *Krishendra* v. *Maharani Surnomoyee, 21 W. R. 27; Jogendra Narain* v. *Crawford, I. L. R. 32 Calc. 1141; J. J. Grey* v. *Anund Mohun, W. R. 1864, 108,* referred to. ISHAN CHANDRA DASS SARKAR *v.* UPENDRA NATH GHOSH (1908) **12 C. W. N. 559**

36. ——— **Non-tidal and non-navigable river**—*Jalkar—Gradual encroachment upon neighbouring estate—Right of fishery over portion encroaching—Regulation XI of 1825, s. 4, cl. 5.* Where a non-tidal and non-navigable river, which formerly flowed through *A*'s estate by gradual and imperceptible encroachment came to submerge a portion of an adjoining estate owned by *B*: *Held,* that *A* did not thereby acquire the right of fishery over that portion of the river, which covered *B*'s estate. *Foster* v. *Wright, L. R. 4 C. P. D. 438,* explained. *Lopez* v. *Muddan Mohan Thakur, 13 Moo. I. A. 467,* relied on. NARENDRA CHANDRA LAHIRI *v.* SURESH CHANDRA LAHIRI (1906) **10 C. W. N. 540**

37. ——— **Right of fishing in the sea**—*Right of suit—Right of the Crown—Public rights.* Rights of the Crown and of the public in the waters and the subjacent soil of the sea discussed. The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property. That right may, in certain portions of the sea, be regulated by local custom. Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable. BABAN MAYACHA *v.* NAGU SHRAVUCHA **I. L. R. 2 Bom. 19**

38. ——— **Adjunct of right of fishery**—*Right of ferry.* A right to the jalkar of a river—that is, right to the produce of the water, such as fish, etc.—does not necessarily carry with it a right of ferry. GOPEE THAKOORAEE *v.* SHEO SEVUK MISSER . . . **5 N. W. 95**

39. ——— **Dispute relating to a fishery**—*Whether proceedings should be under s. 107 or s. 145 of the Criminal Procedure Code (Act V of 1898).* Where there is a *bonâ fide* dispute relating to a fishery right, the proper course for the Magistrate to adopt is to proceed

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under s. 145 of the Criminal Procedure Code, and not under s. 107. The words in s. 145 are mandatory, while the language of s. 107 is discretionary. *Dolegobind Chowdhry* v. *Dhanu Khan, I. L. R. 25 Calc. 559,* followed. BALAJIT SINGH *v.* BHOJU GHOSE (1907) . . **I. L. R. 35 Calc. 117**

FITNESS OF SURETY.

See SECURITY FOR GOOD BEHAVIOUR. **13 C. W. N. 80**

FIXITY OF RENT.

See BENGAL TENANCY ACT (VIII OF 1885), s. 115 . . . **12 C. W. N. 904**

FIXTURE.

See ENCROACHMENT. **I. L. R. 34 Calc. 844**

See INSOLVENCY ACT (11 & 12 VICT., c. 21), s. 23 . **I. L. R. 25 Bom. 659**

——— *Landlord and tenant—Lease—Assignment of lease—Privity of contract—Liability to repair—Transfer of Property Act (IV of 1882), s. 3.* The word *fixture* is one of common use in English law, but in India the word is not so familiar, and the maxim, '*quicquid plantatur solo, solo cedit,*' on which the law of England as to fixtures seems to have been originally founded, has never received so wide an application here as there. For anything to be a *fixture* it must be "attached to the earth" as that expression is defined in s. 3 of the Transfer of Property Act. Where the occupiers of premises continue in possession in the belief common to them and the owner of such premises that they hold under the terms of a lease, which had never been assigned to them by the original lessee and which had expired, they are bound to carry out such covenants as to repairs, etc., as would have to be performed under the lease within a period of similar duration to that during which they hold possession, their liability being based on the footing of a tenancy that commenced at the expiration of the lease, and not on any privity of contract or estate, whether legal or equitable, created by the lease. CHATURBHUJ *v.* BENNETT (1905) . . **I. L. R. 29 Bom. 323**

FOOD.

——— **adulteration of**—

See CALCUTTA MUNICIPAL ACT (BEN. ACT III OF 1899), s. 495. **I. L. R. 30 Calc. 643**

——— **destruction of**—

See CALCUTTA MUNICIPAL ACT (BEN. ACT III OF 1899), ss. 502, 505. **I. L. R. 30 Calc. 421**

FORD.

See PUBLIC NUISANCE. **I. L. R. 32 Calc. 930**

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FORECLOSURE.

See BENGAL REGULATION XVII OF 1806, s. 8 . . **I. L. R. 29 All. 145**

See MORTGAGE . **10 C. W. N. 778**

See MORTGAGE—FORECLOSURE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 87, 89 . **I. L. R. 32 Calc. 253**
9 C. W. N. 577

See TRANSFER OF PROPERTY ACT, ss. 86, 87 . . . **13 C. W. N. 742**

——— **suit for—**

See JURISDICTION—SUITS FOR LAND—FORECLOSURE . **I. L. R. 4 Calc. 283**

See MORTGAGE . **13 C. W. N. 300**

FOREIGN AND NATIVE RULERS.

See JURISDICTION OF CIVIL COURT—FOREIGN AND NATIVE RULERS.
I. L. R. 21 Bom. 351

FOREIGN COURT.

See EXECUTION OF DECREE—FOREIGN COURT.

See FOREIGN COURT, JUDGMENT OF.

See INJUNCTION . **I. L. R. 36 Calc. 233**

——— **Private International Law**—*Suit in British Court on foreign judgment—Territorial jurisdiction—British subject—Domicile— Nationality—Decree of Foreign Court as evidence in Court in British India—Civil Procedure Code (XIV of 1882), s. 13.* A foreign Court has no jurisdiction over a person who is a British subject domiciled and residing in British India, who was not within the territorial jurisdiction of that Court either at the time when a suit was brought against him or previously, and who never subjected himself by any act of his, such as by appearing and defending the suit, to the jurisdiction of that Court. A decree passed by a foreign Court against such a person cannot be given effect to in a Court in British India. Even if there be in such a case any special territorial legislation giving jurisdiction to the foreign Court, such legislation cannot be recognized by a Court in British India. Nationality is determined by birth on the soil, and not by citizenship by descent. There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under s. 13 of the Code of Civil Procedure, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former, it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court. *Gurdyal Singh* v. *Raja of Faridkot, I. L. R. 22 Calc. 222 : L. R. 21 I. A. 171,* followed. CHRISTIEN *v.* DELANNEY
I. L. R. 26 Calc. 931

FOREIGN COURT, JUDGMENT OF.

See AWARD . **I. L. R. 31 Calc. 274**

See CAUSE OF ACTION.
I. L. R. 31 Calc. 274

FOREIGN COURT, JUDGMENT OF— *contd.*

See COMPANY—WINDING UP—GENERAL CASES . . **8 Bom. O. C. 200**
I. L. R. 9 Bom. 346

See DEBTOR AND CREDITOR.
I. L. R. 16 Mad. 85

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION, AND POWERS OF COURT . **I. L. R. 7 Calc. 82**

See EXECUTION OF DECREE—DECREES OF COURTS OF NATIVE STATES.
I. L. R. 15 Bom. 216

See RES JUDICATA—COMPETENT COURT—GENERAL CASES.
I. L. R. 13 Bom. 224

——— **admissibility of, in evidence—**

See TRADE MARK.
I. L. R. 25 Bom. 433

——— **against insolvent, validity of—**

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—PRINCIPAL AND AGENT . **I. L. R. 26 Mad. 544**

1. ——— **Execution of decree of foreign Court**—*Objections to foreign judgments.* The rule in the case of foreign judgments sought to be executed in our Courts is, that such judgments must finally determine the points in dispute, and must be adjudications upon the actual merits, and that they are not open to impeachment on the ground of want of jurisdiction, whether over the cause, the subject-matter, or the parties, or that the defendant was not summoned, or had no opportunity of defence, or that the judgment was fraudulently obtained. SREEHUREE BUKSHEE *v.* GOPAULCHUNDER SAMUNT . **15 W. R. 500**

2. ——— *Suit against person in representative capacity.* The plaintiff obtained a judgment in a French Court against the father (now deceased) of the defendant. Plaintiff sued defendant on that judgment as representative of his father in the French Court. The defendant pleaded that the bond on which that judgment was obtained was not genuine. Judgment was given for the plaintiff in the French Court with costs. The plaintiff brought the present suit on that judgment. The lower Appellate Court decreed for the plaintiff against the defendant personally for the full amount of the decree in the French Court and interest. *Held,* that the defendant was bound by the judgment in the French Court against him as representative of his father and personally bound to pay all costs awarded against him ; but that, in giving effect to the French judgment, it was to be executed according to the rules of the Civil Procedure Code, which, in the absence of proof of assets received by a representative of a deceased, only gives a decree against the defendant as representative to be levied from the assets of the deceased. KANDASAMI PILLAI *v.* MOIDIN SAIB
I. L. R. 2 Mad. 337

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FOREIGN COURT, JUDGMENT OF— *contd.*

3. ——————— *Procedure in giving effect to foreign judgment—Proof of service of process—Notice, service of, on contributory of Company.* Courts in British India, when called upon to give effect to a foreign judgment, should insist upon a strict proof of the validity and service of summonses and other processes alleged to have emanated from a foreign Court, and made a foundation for a liability to be enforced here by Courts that have no cognizance of the case on its merits. EDULJI BURJORJI *v.* MANEKJI SORABJI PATEL . . . **I. L. R. 11 Bom. 241**

4. ——————— *Execution of decree —Foreign decree—Execution in British India of decrees of Courts of Native States—Evidence —Certified copies of foreign judicial records—Cooch Behar, execution in British India of decree passed by Courts of.* A decree of the Court of the Civil Judge of Cooch Behar was sent for execution to the Court of the District Judge of Rungpore. The copy of the record was signed by the sheristadar instead of by the Judge himself. Upon receipt of the decree by the Subordinate Judge, a notice under s. 248 of the Civil Procedure Code was served on the judgment-debtor, calling on him to show cause why the decree should not be executed, and an order was forthwith issued for the attachment of his property. The judgment-debtor appeared and objected that the copy of the record was not properly certified, and therefore that the whole of the execution-proceedings were bad. The Subordinate Judge ordered that the record be sent back to the Cooch Behar Court through the District Judge in order that a certificate might be given in proper form, and directed that the other points raised should be decided after the return of the papers. On appeal it was urged that the order of the Subordinate Judge was made without jurisdiction, but the District Judge rejected the appeal. The judgment-debtor appealed to the High Court. *Held*, that the Subordinate Judge acted properly in sending the record back to the Cooch Behar Court to be properly certified, and also that he should have set aside the execution-proceedings as being altogether void, but, as that formed no portion of the grounds of appeal urged in the lower Appellate Court, the appeal should be dismissed. GANEE MAHOMED SARKAR *v.* TARINI CHARN CHUCKERBATI . . **I. L. R. 14 Calc. 546**

5. ——————— *Suits in British Court on judgments and decrees of Courts established in recognized foreign States—Territorial jurisdiction of each separate State in personal actions—Civil Procedure Code, 1882, ss. 431 and 434—Right of suit.* Jurisdiction, being properly territorial and attaching, with certain restrictions, upon every person permanently or temporarily resident within the territory, does not follow a foreigner, after his withdrawal thence, living in another State. As to land within the territory, jurisdiction always exists, and may exist over moveables within it, and exists in questions of status or succession governed by domicile. But no territorial legislation can give jurisdiction, which a Court of a foreign State ought to recognize, over an absent foreigner owing no allegiance to the State so legislating. In a personal action, to which none of the above causes of jurisdiction apply, a decree pronounced by a Court of a foreign State, *in absentem*, the latter not having submitted himself to its authority, is by international law a nullity. Not to the Courts of the State in which the cause of action has arisen, nor in cases of contract to those of the *locus solutionis*, should resort be had by the plaintiffs, but to the Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions. *Ex parte* decrees for money were made in the territories of the ruling Chief of Faridkot, a State in subordinate alliance with the Government of India, against a person who had been employed by that State within its territories, but had, before suit brought, relinquished his employment, had left the State, and was then, at the time when he was sued, resident in another State of which he was the domiciled subject. *Held*, that these decrees were a nullity by international law, and could not receive effect in a British Indian Court. *Becquet* v. *Macarthy, 2 B. & Ad. 951*, distinguished. The judgment of BLACKBURN, *J.*, in *Schilsby* v. *Westenholz, L. R. 6 Q. B. 155*, referred to and explained. There is no ground for supposing, as did one of the Courts below, that no suit will lie upon the judgment of a recognized foreign Indian State. GURDYAL SINGH *v.* RAJA OF FARIDKOT

I. L. R. 22 Calc. 222
L. R. 21 I. A. 171

6. ——————— *Private international law—Suit in British Court on foreign judgment—Territorial jurisdiction—British subject—Domicile—Nationality—Decree of foreign Court as evidence in Court in British India—Civil Procedure Code (XIV of 1882), s. 13.* A foreign Court has no jurisdiction over a person who is a British subject domiciled and residing in British India, who was not within the territorial jurisdiction of that Court either at the time when a suit was brought against him or previously, and who never subjected himself by any act of his, such as by appearing and defending the suit, to the jurisdiction of that Court. A decree passed by a foreign Court against such a person cannot be given effect to in a Court in British India. Even if there be in such a case any special territorial legislation giving jurisdiction to the foreign Court, such legislation cannot be recognized by a Court in British India. Nationality is determined by birth on the soil, and not by citizenship by descent. There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under s. 13 of the Code of Civil Procedure, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court. *Gurdyal Singh* v. *Raja of Farid-*

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FOREIGN COURT, JUDGMENT OF— *contd.*

kot, I. L. R. 22 Calc. 222 : L. R. 21 I. A. 171, followed. CHRISTIEN *v.* DELANNEY
I. L. R. 26 Calc. 931
3 C. W. N. 614

7. ——— *Decree "in absentem"—Submission to jurisdiction—Suit on judgment of foreign Court.* The plaintiff brought a suit in the French Court at Karikal against the defendant, a British subject, resident in British India. The defendant employed a vakil to defend the suit, but, on the case coming on for hearing, the vakil stated he had no instructions, and an *ex parte* decree was passed. An application by the defendant to have the decree set aside was held to be time-barred. The plaintiff now brought a suit on the judgment of the French Court to recover the amount decreed to him. *Held*, that the suit was not maintainable for the reason that the decree had been passed against the defendant *in absentem* by a foreign Court, to which he had not submitted himself. *Semble:* Even if the foreign judgment had not been entirely invalid as against the defendant, the British Court would have had jurisdiction to disallow an item of claim allowed by the foreign Court on account of prospective damages which was unsupported by evidence. SIVARAMAN CHETTI *v.* IBURAM SAHEB . . **I. L. R. 18 Mad. 327**

8. ——— **Suit in foreign judgment—** *Judgment not for an ascertained sum of money—Maintainability of suit.* Plaintiff, having obtained a decree in a District Court in the province of Mysore, applied to that Court, in execution of the said decree, for an account of certain proceeds alleged to be due to him under the decree. The application having been refused, and the refusal being upheld by the Chief Court of Mysore, plaintiff now brought a suit for an account in the District Court of South Canara. *Held*, that, as the foreign judgment on which the action purported to be brought was not a judgment for an ascertained sum of money, it constituted no foundation for an action. SMITH *v.* COELHO . **I. L. R. 22 Mad. 382**

9. ——— *Suit on a foreign judgment—Civil Procedure Code (Act XIV of 1882), s. 14, as amended by Act VII of 1888.* A suit will lie on a judgment of a Court in a Native State. MAYARAM *v.* RAVJI **I. L. R. 24 Bom. 86**

10. ——— *Native Courts, suit on decree of—Suits in India on judgments of Courts in India—Jurisdiction of Small Cause Court—Civil Procedure Code (Act X of 1877), s. 434.* No suit is maintainable in any Court in British India founded upon the judgment of a Court situate in a Native State. The Courts of British India cannot enforce the decrees of any Native Courts, except as provided by s. 434 of the Civil Procedure Code, Act X of 1877. Under that section, the decrees of certain Native Courts may be executed in British India, as if they had been made by the Courts of British India. A suit will not lie in the Courts of India upon the judgment of any Court in British India. The only exception to this rule is in the case of judgments of a Court of Small Causes on which suits are permitted to be brought in the High Court in order to obtain execution against immoveable property. A foreign judgment creates an obligation belonging to the class of implied contracts. A Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. *Quære:* Whether suits on foreign judgments are maintainable in the Civil Courts of India. BHAVANISHANKAR SHEVAKRAM *v.* PURSADRI KALIDAS
I. L. R. 6 Bom. 292

FOREIGN COURT, JUDGMENT OF— *contd.*

11. ——— *Judgment of Court of Native State—Jurisdiction of Civil Court.* The Civil Courts of British India have jurisdiction to entertain suits brought upon the judgments of Courts of Native States. *Bhavanishankar Shevakram* v. *Pursadri Kalidas, I. L. R. 6 Bom. 292,* dissented from. SAMA RAYAR *v.* ANNAMALAI CHETTI . . . **I. L. R. 7 Mad. 164**

12. ——— *Parties—Members of firm not resident in place where judgment was obtained.* *A* obtained a decree against *B* and *C* in Ceylon, and, having realized a portion of the sum decreed by sale of property in Ceylon, instituted a suit for the balance upon the foreign judgment in British India against *B, C, D, E, F, G,* on the ground that all were members of one firm. *Held*, that the suit would not lie against *D, E, F, G,* upon the foreign judgment. LAKSMANAN *v.* KARUPPAN . . . **I. L. R. 6 Mad. 273**

13. ——— *Native State—Cause of action—Jurisdiction—Objection to jurisdiction on appeal.* *K* sued *C*, who resided in British India, upon a bond executed by *C* in favour of *K* within the territory of *P*, a Native State, and obtained a decree. Having obtained satisfaction in part, *K* sued *C* upon the judgment of the Court of *P* in a British Indian Court at *T*. *Held*, reversing the decrees of the lower Courts, that the Court at *P* had jurisdiction, and that *K* could sue upon the judgment of that Court in the Court at *T*. KALIYUGAM CHETTI *v.* CHOKALINGA PILLAI
I. L. R. 7 Mad. 105

14. ——— *Limitation—Cause of action—Act XIV of 1859.* In a suit brought upon a judgment in the French Court at Chandernagore :—*Held*, that the period of limitation must be reckoned from the day on which the French decree was dated, and therefore in all Courts to which Act XIV of 1859 applied, such suit would be barred at the expiration of six years from that date. HEERAMONEE DOSSEE *v.* PROMOTHONATH GHOSH
2 Ind. Jur. N. S. 233 : 8 W. R. 32

15. ——— *Limitation—Cause of action.* The remedy by suit in a foreign Court continues open for the period prescribed by the law of that Court, without reference to our own Law of Limitation of suits. A foreign judgment is conclusive as between the parties when it cannot be questioned upon the ground of fraud, or

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FOREIGN COURT, JUDGMENT OF— *contd.*

want of jurisdiction, or that it was unduly obtained. Suits on foreign judgments may be maintained within "six years from the time the cause of action (the judgment) arose." BOLORAM GOOY *v.* KAMEENEE DOSSEE . . . **4 W. R. 108**

16. ——— *Jurisdiction of foreign Court—Residence of defendant—Constructive residence.* The plaintiff, having obtained against defendant a judgment in the District Court of Kandy, now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India, and that he had not appeared to defend the suit at Kandy, and was not at the date of that suit, or subsequently, even temporarily resident in Ceylon; but he was a partner in a firm which carried on business at Kandy, and he was interested in lands at that place which he had visited once or twice. *Held,* that the Court at Kandy had no jurisdiction over the defendant. NALLAKARUPPA SETTIAR *v.* MAHOMED IBURAM SAHEB **I. L. R. 20 Mad. 112**

17. ——— *Jurisdiction of foreign Court—Notice, want of.* The defendants, who were British subjects, purchased goods from the plaintiff in French territory. The plaintiff sued the defendants in the French Court and obtained judgment against them, but the defendants neither resided nor owned property in French territory, and did not appear at the trial and had no actual notice of the proceedings. In a suit brought in British India on the judgment of the French Court:—*Held,* that the want of notice to the defendants was fatal to the suit. *Quære:* Whether the French Court would have had jurisdiction (apart from the question of notice) if it had been proved that it was intended that payment should be made in French territory. BANGARUSAMI *v.* BALASUBRAMANIAN **I. L. R. 13 Mad. 496**

18. ——— *Civil Procedure Code, s. 14—Right to re-hearing of case—Waiver of objection to jurisdiction.* In a suit upon the judgment of a Court at Bastar, it appeared that in the suit in which the judgment was pronounced the defendant took no objection as to the jurisdiction of the Court, and that he carried on business by his agent in the Bastar territory, and that a decree was passed for the plaintiff after evidence adduced on both sides in the ordinary way. *Held,* that the defendant was not entitled to have the case re-heard, and that the defendant was not entitled to take objection to the jurisdiction of the Bastar Court. FAZAL SHAU KHAN *v.* GAFAR KHAN **I. L. R. 15 Mad. 82**

19. ——— *Civil Procedure Code, 1882, s. 14—Power of Court to inquire into the merits.* Where a suit was brought in a Court in British India upon the basis of a decree of the Council of Regency of the State of Rampur: *Held,* that the Court was empowered by s. 14 of the Code of Civil Procedure, as amended by s. 5 of Act VII of 1888, to consider the merits of the case in which the decree of the Council of Regency had been passed. COLLECTOR OF MORADABAD *v.* HARBANS SINGH . . **I. L. R. 21 All. 17**

FOREIGN COURT, JUDGMENT OF— *contd.*

20. ——— *Joint contract—Liability of partners—Judgment recovered against one partner—Res judicata—Civil Procedure Code (Act XIV of 1882), ss. 13 and 14.* The defendant were partners trading in the name of Vishnuram Gopinath and Company. On 6th July 1895, at Ahmedabad, the first defendant borrowed from the plaintiff, for the purposes of the partnership business, a sum of R10,000 and passed a khata in the name of his firm. On 25th April 1896, at Baroda, he passed another agreement to plaintiff under which the plaintiff was to recover the debt due to him from the partners jointly and severally. On 2nd October 1896, plaintiff obtained a decree on an award against the first defendant in the Civil Court at Baroda for R13,909-4-0, and in execution of this decree he recovered a sum of R7,000. In 1897 plaintiff filed this suit in the Court of the first class Subordinate Judge at Ahmedabad to recover the balance, *viz.,* R6,909-4-0, from all the partners (defendants Nos. 1 to 8). Defendants Nos. 6 to 8 resided in Baroda territory, the rest in British India; defendants Nos. 2, 3, and 4 defended the suit. The rest did not appear. The Subordinate Judge dismissed the suit, holding on the authority of *King* v. *Hoare, 13 M. & W. 494,* that the judgment of the Baroda Court against one partner (the first defendant) was a bar to a fresh suit against the other partners on the same cause of action. The plaintiff appealed to the High Court. *Held,* that the principle of *King* v. *Hoare* did not apply, and that the suit was not barred. The Baroda Court had no jurisdiction over the defendants, who were British subjects residing in British territory. The judgment of the Baroda Court was therefore no bar to the present suit under s. 14 of the Code of Civil Procedure. LAKSHMISHANKAR DEVSHANKAR *v.* VISHNURAM **I. L. R. 24 Bom. 77**

21. ——— **Effect of foreclosure decree passed by a foreign Court**—*Lis pendens—Transfer of Property Act (IV of 1882), s. 52—Notice of existence of decree.* In 1887, *K,* who resided at Singapore, mortgaged certain lands in the Madura district to *S,* who sued and obtained a conditional foreclosure decree on the 13th June 1892 in the Supreme Court of Singapore. This decree became absolute on the 3rd October 1892. On the 12th August 1892, *K* hypothecated the said land to *P.* In a suit brought by *S*:—*Held,* that the decree of a foreign Court cannot directly affect land situated in British India; that at the date of the mortgage there was no decree purporting to operate upon the land; that the doctrine of *lis pendens* was inapplicable. *Quære:* Whether *P* would have been bound if he had had notice of the existence of the conditional decree at the date of his mortgage. PALANI CHETTI *v.* SUBRAMANYAN CHETTI . **I. L. R. 19 Mad. 527**

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FOREIGN COURT, JUDGMENT OF— *contd.*

22. ——— **Effect of adjudication of insolvency in French territory**—*French law —"Code de Commerce" of France, s. 443—Suit against insolvent for debt.* By s. 443 of the Code de Commerce the effect of an adjudication of insolvency in French territory is to deprive the insolvent of the possession and management of his property, which is entrusted to a syndic, against whom alone all suits in respect thereof must be brought. *Held*, that, though the debt of an insolvent might not be extinguished by such a declaration of insolvency, so as to exempt him from future liability in respect of property which he might subsequently obtain, no suit could be brought against him in French territory, and, for that reason, outside French territory, so long as the adjudication of insolvency remained in force. *Quelin* v. *Moisson, 1 Knapp 256n*, followed. MURUGESA CHETTI *v.* ANNAMALAI CHETTI **I. L. R. 23 Mad. 458**

23. ——— **Effect of foreign judgment** —*Objection to jurisdiction, waiver of—Limitation Acts. 1871, s. 29 ; 1877, s. 28.* Where a defendant sued in a foreign tribunal takes no exception to the jurisdiction, he cannot question the jurisdiction afterwards, inasmuch as he has led the plaintiff to believe that the proceedings are allowed by him to be effectual, and encouraged the plaintiff to proceed in them instead of withdrawing from them and instituting proceedings elsewhere. Irregularity of procedure on the part of a foreign tribunal, which ordinarily proceeds in accordance with recognized principles of judicial investigation, is not a sufficient ground for refusing to give effect to its judgment. Where limitation bars the remedy, but does not destroy the right, the judgment of a foreign tribunal is not open to the objection that the suit (on a contract) was barred by the Law of Limitation applicable in the country where the contract was made. NALLATAMBI MUDALIAR *v.* PONNUSAMI PILLAI **I. L. R. 2 Mad. 400**

24. ——— *Objection to jurisdiction, waiver of—Cause of action.* If a party sued in a foreign tribunal, which has no jurisdiction except by virtue of its own peculiar laws, protests against the assumption of jurisdiction by that tribunal, but defends the suit to escape the inconvenience of being made liable to arrest and attachment of property in foreign territory, and appeals from the adverse decision of such tribunal to a foreign appellate tribunal without repeating his objection to the jurisdiction, his submission to the jurisdiction is not voluntary, and the judgment of the foreign tribunal does not constitute a valid cause of action in a Court of British India. PARRY & CO. *v.* APPASAMI PILLAI **I. L. R. 2 Mad. 407**

25. ——— *Where party has submitted to jurisdiction, irregularities not affecting jurisdiction of the Court do not vitiate the judgment.* A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment even when they are such as will, in the view of the foreign Court, render the judgment there a nullity. The judgment cannot be impeached on grounds which could have been, but were not taken in the foreign Court. *Pemberton* v. *Hughes, [1899] 1 Ch. 781*, referred to. GUDARU KRISTNAYYA NAIDU *v.* MARADUGULA VENKATARATNAM (1907) . **I. L. R. 30 Mad. 292**

26. ——— *Private international law—Foreign Court—Suit on a foreign judgment to recover money due for board, lodging and tuition—Contract, breach of, within jurisdiction, if necessary—Jurisdiction of English Court over British subjects residing in British India—Notice of action—Jurisdiction of British Indian Court to go into merits of the action in the English Court—Civil Procedure Code (Act XIV of 1882), ss. 2, 13, Expl. 6—Order XI, Rule 1 (e), under the Judicature Act—Residence in England, if necessary to fix liability on a foreign judgment—Interest on money decreed, when no provision for such is made in foreign judgment, if recoverable—Order XLII, Rule 16—1 & 2 Vict., c. 110, s. 17—Indian Interest Act (XXXII of 1839).* As a general rule, a Court can exercise jurisdiction over a foreigner, only if he is resident within the limits of its territorial jurisdiction. Natives of British India, though foreigners, owe allegiance to the common sovereign of England and British India, and are subject to the supreme legislative authority in the British Empire. If, therefore, the supreme legislature in the British Empire authorises an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction, and that foreigner is a native of British India, he cannot treat the judgment passed as a nullity merely because he did not reside within the jurisdiction of the Court which passed it. Order XI, rule 1 (*e*), under the English Judicature Act constitutes a legislative Act of the Sovereign power, regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the English Courts jurisdiction over such British subjects in a case which falls within the order. But it is open to a defendant to show that this is not so, and that the English Court had in fact no jurisdiction. *Gurdyal Singh* v. *Raja of Faridkot, L. R. 21 I. A. 171*, followed and explained. In a suit based on a foreign judgment, the plaintiff cannot recover more than appears on the face of the judgment ; and, when such judgment is silent as to interest, he cannot make the defendant liable for interest on the amount of the English judgment, the English Statutes as to judgments carrying interest (order 42, rule 16, and 1 & 2 Vict., c. 110, s. 17) not applying to India. MOAZIM HOSSEIN *v.* ROBINSON (1901) **5 C. W. N. 741**
s.c. I. L. R. 28 Calc. 641

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FOREIGN COURT, JUDGMENT OF— *contd.*

27. ———— **Domicile**—*Defendant not resident or domiciled in foreign country—No appearance by defendant or submission to jurisdiction—Jurisdiction—"Foreigner"—Subject of the Sovereign both of British India and of a British colony.* Courts generally exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction, and, apart from some statutory power, cannot exercise jurisdiction over anyone beyond its limits. *Whaley* v. *Busfield, L. R. 32 Ch. D. 131*, referred to. A judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in a Court in British India, where the defendant at the time the suit commenced was not a subject of, nor resident in, the country in which the judgment was obtained. *Gurdyal Singh* v. *Raja of Faridkote, I. L. R. 22 Calc. 222; Schibsby* v. *Westenholz, L. R. 6 Q. B. 155; Rousillon* v. *Rousillon, L. R. 14 Ch. D. 351*, referred to. A person does not cease to be a "foreigner" within the meaning of the rule laid down in the above cases, because he is the subject of a Sovereign who is the Sovereign of the country where the judgment was obtained and the country where it is sought to be enforced. *Turnbull* v. *Walker, 67 L. T. Rep. 767*, referred to. KASSIM MAMOOJEE *v.* ISUF MAHOMED SULLIMAN (1902)
I. L. R. 29 Calc. 509
s.c. 6 C. W. N. 829

28. ———————— *Jurisdiction of Court over absent foreigner—International Law—Judgment of Court against absent foreigners subject to the same sovereignty—Authority to bind absent foreigner must be conferred by express words by the supreme authority—Submission to jurisdiction of foreign Court, what amounts to.* The rule of International Law that Courts cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only but is also applicable where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owning allegiance to the same sovereign. A judgment of the Ceylon Court against a native of British India who was not, at the time of the action, resident in Ceylon and had not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India. *Gurdyal Singh* v. *Raja of Faridkote, I. L. R. 22 Calc. 222*, referred to. *Emanual* v. *Symon, [1908] 1 K. B. 302*, referred to. It may be competent to the common sovereign authority to confer jurisdiction on the Courts of one country over absent foreigners residing in the other; but such jurisdiction must be conferred by clear and unambiguous words and cannot be inferred as a matter of implication. A decree based on a contract imposing a personal obligation on an absent foreigner is not binding on him, even when the contract is made in the territory of the *forum* which passed the decree. A person who appears

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in obedience to the process of the foreign Court and applies for leave to defend the action without objecting to the jurisdiction of the Court when he is not compellable by law to do either, must be held to have voluntarily submitted to the jurisdiction of such Court. *Parry & Co.* v. *Appasawmy Pillai, I. L. R. 22 Mad. 407*, distinguished. *Siva Raman Chetty* v. *Iburam Saheb, I. L. R. 18 Mad. 327*, distinguished. SHAIK ATHAM SAHIB *v.* DAVUD SAHIB (1909) . **I. L. R. 32 Mad. 469**

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———— **proceedings of—**

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.
I. L. R. 17 Mad. 14

See EVIDENCE ACT, s. 86.
I. L. R. 14 Calc. 546
I. L. R. 27 Calc. 639

———— **record of—**

See CONFESSION—CONFESSIONS TO MAGISTRATE . **I. L. R. 12 All. 595**

See FOREIGN COURT, JUDGMENT OF.
I. L. R. 2 Mad. 400, 407

See REPRESENTATIVE OF DECEASED PERSON . **I. L. R. 16 Mad. 405**

———— **Contract, suit on**—*Making of contract—Cause of action.* *A*, a Hindu British subject, neither domiciled, resident, nor possessing property in the foreign State of Pudukotta, casually resorted thither and there drew a bill for a sum found due to his creditor *B*, resident in that State. *B* sued *A* on this bill in the Civil Court of Pudukotta and got a decree in his favour. *B* then sued *A* in the subordinate Court of Madura for enforcement of this decree. *A* pleaded that the Pudukotta Court had no jurisdiction to pass the decree sued on, and that he had had no notice of the suit. It was found, on regular appeal, that *A* had had notice, and decided that the Pudukotta Court had jurisdiction. *Held*, on special appeal, that the Civil Court of Pudukotta had no jurisdiction to try the suit. That the mere making of a contract within the jurisdiction of a foreign Court does not necessarily render that Court competent to adjudicate upon all the obligatory relations which flow directly or indirectly from it. MATHAPPA *v.* CHELLAPPA
I. L. R. 1 Mad. 196

FOREIGN GOODS, SALE OF.

See MARKET . **11 C. W. N. 1128**

FOREIGN JURISDICTION ACT (XXI OF 1879).

See NATIVE STATES . **10 C. W. N. 361**

———— **ss. 4, 6 and 8—**

———————— *Criminal Procedure Code, s. 4—Indian Penal Code, s. 40—Offence—Jurisdiction of Magistrate in Mysore to try and*

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FOREIGN JURISDICTION ACT (XXI OF 1879)—*concld.*

——— **ss. 4, 6 and 8**—*concld.*

convict a European British subject for an act amounting to an offence under the Mysore law, but not an offence under the Indian Penal Code. A European British subject was charged and tried before, and convicted by, a First-class Magistrate and Justice of the Peace appointed, under the Extradition Act, 1879, in and for the territories of Mysore. The act for which he was so tried and convicted (namely, being in possession of mining materials) constituted an offence under the Mysore Mines Regulation, but was not an offence under the Indian Penal Code. It was contended, in revision, in the Madras High Court that the conviction was wrong on the ground that a Justice of the Peace appointed under the Extradition Act has no authority to deal with an offence committed by a European British subject against a law of the Mysore State. *Held*, that the Magistrate had power to try the accused, or to commit him for trial in the Madras High Court. *Per Sir* ARNOLD WHITE, *C.J.*—S. 8 of the Act of 1879, extending to European British subjects in States in India in alliance with His Majesty, the law relating to offences and to criminal procedure for the time being in force in British India, ought not to be read so as to restrict the powers of the Governor-General which are declared by s. 4 and which may be delegated to his officers under s. 6. The word "offences" as used in s. 6 of the Act of 1879, is not restricted to offences as defined by s. 40 of the Indian Penal Code. Nor is it restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Criminal Procedure [s. 4 (*o*)], which is the same as that contained in the General Clauses Act, is sufficiently wide to include the wrongful act with which the accused in the present case was charged. ADAMS *v.* EMPEROR (1903) **I. L. R. 26 Mad. 607**

FOREIGN OFFENDERS (FUGITIVES).

See EXTRADITION . **8 Bom. Cr. 13**

FOREIGN STATE.

——— **effect of insolvency proceedings in**—

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—PRINCIPAL AND AGENT . **I. L. R. 26 Mad. 544**

——— **promissory note executed in**—

See RIGHT OF SUIT—CONTRACTS AND AGREEMENTS **I. L. R. 17 Mad. 262**

1. ——— **Civil Procedure Code, 1882, s. 431, cl. (b)**—*Cherrapoonjee Raj—Public and private rights—Succession to land in India—Intestate succession—Succession Act X of 1865, s. 5.* The "private rights" spoken of in s. 431, cl. (*b*), of the Code of Civil Procedure do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of Justice, as distinguished from its political or territorial rights, which must from their very nature be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity. *Emperor of Austria* v. *Day, 30 L. J. Ch. 690 : 2 Giff. 628 ; United States of America* v. *Wagner, L. R. 2 Ch. App. 582*, approved of. There is nothing to prevent a foreign or feudatory State from holding immoveable property in British India, and to such property the rule of intestate succession laid down in s. 5 of the Succession Act (Act X of 1865) does not apply. The State must be regarded as a *quasi* corporation which continues to exist as a State so long as it is recognized as such by Her Majesty, whatever the rule of succession to it may be and whatever may be its form of government. Case in which it was found on the facts that certain immoveable property situated in British India, which had formerly belonged to the State of Cherrapoonjee, having been granted by a former Raja of that State to the defendant, was still the property of the State, on the ground that the Raja was not competent to alienate it, and that the defendant's plea of adverse possession and limitation was not supported by the evidence. HAJON MANICK *v.* BUR SINGH **I. L. R. 11 Calc. 17**

2. ——— **Lapse to the British Government of a foreign State in ceded territory**—*Grant of lands therein—Construction of official correspondence—Obari, or abatement of revenue on the estate.* The State of Jalaun, in the territory ceded in 1804 by the Peishwa, lapsed in 1840 to the British Government. Before the lapse, the lands now in suit belonged to the Chief, and were in the hands of managers on his behalf. The last manager, the ancestor of the present parties, remained, after 1840, in possession of the estate till his death in 1880, having been continued therein for life in 1852. In 1867 the Government directed the continuance of the entire estate to "the loyal members of his family." *Held*, that no proprietary interest in the estate had been shown to have belonged to the ancestors when Jalaun was a principality : that all that could be claimed by the defendants was derived from the Government which, after the lapse of the State, had the right at their discretion to control the descent of the estate, and had exercised this discretion. There had been no formal sanad ; but on the true construction of the official correspondence, as to which the Courts below had differed, the Government first continued the possession of the ancestor for life, and afterwards conferred the inheritance, as to one moiety of the estate, upon the defendant, who was one of the sons of the original holder, and, as to the other moiety of the estate, upon the plaintiffs, who were the four

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FOREIGN STATE—*concld.*

brothers of the defendant then living. The claim made by the plaintiffs, having been founded on a different title, was dismissed by the High Court. But this dismissal was accompanied by a declaration that the above grant had been made. This was now altered into a declaratory decree to the same effect with the direction that inquiry be made as to who were entitled to the plaintiffs' moiety, and further directions were reserved. GOBIND RAO *v.* SITARAM KESHO . . . **I. L. R. 21 All. 53**
L. R. 25 I. A. 195
2 C. W. N. 681

FOREIGN TERRITORY.

——— **offence committed in—**

See JURISDICTION OF CRIMINAL COURT —GENERAL JURISDICTION.
I. L. R. 5 Mad. 23
I. L. R. 13 Mad. 423

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT.

See WRONGFUL CONFINEMENT.
I. L. R. 19 Bom. 72

——— **taking evidence in—**

See PRACTICE—CIVIL CASES—COMMISSION . **I. L. R. 30 Calc. 934**

FOREIGNERS.

See JURISDICTION OF CRIMINAL COURT —GENERAL JURISDICTION.
I. L. R. 19 Bom. 741
I. L. R. 22 Bom. 54

See WARRANT OF ARREST.
I. L. R. 18 Bom. 636

——— **jurisdiction over—**

See FOREIGN COURT, JUDGMENT OF.

——— **suits against—**

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—GENERAL CASES . **I. L. R. 25 Bom. 528**

See JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.
I. L. R. 17 Bom. 662

See SMALL CAUSE COURT, PRESIDENCY TOWNS — JURISDICTION — GENERAL CASES **I. L. R. 17 Bom. 662**

——— **Act III of 1864, validity and application of**—*Powers of legislation of the Governor General in Council—Indian Councils Act (Stat. 24 & 25 Vict., c. 67), s. 22—Criminal Procedure Code (1882), s. 491—Arrest—Habeas corpus—Stat. 31 Car. II, c. 2.* On the 3rd July 1894, certain foreigners, resident in Bombay, having been arrested by the police and sent to jail under warrants issued

FOREIGNERS—*concld.*

under ss. 3 and 4 of Act III of 1864, they applied to the High Court and obtained a rule *nisi* under s. 491 of the Criminal Procedure Code (X of 1882) and under Stat. 31 Car. II, c. 2 (Habeas Corpus Act), calling on the Superintendent of the Jail to show cause why they should not be set at liberty. In the affidavits filed in showing cause against the rule, the only reason suggested for their arrest was that they were connected with loose women residing in a certain district of Bombay. It was contended for the prisoners that their arrest and imprisonment were illegal (i) inasmuch as Act III of 1864 was *ultra vires* of the Indian Legislature; (ii) that the Act, being intended only to secure the "peace and security" of British India, was in this case improperly applied. *Held*, (i) that Act III of 1864 was not *ultra vires* of the Governor-General of India in Council; (ii) that it was rightly applied in the case of the foreigners in question, although their residing in Bombay may not have been likely to have affected or endangered the peace and security of British India. *Per* STARLING, *J.*—S. 3 of Act III of 1864 gives the fullest power to the Government to order any foreigner to remove himself from British India. The Government is the sole judge of what is necessary for the peace and security of British India, and, if it acted in accordance with the letter of the Act, the Court could not inquire into the sufficiency of its reasons for so acting. ALTER CAUFMAN *v.* GOVERNMENT OF BOMBAY
I. L. R. 18 Bom. 636

FOREST ACT (VII OF 1865).

——— **Wrongfully cutting timber**—*Liability of Government for expense of carriage of such timber.* Where timber had been cut and sold by a person who had no authority to do so, and was confiscated by Government under Act VII of 1865:—*Held*, that Government was justly liable for the expense of conveying the timber from the place where it was lying, but was not equitably chargeable with the expense of cutting the timber, which was a wrongful act. DEPUTY COMMISSIONER OF NOWGONG *v.* NOTHERAM BHUAYA
21 W. R. 435

FOREST ACT (VII OF 1878).

——— *Land Acquisition Act (I of 1894)—Distinction between the two Acts.* The most important distinction between the Land Acquisition Act (I of 1894) and the Indian Forest Act (VII of 1878) lies in this:—that whereas in the Land Acquisition Act the Legislature has expressly constituted the Local Government the sole arbiter as to what land shall be acquired for a public purpose, the Indian Forest Act gives the power to afforest subject to conditions as to the fulfilment of which the Local Government is given no express power to decide. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905)
I. L. R. 29 Bom. 480

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FOREST ACT (VII OF 1878)—*contd.*

——— **ss. 3, 4, 10**—*"To constitute a reserved Forest"—Local Government, powers of, regarding waste land—Ultra vires order—Nullity—Civil Courts—Jurisdiction.* S. 3 of the Indian Forest Act (VII of 1878) does not make the exercise of the power conferred dependent on the opinion or decision of the Local Government, but upon a question of fact. It runs "the Local Government may constitute any forest land or waste land, which is the property of Government, etc." If the land actually fulfils that condition, Government can exercise the powers, not otherwise. The test is, not what appears to the Local Government, but what is the actual fact, and as the enabling section gives the Local Government no power to decide that fact, it can only be decided by recourse to the Courts, which have authority finally to decide on questions of law and fact wherever their jurisdiction is not expressly barred by the Legislature. The power in s. 4 of the Indian Forest Act (VII of 1878) to appoint an officer to inquire and determine as to rights is limited to land, which it is proposed to constitute reserved forest and "to constitute a reserved forest" is a phrase defined in s. 3. And under that definition, the constitution of a reserved forest connotes as the object forest or waste land only. The specified character of the land is an essential part of the Act defined. According to the definition the phrase "to constitute a reserved forest" means to convert land by notification from forest or waste. The land, therefore, to which a proposal under s. 4 relates, must be forest or waste land, and it is only in respect of such land that the officer appointed has power to inquire and determine. When the land is forest or waste, the Forest officer has the power to inquire into and determine as to rights of way or pasture, forest produce or water courses, and he may admit or reject such claims with finality, because he is dealing with land in respect of which he has a duly delegated jurisdiction. It is possible there may be other rights in or over land which may render it desirable for Government to acquire full ownership and for such cases s. 10 of the Indian Forest Act (VII of 1878) provides, without, however, extending the application of the section to any land incapable of constitution as reserved forest. The provisions of the Indian Forest Act (VII of 1878) do not bar the jurisdiction of the Court to decide whether the land in suit is or is not forest or waste land and whether, if it be not such land, the plaintiffs are entitled to the occupation thereof. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905)

I. L. R. 29 Bom. 480

——— **s. 10.**

See MORTGAGE — REDEMPTION — RIGHT OF REDEMPTION.

I. L. R. 21 Bom. 396

——— **s. 45**—*Drift and stranded timber, Right of Government, under s. 45, to collect and store, with obligation to notify—Meaning of "jalkar"—Test of res judicata—Civil Procedure Code, 1882, s. 13—Construction of decree.* The

FOREST ACT (VII OF 1878)—*contd.*

——— **s. 45**—*contd.*

object of Ch. IX of the Indian Forest Act, 1878, is to regulate the rights of owners, and not to deprive them of their property in drift and stranded timber and wood. S. 45 of that Act does not divest the owner of, or transfer to the Government, any right therein. Nor does anything in the Act affect the right of the Government to take possession and dispose of timber and wood whereof they are the undisputed owners. But upon certain conditions only, the Government have a right to the possession of any drift and stranded timber and wood collected by their officers, which, however, may be claimed by the true owner, who may be a person holding a jalkar or water right comprehending those things. The conditions are that the officers of Government shall store the timber in the manner, and issue the notifications, required by the Act. In case of such procedure not being followed, and the wood being treated as the property of the Government, the latter are in the event of the wood being found not to belong to them, in no better position than any other trespasser. The title to collect given to the Government by the Act is coupled with, and dependent upon, the duty of giving notice to the public, in order that the true owner, whether he be a person from whom the wood has drifted away or the owner of a jalkar, or however he may be entitled, may claim the drifted timber in the manner, and within the time, prescribed by the Act. There is no presumptive ownership of the Government save where their officers collect and hold for the true owner, in the first instance subject to the statutory duty of giving notice. The Government having taken possession of drift timber in the river Teesta as having an absolute right thereto, the zamindar, owning land on the bank, asserted by this suit his right to it, on the ground of his owning the jalkar where the river passed by, and through, his lands. This jalkar, as he showed, had been decreed in 1882 to his predecessor in estate, in a suit against the Government. *Held*, that this term, signifying water right, was aptly used to include the right to drift and stranded timber as well as to fishing or other interest of a similar kind on the produce of the river—a right decreed in the above suit. The rule is that where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause. That the question of the right to drift and stranded timber was included in the jalkar decreed in 1882 was, in their Lordships' opinion, established by intrinsic evidence in the record of that suit. They concurred with the High Court that correspondence and orders by officers, of dates subsequent to the former decree, could not be received as aids to its construction. But the record showed that the right was in controversy before the Judge, and that he meant to include it in the jalkar, which he decreed. The zamindar's claim was therefore judged to be established.

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FOREST ACT (VII OF 1878)—*contd.*

——— **s. 45**—*concld.*

AMRITESWARI DEBI *v.* SECRETARY OF STATE FOR INDIA . . . **I. L. R. 24 Calc. 504**
L. R. 24 I. A. 33
1 C. W. N. 249

——— **ss. 52, 73**—*Sub-Assistant Conservator of Forests—Suspicion of theft—Seizure and detention of timber—Want of a valid pass.* A Sub-Assistant Conservator of Forests having seized timber on the suspicion that it had been stolen from the Government forests:—*Held*, that it was open to him to justify the seizure on the ground of the commission of a forest offence arising from the want of a valid pass. According to s. 52 of the Indian Forest Act (VII of 1878), a forest officer cannot justify the detention of goods on the ground of an offence against the forest laws, if he has not taken the course which that section requires of bringing the matter before a Magistrate. WAMAN RAMCHANDRA GAUNDE *v.* DIPCHAND BALKISAN . . . **I. L. R. 15 Bom. 229**

——— **s. 54 and s. 25**—*Conviction of offence under Forest Act—Subsequent order for confiscation of boats—Confiscation a punishment—When such order should be made.* Certain accused persons were tried summarily and convicted under s. 25 of the Indian Forest Act, and sentenced to pay fines. By a subsequent order under s. 54 of the same Act their boats were confiscated. *Held*, that under the terms of s. 54 an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence. That, being a punishment, the order should have been passed simultaneously with the other punishment for the offence of which the accused have been convicted. *Empress* v. *Nathu Khan, I. L. R. 4 All. 417*, referred to. AINUDDI SHEIKH *v.* QUEEN-EMPRESS
I. L. R. 27 Calc. 450

——— **ss. 54, 58**—*Offence under Act—Order confiscating produce.* No order confiscating forest produce which is the property of Government in respect of which a forest offence has been committed is necessary or can be made. All that need be done is to direct a forest officer to take charge of such forest produce. An order directing the confiscation of forest produce not belonging to Government, in respect of which a forest offence has been committed, can only be made at the time the offender is convicted. EMPRESS *v.* NATHU KHAN . . . **I. L. R. 4 All. 417**

——— **s. 58.**

See REVISION—CRIMINAL CASES—MISCELLANEOUS CASES.
I. L. R. 4 All. 417

——— **s. 69**—*Cattle Trespass Act (I of 1871), s. 11—Cattle straying in a reserved forest—Seizure by forest officer of such cattle.* S. 11 of the Cattle Trespass Act (I of 1871) having been applied to forest by s. 69 of the Indian Forest Act (VII of 1878), the seizure by a forest officer of cattle found straying in a reserved forest is legal, even though no damage has actually been done. QUEEN-EMPRESS *v.* BABAJI LAXMAN
I. L. R. 22 Bom. 933

——— **ss. 75 and 76**—*Khoti tenure—Khoti khasgi land—Right to cut trees—Dunlop's proclamation—Right of Government to rescind proclamation—Crown grant, construction of.* In 1824, by a proclamation, known as Dunlop's proclamation, it was declared that the owners of land in the Ratnagiri District, on which teak and other forest trees were growing or should thereafter be grown, should be the owners of these trees and might dispose of them at their pleasure without any claim on the part of Government. In 1851, however, this proclamation was rescinded by a subsequent proclamation which declared that the "Government resumed, in regard to forest, all the seignorial rights which it possessed previously to 1823." The accused was khot of the village of Asgoli in the Ratnagiri District. He was charged, under s. 75, cl. (*c*), of the Indian Forest Act (VII of 1878), with the offence of cutting down two teak trees without obtaining the permission of Government as required by the rules framed by Government under the Forest Act. He contended that he was absolute owner of the trees under Dunlop's proclamation. He was convicted, and applied to the High Court under its revisional jurisdiction. *Held*, that the conviction must be reversed. The land on which the trees in question were growing was the khoti khasgi land of the accused, and he was therefore entitled to the benefit of Dunlop's proclamation, by virtue of which the trees thereon became his property. *Held*, also, that Dunlop's proclamation could not be withdrawn by Government. *Collector of Ratnagari* v. *Vyankatrav Narayan Surve, 8 Bom. A. C. 1*, followed. *Per* FULTON, *J.*—Khasgi land, of which the khot was actually in possession, was clearly within Dunlop's proclamation, and it granted the right to teak and other trees in khasgi lands held by vatandar khots. . . . . It is clear, too, that the right to trees, having once been conceded, could not be withdrawn by the proclamation of 1851, and it seems also manifest that the contention is untenable that the benefit of the first proclamation did not extend to the case of trees planted after its cancellation in 1851. Even though the khot may not be the proprietor of the soil in khoti khasgi lands, he is certainly the holder of an interest in it, and that interest, having in 1823 been increased by the concession of all trees which he might grow thereafter, could not subsequently be reduced by the withdrawal of the right to such trees. *In re* ANTAJI KESHAV TAMBE **I. L. R. 18 Bom. 670**

See SECRETARY OF STATE FOR INDIA *v.* SITARAM SHIVRAM.
I. L. R. 23 Bom. 518

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FOREST ACT (VII OF 1878)—*concld.*

——— **s. 78**—*Refusal to serve as member of a panch—Penal Code (Act XLV of 1860), s. 187.* A person was convicted under s. 187 of the Indian Penal Code for refusing, when called on by a forest guard, to serve as one of a *panch* for the purpose of drawing up a *panchnáma* with reference to certain wood alleged to have been illegally cut in a reserved forest. *Held*, that the conviction was illegal. The accused was not shown to be one of the persons contemplated by the first three paragraphs of s. 78 of the Indian Forest Act (VII of 1878), nor was the purpose for which he was called upon to give his assistance one of the purposes mentioned in cls. (*a*) to (*d*) of the section. He was therefore not legally bound to assist the forest guard. QUEEN-EMPRESS *v.* BABAJI . . . **I. L. R. 22 Bom. 769**

——— **s. 81.**

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY. **I. L. R. 20 Bom. 764**

——— **s. 172.**

See PENAL CODE, s. 182. **I. L. R. 10 Bom. 124**

FOREST ACT (MAD. V OF 1882).

See MADRAS FOREST ACT (V OF 1882).

FOREST LANDS.

——— **Claim for hills**—*Village and land made over to claimant's ancestor by Government—Hills situated within immemorial boundaries of village—Right of inamdar irrespective of evidence of actual enjoyment—Necessity for proving adverse possession against Government.* A jaghirdar preferred a claim to certain hills. It appeared that in 1842 the uncontrolled management of a certain village and pieces of land was made over to the ancestor of the present claimant. Prior to such handing over, Government officers had been in possession on behalf of the Inamdar. It was not alleged that, when such possession was handed over, the hills in question were excepted; and it was not disputed that the hills were within the immemorial boundaries of the village:—*Held*, that upon these facts, apart from any evidence of actual enjoyments by the Inamdar, he should be held entitled to the hills. *Held*, also, that it was not necessary for the claimant, in these circumstances, to prove adverse possession as against Government. AJAJUDDIN ALLI KHAN *v.* SECRETARY OF STATE FOR INDIA (1905) . **I. L. R. 28 Mad. 69**

FOREST OFFICER.

See BOMBAY LAND REVENUE ACT, s. 3. **I. L. R. 20 Bom. 803**

See BOMBAY REVENUE JURISDICTION ACT, s. 11 . **I. L. R. 20 Bom. 803**

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY. **I. L. R. 20 Bom. 764**

——— **liability of, to tax**—

See MADRAS DISTRICT MUNICIPALITIES ACT, SCH. A . **I. L. R. 25 Mad. 747**

FOREST RIGHTS.

See KHOTI TENURE. **I. L. R. 4 Bom. 264**

FOREST SETTLEMENT OFFICER.

See MADRAS FOREST ACT, s. 4. **I. L. R. 17 Mad. 193**

See PENSIONS ACT, s. 4. **I. L. R. 17 Mad. 193**

——— **jurisdiction of**—

See MADRAS FOREST ACT, s. 10. **I. L. R. 20 Mad. 279**

FORFEITURE.

See CONFISCATION. **I. L. R. 34 Calc. 986**

See FORFEITURE OF PROPERTY.

See LANDLORD AND TENANT. **I. L. R. 31 Mad. 403**
12 C. W. N. 525

See PENALTY . **I. L. R. 36 Calc. 960**

1. ——— *Civil Procedure Code (Act XIV of 1882), s. 375—Consent decree—Status of landlord and tenant—Suit to enforce forfeiture—Relief against forfeiture.* When a plaintiff is seeking to enforce by original suit a right to forfeiture contained in a consent decree (passed under s. 375 of the Civil Procedure Code in accordance with a lawful agreement recorded under that section), whereby the status of landlord and tenant is established between the plaintiff and defendant, the Court in the exercise of its equitable jurisdiction is not precluded from granting such relief against forfeiture as it might have granted, had the status arisen from contract or custom. *Per* JENKINS, *C.J.*—As under s. 375 of the Civil Procedure Code (Act XIV of 1882) the decree was to be in accordance with the agreement, it cannot have altered the relations of the parties as they existed under the agreement. And as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree passed in accordance with the agreement. *Per* BEAMAN, *J.*—The difference between a consent decree declaring the agreement of parties, and the agreement of parties themselves, when the one or the other is sought to be afterwards enforced, goes no further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made. *Shirekuli Timapa Hegda* v. *Mahablya, I. L. R. 10 Bom. 435*, dissented from. KRISHNABAI *v.* HARI GOVIND (1906) **I. L. R. 31 Bom. 15**

2. ——— *Land Revenue Code (Bombay Act V of 1879), ss. 56, 57, 153—Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of the occupant—Regrant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.* Forfeiture ordinarily

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FORFEITURE—*concld.*

implies the loss of a legal right by reason of some breach of obligation. When arrears of assessment are levied by sale, then s. 56 of the Land Revenue Code (Bombay Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant.....or any of his predecessors-in-title or in anywise subsisting against such occupants." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties. *Balkrishna Vasudev* v. *Madhavrav Narayan, I. L. R. 5 Bom. 73,* followed. AMOLAK BANECHAND *v.* DHONDI (1906)
I. L. R. 30 Bom. 466

FORFEITURE OF PROPERTY.

See ABSCONDING OFFENDER.
See ACT OF STATE . **12 B. L. R. 167**

See BOMBAY LAND REVENUE ACT, s. 153.
I. L. R. 16 Bom. 455

See BOMBAY REVENUE JURISDICTION ACT, s. 4 . **I. L. R. 16 Bom. 455**

See CONFISCATION.
I. L. R. 34 Calc. 986

See HINDU LAW—
INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE;
WIDOW—DISQUALIFICATIONS.

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIDOW.
12 B. L. R. 238
I. L. R. 1 Bom. 559
I. L. R. 9 Bom. 108
I. L. R. 15 All. 382
I. L. R. 17 Mad. 392

See HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION . **I. L. R. 1 All. 503**

See LANDLORD AND TENANT—EJECTMENT.
9 C. W. N. 928

See LANDLORD AND TENANT—FORFEITURE.
See LEASE—CONSTRUCTION.
I. L. R. 17 Calc. 826
I. L. R. 20 Calc. 273

See MESNE PROFITS—RIGHT TO AND LIABILITY FOR . . **2 Agra Mis. 6**

See PAYMENT INTO COURT.
I. L. R. 25 Mad. 535

See RIGHT OF OCCUPANCY—LOSS OR FORFEITURE OF RIGHT.

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 111.
I. L. R. 35 Calc. 807

FORFEITURE OF PROPERTY—*contd.*

See WILL—CONSTRUCTION.
I. L. R. 20 Calc. 15

——— of rebel's property.

See LIMITATION—ACT IX OF 1859, s. 20.

1. **——— Confiscation** —*Absconding offender—Beng. Reg. XI of 1796, sale under—Construction of Regulation.* Regulation XI of 1796, being a highly penal statute, should be construed strictly. As it makes no express provision for the case of joint proprietors of land, or persons jointly holding a sudder farm of land, in the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent. A sale under Regulation XI of 1796 does not extinguish under-tenures or incumbrances created by the delinquent or those through whom he claims. JUGGOMOHUN BUKSHEE *v.* ROY MOTHOORANATH CHOWDHRY
7 W. R. P. C. 18 : 11 Moo. I. A. 223

2. **——— Forfeiture against some members of joint Hindu family**—*Beng. Reg. XI of 1796.* Under Regulation XI of 1796, the Governor General in Council could pronounce an order of confiscation in cases of persons charged with offences of a criminal nature who should abscond or conceal themselves so as not to be found upon process issued against them. After the issuing of the attachment by the Court and the subsequent declaration of forfeiture, everything previous to the attachment must be presumed to have been regularly and legally done, unless such presumptions were rebutted by sufficient evidence. Where a forfeiture under Regulation XI of 1796 was declared against three or four brothers constituting a joint undivided Hindu family: *Held,* that the forfeiture did not enure for the benefit of the fourth brother, nor did it affect the rights of the fourth brother, who was entitled to his fourth share in all the ancestral property of the family, and that the widow of the ancestor was also entitled to maintenance. GOLAB KOONWAR *v.* COLLECTOR OF BENARES
7 W. R. P. C. 47 : 4 Moo. I. A. 246

3. **——— Confiscation of rebel's property**—*Seizure and attachment under Acts XXV of 1857 and IX of 1859.* The procedure in regard to the seizure and attachment of property under Act XXV of 1857, and the adjudication of claims to such property under Act IX of 1859, pointed out. *Held,* that it is not incumbent on a party aggrieved by acts done under these laws to bring a suit at all; but if he brings a suit, it must be brought within a year of the attachment or seizure complained of. A seizure within the meaning of s. 20, Act IX of 1859, is such a taking possession of the property forfeited as is referred to in s. 7, Act XXV of 1857, not merely formal but actual. BYJNATH SINGH *v.* SOLANO
14 W. R. 114

4. **——— Attachment against forfeited property**—*Act XXV of 1857—Priority to Govern-*

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FORFEITURE OF PROPERTY—*contd.*

ment. Judgment-creditors having *bonâ fide* attachments upon property at the time that the property of their debtors become forfeited to Government under Act XXV of 1857 are entitled in priority to Government. ODIT DASS *v.* GOVERNMENT **Marsh. 259 : 2 Hay 117**

5. ——— *Right of decree-holder.* A decree-holder is not entitled to have his decree satisfied by sale of the judgment-debtor's properties which have been confiscated by Government for rebellion, unless he can show that they were attached in execution of his decree before the confiscation. An attachment cannot be presumed to have existed or continued from the fact that there was a proclamation of sale before confiscation. RADHA BIBEE *v.* GOVERNMENT . . . **2 Hay 562**

6. ——— *Withholding of payment of annuity—Act IX of 1859, s. 18.* Plaintiff joined with the rebels and took a leading part with them. A reward was set upon him as a rebel leader, and after a time he was captured. No formal proceedings were taken under ss. 2 and 7 of Act XXV of 1857 for adjudicating his property (which consisted of little more than an annuity) to be forfeited. The property charged with the annuity was in the hands of the Collector as the manager under the Court of Wards. The annuity was withheld, and was no longer regarded as a charge on the catate, but was treated as merged. *Held*, that the mere withdrawal of the payment of annuity by those who had the management of the estate, which was charged with the payment, would be an illegal act in no way affecting the plaintiff's right; but as the withholding of the payment was under the authority and direction of the official who was authorized to make attachment of rebels' property, it was with reference to the nature of the property equivalent to an attachment or seizure, and could not be questioned except under the provisions of s. 18 of Act IX of 1859, notwithstanding there had been no adjudication of forfeiture. CHUNDA *v.* ROOP SINGH . . **3 Agra 281**

7. ——— **Forfeiture of share in joint Hindu family property**—*Mitakshara law—Act XXV of 1857, s. 3.* *B S*, the father of the plaintiff and in possession of immoveable property subject to the Mitakshara law inherited from his ancestor, was on the 10th December 1857, after proceedings taken under Act XXV of 1857, declared to be a rebel, and it was ordered that all his property should be confiscated to Government. On the 16th April 1858, *B S* was arrested, and being tried and convicted on a charge of rebellion was sentenced to death. The sentence was carried out on the 21st April, and an order was made on that day for the confiscation of his property. In a suit instituted by the plaintiff to recover the property:—*Held*, that *B S* had such an interest in it as made it the subject of forfeiture under s. 3, Act XXV of 1857, and the plaintiff therefore did not, on the death of *B S*, become entitled to his estate. THAKOOR KAPILNATH SAHI *v.* GOVERNMENT **13 B. L. R. 445 : 22 W. R. 17**

FORFEITURE OF PROPERTY—*contd.*

8. ——— **Forfeiture of land subject to rent**—*Act XXV of 1857—Right to arrears of rent due at time of forfeiture.* Where land forfeited to Government by a conviction of the owner of an offence within Act XXV of 1857 is subject to rent, the person entitled to the rent is not entitled to recover arrears due at the time of the forfeiture, either from the heirs of the owner or from the Government; but the Government is liable for the rent which may subsequently accrue. NEELMONEY SINGH DEO *v.* GOVERNMENT. NEELMONEY SINGH DEO *v.* CHUTTERDHUN SINGH **Marsh. 308 : 2 Hay 226**

9. ——— **Queen's Proclamation, effect of**—*Conviction for rebellion—Act XI of 1857, s. 1—Remission of punishment.* Where *N* and *M* were convicted of rebellion under Act XI of 1857, s. 1, and sentenced, the former to be transported for life and to have all his property confiscated and the latter to have all his property confiscated, the sentence of confiscation was held to be absolute, and not to depend upon the amount of punishment, and the fact of the punishment being remitted by the Governor-General does not restore the property. The Government having left the property of the convicts in the hands of the Administrator-General as administrator to the estate of the convicts' father whence it was derived, in whose hands it was allowed to accumulate pending a separate litigation in respect of that estate, while it asserted its right by virtue of the confiscation to other property of the convicts the title to which was undisputed, it was *held* that the Government had sufficiently declared and acted upon its intention to enforce the confiscation. The Queen's proclamation of amnesty (November 1858), coming after the conviction and confiscation, had not the effect of re-vesting in the convicts the property confiscated. *Held*, also, that the property in question, being Government paper, was liable to confiscation; and lastly, that *N's* widow was not entitled to maintenance out of the property confiscated by the State. GUNGA BAEE *v.* HOGG . . . **2 Ind. Jur. N. S. 124**

10. ——— **Retrospective effect of forfeiture after conviction**—*Attachment in execution—Act XI of 1857, s. 1—Penal Code, s. 121.* In execution of a decree against the defendant, the plaintiff, on 17th July 1871, attached certain property in Calcutta belonging to the defendant. On 26th July 1871, the defendant was convicted, under s. 1 of Act XI of 1857 and also under s. 121 of the Penal Code, of abetting the waging of war against the Queen, and sentenced to transportation for life and forfeiture of all his property. The offence for which he was convicted was committed in September 1861. *Held*, that the forfeiture took effect from the date of the commission of the offence, and therefore any attachment subsequently made was invalid. GANESHLALL *v.* AMIR KHAN **8 B. L. R. 83 : 17 W. R. 80**

11. ——— **Effect of forfeiture**—*Confiscation under Act X of 1858.* The confiscation of

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FORFEITURE OF PROPERTY—*contd.*

a village under Act X of 1858 cancels the rights of the tenants, and the fact that they were permitted to retain their holding on rent and enjoy the produce of the trees for some years subsequent to the confiscation, does not revive the rights which are absolutely avoided by the confiscation. TEEKUM SINGH *v.* DULLO . . . **2 Agra 324**

12. ——— *Act X of 1858—Power of Government to cancel tenures and eject raiyats.* Act X of 1858 gave Government the power as to landed property acquired by confiscation thereunder (if it thought fit to exercise it) of ejecting raiyats. As to under-tenures, the words are of still stronger import. But it must be held rather to confer a power to cancel than absolutely and without act done to annul the tenures. DOORGA PERSHAD *v.* ZORAWUR . . . . **2 N. W. 75**

13. ——— *Act X of 1858, s. 7—Under-tenures.* The Legislature did not intend to include in the term "under-tenures," in s. 7 of Act X of 1858, the holdings of raiyats, but employed that term in the sense in which it is commonly used in this part of India, as applying to tenures of a proprietary character inferior to the zamindari, but superior to the khastkaree tenure. Consequently such holdings were by that Act made voidable, but not absolutely void. The power of avoiding such holdings expired with the Act. BASIT ALI *v.* MAN SINGH . . **2 N. W. 140**

14. ——— **Procedure in forfeiture**—*Criminal Procedure Code, 1861, ss. 131, 132.* The procedure prescribed in ss. 131 and 132 of Act XXV of 1861 must be followed before an order confiscating property is made. BEHARY SHAHA *v.* NUBBY KHAN . . . **9 W. R. Cr. 13**

15. ——— **Evidence of forfeiture**—*Order of confiscation—Attachment, evidence of.* An order of confiscation or an order sanctioning confiscation is not equivalent to an actual confiscation by way of attachment or seizure. A list of confiscated houses is not by itself proof of actual attachment. DEO KARUN *v.* MAHOMED ALI SHAH **3 N. W. 328**

16. ——— **Power of Magistrate to seize property of convict.** A Magistrate has no power to seize the property of a person convicted where he has not been directed to pay a fine. ANONYMOUS . . . **4 Mad. Ap. 28**

17. ——— **Charges on forfeited property**—*Debts and liabilities.* General debts and liabilities are not charges against property forfeited upon conviction of felony. HURRY DOSS BANERJEE *v.* HOGG . . . **1 Ind. Jur. O. S. 86**

18. ——— **Offences for which forfeiture may be enforced**—*Penal Code, s. 62.* S. 62 of the Penal Code, which provides for forfeiture of property of offenders, limits it to cases where the parties shall have been transported or sentenced to imprisonment for at least seven years. QUEEN *v.* KRIPAMOYEE CHASSANEE **8 W. R. Cr. 35**

FORFEITURE OF PROPERTY—*contd.*

19. ——— *Penal Code, s. 62.* Where a zamindar was convicted of wrongfully keeping in confinement a kidnapped person, and was sentenced to transportation by the Sessions Judge, who added a sentence of forfeiture of the rents and profits of the prisoner's estates under s. 62 of the Penal Code, the High Court set aside the sentence under s. 62 as too severe. That sentence should be inflicted for offences of the most atrocious kind, or for offences committed under the most aggravated circumstances. QUEEN *v.* MAHOMED AKIR *alias* TOTAH MEAH . **12 W. R. Cr. 17**

20. ——— *Indian Penal Code, ss. 62 and 406—Criminal breach of trust—Sentence. Held,* that the special sentence provided for by s. 62 of the Indian Penal Code is a sentence which should only be inflicted in rare cases—those in which crimes of an atrocious nature are exposed or in which offences have been committed under aggravated circumstances. *Queen* v. *Mahomed Akhir, 12 W. R. Cr. 17,* followed. EMPEROR *v.* AMRIT LAL (1906) . . **I. L. R. 29 All. 25**

21. ——— **Sale of forfeited property**—*Condition of sale—Act of State—Right of suit against Government.* Where a sale of landed property, which has been executed by the Government, was made by Government without any restriction being attached to the original notice of sale, which stated that the highest bidder was to be the purchaser:—*Held,* that the Government could not, subsequent to the bid and the deposit of the earnest-money, impose any condition, but was bound to make over possession irrespective of the character of the highest bidder. In selling the property of rebels which it had confiscated, the Government does not perform an act of State, but stands in the situation of an individual selling his property by auction, and a suit may therefore be properly brought against the Government by the purchaser, if the Government refuses to give up possession or transfer the possession to another. SHEO LALL BOHREE *v.* MAHOMED **13 W. R. P. C. 4**

22. ——— *Rights of auction-purchaser.* Rights acquired by a purchaser at auction from Government of the confiscated property of a rebel cannot be defeated or lessened by any subsequent act of the Government. ESHREE PERSHAD *v.* DEBEE CHURN . **2 N. W. 470**

23. ——— **Order for confiscation passed subsequently and not at time of conviction.** When a person has been tried and convicted in the Court of a Special Commissioner, an order of confiscation of his property should be made at the time of the trial, and not subsequently. IZZUTTOOLNISSA BEEBEE *v.* HUSNA KOOUR **1 N. W. 101 : Ed. 1873, 151**

24. ——— **Order of confiscation by independent Chief**—*Cognizance by English Courts—Proof of confiscation.* Where the Chief of an independent State, exercising the sovereign power of that State within its territories, confiscates property within those territories, the confiscation

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FORFEITURE OF PROPERTY—*contd.*

must be respected by English Courts of Justice. The fact of such confiscation, if disputed, must be ascertained by the Court in the same manner as are all other facts which are in issue between the parties. SHOAY ATT *v.* SHOAY DOANG . **14 W. R. 218**

25. ——— Order of forfeiture, irregularity in making—*Criminal Procedure Code, 1861, s. 184.* An order of forfeiture under s. 184, Code of Criminal Procedure, if substantially legal cannot be disturbed for an immaterial error of procedure. BAIJOO BOUL *v.* GUGUN MISSER. QUEEN *v.* GUGUN MISSER . . **8 W. R. Cr. 61**

26. ——— Lands attached under s. 146 of the Code of Criminal Procedure, 1898, can never be forfeited to the Government. RAJAH OF VENKATAGIRI *v.* ISKAPALLI SUBBIAH (1902) **I. L. R. 26 Mad. 410**

27. ——— Parlakimidi, zamindari of—*Forfeiture—Re-grant—Maliahs or hill tracts, retained by Government—Bisovees service tenure holders under Government—Nature of tenure—Kattubadi or quit rent—Savaras, inhabitants of hill tracts, position of—Zamindari charged with payment of kattubadi—Ownership, if passed to zamindar—Adverse possession—Acquiescence under mistake—Estoppel—Evidence Act (I of 1872), s. 115.* Prior to the forfeiture by Government of the Parlakimidi zamindari in 1800, the *Maliahs* (certain hill tracts to the north of the zamindari) formed part of the zamindari. The inhabitants of these hill tracts, the *Savaras*, were once a turbulent people and in order to control them and to defend the passes to the plains, the country was divided into *Muttas* or forts and each placed under the control of a local chief or *Bisoyee*. The *Bisoyees* held the *Muttas* on a mere service tenure paying an annual sum to the zamindar by way of *kattubadi* or quit-rent—an arrangement not unlike that which prevails in other hill tracts in India. In 1802, the zamindari of Parlakimidi was re-granted to the zamindar in permanent settlement, but Government advisedly retained possession and control of the "lands held by the *Bisoyees*." *Held*, that by this and similar expressions were meant the entire *Muttas*, which made up the *Maliahs* and not merely the lands, under the direct cultivation of the *Bisoyees*, inasmuch as the benefits enjoyed by them included not only those lands, but also fees and other dues received by them from the *Savaras* throughout the whole of the *Muttas*. *Held*, further, that the proprietary right in the *Maliahs* did not pass to the zamindar, when the *Maliahs* were again placed under the control of the zamindar in 1823 and the *Bisoyees* required to pay their quit-rent through him, and when again in 1825, in consideration of a grant to the zamindar of certain villages situated outside the *Maliahs*, the zamindari was charged with the tribute payable by the *Bisoyees* to Government. From 1830 to 1890 the zamindari had been managed by the Court of Wards. During the whole or a part of this period the Court of Wards worked the forests of the *Maliahs* for the benefit of the zamindari in the mistaken belief that it belonged to the zamindari, and other Government officials acquiesced therein. The Government officials under the same mistake also encouraged the expenditure of zamindari funds upon the making of roads in the *Maliahs*. But on the first occasion that a claim of ownership was distinctly put forward by the zamindar it was repudiated by Government. *Held*, that the Courts in India were right in holding that the zamindar had failed to make out a title by adverse possession. Also, that these facts did not estop the Government from claiming ownership of the *Maliahs*. GOURA CHANDRA GAJAPATI NARAYANA DEO MAHARAJAULUN GARU *v.* SECRETARY OF STATE FOR INDIA (1905) **I. L. R. 28 Mad. 130 9 C. W. N. 553 L. R. 32 I. A. 53**

28. ——— Forfeiture of tenancy—*Ejectment—Co-lessors—Suit for ejectment by one set of co-lessors—Transfer of Property Act (IV of 1882), s. 111.* In a suit for ejectment by one set of co-lessors on the ground that the principal defendants have forfeited their rights as tenants, under s. 111 of the Transfer of Property Act, having denied the title of the plaintiffs in a previous rent suit: *Held*, that, though all the present plaintiffs were not parties to the previous rent suit, inasmuch as the said defendants not only denied the existence of the relation of landlord and tenant between them and the then plaintiffs, but set up a third party as their landlord in respect of the disputed land, they incurred a liability to have their tenancy forfeited. *Held*, further, that though in England any joint tenant may put an end to his demise as far as it operates on his own share, whether his companions join him in putting an end to the whole lease or not, yet according to the decisions, the relation created by contract with several joint landlords continues, until there exists a new and complete volition to change it. Where therefore the relation of joint landlords continues, the tenancy of the lessees cannot be put an end to, except by all lessors acting together. *Ebrahim Pir Mahomed* v. *Cursetji Sôrabji De Vitre, I. L. R. 11 Bom. 644*, explained; *Fayj Dhali* v. *Aftabuddin Sirdar, 6 C. W. N. 575*; *Ramgati Mohurer* v. *Pran Hari Seal, 3 C. L. J. 201*, and *Ram Lochi Koeri* v. *Herbert Collingridge, 11 C. W. N. 397*, distinguished. *Held*, also, that the rule is different in the case of trespassers and in the case of tenants, when *khas* possession is not sought for. *Radha Proshad Wasti* v. *Esuf, I. L. R. 7 Calc. 414*; *Harendra Narain Singh Chowdhry* v. *Moran, I. L. R. 15 Calc. 40*, and *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy, 2 C. W. N. 229*, referred to. GOPAL RAM MOHURI *v.* DHAKESWAR PERSHAD NARAIN SINGH (1908) . **I. L. R. 35 Calc. 807**

FORGED DOCUMENT, USING AS GENUINE.

See FORGERY . . **11 C. W. N. 838**

——— forged indorsement—

See NEGOTIABLE INSTRUMENT. **I. L. R. 36 Calc. 239**

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See APPEAL IN CRIMINAL CASES—PROCEDURE . **B. L. R. Sup. Vol. 426**

See CHARGE—FORM OF CHARGE.
I. L. R. 28 Calc. 434
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See CHEATING . **I. L. R. 12 Mad. 114**

See CRIMINAL PROCEDURE CODE.
8 C. W. N. 643

See HUNDI—ENDORSEMENT.
5 C. W. N. 313

See PENAL CODE . **8 C. W. N. 278**
I. L. R. 28 All. 358

See SANCTION FOR PROSECUTION—DISCRETION IN GRANTING SANCTION.
I. L. R. 29 Calc. 887

See WILL—VALIDITY OF WILL
6 C. W. N. 787

——— abetment of—

See ATTEMPT TO COMMIT OFFENCE.
I. L. R. 16 All. 409

——— committal by Civil Court for—

See CRIMINAL PROCEEDINGS.
I. L. R. 16 Bom. 729
I. L. R. 18 Bom. 581

See SANCTION FOR PROSECUTION—POWER TO GRANT SANCTION.

1. ——— **Requisites for offence**—*Penal Code, s. 29—False document.* To constitute the offence of forgery, the simple making of a false document is sufficient. It is not necessary that the document should be published or made in the name of a really existing person. A writing which is not legal evidence of the matter expressed may yet be a document within the meaning of s. 29 of the Penal Code, if the parties framing it believed it to be, and intended it to be, evidence of such matter. QUEEN *v.* SHIFAIT ALI
2 B. L. R. A. Cr. 12 : 10 W. R. Cr. 61

2. ——— *Penal Code, ss. 463, 467—Criminal Procedure Code, 1889, s. 195.* The word "forgery" is used as a general term in s. 463 of the Penal Code (Act XLV of 1860); and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code (Act X of 1882) so as to embrace all species of forgery, and thus includes a case falling under s. 467 of the Penal Code. QUEEN-EMPRESS *v.* TULJA
I. L. R. 12 Bom. 36

3. ——— **"Valuable security"**—*Settlement of accounts—Penal Code, s. 30.* A settlement of accounts in writing, though not signed by any person, is a "valuable security" within the definition of s. 30 of the Penal Code. *Ex parte* KAPALAVAYA SARAYA . . . **2 Mad. 247**

4. ——— *Copy of lease—Penal Code, ss. 30, 467.* A copy of a lease is not a valuable security within the meaning of s. 30 of the Penal Code, and therefore a conviction under s. 467 for fabricating such a document cannot be supported. REG. *v.* KHUSAL HERAMAN
4 Bom. Cr. 28

5. ——— *Deed of divorce—Penal Code, s. 30.* A deed of divorce is a "valuable security" within the meaning of s. 30 of the Penal Code. The presenting of a forged document of such a nature for registration, and obtaining registration, would be "using" within s. 471 of that Code. QUEEN *v.* AZIMOODEEN
11 W. R. Cr. 15

6. ——— *Sanad—Penal Code, ss. 24, 25, 464, 467, 471—Using as genuine a forged document with intent to defraud—Sanad conferring a title of dignity.* The accused, in order to obtain a recognition from a settlement officer that they were entitled to the title of "Luskur," filed a sanad before that officer purporting to grant that title. This document was found not to be genuine. The Sessions Judge convicted the accused under ss. 471, 464 of the Penal Code. *Held,* on appeal, that, even supposing the accused had used the document knowing it not to be genuine, they could not be found guilty, as the intention of the accused was not to cause wrongful gain or wrongful loss to any one; their intention being to produce a false belief in the mind of the settlement officer that they were entitled to the dignity of "Luskur," and that this could not be said to constitute "an intention to defraud." A sanad conferring a title of dignity on a person is not a valuable security within the meaning of the Penal Code. JAN MAHOMED *v.* QUEEN-EMPRESS, WARIS MEAH *v.* QUEEN-EMPRESS
I. L. R. 10 Calc. 584

7. ——— **Using forged document**—*Copy of document, production of.* A person may be convicted of using as genuine a document which he knew to be forged, though he in the first instance produced only a copy of it. QUEEN *v.* NUJUM ALI
6 W. R. Cr. 41

8. ——— **Intention, proof of**—*Making false document.* A conviction for forgery under the Penal Code cannot be had unless it is proved that the accused himself made a document, or part of a document, with the intention of causing it to be believed that such document, or part of a document, was made by the authority of a person by whose authority he knew that it was not made. QUEEN *v.* RAMGOPAL DHUR . . . **10 W. R. Cr. 7**

9. ——— **False assertion of title**—*Dishonest and fraudulent intent.* A prosecutor in a case of forgery, in order to establish that a title has been asserted with a fraudulent or dishonest intent, must show that the accused had no reasonable ground for asserting the title, and that accused asserted the title dishonestly or fraudulently in the sense in which these terms are used in the Penal Code. QUEEN *v.* KISHEN PERSHAD
2 N. W. 202

10. ——— **Attempting to use fabricated evidence**—*Knowledge of forgery—Inten-*

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tion to use fabricated evidence. Where a prisoner produced as evidence an account book, one page of which had been fraudulently abstracted and another substituted for it:—*Held*, that he was not guilty of the offence of attempting to use as genuine fabricated evidence, unless he knew of the forgery and intended to use the forged evidence for the purpose of affecting the decision on the point at issue when the book was tendered. QUEEN *v.* MODHOOSOODUN SHAW . . . . . **7 W. R. Cr. 23**

11. ———— Intention to defraud—*Wrongful gain or wrongful loss—Avoidance of litigation.* *A* signed *B's* name to petitions presented by *C* to the mamlatdar requesting his summary assistance, under Regulation XVII of 1827, for the recovery of rents from *B's* tenants. *Held*, that, even if *A* had no authority from *B* to sign his name and if *A* wished to deceive the mamlatdar into the belief that it was *B* himself who had signed the petitions, still, if there had been no intention to defraud any body, or if no wrongful gain or wrongful loss could have been caused to *A* or *B*, *A*'s act did not constitute forgery within the meaning of the Penal Code. Avoidance of litigation is no wrongful loss to Government. REG. *v.* BHAVANISHANKAR **11 Bom. 3**

12. ———— Intention to injure—*Penal Code, s. 463.* To constitute the offence of forgery ss. defined by s. 463 of the Penal Code, it is not sufficient to prove that in making the document in respect of which the offence is charged, the accused knew that the document might injure, but it must be proved that it was his intention that it should injure another. FEDA HOSSEIN *v.* EMPRESS **10 C. L. R. 184**

13. ———— Forgery of copy of document—*Penal Code, s. 463.* The forgery of the copy of a document for the purpose of the same being used in evidence comes within the definition of forgery as contained in s. 463 of the Penal Code. ESSAN CHUNDER DUTT *v.* PRANNAUTH CHOWDHRY **W. R. F. B. 71 Marsh. 270 : 2 Hay 236**

14. ———— Unauthorised use of name as agent—*Signing vakalatnamah in name of decree-holders.* The signing of a vakalatnamah in the name of co-decree-holders without their authority to do so, and delivering it to a vakil, w th instructions to file a petition, stating that the debt had been satisfied, and praying that the case may be struck off the file, is forgery within the meaning of s. 463 of the Penal Code. QUEEN *v.* GYANEE RAM . . . . . **6 W. R. Cr. 78**

15. ———— Antedating a document—*Penal Code, ss. 463, 464.* Where a prisoner, who appealed to the Commissioner from an order of an assessor under Act XXI of 1867, filed stamp paper for a copy of the assessor's decision after the period of appeal had elapsed, but on appeal averred that he filed the stamp paper before the time for appealing had elapsed, and fraudulently obtained a certificate to that effect which was antedated, it was *held* that she was guilty of having abetted the commission of forgery of a document within s. 463 and cl. 1, s. 464 of the Penal Code. QUEEN *v.* SOOKMOY GHOSE . . . . . **10 W. R. Cr. 23**

16. ———— Falsification of record in order to conceal negligence—*Fraud—Penal Code (XLV of 1860), ss. 463, 464.* Falsification of a record made in order to conceal a previous act of negligence not amounting to fraud does not amount to forgery within the meaning of ss. 463 and 464 of the Penal Code (Act XLV of 1860). EMPRESS *v.* SHANKAR . . . . . **I. L. R. 4 Bom. 657**

17. ———— Falsification of book to conceal frauds committed—*Penal Code, ss. 463, 466.* The subsequent falsification of a *roznamcha* book kept in the office of a Deputy Inspector of Schools by the mohurrir in charge thereof, for the purpose of concealing frauds previously committed, merely with a view to avoid disgrace and punishment, *held* not to fall within the definition of forgery as given in the Penal Code. QUEEN *v.* JAGESHUR PERSHAD . . . . **6 N. W. 56**

18. ———— Proof of deception—*Making false document—Penal Code, s. 464.* It must be proved that the accused practised deception, so as to prevent a person from knowing the nature of the document before the accused can be found guilty under s. 464 of the Penal Code of making a false document. QUEEN *v.* NUJEEBUTOOLLAH . . . . . **9 W. R. Cr. 20**

19. ———— False entries in account book—*Penal Code, s. 464.* The prisoner made certain entry in his ledger, which consisted of rough loose sheets, showing that certain sums of money had been repaid to the prosecutor, which, in fact, had not been repaid. *Held*, that the prisoner was guilty of forgery under s. 464 of the Penal Code. ANONYMOUS . . **1 Ind. Jur. N. S. 46**

20. ———— Ignorance of contents of document—*Penal Code, s. 464—Absence of deception.* Where the accused, a mohurrir in a registry office, was charged with making false endorsements of registration on the back of certain deeds, which endorsements were signed by the Registrar, it was *held* that, before he could be convicted of forgery under part 3, s. 464, Penal Code, it must be shown that the Registrar, in consequence of deception practised upon him by the accused, did not know the contents of the document he was signing. QUEEN *v.* DWARKANATH GHOSE **20 W. R. Cr. 49**

21. ———— Misrepresentation in document by false description—*Penal Code, s. 464.* A misrepresentation by false description of one's position in life falls under the heading of cheating, and not under that of forgery. Where, therefore, a document purported to have been signed by *G L*, a patwari, and it was said that it had been signed by *G L*, but at a time when *G L* was not a patwari, it was *held* that the document was not a forgery within s. 464 of the Penal Code. JOY KURN SINGH *v.* MAN PATUCK . . **21 W. R. Cr. 41**

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22. ——— Fabricating false evidence —*Penal Code, ss. 192 and 464—Alteration of date of document.* Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently" within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192. *In re* EKRAR ALI. EMPRESS *v.* EKRAR ALI . **I. L. R. 6 Calc. 482**

23. ——— Altering office report to screen negligence. Where prisoner, to screen his own negligence, altered an office report, such conduct does not fall within the definition of forgery in the Penal Code. QUEEN *v.* LAL GUMUL **2 N. W. 11**

24. ——— Making false entries in account book with the intention of concealing criminal breach of trust—*Penal Code (Act XLV of 1860) ss. 24, 25, 465.* Where a clerk, who had committed criminal breach of trust, subsequently made false entries in an account book with the intention of concealing such offence:—*Held,* that the making of such entries did not constitute the offence of forgery, and he had therefore been improperly convicted under s. 465 of the Penal Code. *Queen* v. *Jageshur Pershad, 6 N. W. 56,* and *Queen* v. *Lal Gumul, 2 N. W. 11,* followed. EMPRESS *v.* JIWANAND . **I. L. R. 5 All. 221**

25. ——— False entry in public record—*Penal Code, ss. 192, 465, 466.* S. 466 of the Penal Code is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer. The accused in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate, and as to what estates the rents were in arrear, so that he might take steps to enforce payment, and was convicted by the Sessions Judge of an offence under s. 465 of the Penal Code. *Held,* on appeal, that the accused ought properly to have been convicted under s. 192 of the Code ; the provisions of that section not being confined to false evidence to be used in judicial proceedings. *In the matter of* JUGGUN LALL **7 C. L. R. 356**

26. ——— Fabrication of a receipt as a voucher to cover a contemporaneous embezzlement—*Penal Code, s. 471—Using a forged document.* A postmaster misappropriated a certain sum of money, at the same time made a false document purporting to be a receipt signed by the person to whom the money was payable. He was convicted of using a forged document under s. 471 of the Indian Penal Code. It was

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contended that no forgery had been committed' because the receipt was made merely to cover the embezzlement. *Empress of India* v. *Jiwanand, I. L. R. 5 All. 221. Held,* that the conviction was right. A debtor who frabricates a release to screen himself from liability to pay the debt cannot be said not to be guilty of forgery, because he intended by the fabrication to cover a dishonest purpose. QUEEN-EMPRESS *v.* SABAPATI **I. L. R. 11 Mad. 411**

27. ——— Fabrication of a document to conceal a contemporaneous or past embezzlement—*Penal Code, ss. 463, 464, 467, and 471—"Dishonestly"—"Fraudulently."* An accused person who was in the service of zamindars, and whose duty it was to pay into the Collectorate Government revenue due in respect of their estates, immediately before the due date of a *kist* received from them a certain sum of money with no specific instruction as to its application. On receipt of that money, he paid a portion only of it into the Collectorate on account of the revenue, and having done so, he then altered the challan given back to him showing the amount actually paid, and made it appear that a much larger amount had been paid in than was the fact. This challan he sent to his employer for the purpose of showing the application of the money. He was charged (i) with criminal breach of trust as a servant (s. 408 of the Penal Code) in respect of the difference between the amount actually paid into the treasury and the amount shown to have been paid in by the altered challan ; (ii) with forgery (s. 467) in respect of the challan ; and (iii) with using a forged document (s. 471) in respect of the same document. The accused was convicted on all these charges. It was contended that the charge under ss. 467 and 471 were bad, as there was no evidence to support them, and even admitting the alteration of the challan such alteration did not come within the term "forgery" as used in the Penal Code, not having been made with the intention of causing any wrongful gain or wrongful loss, but with the intention of screening the offence of criminal breach of trust which had been previously committed. *Held,* further, that it is not necessary for the purpose of constituting the offence of forgery that the false document should be made with the intention of committing a fraud or dishonesty in the future, and that, if the intention with which a false document is made, be to conceal a fraudulent act which has been previously committed, the intention cannot be other than to commit fraud, and the offence of forgery as defined in s. 463 is committed. The word "fraudulently" as used in s. 464, must not be taken as being the same as "dishonestly" and implying wrongful gain or wrongful loss, but must be taken to mean as "with intent to defraud." *Empress of India* v. *Jiwanand, I. L. R. 5 All. 221,* and *Queen-Empress* v. *Girdhari Lal, I. L. R. 8 All. 653,* dissented from. *Queen-Empress* v. *Vithal Narain Joshi, I. L. R. 13 Bom. 515 note,* and *Queen-Empress* v. *Sabapati, I. L. R. 11 Mad. 411,* followed. *Held,* therefore, that upon the facts of the case there was ample

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evidence to show that the accused had abetted the forgery of the challan and had used the sum, and that he had been properly convicted of all the offences charged against him, except that of the actual forgery, and that he should have been convicted of abetment of that offence. LOLIT MOHAN SARKAR *v.* QUEEN-EMPRESS
I. L. R. 22 Calc. 313

28. ——— Alteration of Collectorate challan—*Penal Code, s. 467.* The fraudulent alteration of a Collectorate challan is the forgery of a document as described in s. 467 of the Penal Code. QUEEN *v.* HURISH CHUNDER BOSE
W. R. 1864, Cr. 22

29. ——— Document with illegible seal and signature—*Using forged document—Penal Code, ss. 462, 471.* A conviction may be had for using as genuine a forged document purporting to have been made by a public servant in his official capacity, notwithstanding the illegibility of the seal and signature thereon. QUEEN *v.* PROSONNO BOSE
5 W. R. Cr. 96

30. ——— Forging copy of document which is unavailable when forged—*Penal Code, s. 467.* The forging of a document which purports on the face of it to be a copy only, and which, even if a genuine copy, would not authorize the delivery of moveable property, is not punishable under s. 467 of the Penal Code. REG. *v.* NARO GOPAL . . . . **5 Bom. Cr. 56**

31. ——— Falsification of document with intent to deceive—*Penal Code, s. 468. Held,* that, where a person's object was to deceive his employer by falsifying account books which were in his custody, such deception being likely to cause damage to his employer, he was rightly convicted under s. 168 of forgery with intent to cheat, instead of under s. 465 of simple forgery. QUEEN *v.* BANESSUR BISWAS . . . **18 W. R. Cr. 46**

32. ——— Fraudulent using of document as genuine—*Penal Code, s. 471.* There must be a fraudulent and dishonest using of a document as genuine before a conviction can be had under s. 471 of the Penal Code. QUEEN *v.* JAHV BUX . . . . . **8 W. R. Cr. 81**

33. ——— Using document knowing it to be forged—*Penal Code, s. 471.* To support a conviction of the offence under s. 471 of the Penal Code, there must be a using of a document by a person who knows or has reason to believe that it is forged. QUEEN *v.* BHOLAY PRAMANICK
17 W. R. Cr. 32

34. ——— False alteration of police diary—*Penal Code, s. 471.* The false alteration of a police diary by a head constable was *held* to fall under s. 471 of the Penal Code, as the forgery of a document made by a public servant in his official capacity. QUEEN *v.* RUGHOO BARICK
11 W. R. Cr. 44

35. ——— Evidence of fraudulent use of document—*Penal Code, s. 471—Requisites for findings for conviction.* Where the accused was charged under s. 471 of the Penal Code with having, in a suit brought against him by the *kamdar* of his sister to recover possession of certain property acquired by her by right of inheritance from her father, fraudulently and dishonestly used a forged document as genuine, knowing, or having reason to know, it to be a forged document, and it appeared the accused was in possession of the property, and the document in question purported to be a deed of gift from his father :—*Held,* that it was not sufficient for the jury merely to decide on the evidence whether the document was a forgery, and whether the accused knew it was a forgery when he used it, but it was further necessary for the jury to decide whether the document had been used fraudulently and dishonestly. KHOORSHED KAZI *v.* EMPRESS
8 C. L. R. 542

36. ——— *Penal Code, ss. 464, 470, 471—Using a "forged" document—Using "false" evidence—"Dishonestly"—"Fraudulently"—Act XLV of 1860, ss. 24, 25, 196.* The vendees of a plot of land altered the number by which the land was described in the deed of sale, doing so because such number was not the right number. Having made this alteration, they used the deed of sale as evidence in a suit. *Held,* that the alteration of the deed did not amount to "forgery" within the meaning of s. 463 of the Penal Code, nor could the deed after the alteration be designated a "forged document" as contemplated by s. 470, the intention to cause wrongful loss or wrongful gain or to defraud being wanting; nor could it be said that in using the deed the vendees were "dishonestly" or "fraudulently" using as genuine a "forged document," and therefore the use by the vendees of the deed did not constitute an offence under s. 471 of the Penal Code. Further, that their use of it did not render them liable to conviction under s. 196 of that Code. EMPRESS OF INDIA *v.* FATEH . . **I. L. R. 5 All. 217**

37. ——— Public servant framing incorrect record—*Penal Code, (Act XLV of 1860), ss. 218, 463, 471.* A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents, with the intention of screening himself from punishment. *Held,* that such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under s. 218 of the Penal Code, nor, such documents not being forgeries, as they were not made with the intent specified in s. 463, could he be legally convicted under s. 471. EMPRESS *v.* MAZHAR HUSSAIN . . . **I. L. R. 5 All. 553**

38. ——— Unnecessary use of forged document—*Penal Code, ss. 109, 471—Fraudulent intention.* Where a person, in the course of an action brought against him to gain possession of a property uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudu-

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lent. A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction; and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged. *In the matter of* DHUNUM KAZEEM. EMPRESS *v.* DHUNUM KAZEE

I. L. R. 9 Calc. 53; 11 C. L. R. 169

39. ———— Intention in fabricating documents—*Penal Code, s. 464—Fraudulent and dishonest fabrication.* The accused, who was a copyist in the Subdivisional Office at *B*, applied for a clerkship then vacant in that office. An endorsement on his application recommending him for the post and purporting to have been made by the Subdivisional Officer of *B*, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Subdivisional Officer at *B*, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Subdivisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office, the accused fabricated a third document, purporting to be a letter from the Subdivisional Officer to the Postmaster asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of, the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held*, that the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section. ABDUL HAMID *v.* QUEEN-EMPRESS

I. L. R. 13 Calc. 349

40. ———— *Penal Code, s. 465, and ss. 24 and 25—"Dishonestly"—Fraudulently."* A Treasury Accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances: A sum of R500, which was in the Treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the R500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the R500 in question then stood at the payee's credit as a revenue deposit, and that it was about to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-mohurrir, which, as originally drawn up, related to the sum of R500 already mentioned. The signature

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of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of R500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's R500 to the Civil Court, as if it had been the first R500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to. *Held*, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the R500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's R500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside. QUEEN-EMPRESS *v.* GIRDHARI LAL **I. L. R. 8 All. 653**

41. ———— *Penal Code, ss. 24, 25, 471—Fraudulently using as genuine a forged document—"Dishonestly"—"Fraudulently."* The creditors of a police constable applied to the District Superintendent of Police that R2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for R18, the whole amount due. It subsequently appeared that the receipt was one for R8, which the debtor had altered by adding the figure "1," so as to make it appear that the receipt was for R18. *Held*, that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to him, that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditor's claim, and that therefore he ought not to have been convicted of an offence under s. 471 of the Penal Code. QUEEN-EMPRESS *v.* HUSAIN

I. L. R. 7 All. 403

42. ———— *Penal Code (Act XLV of 1860), ss. 471, 24, 25—Fraudulently using as genuine a forged document—"Dishonestly"—"Fraudulently."* In a trial upon a charge, under s. 471 of the Penal Code, of fraudulently or dishonestly using as genuine documents known to be forged, it was found that four forged receipts for the payment of rent used by the prisoner had been fabricated in lieu of genuine receipts which had been lost. *Held*, that, with reference to the definitions of the terms "dishonestly," and "fraudulently" in ss. 24

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and 25 of the Penal Code, the prisoner, upon the facts as found, had not committed the offence punishable under s. 471. QUEEN-EMPRESS *v.* SHEO DAYAL . . . . **I. L. R. 7 All. 459**

43. ———— Possession of counterfeit seals, etc.—*Intention to commit forgery—Penal Code, ss. 472, 473.* Counterfeit seals and forged documents were found in the prisoner's possession, and as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently. QUEEN *v.* KRISTO SOONDER DEB **2 W. R. Cr. 5**

44. ———— *Penal Code, s. 473—Intent to commit forgery.* Where several seals of different descriptions were found in the possession of the accused with intent to commit forgery, it was held that, under s. 473 of the Penal Code, there was a complete and separate offence committed in respect of every seal found, and that the prisoners could be legally convicted of a separate offence in regard to each seal, unless it appeared that several such seals in their possession were for the purpose of committing one particular forgery. QUEEN *v.* GOLUCK CHUNDER . **13 W. R. Cr. 16**

45. ———— Attempt to commit forgery—*Abetment of forgery.* To prepare, in conjunction with others, a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document, do not constitute forgery nor an attempt to commit forgery under the Penal Code, but are facts which would support a conviction for abetment of forgery as being acts done to facilitate the commission of the offence. REG. *v.* PADALA VENKATASAMI **I. L. R. 3 Mad. 4**

46. ———— *Penal Code, (Act XLV of 1860), ss. 465 and 511.* A person cannot be convicted of an attempt to commit an offence under s. 511 of the Penal Code, unless the offence would have been committed if the attempt charged had succeeded. A prisoner, who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had actually been printed and the proof corrected by him; that the prisoner had had an intention of making such addition to the printed form as would make it a false document, and that he did this dishonestly and with intent to commit fraud. The Sessions Judge sentenced the prisoner to rigorous imprisonment for one year under ss. 465 and 511 of the Penal Code for attempting to commit forgery. *Held,* that the conviction was wrong, and must be set aside. *In the matter of the petition of* RIASAT ALI *alias* BABU MIYA *alias* BODIUZZUMA. EMPRESS *v.* RIASAT ALI *alias* BABU MIYA *alias* BODIUZZUMA **I. L. R. 7 Calc. 352 : 8 C. L. R. 572**

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47. ———— Suspicious document used in a case—*"Responsibility of pleader in conduct of case"—"Guilty knowledge"—Penal Code (Act XLV of 1860), s. 471—Sanction for prosecution.* Sanction was given for the prosecution of a pleader who in the conduct of a case had presented to the Court for his clients a document of suspicious appearance and which his clients were charged with having forged. The sanction was granted by the Sessions Judge on the ground that the document bore on its face such marks of concoction that the pleader's suspicions must have been aroused at the first sight of it, and that, had he examined it, as he ought to have done, he would either have rejected it or have advised his client to produce it in Court at his own risk. On appeal to the High Court:—*Held,* that the sanction should be revoked. A pleader is under no higher obligation than any other agent would be, and to justify his prosecution it should be shown that he had been a party (principal or accessory) to the concoction of the document, or that he had the knowledge that it was concocted. The mere fact that his suspicions ought to have been aroused by the sight of the document, was not *primâ facie* evidence that he knew, or had reason to believe, the document to be forged. *In re* RANCHHODDAS **I. L. R. 22 Bom. 317**

48. ———— Abetment of forgery by writing out the deed—*Unregistered document purporting to be a valuable security—Penal Code (Act XLV of 1860), ss. 109, 114, and 467.* The accused was not only the writer, but also took an active part in the preparation of a document, the alleged executant of which was dead before the date of the document, and the person who really had an interest under the document was convicted under s. 82 of the Registration Act (III of 1877). But evidence was wanting to show that the accused took any part in the forgery of the name of the alleged executant. *Held,* that the accused could not be convicted of the offence of forgery under s. 467 of the Penal Code. There being nothing on the record to show that the accused was a party to, or took any part in, the actual forgery of the document, or that he was present on the occasion when it was forged, the proper section to convict him under would be s. $\frac{467}{109}$, that is, of abetment of forgery, and not s. $\frac{467}{114}$. An unregistered document, though it may not be a valuable security until the registration is completed, still "purports" to be a valuable security within the meaning of s. 467 of the Penal Code. *Queen-Empress* v. *Ramasami, I. L. R. 12 Mad. 148,* approved of. KASHI NATH NAEK *v.* QUEEN-EMPRESS **I. L. R. 25 Calc. 207 1 C. W. N. 681**

49. ———— *Penal Code, (Act XLV of 1860), s. 463 and seq.—Meaning of the term "fraud" discussed.* A police head constable's character and service roll in the custody was found to have been tampered with in this way, that a page, apparently containing remarks unfavourable to the head constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers

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of police, had been inserted in its place, the intent being to favour the chances of the promotion of the said head constable. *Held*, that this interpolation amounted to forgery within the meaning of s. 463 of the Indian Penal Code, but that, inasmuch as it was not proved that the head constable himself prepared and inserted the false page in his character roll, he was rightly convicted of abetment only. *Queen-Empress* v. *Shoshi Bhushan, I. L. R. 15 All. 210; Queen-Empress* v. *Vithal Narain, I. L. R. 13 Bom. 515;* and *Lolit Mohan Sarkar* v. *Queen-Empress, I. L. R. 22 Calc. 313*, referred to. QUEEN-EMPRESS *v.* MUHAMMAD SAEED KHAN **I. L. R. 21 All. 113**

50. ——— Intention—*Penal Code, s. 466.* Where a document is made for the purpose of being used to deceive a Court of Justice, it is made with the intention of being used for that purpose. A person therefore who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence), is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document. HARADHAN MAITI *v.* QUEEN-EMPRESS . . . **I. L. R. 14 Calc. 513**

51. ——— Cheating by personation—*Penal Code, ss. 415, 419, 463.* *A* falsely represented himself to be *B* at a university examination, got a hall-ticket under *B's* name, and headed and signed answer papers to questions with *B's* name. *Held*, that *A* committed the offences of forgery and cheating by personation. QUEEN-EMPRESS *v.* APPASAMI . . . **I. L. R. 12 Mad. 151**

52. ——— Using a forged certificate—*Penal Code, s. 471—Fraudulent intention.* The accused passed the Public Service Examination in 1883, and in a certificate given him by the educational authorities of his having passed his age was correctly stated as 23. The accused sent a copy of this certificate to the Collector with a petition for employment in the public service; but in the copy the age of the accused had been altered to 20. *Held*, that the accused was guilty of using a forged document within the meaning of s. 471 of the Penal Code. QUEEN-EMPRESS *v.* VITHAL NARAYAN . . **I. L. R. 13 Bom. 515 note**

53. ——— *Cheating—"Fraudulently"—"Dishonestly"—Penal Code (Act XLV of 1860), ss. 24, 25, 415, and 471.* In construing ss. 24 and 25 of the Penal Code, the primary, and not the more remote, intention of the accused must be looked at. *Queen-Empress* v. *Girdhari Lal, I. L. R. 8 All. 653*, cited. Under the rules of the Calcutta University, a private student desiring to appear at the Entrance Examination is required to forward to the Registrar, with his application for permission to appear, a certificate to the effect, *inter alia*, that he is of good moral character and has submitted himself to a test examination by, and furnished exercises to, the person signing the certificate, sufficient in that person's opinion to show that his qualifications give a reasonable probability of his passing the examination. Such certificate has to be signed by one or other of the persons mentioned in the rules, amongst them being the head master of a high school under public management. On such certificate being sent to the Registrar and the prescribed fee paid, that officer forwards a receipt to the candidate with his roll-number thereon, which is also an authority for him to appear at the examination and enter the examination-hall. A private student forwarded to the Registrar, with his application for permission to appear, a certificate in the prescribed form, purporting to be signed by the head master of a high school, such signature, however, being, as the applicant well knew, a forgery. The Registrar, knowing at the time that the signature of the head master was not genuine, sent to the applicant the receipt for his fee and the necessary authority allowing him to appear at the examination, and in due course the applicant appeared, took his seat in the hall at the desk allotted to him, and commenced the examination. Upon charges being preferred against the applicant of using as genuine a forged document (s. 471) and attempting to cheat (ss. 415 and 511): —*Held*, that his primary object or intention was by falsely inducing the Registrar to believe that the certificate was signed by the head master of a Government school under public management to be permitted to sit for the Entrance Examination, and that such intention could not be *held* to be "fraudulent" or "dishonest" within the meaning of ss. 24 and 25 of the Penal Code. *Held*, consequently, that the use of the forged document, though with the knowledge or belief that it was forged, was not fraudulent or dishonest, and that, as these are essential elements to offences under ss. 471 and 415 of the Penal Code, the accused had not committed either of the offences charged. *Held*, further, that the accused had not committed any offence under the Penal Code. *Jan Mahomed* v. *Queen-Empress, I. L. R. 10 Calc. 584*, cited. QUEEN-EMPRESS *v.* HARADHAN *alias* RAKHAL DASS GHOSH **I. L. R. 19 Calc. 380**

54. ——— *Penal Code, ss. 463, 471, and ss. 24 and 25—False certificate of attendance at law lectures—"Claim"—"Property."* The term "claim" in s. 463 of the Penal Code is not limited in its application to a claim to property. The term "property" in the same section will cover a written certificate. It is not necessary to constitute a forgery under s. 463 of the Penal Code that the property with which it is intended that the false document shall cause a person to part should be in existence at the time when the false document was made. *Queen-Empress* v. *Haradhan, I. L. R. 19 Calc. 380*, dissented from. *Queen-Empress* v. *Appasami, I. L. R. 12 Mad. 151*, and *Queen-Empress* v. *Ganesh Khanderao, I. L. R. 13 Bom. 506*, approved. One *S B* presented

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to the Principal of Queen's College, Benares, a false certificate purporting to have been granted by the Principal of Canning College, Lucknow, to the effect that he had attended a certain proportion of a certain first year course of law lectures delivered at Canning College, *S B* in fact never having attended such lectures. Had that certificate been a true one, it would have entitled *S B* to attend a further course of law lectures at any one of several associated institutions, amongst which was Queen's College, Benares, without attending or paying the fees for the first course of lectures. On presentation of the above certificate, *S B* obtained permission to attend and attended a course of second year lectures at Queen's College, Benares, without attending or paying the fees required for the first year course. After *S B* had attended the above-mentioned second year course of lectures at Queen's College, Benares, he again presented the said false certificate to the Principal of Queen's College, with a view to his obtaining a consolidated certificate, which was necessary, as he alleged, to enable him to become a candidate in the Judge's Court pleadership examination in Calcutta. *Held*, that on both occasions, when he presented the false certificate to obtain admission to the second year law class at Queen's College, Benares, and again when he endeavoured by its use to obtain the consolidated certificate in order to gain admission to the pleadership examination in Calcutta, *S B* was guilty of the offence provided for by s. 471 of Penal Code. QUEEN-EMPRESS *v.* SOSHI BHUSHAN . . **I. L. R. 15 All. 210**

55. ——— *Penal Code (Act XLV of 1860), ss. 463 and 471—Using as genuine a false document.* The accused applied to the Superintendent of Police at Poona for employment in the police force. In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate. *Held*, that the accused was guilty of offences under ss. 463 and 471 of the Penal Code (Act XLV of 1860). QUEEN-EMPRESS *v.* KHANDU-SINGH . . . **I. L. R. 22 Bom. 768**

56. ——— **"Fraudulently" meaning of** —*Penal Code (Act XLV of 1860), ss. 463, 471*—Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false. *Queen-Empress* v. *Haradhan, I. L. R. 19 Calc. 380,* overruled. QUEEN-EMPRESS *v.* ABBAS ALI **I. L. R. 25 Calc. 512 1 C. W. N. 255**

57. ——— *Penal Code (Act XLV of 1860), ss. 24, 25, 467, 471—Using a forged document, knowing it to be forged—"Fraudulently" and "dishonestly," meaning of—"False document"—Suit upon a bond for enforcement of payment—Absence of intention to cause wrongful loss, if any defence—Intention to deceive.* Intention to cause wrongful loss to another, and deception, actual or intended, are not necessary ingredients of the intent to defraud. There is a real distinction between the meaning of the terms "fraudulently" and "dishonestly," as used in the Penal Code; the former denotes an intention to deceive. The production of a forged bond by a person in a suit, with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced, though it may not be dishonest within the meaning of s. 24 of the Penal Code, may yet be fraudulent within the meaning of s. 471 of the Code. *Queen-Empress* v. *Abbas Ali (1897), 1 C. W. N. 255; Lalit Mohan Sarkar* v. *Queen-Empress, I. L. R. 22 Calc. 313; In re Dhunu Kazee, I. L. R. 9 Calc. 53,* referred to. *Queen-Empress* v. *Sheo Dayal, I. L. R. 7 All. 459,* dissented from. KEDAR NATH CHATTERJEE *v.* KING-EMPEROR (1901) . . **5 C. W. N. 897**

58. ——— **Using as genuine a forged document**—*Penal Code (Act XLV of 1860), s. 471—Attempt to commit offence.* The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. *Held*, that he was guilty, not of an attempt to commit an offence under s. 471 of the Penal Code, but of the offence itself. LALA OJHA *v.* QUEEN-EMPRESS . **I. L. R. 26 Calc. 863**

59. ——— *Penal Code (Act XLV of 1860), ss. 466, 471—Using as genuine a forged document—Person convicted of and sentenced for the forgery not also to be sentenced for the use.* *Held*, that a person who, being himself the forger thereof, has used as genuine a forged document, cannot be punished as well under s. 471 of the Indian Penal Code for the use as under s. 466 for the forgery. QUEEN-EMPRESS *v.* UMRAO LAL (1900) **I. L. R. 23 All. 84**

60. ——— *Penal Code (Act XLV of 1860), s. 471, interpretation of—Forged document, using, as genuine.* When in a judicial enquiry under s. 202, Criminal Procedure Code, against a person accused of having forged a document, the accused states before the enquiring Magistrate that the document is genuine, he cannot be said to have used the document so as to make himself amenable to the provisions of s. 471, Indian Penal Code, even though he knew the document to be a forged one. The use of a forged document which is contemplated by s. 471, Indian Penal Code, is such use as causes wrongful gain or wrongful loss. That is to say, that section applies to the case of a person who appears before some other person or before a Court, with a document and endeavours to induce that person or Court to do some act which he or it would not do if it was known to be a forgery. ASIMUDDI SHEIKH *v.* EMPEROR (1907) **11 C. W. N. 838**

61. ——— **Using false name with intent to defraud**—*Penal Code, ss. 419, 420, 467, and 468—Cheating.* The accused was alleged

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FORGERY—*contd.*

by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was R2-4-0, and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta; to have then requested the postal authorities at Calcutta, by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam; to have similarly requested the Post Master at Rajam to pay the money orders to his clerk, Seshagiri Rau; to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the Post Master at Rajam, signing receipt as Seshagiri Rau; Robert S. Wilson and Seshagiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms, ready to be despatched to purchasers. *Held*, that the above allegations supported charges of cheating and forgery. QUEEN-EMPRESS *v.* PERA RAJU . **I. L. R. 13 Mad. 27**

62. ———— Forgery of valuable security—*Penal Code (Act XLV of 1860), ss. 463, 464, 467, 474—False document—Onus of proof—Dishonest or fraudulent intent, proof and inference as to.* To justify a conviction under s. 457, Indian Penal Code, it must be shown that the document is a false document within the meaning of s. 464, Indian Penal Code, and that it was forged by the accused with some intent mentioned in s. 463, Indian Penal Code. It is not sufficient that some possible intent may be inferred from the facts, but it is necessary that such intent should be established by evidence. The accused was found in possession of two documents; one was a registered conveyance in respect of certain lands from one *A D* to the wife of the accused; the second purported to be a conveyance in respect of the same lands from the same vendor to the accused himself, but this was registered. The accused requested a school-boy to have the registration endorsement from the former copied on to the latter, and was thereupon arrested and charged under s. 467 with s. 116, and under s. 474. At the trial *A D* deposed that he never executed the second conveyance, but as regards the first he said that he had executed it in favour of accused's wife, but that the accused was in possession of the lands and had also paid him the consideration-money. *Held*, that, as it was not shown that the second document was made with any of the intents mentioned in s. 463, Indian Penal Code, or that it was intended to be fraudulently or dishonestly used, a conviction under any of the above sections was not maintainable. KAILAS CHANDRA DAS *v.* THE CROWN (1902) **6 C. W. N. 382**

63. ———— Attempting to cheat and forgery—*Penal Code (Act XLV of 1860), ss. 417, 511, 468—Application to University for duplicate certificate by person not entitled—Offence.* *S* held a Matriculation certificate which had been issued to him by a University. *C* had failed to pass the Matriculation Examination. The Registrar of the University received a letter, purporting to be signed by *S*, stating that his certificate had been lost, and requesting that a duplicate might be issued. Enclosed with the letter was what purported to be a certificate by the head-master of a local school, corroborating the statement as to the loss, and supporting the application for the issue of a duplicate. This document had not, in fact, been written by the head-master, and *S* had not in fact lost his Matriculation certificate. *C* was then charged with cheating and forgery to commit cheating. The Deputy Magistrate found, on the evidence, that the writer of the application for a duplicate certificate was the accused, and convicted and sentenced the accused on both charges. The Sessions Judge, on appeal, altered the offences to those of attempting to cheat and forgery to commit cheating, and reduced the sentence. Subject to these modifications, he dismissed the appeal. On a revision petition being filed in the High Court: *Held*, that the charge of cheating must fail, inasmuch as there was no proof that the deception practised by the accused on the Registrar of the University had caused harm or damage to him or to the University which he represented. Nor was it shown that the accused, in applying for the duplicate certificate, had any intention of causing wrongful gain to himself or wrongful loss to the University, to whom he had paid a fee greater than the cost price of the certificate. The charge of forgery also failed, for, assuming that accused had fabricated the head-master's certificate, it was not shown that he had done so fraudulently or dishonestly and with intent to cause damage or injury to the public or to anyone. The question before the Court was not as to his intended use of the certificate subsequently. Even if he had such an intention, this mere preparation did not amount to an attempt to commit an offence within the meaning of s. 511 of the Indian Penal Code. KING-EMPEROR *v.* SRINIVASAN (1902) **I. L. R. 25 Mad. 726**

64. ———— Filing forged document—*Dishonestly using as genuine a forged document—User—Filing document, but not tendering it in evidence—Penal Code (Act XLV of 1860), s. 471.* The mere filing of a document in Court without tendering the same in evidence does not constitute user of it within s. 471 of the Penal Code. AMBIKA PRASAD SINGH *v.* EMPEROR (1908) **I. L. R. 35 Calc. 820**

65. ———— Alteration of Accounts—*Dishonestly using as genuine Forged Document—Falsification of Accounts—Penal Code (Act XLV of 1860), ss. 465, 471, 477A—Reading over Deposition to witness in the presence of the Accused or his Pleader—Criminal Procedure Code (Act V of 1898), s. 360—Practice.* The alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation, is not an offence either under s. 465 or s. 477A of the Penal Code, there being no intent to commit fraud. *Lolit Mohan Sarkar* v. *Queen-Empress, I. L. R. 22 Calc. 313,* and *Emperor* v. *Rash Behari Das, I. L. R.*

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35 Calc. 450, distinguished. Whether or not there is an intent to defraud in any particular case depends on the circumstances of the case. S. 360 of the Criminal Procedure Code is mandatory. The evidence given by a witness must be read over to him in the presence of the accused or his pleader, and no practice to the contrary can alter the plain words of the law. JYOTISH CHANDRA MUKERJEE *v.* EMPEROR (1909) . **I. L. R. 36 Calc. 955**

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1. WHAT CONSTITUTES FRAUD, AND PROOF OF FRAUD.

1. ——— **Imputations of fraud**—*Disposal of allegations of fraud.* Imputations of fraud should be disposed of at the hearing, and should not be left open to be disposed of by the master on the taking of accounts. LALLBHAI VALLABHAI *v.* KAVASZI NANABHAI . . **8 Bom. O. C. 209**

2. ——— **Proof of fraud**—*Presumption.* Fraud and dishonesty are not to be presumed on conjecture, however probable. IMDAD ALI *v.* KOOTHY BEGUM
6 W. R. P. C. 24 : 3 Moo. I. A. 1

3. ——— It is often the case that fraud cannot be established by positive proofs, and on the other hand it is not to be presumed from circumstances of mere suspicion. It is generally shown by such circumstantial evidence as overcomes the natural presumption of honesty and fair dealing, and satisfies a reasonable mind that such

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FRAUD—*contd.*

1. WHAT CONSTITUTES FRAUD, AND PROOF OF FRAUD—*contd.*

presumption has been displaced. MATHURA PANDAY *v.* RAM RUCHA TEWARI.
3 B. L. R. A. C. 108 : 11 W. R. 482

4. ——— *Suit to set aside bonds.* Mere speculation and probability will not in law support a finding of fraud. Where a party puts forward a charge of collusion with a view to defraud, it is incumbent on him to support it by evidence to a certain reasonable extent, *e.g.*, where a party admits that an instrument which on the face of it appears to deal with the property is written or signed by the owner of the property, he can only get rid of its effect by showing facts which would establish fraud in its inception, or show that it was not intended to be operative according to its purport. RAJ NARAIN *v.* ROWSHUN MULL.
22 W. R. 124

KUBEEROODIN *v.* JOGUL SHAHA **25 W. R. 133**

5. ——— *Allegation of fraud in pleadings—Plaint, form and contents of.* Where fraud is charged against the defendant, the plaintiff must set forth particulars of the fraud which he alleges. CHANVIRAPA *v.* DANAVA
I. L. R. 19 Bom. 593

6. ——— *Proof of allegation of fraud.* A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story. MAHOMED GOLAB *v.* MAHOMED SULLIMAN . **I. L. R. 21 Calc. 612**

7. ——— *Allegation of fraud and collusion.* Where a party alleges the fraud or collusion of the opposite party as a ground of relief, general allegations of it will not be sufficient, but the instances upon which such allegations are founded must be stated, as it is unreasonable to require the opposite party to meet a general charge of that nature without giving him a hint of the facts from which it is to be inferred. JOOMNA PERSHAD SOOKOOL *v.* JOYRAM LALL MAHTO **2 C. L. R. 26**

8. ——— *Charge of fraud—Alteration in nature of fraud charged.* It is a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it. In a suit by the Official Assignee to recover a sum which it was alleged had been improperly and fraudulently paid away from the estate of an insolvent, the plaint as presented alleged the fraudulent concealment of the payment from the Assignee. Afterwards when all the evidence had been taken and it had been established that the assignee knew of the payment, this was amended to the statement that, if he did know of it, he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court. *Held*, that the amendment at the stage when it was made was not permissible. The High Court having decreed the claim on a finding of fraud different from either of the above :—*Held*, that on this ground alone the judgment might have been reversed. *Montesquieu* v. *Sandys, 18 Ves. Jun. 302*, followed. ABDUL HOSSEIN ZENIAL *v.* TURNER
I. L. R. 11 Bom. 620
L. R. 14 I. A. 111

9. ——— *General allegations of fraud—Plaint, amendment of—Evidence of fraud—Objection taken for first time in special appeal.* Where a plaintiff seeks relief on the ground of fraud, and the plaint contains general allegations, but no specific instances of the alleged fraud, it ought to be immediately, on presentation, rejected or returned for amendment, as it does not disclose a cause of action. The plaintiff sued to recover damages caused by the defendant's fraud during his management of the plaintiff's estate from 1870 to 1884. The plaint disclosed no specific instances of the fraud imputed to the defendant. The Court of first instance, without going into evidence, rejected the plaintiff's claim on the preliminary ground that the plaintiff had no right to sue during the lifetime of his adoptive mother. In second appeal, the respondent objected that the plaint was defective. The plaintiff's pleader asked for leave to amend it by specifying certain instances of the alleged fraud. *Held*, that the amendment could not then be allowed, and the suit must fail. When fraud is charged, the evidence must be confined to the allegations . KRISHNAJI *v.* WAMNAJI
I. L. R. 18 Bom. 144

10. ——— *Oral evidence.* Oral evidence of witnesses deposing in general terms is not sufficient to establish fraud on the part of a former patnidar in converting mal lands of the patni in excess of 100 bighas into rent-free lands, so as to entitle the present patnidar to resume them as invalid lakhiraj. SHIBSOONDUREE DEBIA *v.* MAHOMED ALI . . **W. R. 1864, 137**

11. ——— *Suit by minor to recover share of consideration paid for lease.* Suit for the recovery of a minor's share of the consideration paid for a maurasi lease granted by the minor's co-proprietors on their own behalf and as his guardians, in order to raise money required for the expenses of the joint estate, which lease was cancelled (on the suit of the minor when he came of age), so far as his share was concerned. *Held*, that the plaintiff was not entitled to recover without proof of fraud, and that the evidence tendered by the plaintiff (namely, the record of the case instituted by the minor for the cancelment of the lease) was not admissible to prove the allegation of fraud. DURGA CHURN BHUTTACHARJEE *v.* SHOSHEE BHOOSHUN MITTER
5 W. R. S. C. C. Ref. 23

12. ——— **Fraudulent transaction**—*Decree obtained after compromise of appeal.* A

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FRAUD—*contd.*

1. WHAT CONSTITUTES FRAUD, AND PROOF OF FRAUD—*contd.*

decree of an Appellate Court obtained after a compromise and an agreement not to prosecute the appeal was held to be an adjudication obtained not only with great impropriety, but in effect by fraud. RAJMOHUN GOSSAIN *v.* GOURMOHUN GOSSAIN **4 W. R. P. C. 47 : 8 Moo. I. A. 91**

13. ——— *Non-payment of debt.* The mere non-payment of a debt does not necessarily prove collusion between the debtor and his vendor to defraud the creditor. Fraud must not be presumed without good and probable grounds. KISHENDHUN SURMAH *v.* RAMDHUN CHATTERJEE **6 W. R. 235**

14. ——— **Benami transaction**—*Taking benami lease.* The mere taking a benami lease, unaccompanied by any other circumstance of suspicion, does not *per se* constitute fraud. MUNNOOLALL *v.* REET BHOOBUN SINGH . . **6 W. R. 283**

15. ——— *Sale for arrears of rent—Benami purchase—Act VIII of 1835.* Plaintiff sued for possession on a declaration of his itmamee right to a portion of a talukh, for which his mother obtained an itmamee pottah. Afterwards the original superior tenure having been sold for arrears of rent under Act VIII of 1835, the father of defendant No. 1 purchased those rights and interests in the name of the defendant, and then obtained from the zamindar a pottah and settlement of the talukh as one coming under the provisions of Regulation VIII of 1819. He then fell into arrears, the talukh was sold under the Regulation last cited, and he purchased it benami. *Held,* that the legal inference from these facts was that the conduct of the father of the defendant No. 1 was fraudulent. SOOBUL CHUNDRA PAUL *v.* ATTUR ALI . . . . . **11 W. R. 32**

16. ——— *Purchaser obtaining assent of beneficial as well as ostensible owner to make his title good.* There is no fraud in a purchaser securing the assent both of the ostensible and beneficial owners to his purchase, so as to acquire a good title. KALEE MOHUN PAUL *v.* BHOLA NATH CHAKLADAR . . . . **7 W. R. 138**

17. ——— **Over-valuation of salt**—*Proof of fraud.* A valuation of salt, based on the loss which the owner may possibly incur on account of the bonds in respect of the salt passed by him to the Government, though greatly in excess of the real value of the salt, is not such an overvaluation as amounts to proof of fraud. HARIDAS PURSHOTAM *v.* GAMBLE . . **12 Bom. 23**

18. ——— **Presumption of fraud**—*Property left to endowment instead of for the support of the widows of the family.* The defendants having pleaded that certain Government paper, in which plaintiff claimed a share, had been appropriated, by a memorandum of agreement, to the service of an idol, and the agreement was substantiated by very strong evidence and shown

FRAUD—*contd.*

1. WHAT CONSTITUTES FRAUD, AND PROOF OF FRAUD—*contd.*

to have been acted upon by all the parties for years, the Privy Council held that it could not be set aside, as a colourable transaction having no validity, merely upon the suggestion that the amount set aside was exorbitant, and that there might possibly have been an intention to defraud widows and others. RADHA MOHUN MUNDUL *v.* JADOOMONEE DASSEE . . . . . **23 W. R. 369**

19. ——— *Vendor and purchaser—Omission of purchaser to take possession—Sale by him to another—Effect of want of possession.* *A* sold certain land to *B* by a sale-deed dated 15th July 1871. The deed was optionally registrable and was not registered. *A* continued in possession after the date of the sale. *A* sold the same land to the plaintiff by a deed of sale dated 1st February 1872. The deed was registered, its registration being compulsory. It was unaccompanied with possession. In 1882 *B* obtained possession of the land from the sons of *A* and sold it to the defendant by a sale-deed dated 14th October 1882. This deed was registered and accompanied with possession. In 1883 the plaintiff sued for possession of the land in dispute. *Held,* that the defendant's vendors, by merely omitting to take possession of the land on his purchase, was not guilty of any positive fraud or of any concealment or negligence so gross as to amount to fraud that would entitle the plaintiff to relief against him. SHIVRAM *v.* SAYA . . . . **I. L. R. 13 Bom. 229**

20. ——— **Constructive fraud**—*Mortgagor and Mortgagee.* Mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee. Neither does the mere fact that, being aware of the second mortgage, he attests the execution of the mortgage-deed amount to such conduct, where his knowledge of the contents of the deed is not shown. Where a prior mortgagee, however, attested the execution of the deed mortgaging the property a second time, and being aware of the contents of the deed kept silence, and thus led the second mortgagee to think that the property was not encumbered and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was *held* to be conduct which amounted to constructive fraud on the part of the prior mortgagee, and deprive him of his right to priority. SALAMAT ALI *v.* BUDH SINGH . . . . . **I. L. R. 1 All. 303**

21. ——— **Fiduciary relationship**—*Onus of proof of fraud—Accounts, proof of falsity of.* It is only in cases where one person stands in a fiduciary relation to another that the law requires the former to exercise extreme good faith in all his dealings with the latter, and

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FRAUD—*contd.*

1. WHAT CONSTITUTES FRAUD, AND PROOF OF FRAUD—*concld.*

scrutinizes those dealings with more than ordinary care and caution. In the absence of any special confidence reposed by one person in another, it lies on him who alleges fraud to prove it. Where accounts are impeached on the ground of fraud, two or three instances of particular items which can be taken as false and fraudulent must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. *Williamson* v. *Barbour, I. L. R. 9 Ch. D. 529,* followed. BOO JINATBOO *v.* SHA NAGARVALAB KANGE **I. L. R. 11 Bom. 78**

22. ——— *Abuse of influence.* The obtaining of property or of any benefit. through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, is a fraud of the gravest character *Mixon* v. *Payne, 8 Ch. App. 887,* followed. NUNDA LAL BOSE *v.* NISTARINI DASSEE (1902) **7 C. W. N. 353**

23. ——— **Judgment obtained by perjury may be set aside on the ground of fraud.** A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England. VENKATAPPA NAICK *v.* SUBBA NAICK (1905) . . **I. L. R. 29 Mad. 179**

2. ALLEGING OR PLEADING FRAUD.

1. ——— **Pleading fraud**—*Defrauded parties.* A party cannot allege or plead his own fraud, nor can his representatives, nor a private purchaser from him, do so unless they are themselves the defrauded parties, and seek relief from the fraud. LUCKEE NARAIN CHUCKERBUTTY *v.* TARAMONEE DOSSEE . . . . . **3 W. R. 92**

PURIKEET SAHOO *v.* RADHA KISHEN SAHOO **3 W. R. 221**

ROWSHUN BEEBEE *v.* KUREEM BUKSH **4 W. R. 12**

BHOWANEE PERSHAD *v.* OHEEDUN **5 W. R. 177**

2. ——— **Fraud of ancestor**—*Estoppel—Party pleading fraud of ancestor.* The plaintiff claiming through the heir of *A* is not at liberty to plead the fraud of *A* as against the defendant in possession, although he claims under the fraudulent conveyance. To allow him to do this would be to violate a well- known principle of law which does not allow a party to set up the fraud of the ancestor through whom he claims. GHURREEB HOSSEIN CHOWDHRY *v.* USEE MOONNISSA KHATOON **1 Hay 528**

3. ——— *Succession to property—Rectification of deeds made fraudulently by*

FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

predecessor. A party succeeding to the possession of the property is not entitled to ask the assistance of the Court either to rectify deeds of transfer fraudulently effected by his predecessor or to ask that these documents should be treated as void in law. GOPAL NARAIN *alias* JUGDEO NARAIN *v.* GUNGA PERSHAD SAHEE . . **19 W. R. 270**

4. ——— *Son suing to regain property alienated fraudulently by father.* A son cannot obtain a decree when suing as heir to regain property, alleging his father's fraud as the cause of action. BUHGGOBUTTY DOSSEE *v.* KISHEN NATH ROY . . . . . **3 W. R. 30**

KALINATH KUR *v.* DOYAL KRISTO DEB **13 W. R. 87**

5. ——— **Pleading fraud of self or as representative.** A party claiming through another is not at liberty to plead that other's fraud as against a defendant in possession who claims under the fraudulent conveyance. FUREEDOONISSA *v.* RUHOMUT . . . . . **4 W. R. 37**

6. ——— *Person alleging his own fraud—Benami holding.* Where property is held benami, and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. BROJO NATH GHOSE *v.* KOYLASH CHUNDER BANERJEE . . . . . **9 W. R. 593**

7. ——— **Sale without consideration**—*Sale by lady to her mooktear without consideration—Suit by transferees from mooktear.* On the 25th July 1866 *M* executed a kobala purporting to convey certain properties to *R* (her mooktear), whose representative *X*, by a deed dated 15th September 1867, conveyed a portion of the property to *Y*, who claimed to be the prior purchaser for valuable consideration without notice. By deed dated 15th September 1867, *M* conveyed the property to the respondents, who were in receipt of rents at the time when *X* and *Y* instituted suits to recover possession of the property and to set aside the deed, the ticcadar and *M* being also made defendants. *Held,* that the conveyance by the native lady to her mooktear without consideration could not be upheld, for to uphold it would be a denial of justice and contrary to sound policy, even if the grantor as plaintiff sued the mooktear as defendant to set it aside. Still less could it be upheld in a case like this, where the parties pleading the fraud were defendants and in possession. LALLA HUREE LAL *v.* KOOLDEEP SINGH **19 W. R. 144**

8. ——— **Fraud on creditors**—*Right of widow to articles of property excluded from husband's schedule of insolvency—Right of Official Assignee.* A widow, as administratrix of her husband's estate, sued to recover certain articles of moveable property belonging to that estate, which had been wrongfully appropriated by her son. Defendant

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FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

pleaded that, if the articles belonged to his father's estate, they had been fraudulently kept out of the father's schedule when the latter had passed through the Insolvent Court, and that the widow could not claim the property, as she would thereby be taking advantage of her husband's fraud. *Held*, that, as the Official Assignee refused to make any claim to the property in dispute, no third party was competent to set up a claim. The creditors had their remedy against the Official Assignee. The right of ownership was still vested in the plaintiff, notwithstanding the alleged fraud. MANLY *v.* MANLY . . . . . **14 W. R. 136**

9. ——— *Conveyance of property for fraudulent purpose, plea of.* Where a mother conveyed property to a daughter, and the property was afterwards attached in execution of a decree against the daughter:—*Held*, that the mother could not obtain a reconveyance of the property on the ground that the conveyance to the daughter was for the purpose of defrauding the mother's creditors, and that the onus was on the mother to prove that the decree against the daughter was a fraudulent contrivance to deprive the mother of possession of the property. KESHUB CHUNDAR SEIN *v.* VYASMONEE DOSSIA **7 W. R. 118**

10. ——— *Husband and wife—Fraud on creditors.* Where a wife had colluded with her husband to buy up a decree under which he and others were judgment-debtors, and the husband subsequently sought to establish his claim to the purchase on the ground that it had really been made with his own money, and the wife pleaded that the husband's fraud had disqualified him:—*Held*, that, as the wife was a partner in the fraud, it gave her no advantage, and that the husband's claim should be recognized, also because it exposed the fraud and afforded the only means of doing justice to the other judgment-debtors. SUFEEOOLLA SIRCAR *v.* BEGUM BIBEE **5 W. R. 219**

11. ——— *Avoidance of fraudulent deed—Deed of gift—Res judicata—Estoppel.* A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors. *Quære:* Whether a donor can avoid his own deed on the ground of his own fraud. RAMANUGRA NARAIN *v.* MAHASUNDOR KUNWA **12 B. L. R. P. C. 433**

12. ——— **Joint fraud**—*Defendant pleading joint fraud—Voidable acts.* A defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit. The distinction between acts voidable by statute and at common law discussed. SESHAIYA *v.* KANDAIYA **2 Mad. 249**

SOOKHNA MEDHEE *v.* GUNDHOORAM MUNDLE **12 W. R. 264**

FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

13. ——— **Admitted fraud, suit on**—*Suit seeking protection from fraud admitted by parties.* A suit founded on an admission of fraud and seeking protection from the consequences of that fraud cannot be maintained. ALOOKSOONDERY GOOPTO *v.* HORO LAL ROY . . . **6 W. R. 287**

14. ——— **Avoidance of deed fraudulently made.** A person who has deliberately executed a deed by which his own property is bound is not at liberty to set up as a plea for evading obligation that he did so for the purpose of defrauding other people, but is bound by such deed. KYLASH CHUNDER MITTER *v.* DHUN MONEE DASSIA **15 W. R. 273**

15. ——— *Avoidance of deed fraudulently made—Possession.* But where there was no transfer of possession under the deed, there is a *locus penitentiæ* and he is entitled to relief, the property being prejudicially affected by other acts. LALL MAHOMED *v.* FURHUTOONISSA **15 W. R. 312**

16. ——— *Setting up one's own fraud to invalidate deed.* A party cannot set up his own fraud to invalidate a deed executed by him. NAUTH SAHOY *v.* JUGDUM SAHOY **2 Hay 499**

17. ——— *Fraud of person through whom party claims.* Where the agreement which formed the basis of a suit was found to have been entered into by the plaintiff and the defendant's ancestors in furtherance of a fraud, it was held that the defendant was at liberty to show what the real circumstances were under which the agreement was entered into, even though it disclosed the fraud of his own ancestor. GOLAM KOODSEE CHOWDHRY *v.* JOKOORRUNNISSA KHATOON **19 W. R. 238**

See SREENATH ROY *v.* BINDOO BASHINEE DEBIA . . . **20 W. R. 112**

18 ——— *Pleading one's own fraud—Admission—Estoppel.* An act done by a party with a view to defeating a claim made against him does not estop him from disputing afterwards the validity of that act. Nor does a statement made by persons in a suit and intended as a fraud on a third party amount to an estoppel as between them or prevent either of them showing the real truth of the transaction. See *Phool Bibee* v. *Goor Surun Dass, 18 W. R. 485; Sreenath Roy* v. *Bindoo Bashinee Dabee, 20 W. R. 112; Bykunt Nath Sen* v. *Gaboola Sikdar, 24 W. R. 39; Debia Chowdhrain* v. *Bimola Soondaree Debia, 21 W. R. 422.* MUKIM MULLICK *v.* RAMJAN SIRDAR **9 C. L. R. 64**

19 ——— *Fraudulent execution of document—Showing real nature of transaction.* Where a person who has executed a document (*e.g.*, a kabuliat) for his own advantage under false pretences is sued upon it, he is not precluded from showing the real nature of the transaction. ASHRUF SIRDAR *v.* BHUBO SOONDUREE **25 W. R. 40**

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FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

20. ———— **Sham transaction**—*Fraudulent conveyance—Suit for possession by purchaser of land—Defence that the sale to plaintiff was a sham transaction to defraud creditors.* The plaintiff sued for possession of certain land, which he alleged he had purchased from the defendant under a registered sale-deed, dated 10th November 1876. The defendant pleaded that the deed was a sham deed and without consideration, and had been executed by him merely to save the land from his creditors. *Held*, that the plea was good, and that it was open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or his creditors generally. BABAJI *v.* KRISHNA . . **I. L. R. 18 Bom. 372**

21. ———— **Right to plead fraud**—*Collusive decree—Execution—Suit to declare property liable to attachment in execution of a decree—Plea that the decree was collusive—Civil Procedure Code (Act XIV of 1882), s. 283.* *A* obtained a money-decree against *B*, and in execution attached property in the possession of *C*, who claimed to have purchased it for value from *B* previously to the date of the decree. The attachment was removed on the motion of *C*. *A* then brought a suit against *C*, under s. 283 of the Code of Civil Procedure (Act XIV of 1882), to have it declared that the property was liable to attachment and sale under the decree. *C* contended that the decree sought to be executed was a collusive one. *Held*, that *C* could not be allowed to impeach the decree between *A* and *B*. GULIBAI *v.* JAGANNATH GALVANKAR . . . **I. L. R. 10 Bom. 659**

22. ———— *Civil Procedure Code (Act XIV of 1882), s. 283—Suit to establish right to attach—Onus of proof—Right of defendant in such suit to set up the title of a third person where defendant's own title derived from such persons is tainted with fraud.* *F* owned a house in Surat. On the 21st August 1882, he was adjudged a bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was then carrying on business as a merchant. On the 20th February 1884, he executed a conveyance of the house to *C*, the trustee in bankruptcy, for the benefit of his scheduled creditors, of whom the defendant was one. The defendant held a mortgage on the house for advances made by him to *F*. *C* had an agent in India, one *N*, with whom the defendant was a partner in business. On the 20th November 1884, the plaintiffs obtained a decree for R78,000 against *F* and another person and in execution of this decree, they attached the house in question as the property of *F*. Prior to the attachment, the defendant, in consideratoin of the mortgage-debt due to him, had obtained a transfer of the house from *C* with possession. No further consideration was paid by him at the time of the transfer. On the attachment being levied by the plaintiffs, th defendant claimed the house as purchaser from *C* and the attachment was raised. The plaintiffs then filed this suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) to establish their right to attach the house as the property of their judgment-debtor. The plaintiffs (the respondents) contended that the transfer of the house by *C* to the defendant was fraudulent, the defendant being a partner of *C's* agent, and no consideration having been paid for the transfer. The defendant (appellant) contended that it was sufficient for him to show that *C's* title was good, and that, if the house had validly passed to *C*, it could not afterwards be attached for *F's* debt. The plaintiffs (respondents) on the other hand argued that the defendant ought not to be allowed to set up *C's* title; that the transfer by *C* to him was fraudulent, and that he ought not to be allowed to benefit by his own fraud. *Held*, that the defendant was entitled to set up *C's* title as a defence, although he might have been guilty of fraud in his subsequent dealings with *C*. If *C's* title neither originated in, nor was upheld by, any fraud of the defendant, and if the plaintiffs' claim failed on proof of *C's* title alone, the defendant would not benefit by his own fraud, but by the proof of a title paramount to that of both plaintiffs and defendant. In a suit brought under s. 283 of the Civil Procedure Code to establish the right to attach property; it is for the plaintiff to prove that the property in question is the property of the judgment-debtor. The onus of proof is upon him. He can have no right to attach property which is proved either never to have belonged to his judgment-debtor, or having been his, to have passed out of his possession and ownership, and become in law the property of others prior to the time at which attachment is sought. The defendant in defending such a suit may therefore rely on the title of a third person. ADAM ISUFBHAI *v.* JAMNADAS RANCHORDAS **I. L. R. 17 Bom. 94**

23. ———— *Suit under Civil Procedure Code, 1882, s. 283—Right of defendant interested in taking defence to plead that decree was fraudulently obtained.* A defendant in a suit brought under s. 283 of the Civil Procedure Code, who is connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband, or as being his co-parcener, may show that the decree in execution of which the property in dispute was attached was collusively obtained. *Gulibai v. Jagannath Galvankar, I. L. R. 10 Bom. 659,* dissented from. NARANAYYAN *v.* NAGASWARYYAN **I. L. R. 17 Mad. 389**

24. ———— **Collusive decree**—*Evidence Act (I of 1872), s. 44—Fraud and collusion—Decree obtained by fraud and collusion between mortgagor and mortgagee, effect of, on property in hands of purchaser subsequent to decree.* *A* mortgaged certain property to *B*, who instituted a suit on his mortgage and obtained a decree therein. Subsequently to such decree, *A* sold the property to a

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FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

third party, *C*. *B* having attempted to execute his decree against the property in the hands of *C*, the latter instituted a suit against *A* and *B* for the purpose of having it declared that the property was not liable to satisfy the decree because the mortgage transaction was a fraudulent one and the decree had been obtained by fraud and collusion. In such suit *B* contended that *C*, having purchased subsequently to the decree, was absolutely bound by it. *Held*, that, having regard to the terms of s. 44 of the Evidence Act, it was perfectly open to *C* to prove that the decree had been obtained by fraud and collusion. *Bhowabul Singh* v. *Rajendra Protab Sahoy*, *5 B. L. R. 321 : 13 W. R. 157*, distinguished. NILMONY MOOKHOPADHYA *v.* AIMUNISSA BIBEE **I. L. R. 12 Calc. 156**

25. ——— *Collusion between parties—Defendant subsequently pleading his own fraud.* *A* obtained a decree against *B* in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. *A* subsequently sued *B* and the tenants to recover possession of the same land. *B* pleaded that the decree obtained by *A* was the result of collusion between himself and *A* in fraud of *B*'s creditors. *Held*, that it was not open to *B* to raise this plea. VENKATRAMANNA *v.* VIRAMMA **I. L. R. 10 Mad. 17**

See CHENVIRAPPA BIN VIRBHADRAPPA *v.* PUTTAPPA BIN SHIVBASAPPA **I. L. R. 11 Bom. 708**

26. ——— *Debtor and creditor—Sham sale-deed to defeat creditors—Collusive decree—Suit to declare title of fraudulent transferor in possession—Right of suit.* *A* executed a sale-deed of his land to *B*. An attachment placed on the land was raised at the instance of *B* as vendee. The attaching creditor sued impeaching the transfer as collusive, but finally consented to a decree upholding the title of *B*, who then applied to be registered as owner in the place of *A*. *A*, who remained in possession throughout, resisted the application, and now sued *B*, for a declaration that he was entitled to remain on the register as owner. It was alleged and proved that the apparent sale-deed was a sham, and had been executed for no consideration with intent to defraud the plaintiff's creditors, and that the plaintiff had paid the attaching creditor to consent to the above-mentioned decree to which both he and *B* were parties. *Held*, that the suit should be dismissed. YARAMATI KRISHNAYYA *v.* CHUNDRU PAPPAYYA . **I. L. R. 20 Mad. 326**

27. ——— **Fraudulent conveyance**—*Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.* When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud

FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

has been carried out, the owner cannot succeed in a suit to recover possession. HONAPA *v.* NARSAPA **I. L. R. 23 Bom. 406**

28. ——— *Suit to set aside collusive decree—Right of suit.* The plaintiff was a Hindu who, in order to prevent his undivided son from obtaining his share of the family property, made and delivered to the defendant certain promissory notes unsupported by consideration, the agreement between them being that the defendant should obtain a decree on the notes and in execution attach and bring to sale and himself purchase the lands of the family, and should hold them at the disposal of the present plaintiff. The suit and the subsequent proceedings in Court were carried on by them collusively, the present plaintiff supplying the necessary funds. The son then sued for his share of the property, and having with the aid of his father (who had meanwhile lost his confidence in the defendant) successfully impeached the sale as collusive, obtained a decree which was executed. It had been agreed that the defendant should hold the land at the disposal of the plaintiff, but he now refused to surrender to him his share. The plaintiff accordingly sued to recover his share of the property and for a declaration that the collusive decree against him and the subsequent proceedings in execution thereof were not binding on him. *Held*, that it is not competent to a party to a collusive decree to seek to have it set aside, and that the plaintiff accordingly was not entitled to relief. VARADARAJULU NAIDU *v.* SRINIVASULU NAIDU . . . **I. L. R. 20 Mad. 333**

29. ——— **Fraudulent decree**—*Power of Court at instance of innocent party to treat decree of another Court obtained by fraud as a nullity.* An innocent party may be allowed to prove in one Court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand, it has jurisdiction to treat that decree as a nullity and render its effect nugatory. NISTARINI DASSI *v.* NUNDO LALL BOSE **I. L. R. 26 Calc. 891**
3 C. W. N. 670

30. ——— *Evidence Act (I of 1872), ss. 40 and 44—Existence of a previous judgment inter partes—Relevant fact—Competency of any party against whom such judgment obtained to prove in a suit between the same parties that it was obtained by fraud.* In a suit brought by *A* against *B* for khas possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to khas possession. The defence (*inter alia*) was that the decree was a fraudulent one. *Held*, that under s. 44 of the Evidence Act (I of 1872) the defendant could show that the decree was obtained by fraud. RAJIB PANDA *v.* LAKHAN SENDH MAHAPATRA . **I. L. R. 27 Calc. 11**
3 C. W. N. 660

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FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*contd.*

See SRIRANGAMMAL *v.* SANDAMMAL **I. L. R. 23 Mad. 216**

31. ———— **Allegations of fraud**—*Particulars constituting fraud should be given—Issue in cases of fraud—Practice.* It is an elementary rule of law that where fraud is set up, particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud. *Per* CHANDAVARKAR, *J.*—It is a matter of supreme importance and necessity that a case of fraud should not be the subject of a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars; and that, if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations. BALAJI *v.* GANGADHAR (1908) . . **I. L. R. 32 Bom. 255**

32. ———— *Auction sale—Combination of bidders—Cause of action—Pleadings—Fraud—Specific allegations, want of.* Allegations of fraud must be specifically pleaded, general allegations, however strong may be the words, being insufficient to amount to an averment of fraud of which any Court ought to take notice. *Wallingford* v. *Mutual Society, 5 A. C. 685,* per Selborne, L. C., at p. 697; *Ganga Narain Gupta* v. *Tilukram Chowdhuri, I. L. R. 15 Calc. 533,* followed. The fact that a combination amongst bidders at an auction sale has been formed to bid at the auction does not, of itself give rise to an action at the suit of the vendor. *Ambica Prasad Singh* v. *R. H. Whitwell, 6 C. L. J. 111,* also *Fuller* v. *Abrahams, 3 Brod. & Bing. 116, Levi* v. *Levi, 6 Car. & P. 239,* dissented from. *Doolub Dass* v. *Ramlall, 15 Jur. 259,* referred to. JYOTIPRAKAS NANDE *v.* JHOWMULL JOHURY (1908) . . **13 C. W. N. 87**

33. ———— *Appeal.* A question of fraud cannot be allowed to be raised in the appellate stage when it was not alleged in the written statement and no issue was raised regarding it. PUNDIT PRAYRAG RAJ *v.* GOUKARAN PERSHAD TEWARI (1902) . **6 C. W. N. 787**

34. ———— *Voidable contract—Defendant entitled to plead fraud—Lapse of time—Undue influence—Contract Act (IX of 1872), s. 16.* Fraud does not make a transaction void, but only voidable at the instance of the person defrauded. The plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage-bond dated the 15th April 1893 by sale of the mortgaged property. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings. *Held,* that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea, though he had not brought a suit to set aside the transaction. RANGNATH SAKHARAM *v.* GOVIND NARSINV (1904) **I. L. R. 28 Bom. 639**

FRAUD—*contd.*

2. ALLEGING OR PLEADING FRAUD—*concld.*

35. ———— **Benami sale**—*Purchaser from benamidar—Attachment in execution of a money decree against the original owner—Raising of the attachment at the instance of he purchaser from benamidar—Suit by the purchaser to recover possession—Original owner setting up his own fraud.* *H,* the owner of certain property, executed a *banami* sale-deed and the *benamidar* sold the property to the plaintiffs' father. The property was afterwards attached in execution of a money decree against *H,* but the attachment was raised at the instance of the plaintiffs' father. Subsequently the plaintiffs brought a suit for the recovery of possession from *H.* *H* pleaded his own fraud as an effective answer to the claim. *Held,* allowing the plaintiffs' claim, that the defendant *H* could not set up his fraud to a claim of immoveable property conveyed by him to the *benamidar.* SIDLINGAPPA *v.* HIRASA (1907) . . **I. L. R. 31 Bom. 405**

3. EFFECT OF FRAUD.

1. ———— **Fraudulent Conveyance**—*Fraudulent joint conveyance where one party really has an interest in the property.* A declaration of title cannot be granted to the purchaser under a kobala from two parties where the conveyance has been found to be fraudulent and collusive, even though one of the parties really had an interest in the property, and transferred it in the same conveyance. The conveyance cannot be upheld in part, the effect of fraud being to make it wholly void. ALTAMOONISSA BIBEE *v.* SAGE . **11 W. R. 335**

2. ———— **Mortgage-bond**—*Subsequent substitution of property as security—Purchaser, right of.* *L* executed a bond in favour of *S,* in which he mortgaged, amongst other property, a village, called Chand Khera, as security for the payment of certain money. Subsequently he sold the same village to *A* concealing the fact of the mortgage to *S.* On this fact coming to *A's* knowledge, he threatened *L* with a criminal prosecution, whereupon *L* proposed that a share in a village called Kelsa, which, he alleged, was his property, should be substituted for Chand Khera as security, and this proposal was accepted by *S.* It subsequently appeared that the share in Kelsa did not belong to *L,* and *S* thereupon sued *L* and *A* on the bond, claiming to enforce a lien on Chand Khera. *A* set up as a defence to the suit that *S* had agreed to substitute Kelsa for Chand Khera in the bond, and produced *S's* letter as evidence of the agreement. *Held,* that *L's* fraud vitiated *S's* agreement to substitute the security of Kelsa for the security of Chand

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FRAUD—*contd.*

3. EFFECT OF FRAUD—*contd.*

Khera in the bond, and *S* was entitled, notwithstanding *A* might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond. SAFDAR ALI KHAN *v.* LACHMAN DAS . . **I. L. R. 2 All. 554**

3. ——— Contract of tenancy—*Misrepresentation—Kabuliat.* Three plots of land were let to *A* under one kabuliat. *A* relinquished two plots, but admitted being in possession of one, alleging that the kabuliat had been obtained by fraud and misrepresentation. *Held*, that, as the lease was an entire contract, one portion only could not be repudiated on the ground of fraud ; but that, if the tenancy was to be avoided on the ground of fraud, it must be avoided *in toto.* ANARULLAH SHAIKH *v.* KOYLASH CHUNDER BOSE **I. L. R. 8 Calc. 118**

S.C. KOYLASH CHUNDER BOSE *v.* ANARULLAH SHEIKH . . . . **9 C. L. R. 467**

4. ——— Fraudulent and collusive decree—*Judgments in rem—Judgments inter partes—Evidence Act, 1872, s. 44.* Where a decree in a suit has been obtained by means of the fraud of one party against the other, it is binding on parties and privies and on persons represented by the parties so long as it remains in force, but it may be impeached for fraud and may be set aside if the fraud is proved. In the case of judgments *in rem* the same rule holds good with regard to persons who are strangers to the suit. Where a decree has been obtained by the fraud and collusion of both the parties to the suit, it is binding upon the parties. It is also binding upon the privies of the parties, except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. But persons represented by, but not claiming through, the parties to the suit may, in any subsequent proceeding, whether as plaintiff or defendant, treat the previous judgment so obtained by fraud and collusion as a mere nullity, provided the fraud and collusion be clearly established. The same rule applies with regard to strangers where the previous judgment is a judgment *in rem. Quære:* As to the proper construction of s. 44 of the Evidence Act (I of 1872). AHMEDBHOY HUBIBHOY *v.* VULLEEBHOY CASSUMBHOY . . . . **I. L. R. 6 Bom. 703**

5. ——— Sale in execution of decree—*Cancellation of sale—Power of Court to refuse to confirm sale.* The purchaser at a sale by public auction did, by the exercise of fraud and collusion with the agent of the execution-creditor (though without the creditor's personal knowledge), succeed in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. *Held*, that the Court which ordered the sale had jurisdiction to refuse to confirm the sale on the ground of the fraud practised by the agent of the execution creditor and the purchaser. *Held* by KERNAN, *J.*, that the party defrauded ought not to be

FRAUD—*contd.*

3. EFFECT OF FRAUD—*contd.*

referred to bring a regular suit. The question ought to be decided at once on motion in the original cause. *Held* by MUTTUSAMI AYYAR, *J.*, that fraud was a valid ground of relief on petition when it related to the mode in which the auction was held, and the purchaser was a party to it, but it was doubtful whether fraud was a ground of relief on petition when it was a remote cause of the sale. SUBBAJI RAU *v.* SRINIVASA RAU **I. L. R. 2 Mad. 264**

See RAMAYYAR *v.* RAMAYYAR **I. L. R. 21 Mad. 356**

6. ——— *Construction 1341 of 17th June 1842—Purchase of decree.* The plaintiff purchased lands which had been pledged to the defendant on a bond, and subsequently, in order to prevent their being taken in execution of a decree obtained by the defendant for the amount of the bond, the plaintiff purchased the decree from the defendant, who notwithstanding took out execution against the lands and sold them as though the decree had never been sold. In a suit by the plaintiff to recover possession of the lands and for reversal of the execution-sale :—*Held* it was no defence that the plaintiff had not notified this purchase of the decree to the Court in compliance with Construction 1341 of the 17th June 1842. SITARAM SAHU *v.* MOHAN MANDAR **B. L. R. Sup. Vol. 345 : 3 W. R. 90**

7. ——— Collusive transactions—*Benami transaction for purpose of defrauding creditors—Deed of conveyance not in real purchasers' name—Collusive suit by nominee against real owner—Decree obtained by fraud—Subsequent suit by real owner against nominee for possession—Right of party to fraud to set fraudulent decree aside—Collusive transaction when held binding, and when set aside—Limitation Act, 1877, art. 93—Suit to set aside decree on ground of fraud.* In 1874 the plaintiff *P* bought a house from *G*, but cause the conveyance to be executed by *G*, in the defendant *C's* name. This was done with the object of protecting the property against the claims of the plaintiff's creditors. The plaintiff occupied the house, ostensibly as tenant to the defendant for a nominal rent. In 1880 the defendant brought a suit against the plaintiff to recover possession of the house, and obtained an *ex parte* decree. He applied for execution of the decree, but allowed the execution-proceedings to drop. In 1883 he made a fresh application for execution. Thereupon the plaintiff filed the present suit for a declaration of his title to the house in question, and of his right to retain possession, alleging that the defendant was a mere benamidar ; that the sale-deed and the *ex parte* decree were sham and collusive transactions in fraud of the plaintiffs creditors ; and that the defendant was merely a trustee for him. *Held*, that the plaintiff was bound by the decree passed in 1880 in the defendant's favour, though it was a collusive decree. The plaintiff could not get the judgment set aside which the

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FRAUD—*contd.*

3. EFFECT OF FRAUD—*contd.*

defendant had obtained against him by his own contrivance. The plaintiff alleged that the defendant held in trust for him, the object of that trust being to protect the plaintiff's property in fraud of his creditors. Even if such a trust enforceable by the Courts could arise out of such a *turpis causa*, the question was whether this continued to subsist and would be enforced, when the original relations of the parties had became merged in the decree obtained by the defendant against the plaintiff. The general principle is that where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control. *Held*, also, upon the general principle of *res judicata*, that the plaintiff was estopped from raising the question of fraud in the present suit, which he might and ought to have urged in the former litigation. *Held*, further, that the suit, if regarded as one for setting aside a decree obtained by fraud, was barred by limitation, such fraud as there was being as well known to the plaintiff in 1880 as in 1883, when the present suit was filed. A party to a collusive decree is bound by it except possibly when some other interest is concerned that can be made good only through his. *Ahmedbhoy Habibhoy* v. *Vulleebhoy Cassumbhoy, I. L. R. 6 Bom. 703*, and *Venkatramanna* v. *Viramma, I. L. R. 10 Mad. 17*, followed. *Paran Singh* v. *Lalji Mal, I. L. R. 1 All. 403*, dissented from. A decree fraudulently obtained may be challenged by a third party who stands to suffer by it either in the same or in any other Court; but, as between the parties themselves to a collusive decree, neither of them can escape its consequences. Where an illegal purpose has been effected by a transfer of property, the transferee is not to be treated as a trustee holding it for the benefit of the transferor. Where a collusive transaction has merely proceeded to the length of sham deeds passed between the parties, or even of false declarations made by them in litigation for their common benefit, the Courts may displace the apparent by the real ownership. In cases in which the transaction was still inchoate, or the grantor still retained a *locus pœnitentiæ*, the formal act has been relieved against by reference to the real intention of the parties. The violation or infringement of the law had not in such cases been completed and a suspensive condition was annexed to the initial acts of which Courts of Equity could take advantage: but, apart from this, a man cannot confine the operation of his deed within the limits of an intended fraud. The purpose having been once answered, especially, by defeat of a third person's rights asserted in Court, a claim for reconveyance would be properly dismissed. CHENVIRAPPA BIN VIRBHADRAPPA *v.* PUTTAPPA BIN SHIVBASAPPA . **I. L. R. 11 Bom. 708**

8. ——————— *Right of suit—Suit to set aside decree on ground of fraud and collusion.* Decrees having been passed against the present plaintiff's father and his agent, respectively, property claimed by the present plaintiff was attached. He filed two suits by his next friend to have the attachments set aside, but these suits were dismissed. He now sued to have set aside the decrees dismissing these suits, alleging that his father's agent, defendant No. 2, had colluded with the decree-holder, defendant No. 1, and given false evidence, and that the decrees had been obtained thereby. *Held*, that, the plaint disclosed a good cause of action. KRISHNABHUPATI *v.* RAMAMURTI **I. L. R. 16 Mad. 198**

9. ——————— *Debtor and creditor—Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree.* *A*, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to *B* without consideration, and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to *B* a house in part satisfaction of the decree; and it appeared that certain of *A's* creditors were consequently induced to remit parts of their claims. *A* having died, his widow and legal representative under Hindu law now sued *B* to have the promissory note and the conveyance set aside, and to have the defendant restrained by injunction from executing the decree. *Held* (by SUBRAMANIA AYYAR, *J.*), (i) that the plaintiff was not entitled to relief in respect of the promissory note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through *A* by whose contrivance and collusion the defendant was enabled to obtain the decree; (ii) that the plaintiff was not entitled to have the sale set aside, inasmuch as there had been at least a partial carrying into effect of the illegal purpose in a substantial manner. RANGAMMAL *v.* VENKATACHARI . . **I. L. R. 18 Mad 378**

In the same case on appeal *held* (by COLLINS, *C.J.*, and BENSON, *J.*), that the plaintiff was not entitled to relief, for *A*, if alive, could not have claimed to have his own fraudulent acts set aside, and the plaintiff was in no better position than he would have been. *Quare:* Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud. RANGAMMAL *v.* VENKATACHARI . . . **I. L. R. 20 Mad. 323**

10. ——————— **Money advanced on hundi** *—Fraudulent misrepresentation—Suit before due date of hundi—Right of suit.* The defendants obtained advances of money on hundis by making untrue representations, knowing them to be untrue and knowing that without them they could not have got the money. *Held*, that the plaintiffs were entitled to rescind the contract and claim immediate repayment before the due date of the hundis. There is no reason why the principle that fraud vitiates all agreements should not be applied to debts evidenced by hundis, promissory

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FRAUD—*contd.*

3. EFFECT OF FRAUD—*concld.*

notes, or other negotiable instruments, if the facts show that the loans were contracted on the faith of fraudulent misrepresentations made by a debtor to a creditor. BABOOLALL *v.* JOY LALL
I. L. R. 24 Calc. 533

11. ——— **Fraudulent decree**—*Power of Court to treat as a nullity the decree of another Court obtained by fraud—Heir of a party to a fraud not bound by the act of his ancestor.* Where by means of a fraud practised on the Court the owner of considerable property, both moveable and immoveable, caused a decree to be passed against himself as defendant in a collusive suit upholding a fictitious *waqf-namah*, by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *waqf* to the exclusion of his collateral heirs, it was *held*, on suit by such heirs to recover possession of their share by inheritance of the property so dealt with, (i) that a Court which was otherwise competent to entertain the suit had jurisdiction, on the finding that it had been obtained by means of fraud, to treat the previous decree as a nullity, (ii) that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person, who practised such fraud, was their predecessor in title. *Nistarini Dassi* v. *Nundo Lal Bose, I. L. R. 26 Calc. 891*; *Bandon* v. *Becher, 3 Cl. & Fin. 479*; *Rajib Panda* v. *Lakhan Sendh Mahapatra, I. L. R. 27 Calc. 11*; *Ahmedbhoy Hubibhoy* v. *Vuleebhoy Cassumbhoy, I. L. R. 6 Bom. 703*; *Prudham* v. *Philips, 2 Ambler 763*; and *William* v. *Lloyd, 5 Bing. N. C. 741*, referred to. BARKAT-UN-NISSA *v.* FAZL HAQ (1904) . **I. L. R. 26 All. 272**

4. JURISDICTION.

1. ——— **Decree of superior Court if can be declared void by inferior Court.** A Court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit. *Aushootosh Chandra* v. *Tara Prasanna Roy, I. L. R. 10 Calc. 612*; *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee, 5 C. W. N. 559*; *Nunda Lal Bose* v. *Nistarini Dassi, 7 C. W. N. 353*; *I. L. R. 30 Calc. 369*, referred to. SARTHAKRAM MAITI *v.* NANDO RAM MAITI (1906) . . **11 C. W. N. 579**

2. ——— *Suit to set aside a decree on the ground of fraud—No other relief claimed—Jurisdiction.* Save under special circumstances, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. *Mewa Lal Thakur* v. *Bhujun Jha, 13 B. L. R. App. 11*; *Abdul Mazumdar* v. *Mahamed Gazi, I. L. R. 21 Calc. 605*; *Pran Nath Roy* v. *Mahesh Chandra Chowdhry Moitra,*

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I. L. R. 24 Calc. 546; *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee, 5 C. W. N. 559*; *Behari Lal* v. *Pokhe Ram, I. L. R. 25 All. 48*; *Nistarini Dassi* v. *Nundo Lal Bose, I. L. R. 26 Calc. 908*, and *Bibeeman* v. *Abdool Aziz, 4 C. L. R. 366*, referred to. UMRAO SINGH *v.* HARDEO (1907)
I. L. R. 29 All. 418

FRAUDULENT CONVEYANCE.

See FRAUDULENT TRANSFER.

1. ——— **Fraud on creditors**—*Transferee, rights of—"Good faith"—Sale by debtor with intent to defeat or delay creditor—Fraudulent intent of vendor shared in by purchaser—Fraudulent preference—Sale in consideration of existing debt—Sale of entire estate of debtor—Transfer of Property Act (IV of 1882), s. 53—Practice—Frame of suit—Appeal.* A suit under s. 53 of the Transfer of Property Act to obtain a declaration that a conveyance is voidable at the instance of the creditors of the transferor must be brought by or on behalf of all the creditors, and the suit unless so framed would not be maintainable. *Burjorji Dorabji Patel* v. *Dhunbai, I. L. R. 16 Bom. 1*; *Isvar Timappa Hegde* v. *Devar Venkappa, I. L. R. 27 Bom. 146*; *Chatterput Singh* v. *Maharaj Bahadur, I. L. R. 32 Calc. 198*, and *Reese River Silver Mining Co.* v. *Atwell, L. R. 7 Eq. 347*, referred to. But a suit cannot be dismissed on this ground, if the objection is taken for the first time in appeal. In order to establish the validity of a conveyance impeached as a fraud upon creditors, consideration and good faith must both be proved. If the transfer is for valuable consideration and is made with a full intention that the property should be parted with, and not as a cloak for retaining a benefit to the grantor, it will be valid as against a creditor, though the object of the transferor may have been to defeat an impending execution. Where, however, a transfer, although for valuable consideration and intended to pass the absolute title in the property, is made with the object of defeating or delaying the grantor's creditors, and such object is known to the transferee who aids and assists in executing it, the transfer cannot be regarded as one made in good faith. In the absence of a law of bankruptcy, a preferential transfer of property to one creditor in satisfaction of an existing debt due to him is not fraudulent as to other creditors, although the debtor in making the transfer intended to defeat the claims, and the transferee had knowledge of such intention, if the only purpose of the latter is to secure his own debt and the property is not worth materially more than the amount of his debt. It makes no difference that the transfer is of the whole of the estate of the debtor. *Ishan Chunder Das Sarkar* v. *Bishu Sirdar, I. L. R. 24 Calc. 825*, approved. HAKIM LAL *v.* MOOSHAHAR SAHU (1907)
I. L. R. 34 Calc. 999

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FRAUDULENT CONVEYANCE—*concld.*

2. ——— *Conveyance to defraud creditors cannot be impeached, if creditors have been defrauded or if conveyance held valid by decree though collusively obtained.* A party, who conveys property to another for no consideration to shield such property from the claims of creditors, cannot set up the fraudulent nature of the transaction when creditors have been defrauded thereby. Even where no creditors have been defrauded, if, in a suit to which the vendor and vendee are parties, the *bonâ fides* of the transaction is alleged and upheld, the vendor cannot, in a subsequent suit, get rid of the effect of the decree collusively obtained as between himself and the vendee, when such decree had been obtained in a proceeding intended to carry out the fraud. Where the former collusive decree had proceeded on the footing that the consideration had been paid, the purchaser, in the subsequent suit, is entitled to obtain possession without payment of the purchase money, even though it is shown that it was not paid, as the effect of compelling the purchaser to pay will be to enable the vendor to get rid of the effect of the former collusive decree, which neither party can be permitted to do. *Rangammal* v. *Venkatachari, I. L. R. 18 Mad. 378,* referred to. *Yaramati Krishnayya* v. *Chunduru Papayya, I. L. R. 20 Mad. 326,* referred to. *Per* ABDUR RAHIM, *J.* —It is a clear and well established principle of law that, when the decree of a Court has been passed upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should therefore be treated as a nullity, and the state of things, which existed previously to the passing of such decree, be restored. And so also, when two persons have combined to defraud a third person and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to show that the transaction between him and the other party to the fraud was not really what it purported to be and that it does not therefore bind him. In the first case the decree is regarded as a subsisting and effectual decree so that the question covered by it is treated as *res judicata,* and in the second case, the Court refuses on grounds of public policy to help a man, who, by his act, has imposed upon another, to get rid of the consequences of that act as against himself. KONDETI KAMA ROW *v.* NUKAMMA (1908) **I. L. R. 31 Mad. 485**

FRAUDULENT DECREE.

See FRAUD.

1. ——— *Execution of decree —Decree declared void as against one of the parties, effect of.* *A* brought a suit for partition against *B* and *C*, and obtained a decree by consent, based upon the award of certain arbitrators. *C* subsequently brought a suit for a declaration that the award and the decree were fraudulent and void as against her. The suit was decreed in her favour. On an application for the execution of the decree by *A* against *B*, objection was taken by the latter on the ground that inasmuch as the decree was declared to be fraudulent and void as against *C*, it was not susceptible of execution. *Held,* that, as the decree was declared fraudulent and void as against *C* only, it was a subsisting decree between *A* and *B*, and was susceptible of execution. *Bhimaji Govind Kulkarni* v. *Rakmabai, I. L. R. 10 Bom. 338,* and *Natesa Ayyar* v. *Annasami Ayyar, I. L. R. 25 Mad. 426,* referred to. PASUPATI NATH BOSE *v.* NANDO LAL BOSE (1903) **I. L. R. 30 Calc. 718**

FRAUDULENT PREFERENCE.

See DEBTOR AND CREDITOR.

See FRAUD.

See FRAUDULENT CONVEYANCE. **I. L. R. 34 Calc. 999**

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.

FRAUDULENT TRANSACTION.

See CHEATING . **I. L. R. 36 Calc. 573**

See FRAUD.

FRAUDULENT TRANSFER.

See BENAMI . **10 C. W. N. 650**

See BENAMI DEEDS. **I. L. R. 33 Calc. 967**

See FRAUDULENT CONVEYANCE.

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 53 . **I. L. R. 34 Calc. 999**

1. ——— *13 Elizabeth, c. 5 and the Transfer of Property Act, IV of 1882, s. 53—Transfer, though for valuable consideration void if made to defeat creditors—Such transfer not valid even in part.* S. 53 of the Transfer of Property Act does not apply to transfers of moveable property. A transfer of moveable property by a debtor is valid as against his creditors only when it is made *bonâ fide* and for valuable consideration. Where a transfer, though in part for valuable consideration, is, as regards the other part, only an arrangement to defeat creditors it is wholly void against the creditors both under s. 53 of the Transfer of Property Act and under 13 Elizabeth, c. 5, and cannot be upheld to the extent to which it is supported by consideration. There is nothing in the statute of Elizabeth or in s. 23 of the Transfer of Property Act to prevent a debtor giving preference to a creditor if nothing is done to affect the other creditors injuriously. *Twyne's Case, 3 Co. Rep. 80,* referred to and followed. *Ramasamia Pillai* v. *Adinarayana Pillai, I. L. R. 20 Mad. 465,* distinguished. CHIDAMBARAM CHETTIAR v. SAMI AIYAR (1906) **I. L. R. 30 Mad. 6**

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FRAUDULENT TRANSFER—*concld.*

2. ——— *Relief given on grounds of public policy—User of fraudulent document by person, ignorant of its fraudulent nature does not estop such person—Pleadings, variation of, when allowable.* The rule of law, which allows a defendant to protect himself against an action by the plaintiff on a contract made or deed entered into between them by showing the illegal or immoral nature of the transaction, is based on grounds of public policy and the benefit that accrues thereby to the defendant is the inevitable result of the application of such rule and is not based on any right to which he is entitled. The fact that the defendant had set up the transaction successfully as a shield against creditors will not be a bar to the application of this rule if the defendant, not being a party to the original transaction, was, at the time the transaction was so set up, a minor and had no knowledge of the real nature of the transaction. A defendant, who had just attained majority, and who had, in ignorance and without proper legal advice, admitted the claim of the plaintiff, may, when the truth is discovered by him subsequently, be allowed to resile from his original plea. RAGHAVALU CHETTY *v.* ADINARAYANA CHETTY (1908)
I. L. R. 32 Mad. 323

FREE AGENT.

See WILL, EXECUTION OF.
11 C. W. N. 824

FREIGHT.

See BILL OF LADING.
Bourke O. C. 171, 309
Bourke A. O. C. 100
1 Ind. Jur. N. S. 230
I. L. R. 5 Bom. 313

See CHARTER PARTY . **8 B. L. R. 340**
I. L. R. 23 Bom. 551

See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 16 Bom. 389**
I. L. R. 26 Calc. 142
4 C. W. N. 313

See INTERPLEADER SUIT.
I. L. R. 18 Bom. 231

FRENCH LAW.

See COURT FEES ACT, SCH. I, ART. 11.
I. L. R. 20 Calc. 575

See FOREIGN COURT, JUDGMENT OF.
I. L. R. 23 Mad. 458

See HINDU LAW—WIDOW—INTEREST IN ESTATE OF HUSBAND—BY INHERITANCE . **I. L. R. 24 Mad. 650**

——— **statement as to—**

See EVIDENCE ACT, s. 38.
I. L. R. 26 Calc. 931

FRESH SUIT.

See RIGHT OF SUIT—FRESH SUITS.

FRONTAGE.

See LAND ACQUISITION ACT.
I. L. R. 33 Bom. 325

FRUIT TREES.

See LANDLORD AND TENANT.
I. L. R. 30 Mad. 155

FULL BENCH.

See REFERENCE TO FULL BENCH.

——— **decision of—**

——— *Practice.* A decision of a Full Bench cannot be questioned except before a Bench specially constituted for that purpose. BALARAM *v.* MANGTA DASS (1907)
I. L. R. 34 Calc. 941

——— **question of law referred to—**

See PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTIONS.
I. L. R. 1 Calc. 226
L. R. 3 I. A. 7 : 25 W. R. 285

FULL BENCH RULING.

See REVIEW—GROUND OF REVIEW.
I. L. R. 6 All. 292

See REVIEW—REVIEWS AFTER TIME.
B. L. R. Sup. Vol. 892
6 W. R. 100
7 W. R. 405, 408
9 W. R. 102
10 W. R. 415
I. L. R. 8 Calc. 700

1. ——— **Effect of Full Bench ruling** —*Retrospective effect.* A Full Bench ruling, as it makes no new law, but merely expounds what the law is, must have retrospective as well as prospective effect. JUGROOPA CHOWDHRAIN *v.* BUNWAREE TEWAREE . . **20 W. R. 351**

2. ——— *Decree for maintenance—Decision contrary to decree.* A decree declaring a Hindu female entitled to maintenance from her father-in-law was held to bind the latter, notwithstanding a later Full Bench ruling to the effect that a daughter-in-law was not entitled to such maintenance. NUND MOHUN CHUTTORAJ *v.* ROHINEE DEBIA . . . **22 W. R. 293**

3. ——— *Question of limitation—Application in execution of decree—Decision contrary to order on application.* The decree in a suit for possession of immoveable property situate in the districts of Shahabad and Gya was affirmed on appeal by the Judicial Committee of the Privy Council on the 28th July 1871. On the 31st December 1877, an application was made to the Shahabad Court for execution, and this application was on appeal *held* by the High Court, on the 13th September 1880, to be barred by limitation. In the meantime an application for execution was, on the 22nd August 1879, made in the Gya Court. This application was admitted on the 12th June 1880, and no appeal was preferred. In the meantime the order of the 13th September 1880 became,

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FULL BENCH RULING—*concld.*

under a later Full Bench decision, an incorrect view of the law. *Held*, on appeal from an order made in proceedings held upon the application of the 23rd August 1879, that the decree-holder was entitled to proceed with the execution of the decree, and that the judgment-debtor was not entitled to refer to the order of the High Court, dated 13th September 1880, to show that it was inoperative. BHOOBOONA ALUMBABI KOER *v.* JOBRAJ SINGH **11 C. L. R. 277**

FUNERAL EXPENSES.

See MESNE PROFITS—ASSESSMENT IN EXECUTION, AND SUITS FOR MESNE PROFITS . **I. L. R. 25 All. 266**

——— liability for—

See HINDU LAW—JOINT FAMILY. **I. L. R. 32 Mad. 191**

FURLOUGH.

See MAGISTRATE, JURISDICTION OF—TRANSFER OF MAGISTRATE DURING TRIAL . **I. L. R. 2 Calc. 117**

FURTHER INQUIRY.

See COMPLAINT—DISMISSAL OF COMPLAINT—EFFECT OF DISMISSAL **I. L. R. 28 Calc. 102**

See CRIMINAL PROCEDURE CODE, s. 437.

See NUISANCE UNDER CRIMINAL PROCEDURE CODES **I. L. R. 24 Calc. 395** **I. L. R. 25 Calc. 425**

See REVISION, CRIMINAL CASES—DISCHARGE OF ACCUSED.

——— reasons for directing further inquiry to be given—

See CRIMINAL PROCEDURE CODE, s. 437. **13 C. W. N. 76**

——— refusal to order—

See COMPLAINT . **I. L. R. 36 Calc. 415**

See CRIMINAL PROCEDURE CODE, s. 203. **13 C. W. N. 193**

1. **——— Security for good behaviour**—*District Magistrate, power of.* A District Magistrate has no power under the law to order a 'further' inquiry in a proceeding under s. 110 of the Code of Criminal Procedure after setting aside, on appeal, an order passed by a Subordinate Magistrate directing the accused to furnish security for good behaviour. DAYANATH TALUQDAR *v.* EMPEROR (1905) . **I. L. R. 33 Calc. 8**

2. **——— Notice to accused**—*Criminal Procedure Code (Act V of 1898), s. 437—Notice to the accused—Power to direct further enquiry.* The power conferred by s. 437 of the Criminal Procedure Code to direct a further inquiry should be used sparingly and with great caution. Though it is not illegal

FURTHER INQUIRY—*concld.*

to make an order directing further enquiry under s. 437, Criminal Procedure Code, without notice to the accused, it is always desirable that notice should be given. The ordinary rule is that no order should be passed against an accused without notice to him. A question may be very clear to a Court directing further inquiry, but still it ought to give an accused already discharged an opportunity to be heard. JOY GOPAL BANERJEE *v.* EMPEROR (1906) **11 C. W. N. 173**

3. ——— *Criminal Procedure Code (Act V of 1898), ss. 203, 437—Transfer by District Magistrate of case remanded for further inquiry — Rioting — Cross-cases —Dismissal—Construction of order for further inquiry—Rule on District Magistrate—Accused's right to show cause.* No order should be passed against an accused person without his getting an opportunity of being heard. Where a rule was issued only upon the District Magistrate to show cause why further inquiry should not be directed into a complaint against the accused, which had been dismissed under s. 203, Criminal Procedure Code: *Held*, that the accused were entitled to be heard. Where a Sessions Judge remands a case dismissed by a Deputy Magistrate under s. 203, Criminal Procedure Code, and directs that further proceedings should be held under the same section, the case cannot after the remand be transferred by the District Magistrate from the file of the Deputy Magistrate. The two rival parties in a case of rioting preferred two complaints which were dismissed by the Magistrate under s. 203, Criminal Procedure Code. The Sessions Judge on the application of both parties under s. 437, Criminal Procedure Code, ordered that further inquiry should be held in both the cases and directed that if one of them be found false, the other case should be tried. When after remand one of the cases was dismissed under s. 203: *Held*, that the Sessions Judge's order contemplated that the cases should be decided after regular trial and not dealt with under s. 203, Code of Criminal Procedure, and that the order of the Deputy Magistrate dismissing the case under s. 203, Criminal Procedure Code, was illegal. BRIJ KISHORE GHOSE *v.* GOPAL RAI (1906) **11 C. W. N. 316**

"FURTHER OR OTHER RELIEF."

——— *Religious or Charitable Trusts—Civil Procedure Code (Act XIV of 1882), s. 539. Held by* BEAMAN, *J.* The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e.g.*, removing fraudulent trustees, restraining a breach of trust, and so forth. SIR DINSHA MANEKJI PETIT *v.* SIR JAMSETJI JIJIBHAI. (1908) . **I. L. R. 33. Bom. 509**

FUTURE INTEREST.

See DECREE . **I. L. R. 35 Calc. 221**

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FUTURE MAINTENANCE.

——— **Decree for**—*Limitation Act (XV of 1877), Sch. II, Art. 79, cl. 6—Decree directing maintenance from date of plaint is a decree within cl. 6—Res judicata—Erroneous decision on question of law no bar.* A decree directing payment of future maintenance from the date of plaint, till death of recipient at a certain rate, is a decree for payment on that date in every subsequent year and the period of limitation for the execution of such a decree is that prescribed by Art. 179 (6) of Sch. II of the Limitation Act. An erroneous decision on a question of law in a previous application for execution of such a decree does not operate as a bar in a subsequent application to recover arrears which accrued subsequently. *Kaveri v. Venkamma, I. L. R. 14 Mad. 396,* followed. AITAMMA *v.* NARAINA BHATTA (1907)
I. L. R. 30 Mad. 504

G

GAMBLING.

See BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887).

See CONTRACT—WAGERING CONTRACTS.

See CONTRACT ACT, S. 23—ILLEGAL CONTRACTS—GENERALLY.
I. L. R. 7 Mad. 301

See GAMBLING ACTS.

See NUISANCE—PUBLIC NUISANCE UNDER PENAL CODE.
I. L. R. 14 Mad. 364

——— **articles used for purpose of**—

See MADRAS POLICE ACT, 1888, S. 42.
I. L. R. 19 Mad. 209

——— **suit to recover notes lost by**—

See TROVER . . **6 B. L. R. 581**

1. ——— **Person "found gaming" in common gaming house**—*Act XIII of 1856, s. 57. Held* on the evidence that there was sufficient to show that the house in which the prisoners were arrested was a common gaming-house. A person is "found gaming" within the meaning of s. 57 of Act XIII of 1856 who, having been seen gaming by an inspector of police, is shortly afterwards, in a place adjoining the room in which he was seen gaming apprehended by police constables acting under the direction of such inspector. REG. *v.* NANA MOROJI. *In re* MADHAV MORAR
8 Bom. Cr. 1

2. ——— **Common gaming-house**—*Hire of instruments of gambling.* Common gaming houses are houses in which instruments of gambling are kept or used for the profit or gain of the owner or occupier, whether by way of charge for the use of the instruments of gaming, or of the house, or otherwise howsoever. QUEEN *v.* SUJJAD ALI
3 N. W. 134

GAMBLING—*contd.*

3. ——— **Lottery tickets**—*Act III of 1867, ss. 1 and 4.* Lottery tickets, by reference to which it is to be decided whether the holder or purchaser wins the whole or any part of any stakes, are instruments of gaming within ss. 1 and 4 of Act III of 1867, and they are instruments of gaming of a nature similar to cards. ANONYMOUS
12 W. R. Cr. 34

4. ——— **Public gaming-house.** Gambling is not ordinarily punishable as an offence; it is only so punishable when carried on in a common gaming-house or in a public street or place. QUEEN *v.* SHEOSUNKUR SINGH . . . **3 N. W. 1**

QUEEN *v.* SUJJAD ALI . . **3 N. W. 134**

5. ——— *Act III of 1867, ss. 4 and 13—Gambling in private house.* The gist of the offence under s. 4 of Act III of 1867 consists in the fact that the house in which the gambling takes place is "a common gaming-house." The gist of the offence under s. 13 is "the gambling in a public street or place." Gambling in a private house is not an offence under the Act. QUEEN *v.* KHYROO . . . . . **2 N. W. 289**

6. ——— **Right to enter or search house**—*Act III of 1867, s. 5.* To authorize an entry or search of a house under s. 5 of Act III of 1867, there must be credible information before the Magistrate or police-officer who may take action under such section that the house is a common gaming-house. Unless a house is entered or searched under the provisions of s. 5, the finding of cards, dice, etc., therein will not be *primâ facie* evidence for the purposes mentioned in Act III of 1867. QUEEN *v.* SUBSOOKH . . . **2 N. W. 476**

7. ——— **Cowries**—*Act III of 1887, s. 6—Instrument of gaming. Held,* that cowries are not "instruments of gaming" within the meaning of s. 6 of Act III of 1867. QUEEN-EMPRESS *v.* BHAWANI . . . **I. L. R. 18 All. 23**

8. ——— *Evidence of house being a common gaming-house—Instruments of gaming—Cowries. Held,* that the mere finding of cowries in a house searched in pursuance of a warrant issued under Act III of 1867 would not raise the presumption that the house was used as a common gaming-house; but evidence that cowries were used in that house as instruments whereby to carry on gaming would bring the house within s. 6 of the Act. *Queen-Empress v. Bhawani, I. L. R. 18 All. 23,* referred to. QUEEN-EMPRESS v. BALA MISRA . . . . **I. L. R. 19 All. 311**

9. ——— **Beng. Act II of 1867**—*Publication as to notification of.* The notification which the Government is empowered to issue under s. 2 of the Gaming Act, Bengal Act II of 1867, should specify the limits of any town to which it is intended the Act should apply, and must be published in three consecutive Gazettes. Where a first notification which extended the Act to a town with specification of limits to which it was intended to be applied was published only once, and a subsequent notification

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GAMBLING—*contd.*

published three times extended the Act to the town without specifying the limits to which the Act was to apply, it was *held* that the subsequent notifications were not sufficient, but that did not prevent the operation of the Act in places which are shown to be undoubtedly within the town according to its ordinary designation. *In the matter of the petition of* BANEE MADHUB KOONDOO . . **21 W. R. Cr. 23**

10. ——— Coins and cowries—*Gambling Act (Ben. Act II of 1867), ss. 1, 6—Gambling in a common gaming house—Common gaming house—Private house—Coins and cowries, if and when instruments of gambling—Presumption—Inference.* Coins and cowries are not necessarily implements of gambling but they become "instruments of gaming," within the meaning of the Gambling Act (Ben. Act II of 1867), if they are found to be used for that purpose. A house cannot be considered as exclusively private in its character which is used for the purposes of gaming by a large party of people, of different social position and standing, who would not ordinarily be friends or guests of the owner. S. 6 of the Gambling Act raises a presumption that a house in which such articles or instruments are found is a common gaming-house within the meaning of the Act. AMRIT SINGH *v.* KING-EMPEROR (1901) **5 C. W. N. 503**

11. ——— Unauthorized entry and arrest in gaming-house—*Evidence—Presumption.* Where a police-officer, unauthorized by a Magistrate or District Superintendent of Police, enters and searches an alleged gaming-house, and arrests persons found therein, a Magistrate is justified in convicting such persons, if it is proved, without resorting to the presumption created by Bengal Act II of 1867, s. 6, that the house is a gaming-house. NAZIR KHAN *v.* PROLADH DUTTA **I. L. R. 4 Calc. 659**

12. ——— *Right to enter and search gaming-house.* A deputy inspector of police is not authorized to enter and search an alleged gaming-house, unless he receives authority so to do from a Magistrate or a District Superintendent of Police. Where such an unauthorized entry and subsequent arrest of persons in a gaming-house takes place, there being no other evidence of an offence under s. 5 of Act II of 1867, a Magistrate has no evidence before him on which he can convict. The evidence required cannot be presumed under s. 6 of the Act, because that presumption only arises when the proceedings are authorized by s. 5. SREERAM CHANDRA LERKAN *v.* BIPINDASS **I. L. R. 4 Calc. 710**

13. ——— Common gaming-house—*Cowries—Instruments of gaming.* Cowries may be treated as instruments of gaming where they are used as counters or as a means to carry on gaming. The finding of cowries in a house upon search made under a warrant will, under s. 6 of the Gambling Act (Bengal Act II of 1867), raise a rebuttable presumption that the house is used as a common gaming-house. QUEEN-EMPRESS *v.* MAKUND RAM . . . **I. L. R. 25 Calc. 432**

GAMBLING—*contd.*

14. ——— *Gambling Act (Ben. Act II of 1867), s. 11—Ground enclosed by high wall forming a thakurbari, whether a "place" within the section—Place, meaning of—Public place—Confiscation of money for which game is played.* The word "place," as used in s. 11 of the Gambling Act (Ben. Act II of 1867), cannot but refer to a public place, and is used *ejusdem generis* with the other words in the section, public market, fair, street, thoroughfare; and the place must be of the same character as a public market, fair, street or thoroughfare. A *thakurbari* surrounded by a high compound wall is not a public place as contemplated by the section. When a conviction under s. 11 of Ben. Act II of 1867 is set aside, the order for confiscation of the money for which the game was played must necessarily fall. KHUDI SHEIKH *v.* KING-EMPEROR (1901) . . **6 C. W. N. 33**

15. ——— Bombay Act III of 1866—Entry under illegal search-warrant. Conviction of keeping a common gaming-house upheld where portion of the evidence against the accused consisted of instruments of gaming found in such a house which had been entered in pursuance of a search-warrant illegally issued; there being sufficient *aliunde* to justify the conviction. REG. *v.* NARAYAN SUNDUR . . **5 Bom. Cr. 1**

16. ——— Coin—*Instrument of gaming.* A coin is not an instrument of gaming within the meaning of s. 11 of Bombay Act III of 1866. An instrument of gaming means an implement devised or intended for that purpose. EMPRESS *v.* VITHAL BHAICHAND **I. L. R. 6 Bom. 19**

17. ——— Coin—*Bombay Act IV of 1887 and I of 1890, s. 12—Instrument of gaming—Meaning of the expression.* A coin is not an "instrument of gaming" within the meaning of s. 12 of Bombay Act IV of 1887 as amended by Bombay Act I of 1890. The expression "instrument of gaming," as used in s. 12 of the Act of 1887, means an implement devised or intended for that purpose. *Imperatrix* v. *Vithal, I. L. R. 6 Bom. 19,* followed. QUEEN-EMPRESS *v.* GOVIND **I. L. R. 16 Bom. 283**

18. ——— Public nuisance—*Common gaming-house—Nuisance—Penal Code, s. 268.* A common gaming-house is one which is kept or used for profit or gain, and may constitute a public nuisance; but it cannot be held, in the absence of evidence of any actual annoyance to the public, that every person who admits gamblers into his house and all person who game therein, are guilty of a public nuisance within the meaning of s. 268 of the Penal Code. REG. *v.* HAU NAGJI **7 Bom. Cr. 74**

19. ——— Wagering business—*Bom. Act IV of 1887, ss. 3, 4, 5 and 7—Instruments of gaming—Books and telegrams—Game—Procedure—Police officer investigating offence not to conduct prosecution—Criminal Procedure Code (Act V of 1898), ss. 495 (cl. 4) and 537.* The accused was partner in a shop at Surat, in which he ostensibly

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GAMBLING—*contd.*

carried on the business of cloth selling, but in which he also actually carried on a *satta*, or wagering business. The wagers were made with regard to the last unit of the figures denoting the prices for which opium was sold at Calcutta on a given day. Information as to these sales was received by telegraph from Calcutta. The firm kept books in which the wagers were recorded. The accused was convicted and sentenced under ss. 4 and 5 of Bombay Act IV of 1887. *Held* by CANDY and FULTON, *JJ.* (confirming the conviction under s. 4), that the books kept by the firm for the purpose of recording the wagers were "instruments of gaming" within the definition of s. 3 of Bombay Act IV of 1887. *Held* by CANDY, *J.*, that the telegrams received and used for the purpose of determining the result of the bets were also within the definition. *Held*, also, (setting aside the conviction under s. 5), that the wagering with which the accused was charged was not a "game," and the presumptions under s. 7 and cl. 2 of s. 5 of the Act did not apply. A police Inspector, who has taken part in the investigation into an offence, is not qualified to conduct the prosecution of the person charged with that offence (Criminal Procedure Code, Act V of 1898, s. 495, cl. 4). EMPEROR *v.* TRIBHOVANDAS BRIJBHUKANDAS (1902) . . **I. L. R. 26 Bom. 533**

20. ———— Power of seizing money—*Bom. Act IV of 1887, s. 8—Power of seizing money 'found therein'—Interpretation.* The power of seizing money found in a gaming-house, under s. 8 of Bombay Act IV of 1887, does not extend to money found on the persons of those who may at the time be in such gaming house. EMPEROR *v.* WALLI MUSSAJI (1902) . . **I. L. R. 26 Bom. 641**

21. ———— Betting on rainfall—*Bombay Acts IV of 1887 and I of 1890, s. 3—"Common gaming-house"—"Instrument of gaming"—"Used"—Meaning of these words in s. 3 of the Act.* The accused rented a place near a public road at Bombay at R250 a month. There they erected a shed containing eleven *pedhis* or stalls. In the centre of the shed they put up, in a prominent position, a clock for keeping accurate time. The stalls were let out to certain persons, each at the rate of R100 a month. The roofs of several adjoining houses surrounded this place. From one of these roofs rain fell into the place. Numbers of people resorted to this place for the purpose of rain-betting. The rain-betters staked certain sums of money on the chance whether the rain would fall or would not fall within a certain time. After making the bets, the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept for the purpose, and each deposited with the stall-keeper the amount staked. The bets as to rain falling were determined by persons at the place seeing the rain falling in a stream from such of the roofs of the adjoining houses as had been chosen by the betters on making the bets, and seeing also the time, by the clock—if there was any doubt as to the time. After the bet was determined, the winner received from the stall-keeper the amount of the stake. Under these circumstances, the accused were charged before the Chief Presidency Magistrate with committing the offence of keeping a "common gaming-house" under s. 4, cls. (*a*), (*b*), and (*c*), of the Bombay Gambling Act (IV of 1887), as amended by Act I of 1890. On a reference by the Magistrate under s. 432 of the Code of Criminal Procedure (Act X of 1882):—*Held*, that to bring the place in question within the definition of a "common gaming-house" in s. 3 of the Bombay Gaming Act (IV of 1887) as amended by Bombay Act I of 1890, the instrument of gaming or wagering must be in the place itself, either kept there, or brought there and used there, for profit and gain. It is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. The roofs of the houses surrounding the place in question could not therefore be regarded as "instruments of gaming, either kept or used therein," within the meaning of s. 3 of the Act. *Held*, also, that the word "used" in s. 3 of the Act, as amended by Act I of 1890, must be taken in its ordinary sense, as meaning actually used. Any article which is in fact used as a means of wagering comes within the definition of "an instrument of gaming," even though it may not have been specially devised or intended for that purpose. *Held per* TELANG, *J.*, that neither the stalls nor the books in which the bets were registered nor the money staked and deposited with the stall-keeper, were instruments of gaming or wagering. QUEEN-EMPRESS *v.* KANJI BHIMJI **I. L. R. 17 Bom. 184**

22. ———— Rain-betting—*Bombay Act IV of 1887, ss. 3, 4—Common gaming-house—What constitutes gaming.* The accused kept a shed where large numbers of people assembled for the purpose of betting on the quantity of rain which might fall in a given time. The instruments used for measuring the quantity of rainfall were two: a rain-gauge and a gutter attached to the roof of the shed. The accused, who registered the quantity of rainfall, were entitled to a commission on each bet. They were charged, under s. 4, cls. (*b*) and (*c*), of Bombay Act IV of 1887, with keeping the shed for the purpose of a "common gaming-house." *Held*, that Bombay Act IV of 1887 did not apply to betting. The shed in question was undoubtedly a common betting place, and the instruments used were instruments of betting, but there is no law in India which makes betting illegal. There is a distinction between betting and gaming. There must be a game before there is gaming; and to constitute a game, there must be a contest, and an active participation of certain persons is also necessary. In the present case there was no contest, no players, and no active part taken by the betters who merely watched the falling of rain. Rain-betting is therefore not a game, and the place where it was carried on not a "common gaming-house." QUEEN-EMPRESS *v.* NAROTTAMDAS MOTIRAM **I. L. R. 13 Bom. 681**

23. ———— Presumption—*Bombay Act IV of 1887, ss. 4, 5 and 7—Proof of keeping or of*

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GAMBLING—*contd.*

gaming in a common gaming-house—Presumption—Evidence. A number of persons were found by the police in a closed room in the upper storey of a house gambling with dice and having cowries and money before them. They were convicted under Bombay Act IV of 1887. *Held*, confirming the conviction, that under s. 7 of the Act the facts found were evidence (until the contrary was shown) that the room was used as a common gaming-house, and that the persons found therein were there present for the purpose of gaming. QUEEN-EMPRESS *v.* BAI VAJU . . . . **I. L. R. 22 Bom. 745**

24. ——— Public nuisance—*Penal Code (XLV of 1860,) ss. 268, 290—Gambling, whether an offence where the Gambling Act is not in force—Whether gambling is a public nuisance.* Gambling is not an offence such as is defined in s. 268, Indian Penal Code (public nuisance). Certain persons were found to have gambled at a place where the Gambling Act was not in force, and were convicted under s. 290, Indian Penal Code (public nuisance). *Held*, that the conviction was bad. SASI KUMAR BOSE *v.* EMPEROR (1903) . . **7 C. W. N. 710**

25. ——— Single page of paper used for registering wagers—*Bombay Prevention of Gambling Act (Bombay Act IV of 1887), ss. 3, 4 (a)—Instrument of gaming.* The expression "instruments of gaming" as defined in s. 3 of the Bomaby Prevention of Gambling Act (Bombay Act IV of 1887) includes a single page of paper used for registering wagers. EMPEROR *v.* LAKHAMSI (1905) . . . . **I. L. R. 29 Bom. 264**

26. ——— Gambling in a boat—*Bombay Prevention of Gambling Act (Bombay Act IV of 1887), ss. 3, 4, 12—Gambling in a machhwa—Public place—Bombay Harbour.* The accused, fourteen in number, chartered a *machhwa* (boat), and having got it anchored in the Bombay Harbour a mile away from the land, carried on gambling there. For this they were convicted of an offence under s. 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) for gaming in a public place. *Held*, that the accused were not guilty of an offence under s. 12 of the Act, since they cannot be said to be gambling in a public place. *Per* BATTY, *J.*—The word "place," which is patient of many different meanings, must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus in s. 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) or in s. 3 of 36 and 37 Vict., c. 38, in connection with such words as roads, streets, and thoroughfares, it has a very different meaning from that which it bears in s. 4 of the Act, and from that given to it in connection with s. 3 of 16 and 17 Vict., c. 119, by judicial decisions. The mischief aimed at in s. 4 of the Act is a mischief clearly distinct from that aimed at in s. 12 of the Act. In the former, the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent. In the latter, the offence is not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. S. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) aims at gambling *in* a public place or thoroughfare ordinarily with no intervening obstruction to the public view, where there is voluntary publicity. EMPEROR *v.* JUSUB ALLI (1905) . . . . **I. L. R. 29 Bom. 386**

27. ——— Gambling in jamatkhana—*Gambling Act (Bombay Act IV of 1887), ss. 4, 5, 7—Common gaming house—Jamatkhana of the Borah community.* The accused were found playing for money with cards in a building ordinarily used as a *jamatkhana*, but accessible to such members of the Borah community as have no place to live in and are too poor to afford the rent of a room. This place was frequented by the petitioners and others and instruments of gaming were found there, when the accused were arrested. The Magistrate convicted the accused of offences under ss. 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887): *Held*, that it was open to the Magistrate to rely on the presumption which under s. 7 of the Act might be drawn, that this place was used as a common gaming house, unless the contrary was made to appear by the evidence before him: there was, therefore, no ground to interfere in revision with the convictions under s. 5 of the Act. *Held*, further, that no presumption arose under s. 7 of the Act that the place was "kept" by any person as a common gaming house: the conviction under s. 4 was therefore wrong. In order to constitute an offence, under s. 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), of keeping a common gaming house, it is necessary to show in the first place, that the person charged with that offence is the owner, or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house. It is not sufficient to show that the accused used the place in question for the purpose of gaming there. EMPEROR *v.* WALIA MUSAJI (1904) **I. L. R. 29 Bom. 226**

28. ——— Gambling in a railway carriage—*Bombay Prevention of Gambling Act (Bombay Act IV of 1887), s. 12—Through special train—Public place—Railway track—Public having no right of access except passengers.* The accused were convicted under s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) as persons found playing for money in a railway carriage forming part

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of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station (on the Bore Ghauts between Karjat and Khandala Stations) of the Great Indian Peninsula Railway. *Held*, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). *Per* JENKINS, *C.J.*—The word "*place*," in s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), is, I think, qualified by the word "public" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road* or *thoroughfare* . . . I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to a street or thoroughfare as to justify us in holding that it was a public place within the meaning of s. 12 of the Act, with which alone we are concerned. *Per* RUSSELL, *J.*—The adjective "public" in s. 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) applies to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare," inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares." EMPEROR *v.* HUSSEIN (1905)

I. L. R. 30 Bom. 348

29. ——— Gambling in business premises, at night—*Gambling Act (Beng. II of 1867), s. 4—Common gambling house.* Where the premises of Messrs. John King & Co. were used, during the night, when they were deserted for business purposes, for the purpose of gambling for months together, to the profit of the durwans left in charge thereof: *Held*, that the premises could not be regarded as a "common gambling house" even though the durwans might have made some profit out of the gambling which went on there. MOHESH NARAIN PANDAY *v.* EMPEROR (1907)

11 C. W. N. 972

30. ——— Arrest without warrant—*Bombay Prevention of Gambling Act (Bom. Act IV of 1887), ss. 4, 5, 6, 7—Keeping a common gaming-house—Presumption under s. 7 of the Act—Criminal Procedure Code (Act V of 1898), ss. 65, 105.* The complainant, an Abkari Sub-Inspector, having come to know that gambling was then actually going on in the house of the accused, communicated the information to the District Magistrate, whom he met on the road. The District Magistrate desired the complainant to go and stand before the house and ordered him to enter the house and arrest the persons gambling there on sight of the District Magistrate's carriage at the spot. The complainant did so; and on a signal by the District Magistrate entered the house and arrested the accused with cards and money. During the trial,

GAMBLING—*concld.*

the District Magistrate was not examined as a witness. The trying Magistrate convicted the accused for offences under the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), applying to them the presumption arising under s. 7 of the Act: *Held*, reversing the conviction and sentence, that the Magistrate erred in applying to the accused the presumption arising under s. 7 of the Act. The presumption under s. 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) arises only where there has been an arrest and a search under s. 6 of the Act. As a First Class Magistrate has, under s. 6 of the Act, power to give authority under a special warrant to a police officer of the class designated in the section to make the arrest and the search, the Legislature must be presumed to have intended that the Magistrate, First Class, should have the authority to make the arrest and the search himself, if necessary. Where the Bombay Prevention of Gambling Act has provided for the manner or place of investigating or inquiring into any offence under it, its provisions must prevail and the Criminal Procedure Code must give way. Accordingly, no provision of the Code as to the authority empowered to issue a warrant for arrest or search, or the person to whom and the conditions under which such warrant may be issued, can apply for the purposes of s. 7 of the Act. The authority, the persons and the conditions must be respectively those specifically mentioned in s. 6 of the Act and no other. But the special provision in s. 6 would still be subject to the general provisions of ss. 65 and 105 of the Code. When a Magistrate, First Class, or other officer mentioned in s. 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) himself acts under its provisions, instead of acting through an officer of the particular class prescribed therein under a special warrant, he must act strictly in compliance with those provisions. The first condition necessary to make an arrest and seizure, under the section, legal so as to bring in the operation of s. 7 is that where the Magistrate is acting on information, there must be a complaint made before him *on oath* to set him in motion. When a Magistrate, First Class, or other officer mentioned in s. 6 himself does the acts specified in clauses (*1*) to (*3*) of the section instead of issuing a special warrant, he must give evidence, because he supplies the place of the warrant and the warrant is a necessary part of the evidence for the prosecution. Where a Magistrate, First Class, himself makes an arrest and seizure under s. 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) he must himself "enter" the "house, room or place" with the assistance of such persons as may be found necessary. S. 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) must be construed strictly because s. 7 gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases. *Imperatrix* v. *Subhabhatta, Unrep. Cr. Cas. 825: Cr. Rul. 68 of 1895*, followed. EMPEROR *v.* FERNAD (1907) . **I. L. R. 31 Bom. 438**

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GAMBLING ACT (XXI OF 1848).

See CONTRACT—WAGERING CONTRACTS.

See TEZI MANDI CHITTIES.
8 B. L. R. 412, 415 note

GAMBLING ACT (BENGAL ACT II OF 1867).

See GAMBLING.

——— **s. 4—**

See GAMBLING . **11 C. W. N. 972**

——— **ss. 4, 5 and 6**—*Common gaming house—Evidence—"Credible information." Held,* that when a house is searched by the Police on information that it is a common gaming house, the finding of instruments of gaming will be admissible evidence that the house is used as a common gaming house notwithstanding that the warrant, under which the search is conducted, is defective, though the finding of such articles may not be evidence to the extent mentioned in s. 6 of Bengal Act II of 1867. *Held,* also, that the words "credible information" as used in s. 5 of Act II of 1867, have not the same meaning as "credible evidence." The "credible information" there mentioned need not be in writing. EMPEROR *v.* ABDUS SAMAD (1905)
I. L. R. 28 All. 210

1. ——— **s. 11—Gambling in osara or verandah**—*Public place.* The accused were convicted under s. 11 of the Gambling Act of gambling in a public place. The place, where the gambling was held, was an osara or verandah, which was enclosed on all sides, but having doors opening towards the road and having a platform between the osara and the road. It was a part of a building, which was the private property of certain individuals and was used during the day as a shop; but not so in the night. The gambling in question took place after midnight. *Held,* setting aside the convictions, that the osara was not a public place within the meaning of s. 11 of the Gambling Act. DURGA PRASAD KALWAR *v.* EMPEROR (1904) . . . **I. L. R. 31 Calc. 910**
s.c. 8 C. W. N. 592

2. ——— **Sham horse-racing machine**—*Instrument of gaming—Compound of house—Public place.* The accused played a game of sham horse-racing known as "little horses" by means of a machine. Which horse won was a pure matter of chance. The public staked their money on any of the horses before the machine was started. The accused appropriated all the stakes, returning four times their stakes to those, who had staked their money on the winning horse. The game was played in the compound of the Sanjoy Press consisting of an open space of land without any fence situated one cubit from the bazar. There was no evidence that the owner ever gave or refused permission to any one to come on his compound or that any one asked his permission to do so, or that any one was prevented from doing so by him. *Held,* the accused was rightly convicted under s. 11 of the Bengal Gambling Act,

GAMBLING ACT (BENGAL ACT II OF 1867)—*concld.*

——— **s. 11**—*concld.*

II of 1867. The difference between gaming and betting discussed. *The Queen* v. *Wellard, L. R. 14 Q. B. D. 63; Turnbull* v. *Appleton, 45 J. P. 469; Queen-Emperss* v. *Srilal, I. L. R. 17 All. 166; Khudi Sheikh* v. *The King-Emperor, 6 C. W. N. 33; Queen-Empress* v. *Narottamdas Matiram, I. L. R. 13 Bom. 681,* referred to. HARI SINGH *v.* JADU NANDAN SINGH (1904)
I. L. R. 31 Calc. 542
s.c. 8 C. W. N. 458

GAMBLING ACT (III OF 1867).

See GAMBLING.

——— **ss. 5 and 6**—*Warrant for search of suspected house—"Credible information"—Procedure—Endorsement of warrant by officer to whom it was issued.* Warrants issued under Act III of 1867 are governed by those provisions of the Code of Criminal Procedure, which provide for the issue and execution of warrants in general: there is, therefore, no objection to the officer, to whom such a warrant is originally issued, endorsing it to another officer, provided that the latter is an officer to whom such warrant could be legally issued in the first instance. EMPEROR *v.* KASHI NATH (1907)
I. L. R. 30 All. 60

——— **s. 13**—*Gaming in public place—Seizure of money as well as instruments of gaming not authorized. Held,* that, where persons are found gaming in a public place under circumstances to which s. 13 of Act III of 1867 is applicable, although instruments of gaming, etc., may be seized by the police, there is no authority for the confiscation of money found with the persons arrested. *Sant Ram Sahai* v. *Queen-Empress, Punj. Rec. J. Cr. p. 60,* followed. EMPEROR *v.* TOTA (1904)
I. L. R. 26 All 270

GAMING HOUSE.

See GAMBLING . . **5 C. W. N. 503**
I. L. R. 29 Bom. 226

See MADRAS POLICE ACT, s. 1888, 42.
I. L. R. 19 Mad. 209

See MADRAS TOWNS NUISANCES ACT, s. 73 . . **I. L. R. 18 Mad. 46**

GANJAM AND VIZAGAPATAM AGENCY COURTS ACT (XXIV of 1839).

See HIGH COURT, JURISDICTION OF—MADRAS—CIVIL.
I. L. R. 26 Mad. 266

See HIGH COURT, JURISDICTION OF—MADRAS—CRIMINAL.
I. L. R. 14 Mad. 121

See LIMITATION ACT, 1877, s. 12.
I. L. R. 14 Mad. 365

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GANJAM AND VIZAGAPATAM AGENCY COURTS ACT (XXIV OF 1839)—*concld.*

See REVISION—CIVIL CASES.
I. L. R. 16 Mad. 229

See RULES MADE UNDER ACTS—ACT XXIV OF 1839 . **I. L. R. 24 Mad. 345**

See TRANSFER OF CIVIL CASE—GENERAL CASES . **I. L. R. 13 Mad. 329**

See VALUATION OF SUIT—APPEALS.
I. L. R. 22 Mad. 162

GANJAM AND VIZAGAPATAM AGENCY RULES.

——————— *Limitation Act (XV of 1877), Sch. II, Art. 4, does not apply when act complained of is a nullity—Ganjam and Vizagapatam Agency Rules, Act XXIV of 1839, rule 20—High Court may interfere when Agent decides wrongly on question of limitation.* An erroneous decision by an Agent acting under the Ganjam and Vizagapatam Agency Rules, on a question of limitation, is a 'special ground' which will authorise an interference by the High Court under rule 20 of such Rules. Art. 14, Sch. II of the Limitation Act, does not apply to an act done by a Government officer, when such act purports to be done in pursuance of an order, but, in fact, owing to a mistake is not so done. Such an act is a nullity which need not be set aside. MAHARAJA OF VIZIANAGRAM *v.* SATRUCHERLA RAJU (1906)
I. L. R. 30 Mad. 280

GARHWAL.

See KUMAON AND GARHWAL.

GAYAWAL PRIESTS.

See ADOPTION . . **11 C. W. N. 147**

GAZETTE, GOVERNMENT.

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—GOVERNMENT GAZETTE . . **W. R. 1864, 50**

See EVIDENCE—CRIMINAL CASES—GOVERNMENT GAZETTE . **7 B. L. R. 63**

GENERAL AVERAGE.

See SHIPPING LAW.
I. L. R. 17 Calc. 362 : L. R. 16 I. A. 240

GENERAL CLAUSES ACT, 1887 (I OF 1887).

——————— **s. 3, c. (13).**

See VALUATION OF SUIT—SUITS—PARTITION . . **I. L. R. 24 All. 381**

GENERAL CLAUSES ACT (X OF 1897).

——————— **s. 3 (27).**

See NEPAL . . **7 C. W. N. 635**

GENERAL CLAUSES ACT (X OF 1897)—*concld.*

——————— **s. 3 (33).**

See MARINE INSURANCE.
I L. R. 36 Calc. 516
13 C. W. N. 425

——————— **s. 3, cl. (52)**—*Signature—Thumb impression—Criminal Procedure Code (Act V of 1898), s. 164.* A thumb mark affixed to a confession by an accused able to write his name is not a signature within the meaning of s. 3, cl. 52 of the General Clauses Act or s. 164 of the Criminal Procedure Code. SADANANDA PAL *v.* EMPEROR (1905)
I. L. R. 32 Calc. 550

——————— **s. 8 and s. 24 ("order")**—

See PETROLEUM ACT (VIII OF 1899), SS. 1 (3), 11 AND 15 . **7 C. W. N. 658**

GENERAL CLAUSES ACT (BEN. ACT I OF 1899).

——————— **s. 7.**

See MAMLATDARS' COURTS ACT (BOMBAY ACT III OF 1876).
I. L. R. 32 Bom. 337

——————— **s. 8.**

See CALCUTTA MUNICIPAL ACT, 1899, SS. 391 AND 449 . **7 C. W. N. 374**

——————— **s. 8 (c).**

See CALCUTTA MUNICIPAL ACT, 1899, S. 449 . . . **7 C. W. N. 554**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 310A . **12 C. W. N. 434**

GENERAL CLAUSES ACT (MADRAS).

See MADRAS GENERAL CLAUSES ACT.

GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868).

See ATTACHMENT—SUBJECTS OF ATTACHMENT—PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS.
I. L. R. 14 All. 30

——————— **s. 1**—"*Include.*" The word "include" in cl. (13) and other clauses of s. 1 of Act I of 1868 is intended to be enumerative, not exhaustive. EMPRESS *v.* RAMANJIYYA . **I. L. R. 2 Mad. 5**

——————— **s. 2.**

See STAMP ACT, 1879, SCH. I, ART. 5.
I. L. R. 13 Bom. 87

——————— **cl. (5).**

See HAT . . **I. L. R. 36 Calc. 665**

See JURISDICTION OF CIVIL COURT—FOREIGN AND NATIVE RULERS.
I. L. R. 9 Calc. 535

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 22 Calc. 33

See TRANSFER OF PROPERTY ACT, S. 107.
I. L. R. 22 Calc. 752

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GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868)—*contd.*

——— **s. 2**—*concld.*

——— **cls. (5), (6).**

See TRANSFER OF PROPERTY ACT.
I. L. R. 13 All. 432

——— **cl. (18).**

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO . **I. L. R. 9 All. 240**

See SENTENCE—IMPRISONMENT—IMPRISONMENT GENERALLY.
18 W. R. Cr. 3
I. L. R. 9 All. 240

——— **s. 3.**

See FISHERY, RIGHT OF.
I. L. R. 20 Calc. 446

See LIMITATION ACT, 1877, ART. 132.
I. L. R. 9 Bom. 233

——— **cl. (1).**

See LIMITATION ACT, 1877, ART. 177.
I. L. R. 15 All. 14

——— *Stamp Acts, 1862 and 1869, s. 2, and Sch. 3—Repeal by Act XIV of 1870, effect of.* By force of s. 3, cl. (*1*), of Act I of 1868, the mere repealing of s. 2 and Sch. 3 of Act XVIII of 1869 by Act XIV of 1870 did not *per se* revive the repealed portions of Act X of 1862. ANONYMOUS . . . . . **7 Mad. Ap. 9**

——— **cl. (2).**

See LIMITATION ACT, 1877, s. 7.
I. L. R. 13 Mad. 135

——— **s. 5.**

See CANTONMENT MAGISTRATE.
I. L. R. 8 Mad. 350

See SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.
7 Bom. Cr. 76

——— **s. 6.**

See APPEAL—RIGHT OF APPEAL, EFFECT OF REPEAL ON . **I. L. R. 1 All. 668**
I. L. R. 3 Calc. 662, 727
4 C. L. R. 18
I. L. R. 5 Calc. 259 : 4 C. L. R. 23
I. L. R. 2 All. 785

See BENGAL TENANCY ACT, SS. 20, 21.
I. L. R. 14 Calc. 553
I. L. R. 15 Calc. 376

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.
I. L. R. 16 All. 259

See COMPANY—FORMATION AND REGISTRATION . . **I. L. R. 11 All. 349**

See COSTS—SPECIAL CASES—SMALL CAUSE COURT SUITS.
I. L. R. 24 Calc. 399
I. L. R. 21 Bom. 779

GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868)—*contd.*

——— **s. 6**—*contd.*

See EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION.
I. L. R. 2 Bom. 148
I. L. R. 3 Bom. 214, 217
I. L. R. 4 Bom. 163
I. L. R. 3 Mad. 98
I. L. R. 16 Calc. 323
I. L. R. 21 Calc. 940
I. L. R. 22 Calc. 767

See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE, AND COMPENSATION FOR IMPROVEMENTS ON LAND . **I. L. R. 13 Mad. 502**

See LIMITATION ACT, 1877, ART. 179 (1871, ART. 167)—LAW APPLICABLE TO APPLICATION FOR EXECUTION.
11 Bom. 111, 116 note
I. L. R. 9 Calc. 446, 644
I. L. R. 7 Bom. 459
I. L. R. 11 Calc. 55

See MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.
I. L. R. 15 Calc. 357

See OFFENCE COMMITTED BEFORE PENAL CODE CAME INTO OPERATION.
I. L. R. 2 Calc. 225
I. L. R. 1 All. 599

See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL.
I. L. R. 15 Calc. 107

See TRANSFER OF PROPERTY ACT, s. 2.
I. L. R. 6 All. 262
I. L. R. 11 Calc. 582
I. L. R. 12 Calc. 436, 505
I. L. R. 15 Calc. 357

1. ——— *"Proceedings," meaning of—Service of notice of foreclosure.* The proceedings referred to in s. 6 of the General Clauses Consolidation Act (I of 1868) are not necessarily judicial proceedings, but ministerial Proceedings, as, *e.g.*, the service of notice of foreclosure. UMESH CHUNDER *v.* CHUNCHUN OJHA
I. L. R. 15 Calc. 357

2. ——— *Proceedings—Procedure—Civil Procedure Code, 1877-82, s. 3—Proceedings in execution of decree commenced before Act X of 1877.* S. 6 of Act I of 1868 covers proceedings taken in execution of decree which have been commenced before Act X of 1877 came into force. *Per* GARTH, *C.J.*—A suit is a "judicial proceeding," and the words "any proceeding" in s. 6 of Act I of 1868 include all proceedings in any suit from the date of its institution to its final disposal, and therefore include proceedings in appeal. The word "procedure" in s. 3, Act X of 1877, has not the same meaning as the word "proceedings" in the abovementioned section. RUNJIT SINGH *v.* MEHERBANS KOER
I. L. R. 3 Calc. 662 : 2 C. L. R. 391

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GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868)—*contd.*

——— **s. 6**—*contd.*

BURKUT HOSSEIN *v.* MAJIDOONISSA **3 C. L. R. 208**

NADIR HOSSEIN *v.* BISSEN CHAND BESSARAT **3 C. L. R. 437**

3. ——— *Pending proceedings—Effect of repeal.* An appeal having been filed on the 10th April 1879, a memorandum of objections under s. 561 of the Civil Procedure Code was filed by the respondent on the 18th September 1879 before the actual hearing which took place in July 1880. *Held*, that the memorandum under s. 561 of the Code as amended by s. 86 of Act XII of 1879 ought to have been filed not less than seven days before the date fixed for hearing, and was therefore inadmissible. On an application for review :—*Held per* MACLEAN, *J.*, distinguishing the case of *Ratansi Kullianji, I. L. R. 2 Bom. 148*, that nothing having been done and no proceeding having been commenced by the respondent up to 31st May 1879, under the Procedure Code as it existed prior to that date, the filing of the memorandum was governed by the present Code as amended, and it was therefore admissible. *Held per* MITTER, *J.*, that the appeal, having been filed before Act XII of 1879 was passed, was a proceeding within the meaning of s. 6 of the General Clauses Act, I of 1868, and that the new Act therefore did not affect the appeal. RAM GOBIND JUGODEB *v.* DENO BUNDHU SRI CHUNDUN MOHAPATTER . . . **9 C. L. R. 281**

4. ——— *Criminal Procedure Code, 1882, s. 558—Change of procedure—Effect on pending trial.* *S* was tried by a Sessions Court in December 1882 on charges some of which were triable by assessors, others by jury. Before the trial was concluded, the Code of Criminal Procedure, 1882, came into force. By s. 269 of that Act, all such charges are to be tried by jury. By s. 558 of the same Act, the provisions of that Act are to be applied, as far as may be, to all cases pending in any Criminal Court on 1st January 1883. *Held*, that, by virtue of s. 6 of the General Clauses Act, 1868, the trial must be conducted under the rules of procedure in force at the commencement of the trial. SRINIVASACHARI *v.* QUEEN . . **I. L. R. 6 Mad. 386**

5. ——— *Deccan Agriculturists' Relief Act Amending Act, XXII of 1882—Decree, execution of—Attachment—Sale—Proceeding—Deccan Agriculturists' Relief Act, 1879—Effect of repeal.* On the 7th of September 1870, the applicant obtained a money decree against agriculturist defendants, and, having made five applications for execution up to 1879, realized a part of the judgment-debt. On the 2nd of September 1882—that is, after the coming into force of Act XVII of 1879—the creditor made his last application for recovering the balance by attachment and sale of the lands of the debtors. On the 1st of February 1883—while the above application was pending—Act XVII of 1879 was amended by Act XXII of 1882 so as to prohibit the sale of the immoveable property of agriculturists in execution of a decree, even though such decree was passed before the date of the Act. *Held*, notwithstanding the provision of s. 6 of the General Clauses Act, I of 1868, and the attachment of the lands before the coming into operation of Act XXII of 1882, that the order for sale, having been made subsequently, was illegal, and should be set aside. SHIVRAM UDARAM *v.* KONDIBA **I. L. R. 8 Bom. 340**

6. ——— *Limitation Act, 1871, operation of—Appeals and applications.* The Limitation Act, 1871, came into operation from 1st July 1871, with respect to appeals and applications, and was not controlled by the General Clauses Consolidation Act, 1868, s. 6. GOBIND LAKSHMAN *v.* NARAYAN MARESHVAR . . . **11 Bom. 111**

BALKRISHNA *v.* GANESH . **11 Bom. 116 note**

7. ——— *Limitation Acts, 1871 and 1877—Effect of repeal.* Under s. 6 of Act I of 1868, the repeal of Act IX of 1871 by Act XV of 1877 did not affect any proceedings commenced before the repealing Act came into force. *In re Ratansi Kalianji, I. L. R. 2 Bom. 148*, followed. BEHARY LALL *v.* GOBERDHAN LALL **I. L. R. 9 Calc. 446 : 12 C. L. R. 431**

8. ——— *Registration Acts—Effect of repeal of Act.* By s. 6 of the General Clauses Act, a suit is to be governed by the Registration Law in force at the institution of the suit, and not by that which may be in force when it comes on for hearing. OGHRA SINGH *v.* ABLAKHI KOOER **I. L. R. 4 Calc. 536 : 3 C. L. R. 434**

9. ——— *Repeal of Registration Act VIII of 1871 by III of 1877—Proceedings.* *Held*, that, under the provisions of s. 6 of Act I of 1868 (the General Clauses Act), proceedings must be governed by the Act in force at the time when they were instituted. MAHOMED HOSSEIN *v.* HADZI ABDULLAH . . . . **I. L. R. 3 Calc. 727**

10. ——— *Stamp Act, X of 1862, s. 3—Offence under Stamp Act, 1862.* By s. 6 of Act I of 1868, an offence committed under s. 3 of Act X of 1862, whilst that enactment was in force, is still an offence, and may be tried under that enactment. ANONYMOUS . **7 Mad. Ap. 9**

11. ——— *Effect of repeal—Proceedings—Bengal Rent Act (VIII of 1885), s. 5.* The words "any proceedings commenced before the repealing Act shall have come into operation" in s. 6 of the General Clauses Act (I of 1868) include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. In a suit between landlord and tenant a decree was passed by the lower Appellate Court on the 28th of July 1885. Under

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GENERAL CLAUSES CONSOLIDATION ACT (I of 1868)—*concld.*

——— **s. 6**—*concld.*

the provisions of the Act then in force, namely, Bengal Act VIII of 1869, s. 102, a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November 1885. *Held*, that no appeal lay. HURROSUNDARI DABI *v.* BROJOHARI DAS MANJI **I. L. R. 13 Calc. 86**

12. ——— *Bengal Tenancy Act (VIII of 1885), s. 170—Decree for rent under Bengal Act VIII of 1869—Attachment under decree obtained under Rent Law of 1869, subsequently to the passing of Act VIII of 1885—General Clauses Consolidation Act (I of 1868), s. 6.* Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy in respect of which the rent had become due was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by s. 170 of the Bengal Tenancy Act of 1885. *Held*, that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution, the term "proceedings" in s. 6 of Act I of 1868 not including proceedings in execution after decree. DEB NARAIN DUTT *v.* NARENDRA KRISNA **I. L. R. 16 Calc. 267**

GENERAL CLAUSES CONSOLIDATION ACT (I OF 1887).

——— **s. 3, cl. (13).**

See VALUATION OF SUIT—APPEALS. **I. L. R. 13 All. 320**
I. L. R. 15 All. 363

——— **s. 7.**

See SANCTION FOR PROSECUTION—EXPIRY OF SANCTION. **I. L. R. 22 Calc. 176**

GENERAL COMMITTEE.

——— **power of—**

See HIGH COURT, JURISDICTION OF. **I. L. R. 34 Calc. 30**

GENERAL POWER OF ATTORNEY.

See CIVIL PROCEDURE CODE, 1882, s. 37. **I. L. R. 28 All. 135**

GENERAL REPUTE.

See CRIMINAL PROCEDURE CODE, s. 110. **I. L. R. 31 Calc. 783**
13 C. W. N. 244

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 35 Calc. 243**

GENERAL RULES OF RAILWAY COMPANY.

See RAILWAY COMPANY. **I. L. R. 36 Calc. 819**

GHAT.

See BURNING GHAT. **I. L. R. 33 Calc. 1290**

GHATWALI TENURE.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—EXPECTANCY. **I. L. R. 28 Calc. 483**

See PARTITION—RIGHT TO PARTITION—PARTITION OF PORTION OF PROPERTY. **5 C. W. N. 185**

See RIGHT OF OCCUPANCY. **I. L. R. 33 Calc. 630**

1. ——— **Nature of tenure**—*Perpetual tenure.* Ghatwali tenures are perpetual holdings subject to condition of service. LEELANUND SINGH *v.* MONORUNJAN SINGH . **5 W. R. 101**

2. ——— *Chakeran tenure—Grant of ghatwali tenure.* In the absence of long usage, a ghatwali grant confers a mere chakeran holding or interest. *In re* SARWAN SINGH **2 Ind. Jur. N. S. 149**

3. ——— *Ghatwals of Khurruckpore—Perpetual hereditary tenure.* The ghatwals of Khurruckpore hold a perpetual hereditary tenure at a fixed jumma payable in money and service, and cannot be evicted by the zamindar except for misconduct. MUNRUNJUN SINGH *v.* LEELANUND SINGH . . . **3 W. R. 84**

4. ——— *Right of resumption when service not required.* In the absence of express words to the contrary, ghatwali lands held under a lease which neither confirms nor recognizes the pre-existing status of the ghatwals, nor confers on them any right other than that of holding the lands at a fixed rate as long as ghatwal service is required from them, are resumable by the zamindar when that service is no longer required. LEELANUND SINGH *v.* SARWAN SINGH . **5 W. R. 292**

5. ——— *Right to hold tenure on cessation of service.* When ghatwals hold land, not under a sanad conveying an hereditary indefeasible right, but on payment of a quit-rent, with enjoyment of the profits of the land in lieu of wages, such possession, however long, would not entitle them to hold the land at a fixed jumma, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them. LEELANUND SINGH *v.* NUSSEEB SINGH **6 W. R. 80**

6. ——— **Succession to ghatwali tenure**—*Female holder.* Succession to ghatwalis is regulated solely by the nature of the ghatwali tenure which descends undivided to the party who succeeds to and holds the tenure as ghatwal. A woman is not incapable of holding a ghatwali tenure. KUSTOORA KOOMAREE *v.* MONOHUR DEO. GOVERNMENT *v.* MONOHUR DEO **W. R. 1864, 39**

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GHATWALI TENURE—*contd.*

7. ——— *Descent of ghatwali estate—Females.* A ghatwali estate is not necessarily held by males to the exclusion of females. DOORGA PERSHAD SINGH *v.* DOORGA KOOEREE **20 W. R. 154**

8. ——— *Services dispensed with.* Although in custom the ghatwali tenure descended from father to son, no succession was legal or valid till confirmed by the zamindar and reported by him to the Government authorities. Where Government has dispensed with the services of the ghatwals, the zamindar is under no obligation to continue to appoint, and may, on a vacancy occurring, settle the tenure as he pleases. MAHBUB HOSSEIN *v.* PATASU KUMARI **1 B. L. R. A. C. 120 : 10 W. R. 179**

9. ——— *Power of Commissioner of Revenue—Disqualification.* A Commissioner of Revenue is not warranted by law, on the demise of a ghatwal, in considering the eligibility of rival claimants to the tenure (a perpetual and descendible one), and in rejecting the claims of the natural heir on considerations purely moral,—*e.g.*, his having evinced a want of filial respect and dutiful feeling to his father. LALL DHAREE ROY *v.* BROJO LALL SINGH . . . **10 W. R. 401**

10. ——— *Right of succession to ghatwali tenure in Beerbhoom—Beng. Reg. XXIX of 1814, s. 2—"Descendants," meaning of—Impartible property—Separate property—Hindu law, Mitakshara.* Ghatwali tenures in Beerbhoom are tenures to be held in perpetuity, and are descendible from generation to generation subject to certain conditions and obligations, and it would be inconsistent with the true character of these tenures to hold that the Legislature intended that they should devolve on issue of the body only, and not on heirs generally according to the law which may govern such succession. The word "descendants" therefore in s. 2 of Bengal Regulation XXIX of 1814 is not to be construed in its restricted meaning, but includes the widow of a deceased ghatwal, who may therefore be one of his heirs. *Lall Dharee Roy* v. *Brojo Lall Singh, 10 W. R. 401,* and *Kustoree Koomaree* v. *Monohur Deo, W. R. Gap Number (1864) 39,* referred to. Where a ghatwali tenure was admittedly impartible and governed by Mitakshara law, and the only heirs were the widow and the brother of the late ghatwal:—*Held* (it being found on the evidence that the brothers had separated, and that the ghatwali tenure was the exclusive property of the late ghatwal), that his widow was his heiress according to Mitakshara law. Although, according to the decision of the Privy Council in *Chintamun Singh* v. *Nowlukho Koonwari, I. L. R. 1 Calc. 153 : 13 W. R. P. C. 21,* impartible property is not necessarily separate property, yet, *semble,* that with reference to the peculiar character of ghatwali tenures as described in Regulation XXIX of 1814 they were intended to be the exclusive property of the ghatwal for the time being and not joint family property in the proper sense of the term. CHHATRADHARI SINGH *v.* SARASWATI KUMARI **I. L. R. 22 Calc. 156**

11. ——— **Suit for khas possession of ghatwali lands**—*Lands in decennially-settled estate.* A suit for khas possession by Government will not lie in respect of ghatwali lands admittedly included in a decennially-settled estate. GADHADHUR BANERJEE *v.* GOVERNMENT . **6 W. R. 326**

12. ——— **Ghatwal becoming defaulter**—*Beng. Reg. XXIX of 1814—Transfer of tenure.* When a ghatwal becomes a defaulter, it is in the power of the authorities, according to Regulation XXIX of 1814, to transfer his tenure, and that power is not put an end to by the money being offered before the tenure is actually made over to another person. CHITTRO NARAIN SINGH TEKAIT *v.* ASSISTANT COMMISSIONER OF SONTHAL PERGUNNAHS . . . **14 W. R. 203**

13. ——— **Resumption and assessment**—*Beng. Reg. I of 1793, s. 8, cl. 4.* The ghatwali lands in the zamindari of Khurruckpore are not liable to resumption and re-assessment under cl. 4, s. 8, Regulation I of 1793, relating to thannah or police establishments. LEELANUND SINGH *v.* GOVERNMENT OF BENGAL **4 W. R. P. C. 77 : 6 Moo. I. A. 101**

14. ——— *Resumption of service tenure.* In 1775 a rent-free sanad was granted to *M* for having put down wild elephants, the consideration in future being to cultivate, and keep up a body of men, and take care of the raiyats. *M* died, and a fresh sanad was in 1786 granted to *K* and *R*, they being thought to be his heirs ; but in 1807, *M*'s true heirs having established their title, the Government gave them a fresh sanad in lieu of the one to *K* and *R*, reciting the circumstances ; both these sanads were to cultivate, keep up a body of men, keep off elephants, and attend to the safety of the raiyats. *Held,* that this was not a service tenure that could be resumed, and the subject of service tenures was explained. FORBES *v.* MIR MAHOMED TAKI . . . **5 B. L. R. 529**
14 W. R. P. C. 28
13 Moo. I. A. 438

15. ——— *Terms implying hereditary tenure—Construction of grant.* Suit for resumption of a ghatwali tenure. *Held,* that the sanad in this case was personal to the grantee, and that it did not confer on his descendants or representatives a hereditary transferable and permanent tenure at a fixed rate. *Held,* also, that the clearest and most precise definition, such as istemrari and maurasi, with the addition of *nuslun bad nuslun* (from generation to generation), would be necessary to support the appeal. SONA *v.* LEELANUND SINGH **5 W. R. 290**

16. ——— **Assessment of rent**—*Evidence of grant—Former dismissal of suit for rent.* Long possession (presumably from the Decennial Settlement) and gradual cultivation by a ghatwal on payment of a quit-rent (and not merely possession

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GHATWALI TENURE—*contd.*

without cultivation) are evidence of an implied grant which protects the ghatwal from enhancement or assessment on the land so cultivated. An adjudication by a competent Court made sixty years ago dismissing the landlord's claim to rent from the ghatwal is evidence of the highest order as to the right of the ghatwal in a suit brought by a landlord for a declaration of right to take rent in future. ERSKINE *v.* MANICK SINGH GHATWAL

6 W. R. 10

17. ——— *Suit to assess ghatwal—Act X of 1859, ss. 3 and 15.* Where it was admitted that the ghatwal defendant's tenure dated from a time anterior to the Decennial Settlement, and before the creation of the zamindari, the defendant is protected, whether under s. 3 or under s. 15, Act X of 1859, from any fresh assessment. ERSKINE *v.* GOVERNMENT . . **8 W. R. 232**

18. ——— **Enhancement of rent**—*Hereditary tenure—Services, cessation of—Act XI of 1859, s. 37.* The plaintiff, an auction-purchaser of a zamindari at a sale for arrears of revenue, sued in 1863 to eject the defendants from certain mouzahs included in the zamindari, and which were held by the defendants under a ghatwali tenure, on the ground that the service for which the grant was made was no longer required, and that the sanad or grant contained no words of inheritance. The defendants proved that the grant was made in the year 1743 to *M*, after whose death, the land was in the possession of *M*'s heir-at-law prior to the Permanent Settlement; and that he and his ancestors had enjoyed uninterrupted possession in direct succession from a period prior to the Permanent Settlement at a quit-rent of R61 per annum. The Collector appeared on behalf of the Government, and stated that the ghatwali services had not been dispensed with by the Government, but might be required at any time. *Held*, the plaintiff was not entitled to eject the defendants. *Per* PEACOCK, *C.J.*—The case falls within, and is protected by, s. 37 of Act XI of 1859. *Per* TREVOR and JACKSON, *JJ.*—S. 37 of Act XI of 1859 does not apply to the case. *Quære:* Is the zamindar entitled to enhance the rent of a ghatwal in lieu of service? KOOLDEEP NARAIN SINGH *v.* MOHADEO SINGH

B. L. R. Sup. Vol. 559 : 6 W. R. 199

Held, on appeal to the Privy Council, that a purchaser at an auction sale cannot, where lands are held under an hereditary ghatwali tenure originally created before the Decennial Settlement and at a fixed rent, resume those lands on the suggestion that the ghatwali services are no longer required. The omission of words of inheritance does not show conclusively that a sanad is not hereditary: it being shown that a ghatwali tenure had descended from father to son for several generations, it was held that it was an hereditary tenure. KOOLDEEP NARAIN SINGH *v.* GOVERNMENT OF INDIA

11 B. L. R. 71
14 Moo. I. A. 247

GHATWALI TENURE—*contd.*

19. ——— *Grants prior to Permanent Settlement—Beng. Reg. VIII of 1793, s. 51, cl. 1—Enhancement of rent, suit for.* Where grants of land had been made prior to the Permanent Settlement on ghatwali tenure at a fixed rent, and the Government subsequently dispensed with the services on the part of the zamindar:—*Held*, in a suit by the zamindar to enhance the rents, that as long as the ghatwals were able and willing to perform the services, the zamindar had no right to enforce payment of an enhanced rent on the ground that the services were no longer required. The ghatwals are dependent talukdars within the meaning of Regulation VIII of 1793, and are protected from enhancement by cl. 1 of s. 51 of that Regulation. LEELANUND SINGH *v.* MUNRUNJUN SINGH

I. L. R. 3 Calc. 251

20. ——— *Resumption—Purchaser at auction-sale, rights of—Beng. Reg. XLIV of 1793—Enhancement of rent—Refund of revenue.* Where, prior to the Permanent Settlement grants of land had been made on ghatwali tenure at a fixed rent, and the Government subsequently dispensed with the performance of the ghatwali services on the part of the zamindar:—*Held*, in a suit by the zamindar to resume the lands, that as long as the ghatwals were willing and able to perform the services, the zamindar had no right to put an end to the tenure on the ground that the services were no longer required. A purchaser at a sale for arrears of Government revenue is not entitled, under Regulation XLIV of 1793, to cancel a ghatwali tenure created subsequently to the Permanent Settlement. *Quære:* Whether he would be entitled to enhance the rent. Where lands granted on ghatwali tenure were, in accordance with a decision of the Special Commissioner, resumed by Government, who made a settlement with the ghatwals, under which the latter continued to pay to the Government half the sum assessed as revenue, reserving the other half to themselves, and the resumption-proceedings were subsequently reversed by the Privy Council:—*Held*, that the ghatwals were entitled to a refund of the sum paid by them to Government less the sum which the zamindar ought to have received from them for rent during the time they had paid to Government. LEELANUND SINGH *v.* MUNORUNJUN SINGH. MUNORUNJUN SINGH *v.* LEELANUND SINGH

13 B. L. R. 124
L. R. I. A. Sup. Vol. 181

21. ——— **Resumption**—*Compensation.* In the Khurruckpore ghatwali mehals the profits of the lands, minus the quit-rent paid to the zamindar, represented the remuneration given to the ghatwals for police services. Government illegally resumed those lands, dispensing with the services of the ghatwals, and settled the tenures with the ghatwals at half the rent current in that part of the country. The resumption proceedings having been set aside it remained to determine to whom and in what proportions Government should refund the half jumma taken by it as rent from the ghatwals during the period of settlement. *Held*,

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GHATWALI TENURE—*contd.*

that, inasmuch as the ghatwals rendered no service during the period of settlement, the moiety of the jumma retained by them was ample compensation for any loss they might have sustained, and the zamindar was entitled to receive the whole of the moiety taken by Government, partly as quit-rent due to him and partly as compensation for loss of the ghatwals' services during the continuance of the settlement. LEELANUND SINGH *v.* GOVERNMENT **2 B. L. R. A. C. 114**

22. ——— Acquisition of land—*Compensation.* Where land forming part of a ghatwali tenure in the district of Beerbhum was taken up for public purposes :—*Held*, that neither the zamindar nor the under-tenants of the ghatwal could claim a proportionate share in the compensation-money payable for such land. The money so obtained carries with it all the incidents of the original ghatwali tenure, and the ghatwal for the time being is entitled only to the interest accruing therefrom during his life-time. RAM CHUNDER SINGH *v.* JOHER JUMMA KHAN **14 B. L. R. Ap. 7 : 23 W. R. 376**

23. ——— Dismissal of ghatwal—*Jurisdiction of Civil Court.* The Civil Courts cannot interfere to reinstate a ghatwal, who has been dismissed by the police authorities, in the land which he formerly held as ghatwal. The right to possess the land depends on the tenure of the office. DEBEE NARAIN SINGH *v.* SREE KISHEN SEIN **1 W. R. 321**

24. ——— *Misconduct of ghatwal—Forfeiture of tenure on dismissal.* The dismissal of a ghatwal will carry with it the forfeiture of his tenure. SECRETARY OF STATE *v.* PORAN SINGH . . . . **I. L. R. 5 Calc. 740**

25. ——— Arrears of rent, liability of successor for—*Service tenure.* *A*, the holder of a service tenure, subject to a quit-rent to the zamindar, died, leaving his rent for the last three years unpaid. *B*, his son, succeeded him in the tenure. *Held*, that the zamindar could not sue *B* as *A*'s successor in the tenure for *A*'s arrears of rent. NILMONEE SINGH *v.* MADHUB SINGH **1 B. L. R. A. C. 195**

See NILMONEE SINGH *v.* BUKRONATH SINGH **10 W. R. 255**

26. ——— Debts of deceased holder, liability for. The rents of a ghatwali tenure are not liable for the debts of the former deceased holder of the tenure. BINODE RAM SEIN *v.* DEPUTY COMMISSIONER OF THE SONTHAL PERGUNNAHS **6 W. R. 129 : s.c. on review 7 W. R. 178**

27. ——— Power of alienation—*Transfer of tenure.* A ghatwal cannot give a pottah of his tenure binding a subsequent ghatwal. The rights and interests of each ghatwal in his tenure last only for his life. JOGESWUR SIRKAR *v.* NIMAI KARMAKAR . . . . **1 B. L. R. S. N. 7**

GHATWALI TENURE—*contd.*

28. ——— *Reg. XXIX of 1814—Alienation by ghatwal in Beerbhoom—Ejectment by Court of Wards.* A ghatwal of Beerbhoom granted a lease to *A*. After *A* and his heirs had been in possession of the lands under the lease for sixty years, a surburakar appointed by the Court of Wards for the estate of the heir of *A*'s lessor, then a minor, entered upon the lands, and ejected the person then in possession under the lease. *Held*, that, notwithstanding the ghatwals of Beerbhoom (independently of the recent Statute) had not the power of alienation, still having an estate in perpetuity so long as the services were performed and the rent paid, the lease could not be regarded as a nullity, and the surburakar was not justified in ejecting the tenant without legal process. RUNGOLALL DEO *v.* DEPUTY COMMISSIONER OF BEERBHOOM. DEPUTY COMMISSIONER OF BEERBHOOM *v.* RUNGOLALL DEO **Marsh 117 : W. R. F. B. 34 1 Ind. Jur. O. S. 34 : 1 Hay 200**

29. ——— Ghatwals of Beerbhoom, leases granted by. Permanent leases granted by the ghatwals of Beerbhoom prior to the Decennial Settlement, for the due performance of the police duties for which the lands were originally granted to the ghatwals, and which have been held from generation to generation, cannot be set aside at the instance of the present sirdar ghatwals. The creation of such under-tenures is not beyond the powers of the ghatwals. MUKURBHANOO DEO *v.* KOSTOORA KOONWAREE . . **5 W. R. 315**

30. ——— *Power creating incumbrances.* A ghatwal in the district of Beerbhoom is not competent to grant a lease of the whole or a portion of his ghatwali tenure in perpetuity. Ghatwali tenures in Beerbhoom are grants of land by the Government to individuals for the performance of certain police duties. These tenures are heritable, but the incomes arising from them cannot be charged or encumbered by the ghatwal in possession so as to bind his successor. GRANT *v.* BANGSI DEO . . **6 B. L. R. 652 : 15 W. R. 38**

31. ——— Mokurari lease—*Power of ghatwal to grant mokurari leases—Jungleburi leases.* Any presumption that there may be against the right of a ghatwal to grant mokurari leases cannot hold good against such leases, when granted in good faith, for the clearance of jungle. DAVIS *v.* DEBEE MAHTOON . . . . **18 W. R. 376**

32. ——— Sale of attachment in execution of decree. Ghatwali tenures are not liable either to sale or attachment in execution of decrees. The surplus proceeds of such a tenure collected during the lifetime of the judgment-debtor are liable to be taken in execution as being personal property, but profits accumulated after the death of the judgment-debtor are not so liable. KUSTOORA KOOMAREE *v.* BINODERAM SEIN **4 W. R. Mis. 4**

33. ——— *Liability to attachment in execution of decree—Execution for rents due to ghatwal during his lifetime.* After deduction of all necessary outgoings from the total

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GHATWALI TENURE—*contd.*

rents due to a ghatwal, the residue, being his own absolute property, may be attached in execution of a personal decree against him. *Bally Dobey* v. *Ganei Deo, I. L. R. 9 Calc. 388,* distinguished. *Kustoora Kumari* v. *Benoderam Sen, 4 W. R. Mis. 5,* approved. RAJKESHWAR DEO *v.* BUNSHIDHUR MARWARI . . . . **I. L. R. 23 Calc. 873**

34. ——— *Ghatwals of Khurruckpore.* The lands of the ghatwals of Khurruckpore are not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees, except with the consent of the zamindar and his approval of the purchaser as a substitute for the outgoing ghatwal. LEELANUND SINGH *v.* DOORGABUTTY . . . . **W. R. 1864, 249**

35. ——— *Sale of rights and interest in ghatwali tenure.* The proprietor *K* of the ghatwali talukh in Bhagulpore sold one mouzah out of it to defendant *L.* Some time afterwards *K*'s right was sold in execution of a decree, and purchased by plaintiff *C,* who obtained a sanad from the zamindar as ghatwal. Subsequently the zamindar, having compounded with Government for a money payment in lieu of ghatwali services, gave *G* a mokurari pottah of the ghatwali estate. *G* then sued *L* for possession of the mouzah purchased by the latter. *Held,* that *K* had no power to sell the whole of the ghatwali estate to *L* without the consent of the zamindar; and that, when he sold a part, the interest which he conveyed could not be higher than what he himself had; accordingly when his entire rights and interests were sold, those of *G* ceased. *Held,* that the zamindar, by granting a fresh ghatwali sanad, appointed the grantee to the office of ghatwal, and disallowed the sale made by *K* to *G.* LALLA GOOMAN SINGH *v.* GRANT **11 W. R. 292**

36. ——— *Nature of such tenure—Sale of tenure—Misdescription in proclamation of sale—Beng. Reg. XXXIV of 1814.* In the area of a zamindari were included at the Permanent Settlement the mouzahs which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zamindari assets on which the jumma of the latter was fixed. *Per* JACKSON, *J.*—Where a jaghir is held by a person subject either to the appointment or approval of Government, and with an additional burden of public duty to the Government, such a jaghir cannot be attached and sold in satisfaction of the debts of the jaghirdar's predecessor in title as land coming into his possession from the hands of the deceased jaghirdar, as the appointment and approval of the Government deprive the jaghir of the character of simple heritable property. *Per* AINSLIE, *J.* (dissenting)—The fact that the Government could dismiss a ghatwal and so cut off the descent does not destroy the generally hereditary character of the holding, or make such lands, when included in the Permanent Settlement, police lands resumable by Government under cl. 4, s. 8 of Regulation I of 1793. *Per* WHITE, *J.*—Where a tenure is held under services which are not private or personal to the zamindar, but are of a public nature, a proclamation issued for the sale of the tenure describing it as an ordinary rent-paying one and ignoring the important fact that the tenure is a service one is bad, and is such a misdescription of the tenure as would vitiate a sale held under such a proclamation. BUKRONATH SINGH *v.* NILMONI SINGH **I. L. R. 5 Calc. 389 : 4 C. L. R. 583**

Held, on appeal to the Privy Council, that, whether the jaghir was a ghatwali tenure or not within the meaning of the term as applied in Regulation XXIX of 1814 (the zamindari being Pachit, adjoining, and at one time included in, Birbhoom), the jaghir was analogous of such tenure as described in the preamble to the Regulation. *Held,* also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained as before public services, and continued to be due to the Government. That the zamindar became entitled only to the rent or revenue which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahomedan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of the jaghir mehal upon the death of the holder and alienation during his life. It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar so approved, as assets by descent in the possession of the latter. *Leelanund Singh* v. *Government of Bengal, 6 Moo. I. A. 101,* followed. NILMONI SINGH DEO *v.* BUKRONATH SINGH **I. L. R. 9 Calc. 187 L. R. 9 I. A. 104**

37. ——— *Execution of decree—Attachment—Shikmi ghatwali tenure.* A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder. BALLY DOBEY *v.* GANEI DEO . . . . **I. L. R. 9 Calc. 388**

38. ——— **Ghatwali tenures in Khurruckpore**—*Transferability of ghatwali tenures—Mitakshara law inapplicable to ghatwali tenure—Family custom inapplicable to ghatwali tenure.* A ghatwali tenure in Khurruckpore is transferable if the zamindar assents and accepts the transfer. Such assent and acceptance may be presumed from the fact of the zamindar having made no objections to a transfer for a period of over twelve years, and when such a fact has been found, a Court ought to recognize such a transfer. In a suit bought to recover possession of a ghatwali tenure situated in Khurruckpore which had been brought

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GHATWALI TENURE—*contd.*

to sale in execution of a decree against the previous ghatwali and purchased by the defendants, the plaintiffs sought to rely on the Mitakshara law and certain family custom for the purpose of establishing their right. The lower Court, appyling such law and custom, found that the tenure was transferable, and that it was joint ancestral property, and gave the plaintiffs a decree for two-thirds of the property, and the defendants a decree for the remaining one-third, holding that to be the extent of the previous ghatwali interest which had been purchased by the defendants. *Held*, on appeal, that the decision of the lower Court was erroneous; that in dealing with a ghatwali tenure the Court must have regard to the nature of the tenure itself and to the rules of law laid down in regard to such tenures, and not to any particular school of law or the customs of any particular family; and that a ghatwali, being created for specific purpose, has its own particular incidents, and cannot be subject to any system of law affecting only a particular class or family. ANUNDO RAI *v.* KALI PROSAD SINGH

I. L. R. 10 Calc. 677

39. ——— *Ghatwali tenures in Bhagulpore—Ghatwal's right of alienation—Sale of ghatwal's estate in execution of decree against him.* Ghatwali tenures are rendered by their origin and incidents distinct in some particulars from other inheritances, and to them the law of the Mitakshara, to its full extent, is not entirely applicable; yielding in their case to a custom, though only to the extent of the custom proved. On a question whether the sale of a ghatwali tenure in the Kharagpore zamindari, in Bhagulpore, in execution of a decree against the ghatwal, had transferred the inheritance as against the ghatwal's son:—*Held*, in regard to a proved custom, that the ghatwali was not inalienable, but might be aliened by the ghatwal or sold in execution of a decree against him, if such alienation was assented to by the zamindar, this power of alienation not being limited to the life-interest of the ghatwal for the time being, but forming part of this right and title to the ghatwali. KALI PERSHAD *v.* ANAND ROY

I. L. R. 15 Calc. 471
L. R. 15 I. A. 18

40. ——— **Perpetual lease**—*Ghatwal, right of, to grant perpetual lease—Bengal Tenancy Act (VIII of 1885), ss. 5, 181—Tenure—Holding—Contract.* As a general principle, a *ghatwal* is not competent to grant a lease in perpetuity, and his successor is not bound to recognize such an incumbrance. *Grant and the Court of Wards* v. *Bungshee Deo, 15 W. R. 38*, followed. A lease in perpetuity, granted to the plaintiff by defendant No. 7 who is a *ghatwal* jointly with the precedessors of the other *ghatwal* defendants, is inoperative even against defendant No. 7, as the lease is one and indivisible. *Held*, also, on the construction of the lease and findings of the lower Appellate Court, that the lease created a tenure and not a *raiyati* holding. NARAIN MULLICK *v.* BADI ROY (1901)

I. L. R. 29 Calc. 227 : s.c. 6 C. W. N. 94

GHATWALI TENURE—*concld.*

41. ——— **Heritability**—*Ghatwali tenure in Bankura—Permanent right—Dismissal.* A *ghatwali* tenure existed from before the grant of the Dewani to the East India Company and for many generations descended from father to son; it was held upon payment of a quit-rent and the performance of *ghatwali* services; such quit-rent was paid at a fixed amount from time long antecedent to the Permanent Settlement and was recognised at the time of the Settlement, when the lands were included within the *mal* lands of the zamindari and the revenue was assessed upon the footing that the quit-rent was fixed in perpetuity. *Held*, that the tenure was not merely heritable, but also permanent, and the holder was bound to perform the services; and that a tenure of this description could not be determined or resumed by the zamindar or the Government on the ground that the services were no longer necessary or had been dispensed with. *Koolodeep Narain Singh* v. *Mahadeo Singh, B. L. R. Sup. Vol. 559 : 6 W. R. 199*, followed. If it be one of the incidents of a *ghatwali* tenure, either under the original grant or engrafted on it by usage that, when the *ghatwal* becomes incapable of personally performing the services, a deputy (preferably the next successor) may be appointed to act on his behalf by the Magistrate, it does not follow that an incapacity on the part of the deputy to discharge adequately the duties incidental to the office operates as a forfeiture of the appointment of the principal. Where during the lifetime of a *ghatwal* his son, who was appointed deputy, was dismissed: *Held*, that the dismissal of the son did not amount to the dismissal of his faher, and that after the father's death the son was entitled to succeed, although during his father's lifetime he had been dismissed, while acting as the deputy of his father. JOGENDRA NATH SINGH *v.* KALI CHARAN ROY (1905) . . . **9 C. W. N. 663**

GIFT.

See BENAMI . **10 C. W. N. 570**

See CONTRACT ACT, S. 23—ILLEGAL CONTRACTS—GENERALLY.

I. L. R. 2 All. 433
I. L. R. 6 All. 313

See CONTRACT ACT, S. 25.

I. L. R. 2 All. 891

See HINDU LAW—

ADOPTION—WHO MAY OR MAY NOT ADOPT . **I. L. R. 26 Bom. 491**

GIFT.

INHERITANCE—SPECIAL HEIRS—MALES—HUSBAND, HEIRS OF.

I. L. R. 28 Calc. 311
I. L. R. 33 Calc. 23, 947
16 C. W. N. 1

See HINDU LAW—WIDOW—INTEREST IN ESTATE OF HUSBAND—BY DEED, GIFT, OR WILL . **I. L. R. 1 Calc. 104**
I. L. R. 5 Calc. 684
I. L. R. 8 Calc. 357
I. L. R. 10 All. 495

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GIFT—*contd.*

See HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION . 5 W. R. P. C. 131
2 Moo. I. A. 331
I. L. R. 7 Bom. 491
I. L. R. 1 Mad. 307
I. L. R. 10 All. 407
I. L. R. 14 All. 377

See HINDU LAW—WILL—CONSTRUCTION OF WILLS . I. L. R. 36 Calc. 75

See LIFE ESTATE . 5 C. W. N. 569

See MAHOMEDAN LAW—
ENDOWMENT I. L. R. 30 Calc. 666
GIFT . . 10 C. W. N. 207
L. R. 34 I. A. 167

See MALABAR LAW—GIFT.

See PARSIS . I. L. R. 5 Bom. 506
I. L. R. 6 Bom. 151
I. L. R. 22 Bom. 355

See PRACTICE . I. L. R. 29 Bom. 133

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES.
I. L. R. 26 Mad. 365

See STAMP ACT, 1879, SCH. I, ART. 36.
I. L. R. 12 Mad. 89
I. L. R. 7 Bom. 194

See SUCCESSION ACT.
I. L. R. 30 Bom. 500

See TITLE . I. L. R. 36 Calc. 311

See TRANSFER OF PROPERTY ACT.
10 C. W. N. 717

See TRANSFER OF PROPERTY ACT, s. 123.
I. L. R. 34 Calc. 853
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See TRUST . . 8 C. W. N. 918

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I. L. R. 33 Calc. 773

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See WILL—CONSTRUCTION.
6 C. W. N. 321
I. L. R. 26 Bom. 319
I. L. R. 32 Bom. 214

——— **for maintenance—**

See CONTRACT—CONSTRUCTION OF CONTRACTS . . L. R. 28 I. A. 198

——— **registration of, after death of donor—**

See REGISTRATION ACT, 1877, s. 17.
I. L. R. 25 Mad. 672

——— **to a class—**

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.

See TRUST . I. L. R. 26 Bom. 449

GIFT—*contd.*

——— **to a class—***concld.*

See WILL—CONSTRUCTION.
I. L. R. 4 Calc. 304, 670

——— **to daughter by proprietor of Betia Raj.**

See TITLE . I. L. R. 36 Calc. 311

——— **to unborn persons—**

See MAHOMEDAN LAW.
I. L. R. 36 Calc. 431

——— **validity of—**

See MAHOMEDAN LAW—GIFT.
L. R. 34 I. A. 167

——— **void for remoteness.**

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.

1. ——— **Subsequent condition attached to gift**—*Void condition.* To a gift divesting the donor of all his interest in certain property, a condition cannot afterwards be attached. Where a gift completed by transfer rested on a valid consideration at the time when it was made:—*Held*, that, even assuming that a condition could be afterwards imported into the transaction, and that condition an immoral one, this would not invalidate the gift, the general rule of law being that a gift to which such a condition is attached remains a good gift while the condition is void. A gift of villages was complete, being followed by transfer of possession. Afterwards in a petition to the Collector for "dakhil kharij" between the parties, the donor stating the gift added that it was on certain conditions: *Held*, that the petition must be treated as ineffective for the purpose of adding any condition. RAM SARUP *v.* BELA . . . . I. L. R. 6 All. 313
L. R. 11 I. A. 44

Affirming the decision of the High Court in LACHMI NARAIN *v.* WILAYATI BEGAM
I. L. R. 2 All. 433

2. ——— **Construction of gift as to quantity of estate given**—*Gift when operative without delivery of possession—Hindu law.* The rule as to the construction of the language in which a gift is made, independently of the "transfer of Property Act," Act IV of 1882 (which may or may not have been expressed so as to lay down, in favour of absolute gifts, a rule more positive), is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention. A gift being thus expressed,—"I put a stop to my interest in those talukhs, and withdraw my enjoyment thereof, and I make them over to you,"—*Held*, that this must be read with what preceded it, *viz.*, "in order that you may perform those religious ceremonies, celeberate the festivals satis-

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GIFT—*contd.*

factorily, and may provide for your own support, by having the property under your authority and control;" and that the words of gift must be taken to be limited by the purpose of the gift; the whole taken together showing that the donor's intention was that the donee should take the property for life only. *Held*, also, that, consistently with the authorities in the Hindu law, a gift, where the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession; and that where a donee or vendee is, under the terms of the gift or sale, entitled to possession, there is no reason why such gift or sale, though not accompanied by possession, whether of moveable or immoveable property (where the gift or sale is not of such a nature as would make the giving effect to it to be contrary to public policy), should not operate to give the donee or vendee a right to obtain possession. KALIDAS MULLICK *v.* KANHAYA LAL PUNDIT . . . **I. L. R. 11 Calc. 121 L. R. 11 I. A. 218**

3. ——— Gift of land in consideration of performance of services—*Failure to perform services—Obligation to restore land—Revocable gift.* Plaintiff's father and defendant entered into an agreement in 1850, by which the former delivered over certain lands to the latter in consideration of his promises to perform certain services. Plaintiff brought this suit for restoration of the land, alleging that defendant had failed to perform the services. Defendant denied failure to perform, and pleaded that the contract was not revocable. *Held*, in special appeal, reversing the decisions of the lower Courts, that the question was whether there was in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side was the presupposition of the continuous existence of the gift on the other, or whether there was a mere gift with the charge upon it, the primary intent being to give; that this was a question of construction; and that in the present case, taking the agreement and counterpart together, there was clearly a covenant for the hereditary performance of the services. KACHUR SURRAYA *v.* BENGAL SANTAPPAIYA . **7 Mad. 167**

4. ——— Gift of Government promissory notes—*Necessity of endorsement—Intention.* The plaintiffs, *M* and *R*, were Parsis, and were married in the year 1851. The defendant was the widow of *B M* who was the father of the plaintiff *R*. The plaintiffs sued to recover from the defendant certain Government promissory notes which they alleged had been presented by *B*, to *M* at her marriage for her sole and separate use. They alleged that the said notes, then of the nominal value of R1,500, were endorsed in the name of the said *B*, and had been deposited by him for safe custody with *M*'s grandfather *J*; that the said *B* during his life used from time to time to receive the said notes from *J*, and draw the interest thereon for *M*; that *B* died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw the interest for *M*; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for *M*; that the plaintiffs had been living with the defendant until shortly before the present suit, and, having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband *B* had presented *M* with Government notes for her separate use. She alleged that the notes which had been deposited by *B* with *J* were her own separate property, and not *M*'s; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with *J* had been disposed of by *B* in his lifetime with her consent; that in 1869 she obtained the remaining notes from *J* and sold them, and applied the proceeds to her own benefit. At the hearing, it was proved that on the occasion of the plaintiff's marriage presents were made to *M* both by her own family and by that of the bridegroom *R*. Two accounts were then opened in the books of the firm of *J N & Co.*, of which *M*'s grandfather *J* was a partner, one of which showed her acquisitions from her own family and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August 1854) to the effect that the father-in-law of *M* had bought two Government notes for R1,500 in *M*'s name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of *B* and *J*, in which the said Government notes were alluded to as the property of *M* and as having been purchased with her moneys. In 1864 *B* died without having endorsed the notes over to *M* or to any one in her behalf, and they remained in his name in the hands of *J* until 1869, when the defendant got possession of them. *Held*, that, the notes not having been endorsed to *M*, there was no valid gift of them to her by *B*. If *B* intended to bestow the notes as a gift only, without any intention that his purpose should be effected otherwise than by a substitution of ownership, his purpose remained unfulfilled, and the Court could not fulfil it for him. Without endorsement, or something equivalent, a gift of Government stock cannot be completed. Where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a will. *Held*, further, that, having regard to the general practice among Parsis, the conduct of *B* in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by *M* and her children. Among Parsis a gift may be made to the separate use of a married woman or of a woman about to be married. MERBAI *v.* PEROZBAI . . . **I. L. R. 5 Bom. 268**

5. ——— Transfer by gift—*Failure to prove alleged inequitable advantage taken by donee*

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GIFT—*contd.*

over donor—Contract Act (IX of 1872), ss. 16 and 17. The heir to a share in an ancestral estate, out of possession and at a time when he expected that his right would be contested by another claimant, made a gift of his title to his brother's son, providing that he, the donor, should have nothing to do with the cost of getting possession. After the donee had obtained possession, the donor sued to have the gift set aside. The gift, having been maintained in the first Court, was set aside by the Appellate Court on the ground that, it having been made without consideration and imprudently as regarded the donor's interests, he had had no opportunity to obtain any advice from an independent person, but had only had that advice which came from, or was given on behalf of, the donee. Thus the gift was not an equitable transaction which the Court should enforce. The Appellate Court had, however, affirmed the finding of the first Court, that the donor, with full knowledge of the contents of the deed, had voluntarily executed it, and that he had been apprehensive of incurring costs in litigation in getting possession of his inherited share. *Held*, that the Appellate Court was in error in taking it that the question was whether the transaction was an equitable one which that Court should enforce. The defendant was not asking the Court to enforce the deed ; and the reason why the gift was without consideration was explained by the circumstances. The reasons given by the Appellate Court for reversing the decision of the first Court were insufficient. It did not appear that unsound advice was given to the donor by, or on behalf of, the donee, or that confidence was reposed by the donor so as to bring the case within s. 16 of the Indian Contract Act, 1872. There was only the donor's statement that he had confidence, which was not sufficient proof of it. Whether a gift made as this had been should be set aside, as being inequitable between the parties, would depend on the circumstances existing at the time of the gift, and not on subsequent events. GANGA BAKSH *v.* JAGAT BAHADUR SINGH . . **I. L. R. 23 Calc. 15**
L. R. 22 I. A. 153

6. ———— Gift of land—*Transfer of property Act (IV of 1882), s. 123—Retraction by donor prior to registration—Effect of registration contrary to wishes of donor.* Where a donor made a gift of land to the plaintiff, but prior to registration retracted his consent, upon which the District Registrar ordered compulsory registration : *Held*, that the donor could not be compelled to register contrary to his wishes, and that the registration was void and the gift of no effect. RAMAMIRTHA AYYAN *v.* GOPALA AYYAN **I. L. R. 19 Mad. 433**

7. ———— Onerous gift to an infant—*Transfer of Property Act (IV of 1882), s. 127—Acceptance.* Land was given by the defendant to the wife of the plaintiff burdened with an obligation She accepted the gift, and died in infancy leaving the plaintiff, her heir. The plaintiff now sued to make good his title to the land against the donor. *Held*, that the gift was complete as against the donor, and that the plaintiff was entitled to a decree. SUBRAMANIA AYYAR *v.* SITHA LAKSHMI
I. L. R. 20 Mad. 147

8. ———— Registration of gift of immoveable property after the death of the donor—*Transfer of Property Act (IV of 1882), ss. 122, 123—Validity of gift.* A gift of immoveable property duly made by means of a registered deed is not invalid, merely because registration of the deed of gift may have taken place after the death of the donor. *Hardei v. Ram Lal, I. L. R. 11 All. 319*, referred to. NAND KISHORE LAL *v.* SURAJ PRASAD . . **I. L. R. 20 All. 392**

9. ———— Construction of document—*Clause in deed of gift, excluding claims of the donor or his heirs or representatives.* A Hindu transferred to his daughter a portion of his immoveable property, by an instrument which purported to be a deed of gift, the consideration of which was the dutiful behaviour of the donee towards the donor. The deed in particular contained a clause absolutely excluding all claims which might be made in the future by the donor or by his heirs and representatives to the property, the subject of the deed. *Held*, that the deed conveyed to the donee a heritable estate with the power of alienation. *Kanhia* v. *Mahin Lal, I. L. R. 10 All. 425*, and *Ram Narain Singh* v. *Peary Bhughut, I. L. R. 9 Calc. 830*, referred to. THAKUR SINGH *v.* NOKHE SINGH (1901)
I. L. R. 23 All. 309

10. ———— Relinquishment—*Mahomedan Law—Possession, transfer of, by the donor—Relinquishment of a share by a Mahomedan in the property of the deceased—Valuable consideration—Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Good faith.* To facilitate the action of the Collector in obtaining the certificate of guardianship to the property of a Mahomedan minor, under the Guardians and Wards Act (VIII of 1890), *M*, the uncle of the minor, relinquished in favour of the minor the share to which he was entitled in the property of his deceased brother, the father of the minor girl. The certificate was duly obtained by the Collector. The plaintiff, a judgment-creditor of *M*, then sued the minor for a declaration that *M*'s share in the property of his brother, which he had relinquished, was liable to attachment and sale in execution of his decree. The lower Court decreed the plaintiff's claim on the grounds that the relinquishment was not valid and binding upon the donor under the Mahomedan Law, since being a gift it had not been accompanied and perfected by possession and that it was void against *M*'s creditors under s. 53 of the Transfer of Property Act (IV of 1882), because it had been made with intent to defeat, delay or defraud them. *Held*, that the relinquishment by *M* of his share in the property of his brother was not a gratuitous transaction, but was supported by valuable consideration, since as consideration for the Collector's undertaking the responsibility of administrator of the minor's property, he agreed to relin-

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GIFT—*concld.*

quish his share to the minor: the relinquishment was not a mere gift, but was supported by consideration, which the law regards as valuable and that, therefore, the rule of Mahomedan Law, which requires that a gift must be accompanied by possession to render it valid and binding upon the donor, did not apply to the transaction. MAHAMMADUNISSA BEGUM *v.* J. C. BACHELOR (1905)
I. L. R. 29 Bom. 428

11. ———— Law of Native State—*Law in British India—Difference—Burden of proof—Trustee—Cestui que trust—Confidential relation.* It lies on him, who asserts it, to prove that the law of the Native State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature. Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits, which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the person, by whom the benefits have been conferred, had competent and independent advice in conferring them. This applies to the case of a trustee and *cestui que trust.* *Vaughton* v. *Noble, 30 Beav. 34, 39,* and *Liles* v. *Terry, 2 Q. B. 679 at page 686,* followed. RAGHUNATH *v.* VARJIVANDAS (1906) . . . **I. L. R. 30 Bom. 578**

12. ———— Registration—*Deed of gift of immoveable property after death of the donor—Representative of deceased donor—Transfer of Property Act (IV of 1882), ss. 4, 123—Registration Act (III of 1877), s. 35.* Where the widow of a deceased person, who had executed a deed of gift, was his representative, she would be his representative within the meaning of s. 35 of the Registration Act, although she was also the donee under the deed and would be qualified to admit the execution and so to render the registration of the deed proper and effectual. *Pakran v. Kunhammed, I. L. R. 23 Mad. 580,* referred to. S. 123 of the Transfer of Property Act is, by virtue of s. 4 of the Act, to be read as supplemental to the Indian Registration Act, and the expression "registered instrument," in s. 123 means an instrument registered in accordance with the provisions of the Indian Registration Act, and not necessarily one registered by the donor himself. *Nand Kishore Lal* v. *Suraj Prasad, I. L. R. 20 All. 392,* approved. Where a Hindu executed a deed of gift in favour of his wife and it was registered after his death on her admission, she being his representative. *Held,* that the deed was a registered instrument within the meaning of s. 123 of the Transfer of Property Act. BHABATOSH BANERJEE *v.* SOLEMAN (1906).
I. L. R. 33 Calc 584
s.c. 10 C. W. N. 717

GOCHAR LAND, IF "COMMON LAND."

See CENTRAL PROVINCES LAND REVENUE ACT . . **12 C. W. N. 1036**

GOMASTAH.

See BENGAL RENT ACT, 1869. s. 30.
10 W. R. 51
16 W. R. 149
20 W. R. 386

See CIVIL PROCEDURE CODE, 1882, ss. 37, 38, 417, 432 (1859, s. 17).
5 B. L. R. Ap. 11

See HEREDITARY OFFICE.
I. L. R. 16 Bom. 374
L. R. 19 I. A. 39

See INSOLVENCY, ACT, s. 9.
I. L. R. 5 Calc. 605
I. L. R. 20 Calc. 771
I. L. R. 23 Calc. 26
L. R. 22 I. A. 162

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . **Bourke A. O. C. 43**
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GOOD BEHAVIOUR.

See SECURITY FOR GOOD BEHAVIOUR.
13 C. W. N. 80

GOOD FAITH.

See BONÂ FIDES.

See DEFAMATION **I. L. R. 36 Calc. 375**

———— test of—

See DEFAMATION **I. L. R. 31 Bom. 293**

GOODS.

See CONTRACT . **I. L. R. 33 Calc. 547**

GOODS AND CHATTELS.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—MOVEABLE PROPERTY . **I. L. R. 4 Calc. 946**
10 B. L. R. 448

GOODS BARGAINED AND SOLD, ACTION FOR.

See CONTRACT . **I. L. R. 36 Calc. 736**

GOODS LOST IN TRANSIT.

See RAILWAYS ACT (IX OF 1890).
12 C. W. N. 165

GOODS SOLD.

See LIMITATION ACT, 1877, ART. 52.

See LIMITATION ACT, 1877, s. 62.
I. L. R. 14 Calc. 457

GOODS SOLD AND DELIVERED.

1. ———— Action for—*Principal and agent—Delivery by, and payment to, unauthorized agent.* The defendant through a broker purchased from the plaintiffs certain goods, to be paid for by cash on delivery and before removal. Both the defendant and his broker knew that the plaintiffs had a separate cash office where payments for goods of the description purchased were usually made, and the broker knew that the delivery clerk, whose duty it was to deliver the goods, had no authority to do so

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GOODS SOLD AND DELIVERED—*concld.*

without a special order from the plaintiffs. A portion of the goods was paid for at the cash office, and delivery thereof obtained from the delivery clerk in the usual way. For the remainder of the goods, the broker, on behalf, but without the knowledge, of the defendant, paid the delivery clerk and obtained delivery from him of the goods without any order for delivery having been given by the plaintiffs. The plaintiffs, a year subsequently, discovered that the delivery clerk had embezzled the money so paid to him. *Held*, that they were entitled to recover the balance of the price of the goods from the defendant in an action for goods sold and delivered. MACKENZIE LYALL *v.* SHIB CHUNDER SEAL **12 B. L. R. 360**

2. ——— **Agreement for sale of goods** —*Place of delivery.* In the absence of any agreement as to delivery, goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or, if not then in existence, at the place at which they are to be produced. Distinction between an ordinary contract for sale of goods and a contract to pay an existing debt in specific articles pointed out. DADABHAI NARSI *v.* SALEMAN DASSI . . . **5 Bom. A. C. 127**

GOONDAISH LANDS.

——— **Meaning of goondaish.** Goondaish lands are lands which in some way or other have been taken up by the holders of the lands measured at the time of the Government survey as something which they had right to annex to the surveyed lands. ASSANOOLLAH *v.* SAFEER ALI **21 W. R. 135**

GORABANDI TENURE.

——— **Nature of tenure, Transferability of**—*Onus probandi.* The onus lies upon a plaintiff claiming, in virtue of a purchase of the tenure from the former holder, to be entitled to possession of gorabandi lands to prove that such lands are transferable. *Per Curiam.*—There are no decided cases, nor is there any evidence to show either that gorabandi rights are more extensive than rights of occupancy, or if more extensive, extensive in this particular direction,—that is to say, that they are transferable. CHUTTERBHUJ BHARTI *v.* JANKI PROSAD SINGH . . . . **4 C. L. R. 298**

GORAIT.

See PENAL CODE, s. 21. **I. L. R. 26 All. 542**

GORDON SETTLEMENT.

See HEREDITARY OFFICES ACT. **4 C. W. N. 517**

See HEREDITARY OFFICES ACT, s. 10. **I. L. R. 20 Bom. 423**

See SERVICE TENURE. **I. L. R. 15 Bom. 13**
I. L. R. 18 Bom. 22

GOSHAIN.

See HINDU LAW . **I. L. R. 29 All. 109**

GOVERNMENT.

See ACT OF STATE.

See GRANT . **I. L. R. 32 Bom. 432**

See PARTIES—PARTIES TO SUITS—GOVERNMENT.

See PREROGATIVE OF THE CROWN.

——— **appeal by—**

See APPEAL IN CRIMINAL CASES—ACQUITTALS, APPEALS FROM.

——— **application by, when not a party to suit—**

See DECREE—ALTERATION OR AMENDMENT OF DECREE . . **2 C. L. R. 461**
13 W. R. 155

See PAUPER SUITS—APPEALS. **I. L. R. 13 All. 326**
I. L. R. 15 Bom. 454

See PAUPER SUIT—SUITS. **I. L. R. 15 Bom. 77**

——— **debt due to—**

See CROWN DEBTS. **I. L. R. 12 Calc. 445**
5 Bom. O. C. 23

——— **disaffection towards, or disapprobation of acts of—**

See PENAL CODE, s. 124A. **I. L. R. 19 Calc. 35**
I. L. R. 22 Bom. 112, 152
I. L. R. 20 All. 55

——— **liability of—**

See GOVERNMENT OFFICERS, ACTS OF.

See JUDICIAL OFFICERS, LIABILITY OF.

See RIGHT OF SUIT—ACTS DONE IN EXERCISE OF SOVEREIGN POWERS. **I. L. R. 1 Calc. 11**
I. L. R. 4 Mad. 344
I. L. R. 5 Mad. 273
I. L. R. 3 All. 829

See SECRETARY OF STATE. **Bourke A. O. C. 106: 5 Bom. Ap. 1**
1 N. W. 118

See SPECIFIC PERFORMANCE—SPECIAL CASES . . **I. L. R. 3 Calc. 464**

See SECRETARY OF STATE. **I. L. R. 27 Bom. 189**

——— **order of—**

See JURY—JURY IN SESSIONS CASES. **I. L. R. 23 Mad. 632**

——— **power of—**

See CESSION OF BRITISH TERRITORY IN INDIA . **I. L. R. 1 Bom. 367**
L. R. 3 I. A. 102

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GOVERNMENT—*contd.*

——— **power of, to extend time for appeal—**

See MADRAS BOUNDARY MARKS ACT (XXVIII OF 1860).
I. L. R. 1 Mad. 192
I. L. R. 3 Mad. 92
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——— **provision in Act for benefit of—**

See BOMBAY ACT II OF 1863.
I. L. R. 2 Bom. 529

——— **resolution of—**

See COLLECTOR . **I. L. R. 18 Bom. 103**
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I. L. R. 27 Bom. 189

——— **right of, in navigable river.**

See ACCRETION—NEW FORMATION OF ALLUVIAL LAND—CHURS OR ISLANDS IN NAVIGABLE RIVER . **6 B. L. R. 255**
6 B. L. R. Ap. 93
5 C. L. R. 154
14 B. L. R. 219
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11 C. L. R. 11
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I. L. R. 11 Calc. 434
I. L. R. 8 Mad. 467
I. L. R. 2 Bom. 19
I. L. R. 22 Calc. 252

——— **right of, to costs or court-fees—**

See PAUPER SUIT—APPEALS.
I. L. R. 13 All. 326
I. L. R. 18 Bom. 454, 464
See PAUPER SUIT—SUITS . **15 W. R. 205**
I. L. R. 1 Bom. 7
I. L. R. 1 All. 596
I. L. R. 2 All. 196
I. L. R. 9 All. 64
I. L. R. 18 All. 419
2 B L. R. Ap. 22
I. L. R. 15 Bom. 77
I. L R. 20 Calc. 111
I. L. R. 21 Mad. 113

——— **right of, to property found—**

See TREASURE TROVE.

——— **right of, to withdraw proclamation.**

See FOREST ACT, SS. 75 AND 76.
I. L. R. 18 Bom. 670
I. L. R. 23 Bom. 518

——— **sanction of—**

See DECREE—FORM OF DECREE—MORTGAGE . **I. L. R. 20 Bom. 565**

GOVERNMENT—*contd.*

——— **sanction of**—*concld.*

See EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION.
I. L. R. 17 Bom. 289
I. L. R. 19 Bom. 80
I. L. R. 20 Bom. 565
See HINDU LAW—ADOPTION—REQUISITES FOR ADOPTION—SANCTION.
7 Bom. A. C. 26
I. L. R. 1 Bom. 607
See NAWAB OF SURAT . **12 Bom. 156**
I. L. R. 12 Bom. 496

——— **suits against—**

See COSTS—TAXATION OF COSTS.
I. L. R. 15 Mad. 405
I. L. R. 17 Mad. 162
See JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.
1 Hyde 37
1 Mad. 286
I. L. R. 14 Calc. 256
See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—GOVERNMENT, SUITS AGAINST . . **10 Bom. 308**
I. L. R. 17 Calc. 290
I. L. R. 18 Mad. 395

——— **when necessary parties or not, to suits—**

See DIGWARI TENURE.
I. L. R. 34 Calc. 753
See JURISDICTION OF CIVIL COURT—CUSTOMARY PAYMENTS.
I. L. R. 16 Bom. 649
See PARTIES—PARTIES TO SUITS—GOVERNMENT.

——— **Wrongful dismissal of Public servant, suit against Government for—** *Contract of service—Public servant—Payment of monthly wages.* A suit for wrongful dismissal by one of its servants will lie against the Government. In a suit by a subordinate officer in the Public Works Department for wrongful dismissal against the Government, in which it was admitted that there was no time of service fixed, and in which the plaintiff put in a memorandum of agreement between himself and the Government, stipulating that he should give six months' notice of his intention to leave the service of the Government:—*Held*, that the hiring was indefinite; and that, although the plaintiff had bound himself to give six months' notice prior to leaving their service, there was no corresponding obligation on the Government to give notice before dismissing him. The Government, however, would not be allowed to exercise this power capriciously, or to the damage of the servant. An indefinite hiring in India does not mean a hiring for a year. The mere payment of wages monthly is not enough to show that a hiring

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GOVERNMENT—*concld.*

is a monthly hiring. HUGHES *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL . **7 B. L. R. 688**

GOVERNMENT CURRENCY NOTE.

See ATTEMPT TO COMMIT OFFENCE.
I. L. R. 16 Calc. 310

——— **theft of—**
See CONTRACT ACT, S. 76.
I. L. R. 3 Calc. 379
1 C. L. R. 339

See CRIMINAL PROCEDURE CODE, S. 520 (1872, S. 419) [**I. L. R. 3 Calc. 379**
1 C. L. R. 339

——— **Forgery of currency note**—*Notice—Delay.* A person who receives a forged currency note in payment is not (in order to entitle himself to be paid a second time) upon discovering the forgery, bound to give immediate notice of it to the person from whom he receives the forged note, the rule relating to forged acceptances on bills of exchange not applying. *Semble :* That if the delay in communicating the fact of the forgery of the note were so great as to damnify the payer of it in his remedy against, or in his power of tracing, the person from whom he received his note, such delay would be a good defence in an action brought upon the original consideration. MATHEWS *v.* GIRIDHARILAL FATECHAND . . . . . **7 Bom. O. C. 1**

GOVERNMENT OFFICERS, ACTS OF.

See SECRETARY OF STATE.
I. L. R. 27 Bom. 189

1. ——— **Protection of officers acting bonâ fide**—*Illegal collection of revenue—Action of trespass.* If a party *bonâ fide*, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act. SPOONER *v.* JUDDOW
4 Moo. I. A. 353

2. ——— **Binding, effect of**—*Construction of sanad—Beng. Reg. VII of 1822, s. 6, cl. 3.* Where by a sanad, a grant was made of certain mouzahs, specified as containing an estimated number of bighas, a recognition by the revenue authorities and Civil Courts of the grantee being entitled to forest land as part of that grant, although much exceeding the estimated area was *held* to be binding on Government, and not to be an error within the meaning of Regulation VII of 1822, s. 6, cl. 3. ZAHURRUDDIN *v.* COLLECTOR OF GORUCKPORE . **4 B. L. R. P. C. 36 : 13 W. R. P. C. 31**

3. ——— **Special Commissioner**—*Decree under Act IX of 1859 directing officer to put party in possession.* Where, by a decree of the Special Commissioner's Court established under Act IX of 1859, a decree was made directing property to be made over to a claimant, the proceedings of officials making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or of the making over of the bulk of the property under it, *held* to bind the Government as to the right of the decree-holder to the property. SECRETARY OF STATE *v.* KHANZADI
5 B. L. R. P. C. 312

GOVERNMENT OFFICERS, ACTS OF—*contd.*

4. ——— **Ratification by Government**—*Excess of authority.* The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority when the Government in fact or in law, directly or by implication, ratifies the excess. COLLECTOR OF MASULIPATAM *v.* CAVALY VENCATA NARAINAPAH
2 W. R. P. C. 61 : 8 Moo. I. A. 529

5. ——— *Settlement of Noabad lands in Chittagong—Evidence of settlement by Government—Acceptance of kabuliat by Government—Ratification—Acts of Government officers as binding the Government—Reg. III of 1822, s. 5, cl. 1—Reg. VII of 1822, s. 7, cl. 1—Acquiescence—Acceptance of rent after term of settlement—Presumption of due performance of official acts.* The plaintiff sued the Secretary of State for India in Council for the declaration that a certain Noabad mehal of his in the district of Chittagong was a permanent talukh, not resumable by the Government. He based his claim on two grounds : (i) that the mehal existed from before the time of the Decennial Settlement, and the settlement of 1800 confirmed the permanent right of the talukhdar in the same ; and (ii) that, at any rate, a kabuliat executed in 1836 by his predecessors in title with the approval of the Collector had the same effect. In defence, it was alleged (1) that the mehal was not in existence at the time of the Decennial Settlement, and the settlement of 1800 was a temporary one ; and (2) that the kabuliat was never accepted by the Government, but that, on the contrary, the Government passed distinct orders that the settlements of 1836 were for thirty years only, which order was duly published by an *istahar* to that effect. It was found on the evidence that the talukh was not shown to have been in existence before 1800, and the settlement proceedings of that year and the variation of rent from time to time did not support the plaintiff's contention. *Held*, that the kabuliat of 1836 was merely an offer on the part of the talukhdar for the time being and was not binding on the Government, its terms not having been accepted either by the Government or by any duly authorized officer thereof ; that both by law and by the special instructions issued for the guidance of settlement officers, no settlement could be binding on the Government unless confirmed by the Governor-General in Council. There being no proof given by either party as to whether the *istahar* abovementioned was or not duly published :—*Held*, that the publication of the *istahar* must be presumed, having regard to the presumption in favour of the due performance of official acts. *Held*, also, that, even assuming that the officers of the Government

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GOVERNMENT OFFICERS, ACTS OF —*concld.*

induced by their act and conduct a belief in the talukhdar that the kabuliat had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government, that did not amount to a ratification of the kabuliat, inasmuch as such conduct of the officers was in violation of their duty as such officers and in direct contravention of the express orders of the Government. *Held*, also, that the acceptance by the Government of rent at the old rate from the talukhdar for a long time after expiration of thirty years did not amount to an acquiescence in the terms of the kabuliat. Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State. PROSUNO COOMAR ROY *v.* SECRETARY OF STATE . . . . **I. L. R. 26 Calc. 792**
3 C. W. N. 695

GOVERENMENT PLEADER.

——— **Officer prosecuting case, duty of** —*Discrepancies of witnesses for prosecution.* It is the duty of the Government pleader or other officer who conducts the prosecution before the Court of Session to point out to the Court any glaring discrepancy between the evidence being given by a witness before the Court of Session and that previously recorded by the committing officer. QUEEN *v.* GONESHA MOONDA . . **20 W. R. Cr. 38**

GOVERNMENT PROMISSORY NOTE.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS.
1 C. W. N. 170

See CONTRACT—WAGERING CONTRACTS.
I. L. R. 17 Mad. 480, 496
I. L. R. 18 Mad. 306

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—BREACH OF CONTRACT . . **I. L. R. 2 All. 756**

See GIFT . . **I. L. R. 5 Bom. 268**

See GOVERNMENT SECURITIES.

See LACHES . . **18 W. R. 58**

——— **at their nominal value—**

See PRIVY COUNCIL APPEAL.
I. L. R. 36 Calc. 653

1. ——— **Renewal of note**—*Loss of negotiability by note becoming covered with endorsements*—"*Allonge.*" In a suit by a Hindu widow as the holder and last endorsee of a Government promissory note of the 5½ per cent. loan, 1859-60, to enforce renewal of the note, it appeared that in the advertisement of the loan in the *Gazette*, it was stated that "the practice and rules heretofore in use in regard to the renewal, etc., of promissory notes will be adhered to in respect of the promissory notes of this loan;" that it was the practice of the Government to insist on the production of the promissory note when the interest due on it was applied for, and

GOVERNMENT PROMISSORY NOTE —*contd.*

to endorse the payment of such interest on the back of the note; that the note of which renewal was sought had in consequence become so covered with endorsements that a slip of paper had been attached to it by the Government for the purpose of allowing further endorsements on payment of interest to be made; and that in consequence of having this paper attached, and being covered with endorsements, the note was practically unnegotiable. The defence was that the Government had a discretion as to granting or refusing renewal, and had, on objection made by the reversioners, exercised that discretion in refusing to renew the note. The lower Court dismissed the suit on the ground that the plaintiff had failed to show any legal right to renewal against the Government. *Held*, on appeal, that the practice of insisting on endorsement of payments of interest on the note as a preliminary to receipt of interest thereon having rendered it practically unnegotiable, the Government were bound to renew the note. MONMOHINEE DEBI *v.* SECRETARY OF STATE . **13 B. L. R. 359 : 22 W. R. 106**

2. ——— **Theft of note**—*Purchaser, rights of—Title.* In the month of October 1878, a Government promissory note for R10,000 was sent from the A treasury to the Public Debt Office for enfacement. The note was duly received at the office, and its receipt was entered in the proper book. The business of the Public Debt Office is carried on by certain officers of the B Bank. The note was stolen from the office, and endorsed over by the thief to a person who sold it to *C* for full value. The note bore two blank endorsements prior to that of the thief. In the same month *C* applied to the B Bank for a loan, which the Bank agreed to make upon the security of *C's* promissory note, and the deposit of Government notes. The form of application for the loan specified by their numbers the notes which were to be deposited. One of these was the stolen note. Before finally agreeing to the advance, the officers of the Bank in charge of the Loan Department sent the application, showing the numbers of the notes to the Public Debt Office, and received it back with a memorandum upon it to the effect that the notes were not stopped. On the 23rd October the loan was made, and the securities were given. Shortly afterwards, the theft was discovered and the note was stopped. In November the Bank, at the request of *C*, sent the note to the Public Debt Office for payment of interest, and the note was detained by the Superintendent. The Bank then required *C* to repay the amount of his loan. This he refused to do unless all his securities were handed over to him. In a suit by the Bank against *C* upon his promissory note:—*Held*, that he was not entitled to refuse payment until the stolen note was given up to him. *Per* GARTH, *C.J.*—The Public Debt Branch of the B Bank is as much a Government office as if it were carried on separately under the management of Government officers. The note was therefore stolen whilst virtually in the hands of the Government,

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GOVERNMENT PROMISSORY NOTE —*contd.*

and was, when detained by the Superintendent of the Public Debt Office held by him as the agent of the Government on behalf of the true owner at the time when it was stolen, and the Bank had no right or power to take it in their private capacity out of the hands of the Public Debt Office. When an instrument, such as the note in question, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he had obtained it *bonâ fide* for value without notice of the theft. In this case the note was stolen whilst in the custody of the Public Debt Office before *C* had any title to it. The Bank, therefore, as agents for the Government, on behalf of the true owner, from whom and on whose behalf they received it, had *primâ facie* a better title than the thief or any one claiming through him, and *C*, in order to rebut that *primâ facie* case, would have to show that he was a *bonâ fide* holder for value. In order to do so, he would have to prove that the note at the time when it was stolen, was a negotiable instrument, and this he had failed to do, as he had not proved that the endorsements prior to that of the thief were genuine. BANK OF BENGAL *v.* MENDES
I. L. R. 5 Calc. 654 : 5 C. L. R. 586

3. ——— **Government promissory notes bearing a forged endorsement**—*Title of holder—Government promissory notes surrendered for renewal—Title to renewed notes—English Bills of Exchange Act (45 & 46 Vict. c. 61)—Negotiable Instruments Act (XXVI of 1881)—Holder in due course.* The plaintiff, as administrator of Purmanand Cooverji, a deceased Hindu, sued to recover from the defendants (thirty-one in all) certain shares, debentures, and Government promissory notes which he alleged belonged to the estate of the deceased, but which the first four defendants had stolen and by means of forged endorsements sold them to the other defendants and received the purchase-money. Those of the defendants who had purchased the Government promissory notes, contended that as innocent purchasers for value they were entitled to retain them. *Held*, that the plaintiff was entitled to recover all the shares, debentures, and Government promissory notes from the defendants. Some of the Government promissory notes on which the forged endorsements had been made had been surrendered for renewal and fresh promissory notes issued in their place. *Held*, that the plaintiff was entitled to recover the renewed notes from the holders. HUNSRAJ PURMANAND *v.* RUTTONJI WALJI
I. L. R. 24 Bom. 65

4. ——— **Right of Hindu widow with certificate to negotiate notes.** A Hindu widow holding a certificate under Act XXVII of 1860 to collect debts due to the estate of her deceased son, who had been allowed to draw

GOVERNMENT PROMISSORY NOTE —*concld.*

interest on certain Government promissory notes, which, though entered in the certificate, stood apparently in the name of her late husband, having applied for authority to negotiate those promissory notes:—*Held*, that she was bound to show how she got possession of those notes. *In the matter of the petition of* BYDYA SOONDUREE DOSSEE
15 W. R. 267

GOVERNMENT REVENUE.

See REVENUE.

See HINDU LAW—LEGAL NECESSITY.
I. L. R. 36 Calc. 753

GOVERNMENT SECURITIES.

See GOVERNMENT PROMISSORY NOTES.

——— **deposit of—**

See LIMITATION ACT, 1877, SCH. II ART. 145 . . **7 C. W. N. 476**

——— **sale of—**

See CONTRACT—CONTRACTS FOR GOVERNMENT SECURITIES OR SHARES.
Cor. 1 : 2 Hyde 121
I. L. R. 9 Calc. 791

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . **I. L. R. 9 Calc. 791**

GOVERNMENT SOLICITOR.

See COSTS—TAXATION OF COSTS.
I. L. R. 15 Mad. 405

See MADRAS MUNICIPAL ACT, 1884, s. 103
I. L. R. 23 Mad. 529

——— **person appointed by, to act as prosecutor in Police Courts.**

See PUBLIC SERVANT.
I. L. R. 3 Calc. 497

GOVERNOR GENERAL IN COUNCIL.

——— **consent of—**

See JURISDICTION OF CIVIL COURT—FOREIGN AND NATIVE RULERS.
I. L. R. 21 Bom. 351

——— **Statutes affecting the Crown or Governor General as representing it**—*Exemption of Governor General from General Statutes.* The rule of construction according to which the Crown is not affected by a statute unless expressly named in it applies to India; and the Viceroy and Governor General as representing the Crown therefore enjoys a like exemption. SECRETARY OF STATE FOR INDIA *v.* MATHURABHAI
I. L. R. 14 Bom. 213

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GOVERNOR OF BOMBAY IN COUNCIL.

1. ——— **Powers of Legislature**—*Jurisdiction of Courts in mofussil—Course of legislation.* The Governor of Bombay in Council has power to pass Acts limiting or regulating the jurisdiction of the Courts in the mofussil established by the local Legislature, and such Acts are not void because their indirect effect may be to increase or diminish the occasions for the exercise of the appellate jurisdiction of the High Court. The policy of Government, as shown in its course of legislation of recent years with reference to judicial institutions, as compared with its policy at the time when the Elphinstone Code was passed, reviewed. PREMSHANKAR RAGHUNATHJI *v.* GOVERNMENT OF BOMBAY . . . . **8 Bom. A. C. 195**

2. ——— **Power to make laws**—*Laws affecting authority of High Court.* The Bombay Legislative Council has authority to make laws regulating the rights and obligations of the subjects of the Bombay Government, but not to affect the authority of the High Court in dealing with them when made. COLLECTOR OF THANA *v.* BHASKAR MAHADEV SHETH . **I. L. R. 8 Bom. 264**

GOVERNOR OF MADRAS IN COUNCIL.

1. ——— **Power of, to pass Act affecting Imperial statute.** It is beyond the power of the local Legislative Council to pass an Act in any way affecting the provisions of a statute of the Imperial Parliament. ABOO SAIT & CO. *v.* ARNOTT. ABOO SAIT & CO. *v.* DALE . . **2 Mad. 439**

2. ——— **Jurisdiction**—*Court of Agent of Governor—Appeal to Governor in Council—Dismissal of suit on ground of political expediency—Legality—Res judicata—Jurisdiction, want of—Consent of parties—Act XXIV of 1839, ss. 2, 3, 4—Rules XXI and XXII.* A suit instituted in the Court of the Agent to the Governor at Vizagapatam was, upon application to the defendant and without opposition from the plaintiff, transferred by the High Court to the District Court. The District Court dismissed it on the ground that no sufficient evidence had been given to establish the plaintiff's case. Subsequently the High Court decided that it had no jurisdiction to order such a transfer and the consent of parties could not confer jurisdiction. The plaintiff thereafter instituted a fresh suit in the Agent's Court on the same cause of action. The Agent dismissed the suit as *res judicata*, and an appeal to the Governor in Council was rejected on the ground that it would be inexpedient and set a bad example encourage and a multitude of suits for the same cause of action. *Held*, by the Judicial Committee, that the legal right to bring a suit and to have it determined by the proper Court created for the purpose of determining such suits cannot be barred upon considerations of policy or expediency. *Held*, also, that the former decision of a Court adjudged by the High Court to be without jurisdiction cannot be treated as *res judicata*, and the plaintiff was entitled to have his suit tried on the

GOVERNOR OF MADRAS IN COUNCIL—*concld.*

merits by the Agent's Court. SRI VIKRAMA DEO MAHARAJULUGARU MAHARAJA OF JEYPORE *v.* GUNAPURAM DEENABANDHU PATNAICK (1905) **I. L. R. 28 Mad. 24**
s.c. 9 C. W. N. 257

GRANT.

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See CANTONMENT PROPERTY. **I. L. R. 30 Bom. 137**

See CHOTA NAGPUR ENCUMBERED ESTATES ACT . . . **10 C. W. N. 149**

See COGNIZANCE. **I. L. R. 28 Mad. 539**

See CROWN LANDS **I. L. R. 26 Mad. 288**

See ESTOPPEL . **10 C. W. N. 747**

See FISHERY, RIGHT OF. **I. L. R. 33 Calc. 1349**

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See JAGHIR.

See LANDLORD AND TENANT. **10 C. W. N. 17, 425**

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See PENSIONS ACTS, 1849 AND 1871.

See PRESCRIPTION.

See REGISTRATION ACT (III of 1877), ss. 17, 49 . **I. L. R. 27 Mad. 30**

——— **by Crown**—

See FERRY . **I. L. R. 18 Calc. 652**

——— **by Government**—

See CROWN LANDS. **I. L. R. 26 Mad. 268**

See HINDU LAW—
CUSTOM—IMPARTIBILITY; **I. L. R. 29 Calc. 828**
INHERITANCE—IMPARTIBLE PROPERTY.

See REGISTRATION ACT, s. 90. **I. L. R. 19 Calc. 742**

See RESUMPTION—EFFECT OF RESUMPTION . . **I. L. R. 26 Mad. 339**

See SANAD . **I. L. R. 1 Bom. 523**
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See SUCCESSION . **L. R. 30 I. A. 190**

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GRANT—*contd.*

——— construction of—

See HINDU LAW—ENDOWMENT—ALIENATION OF ENDOWED PROPERTY.
I. L. R. 18 Mad. 266
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See LEASE—CONSTRUCTION.
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See LIFE ESTATE . **5 C. W. N. 569**

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See OWNERSHIP, PRESUMPTION OF.
I. L. R. 15 Mad. 101
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See SERVICE TENURE.
I. L. R. 14 Bom. 82
I. L. R. 22 Calc. 938
I. L. R. 26 Mad. 403

——— construction of re-grant—

See EJECTMENT, SUIT FOR.
L. R. 28 I. A. 169

——— endorsement on—

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS **I. L. R. 14 Bom. 472**

——— in lieu of maintenance.

See RESUMPTION—RIGHT TO RESUME.
22 W. R. 225
I. L. R. 3 Calc. 793
I. L. R. 5 Calc. 113

——— of land for building.

See CANTONMENT . **I. L. R. 3 All. 669**
I. L. R. 6 All. 148

——— of rents and profits.

See LIFE ESTATE . **13 C. W. N. 611**

——— prior to Permanent Settlement.

See GHATWALI TENURE.
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13 B. L. R. 124
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1. CONSTRUCTION OF GRANTS.

1. **——— Grant of freehold**—*Hindu law—Words of inheritance.* By the Hindu law, no words of inheritance are necessary to pass the freehold interest in land to the heirs. ANUNDOMOHEY DOSSEE *v.* DOE . . **4 W. R. P. C. 51**
8 Moo. I. A. 43

2. **——— Omission of words of inheritance**—*Stipulation for retention rent-free.* A

GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

zamindar, on giving up a four-anna share which he had theretofore held, but had mortgaged, stipulated for the retention of the holding in suit rent-free for maintenance. *Held*, that the retention of the holding was intended not only for the benefit of the proprietor himself, and to inure during his life only, but also for the benefit of his heirs. Words of inheritance are neither necessary nor customary in such cases, and no inference is to be drawn from their absence. GUNGA DEEN *v.* LUCHMUN PERSHAD . **1 N. W. 147: Ed. 1873, 229**

3. **———** *Proof of hereditary nature of grant.* The absence of words of inheritance in a deed of grant of land is not of itself conclusive to show that such grant was not intended to be in perpetuity; but the hereditary character of the tenure may be inferred from evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son. GYAN SINGH *v.* PEETUM SINGH
1 N. W. Part 6, 73: Ed. 1873, 165

4. **——— Hereditary tenure**—*Transfer of tenure granted—Regs. XIII of 1795 and XXXVII of 1793.* Grants which are hereditary "*nustan bad nustan butnun bad butnun*" are declared transferable by gift, sale, or otherwise, under the terms of s. 15, Regulation XIII of 1795, and s. 15, Regulation XXXVII of 1793. *Held*, that the grant in this case was not for the benefit of the family, but was confirmed to the grantee's son only. The family could have no other claim upon him than a natural obligation to help them, and their title to succeed to the grant could only accrue in regular succession. BITHUL BHAT *v.* LALLA RAJ KISHORE . . **2 Agra 284**

5. **———** *Mafee birt tenure.* Whatever the words "mafee birt tenure" may have imported originally, the *primâ facie* meaning of the words has come to be an hereditary tenure. MAHENDRA SINGH *v.* JOKHA SINGH
19 W. R. P. C. 211

6. **———** *Meaning of "talukh."* Where the word "talukh" occurs in a grant without any sort of qualification and restriction, it refers *primâ facie* to a hereditary interest. ASSANOOLLAH *v.* KALEE MOHUN MOOKERJEE
18 W. R. 469

KRISHNO CHUNDER GOOPTO *v.* SUFDUR ALI
22 W. R. 326

7. **——— Ambiguity in document explained by reference to another document**—*Ambiguity in date.* In a suit to recover possession of immoveable property under a grant from the Raja of P. on the ground that the grant was prior in time to the grant from the same grantor under which the defendants professed to hold, it was found that the plaintiff's grant was dated "25th Falgoon in the year 16." *Held*, that the meaning of the words "in the year 16" might, for the purpose of showing it to be a document more than 30 years old,

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GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

be shown by reference to another grant signed by the same officer, from which it appeared that the "year 37" meant the 37th year of the Raja of P., and that it corresponded with 1186 B.S. EQUITABLE COAL COMPANY *v.* GONESH CHUNDER BANERJEE **9 C. L. R. 276**

8. ——— **Inaam-i-altamgha grant**—*Grants for religious and charitable purposes or for rendering military services.* A grant in *inaam-i-altamgha* to *N* and his children, "and their descendants in lineal succession, for generation after generation, in perpetuity and for ever," which was unburdened with any condition as to prospective service, and free from any religious, charitable, or other trust, held to confer an alienable estate. Grants of land revenue for religious and charitable purposes or for the future condition of civil or military service of the estate considered and to some extent classified; and the enactments and authorities, historical and legal, relating to the question of their alienability, mentioned. KRISHNARAV GANESH *v.* RANGRAV **4 Bom. A. C. 1**

9. ——— **Inam**—*Shares in profits of grant—Rule as to altumga grants—Mahomedan law.* Certain Mahomedans hypothecated to the plaintiff, to secure repayment of a debt, their interest in lands which had been enfranchised as a personal inam, a claim that the lands constituted the endowment of certain mosques having been rejected at the inam enquiry. In a suit against the executants of the mortgage and their heirs and representatives to recover the principal together with interest up to date:—*Held*, that, under the circumstances of the case, the rule as to the equality of the shares of males and females in the subject of an *altumga* grant was inapplicable. BADI BIBI SAHIBAL *v.* SAMI PILLAI . . . **I. L. R. 18 Mad. 257**

10. ——— **Grant for service performed**—*Construction of grant of villages "as jaghir"—Bengal Regulation XXXVII of 1793, s. 15—Sanad—Alienation—Sale.* On the 22nd of September 1830, the British Government made a grant to *A B* in the following terms: "In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor in Council hereby gives and bestows upon *A B*, son of *D*, and his heirs for ever, as jaghir, the following four villages: Bhestan and Sonari in the Chorasi Pergunnah, Kumwada and Boriach in the Chikhli Pergunnah, in the zillah of Surat, with the jema and moglai of the same—now yielding an average net sum of rupees two thousand nine hundred and ninety-two, one quarter, and ninety-six reas. The revenue of the said villages hereafter, whether more or less, to be collected by the said *B* and his heirs from the 5th of June 1830, and *A* such *lawazims or haks* as are at present settled on those villages are to be disbursed by the said *A B* in the same manner as heretofore." *Held*, having regard to the language of the grant and to the object with which it was made, *viz.*, to reward the past services of the grantee, that the introduction of the words "as jaghir" was not intended to control the right of alienation inherent in the operative terms of the grant. DOSIBAI *v.* ISHVARDAS JAGJIVANDAS . **I. L. R. 9 Bom. 561**

Held, by the Privy Council, affirming the above decision, when a jaghir is granted in indefinite terms, it is taken to be for the life only of the jaghirdar; but when it is to the grantee "and his heirs," and there is nothing to control the ordinary meaning of the words, he takes an absolute interest. That jaghirs are to be considered life tenures only, unless otherwise expressed in the grant, is laid down in Bengal Regulation XXXVII of 1793, s. 15. It is the law also in Bombay and other parts of India. DOSIBAI *v.* ISHVARDAS JAGJIVANDAS **I. L. R. 15 Bom. 222 L. R. 18 I. A. 22**

11. ——— **Grant for an indefinite period**—*Interest of grantor in property—Duration of grant—Rules of construction.* The rule of construction that a grant made to a man for an indefinite term inures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey. LEKHRAJ ROY *v.* KUNHYA SINGH **I. L. R. 3 Calc. 210: L. R. 4 I. A. 223**

12. ——— **Grant for particular purpose**—*Building—Forfeiture.* *A* received from *B* the use of his ground rent-free, which he thus acknowledged in writing: "Building a house thereon, I shall enjoy so long as I and my kinsmen live therein. I shall have no right to sell the ground to another." A house was built on the site and inhabited by *A* and his heirs for several years, until it was destroyed by fire, when the heirs commenced to build a new house upon a portion of the ground, having leased another portion of it for building upon, and having mortgaged the whole of it. *Held*, that the heir of *B* was entitled to recover possession of the ground, as the conditions of the grant had not been observed, and that the word "sell" must be construed as prohibiting alienation of any kind. BALAJI J. RAHALKAR *v.* NARAYAN BHAT **3 Bom. A. C. 63**

13. ——— **Grant to one of members of joint family**—*Subjection of, to rights of other members.* In a suit for division of a village between members of the same family, the defendant alleged that a former division relied upon by the plaintiff was merely nominal, and never intended to be carried out; and also that the village was in 1836 granted to his father for his sole use, and both these allegations were found against defendant, who appealed on the ground that the village which is inam was granted to defendant for his sole use in 1857 on the death of his father. *Held*, that the grant to defendant was not a new grant, and was

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GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

subject to the rights of the other members of the family. NATTAN VENKATARATNUM *alias* BALAKONDA VENKATA NARAYANA ROW *v.* NATTAM RAMAIYA *alias* BALAKONDA RAMA ROW **2 Mad. 470**

14. ——— Limited grant—*Prescriptive right of inamdars to recover from shilatridars the revenue formerly paid by latter to Government.* Government, by an indenture, dated 25th January 1819, conveyed to *A* and *B* and their heirs and assigns certain villages in the Island of Salsette with the exception of such spots of *shilatri* tenure as might be therein or on any part thereof which could only become the property of *A* and *B* on their purchasing the same from the proprietors. Since 1819 the holders of these *shilatri* lands had paid to the grantees and their heirs assessment (or rent) at a fixed rate which before the grant they used to pay to Government. In a suit brought by an heir of *A* and *B* in 1868 to recover an enhanced rent or assessment levied on these lands:—*Held*, that, though the language of the exception was so large that it might have been construed to exclude any right on the part of the grantees to receive rent (or revenue), yet that as the defendant or his predecessors had, ever since 1819, paid to the plaintiff and his predecessors the revenue paid before that time to Government, that revenue passed under the indenture of 1819 to the grantees in the deed. DADABBAI JAHANGIRJI *v.* RAMJI BIN BHAU . . . **11 Bom. 162**

15. ——— Grant of mortgaged villages—*Provision for grant of others in case of redemption—Implied confirmation of father's grant by son.* In 1846 *A* granted a pottah of a certain village, which had been mortgaged to him, to his illegitimate son *B*, promising, in the event of the mortgagor redeeming the estate, to make over to *B*, in lieu of the village granted, other villages yielding an equal revenue, and in 1847 confirmed the grant making it rent-free. On *A's* death, the grant made by him was confirmed by his legitimate son, the appellant, in certain pottahs, in which, however, no reference was made to the provision in the earlier grant by the father for the substitution, in the event of the mortgagor redeeming, of villages yielding an equal revenue. After the passing of Act XIII of 1866, the mortgagor obtained a decree for redemption and ousted *B*. *Held*, by the Privy Council, that the appellant was bound by his father's agreement in the pottah of 1846 to make over to *B* villages yielding a revenue equal to that of the village which had been redeemed. BIJAI BAHADOOR SINGH *v.* BHYRON BUX SINGH . . **6 C. L. R. 21**

16. ——— Implied grant when intention to grant is not completed—*Intention to give further deed of grant.* Where a piece of land is held partly by a permanent lease and partly by an *amalnamah*, granted almost simultaneously and intended eventually to be changed for a lease, and thereupon the whole piece of land is thrown into one compound and occupied, and new buildings are erected thereupon with the consent of the lessor, and there is no failure on the part of the lessee to comply with the terms of the grant:—*Held*, that the permanent grant was to be impliedly extended to the entire premises in question, notwithstanding that no lease was formally granted with respect to the remaining portion as originally contemplated. PUDDOMONEE DOSSEE *v.* DWARKANATH BISWAS . . . . **25 W. R. 335**

17. ——— Grant by zamindar—*Mad. Reg. XXV, 1802, s. 3—Inam—Tenancy not determinable at will of grantor's successor.* Regulation XXV of 1802, s. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zamindar has no power to disturb grants otherwise valid made by his predecessor or titles to inams acquired by prescription. An inam, existing under a grant made in 1811, became in 1863 the subject of arrangement between the zamindar, who had succeeded the grantor in the zamindari, and the inamdars. This resulted in what was either a confirmation of the original grant on terms more favourable to the zamindar, or a new grant of an estate in all respects, save as to the rent, similar to the previously existing estate, which was a tenancy in perpetuity. Subsequently the son and successor of the grantor of 1863 claimed to have determined the tenancy by a notice to quit. *Held*, that it was not determinable by such notice. MAHARAJA OF VIZIANAGRAM *v.* SURYANARAYANA . . **I. L. R. 9 Mad. 307**
L. R. 13 I. A. 32

18. ——— Grant from Government—*Mad. Reg. IV of 1831—Ancient and permanent tenures.* Regulation IV of 1831, Madras Code, which must be strictly construed, applies only to suits brought to try the validity of grants emanating from, or confirmed or affected by, the direct act and order of the Governor in Council. A written order under that law is not necessary in a suit brought by a person who claims to hold under an ancient and permanent tenure in existence before the Dewany. BRETT *v.* ELLAIYA **12 W. R. 33: 13 Moo. I. A. 104**

19. ——— Grant in saranjam—*Jaghir—Grant of revenue—Grant of soil—Pensions Act, XXIII of 1871—Evidence—Burden of proof—Impartibility—Primogeniture.* The grant in jaghir or saranjam is very rarely a grant of the soil, and the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it. It is for the Government to determine how saranjams are to be held and inherited, and in cases where the Civil Courts have jurisdiction over claims relating to saranjams, in consequence of the non-applicability of the Pensions Act, XXIII of 1871, or otherwise they would be bound to determine such claims according to the rules, general or special, laid down by the British Government. In the absence of such rules, the Courts would be guided by the law applicable to

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GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

impartible property. *Semble :* That a saranjam is impartible, and on the death of the eldest son descends to his son in preference to his surviving brother. RAM CHANDRA MANTRI *v.* VENKATRAO MANTRI . . . . **I. L. R. 6 Bom. 598**

20. ——— Saranjam—*Descent of—Impartibility of—Suit for possesssion of—Joint management of saranjam—Manager of saranjam—Trustee of profits—Account of management.* A saranjam is ordinarily impartible, and descends entire to the eldest representative of the past holder. In 1885 plaintiff brought this suit to recover possession of certain saranjam villages from the defendant. His beneficial right to a third share of the rents and profits of the villages was admitted by the defendant. The point in dispute was the possession and management. The defendant contended (i) that the plaintiff never was entitled to the exclusive possession and management; (ii) that he (the defendant) had for years been in actual possession and management, and entitled thereto by virtue of an arrangement between all the sharers in the villages; and (iii) that the plaintiff's claim to such possession and management was barred. *Held,* on the evidence, that the right of management belonged to the plaintiff's branch of the family, and that there was no proof of the arrangement alleged by the defendant. But *held,* also, that the right to such possession and management was an interest in immoveable property within the meaning of Art. 144 of Sch. II of the Limitation Act, XV of 1877; that the defendant had enjoyed that interest adversely to the plaintiff's rights, at all events since January 1866, at which date the plaintiff, who had been in correspondence with Government with reference to his claim against the defendant, was referred by Government to the Civil Courts, and that the plaintiff's claim was therefore barred by limitation. *Held,* also, that it was not open to the plaintiff to ask to be placed in possession and management of the villages jointly with the defendant. If the condition of the tenure requires sole management by one person, that condition must be held to pass with the tenure, even though the tenure has passed out of the hands of the lawful holders by adverse possession. The general rule, that persons beneficially entitled to shares in an estate are entitled to partition of it, is excluded from application to properties such as saranjams. *Held,* further, that the defendant's possession, being admittedly one for management, subject to the rights of the sharers to receive their respective shares in the profits of the villages, was the possession of a trustee of such profits. The plaintiff was therefore entitled to have an account taken of the management of the villages by the defendant, and there was no limit to the period over which the accounts should extend other than the limit stated in the plaint. NARAYAN JAGANNATH DIKSHIT *v.* VASUDEO VISHNU DIKSHIT

I. L. R. 15 Bom. 247

GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

21. ——— Sanad—*Construction of sanad—Endowment for charitable purposes.* A sanad, after reciting that certain villages had been held by *C* as inam "on account of the worship, jubilees and feeding of Brahmins in honour of the Shri (or the Deity)," proceeded to "confirm the inam as before," directing that "it be continued to *C* and his sons and grandsons from generation to generation as it had been continued to the Shri from former times." *Held,* that this was a grant to the religious foundation, and not to *C* and his descendants for their own benefit. GANESH DHARNIDHAR MAHARAJDEV *v.* KESHARAV GOVIND KULGAVKAR

I. L. R. 15 Bom. 625

22. ——— Grant of zamindari lands—*Hereditary mokurari tenure—Death of grantee without heirs—Escheat.* Lands belonging to a zamindari granted by the zamindar under an absolute hereditary mokurari tenure do not, on the death of the grantee without heirs, revert to the zamindar; nor does the zamindar, under such circumstances, take by escheat a tenure subordinate to and carved out of his zamindari. Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a mokurari tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it. SONET KOOER *v.* HIMMUT BAHADOOR

I. L. R. 1 Calc. 391: 25 W. R. 239
L. R. 3 I. A. 92

23. ——— *Grant by landlord—Omission to reserve right of re-entry or reversion. Semble :* That where a landlord grants a permanent and heritable tenure in land, he has no estate left in him unless he reserves to himself a right of re-entry or reversion. *Sonet Koer* v. *Himmut Bahadur, I. L. R. 1 Calc. 391,* referred to. NIL MADHAB SIKDAR *v.* NARATTAM SIKDAR

I. L. R. 17 Calc. 826

24. ——— *Rent due to zamindar—Maganam in hands of separate persons—Apportionment of rent—Mad. Reg. XXV of 1802, s. 9.* The rent due to a zamindar from the grantee of a *maganam* or division of the zamindari is not a charge upon the *maganam.* It is a debt due to the zamindar, and nothing more. When the zamindar instituted the suit for rent, the *maganam* was in the possession of third parties, who had become owners of different portions of it by purchase. The zamindar sought to make all of them jointly and severally liable for the entire amount of rent due to him. The lower Court apportioned the rent upon the several villages in the hands of the purchasers. *Held,* that, in the absence of a subdivision under s. 9 of Regulation XXV of 1802, the apportionment might not be binding upon the Government, but it did not follow that it might not be good as between the parties to the suit, and that there was no foundation for the contention that the purchasers

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GRANT—*contd.*

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were jointly and severally liable for the rent fixed upon the whole *maganam*. ZAMINDAR OF RAMNAD *v.* RAMAMANY AMMAL . **I. L. R. 2 Mad. 234**

25. ——— Grant of rent-free zamindari land—*Beng. Reg. XIX of 1793.* Regulation XIX of 1793 refers to grants to hold land free of revenue, not to grants made by a private individual free of rent. A party holding under a *joutuck* grant from a zamindar containing no reservation of rent is entitled to hold rent-free. KAMESHUREE DASSEE *v.* COURT OF WARDS . . . **12 W. R. 251**

26. ——— Unsettled palayam held on service tenure—*Commutation of service for quit rent—Enfranchisement—Inam pottah issued to Hindu widow by Government—Effect of acknowledging her absolute title to estate.* The palayam of *G* was granted during the Mahomedan rule to a Hindu on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under Permanent Settlement under the provisions of Regulation XXV of 1802. The last male holder died in 1860 leaving him surviving a widow *K* and a daughter *C*. In 1865 the Government discontinued the service and, in lieu thereo and of the reversionary interest of the Crown, imposed a quit-rent, and an inam pottah was issued to *K* by the Inam Commissioner by which her title to the estate was acknowledged by the Government of Madras, and the estate was confirmed to her as her absolute property subject to the quit-rent. *Held*, that the effect of the inam pottah was not to confer on *K* any new estate, but merely as between the Crown and the owners of the estate to release the reversionary right of the Crown. NARAYANA *v.* CHENGALAMMA . . **I. L. R. 10 Mad. 1**

27. ——— Grant of profits of vatan deshmukhi in perpetuity—*Hereditary gomastahs—How far such grant valid after the death of the grantor.* By a sanad duly executed on the 20th August 1850, the plaintiff's father, *Y*, who was a vatandar deshmukh, appointed the defendants and their heirs hereditary vatani gomastahs, and granted, by way of remuneration for their services, R201 and a quantity of grain out of the annual vatan income in perpetuity. In consideration of certain sums obtained from the defendants, *Y* mortgaged the vatan property to the defendants, who subsequently sued *Y* upon the mortgage. The suit was referred to arbitration, and an award was duly made, and a decree upon the award was obtained by the defendants against *Y*. In 1859 execution of the decree was granted against *Y*. In 1864 the services connected with the vatan were discontinued, by Government. In 1871 *Y* died. The defendants having kept the decree alive, sought in 1881 to execute the decree against the plaintiff's eldest brother, who filed objections, but his objections were overruled, and execution was ordered to issue. The plaintiffs brought this suit in 1883 for a declaration that the defendants were no longer

GRANT—*contd.*

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entitled to the allowance under the sanad, and for an injunction restraining the defendants from the execution of the decree against the vatan. The defendants contended, *inter alia*, that the sanad could not be cancelled, *Y* having granted it as full owner, and that the receipt by the defendants of the allowance had been adverse since 1864, when their services had ceased. *Held*, confirming the decree of the lower Courts, that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for. Although the management of the vatan was vested by the sanad in the defendants and their heirs in perpetuity under the title of gomastahs, nevertheless the remuneration attached to the office by *Y* was in derogation of his successor's rights, and was therefore, at any rate in the absence of proof of custom, invalid against them. *Held*, also, that, having regard to the terms of the sanad, it was in the power of the original grantor or any of his successors to determine the office and the remuneration at any time after the vatan services ceased in 1864. KRISNAJI *v.* VITHALRAV **I. L. R. 12 Bom. 80**

28. ——— Proprietary right of khot to khoti vatani land—*Right of such khot to forest land and to timber and wood growing thereon—Government, right of, to appropriate forest preserves, assessed or unassessed land—Construction of such khoti grants.* The plaintiff sued the defendant, alleging that the village of mouzah Ambedu, in the Ratnagiri District, was his khoti vatani village in which his proprietary right extended to raise crops of any kind or to preserve and cut the jungle and forest trees on the lands therein. He complained that since 1855-56 the Collector of the district had prohibited him from exercising the above alleged rights, and prayed that the obstruction might be removed and R600 awarded as damages. The plaintiff based his claim mainly on the settlement of 1788, Dunlop's proclamation of 1824, and several other khoti grants in the district. The defendant denied that the plaintiff had any proprietary right in the village, and contended, *inter alia*, that the khot derived his rights from the yearly kabuliats passed by him, that his right to cultivate did not extend to cultivating the jungle land, and that his position was no better than that of a patel. The joint Judge who tried the suit held that under the settlement of 1788 the plaintiff as khot was entitled to the jungle-produce, except timber; that in virtue of Dunlop's proclamation of 1824 the plaintiff acquired an unqualified right to the forest land in the village and timber growing on it, and that the defendant had no right to appropriate assessed or unassessed land for forest purposes, and awarded the plaintiff the sum of R600 as damages. On appeal by the defendant to the High Court :—*Held*, that the application of the general rules of construction of grants to a subject by the State requires that language of such general import

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GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

as is ordinarily to be found in the khot's sanads, should be taken most beneficially to the State. *Held*, accordingly, that, in the absence of a sanad expressly granting it, the ownership neither of the soil nor of cultivated or uncultivated lands passes by the grant of the vatandari khotship. *Held*, also, that the grant of the vatani khoti did not make the khot a perpetual tenant of Government in respect of all lands in the village, except dhara lands. *Held*, on the authority of *Tajubai* v. *Sub-Collector of Kolaba, 3 Bom. A. C. 132*, and *Ramchandra Narsinha* v. *Collector of Ratnagiri, 7 Bom. A. C. 41*, that a permanent relationship was created between the Government and the khot which could not be interfered with as long as the settlement of 1788 was in force, except with the khot's consent, and therefore that in 1855, when the pahani of 1788 was in force, the Government could not withdraw the thikan in question from the plaintiff's cultivation. *Held*, also, that, in the absence of evidence to show that the right to the jungle produce was intended to be reserved to Government, the plaintiff was entitled to cut down brushwood, whether as a source of revenue or for the purpose of bringing the land into cultivation. *Held*, that the respondent was entitled to damages for the years during which he had been excluded, and to an injunction restraining the defendant from excluding him in the future. *Held*, also, that as khot the respondent had no right to cut timber in forest and uncultivated land, whether by virtue of his khotship or Dunlop's proclamation. COLLECTOR OF RATNAGIRI *v.* ANTAJI LAKSHMAN . . . **I. L. R. 12 Bom. 534**

29. ——— Right to cut trees—*Khoti khasgi land in the Ratnagiri District—Dunlop's proclamation—Crown grant—Right to rescind.* Defendants were khots of the village of Ojharkhol in the Ratnagiri District, of which a certain plot (Survey No. 52) was their khoti khasgi land. In 1894 they cut down a large number of teak trees growing on this land. Thereupon the Secretary of State for India in Council sued to recover their value alleging that they were the property of Government. Defendants pleaded that they were the absolute owners of the trees, and relied, in support of their title, on a proclamation issued by Government in 1824, known as Mr. Dunlop's proclamation. This proclamation had been subsequently rescinded by Government in 1851. The material part of Mr. Dunlop's proclamation was in the following terms :—"Upon the teak and other trees that may be on any person's land, Government has no design. He whose trees may now exist, or he whose trees may hereafter grow, may make such use of them as he pleases. Government will not offer the slightest obstruction." *Held*, that this proclamation was not a mere promise, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing, or might thereafter grow, and that the gift could not be revoked. *Held*, also, that by reason of this proclamation Government had no right to the teak trees growing on the land in question. SECRETARY OF STATE FOR INDIA *v.* SITARAM SHIVRAM **I. L. R. 23 Bom. 518**

GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

30. ——— Managing hot's right to create tenancies—*Maphi istava lands—Suti lands—Sanad, construction of—Fraud.* In 1832 the British Government granted to the plaintiff's father, Mahomed Ibrahim Makba, the village of Ransai on khoti tenure by a sanad which provided, *inter alia*, as follows :—(i) That the whole of the land waste in the year 1830-31 was granted as inam. (ii) That exclusive of this inam land, all the rest of the village was granted on khoti tenure on certain conditions and stipulations set forth in 12 clauses, the chief of which were the following : Clause 1st provided that the khot should annually pay to Government a fixed sum of R249 2 as. 35 rs. Clause 7th provided that the khot should allow the lands, which had been granted on *maphi istava* tenure to certain kowldars before the date of the sanad, to continue in their possession ; that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the khotship. Clause 9th provided that the holders of the *suti* lands in the village were the owners of those lands. Should a new survey be made and a new assessment settled, the same should be settled by Government for the holders of the *suti* lands agreeably thereto. From 1845 to 1871 the management of the khoti village was entrusted to the defendant as a maktadar, or lessee, under two kabuliats passed by him—one in 1845 to Mahomed Ibrahim Makba, the grantee of the khoti village, and the other in 1858 to the grantee's heirs and legal representatives. By clause 5th of the kabuliat of 1858 the defendant agreed to carry on the management of the village and render a detailed account of the balance of the village revenue every year. Clause 7th of the same kabuliat was in the following terms :—"I (the lessee) will bring under cultivation and into prosperous state the waste, culturable, and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village) nor lease to any body for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer." In 1859 some of the *maphi istava* lands were sold by the Collector for arrears of assessment, and bought in by Government. The defendant applied to the Collector to have the lands transferred to him, and the Collector transferred them to his name. Shortly afterwards the defendant acquired some more lands, which were held on *suti* tenure in the village. He either purchased them or took them up on the

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GRANT—*contd.*

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tenants abandoning them. In 1861, when the survey was introduced into the village, he got his title to these lands recognized by the Superintendent of Survey. In 1871 the defendant's management of the village ceased. But he refused to deliver up to the plaintiff either the *maphi istava* or the *suti* lands which he had acquired during his management. The plaintiff therefore sued, as khot of the village, to recover the said lands with mesne profits, alleging that the defendant had illegally and fraudulently acquired those lands on his own account while acting as plaintiff's agent and praying that he should be declared to have acquired and held them in trust for the plaintiff. The defendant contended, *inter alia*, that the lands in suit were not included in the khoti grant; that they belonged to Government; that he had acquired some from the Collector and the rest from the Superintendent of Survey; that under his kabuliats he was entitled to take up the lands direct from Government, and that the plaintiff was only entitled to the assessment due on the lands which he had refused to accept. Lastly, the defendant denied that he had acted in fraud of the plaintiff's rights in acquiring the lands in dispute on his own account. *Held*, on the construction of the sanad, that, the plaintiff being the khot of the whole of the village exclusive of the land granted in inam, the *maphi istava* lands were included in the khoti grant; that the khot's interest in them, whatever might be the extent of it, was not separable from the khoti estate; and that the khot had a reversionary interest in the *maphi istava* lands as well as in the *suti* lands which had been abandoned by their former occupants. *Held*, also, that the defendant was not precluded by the terms of his lease from acquiring the lands in dispute on his own account. The engagement to furnish accounts of the balance of the village revenue at the end of each year was simply an engagement to furnish the plaintiff with information which would be of use to him, and which indeed it would be necessary for him to possess when he resumed the management of the village on the determination of the lease. It imported nothing more than that; and the whole transaction evidenced by the kabuliats was merely an assignment in consideraiton of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter to be exercised and discharged for a certain period by the former. For that period the defendant was the maktadar or tenant of the plaintiff's khotship; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was bound jealously and scrupulously to protect the plaintiff's interests, so far as they were in his keeping, yet he was not bound by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*. Under clause 7th of the kabuliat of 1858, the defendant was at liberty either to take up waste lands himself or put in tenants; if he put in tenants on leases, the special advantages of any leases were to expire with his own lease. But the actual occupation of land either by himself or by his tenants was not to be interfered with at the determination of his lease, so long as he or they continued to pay the assessment according to the practice of the village. The defendant could therefore, without the intervention of the Collector, have taken up the *maphi istava* lands in suit and become himself the tenant; and he could have also acquired the *suti* lands from former *sutidars*, or taken them up, if waste, without the intervention of the Survey Superintendent. The circumstance that when acquiring the lands he needlessly invoked the assistance of the revenue authorities, would not invalidate his title if it could not be impugned on other grounds. *Held*, further, that the defendant was not guilty of fraud, as there was no evidence to show that he had acted in a surreptitious or secret manner in acquiring the lands in suit. On the contrary, his action in applying to the revenue authorities was a sign of his good faith rather than of any fraudulent intent. The plaintiff was therefore not entitled to oust the defendant from the lands in suit. FAKI ISMAIL *v.* MAHOMED ISMAIL . . **I. L. R. 12 Bom. 595.**

31. ——— Invalidity of grant, or covenant by grantor, in favour of person unborn upon a condition which may never arise— *Restraint upon grantor's own power of alienating —Hindu law.* The purpose of a grant was to oblige the grantor and his successors in a raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that, on the failure of the raja of the day at any future time to maintain such descendants, the latter were to have an immediate right to four of the raj villages. This might be regarded as imparting a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the raj estate, in favour of non-existing covenantees, to give the villages to them in the event specified. *Held*, that in either view it was equally ineffectual. *Held*, also, that the High Court had correctly construed the instrument in holding that the words "If ever in the time of my descendants you are not provided with means of maintenance" formed a condition which also was unfulfilled—the descendants being in possession of villages granted to them by the raja, other than those claimed, more than sufficient for their maintenance. CHANDI CHURN BARUA *v.* SIDHESWARI DEBI . **I. L. R. 16 Calc. 71 L. R. 15 I. A. 149.**

32. ——— Revenue-free grant—*Settlement in favour of daughter purporting to render other lands than the lands settled liable in the hands of the settlor and his heirs for the revenue of the settled lands—Beng. Reg. XXXI of 1803, s. 6—Mahomadan law of inheritance.* One *B* in 1843 settled certain lands on his daughter R, and covenanted that he and his heirs would pay the land

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GRANT—*contd.*

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revenue due on the estate so assigned along with the land revenue for their own estate. The deed of settlement then went on to provide that, if at any time the heirs of the settlor, or whoever might be in possession of the rest of his estate, should demand from *R*, or the person in possession of the lands assigned to her, the revenue assessed on those lands, then *R* and her heirs would be entitled to claim and take possession of the legal share in the settlor's estate to which she would be entitled under the Mahomedan law of inheritance. *Held*, that, as regards a person who had acquired a portion of the settled property partly by private sale and partly by sale at auction, the settlement contravened the provisions of s. 6 of Regulation No. XXXI of 1803, and the heirs of the settlor could not be compelled to pay the land revenue due on the portion of the settled lands acquired by the said purchaser, nor had the purchaser any right under the deed of settlement to a proportionate part of the inheritance which would have come to Rahmat-un-nissa from her father. SAHIB ALI *v.* SUBHAN ALI **I. L. R. 21 All. 12**

33. ——— Grant of portion of impartible zamindari—*Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of inheritance.* In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided, *inter alia*, that in case of failure of self-begotten male issue in the grantee's line, the immoveable property of the grantee should be put in possession of the grantor's line. On the death of the first grantee, the property passed into the possession of his two sons, and, on the death of the elder son, it came into the possession of the younger son. On his death without male issue, the estate passed into the possession of his widow defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not fail to be co-parceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant. *Held*, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of female issue contravened the principle laid down in the case of *Tagore* v. *Tagore, 9 B. L. R. 377 : L. R. I. A. Sup. Vol. 47*, and was inoperative. VENKATA

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KUMARA MAHIPATI SURYA RAU *v.* CHELLAYAMMI GARU . . . . **I. L. R. 17 Mad. 150**

34. ——— Grant of land—*Presumption as to boundaries where grant is described as bounded by a river or a road—Meaning of "river."* If land adjoining a high way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption; and this though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road. And this rule of construction cannot be departed from, merely because it is shown that it would have been to the interest of the grant or to retain half the bed of the river. This rule of construction applies equally whether the subject-matter be a grant from the Crown or a subject. *Micklethwaite* v. *Newlay Bridge Co., L. R. 33 Ch. D. 133; Ecroyd* v. *Coulthard*, [*1897*] *2 Ch. D. 554;* and *Lord* v. *Commissioner for the City of Sydney, 12 Moo. P. C. 473*, followed. BALBIR SINGH *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 22 All. 96**

35. ——— ——— *Construction of a grant for maintenance—Use of the words "proprietors" and "for ever"—Grant for life not extended thereby.* An Oudh *talukhdar*, who had inherited an impartible estate descending to a single heir, made a grant of villages for the maintenance of a member of the joint family to which they both belonged. Documentary evidence bearing on the duration of the grant consisted of a *baz-dawa*, or deed of relinquishment of claim, executed by the grantee, and of petitions by the grantor for the entry of change of names in the revenue record, with such entry. And relevant facts and circumstances were in evidence. *Held*, that the purpose of the grant, which was for the maintenance of the grantee, was *primâ facie* an indication that the grant was intended to be only for his life; and that its true construction was not extended by the use of the words "proprietor" and "for ever" in the documents. On the evidence, the District Judge had rightly declined to infer an intention to grant an estate of inheritance. His judgment that the estate did not extend beyond the life of the grantee had been reversed by the Appellate Court on insufficient grounds, and was now maintained in that respect. *Maulvi Abdul Majid* v. *Fatima Bibi, L. R. 12 I. A. 159*, referred to, the principle in that case applying to this. RAMESHAR BAKHSH SINGH *v.* ARJUN SINGH (1900)

I. L. R. 23 All. 194
s.c. L. R. 28 I. A. 1

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GRANT—*contd.*

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36. ——————— *Grant, whether for maintenance only or for an estate of inheritance—Intention as shown by documents—Partition by grantees on assumption that grant conferred an hereditary estate.* On a question as to whether a grant of lands made in 1844 out of the zamindari of Nidadavolu to collateral members of the family was a maintenance grant only and therefore resumable, or whether it conferred an estate of inheritance, it appeared that the grantees held other lands on what was admittedly a permanent tenure, and that of the latter lands and the lands granted in 1844 they had in 1846 made a partition "through and in the presence of the zamindar," and on the assumption that all the lands were held on an absolute and permanent tenure. The Judicial Committee (reversing the decision of the High Court), *held*, on the construction of the documents evidencing the grant, and under the circumstances of the case, that it conferred an hereditary estate, and that the title was completed by the partition. RAJAJI BAHADUR GARU *v.* PARTHASARADHI APPA RAU (1902) . . . **I. L. R. 26 Mad. 202**
s.c. L. R. 30 I. A. 14

37. ——————— *Deeds, interpretation of—Grant by way of lease—"Istemrari mokurari"—Grant for life—Tenure, permanent and hereditary—Grant for maintenance—Impartible Raj—Declaratory suit—Bengal Tenancy Act (VIII of 1885), ss. 106, 107, 109—Limitation Act (XV of 1877), Sch. II, Art. 14—Civil Procedure Code (Act XIV of 1882), s. 375—Registration Act (III of 1877), ss. 17, 49.* A grant was made of certain villages by the proprietor of an impartible Raj to his wife, in istemrari mokurari, at a fixed annual rent, the deed containing the following covenant, "I, the declarant, or my representatives, have and shall have no claim, right or dispute thereto, except the aforesaid reserve rent." *Held*, (1) that the use of the words istemrari mokurari in the lease was not sufficient to create a permanent and hereditary tenure; and (2) that the words excluding the claim of, or right of interference by, the grantor or his representatives did not necessarily import the creation of a permanent and hereditary tenure, but might fairly be construed as only to mean that the grantor or his representatives would not have the power to disturb the grantee during her lifetime. AGIN BINDH UPADHYA *v.* MOHAN BIKRAM SHAH (1902)
I. L. R. 30 Calc. 20 : s.c. 7 C. W. N. 314

38. ——————— *Construction of deed of gift—Words of inheritance—Al aulad—Male descendants—Custom—Khairat Bishanprit—Chota Nagpur—Bengal Act I of 1879, s. 124.* In a deed of gift of the nature known as Khairat Bishanprit made to a Brahman by the proprietor of a Chota Nagpur Raj, it was provided the grantee and his *al aulad* were to possess and enjoy the property, but the deed contained no words importing a right of alienation. *Held*, that, although the words *al aulad* etymologically include female as well as male descendants, yet according to a custom proved to have prevailed at the time of the grant and subsequently in that part of the country, the words must be interpreted to mean lineal male descendants only. *Hiranath Koer* v. *Babu Ram Narayan Singh, 15 W. R. 375 : 9 B. L. R. 274: Indur Chunder Doogur* v. *Luchmee Bibee, 15 W. R. 501*; and *Mana Vikrama* v. *Rama Patter, I. L. R. 20 Mad. 275*, distinguished. *Roopnath Konwur* v. *Juggunath Sahee Deo, 6 S. D. A. Sel. Rep. 133*, followed. PERKASH LAL *v.* RAMESHWAR NATH SINGH (1904)
I. L. R. 31 Calc. 561

39. ——————— *Zamindary estate—Compromise amongst creditors—Sale thereunder—Purchase by Government and resettlement upon debtor and creditors, effect of—Portion given absolutely to kinsmen in lieu of maintenance—Grant whether by zamindar or Government—Hindu law, Mitakshara—Succession.* *N*, a Hindu zamindar of Madras, owed considerable sums to creditors and also to Government for arrears of revenue. By a compromise effected between *N* and the cerditors (the Government being represented by the Collector), *N's* estate was sold and purchased by Government. Portions of the estate so purchased were then settled on the different creditors of *N* in satisfaction of their debts and the remainder given back to *N*. One such portion *T* was given absolutely to *S* and *V*, two kinsmen of *N*, to whom *N* owed a large sum on account of arrears of maintenance, in satisfaction of all claims for maintenance past as well as future. A similar grant of estate *C* was made by another zamindar, a cousin of *N*, and for similar reasons to *S* and *V*. *S* and *V* subsequently partitioned the above joint properties, and estate *T* fell to *S*. *S* died and his widow who succeeded also died and estate *T* was claimed by *S's* daughter's son on the one hand and persons claiming either under *N* or *V* on the other. *Held* (reversing the decree of the High Court), that the latter had no interest in estate *T*, in which *S* had acquired an absolute title, that title having originated in a grant from Government and not from *N*, who at the time of the settlement had no estate out of which to make a grant. JEE BAHADUR GARU *v.* PARTHASARADHI APPA ROW AND PAPAMMA ROW BAHADUR (1904) . . **8 C. W. N. 105**

40. ——————— *Grant of taluk in Oudh—Sanads, successive—Sanad granted in substitution for another—Imposition of rule of inheritance contrary to Hindu law—Validity—Executive act in times of peace—Effect—Crown Grants Act (XV of 1895), s. 3—Pleadings—Issue not specifically raised—Secondary evidence—Admissibility—Oudh Estates Act (I of 1869), s. 22—"Legatee," meaning of.* Before the annexation of Oudh and the proclamation of confiscation, a taluk was held by a person with whom subsequently a summary settlement was made and who in 1859 obtained a *sanad* purporting in terms to be a grant of the taluk to him

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GRANT—*contd.*

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and his heirs. No particular line of inheritance was indicated in this *sanad*. After his death the person who succeeded him as his heir accepted, in 1861, another *sanad*, which imposed a rule of descent different from that laid down by law. *Held*, that it was competent for the latter, who became absolutely entitled by inheritance to everything that passed under the earlier grant, to surrender it in consideration of a re-grant of the same estate on new terms. *Held*, further, that all doubts regarding the validity of the second grant have been removed by the provisions of s. 3 of the Crown Grants Act. *Quære :* Whether after peace has been established in a newly acquired territory a Government can by an executive act create a line of inheritance different from that laid down by law. A legatee, who succeeded as such before the passing of the Oudh Estates Act, is not a legatee within its meaning. *Thakurain Balraj Kunwâr* v. *Rae Jagatpal Singh, 8 C. W. N. 699 : s.c. 31 I. A. 142*, followed. The Judicial Committee allowed this appeal on a case, in respect of which no specific issue had been settled, the issue as settled appearing to be sufficiently wide to cover the case and their Lordships being satisfied that the respondents were not thereby unfairly taken by surprise. RAJ INDRA BAHADUR SINGH *v.* RANI RAGHUBANS KUNWAR (1905)

9 C. W. N. 1009

41. ——————— *Mahomedan law —Transfer of possession—Costs.* On the 5th day of July 1901, *J*, a Mahomedan lady, executed a gift of moveable and immoveable properties, including the house in which she resided, in favour of *A, B, C, D, E*, the widow and minor children, respectively, of her deceased son *M*. After the execution of the deed of gift, *A* took exclusive possession of the house on her own and on her children's behalf. On the 7th day of July 1901, *J* returned to the house, and at her instance, the tenants, who resided on a portion of the property transferred, attorned to *A*. During the absence of *J* from July 5th to July 7th, 1901, certain furniture and other moveable property belonging to her remained in the house, the subject of the gift. On the 18th of October, 1903, *J* died intestate. Upon *S*, the sole surviving daughter of *J*, filing a suit, claiming that the alleged gift was invalid under Mahomedan Law :—*Held*, the execution of a deed of gift of immoveable property accompanied by a temporary abandonment of possession by the donor in favour of the transferee and the attornment of tenants to the transferee is a sufficient delivery of seisin to make the gift valid under the Mahomedan law. The fact that during the abandonment of possession, a portion of the donor's moveable property remains on the premises, and that the donor, after a temporary absence, continues to reside in the same, does not render the transfer of possession inoperative. *Shaik Ibrahim* v. *Shaik Suleman, I. L. R. 9 Bom. 146*, followed. It was within the discretion of the lower Court to allow separate costs to the 1st defendant and her minor children. But only one set of costs was allowed in the appeal. KHAVER SULTAN *v.* RUKHIA SULTAN (1905)

I. L. R. 29 Bom. 468

42 ——————— *Grant, construction of—Holdings, which an Inamdar acquires by purchase from a kadim occupant or by lapse of prior occupancies distinguished from the rights, which he obtains directly from the grant itself.* A grant which purports to be a grant only of the Royal share of the revenue given in commutation of cash theretofore payable as a palanquin allowance, must be construed strictly in favour of the Crown, and is *primâ facie* a grant only of the revenue. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905)

I. L. R. 29 Bom. 480

43. ——————— *Re-grant after confiscation—Exception of Maliahs in re-grant—Construction of exception—Title by adverse possession—Estoppel—Maliahs treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government—Evidence Act (I of 1872), s. 115.* Prior to 1799 the zamindari of Parlakimedi included certain tracts of forest land called *Maliahs*, which were held by *Bissoyees* or local chiefs on service tenures in respect of which they paid to the zamindar a sum as *kattubadi* or quit-rent ; their duties being, *inter alia*, to keep up an establishment of guards at certain thanas for police purposes. Besides the *Maliahs* they held other lands which they occupied and cultivated for their own support. In consequence of a rebellion in 1799 in which the then zamindar took part, the Government, by a proclamation issued in 1800, declared that the zamindari was confiscated ; and that "the Bissoyees" were henceforward to pay their revenue directly to the Collector and to be for ever under the Company's immediate authority ; but that they would in due course restore the son of the zamindar "to the lands of his ancestors with the exception of those now held by the *Bissoyees*, which are hereby declared separated from the zamindari for ever." This restoration was made in 1803, after the death of the rebellious zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as "the lands held by the *Bissoyees*," "the possessions of the Bissoyees," and "all lands or *russums* or fees heretofore appropriated to the support of police establishments." In a suit against the Government by the zamindar of Parlakimedi in 1894, claiming proprietary right in, and possession of, the *Maliahs* as appertaining to the zamindari :—*Held*, that the proper construction of the exception was that it included the *Maliahs*, and not only the lands occupied and cultivated by the *Bissoyees*, the *Maliahs* therefore did not pass under the re-grant, but remained the property of Government as they had done since the forfeiture. In 1923 the Government transferred the *Bissoyees*, who

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GRANT—*contd.*

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had been placed in 1800 under the Collector, to the zamindar, and directed that they should be required to pay their quit-rents to him. *Held*, that the arrangement conferred no proprietary right in the *Maliahs* upon the zamindar, who incurred thereby no liability for the quit-rents of the *Bissoyees*, but had only to account for what he succeeded in collecting. In 1835 certain villages not within the *Maliahs* were granted to the zamindar in consideration of his undertaking liability for the quit-rents of the *Bissoyees*. *Held*, that such an express grant excluded the inference that the zamindar obtained any proprietary right in the *Maliahs*. The Courts below had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and the Judicial Committee upheld that decision. From 1861 to 1893, in consequence of the disability or incapacity of successive zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the *Maliahs*, as if they belonged to the zamindari, worked the forests in the *Maliahs* and constructed roads through them at the expense of the zamindar; and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the *Maliahs* as seemed good in the public interest. *Held* (affirming the decision of the High Court), that there was in that conduct no such representation as could give rise to an estoppel which would prevent the defendant from denying the plaintiff's title. GOURA CHANDRA GAJAPATI NARAYANA DEO *v.* SECRETARY OF STATE FOR INDIA (1905)

I. L. R. 28 Mad. 130
s.c. 9 C. W. N. 553

44. ——— Khorposh grant—*Injunction—Minerals, working of—Suit by khorposhdar—Specific Relief Act (I of 1877), s. 52—Injunction, relief by, when to be granted—Sound discretion—Presumption as to title conveyed—Life-grant—Underground rights—Right to rents—Reversion—Jungle-buri lease—Right of lessee to minerals.* In the absence of direct evidence of its terms and failing proof of territorial or family custom to the contrary, a *khorposh* grant cannot be presumed to be of greater duration than for the lifetime of the grantee. Such a grant cannot, moreover, be presumed to be more than a grant of rents and profits and does not carry with it a right to open mines and remove minerals, which are a portion of the soil. Previous to the *khorposh* grant in question in this case, the grantor had leased away the surface rights in favour of one *G* and subsequent to the grant he conveyed the underground rights to one *C*, who meanwhile had purchased the surface rights from the successors in title of *G*. *Held*, that in this case, the *khorposhdar* being entitled neither to the minerals nor to the possession of the surface, the Courts in India had properly refused his prayer for an injunction restraining *C* from working the minerals. His rights being limited to the receipt of the rents reserved under the lease to *G* and such other rights, if any, as might be incident to the reversion acquired under the grant, he might possibly be entitled to damages upon proof of injury to his reversion or that his security for the rent would be impaired. But there was no case for granting an injunction. S. 52 of the Specific Relief Act places the grant of an injunction in the sound discretion of the Court. No injunction ought, in the exercise of sound discretion, to be granted where far more injury would be inflicted thereby on the defendant than any advantage accruing to the plaintiff. A lessee under a *jungle-buri* lease became entitled to the use and possession of the surface. The mineral rights remained in the owner. TITURAM MUKERJEE *v.* COHEN (1905)

9 C. W. N. 1073

45. ——— Dedication of land for public use—*Land acquired for a public purpose—Collector's award of compensation—Dispute between rival claimants—Elements of a good dedication made to the public—Exclusive and continuous user by the public with owner's knowledge—Burning ghat—Meaning of term 'ghat'—Bengal Municipal Act (Bengal Act III of 1884), ss. 30, 87, 98, 254, 256, 347, 348.* An exclusive and continuous user by the public with the owner's knowledge and acquiescence for the prescription period will raise the presumption of a grant or dedication to the public. *Bessemer v. Jenkins, 56 Am. Sp. Rep. 26; Kennedy* v. *Cumberland, 57 Am. Rep. 346;* and *Boyce* v. *Kalbaugh, 28 Am. Rep. 464,* referred to. Where a dedication is implied only, the question may arise whether the dedication was of the entire ownership of the land or merely of the right of user. *Grogan* v. *Hayward, 4 Fed. Rep. 161; Bushnell* v. *Scott, 94 Am. Dec. 555,* referred to. To constitute a valid dedication it is not essential that the legal title should pass from the owner. *New Orleans* v. *United States, 10 Peters 662, 712,* referred to. It is not consistent with an effectual dedication that the owner should continue to make any and all uses of the land, which do not interfere with the uses for which it is dedicated. *State* v. *Trask, 27 Am. Dec. 554; The Vestry of St. Mary, Newington,* v. *Jacobs, L. R. 7 R. B. 47; Jaggamoni Dasi* v. *Nilmoni Ghosal, I. L. R. 9 Calc. 75,* referred to. One of the essential elements of a good dedication is that it is made to the public that it be irrevocable, and the land be for ever dedicated for the designated public use. *Dawes* v. *Hawkins, 8 C. B. N. S. 848; San Francisco* v. *Canonan, 42 Calif. 541,* referred to. Land dedicated for cemeteries, if subsequently abandoned, will revert to the dedicator or his heirs. *Campbell* v. *City of Kansas, 10 L. R. A. 593; New Ark* v. *Watson, 94 L. R. A. 843; Board of Commissioners* v. *Young, 8 C. C. A. 27: L. C. 59, Fed. Rep. 96; Board of Education* v. *Edson, 98 Am. Dec. 114; Quinn* v. *Leathem, App. Cas. 495, 506,* referred to. *Manmatha Nath Mitter v. Secre-*

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tary of State for India in Council, I. L. R. 25 Calc. 194 : s.c. L. R. 24 I. A. 177, distinguished. The following English cases are authorities on the question of the principle of valuation of land subject to restrictions to use. *Hilcoat* v. *Archbishop of Canterbury, 10 C. B. 327; Stebbing* v. *Metropolitan Board of Works, L. R. 6 Q. B. 37 ; City and South Railway Co.* v. *St. Mary, Woolnoth, 18 T. L. R. 612 : s.c. 19 T. L. R. 363.* The following English cases were referred to where the question raised was as to the principle upon which compensation, when awarded for land subject to restriction as to use, had to be apportioned amongst persons interested in the property: *Campbell* v. *Mayor and Corporation of Liverpool, L. R. 9 Eq. 579 ; Ex parte Rector of Liverpool, L. R. 11 Eq. 15 ;* and *Ex parte Rector of St. Martin's, Birmingham, L. R. 11 Eq. 23.* Under s. 30 of the Bengal Municipal Act the term 'ghat' does not include a burning ground. *Chairman of the Naihaty Municipality* v. *Kishory Lal Goswami, I. L. R. 13 Calc. 171 ; Modhu Sudan Kundu* v. *Promoda Nath Roy, I. L. R. 20 Calc. 732,* referred to. CHAIRMAN OF THE HOWRAH MUNICIPALITY *v.* KHETRA KRISHNA MITTER (1906)

I. L. R. 33 Calc. 1290
s.c. 10 C. W. N. 1044

46. ——— Absolute grant to widow—*Mention of a person as heir of grantee confers no interest on such person.* Where a deed of grant to a widow recites that she has no other heirs than her daughter and that the lands shall belong to such daughter at her death, the grant is not to be construed as a grant to the widow and her daughter. The grant is absolute and to the widow alone, the daughter taking no interest under it. RENGASAMY NAIKEN *v.* GANGAMMAL (1905)

I. L. R. 29 Mad. 300

47. ——— Grant of village "with wells, tanks, and waters," effect of—*Irrigation works, rights of Government in—Proprietary right not proved by contribution of customary labour.* A grant of village "with all wells, tanks, and waters" within the boundaries will not pass to the grantee an artificial water-course then existing, which irrigated the village granted and other lands. Subsequent contribution of labour by the grantee for clearing the channel will not be evidence of proprietary right as such labour is customary and may be enforced under Madras Act I of 1858. The ruling power in India had from the earliest times the conservation and control of works of irrigation, and Government has accordingly the right to carry out repairs and improvements in the irrigation works belonging to it, provided that in doing so it does not diminish materially the supply of water to which others may be entitled. AMBALAVANA PANDARA SANNATHI *v.* THE SECRETARY OF STATE FOR INDIA (1905) . . . **I. L. R. 28 Mad. 539**

48. ——— *Regulation XIX of 1793—Act XI of 1859—Sale—Encumbrance—*

GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

Liability to pay rent. Some years before the acquisition of the Dewani by the East India Company, the zamindar made rent-free grant of village P to one *D.* Since then *D,* and after him his heirs, continued in possession of the village, until the institution of this suit. After the acquisition, the Company made an assessment of the lands in the Bengal Province, and village P was then, and again at the time of the Permanent Settlement, assessed at *sicca* R80, which assessment was accepted by the zamindar, and he and his heirs continued to pay the assessed amount. In the year 1900 the zamindar made default in payment of the revenue for the September *kist,* and the village was sold under the provisions of Act XI of 1859. The purchaser instituted a suit for recovery of possession or for assessment of rent and mesne profits. *Held,* that the right created under the grant was an encumbrance, which existed from before the time of the Permanent Settlement ; but the plaintiff could not be affected by the laches of the defaulter or his predecessors ; he was entitled to hold the estate in the same condition as it was at the time of the Permanent Settlement, when the revenue was assessed at *sicca* R80 and to recover that amount with cesses from the defendants. *Held,* further, that s. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid before the Permanent Settlement ; the rent is not enhancible according to the law now in force, as the land must be considered to be comprised in a tenure existing from before the time of the Permanent Settlement. *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo, 14 Moo. I. A. 152,* referred to. BRINDABAN BEHARI LAL *v.* BHOWANI SAHAI (1908) **I. L. R. 35 Calc. 931**

49. ——— *Grant by Government of the revenue of a village as a unit of assessment—Cultivation by grantee of uncultivated or unassessed land—Grantee can do so and profit thereby.* *Held,* that when Government grants the revenue of a village considered as a unit of assessment, and in course of time the grantee is able to bring under cultivation land which had previously been uncultivated or even unassessed, it is open to him under the grant to do so and to profit by the new cultivation. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1908)

I. L. R. 32 Bom. 432

50. ——— Grant of land in Secunderabad Cantonment—*Grant to founders of Parsi Tower of Silence—Documents by Hyderabad State and by Officer Commanding Hyderabad Subsidiary Force Controlling Cantonment—Proof of title—Suit—Encroachment—Parsi community—Evidence of conduct of founders subsequent to acquisition of land.* In a suit, in which the parties were the members of the Parsi community at Secunderabad, the plaintiffs claimed the exclusive right to certain land in the cantonment, on which stood a Parsi Tower of Silence, as descendants and

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GRANT—*contd.*

1. CONSTRUCTION OF GRANTS—*contd.*

representatives in title of the original founders, by whom they alleged the Tower had been erected after the land had, on the application of the founders, been granted to them in 1837 by the Hyderabad Government. The defence was that the grant relied on by the plaintiffs was a forgery, and that the real grant had been made by the Officer Commanding the Hyderabad Subsidiary Force in 1838, not to the predecessors in title of the plaintiffs personally, but to, and for the benefit of, the whole Parsi community. *Held*, that the documentary evidence supported the plaintiff's title. The document, on which they relied (which was held to be genuine), was issued by an Officer of the Hyderabad State, and purported to express a transaction, by which the State had assented to the grant of the land to the two founders by name, and directed possession of it to be delivered to them. That relied on by the defendants (which had also been applied for and obtained by the founders) was a document issued by order of the Military authorities, who could not be held empowered to alienate in perpetuity land forming part of the Cantonment for a purpose wholly inconsistent with military requirements. It was, moreover, not a grant, but a document giving permission to use the land, already conveyed, for the particular purpose of a Tower of Silence and to enclose the land, matters obviously within the discretion of the Commanding Officer as possibly affecting the convenient occupation of the cantonment. The effect of the two documents was to show a good title in the founders and not in the Parsi community. That view was confirmed by the fact that the founders admittedly enclosed the land and erected a Tower of Silence on it at their own expense; that they erected a Fire Temple in connexion with it on land acquired by private purchase, and that the evidence showed that the possession, management and control of the Tower of Silence and of the land, on which it stood, were in the founders, who for many years afterward bore the whole expenses of the establishment and all costs of maintenance and repair; and that in the early years after the acquisition of the land and erection of the Tower (the events of which were more important than those in later years when the circumstances of the parties had somewhat changed) the priests referred such difficulties and questions as arose for the orders of the founders and obeyed those orders. PESHONJI JIVANJI *v.* SHAPURJI EDULJI CHINOY (1908) . . **I. L. R. 35 Calc. 478**
s.c. L. R. 35 I. A. 79
12 C. W. N. 465

51. ———— Forfeiture—*Inheritance— Whether the words of inheritance contained in the grant created an absolute estate in favour of the grantee—Re-entry, right of—Breach of restriction against voluntary alienation, effect of.* *A* by a deed granted a *miras taluq* to his daughter *B*. The demise was to her for life, on her death to her son, if she adopted one, for life; on his death "to his sons, grandsons, etc.," by right of inheritance in the male line: without any power of disposing of the property at will, by gift, sale, etc. If the grantee did not adopt a son, or if she adopted, and the son died without a son, grandson, etc., the property was to revert to the grantor or to his representative. It was also provided that "the said property cannot be attached or sold for any debt incurred by you or your adopted son or grandson, etc. If it be attached or sold, the grant will at once become null and void, and the property will come into *khas* possession of me or my representatives." *B* adopted a son *C* and subsequently made a gift of the land to him by a deed. Upon a suit by the grantor's son against *B* and *C* for recovery of possession of the land on the ground that the conveyance operated as a forfeiture:—*Held*, that although the alienation by *B* to *C*, being directly contrary to the provisions of the grant, was bad in law, yet, inasmuch as the breach of the provisions did not operate as a forfeiture, the plaintiff was not entitled to a decree for *khas* possession. DHARANI KANTA LAHIRI *v.* SIBA SUNDARI DEBI (1908)
I. L. R. 35 Calc. 1069

2. POWER TO GRANT.

1. ———— Grant of rent-free tenure—*Jaghirs—Power before Permanent Settlement.* A zamindar had no power before the Permanent Settlement to grant a rent-free tenure, or a tenure at a less rent than the share of the produce payable to Government for revenue; nor had he power to grant jaghirs. NILMONEY SINGH *v.* GOVERNMENT
6 W. R. 121

s.c. on appeal to Privy Council **18 W. R. 321**

2. ———— Grant of land rent-free—*Beng. Reg. XIX of 1793, s. 10—Reg. XLI of 1795, s. 10—Act XVIII of 1873, ss. 30, 95—Act XIX of 1873, s. 79.* The plaintiff in this suit claimed the possession of certain land in virtue of a grant thereof to him, not merely of the proprietary right in such land, but of the rents of the same undiminished by the payment of the revenue assessed thereon, which the grantor took upon himself to pay. *Held*, by STUART, *C.J.*, PEARSON, *J.*, and OLDFIELD, *J.*, that the grant was null and void and liable to resumption, with reference to s. 10 of Regulation XIX of 1793, and Regulation XLI of 1795, and s. 30 of Act XVIII of 1873, and s. 79 of Act XIX of 1873. *Per* SPANKIE, *J.*—That the question whether the grant was null and void with reference to those Regulations and Acts did not arise, as the grant, on the facts found by the Court below, was not one within the terms of those Regulations. JAGANNATH PANDAY *v.* PRAG SINGH
I. L. R. 2 All. 545

3. ———— *Beng. Reg. XIX of 1793, s. 10—Act XVIII of 1873, ss. 30, 95 (c)—Act XIX of 1873, ss. 79, 241 (h).* The plaintiffs in this suit, zamindars of a certain village, sued for the

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GRANT—*contd.*

2. POWER TO GRANT—*contd.*

possession of certain land in such village, alleging that it had been assigned to a predecessor of the defendant to hold so long as he and his successor continued to perform the duties of village watchman, and the defendant had ceased to perform those duties and was holding as a trespasser. The defendants set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, and that he held it as a proprietor. *Held*, that such assignment was not a grant within the meaning of Regulation XIX of 1793. PURAN MAL *v.* PADMA . **I. L. R. 2 All. 732**

4. ———————— *Reg. XIX of 1793, s. 10—Grant for public purposes—Rent—Revenue.* A zamindar in 1830 granted rent-free 22 bighas of land out of his zamindari to *A*, who was to make a tank, the use of which was to be devoted to the public. In February 1862, a successor to the grantor in the zamindari sought to resume the land, on the ground that the original "rent-free" grant was null and void, it having been made without the sanction of Government. *Held*, *per* NORMAN, PUNDIT, and LEVINGE, *JJ.* (TREVOR and LOCH, *JJ.*, dissenting), that such a grant was valid. It was not within the meaning of Regulation XIX of 1893, s. 10. "Rent to the zamindar" and "Revenue of Government" distinguished. PIZIRUDDIN *v.* MADHUSUDAN PAL CHOWDHRY
B. L. R. Sup. Vol. 75 : 2 W. R. 15

Overruling HUREENARAIN GOSSAIN *v.* SHUMBHOONATH MUNDLE . . . . . **1 W. R. 6**

5. ———————— *Beng. Reg. XIX of 1793, s. 10—Resumption—Rent—Revenue. Held, per* PEACOCK, *C.J.*, and L. S. JACKSON and MACPHERSON, *JJ.* (BAYLEY, NORMAN, and SETON-KARR, *JJ.*, dissenting), that the words "exempt from revenue" in s. 10, Regulation XIX of 1793, refer only to grants free from the payment of revenue to Government, and do not include grants or leases by a zamindar exempt from the payment of rent. Therefore a rent-free grant made by a zamindar, and *à fortiori* one by a mourasi ijaradar, of a specified portion of land after a Permanent Settlement of the estate to which it belongs, is valid as against the grantor and his heirs or against a purchaser of the estate by private sale, and is not liable to be resumed under that section. *Held*, *per* BAYLEY, NORMAN, and SETON-KARR, *JJ.*, *contra.* MAHOMED AKIL *v.* ASADUNNISSA BIBI. MUTTYLALL SEN GWYAL *v.* DESHKAR ROY
B. L. R. Sup. Vol. 774 : 9 W. R. 1

6. ———— **Effect of grant against auction-purchaser.** A certain quantity of *seer* land was given by a Mahomedan zamindar to his daughter, on the occasion of her marriage, to be held by her as *seer*,—that is to say, free from payment of rent, but not free from payment of revenue. *Held*, that a zamindar was competent to make such grant, and his act is binding on the auction-purchaser, whose right is only to receive the revenue rate from the grantee. AHMUD OOLLAH *v.* MITHOO LALL . . . . . **3 Agra 186**

7. ———— **Grant for public purposes** *—Liability to assessment of rent.* A grant for a road used annually for the Rath Jattra is valid and not assessable with rent, the grant being for a public purpose. HUREENARAIN GOSSAIN *v.* SHUMBHOO NATH MUNDUL . . . . . **1 W. R. 6**

8. ———————— *Tank granted subsequent to 1790.* A tank granted subsequently to 1790 is liable to resumption in the absence of proof of its having been either the condition of the grant or the intention of the grantor that the tank should be a public benefit. Such a case does not come within the ruling of the Full Bench in *Piziruddin* v. *Mudhusoodun Pal Chowdhry, B. L. R. Sup. Vol. 75.* JUDOONATH SIRCAR *v.* BONOMALEE MITTER
2 W. R. 295

CHUNDER KANT CHUCKERBUTTY *v.* BUNKOO BEHAREE CHUNDER . . . . **3 W. R. 177**

9. ———————— *Supply of water to villagers from wells to be dug—Building temples—Power to resume and assess grant.* Where the manager of a coal company had allowed persons to settle on the lands of the company, on conditions about which a dispute arose, and the company sought to assess the land with rent, and the tenants claimed to hold it rent-free :—*Held*, by the High Court, that, in the case of one plot on which the tenant had agreed to dig wells and had done so, the water which the villagers on the company's estate drew from the said wells was in the nature of a fair consideration for the land ; and that, though the land was assessable with rent, the company could not assess it so long as the villagers were supplied with water. In regard to another plot, however, in which some temples had been erected :—*Held*, that the temples did not in any way further the objects of the company, and could not be treated as fair consideration, and that the company could assess the plot. BENGAL COAL COMPANY *v.* HURDYAL MARWAREE . . **25 W. R. 245**

10. ———— **Hereditary grant, presumption of**—*Allowance—Long enjoyment—Title—Bom. Reg. V of 1827, s. 1.* Where the plaintiff's ancestors had enjoyed an allowance during four successive generations for a period extending over more than a century, the legal presumption, in the absence of the original grant, is that such grant was hereditary. The allowance having been continued by the British Government to the plaintiff's grandfather, for the same reason for which a village (admitted to be held on hereditary tenure) had been continued, and having been paid to the plaintiff's grandfather up to his decease and afterwards, as a matter of course, to the plaintiff's father, it was held that the enjoyment of the plaintiff's grandfather and father was proprietary enjoyment ; and as this enjoyment had continued uninterruptedly for more than thirty years, that, under

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GRANT—*contd.*

2. POWER TO GRANT—*contd.*

Regulation V of 1827, s. 1, a statutory and indefeasible title to the allowance had been acquired. DESAI KALYANRAYA HUKAMATRAYA *v.* GOVERNMENT OF BOMBAY . . **5 Bom. A. C. 1**

11. ——— Hereditary charitable grant —*Allowance for temple—Bom. Reg. V of 1827, s. 1.* Where a charitable grant in connection with a temple was proved to have been enjoyed by the incumbent and those under whom he held in regular succession for more than thirty years, it was held that the grantee had acquired a right of property in it under Regulation V of 1827, s. 1. *Per* WARDEN, *J.*—Independently of the origin or nature of the grant. *Per* GIBBS, *J.*—In the absence of it being shown to have been a personal grant, and by the conduct of Government in paying to the several generations in succession. COLLECTOR OF KHEDA *v.* HARISHANKUR TIKAM . . . . **5 Bom. A. C. 23**

12. ——— Grant by widow for religious benefit of husband—*Power of successors to resume grant.* Where two widows of a zamindar granted a small portion of the zamindari to a Brahman who had been brought up by them with a view that he should perform the funeral and annual ceremonies of their deceased husband :—*Held*, that the grant was not *ultra vires*, and could not be resumed by the zamindar's successor. LAKSHMINARAYANA *v.* DASU . **I. L. R. 11 Mad. 288**

13. ——— Invalidity of grant or covenant by grantor, in favour of persons unborn, upon a condition which may never arise—*Restraint upon grantor's own power of alienating—Hindu law.* A Hindu owner cannot make a conditional grant of a future interest in property in favour of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant. The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that, on the failure of the Raja of the day at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favour of non-existing covenantees, to give the villages to them in the event specified. *Held*, that in either view it was equally ineffectual. CHANDI CHURN BARUA *v.* SIDHESWARI DEBI . . **I. L. R. 16 Calc. 71**
L. R. 15 I. A. 149

14. ——— Grant of building-sites by Tahsildar—*Darkhast rules—Appeal to Divisional*

GRANT—*contd.*

2. POWER TO GRANT—*concld.*

officer—Failure to reverse grant—Validity of grant. By the *darkhast* rules, as amended in 1894, an appeal is provided to a Divisional officer from the orders of a *Tahsildar* in respect of grants of building-sites. A *Tahsildar* passed an order granting an application for a building-site and an appeal was preferred therefrom to the Sub-Collector (the Divisional officer). This officer apparently referred the appeal to the Collector, who passed an order annulling the grant. The Collector's order was sent to the Divisional officer, who communicated it to the *Tahsildar*. On a suit being instituted by the applicant for a declaration of his title to the land :—*Held*, that he had acquired a good title. The appeal lay to the Sub-Collector, who had exercised no discretion with reference to the question which came before him on appeal. He had not dealt with the appeal, or made any order thereon. No authority had been cited to show that, in matters not dealt with by the regulations, the Collector has a revisional power similar to that given to him by the regulations in matters dealt with therein, and that the Collector's order on appeal to the Sub-Collector ought to be regarded as an order made by the Collector in the legal exercise of his revisional powers. The result was that the order of the *Tahsildar* granting the title had not been legally set aside, and the plaintiff had acquired a good title by virtue of the grant duly made by the *Tahsildar*. SAPPANI ASARI *v.* COLLECTOR OF COIMBATORE (1903) . **I. L. R. 26 Mad. 742**

3. GRANTS FOR MAINTENANCE.

1. ——— Nature of tenure—*Resumption and assessment of lands.* In a suit for assessment of rent on certain villages the defendant admitted that the villages formerly belonged to the plaintiff's predecessor, but were given over to them for their maintenance. *Held*, that under these circumstances the defendant's tenancy was a mere tenancy-at-will which the plaintiff's predecessor had a right to determine at any time. GOVERNMENT *v.* LALL MOHUN NAUTH . . **2 Hay 136**

2. ——— Grant by Raja of Pachete—*Duration and effect of such grants.* A grant by a former Raja of Pachete of a pergunnah, part of the zamindari or raj of Pachete, to a member of his family, *held* to be a grant for maintenance only, and resumption was decreed to the Raja in possession. *Semble :* Grants made by the predecessor of the Raja in possession, whether in fee or for maintenance, enure only during the lifetime of the grantor, and are not binding on his successor. *Quære :* Whether the zamindari of Pachete constitutes an indivisible estate of inheritance and as such inalienable. ANUNDLAL SING DEO *v.* DHEERAJ GURROOD NARAYAN DEO . . . . **5 Moo. I. A. 82**

3. ——— Duration of maintenance grant—*Power of zamindar to resume grant for maintenance—Possession of successors of grantee.*

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GRANT—*contd.*

3. GRANTS FOR MAINTENANCE—*contd.*

Land held as a maintenance grant is resumable by the zamindar at the death of the grantees, whether it is in the hands of more immediate, or in those of more remote, members of the family ; the nature of such a grant being to make suitable provision for the immediate members, while it prevents the zamindari from being completely swallowed up by continuous demands. The successors of such grantee paying rent to the zamindar cannot be regarded as holding adversely to him. WOODOYADITTO DEB *v.* MAKOOND NARAIN ADITTO DEB . **22 W. R. 225**

4. ——————— *Charge on zamindari.* A maintenance grant, claimed to be hereditary, held to be for life only. *Lekraj Roy* v. *Kunhya Singh, I. L. R. 3 Calc. 210,* quoted. A maintenance grant which the donor directs to be paid by his agent out of the revenues of a certain zamindari does not form a charge on that zamindari. BIR CHUNDER MANICKYA BAHADOOR *v.* ISHAN CHUNDER THAKUR . . **3 C. L. R. 417**

5. ——————— *Value of land enhanced by irrigation.* Where a zamindar granted to his mother, in lieu of maintenance, two villages, the income of which, upon the introduction of irrigation, was greatly enhanced without any expenditure or labour on the part of the grantee :—*Held,* in a suit by the grantee for damages against parties claiming to have been put in possession of the lands of the two villages by the successor of the grantor, that (i) in the absence of express words to the contrary, the grant enured for the grantee's life ; (ii) that as the provision was reasonable, the grant was binding on the successor of the grantor ; (iii) that the introduction of irrigation, not having been contemplated at the time of the grant, might entitle the present zamindar to revise and re-adjust the terms of the grant, but was no ground for dispossessing the grantee. BHAVANAMMA *v.* RAMASAMI . . . . **I. L. R. 4 Mad. 193**

6. ——————— *Presumption of nature of grant from long undisturbed possession.* Successive enjoyment for three generations, without interference, of land granted by a zamindar to a member of his family in lieu of maintenance justifies the presumption that the original grant was intended to be absolute. SALUR ZAMINDAR *v.* PEDDA PAKIR RAJU . **I. L. R. 4 Mad. 371**

7. ——————— **Babuana property, nature of** —*Grant for maintenance—Power of grantee to alienate—Kulachar of Darbhanga Raj. Babuana* property granted in accordance with the *kulachar* or family custom of the Darbhanga Raj is property granted to the junior male members of the family to be enjoyed by them in lieu of money maintenance subject to the proprietary rights of the grantor and his ultimate claim as reversioner on the extinction of the grantee's dependants in the male line. The grantor remains responsible for the payment of the Government revenue and retains his position as the recorded proprietor of the property assigned. The grantee is bound to pay to the grantor such revenue which the latter pays into the Collectorate, and this obligation can be enforced by suit. The grantee has a right to alienate the property subject only to the contingent interest of the grantor. RAMESWAR SINGH *v.* JIBENDER SINGH (1905)
I. L. R. 32 Calc. 688
s.c. 9 C. W. N. 567

4. POWER OF ALIENATION BY GRANTEE.

1. ——————— **Survivorship**—*Rights of widow —Grant by Government for maintenance of family.* The lands of three brothers having been confiscated, the Government afterwards assigned revenue-paying lands for the benefit, in certain proportions, of the minor son of the eldest brother, also of the widow, minor son, and daughter of the youngest brother (both these brothers being then deceased) ; and the second brother, who survived, was put into possession of a proportionate part of the property. *Held,* by the Privy Council, that the widow of the youngest brother, on the deaths of his son and daughter, became by survivorship sole owner of the estate so assigned for their and her benefit ; so that an alienation of part, if made by her, could not be set aside at the instance of the second brother, who failed to show, on the above state of things, that the estate was heritable property of the son, as whose uncle and heir he claimed. NARPAT SINGH *v.* MAHOMED ALI HUSSAIN KHAN
I. L. R. 11 Calc. 1

2. ——————— **Alienation by zamindar**— *Validity of, against his successor.* A grant of a portion of a zamindari by the zamindar in favour of his sister cannot operate independently of her claim to maintenance, so as to bind his successor, though the alienation may be binding as against the grantor during his life. MALAVARAYA NAYANAR *v.* OPPAY AMMAL . . . . . **1 Mad. 349**

3. ——————— **Charge in favour of stranger**—*Perpetual annuity.* A zamindar has no more power to charge a perpetual annuity in favour of a stranger on the income of the zamindari than he has to alienate the corpus. NARAYANGA DEVU *v.* HARISCHANDANA DEVU . . **1 Mad. 455**

See SUBBARAYULU NAYAK *v.* RAMA REDDI
1 Mad. 141

4. ——————— **Grant by holder of appanage**—*Lease for mining purposes.* Though the holder of a younger brother's appanage has no power of complete and absolute alienation of property, of which he has only a limited tenure for maintenance, still a lease granted by him is good as between him and the grantee and those claiming under the grantor, at least during the grantor's life. Mining leases, like leases for building, are among those which the regulations particularly favour as being in their nature such as to require a long time

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GRANT—*contd.*

4. POWER OF ALIENATION BY GRANTEE —*contd.*

for profitable working. GORDON, STUART & Co. *v.* TIKAITNEE SCOLAS KOWAREE . **W. R. 1864, 370**

5. ———— **Grant by zamindar of estate for maintenance**—*Pottah "dawami" made to a lessee by the grantee in excess of his estate to what extent effectual, from circumstances—Suit for possession—Limitation Act (XV of 1877), Sch. II, Art. 91—Suit for declaratory decree—Specific Relief Act (I of 1877), s. 39—Adverse possession.* A grant of a village for maintenance was made by a zamindar to his nephew, operating only for life. The grantee survived the grantor, and by ikrarnama acknowledged the succeeding zamindar to be entitled to the village. The grantee had, however, already executed a pottah, described therein as permanent, to a lessee. The latter obtained possession, and from him after the death of the original grantee for life the zamindars who succeeded the grantor accepted rent at the rate stipulated in the pottah, and did not disturb his possession. This suit, after the death of the lessee, claimed the village as part of the inherited zamindari, the defence being that the lease was perpetual. *Held*, (i) that the original grant not having extended to more than the life of the grantee, the pottah was void as against the successor in title of the grantor, and not merely voidable after the grantee's death. The acceptance of rent at the rate in the pottah could not have the effect of confirming it in its entirety, which, according to the construction of the High Court, would have been for a permanent estate. The duration of the pottah could not exceed that of the original grant; nor could an admission, taken by the High Court to have been that the acceptance of rent had confirmed the permanency of the lease, preclude the claim for legal rights, even supposing that admission to have been made. The matter in contest was as to the circumstances under which the lessee was allowed to remain in possession and their legal effect. And on the evidence, the lessee had been allowed to remain as a mokurari tenant for his life. (ii) The suit for possession was not barred under article 91 of the Limitation Act (XV of 1877) on the ground that a decree declaratory of title to have the pottah cancelled might have been sued for in the lessee's lifetime under s. 39 of the Specific Relief Act, 1877. (iii) The possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1877 by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure. BENI PERSHAD KOERI *v.* DUDHNATH ROY
I. L. R. 27 Calc. 156
L. R. 26 I. A. 216
4 C. W. N. 274

6. ———— **Grant from person with only temporary interest**—*Failure to prove right of occupancy.* In a suit to recover possession of debutter land where plaintiff relied upon a mourasi pottah which had been granted by, or with the permission of, a poojaree no longer in office, the principal defendant claiming under a lease from the existing poojaree:—*Held*, that plaintiff could not succeed, in the absence of evidence of a right of occupancy, under s. 6, Act X of 1859, and his title was bad as based upon a grant from a person who had only a limited or temporary interest in the land. GOOROO PERSHAD ROY *v.* RAM LOCHAN PAURAY . . . . **13 W. R. 241**

GRANT—*contd.*

4. POWER OF ALIENATION BY GRANTEE —*concld.*

7. ———— **Grant by military authorities of cantonment-land**—*Resumption by Government.* Where Government had permitted the military authorities to use certain land for cantonment purposes, which land was subsequently resumed by the Government:—*Held*, that the military authorities had no power to make a grant of the land given for military purposes for a period longer than the land would remain in their possession, and that no term of limitation had expired to bar the ordinary right of Government as a landlord to demand rent. RAMCHAND *v.* COLLECTOR OF MIRZAPORE
3 Agra 7

5. RESUMPTION OR REVOCATION OF GRANTS.

1. ———— **Mokurari grant in perpetuity**—*Right of resumption in grantor.* A mokurari tenure granted in perpetuity cannot be resumed by the grantor, even if the grantee dies without leaving heirs. HIMMUT BAHADUR *v.* SOONEET KOOER . . . . **15 W. R. 549**

2. ———— **Grant of mokurari pottah**—*Power to resume on death of grantor.* A mokurari pottah granted by a Raja of Tipperah to a member of his family is, by recognized custom, resumable on the death of the grantor. ROOP MOONJUREE KOOEREE *v.* BEER CHUNDER JOOBRAJ
9 W. R. 308

3. ———— **Amaram grant**—*Right to resume—Arrears of assessment, liability for.* An amaram grant is resumable at the pleasure of the zamindar. The grantees of such a grant, when resumed, if they remain in possession without payment of the assessment which they are lawfully bound to discharge, are liable to be sued for such arrears of assessment. UNIDI RAJAHA RAJI VENKATAPERUMAL RAUZE *v.* PEMMASAMY VENKATADRY NAIDOO
4 W. R. P. C. 121 : 7 Moo. I. A. 128

See NARASAYYA *v.* VENKATAGIRI RAJAH
I. L. R. 23 Mad. 262

4. ———— **Annual allowance for palki huq**—*Allowance attached to hereditary office—Right of Government to resume.* An annual allowance for palki huq (palanquin allowance) to the holder of the hereditary office of Desai of Broach held under a jaghir grant charged by former native Governments in the land revenues of that pergunnah

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GRANT—*contd.*

5. RESUMPTION OR REVOCATION OF GRANTS—*contd.*

is incident to the tenure of Desai and is not resumable by Government. GOVERNMENT OF BOMBAY *v.* DESAI KALLIANRAI HAKOOMUTRAI **14 Moo. I. A. 551**

5. ——— Grant by Government by proclamation—*Revocation of, by proclamation—Consent—Resumption, power of.* Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made. COLLECTOR OF RATNAGIRI *v.* VYANKATRAV NARAYAN SURVE **8 Bom. A. C. 1**

See SECRETARY OF STATE FOR INDIA *v.* SITARAM SHIVRAM . . . **I. L. R. 23 Bom. 518**

6. ——— Construction of gift—*Tribal custom—Evidence of intention.* In view of the circumstances under which an oral lease of villages at a favourable rate of rent, and of indefinite duration, was made by the proprietor, a talukhdar, in favour of her daughter, it was held not to be a lease for life, but to be resumable at the lessor's pleasure. The parties belonged to a tribe (Ahban) appearing to be Mahomedan, but in regard to inheritance and maintenance, having customs of its own, which permitted the resumption. There was no evidence of the lessor's intention contemporaneous with the making of the lease ; but her will, executed within two years after and made known to the Government to show the future succession to the talukh, contained a bequest of the same villages to the lessee with express reservation of power to alter this disposition. *Held*, that this was evidence bearing on the question of intention. NAJBAN BIBI *v.* CHAND BIBI . **I. L. R. 10 Calc. 238 : 13 C. L. R. 401 L. R. 10 I. A. 133**

7. ——— Effect of resumption and settlement on lakhiraj tenures. After resumption and settlement, a lakhiraj estate becomes, to all intents and purposes, a separate zamindari held from Government in perpetuity, the proprietors of which are, in accordance with the Full Bench ruling of the 14th December 1867—*Mahomed Akil* v. *Asadunisa Bibi, B. L. R. Sup. Vol. 774 : 9 W. R. 1*—capable of granting portions rent-free ; the grant or taking such land, with the risk of losing it again, in the event of the whole estate being sold for default on the part of the zamindar. DABEE PERSHAD *v.* JOY LAL CHOWDHRY . . **12 W. R. 361**

8. ——— Grant by Hindu sovereign to Hindu temple—*Nibandha—Antastha sadilvar—Kherij jummabundi parbhare paiki—Religious penalty for resumption.* The Peishwa, by a sanad dated 1790, granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance of R350 out of the "Antastha sadilvar," and three khandis of rice out of the "kherij jummabundi parbhare," to be levied from certain mehals and forts mentioned in the sanad.

GRANT—*contd.*

5. RESUMPTION OR REVOCATION OF GRANTS—*contd.*

The allowances were paid till the death of the plaintiffs' father on the 26th December 1859, when the Collector of Thana stopped them. On the 23rd December 1870, the plaintiffs sued to establish their right to the grant and to recover six years' arrears of the allowances. *Held*, that the grant was irresumable, inalienable, and perpetual. It was not a grant from the revenues of the State at large or even of the zillah, but was made up of certain small special grants charged upon the antastha sadilvar, produced by certain special localities in the zillah. Thus the grant was essentially localized, and whatever there might have been of contingency or variability in the levy or application of the antastha sadilvar previously to the making of the grant, such contingency or variability ceased to the extent of the grant from the moment of its being made to a Hindu temple. The religious penalty for the resumption of a royal grant made for Hindu religious purposes is sometimes expressed in the grant and sometimes omitted from it. But its omission does not in any wise derogate from the durability of the grant. The Hindu law implies the religious penalty for resumption, albeit not expressed in the sanad. A pension or other periodical payment or allowance granted in permanence is nibandha, whether secured on land or not. *Quære :* Whether a private individual as well as a royal personage may create a nibandha. COLLECTOR OF THANA *v.* HARI SITARAM **I. L. R. 6 Bom. 546**

9. ——— Madras Regulation IV of 1831—*Madras Act IV of 1862—Resumption of inam—East India Company's jaghir—Act of State—Menkaval lands—Mirasi rights, evidence of—Secondary evidence of lost grant by Government.* In a suit to declare the plaintiff's title to a shrotrium village which was included in the jaghir granted in 1763 by the Nawab of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nawab free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally, without conditions of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862, on failure of the direct male line, the grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1868 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification, the Kazi transferred the

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GRANT—*concld.*

5. RESUMPTION OR REVOCATION OF GRANTS—*concld.*

village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi from whom the plaintiff claimed died in 1868. An inam of certain menkaval lands, which had formerly been allotted to the village watchman as inam, had been granted to the Kazi in 1802-3; they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pottahs to the raiyats. *Held*, (i) that the grant of 1779, the original document not having been reproduced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be correct and attested by the Persian translator to Government; (ii) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State; (iii) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government were not acting *ultra vires* in cancelling the enfranchisement, etc.; (iv) that the Kazi through whom the plaintiff claimed having died in 1868, there was no reason to question the resumption in 1873; (v) that the plaintiff was entitled to possession of the menkaval lands, the action of Government in issuing pottahs to the raiyats being *ultra vires*. Issues first framed on appeal as to the plaintiff's claim to mirasi rights and menkaval lands. Evidence of mirasi rights considered. KARUNAKARA MENON *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 14 Mad. 431

GRANTOR.

See ESTOPPEL . **I. L. R. 33 Calc. 915**

GRATIFICATION.

——— **illegal—**

See ILLEGAL GRATIFICATION.

——— **officer to give—**

See PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL **I. L. R. 17 All. 498**
L. R. 22 I. A. 193

GRATUITY.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—ANNUITY OR PENSION.
I. L. R. 6 All. 173, 634

See RIGHT OF SUIT—OFFICE OR EMOLUMENT . . . **1 Bom. Ap. 18**
6 Bom. A. C. 250
I. L. R. 2 Bom. 470

GRAVE-YARD.

See MAHOMEDAN LAW—CUSTOM.
I. L. R. 26 Bom. 198

GRAVE-YARD—*concld.*

See RIGHT OF SUIT—CHARITIES AND TRUSTS . . **I. L. R. 21 All. 187**

——— **prohibiting use of—**

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, s. 381 . **I. L. R. 25 Calc. 492**
2 C. W. N. 145

——— **trespass on—**

See RELIGION, OFFENCES RELATING TO.
I. L. R. 18 All. 395

GRAZING.

See PASTURAGE, RIGHT TO.

GRIEVOUS HURT.

See HURT—GRIEVOUS HURT.
See PENAL CODE, ss. 304 AND 325.
I. L. R. 29 All. 282
8 C. W. N. 344
I. L. R. 30 All. 568

See REVISION—CRIMINAL CASES—COMMITMENTS . **I. L. R. 16 Bom. 580**

See RIOTING . . **3 N. W. 174**
I. L. R. 24 Calc. 686
1 C. W. N. 423

See SENTENCE—CUMULATIVE SENTENCES.

——— *Penal Code (Act XLV of 1860), ss. 304 and 325—Assault by three persons armed with lathis—Intention—Culpable homicide—Grievous hurt.* Three persons attacked a fourth with lathis, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow. *Held*, that the offence of which the three assailants were guilty was grevious hurt rather than culpable homicide not amounting to murder. *Queen-Empress* v. *Duma Baidya, I. L. R. 19 Mad. 483*, followed. EMPEROR *v.* BHOLA SINGH (1907) . . . **I. L. R. 29 All. 282**

GROUNDS OF APPEAL.

See APPEAL—GROUNDS OF APPEAL.
1 N. W. 193
I. L. R. 15 Mad. 503
L. R. 19 I. A. 179

See CIVIL PROCEDURE CODE, 1882, s. 574.
13 C. W. N. 143

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL.

——— **of second appeal—**

See CIVIL PROCEDURE CODE, 1882, ss. 244, 574 . . **13 C. W. N. 105, 143**

GUARANTEE.

See PARTNERSHIP—
RIGHTS AND LIABILITIES OF PARTNERS;
6 C. W. N. 429

SUITS RESPECTING PARTNERSHIPS.
I. L. R. 25 Bom. 606

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GUARANTEE—*contd.*

See PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL . **6 C. W. N. 429**

See RES JUDICATA—CAUSES OF ACTION—CONTINUING GUARANTEE. **I. L. R. 27 Bom. 418**

See PRINCIPAL AND SURETY—DISCHARGE OF SURETY . **I. L. R. 15 Bom. 585**

1. ——— **Contract of**—*Statute of Frauds (29 Car. II), c. 3, s. 4—21 Geo. III, c. 70, s. 17.* A contract of guarantee is a "matter of contract and dealing" within the terms of s. 17 of 21 Geo. III, c. 70, and therefore such a contract made by a Hindu is not affected by s. 4 of the Statute of Frauds. JAGADAMBA DASI *v.* GROB **5 B. L. R. 639**

2. ——— **Appropriation of payments**—*Guarantee on advance to limited company.* In consideration that the plaintiffs would advance a certain sum to a limited company, two of the directors agreed that the plaintiffs should repay themselves the amount "from the first moneys received by them on account of the said company, and each of them agreed to hold himself personally responsible for the payment of half the amount of any deficiency of the amount realized by the plaintiffs in the manner above described. At this time the plaintiffs were the bankers of the company, and were regularly paying and receiving money for them. The plaintiffs, instead of applying the first moneys coming to their hands in liquidation of the amount advanced under the guarantee, applied such moneys towards the payment of other debts due to themselves from the company. In an action against the executrix of one of the directors:—*Held*, upholding the decision of the Court below, that the plaintiffs, as between themselves and the guarantors, were bound to appropriate the first receipts to the payment of the guaranteed debt, and that, as they had not done this, the guarantee was discharged. NICHOLLAS *v.* WILSON **I. L. R. 4 Calc. 560 : 3 C. L. R. 361**

3. ——— **Custom**—*Trade custom in Beawar—Payments made by arathdars—Ratification.* By a custom of Beawar, a merchant coming there from another district is allowed to trade only in the name and in the credit of some local arath or banking firm which guarantees his dealings, and to which, on the conclusion of transactions, a panri, or memorandum thereof, is sent by the stranger merchant. *C* coming to Beawar made several purchases in accordance with the above custom, using the firm of *S & M* as his arath. On leaving Beawar he sent *S & M* a panri, in which all his purchases, except the last and largest, under which he had taken no delivery and had made no payment, were entered. On application by the vendors in the last transaction to *S & M* as guarantors of *C* to make good the purchase-money, they at first refused on the ground that the transaction was not entered in the panri sent them, but afterwards they consented to pay the vendors the amount of the loss occasioned by *C's* failure to pay and take delivery. In a suit by *S & M* against *C* to recover the amount so paid:—*Held*, that, if the plaintiffs were congnizant of and allowed their names to be used in the last transaction, as was shown to have been the case in previous transactions, they were, according to the custom, liable to the vendors, and consequently entitled to recover over from the defendant what they had paid; and that, even if there was no actual authority given at the time of the transaction, still as the defendant had used the names of the plaintiffs as his guarantors, and had held them out as liable to pay on his behalf for the goods he purchased, they were thereby authorized, if they thought fit, to make the subsequent payment which they did on behalf of the defendant, or (in other words) to ratify the use which the defendant had made of their name, and were not deprived of their right to do so by their having for a time repudiated liability. SETH SAMUR MULL *v.* CHOGA LALL **I. L. R. 5 Calc. 421 L. R. 6 I. A. 238**

4. ——— **Condition precedent**—*Charter-party—Damages, measure of.* The defendants, *M G & Co.*, entered into a contract of guarantee with the plaintiffs, *P* and *C N C & Co.*, which was contained in the following letter:—"In consideration of your paying us on account of *C*, the owner of the ship *Caroline*, chartered by you to load at Rangoon with timber, as per charter-party executed by him and your good selves, dated this day, the sum of R21,500, to be paid in advance and in part freight of the said vessel payable as follows:—*viz.*, R18,000 at Calcutta and R3,500 at Bombay for the disbursement of the vessel there;—we hereby guarantee and engage to hold you harmless against all losses, damages, and consequences arising from the non-performance of any of the acts, covenants, or agreements to be done, kept, observed, or performed by or on the part of the said *C* in terms of the said charter-party; and we further agree to allow you interest at the rate of 10 per cent. per annum, to be charged by you for the said advance in the event of its being refunded by us. We also agree to see the voyage performed by the said vessel in full terms and conditions of the said charter-party this day executed by *C* in your favour." To this the plaintiffs replied on the same day: "In consideration of your having guaranteed to keep us harmless for the advance made by us to *C*, owner of the ship *Caroline*, against freight of that vessel, to be earned by her on the anticipated voyage from Rangoon to Bombay, with a cargo of timber, as per charter-party executed this day between ourselves and the said *C* as per your letter of guarantee dated this day, we hereby agree and engage ourselves to make you over a mortgage-bond on the British barque *Moulmein* of 305 tons, executed in Moulmein by the said *C* in favour of *N B* of Rangoon, for certain debts due to him by the said *C*, duly transferred to you free from *N B's* claim on the said barque *Moulmein*." The charter-party was of even date, and was made by *C* on the one part and the plaintiffs on the other part, and

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it was thereby agreed that the ship *Caroline*, "being tight, strong, and staunch, and in every way fitted for the voyage, and now at Bombay, shall with all convenient despatch proceed to the port of Rangoon in British Burma or so near thereto as she may safely get, and there load from the charterer's agents or their order a full and complete cargo of timber," etc. "and being so loaded shall proceed to Bombay," etc., "and deliver the same on being paid freight in the manner below at and after the rate," etc., "the act of God, etc., excepted." The freight to be paid as follows:—"R18,000 in Calcutta on the signing of this charter-party, R3,500 also in advance at Bombay towards defraying the disbursements of the vessel at that port, and the balance to be paid by transfer on account and to credit of *N B* of Rangoon, for money due and owing to him by the said *C*," etc. "And the said *C* hereby binds himself," etc., "that the said vessel *Caroline* shall be ready to leave Bombay without any delay immediately upon the disbursements being satisfied; and in case she cannot leave the said port of Bombay within such time as shall be considered reasonable, or is otherwise detained either at Bombay aforesaid or at Rangoon, except for or by such causes as the act of God," etc., "then and in such case this charter-party shall be considered null and void, and the said charterers shall be entitled to recover from the said *C*, his heirs and representatives, the aforesaid sum of R21,500, together with interest thereon, calculated from the date hereof, at the rate of 10 per cent. per annum. The charterers to have the option of cancelling their charter-party in the event of the vessel arriving at Rangoon in a disabled state, and the time for repairs to make the ship seaworthy in every respect exceeding twenty-five days. Penalty for non-performance of this agreement, the estimated amount of freight." The plaintiffs were acting on behalf of *N B*, and the defendants on behalf of *C* during the whole of this negotiation, and *C* was at the time largely indebted to *N B*. The ship *Caroline* turned out to be unseaworthy, and the charter-party was not carried out. In an action by the plaintiffs against the defendants on the guarantee:—*Held*, that the covenant to transfer the mortgage of the *Moulmein* was independent, and not a condition precedent to the plaintiff's right of action. *Held*, also, on the facts, that the representation in the charter-party that the *Caroline* was, while lying at Bombay, "tight, strong, and staunch," etc., amounted to a contract that the ship should be so, and the defendants' guarantee covered it. *Held*, also, that the defendants, not being parties to the charter-party and not having bound themselves to any assessment of damages, were not called on to pay the penalty specified in the last clause of the charter-party, but that the damages against them must be the actual damages which the plaintiffs on *N B's* behalf suffered in consequence of *C's* breach of contract, —that is, R21,500 paid under the contract, and the balance of freight that would have gone to reduce *N B's* debt and interest on both sums from the date of the contract. The plaintiffs, however,

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claimed a less sum than these damages would amount to, and therefore the plaintiff's claim was decreed in full. PRESTOMJEE DHUNJEEBHOY *v.* GREGORY . . . **1 Ind. Jur. N. S. 412**

5. ——— **Surety, discharge of**—*Disclosure—Material fact—Contract Act, s. 142.* *M* was declared the highest bidder at a sale of an abkari farm for three years, and his bid was accepted, subject to his furnishing the security required by the conditions of sale. Having failed to furnish security, the farm was re-sold at a loss of R4,875, and *M* became indebted to Government in that amount. On the re-sale, *M* was again declared purchaser, and being unable to furnish the necessary security, *N* was accepted as his surety for the due fulfilment of the conditions of the lease to be performed by *M*. *N* did not enquire and was not informed by the Collector as to the debt due by *M* when he executed the surety-bond. *Held*, in a suit to enforce this bond (which was executed before the Contract Act, 1872, came into force) against *N*, that *N* was not discharged by reason of the fact that the indebtedness of *M* was not disclosed to him by the Collector. SECRETARY OF STATE FOR INDIA *v.* NILAMEKAM PILLAI **I. L. R. 6 Mad. 406**

6. ——— **Intention of parties**—*Bonâ fide endeavour to perform engagement—Penalty.* When a third person voluntarily consents to incur liability on account of another, and binds himself in a penalty for the due performance of his engagement, the nice technicalities of English law are not applicable, but the real intention of the parties must be looked to. In this case, there having been a *bonâ fide* endeavour on the part of the respondent fairly to perform his engagement, and there having been a disposition on the part of the appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty consequent on non-performance, the appeal was dismissed. RAM GOPAL MOOKERJEE *v.* MASSEYK **2 W. R. P. C. 43 : 8 Moo. I. A. 239**

7. ——— **Unascertained amount**—*Promise to pay debt of another.* A promise to pay a debt of a third person may be binding, although the amount may not be ascertained at the time. PEAREE LALL SHAHA *v.* WOOMESH CHUNDER MOZOOMDAR . . . . . **9 W. R. 140**

8. ——— **Effect of guarantor signing voucher as surety.** Where a surety for the payment of the price of goods sold to another person signs as voucher for them, that fact does not alter his position as surety or make him primarily responsible for them. AGUILAR *v.* WOOMESH CHUNDER SHAW . . . **22 W. R. 209**

9. ——— **Recommendation to lend money**—*Liability to repay.* A mere recommendation by one party to another to lend money to a third party does not operate as a guarantee nor render the first party liable to repay the loan. JUGGAT INDAR NARAIN ROY CHOWDHRY *v.* NISTARINEE DASSEE . . . **24 W. R. 446**

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GUARANTEE—*contd.*

10. ——— Construction of contract guaranteeing conduct of person employed as agent of the guarantor—*Liability for loss resulting from such agent's misconduct towards his employer.* Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor :—*Held*, that the loss, to be recoverable in a suit against the guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khezanchi of a district treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah, appointed as his agent. The latter became a party to frauds by putting off upon the public forged stamps, in addition to the genuine ones issued from the treasury, into which, however, all the proceeds of sales were paid. The darogah, on whose indent the stamps were issued, made the proceeds appear to correspond in his accounts with the value of the stamps issued to him ; but, under cover of the above payment, he misappropriated certain genuine stamps. *Held*, that, although the guarantor might not be responsible in respect of the forgery of the stamps, yet he was responsible on his agreement by reason of the misappropriation of the genuine stamps and the false accounts rendered ; and that losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by the fact of such misappropriation and false accounting. SRI KISHEN *v.* SECRETARY OF STATE FOR INDIA

I. L. R. 12 Calc. 143
L. R. 12 I. A. 142

11. ——— Guarantee on condition of not taking criminal proceedings—*Consideration—Compounding felony.* *S* gave to the creditors of *H* a guarantee for the payment of the debts due to them by *H*. As a consideration for this guarantee, the creditors were to abstain from taking criminal proceedings against *H* for fifteen days, and by implication were to abstain from taking such proceedings altogether if the said debts were paid within that time. *Held*, that such a guarantee could not be enforced by the creditor. A man, to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute. He must not, however, by stifling a prosecution obtain a guarantee from third parties. KESSOWJI TULSIDAS *v.* HURJIVAN MULJI

I. L. R. 11 Bom. 566

12. ——— Guarantee for rent—*Lease—Indemnity—Liability—Continuing guarantee—Death of surety—Contract Act (IX of 1872), ss. 124, 125, cl. (2), 126, 129, 131.* One *B* proposed to take a lease of zamindari property from *M* for the period of eight years at a rental of R3,900 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms :—" And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee, and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed on appeal by the District Judge. On second appeal it was contended that, under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim. *Held*, that, assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death. *Held*, further, that neither *G* if he were alive, nor on his death the defendant as his representative, could be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit. *Lloyds* v. *Harper, L. R. 16 Ch. D. 290*, was referred to. GOPAL SINGH *v.* BHAWANI PRASAD

I. L. R. 10 All. 531

13. ——— Revocation of guarantee—*Contract Act (IX of 1872), s. 260—Surety—Liability of surety to a firm which has undergone change in its constitution—Cause of action—Surety bond.* The defendants *B* and *R*, on December 6th, 1895, executed a security bond, the condition of which was that *B* should duly and faithfully discharge his duties while employed as cash-keeper to the firm of " N. C. Mookerji," *R* standing as *B's* surety to the firm. In July 1896, there being a change in the constitution of the firm, it came to be styled and designated as " N. Mookerjee and Son." Defalcations on the part of *B* were discovered between January 1897 and May 1900, *i.e.*, while

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GUARANTEE—*concld.*

B was in the service of "N. Mookerjee and Son," a firm which came into existence in the year following that in which the bond was executed. The members of the present firm of "N. Mookerjee and Son" sued the defendants on the bond. An objection by way of demurrer to the plaintiff's claim—that no cause of action was shown to exist against the defendants—having been taken:—*Held*, that, there being a change in the constitution of the firm before the alleged defalcations took place, the guarantee given by *R* would be taken as revoked by virtue of s. 260 of the Contract Act; and, the alleged embezzlements having been committed by *B* while in the service of the new firm of "N. Mookerjee and Son," and not that of N. C. Mookerjee, there was no breach of the conditions of the bond: the objection taken by the defendants must therefore prevail, and the suit be dismissed. NEEL COMAL MOOKERJEE *v.* BIPRO DASS MOOKERJEE (1901)
I. L. R. 28 Calc. 597

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See CUSTODY OF CHILDREN.

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See GUARDIAN AND MINOR.

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See GUARDIANS AND WARDS ACT (VIII OF 1890).

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I. L. R. 33 Bom. 419

See HINDU LAW—GUARDIAN.

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I. L. R. 31 Bom. 80

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See MORTGAGE—REDEMPTION—MISCELLANEOUS CASES **I. L. R. 27 Bom. 23**

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——— appointed under Guardians and Wards Act—

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——— certificated—

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——— continuance of parent's guardianship—

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GUARDIAN—*contd.*

——— **contract made by—**

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——— **negligence of—**

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——— **possession by—**

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——— **powers of—**

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I. L. R. 18 Bom. 375

1. APPOINTMENT.

1. ——— **Application to appoint guardian**—*Minor—Act IX of 1861, ss. 1 and 6—Previous application which had been refused.* A Court is not precluded from entertaining a fresh application for the guardianship of a minor under s. 1, Act IX of 1861, by the circumstance that a previous application of the same sort has been refused. NEHALO *v.* NAWAL . . **I. L. R. 1 All. 428**

2. ——— *Infant—Power of High Court—Application by petition without suit.* On an application made on petition without suit for the appointment of a guardian of the person and property of an infant, the Court Receiver was appointed receiver, and the property was ordered to be handed over to him with liberty to him to sell it and invest the proceeds in Government paper, and the matter was referred to the Judge in chambers

GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

for enquiry as to the proper person to be appointed guardian. *In the matter of* BITTAN
I. L. R. 2 Calc. 357

3. ——— **Power of Court to appoint guardian of person and estate of a minor.** The power of the Court of Chancery to appoint guardians to infants, whether such infants have property or not, is possessed by the High Court. *Re* JAGANNATH RAMJI . . . **I. L. R. 19 Bom. 96**

4. ——— *Inherent power of High Court to appoint guardian—Guardians and Wards Act (VIII of 1890)—Appointment of Hindu father as guardian.* The High Court has the power, irrespective of the provisions of the Guardians and Wards Act (VIII of 1890), of appointing a guardian for an infant or his estate. A Hindu father appointed guardian of his infant sons for the purpose of raising money by the mortgage of ancestral immoveable property, on its appearing to the Court that by so appointing him guardian better terms were likely to be procured from the mortgagee, and the infants to that extent consequently benefited. *In the matter of the petition of* JAIRAM LUXMON
I. L. R. 16 Bom. 634

5. ——— **Guardianship of female minor**—*Mahomedan Law—Beng. Reg. X of 1793, s. 21—Act XL of 1858, s. 27—Act IX of 1861.* The effect of s. 21 of Regulation X of 1793 and of s. 27 of Act XL of 1858 is that no person other than a female shall in any case be entrusted with the guardianship of a female minor. *Held*, therefore, where a Mahomedan mother had by marrying a stranger forfeited her right to the guardianship of her children, that in the case of her female children their grandmother was entitled to be appointed guardian to the exclusion of male relatives. And the fact that the proceeding in which the right is sought to be established is under Act IX of 1861 does not affect the rule. FUZEEHUN *v.* KAJO
I. L. R. 10 Calc. 15

6. ——— *Female minor, right to custody of—Mahomedan law, Shia sect—Act IX of 1861—Act XL of 1858, s. 27.* A Mahomedan father of the Shia sect is entitled to the custody of a daughter above the age of seven years as against the mother. The decision in *Fuzeehun* v. *Kajo, I. L. R. 10 Calc. 15,* has no application to a case where the father is seeking to get the custody of his daughter. *In the matter of the petition of* MAHOMED AMIR KHAN. LARDLI BEGUM *v.* MAHOMED AMIR KHAN . . **I. L. R. 14 Calc. 615**

7. ——— **Certificate of guardianship**—*Act XL of 1858, s. 7—Minor.* The grant of a certificate under s. 7 of the Bengal Minors Act (XL of 1858) should not be based exclusively on considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed. SOHNA *v.* KHALAK SINGH
I. L. R. 13 All. 78

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GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

8. ——— Guardianship of estate of minor paying revenue to Government—*Mad. Reg. V of 1804, s. 20—Mad. Reg. X of 1831, s. 3—Minor—Estate paying revenue to Government—Jurisdiction of District Court.* A District Court has no jurisdiction under s. 20 of Regulation V of 1804 and s. 3 of Regulation X of 1831 to appoint a guardian of the estate of a minor when the estate pays revenue to Government. *Ex parte* SUBRAMANYAN . . . **I. L. R. 6 Mad. 187**

9. ——— Guardianship of children of deceased husband—*Act XV of 1856, s. 3—Re-marriage of Hindu widow.* On the re-marriage of a Hindu widow, if neither she nor any other person has been expressly constituted by the will or the testamentary disposition of the deceased husband the guardian of the child, and such child has property of his own sufficient for his support and education whilst a minor, such child should ordinarily be regarded as a child, "who has neither father nor mother" in the sense of s. 3 of Act XV of 1856, and in such a case a proper male relative of the deceased husband should ordinarily be appointed guardian of such child in preference to his re-married mother. KHUSHALI *v.* RANI . . **I. L. R. 4 All. 195**

10. ——— Guardianship of minor co-shares—*Act XL of 1858—Guardian and minor—Relation of manager of joint estate to co-sharers under age.* A co-sharer in ancestral family estate under the Mitakshara law, the co-proprietors being minors, though he may have power to manage the estate, is not in consequence the guardian of such minors for the purpose of binding them by the execution of a bond charging the estate; nor is the eldest male member of the family, being of full age, guardian of such minors for the purpose of defending suits brought against them for money advanced in respect of the estate, unless he has obtained a certificate of administration under Act XL of 1858, s. 3. That Act shows that he is not guardian of the minors, the care of whose persons and property (unless taken under the protection of the Court of Wards by s. 2) is subject to the jurisdiction of the Civil Courts. DURGAPERSAD *v.* KESHOPERSAD SINGH . **I. L. R. 8 Calc. 656 : 11 C. L. R. 210 L. R. 9 I. A 27**

11. ——— *Guardians and Wards Act (VIII of 1890)—Minor, a member of joint Mitakshara family and having no separate property—Act XL of 1858.* Under the Guardians and Wards Act, 1890, a guardian cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law, and possessed of no separate estate. Difference between the Guardians and Wards Act, 1890, and Act XL of 1858 stated. *Durgapersad* v. *Keshopersad Singh, I. L. R. 8 Calc. 656, L. R. 9 I. A. 27,* explained. *Narsingrav Ramchandra* v. *Venkaji Krishna, I. L. R. 8 Bom. 395,* and *Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75,* referred to. SHAM KUAR *v.* MOHANUNDA SAHOY . . **I. L. R. 19 Calc. 301**

GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

12. ——— *Guardians and Wards Act (VIII of 1890)—Minor co-parcener in a joint Hindu family governed by the Mitakshara law—Hindu law—Guardian of person of minor.* Under Act VIII of 1890, a guardian cannot be appointed to the property of a minor who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate property. A guardian of the person of such a minor may be appointed under the Act. VIRUPAKSHAPPA *v.* NILGANGAVA . . . **I. L. R. 19 Bom. 309**

13. ——— *Appointment of guardian of property of minor—Minor who is a member of a joint Hindu family.* It is not competent to a Court under Act VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. *Virupakshappa* v. *Nilgangava, I. L. R. 19 Bom. 309,* and *Sham Kuar* v. *Mohanunda Sahoy, I. L. R. 19 Calc. 301,* referred to. JHABBU SINGH *v.* GANGA BISHAN **I. L. R. 17 All. 529**

14. ——— *Guardians and Wards Act (VIII of 1890), s. 34—Guardian to the property of a minor who is a member of a joint Hindu family.* It is not competent to a Court to appoint a guardian to the property of a minor when such minor is a member of a joint Hindu family and has no other property than his share in the joint family estate. *Jhabbu Singh* v. *Ganga Bishen, I. L. R. 17 All. 529,* and *Gurja* v. *Moher Singh, All. Weekly Notes (1896) 30,* referred to. BANDHU PRASAD *v.* DHIRAJI KUAR . . **I. L. R. 20 All. 400**

15. ——— Rival claimants—*Guardians and Wards Act (VIII of 1890), s. 17—Relationship.* In appointing a guardian of a minor under Act VIII of 1890, the main question for the Court to determine is what is for the welfare of the minor; in determining this, the Court may take into consideration the nearness of relationship of the applicants as being a circumstance tending to show that the interest of the minor will be better looked after. Before Act VIII of 1890 was passed, no relation other than the father or mother had an absolute right to the custody of a Hindu minor. The law now gives no such absolute right. *Krishto Kishore Neogi* v. *Kadu Moye Dasi, 2 I. L. R. 583,* referred to. BHIKUO KOER *v.* CHAMELA KOER **2 C. W. N. 191**

16. ——— Appointment of guardian by will—*Application for certificate of guardianship—Guardian and Wards Act (VIII of 1890), ss. 7, cl. (3), 13, and 48—Procedure.* When a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under s. 7 (3) of Act VIII of 1890 until it is found, after due investigation, that there is no valid will. The procedure under Act VIII of 1890 is not intended to be summary. SHAHU *v.* HAFIJA BEGAM . . . **I. L. R. 17 Bom. 560**

17. ——— Testamentary appointment of a guardian—*Guardians and Wards Act (VIII*

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GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

of 1890), ss. 7, 8. A Hindu mother has no authority to appoint a guardian for her son by will; it is accordingly the duty of the Court, on an application under Guardians and Wards Act, 1890, for the appointment of a guardian for the son of a Hindu widow who had purported to make such an appointment, to inquire, under s. 7, as to the necessity for an appointment being made and itself to appoint a fit and proper person. VENKAYYA GARU *v.* VENKATA NARASIMHULU **I. L. R. 2 Mad. 401**

18. ——— Testamentary guardians— *Minor residing out of the jurisdiction of the Court—Letters Patent, High Court, cl. 17—Guardians and Wards Act (VIII of 1890), ss. 4, 7, 9.* Case in which the Court refused, on a summary proceeding under cl. 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the ordinary original civil jurisdiction of the Court, there being testamentary guardians in existence, and no application or suit filed to remove them. On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890. *In the matter of* SRISH CHUNDER SINGH **I. L. R. 21 Calc. 206**

19. ——— Minor residing in England *—Jurisdiction of High Court.* Where a mother residing at Poona, the widow of a deceased European inhabitant of Poona, applied to be appointed guardian of her three minor children, two of whom were residing with her, and the third a girl of the age of 16 years, was residing in England, and to have certain payments made to her out of the estate of their deceased father on their account, and to have certain powers over their persons given to her, and to have the costs of the application paid out of the shares of the said three minor children in the hands of the Administrator-General of Bombay, the Court made the order applied for. *In re* MEAKIN . **I. L. R. 21 Bom. 137**

20. ——— Proceedings for appointment of a guardian in more Courts than one—*Guardians and Wards Act (VIII of 1890), s. 14—Report by District Court to High Court—Direction by Chief Justice—Powers of High Court—Letters Patent High Court, 1865, cl. 17—Costs.* S. 14 of the Guardians and Wards Act (VIII of 1890) does not apply to the High Court in the exercise of its original civil jurisdiction; and the term "report" in cl. (2) of that section refers, not to a judicial reference, but to a ministerial act. Proceedings had been taken for the appointment of a guardian of a minor under that section in the High Court and afterwards in a Mofussil Court. The latter reported the case to the High Court, and the Chief Justice thereupon directed that the proceedings in the Mofussil Court should be stayed, and that a Judge of the Original Side of the High Court should hear and determine the matter. *Held,* that

GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

such direction was in order, and that the Judge who determined the matter had jurisdiction to do so. *Held,* also, that, although a petitioner had failed in his application on all points except the removal of the guardian, he was entitled to his costs up to and including the order removing the guardian, as he must be taken to have acted so far for the benefit of the minor. *In the matter of* FAKARUDDIN MAHOMED CHOWDHRY. HAFIZ AMMINUDDIN AHMED *v.* GARTH . . **I. L. R. 26 Calc. 133**
3 C. W. N. 91

21. ——— Guardian ad litem—*Court in which suit is proceeding.* Guardians *ad litem* should always be appointed by the Court in which the litigation is pending. ANONYMOUS **5 Mad. Ap. 8**

22. ——— *Appointment of mother where there is not male relative suitable.* In the absence of a competent and unobjectionable male relative, ready and willing to act as guardian *ad litem* of an infant, the mother of the infant may be appointed such guardian, if there be no objection to her on any ground but that of her sex. *In the matter of* DANAPPA BIN SUBRAV **1 Bom. 134**

23. ——— *Appointment by Judge in default of relative—Act XL of 1858—Civil Procedure Code, 1882, s. 443.* If no friend or relative of a minor defendant is willing to take out a certificate under Act XL of 1858, and appear as guardian for the infant, the Judge should appoint an officer of Court, or some respectable nominee or nominees of the minor, guardian to defend the suit. *Babaji bin Kusoji* v. *Maruti, 11 Bom. 182,* and *Dhoniba Lakshman* v. *Kusa, 6 Bom. 219,* cited and followed. ISSUR CHUNDER GUPTO *v.* NOBO KRISTO GUPTO . . . . . **7 C. L. R. 407**

24. ——— *Next friend—Uncle—Nephew—Mahomedan law.* The rule of Mahomedan law that an uncle cannot be the guardian of the property of a minor does not prevent an uncle from representing his infant nephew under the Code of Civil Procedure as next friend in a suit. ABDUL BARI *v.* RASH BEHARI PAL **6 C. L. R. 413**

25. ——— *Suit against person not appointed guardian by Court.* Neither the Code of Civil Procedure nor the proviso of s. 3 of Act XL of 1858 gives a plaintiff any power to institute a suit against a person named by himself as guardian *ad litem* on behalf of a minor, nor when he has done so do they give to the Court the power of transferring, by a mere order made *ex parte,* such an irregular proceeding into a suit against the minor. GURU CHURN CHUCKERBUTTY *v.* KALI KISSEN TAGORE . **I. L. R. 11 Calc. 402**

26. ——— *Minors' Act, XX of 1864—Act XV of 1880, s. 3—Appointment of guardian ad litem—Civil Procedure Code, 1877, ss. 456, 458—Costs.* Where no administrator of

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GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

the estate of a minor is appointed under Act XX of 1864, there is no objection to the appointment of a guardian *ad litem* under s. 443 of the Civil Procedure Code (Act X of 1877, as amended by Act XII of 1879) for the purpose of defending a suit against the minor. Act XX of 1864, s. 2, has no bearing on the case of a next friend or guardian *ad litem* not claiming charge of the minor's estate. Neither Act XX of 1864 nor the Civil Procedure Code (Act X of 1877, as amended by Act XII of 1879) empowers any Court to appoint a person against his or her will to be a next friend, guardian *ad litem*, administrator of the estate, or guardian of the person of the minor. S. 458 of the Civil Procedure Code (Act X of 1877) is not, so far as regards payment of costs, applicable to any person appointed to act as guardian *ad litem* without his previous assent. S. 3, cl. (*b*), of Act XV of 1880, preserves jurisdiction to a Court to try a suit against a minor, notwithstanding the appointment of one of its officers to be the minor's guardian *ad litem*. The decision in *Mohun Ishwar* v. *Haku Rupa, I. L. R. 4 Bom. 638*, is superseded by Act XV of 1880, s. 3, cl. (*b*), in so far as that decision affected officers of the Court appointed guardians *ad litem* under s. 456 of Act X of 1877, as amended by Act XII of 1879. JADOW MULJI *v.* CHHAGAN RAICHAND **I. L. R. 5 Bom. 306**

27. ——————— *Change of guardian on application of word—Guardians and Wards Act (VIII of 1890), s. 10.* Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant, the Court will appoint the guardian so named in the absence of any special and valid objection to such person. JWALA DEI *v.* PIRBHU **I. L. R. 14 All. 35**

28. ——————— *Husband and wife—Suit for divorce under Parsi Marriage Act (XV of 1865), s. 30—Minor—Age of majority.* In a suit by a husband for divorce under s. 30 of the Parsi Marriage Act (XV of 1865), the defendant, if under the age of 21 years, although more than 18, must be deemed to be a minor, and a guardian of the defendant for the suit must be appointed. SORABJI CAWASJI POLISHVALA *v.* BUCHOOBAI **I. L. R. 18 Bom. 366**

29. ——————— *Appeal by a person other than guardian.* Two defendants in a suit, being minors, were represented by a properly appointed guardian *ad litem*. Upon a decree being passed in favour of the plaintiff, an appeal was filed on behalf of the minors, by their mother, without any order obtained by her constituting her guardian and without any previous removal of the properly appointed guardian *ad litem*. *Held*, (i) that the appeal could not be heard; and (ii) that the appointment of guardian in a Court of first instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal. VENKATA CHANDRASEKHARA RAZ *v.* ALAKARAJAMBA MAHARANI **I. L. R. 22 Mad. 187**

30. ——————— **Nazir of Court**—*Minors' Act, XX of 1864—Bombay Civil Courts Acts, XIV of 1869 and X of 1876—Officer of Government—Collector—Public Curator under Act XIX of 1841.* The nazir of a Civil Court, who is appointed guardian of the estate of a minor under Act XX of 1864, is not an officer of Government within the meaning of s. 32 of Act XIV of 1869, as amended by s. 15 of Act X of 1876. An officer of Government, in order to come within those enactments, must be a party to a suit in his official capacity. The only officers of Government whom Act XX of 1864 contemplates as guardians of the estate of a minor in their official capacity are the Collector of the district and the public curator, appointed as such under Act XIX of 1841. A Subordinate Judge who, under s. 456 of the Civil Procedure Code (Act X of 1877, as amended by s. 73 of Act XII of 1879), appoints the nazir or any other officer of his Court to act as guardian of a minor plaintiff or defendant in a suit in his Court, has no jurisdiction to hear it and pass a decree against that officer as guardian *ad litem* of the minor. *Trimbak Nimbaji* v. *Shivaram, I. L. R. 4 Bom. 642 note*, followed. MOHAN ISHWAR *v.* HAKU RUPA . **I. L. R. 4 Bom. 638**

31. ——————— *Minor, suit against—Nazir appointed guardian ad litem—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code (Act XIV of 1882), s. 458—Procedure.* There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the nazir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the nazir has been unavoidably prevented from making himself acquainted with the case against the minor. In a suit against a minor residing in a Native State at a distance from the nazir of the Court who was appointed guardian *ad litem*, and where the nazir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay:—*Held*, that the Court, if it chose, might cancel the appointment of the nazir as guardian *ad litem* under s. 458 of the Civil Procedure Code (Act XIV of 1882). NARAYANDAS RAMDAS *v.* SAHEB HUSSEIN . . . **I. L. R. 12 Bom. 553**

32. ——————— **Certificate of administration of minor's estate**—*Minors' Act (XX of 1864)—Default in appearance as indicating consent—Procedure.* An order for the issue of a certificate of administration to any particular individual under Act XX of 1864 ought not to be made until it is ascertained whether that individual is willing to

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GUARDIAN—*contd.*

1. APPOINTMENT—*contd.*

take it. Where an order for the issue of a certificate of administration was made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her:—*Held*, that such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party. If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge should name some officer of his Court or some respectable nominee of the suing creditor of the infant. BABAJI *v.* MARUTI . . . **I. L. R. 5 Bom. 310**

33. ——— Power of appointing guardians—*Guardian appointed of property of a minor who was a member of a joint Hindu family, the property being joint property—Sanction given for sale of family property in which minor had a share. Jurisdiction of High Court.* Under its general jurisdiction, and apart from the Guardians and Wards Act (VIII of 1890), the High Court has power to appoint a guardian of the property of a minor who is a member of joint Hindu family and where the minor's property is an undivided share in the family property. The applicant in this case, who sought to be appointed guardian, also sought the sanction of the Court for a sale of the family property in which the minor was interested. *Held*, under the special circumstances of the case, that the sanction should be given. *In re* MANILAL HURGOVAN (1900) . **I. L. R. 25 Bom. 353**

34. ——— *Guardian and Wards Act (VIII of 1890), s. 10—Guardian and minor—Discretion of Court as to appointment of guardian.* In this case the High Court set aside the appointment of the father as guardian of his own daughter, aged 10 years, upon the grounds chiefly that the father had married again and that under the circumstances the child was likely to be happier with her maternal grandmother with whom she had been living since the age of 5, than with her father. BINDO *v.* SHAM LAL (1906)
I. L. R. 29 All. 210

35. ——— *Minor—Guardian and Wards Act (VIII of 1890), s. 7—Sonthal Parganas—Power of the District Judge to appoint the Deputy Commissioner as guardian when holding simultaneously the offices of District Judge and Deputy Commissioner.* The Deputy Commissioner of the Sonthal Parganas, being in the position of the Collector, is not incompetent to apply, as such, for the appointment of a guardian to a minor under the provisions of the Guardian and Wards Act, even though the application would be to himself in his capacity as a District Judge; and the District Judge is not precluded from appointing the Deputy Commissioner as guardian to the minor, even though he himself may hold the latter office. KESHOBATI KUMARI *v.* SATYANARAIN SINGH (1907)
I. L. R. 34 Calc. 569

36. ——— Attainment of majority—*Guardian and Wards Act (VIII of 1890), s. 52—Indian Majority Act (IX of 1875), s. 3—Guardian and minor—Effect of appointment of guardian—Civil Procedure Code, s. 440.* Where a guardian has once been appointed under the provisions of Act No. VIII of 1890, the attainment of majority by the ward is postponed until he reaches the age of twenty-one years notwithstanding that the guardian appointed by the Court may be discharged before that time arrives. *Gordhandas Jadowji* v. *Harivalubhdas Bhaidas, I. L. R. 21 Bom. 281*, followed. *Patesri Partap Narain Singh* v. *Champa Lal, All. Weekly Notes (1891), 118*, distinguished. SADHO LAL *v.* MURLIDHAR (1907)
I. L. R. 29 All. 672

37. ——— Testamentary guardian—*Guardian of minor "appointed by an authority competent in this behalf," meaning of—Powers of a Hindu father to appoint a testamentary guardian to his minor son—Indian Succession Act, s. 47, not applicable to the will of a Hindu.* Assuming that a Hindu father has power to appoint a testamentary guardian, it is not by virtue of any statute; for s. 47 of the Indian Succession Act does not apply to the will of a Hindu. If, therefore, the power exist it must be under Hindu Law as distinct from statute. It would not be in accordance with the ordinary use of language to speak of a father, whose power (if any) rests on the General Hindu Law as "an authority competent in that behalf." It is clear that s. 440 of the Civil Procedure Code does not apply to all guardians, for it would be impossible to suggest that it applies to natural guardians. BUDHILAL *v.* MORARJI (1907)
I. L. R. 31 Bom. 413

2. DUTIES AND POWERS OF GUARDIANS.

1. ——— Filing accounts of estates—*—Payment of debts barred by lapse of time.* Guardians appointed by Civil Courts ought to file the accounts of their estates annually as required by law. A guardian is not necessarily accountable for sums paid by him in discharge of debts barred by limitation. CHOWDHRY CHUTTERSAL SINGH *v.* GOVERNMENT . . . . . **3 W. R. 57**

2. ——— Accounts and inventory—*Minors' Act (XX of 1864), ss. 6 and 16.* The person appointed administrator to a minor's estate under s. 6 of the Bombay Minors' Act (XX of 1864) is not liable to furnish an inventory and accounts under s. 16 of the Act. VALLAKDHAS HIRACHAND *v.* GOKALDAS TEJIRAM . **3 Bom. A. C. 89**

3. ——— Property of minor in hands of Court—*Brother's right to receive and apply funds.* Where the Court has taken the property of a minor into its own hands, the guardian appointed by the Court, and not the brother, is the right party to receive and apply the money granted by the Court to defray the expenses of the *kurnobedh* and marriage of the ward. MONEMOTFONATH DEY *v.* AUSHOOTOSH DEY . **1 Ind. Jur. N. S. 24**

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GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*contd.*

4. ——— **Testamentary guardian**—*Regulations previous to Act IX of 1861—Power of District Court over guardian deriving authority from will.* A testamentary guardian applied to the District Court for permission to remove his wards for the purpose of having them educated. *Held*, that, as the guardian derived his authority from the will of the minor's father, and did not come within the meaning of the Regulations and Acts previous to Act IX of 1861, he could not thus apply to the District Court. SASHADRY AIYANGAR *v.* PERIA NATCHIAR *alias* PARWATHA VURTHANI NATCHIAR **8 Mad. 94**

5. ——— **Arrangements for minor's education**—*Collector as guardian—Act XL of 1858, s. 12.* A Collector appointed guardian under s. 12, Act XL of 1858, has power to make arrangements for a minor's education, and is not so far amenable to the jurisdiction of the Civil Courts. RAMENDRA BHUTTACHARJEE *v.* COLLECTOR OF RAJSHAHYE . . . . . **14 W. R. 113**

6. ——— **Acts of guardian as representative of minor in suit**—*Admissions in suit by or against minor.* It is incumbent upon a Court which is called upon to try an issue between a person of mature years and an infant, to take care that facts essential to his adversary's case are not unadvisedly admitted on behalf of the infant. The Court should take nothing as admitted against an infant party to the suit unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation. ABDUL HYE *v.* BANEE PERSHAD . . . . . **21 W. R. 228**

7. ——— *Improper conduct of suit brought against minor—Fraud—Suppression of facts in favour of minor.* *B*, "for self and as guardian of *C*, a minor" was defendant in a suit for debt brought by *A*. In that suit, a part payment of the debt by *B* to *A* on account of *C* was suppressed, a personal decree was given against the minor, and in execution of that decree certain property belonging to the minor was sold. *Held*, in a subsequent suit by the minor, that the latter was entitled to have the decree and the subsequent sale set aside, as against a purchaser with notice, on the ground of fraud. GRISH CHUNDER MOOKERJEE *v.* MILLER . . . . . **3 C. L. R. 17**

8. ——— *Decree against minor, sale under—Suit to set sale aside on attaining majority, ground for—Procedure.* Where a decree has been made against an infant duly represented by his guardian, and the infant on attaining his majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or colusion on the part of his guardian. If the infant desire to have the decree set aside because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an *ex parte* one, the procedure adopted should be that given in the Civil Procedure Code for setting aside *ex parte* decrees. RAGHUBAR DYAL SAHU *v.* BHIKYA LAL MISSER . . . **I. L. R. 12 Calc. 69**

9. ——— *Sale under decree in suit where minor is not properly represented.* A sale under a decree in a suit in which the minor was not properly represented is not valid. JUNGEE LALL *v.* SHAM LALL MISSER . **20 W. R. 120**

10. ——— *Power of lawful guardian to set aside decree obtained by unauthorized guardian.* *Held*, that a decree obtained against a minor and his property represented by an unauthorized guardian may be set aside by a lawful guardian without imputation of fraud or collusion, and that such decree would have no effect, and will not be binding on the minor or against his property. KHOOSHALO *v.* SUBOOKH . . **1 Agra 175**

11. ——— **Acts of guardian how far binding on minor**—*Payment before certificate granted.* *Held*, that the act of the guardian was binding on the minor, unless it be proved that it was an unreasonable one, and that the payment by the debtor before any certificate was obtained was not an invalid payment. MOTEE RAM SAHOO *v.* KHULEELOOLLAH . . . **2 Agra 338**

12. ——— **Power of guardian to sell minor's property**—*Guardian not appointed under special Act. Quære:* Whether a guardian appointed by the Court (except under some special Act) has any authority to sell the property of his ward unless the express sanction of the Court is given. *Re* JAGANNATH RAMJI . **I. L. R. 19 Bom. 96**

13. ——— **Inability of guardian to contract on behalf of infant ward, so as to bind him personally**—*Effect of Act VI of 1862 (Bombay), s. 12, in regard to a charge upon a talukhdari estate in the Ahmedabad District during the period of management.* A guardian cannot contract in the name of a ward, so as to impose on him a personal liability. Act VI of 1862 (Bombay) "for the amelioration of the condition of talukhdars in the Ahmedabad Collectorate and for their relief from debt," was intended to deal with all debts and liabilities which could possibly impose a charge upon the talukhdari estate at the end of the period of management; when the estate was to be restored to the talukhdar free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the management, of which the maximum period was twenty years, they were not to be paid. A widow, as guardian of her infant son, the heir of talukhdari estate in the above district, validly transferred villages, part thereof; and in the deed of transfer, to which her ward was by her as his guardian nominally a party, contracted to indemnify the purchaser in case the Government should claim and enforce a right to

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GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*contd.*

revenue upon the villages which she transferred as being rent-free. The deed purported to make both guardian and ward personally liable in this respect, and also charged the liability upon other parts of the talukhdari estate. The infant attained majority, and the estate was then placed under management within Act VI of 1862. During the period of management the Governmentclaimed and enforced payment of revenue upon the villages. *Held*, that there was no personal liability on the part of the talukhdar created by the above; also that, if the charge on the estate had been validly made, it fell, at all events, within the terms of s. 12 of Act VI of 1862, absolving estates from liability for debts incurred not only before, but during the period of management. WAGHELA RAJSANJI *v.* MASLUDIN **I. L. R. 11 Bom. 551 L. R. 14 I. A. 89**

14. ——— Power of dealing with property of minor—*Brother managing family—Power of, to act for minor.* A brother acting as manager of the family property and for the benefit of the minors, although he has not obtained a certificate of guardianship under Act XL of 1858, may make a temporary alienation of the family property for necessary purposes and for the benefit of the minors. LALLA SEETUL PERSHAD *v.* CHAND KHAN **2 N. W. 428**

15. ——— *Sale by guardian without certificate—Invalidity of sale—Refund of purchase-money.* A sale made by a guardian without the sanction of the Court, required by Act XL of 1858, s. 18, is made without power, and is therefore invalid, even if the purchaser has acted honestly and paid a fair price. In such a case, where possession was ordered to be restored with mesne profits, it was made contingent on repayment to the purchaser of so much of the purchase-money as had been applied to the benefit of the minor's estate. SURUT CHUNDER CHATTERJEE *v.* ASHOOTOSH CHATTERJEE . . . **24 W. R. 46**

16. ——— *Sale by guardian—De facto and de jure guardian—Transaction beneficial to minor.* Where a deed of sale was executed by a *de facto* guardian of certain minors, and the consideration money was duly applied for the benefit of the property, and the transaction was found to be a necessary one and beneficial to the minors, the mere fact that the manager was not *de jure* guardian is not sufficient to invalidate the transaction. GUNGA PERSHAD *v.* PHOOL SINGH **10 B. L. R. 368 note: 10 W. R. 106**

17. ——— *Alienation by de facto guardian without certificate under Act XX of 1864.* Alienations for family purposes of the ancestral estate by a Hindu widow (the mother of a minor son), though she was not appointed an administratrix under Act XX of 1864, upheld as made by a *de facto* manager. BAI AMRIT *v.* BAI MANIK **12 Bom. 79**

GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*contd.*

18. ——— *Powers of de facto guardian to grant leases.* A *de facto* guardian has not in that capacity larger powers than one appointed under Act XL of 1858, and is therefore not competent to grant a lease for ten years without an order of Court previously obtained. KHETTUR NATH DASS *v.* RAM JADOO BHUTTACHARJEE **24 W. R. 49**

19. ——— *Powers of de facto guardian—Minor—Act XL of 1858.* No greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate, than can be exercised by a guardian duly appointed under Act XL of 1858, with reference to which Act his powers must be determined. ABHASSI BEGUM *v.* RAJROOP KOONWAR . **I. L. R. 4 Calc. 33: 2 C. L. R. 249**

20. ——— *Alienation by guardian without certificate—Return of property to ward.* An alienation by the natural guardian of a ward's immoveable estate made without having obtained a certificate under the Minor's Act is invalid. The Court, while declaring such an alienation invalid, will, under special circumstances, order the ward to repay the amount of the purchase-money paid to the guardian, before setting aside the sale and directing the alienated property to be made over to the ward. BAI KESAR *v.* BAI GANGA **8 Bom. A. C. 31**

See MUTHOORA DOSS *v.* KANOO BEHAREE SINGH . . . **21 W. R. 287**

21. ——— *Compromise by guardian with certificate—Proof of sanction of Court.* Before accepting a compromise affecting rights in immoveable property tendered in special appeal by a guardian appearing under a certificate on behalf of a minor, the Court requires the certificate-holder to procure the consent of the Court by which the certificate was granted to the filing of the compromise. SHEONUNDUN SINGH *v.* KAHSA KOOER **6 N. W. 179**

22. ——— *Transaction by guardian without sanction of Court—Act XL of 1858, s. 18.* A suit to recover possession of the plaintiff's share of certain ancestral property, which had been pledged by her mother as guardian and other relatives during her minority for a sum of money lent on a bond, on which the obligee afterwards obtained an *ex parte* decree declaring the property mortgaged to be liable in satisfaction thereof, having been dismissed by the first Court, the order of dismissal was upheld by the lower Appellate Court: the plaintiff then preferred a special appeal. *Held*, that, although the guardian had not obtained the sanction of the Court under Act XL of 1858, s. 18, the irregularity ought not to prevail where the mortgage transaction was a proper one, and there was subsequently a decree in a suit in which the minor was represented under which the property

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GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*contd.*

was sold. AHFUTOONNISSA *v.* GOLUCK CHUNDER SEN . . . . . **22 W. R. 77**

23. ——— *Act XL of 1858, s. 18—Sale without sanction of Court—Transaction for benefit of minor's estate.* In order to save certain property from sale in execution of a decree obtained upon a mortgage executed by the father of three brothers, of whom one was a minor, the other two brothers, one of whom had, under Act XL of 1858, obtained a certificate of guardianship to the minor brother, executed a mortgage of certain other property in order to raise money and pay off the decree-holder. Upon the latter mortgage the mortgagee obtained a decree and sold the properties covered thereby. No sanction had been obtained by the guardian to encumber the minor's estate. *Held*, on the authority of *Ahfutoonnissa* v. *Goluck Chunder Sen, 22 W. R. 77*, that the transaction having been a proper one, the minor was not entitled to have the sale set aside on the ground that sanction had not been obtained under s. 18 of Act XL of 1858 to the mortgage. TIL KEOR *v.* ROY ANUND KISHORE . . . **10 C. L. R. 547**

24. ——— *Power of guardian to mortgage minor's property—Act XL of 1858, s. 18—Guardians and Wards Act (VIII of 1890), s. 30, read with s. 2, retrospective effect of —Mortgage without sanction of Court.* A mortgage of a minor's property, made by his guardian, holding a certificate under Act XL of 1858, without obtaining sanction of Court as required by s. 18 of the Act, is absolutely null and void. S. 2 of the Guardians and Wards Act (VIII of 1890) does not give retrospective effect to s. 30, which therefore does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character and render it merely voidable. LALA HURRO PROSAD *v.* BASARUTH ALI **I. L. R. 25 Calc. 909**

25. ——— *Act XL of 1858, s. 18—Mortgage by certificated guardian without sanction of District Court—Mortgage money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Contract Act (IX of 1872), s. 65.* S. 18 of the Bengal Minor's Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian without the sanction of the Civil Court, is illegal and void *ab initio;* but the proviso means that in the absence of such sanction the certificated guardian, who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. If any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction is on the basis of no certificate having been granted. In a suit brought by the guardian of a Mahomedan minor for a declaration that a mortgage-deed executed by the minor's mother was null and void to the extent of the minor's share and for partition and possession of such share, it was found that a considerable proportion of the moneys received by the mortgagor had been applied for the benefit of the minor's estate by discharging incumbrances imposed on it by his deceased father. It appeared that at the time of the mortgage the mother held a certificate of guardianship under the Bengal Minors Act, and that she had not obtained from the Civil Court any order sanctioning the mortgage under s. 18 of that Act. *Held*, that the omission to obtain such sanction did not make the mortgage illegal or void *ab initio*, but relegated the parties to the position in which they would have been if no certificate had been granted, *i.e.*, that of a transaction by a Mahomedan mother affecting to mortgage the property of her minor son, with whose estate she had no power to interfere. *Held*, that this fell within the class of cases in which it has been decided that if a person sells or mortgages another's property having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate. *Held*, that, even if mortgages executed by a certificated guardian without the sanction required by s. 18 of the Bengal Minors Act were void, the section did not make them illegal; and, with reference to s. 65 of the Contract Act, the plaintiff could not obtain a decree for a declaration that the mortgage was inoperative as against his share, except on condition of his making restitution to the extent of any moneys advanced by the defendant under the mortgage-deed which had gone to the benefit of the plaintiff's estate, or had been expended on his maintenance, education, or marriage. *Mauji Ram* v. *Tara Sing, I. L. R. 3 All. 852*, distinguished. *Shurrut Chunder* v. *Rjkissen Mookerjee, 15 B. L. R. 350; Pana Ali* v. *Sadik Hossein, 7 N. W. 231; Sahee Ram* v. *Mahomed Abdul Rahman, 6 N. W. 268; Hamir Sing* v. *Zakia, I. L. R. 1 All. 57;* and *Gulshere Khan* v. *Naubey Khan, All. Weekly Notes (1881), 16*, referred to. GIRRAJ BAKHSH *v.* HAMID ALI **I. L. R. 9 All. 340**

26. ——— *Validity of lease—Act XL of 1858, s. 18—Lease granted by guardian of minor's property for term exceeding five years without sanction of Court, effect of.* A lease granted by a guardian of minor's property who has obtained a certificate under Act XL of 1858 for a term exceeding five years without the sanction required by s. 18 of that Act is invalid. BHUPENDRO NARAYAN DUTT *v.* NEMYE CHAND MONDUL **I. L. R. 15 Calc. 627**

27. ——— *Guardians and Wards Act (VIII of 1890), ss. 29, 30—Mortgage by guardians on estate of minor—"Previous permission of the Court"—Contract Act (IX of 1872), s. 64—Transfer of Property Act (IV of 1882), s. 35.* Guard-

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ians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the amount of principal and interest due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied; but the guardians had not obtained the sanction of the Court as directed by s. 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced :—*Held*, that a mortgage so executed was not void, but only voidable; and that the defendant was entitled to avoid the mortgage, but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received. The fact that the person who had received the benefit was the defendant, did not alter his position. SINAYA PILLAI *v.* MUNISAMI AYYAN
I. L. R. 22 Mad. 289

28. ——————————— *Act XX of 1864, s. 18—Sanction of alienation of minor's property—Civil Procedure Code (Act X of 1877), s. 462—Compromise on behalf of a minor—Mortgage—Assignment of mortgage by guardian of minor—Suit on mortgage by assignee—Proof of assingment when necessary—Consideration for assignment—Adequacy of consideration—Parties.* S. 18 of the Bombay Minors Act, XX of 1864, applies only to persons to whom a certificate has been granted under that Act. An assignment of a mortgage, therefore, by a widow acting as natural guardian of her minor son, but who has not obtained a certificate under the Act, is not invalid, because effected without the sanction of the Court. Where a widow acting as natural guardian of her minor son assigned a mortgage which had been executed to her deceased husband for a consideration, a part of which was a sum due under a decree, to the assignee :—*Held*, that such an assignment was not invalid under s. 462 of the Civil Procedure Code (Act X of 1877). Assuming that section to be applicable to the compromise of a decree, the circumstance that the compromise was voidable would only affect the consideration for the assignment by reducing its amount. The plaintiff sued as assignee of a mortgage to recover the debt due from the mortgagors personally and from the property mortgaged. The assignor was a Hindu widow, acting as natural guardian of her minor son. The consideration for the assignment was a sum of R68-9 due to the plaintiff under a decree obtained by him and R30-7 cash paid. The lower Courts *held* that, as to the R68-9, the transaction really amounted to a satisfaction or adjustment of the decree under which it was due, and that, as such adjustment had not been certified to the Court, it was invalid; they further *held* that the consideration for the assignment of the mortgage having so far failed, the assignment was without adequate consideration, and therefore

they dismissed the suit. On appeal to the High Court :—*Held*, that, although in ordinary cases it is the rule that, where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that, under the peculiar circumstances of this case, that rule did not apply. The mortgage-deed was assigned by a widow acting as the natural guardian of a minor, and a great part of the consideration for the assignment had admittedly failed, the confirmation of the decree which formed part of the consideration not having been certified to the Court. There was on the record no admission of the assignment by the assignor. It might be that the minor in a suit by his next friend or guardian appointed under Act XX of 1864, might dispute the assignment. The defendants, in order to protect themselves, had a right to call on the plaintiff to prove the assignment, and a Court ought, in the interests of justice, to see that they were so protected. The assignment was on behalf of a minor, and the person acting as his guardian had not admitted it, and it might be that even her admission would not be binding on him, since he was not a party to the suit. It was necessary that the point should be so tried and determined as to bind the minor, and to do that it was essential that he should be made a party to the suit. The Court, therefore, reversed the decree of the lower Courts and remanded the case. MANISHANKAR PRANJIVAN *v.* BAI MULI
I. L. R. 12 Bom. 686

29. ——————————— *Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under Civil Procedure Code (Act XIV of 1882), s. 305—Guardians and Wards Act (VIII of 1890), ss. 29 and 30—Bombay Minors Act (Bombay Act XX of 1864).* *A* was the owner of the property in dispute. He mortgaged it with possession to defendant No. 1 in 1884. *A* died leaving an adopted son, a minor. Thereupon one *V* was appointed by the District Court to be guardian of the person and property of the minor under Act XX of 1864. In September 1890, *V* mortgaged the same property to plaintiff with the sanction of the Subordinate Judge's Court obtained under s. 305 of the Code of Civil Procedure (Act XIV of 1882). In 1895 the plaintiff as second mortgagee brought this suit to redeem the earlier mortgage of 1884. *Held*, that *V* as certificated guardian had no power to mortgage the minor's property without the previous permission of the Court which had appointed him to act as guardian, and that the sanction of another Court given under s. 305 of the Code of Civil Procedure was not sufficient to legalize the mortgage. *Held*, also, that such mortgage would have been absolutely void under Act XX of 1864, but was only voidable under s. 30 of Act VIII of 1890, at the instance of any other person affected thereby. DATTARAM *v.* GANGARAM
I. L. R. 23 Bom. 287

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GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*contd.*

30. ——— *Act XL of 1858, s. 18—Power of guardian of minor to mortgage minor's property—Rate of interest.* A guardian, to whom a certificate had been granted under Act XL of 1858, having obtained under s. 18 an order of a Court authorizing the raising of money by mortgage of the minor's immovables, mortgaged accordingly. In the order so obtained, the rate of interest at which the money was to be raised was not specified. On a question whether, there being no proof of the necessity or expediency of agreeing to pay interest at a rate so high as eighteen per cent., the agreement to pay at this rate was rightly set aside by the High Court, which decreed interest at twelve per cent. :—*Held*, that the proper construction of the order, and the one most favourable to the lender regarding the rate of interest, was that the guardian was authorized to borrow only at a reasonable rate of interest, and that consequently the decree of the High Court was right. GANGAPERSHAD SAHU *v.* MAHARANI BIBI
I. L. R. 11 Calc. 379 : L. R. 12 I. A. 47

31. ——— *Minor, Interest of, not represented—Partition of joint property in which minor was interested.* In a suit between co-proprietors, plaintiffs sought to recover exclusive possession of a mouzah which they claimed to have derived in a partition made some years before, and to have enjoyed it under the terms of that partition until they were dispossessed from it by defendant No. 1, one *D N*, who, on the other hand, denied that he had more than a 4-anna share, alleging that plaintiffs were not entitled to the whole mouzah, and that the partition had been fraudulent and had been effected while he was a minor. It appeared that no formalities had been observed in coming to the partition, and no record preserved of the proceedings except a list representing the result arrived at ; that the division was effected simply on reference to a thakbust map, an average rental per bigha taken as the basis thereof and a number of bighas allotted in proportion to each individual's share. None of the ordinary precautions were taken for the protection of the interest of minors. *Held*, that the partition was not made in such way, and under such circumstances as to be in itself obligatory on the minor, who had the option of repudiating it when he came of age or within a reasonable period after that date. *Held*, also, that the minor could only be held to have accepted the partition if he had acted in such a way to the plaintiffs as to lead them naturally to suppose that he had done so. KALEE SUNKUR SANNYAL *v.* DENENDRONATH SANNYAL . . **23 W. R. 68**

32. ——— *Refusal of Court to sanction compromise on behalf of minor.* The acts of guardians on behalf of minors must show the strictest good faith, and must be based on considerations of actual necessity and advantage, not on calculations of possible benefit. In this case the Court refused to sanction a compromise effected between the guardian and the widow by which the minor received immediate possession of half the property as consideration for the surrender of the reversion of the other moiety, no interest or advantage to him being shown in the arrangement. BODH MULL *v.* GOUREE SUNKUR . **6 W. R. 16**

33. ——— *Power of, to alienate minor's lands in perpetuity.* A guardian cannot grant his ward's lands in perpetuity except on clear proof of benefit to the minor. ODDOYTO CHUNDER KOONDOO *v.* PROSUNNO KOOMAR BHUTTACHARJEE . . . . **2 W. R. 325**

34. ——— *Power of compromise—Onus of proof.* Where it is alleged that a deed of compromise was beneficial to a minor in a transaction involving a surrender of the minor's title in a large estate for a very inadequate maintenance and her waiver of the rights of appeal and cross-appeal, the onus of proving that such a deed was beneficial to the minor is on the party making the allegation. ROSHAN JAHAN *v.* ENAET HOSSEIN. ENAET HOSSEIN *v.* ROSHAN JAHAN . **5 W. R. 5**

35. ——— *Effect on minor's estate of bonds for money raised for minor's benefit.* A minor's estate is not liable under bonds contracted by his guardian otherwise than for the minor's benefit and without legal necessity. DEOPUTTEE KOONWAR *v.* DHAMOO LALL . . **11 W. R. 240**

36. ——— *Power of mother to compromise.* A mother as guardian has no power to make a compromise on behalf of a minor daughter, unless the compromise is beneficial to the daughter's interests. ROUSHAN JAHAN *v.* ENAET HOSSEIN . . . **W. R. 1864, 83**

37. ——— *Test of validity of transaction.* The test of the validity of a transaction effected by a guardian is whether it was beneficial to the minor. LALLA BOODMULL *v.* LALA GOUREE SUNKUR . . . **4 W. R. 71**

38. ——— *Power of binding minor's estate for debt—Sale in execution of decree.* A sale in execution of a decree against an adoptive mother is good as against the adopted son when made, not personally, but as guardian of the adopted son, and not for a personal debt, but for payments made by co-sharers of Government revenue on account of the adopted son to preserve their joint property. The estate of the adopted son is not liable for a debt without proof that the debt is other than personal. ROOPMONJOOREE CHOWDHRANNEE *v.* RAMLALL SIRCAR. GREESH CHUNDER LAHOREE *v.* RAMLALL SIRCAR . **1 W. R. 144**

39. ——— *Mother—Power to bind sons.* A mother can bind her sons acting in good faith as their guardian. MAKBUL ALI *v.* MASNAD BIBEE
3 B. L. R. A. C. 54 : 11 W. R. 396

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GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*contd.*

40. ——— *Relinquishment by guardian of portion of property.* *A* sued *B* to recover possession of an hereditary jote, of which he alleged he had been dispossessed by *B* during his minority. *B* raised the defence of relinquishment by *A's* grandmother and guardian. The Munsif decided against *A* on the merits, and his decision was upheld by the Judge. *Held*, on special appeal, that to make the relinquishment, if any, valid against *A*, it ought to have been shown that it was for *A's* benefit. Decision of the lower Court reversed. KEDARNATH MOOKERJEE *v.* MUTHURANATH DUTT . **1 B. L. R. A. C. 17: 10 W. R. 59**

In the same case on review, LOCH, *J.*, held that the judgment of the High Court on special appeal must be revised as being *ultra vires*, for that the question of injury to the minor was not urged in the Court below ; no issue was raised on that point, and even if the relinquishment of the jote by the guardian did turn out to the disadvantage of the minor, that was not sufficient ground for setting aside the act of the guardian as invalid, provided that, at the time it was done, it appeared to be for the interest of the minor, and was done in good faith. GLOVER, *J.*, held that the conclusion of the High Court on special appeal was justified, but he was willing to remand the case to the Judge below to find the fact whether or not the relinquishment by the guardian was made in good faith for the interests of the minor. MATHURANATH DUTT *v.* KEDARNATH MOOKERJEE . **2 B. L. R. A. C. 128**

41. ——— *Suit on account stated—Limitation Act, 1877, Art. 64. Transaction for benefit of minor.* A suit upon an account stated against a minor cannot succeed unless it be shown that the act of the guardian in the matter of the settlement of the account is beneficial to the interests of the minor. AJUDDIN HOSSAIN *v.* LLOYD **13 C. L. R. 112**

42. ——— *Pre-emption, power to assert right of.* The guardian of a minor is competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and the minor is bound by his guardian's act if done in good faith and in his interest. LAL BAHADUR SINGH *v.* DURGA SINGH **I. L. R. 3 All. 437**

43. ——— *Setting aside award made on behalf of minor sons.* An arbitration award as to division of property left to minor sons alleged to give effect to the wishes of a father regarding a partial division of his property after his death was set aside, so far as it affected those sons, on proof that the partition was injurious to them. RAMNARAIN PORAMANICK *v.* SREEMUTTY DOSSEE . . . . . **1 W. R. 280**

44. ——— *Acts of guardian as sole proprietor.* Any act done by the widow and any decree given against her as sole proprietor of the lands, and not as guardian, would not, if she were found to have been holding actually as guardian, bind the minors. BAHUR ALI *v.* SOOKEA BIBEE . . . . . **13 W. R. 63**

45. ——— *Sale of expectancy by, on behalf of minor. Quære :* Whether a mere expectancy can be the subject of a sale, and if so, of a sale by a guardian, acting or purporting to act on behalf of an infant. DOOLI CHAND *v.* BIRJ BHOOKUN LAL AWASTI . . **6 C. L. R. 528**

46. ——— *Power to bind infant—Division of property—Fraud.* A division of property took place in 1837 between *A*, the mother and guardian of the plaintiff, and *B*, the husband of two childless widows, who become defendants in a suit to recover possession of the property on the ground that the division did not bind the plaintiff. *Held*, that there being no proof of fraud, nor that undue advantage was taken of plaintiff's minority, and in the absence of proof of gross inequality in the distribution of the property, the division was valid and binding upon the plaintiff. NALLAPA REDDI *v.* BILAMMAL . . . **2 Mad. 182**

47. ——— *Suit for partition of family property.* A suit on behalf of a minor for partition will lie, if the interests of the minor are likely to be prejudiced by the property being left in the hands of the co-parceners from whom it is sought to recover it. KAMAKSHI AMMAL *v.* CHIDDAMBARA REDDI . . **3 Mad. 94**

CHOKALINGAM PILLAI *v.* SVAMIYAR PILLAI **1 Mad. 105**

PARVATHI *v.* MANJAYA KARANTHA **5 Mad. 193**

48. ——— *Power to bind infant—Reference of question as to property to panchayat.* All acts of the guardian of a Hindu infant, which are such as the infant might, if of age, reasonably and prudently do for himself, should be upheld. Such a guardian may bind his ward by referring to a panchayat of their caste a question of customary partition. Where a Sudra died leaving two wives, one with an only son and infant, and the other with two sons :—*Held*, that the guardian of the infant might refer the question whether the deceased's estate should be divided according to Patnibhaga or Putrabhaga. TEMMAKAL *v.* SUBBAMAL **2 Mad. 47**

49. ——— *Sale by guardian—Compromise—Onus probandi.* A suit by the plaintiff's guardians for the plaintiff's mother's share in certain dower resulted in a decree for R62,913 calculated on the allegation in the plaint that such share was a third of the entire amount of dower. That suit having been sold by the plaintiff's guardians for the alleged sum of R51,000, the plaintiff brought the present suit to set aside that sale as collusive. *Held*, that it was incumbent on the defendants in this suit to prove that they paid the R51,000 to the plaintiff when he came of age,

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GUARDIAN—*contd.*

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or at least that the money reached the plaintiff's hands when he came of age. ABDOOL ALI *v.* MOJUFFER ALI CHOWDHRY . . **16 W. R. P. C. 22**

50. ——— *Suit on bond executed by mother for debts which son, then a minor, might be liable to pay.* A bond executed by a widow in possession of a zamindari was held binding on the adopted son of the late zamindar, the inference from the evidence being that the bond was given for debts which the defendant (the adopted son) as owner of the zamindari might be liable to pay, and that by his own acts he had admitted that he actually was liable to the payment. CHETTY COLUM COOMARA VENCATACHELLA RADDYAR *v.* RUNGASANWEY IYENGAR **4 W. R. P. C. 71 : 8 Moo. I. A. 319**

51. ——— *Necessity for borrowing—Mortgage by de facto guardian or manager without de jure title.* Under the Hindu law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* guardian or manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. Under the Hindu law, the power of a manager for an infant heir to charge an ancestral estate is a limited and qualified one, to be exercised in a case of need, or for the benefit of the estate. Where the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The lender is bound to enquire into the necessities for the loan, and to satisfy himself that the manager is acting for the benefit of the estate. But if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and he is not bound to see to the application of the money. The mere creation of a charge by a manager, securing a proper debt, cannot be viewed as improvident management; and a *bonâ fide* creditor should not suffer when he has acted honestly and with due caution, but is himself deceived. HUNOOMAN PERSHAD PANDEY *v.* MUNDRAJ KOONWAREE **6 Moo. I. A. 393 : 18 W. R. 81 note**

52. ——— *De facto manager—Sale by a de facto manager of minor's property for legal necessity and for his benefit, whether valid.* A *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. *Hunooman Pershad Pandey* v. *Mundraj Koonwaree, 6 Moo. I. A. 393,* and *Gunga Pershad* v. *Phool Singh, 10 W. R. 106 : 10 B. L. R. 398 note,* referred to. MOHANUND MONDUL *v.* NAFUR MONDUL . **I. L. R. 26 Calc. 820 3 C. W. N. 770**

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53. ——— *Alienation made by guardian—Suit to set aside.* A suit brought by a Hindu widow as guardian of her minor child, to set aside alienations made by her late husband, the minor's father, is governed by the principle laid down by the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187 : 22 W. R. 56, viz.,* that the estate is not exempted from liability unless the alienations were illegal or made for an immoral purpose. SANJOOGEE KOOER *v.* HUR PERSHAD . . . . **24 W. R. 274**

54. ——— *Bonâ fide purchaser, what constitutes.* In a sale by a guardian of a minor without necessity, the purchaser cannot be said to have acted *bonâ fide* unless his belief that the sale was necessary had been arrived at after due care and attention. SHEO PERSHAD RAM *v.* THAKOOR PERSHAD. GOUR PERSHAD NARAIN *v.* SHEO PERSHAD RAM . . **5 W. R. 103**

55. ——— *Purchaser from guardian.* Where a purchaser of immoveable property deals with a person having a qualified power of dealing with that property, it lies upon the purchaser to give some reason of the need which actually existed, or was alleged to exist, for the sale. VADALI RAMAKRISTNAMA *v.* MANDA APPAIYA **2 Mad. 407**

MOOTHOORA DOSS *v.* KANOO BEHAREE SINGH **21 W. R. 287**

56. ——— *Suit to set aside sale—Proof of necessity for sale.* In a suit to set aside sales made by a minor's guardians, on the ground that the sales were not justified by any recognized legal necessity, the onus is on the defendant to prove the necessity. Nature of proof sufficient to discharge such onus explained. LOOLOO SINGH *v.* RAJENDUR LAHA . **8 W. R. 364**

57. ——— *Sale by guardians—Onus of proof—Purchaser. Held,* that the onus of proving that a sale by his guardians of a minor's property was necessary and for his benefit lies upon the purchaser, and that adequacy of price is an important point to be considered in determining this question. DAGDU BIN DAUD TELI PARDESHI *v.* SHEKH SAHEB VALAD BADRUDDIN KAMBLE **2 Bom. 369 : 2nd Ed. 348**

58. ——— *Onus of proof—Purchaser.* Where the plaintiff was a minor, and his interest could not *primâ facie* be alienated :—*Held,* that the onus of proving that due enquiries were made as to the necessities for the loan, and that it was incurred by the manager for the benefit of the estate, lay on the alienee. It is not necessary to show that such necessities actually existed, but that reasonable enquiry was made as to the existence of such necessities and the object for which the loan was intended. POOLUNDER SINGH *v.* RAM PERSHAD . . . . **2 Agra 147**

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GUARDIAN—*contd.*

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59. _____ *Transaction by guardian—Responsibility of lender to guardian of a minor.* A lender to the manager of a minor's estate is bound to satisfy himself that the loan is for the benefit of the estate. LALLAH BUNSEEDHUR *v.* BINDESEREE DUTT SINGH **1 Ind. Jur. N. S. 165**

60. _____ Though the lender of money borrowed by the guardian of a minor for the payment of a family debt is bound to enquire into the necessity for the loan, and to satisfy himself as well as he can that the guardian is acting for the benefit of the estate, yet if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably created necessity is not a condition precedent to the validity of his charge, and he is not, under such circumstances, bound to see to the application of his money. MAHA BEER PERSHAD SINGH *v.* DUMREERAM OPADHYA **W. R. 1864, 166**

RADHA KISHORE MOOKERJEE *v.* MIRTOONJOY GOW . . . . . **7 W. R. 23**

61. _____ *Sale by guardian—Purchaser—Grounds for reversal of sale.* Although purchasers are not bound to look to the application of the purchase-money or to enquire whether there were goods sufficient to redeem the mortgage and so to obviate the necessity of a sale of a minor's property, yet the purchaser not proving necessity or not satisfying himself of the existence of necessity and the unwillingness of the minor's mother to dispose of the property in his minority, are sufficient legal grounds for reversal of the sale. GOMAIN SIRCAR *v.* PRANNATH GOOPTO **1 W. R. 14**

62. _____ *Alienation of minor's property by intervention of Court—Suit to set aside alienation—Purchaser of minor's property.* An alienation of property during the owner's minority is open to be questioned when the minor comes of age, even if it was effected partly through the intervention of a Civil Court, *e.g.*, under a decree on foreclosure proceedings. A party justifying a title so obtained against a minor must show not only that he was acting honestly in the transaction, but that facts existed at the time of the mortgage such as would reasonably support the conclusion that there was a necessity for the alienation, and that the mortgagor had authority to give a good title as the minor's agent. BUZRUNG SAHOY SINGH *v.* MAUTORA CHOWDHRAIN . . **22 W. R. 119**

63. _____ *Sale of minor's property by guardian—Proof of legal necessity for sale.* The mother and guardian of two minors borrowed R1,000 ostensibly for their marriage expenses. The lender of the money obtained an *ex parte* decree against the minors, and in execution attached their estate, when the mother, in order to save it from sale, sold half the estate for R2,500, out of which she satisfied the decree. One of the minors subsequently brought a suit against the purchasers to set aside the sale. *Held*, that it was obligatory on the defendants to prove that in selling the property the mother acted under an unavoidable necessity in the interests of her minor sons, and that the decree against the minors was such as would bind their interests. LOOTF HOSSEIN *v.* DURSUN LALL SAHOO . . . . **23 W. R. 424**

64. _____ *Guardian and minor—Sale of minor's property—Legal necessity.* Where a guardian conveyed the property of her minor son by a deed of sale in which she did not in terms describe herself as his guardian:—*Held*, that the omission was immaterial, since it clearly appeared from the deed that it was the minor's property which formed the subject of sale. *Hunooman Perhasd* v. *Babooee Munraj Koonweree, 6 Moo. I. A. 393*, and *Jadoonath Chuckerbutty* v. *Tweedie, 11 W. R. 20*, followed. A widow, guardian of her minor son, being left after her husband's death in a state of extreme poverty, sold the entire property of the minor for less than one-fourth of its real market value, by a sale-deed reciting that the object of the sale was the minor's maintenance and marriage. It was found that the sale was obtained by the vendee by taking advantage of the guardian's poverty, and that there was nothing to show that in purchasing the property he had satisfied himself of the actual existence of the necessities for which the sale purported to be made. *Held*, that the recital in the deed of the objects of sale was in itself no evidence of the necessity of the alienation. *Rajlakhi Debia* v. *Gakul Chandra Chowdhry, 3 B. L. R. P. C. 57*, followed. *Held*, also, that the needy circumstances of the minor did not by themselves constitute a sufficient legal necessity for such an alienation. Under the Hindu law, the maintenance or marriage of a minor may be a legitimate cause for the alienation of his property by the guardian, but cannot justify a Court of equity in up holding a bargain obviously imprudent and reckless. The best test is whether the alienation would have been reasonably and prudently made by the minor himself had he been of full age. *Held*, further, that, upon such an alienation being set aside in consequence of a suit brought by the minor, the vendee was entitled to be recouped by the plaintiff to the extent of any portion of the purchase-money which had been appropriated to the latter's benefit. *Paran Chandra Pal* v. *Karunamayi Dasi, 7 B. L. R. 90; Bai Kesar* v. *Bai Ganga, 8 Bom. A. C. 31; Kuvarji v. Mati Haridas, I. L. R. 3 Bom. 234;* and *Gadgeppa Desai* v. *Apaji Jivanrao, I. L. R. 3 Bom. 237*, referred to. MAKUNDI *v.* SARABSUKH **I. L. R. 6 All. 417**

65. _____ *Enhancement of rent, effect of—Acts of mother and guardian how far binding on minor son—Kabuliat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her.* A patnidar ob-

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tained decrees for the enhancement of the rent of holdings, in the possession of the widow, of a deceased tenant, one decree being in respect of land formerly held by the latter and the other in respect of a holding purchased by the widow on behalf of her minor son by the deceased whilst the enhancement suits were pending. The widow also signed kabuliats relating to both tenancies, agreeing, as mother of the minor, to pay the enhnaced rent. *Held*, that, as the patnidar was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son ; also as she had come to what she believed to be, and was, a proper arrangement, the son, on his attaining full age and entering into possession of the tenancies, was bound by the kabuliats. WATSON & CO. *v.* SHAMLALL MITTER . **I. L. R 15 Calc. 8 L. R. 14 I. A. 178**

66. ——————————— *Sale by guardian for minor—Necessity—Bonâ fides.* When neither want of enquiry nor *mala fides* is shown, the existence of legal necessity must be presumed, and the acts of the guardian considered to be the acts of the minor. *Quære :* Whether the same rule strictly applies to the relation of the head of a family and his descendants holding vested rights in his estate, in regard to alienations by the head of the family to which the descendants did not expressly consent. SEETUL PERSHAD SINGH *v.* GOUR DYAL SINGH . **1 W. R. 283**

67. ——————————— *Sale of minor's property for transactions by guardian not for benefit of minor—Want of necessity—Ground for setting aside sale.* In 1850 the guardian of a minor (his step-mother) by an ikrarnamah among other things charged the minor's ancestral estate with the payment of R27,000 in favour of *L*, the amount of his alleged claim against the estate, respecting which an appeal was then pending, but to which estate he was himself a debtor, undertaking at the same time to prosecute certain claims against *M*, *L* agreeing to advance money for that purpose and to resist certain claims brought by *M* against the minor's estate. In February 1851, *M* having obtained judgment against the estate for R26,986, and taken out execution thereon, the estate was advertised for sale on the 20th of that month. To prevent the sale, *L* advanced the amount of the judgment-debt, and on the 19th of that month commenced a suit against the guardian, in which he claimed the R26,986, the amount advanced by him, and the R27,000 agreed to be paid him by the ikrarnamah, and the further sum of R1,354 alleged to have been paid by him for the proceedings against *M*, making together R55,341. On the following day the guardian filed a confession of judgment admitting the debt, hypothecating the minor's estate, and undertaking to pay the same by instalments, with the exception of the R27,000, at 6 per cent. interest. The instalments not being

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paid, *L* in 1853 took out execution on the judgment and under the execution put up the estate for sale, and became the purchaser himself. On the minor attaining his majority, he brought a suit to set aside the sale, impeaching the transaction as fraudulent and collusively obtained by *L* from his late guardian. The Courts in India set aside the sale on the ground of fraud, and decreed the restitution of the estate, with mesne profits and damages, subject to the repayment by way of reduction of the R26,986 at 5 per cent. Upon appeal such decree was affirmed by the Judicial Committee, *first*, on the ground that the transaction was fraudulent and collusive and prejudicial to the estate of the minor, there being no evidence to show the necessity for the guardian obtaining the pecuniary assistance sought, or to justify her submitting to *L's* extraordinary terms contained in the ikrarnamah, by allowing, without consideration, his doubtful claim against the minor's estate, to which he really was a debtor himself ; and, *secondly*, that *L*, who set up the charge, had failed to relieve himself of the burden which the Hindu law cast upon him of showing that he had at least good ground for supposing that the transaction was for the benefit of the minor's estate. In setting aside the ikrarnamah and sale, interest was allowed to *L* on the R26,000 advanced by him at the rate of 6 per cent. contracted for in the ikrarnamah in lieu of 5 per cent. awarded by the Sudder Court. Such a modification of the decree of the Court below *held* not sufficient to deprive the respondent of his costs of appeal. The case of *Ali Hossein* v. *Badal Khan, S. D. A., N.-W. P., 1863, 19th May*, where it was *held* that there is no difference to be made between an innocent purchaser and one tainted with fraud which had brought about an execution-sale, observed upon and dissented from. LALLA BUNSEEDHUR *v.* BINDESEREE DUTT SINGH . **10 Moo. I. A. 454**

68. ——————————— *Hindu law—Joint family—Release obtained from person just come of age.* The plaintiff as a joint member of the defendant's family sued to set aside a release obtained from him by the defendant and for partition, etc. The plaintiff was the son of one *L*, and the defendant was the plaintiff's nephew and grandson of *L*, being the son of *T* and elder brother of the plaintiff. The plaintiff alleged that *L* and his brother *J* were joint and had carried on a family business ; that *J* died childless, and that on *L's* death in 1868 the whole family property passed into the hands of *T*, his eldest son, on whose death it came into the possession of the defendant as eldest male member of the family, although belonging to a younger generation than the plaintiff. The plaintiff alleged that in 1882, shortly after he came of age, the defendant induced him to sign a release of all his claims upon the estate in consideration of the sum of R25,000. He prayed that this release might be set aside. The defendant denied the plaintiff's allegations as to the release. *Held*, that

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the release must be set aside. The defendant stood in the relation of a guardian to the plaintiff. Releases executed immediately after a ward comes of age are looked upon with suspicion. The circumstances must show the fullest deliberation on the part of the ward and perfect good faith on the part of the guardian. The circumstances of this release did not fulfil these requirements. There was not that absolute fairness and good faith required by the relations of the parties, and the signing of the release was an improvident act which a prudent person would not have done with full knowledge of the circumstances. TOOLSEYDAS LUDHA *v.* PREMJI TRICUMDAS . . . **I. L. R. 13 Bom. 61**

69. ——— *Loan by guardian for marriage expenses of minor—Legal necessity.* The marriage of a Hindu minor is a legitimate cause of expense in regard to which his guardian can bind him unless it is shown that the amount of the loan was extravagant for the purpose, considering the social or pecuniary circumstances of the minor, or that it was not duly applied and expended. JUGGESSUR SIRCAR *v.* NILAMBUR BISWAS **3 W. R. 217**

70. ——— *Sale by guardian—Onus of proof of bonâ fides of purchaser.* Purchasers from a guardian must show that they acted *bonâ fide.* RUNNOO PANDEY *v.* BAKSH ALI **3 N. W. 2**

71. ——— *Decree—Legal necessity.* The existence of a decree, which may at any time be executed against ancestral property, is a clear necessity for contracting a loan, and ample justification to any one coming forward to lend money on the mortgage of the property. PURMESUR OJHA *v.* GOOLBEE . . **11 W. R. 446**

72. ——— *Sale by guardian on behalf of minor—Repayment of purchase-money before minor allowed to recover estate.* The sale by *S's* mother of his share, during his minority, in the estate of his deceased father was rightly held to be invalid; but his claim to recover possession of the share from the purchasers, who had redeemed a mortgage existing on the estate created by his father, without tendering payment of his share of the mortgage debt, was properly dismissed. PANA ALI *v.* SADIK HOSSEIN . . **7 N. W. 201**

73. ——— *Sale by guardian—Suit on majority to set aside sale—Refund of sale-proceeds.* The plaintiff on coming of age sued to set aside a sale of his ancestral property which had been made by his guardian during minority. No legal necessity was proved, but it appeared that he had had the benefit of the sale-proceeds. A decree was passed in his favour, but subject to the condition that he should first refund the proceeds of sale. PARAN CHANDRA PAL *v.* KARUNAMAYI DASI **7 B. L. R. 90 : 15 W. R. 268**

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AGOOREE HURRIHUR CHURN *v.* GUNGA PERSAD OPADHYA . . . . **W. R. 1864, 208**

SIRDAR DYAL SINGH *v.* RAM BUDDUN SINGH **17 W. R. 454**

MOTHOORA DOSS *v.* KANOO BEHAREE SINGH **21 W. R. 287**

74. ——— *Court of Wards—Collector—Waiver—Application of the Land Acquisition Act, 1870, to the land of a minor—Insufficiency of compliance with the other requirements of the Act, without actual compensation to the minor's estate—Recovery of land by minor on coming of age.* The guardian of a minor's estate has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act, 1870, although the owner, had he been of full age, might have waived it. Although the Court of Wards had no power to alienate the land of a minor of whose estate it had charge, yet possession might have been lawfully taken of the land for a public purpose under, and in conformity with, the Land Acquisition Act, 1870, if there had been due compliance with the provisions of the Act, as regards compensation to the minor's estate. Where, however, compensation had not been given, and a merely nominal consideration had passed, the Collector not having acted, as the representative of the Court of Wards, so as to protect the interests of the minor :—*Held,* that no valid title to the land was established as against the ward, and that, on his attaining full age, he could recover it with mesne profits. LUCHMESHWAR SINGH *v.* CHAIRMAN OF THE DARBHANGA MUNICIPALITY . . **I. L. R. 18 Calc. 99**
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75. ——— *Power to refer to arbitration—Natural guardian—Reference by arbitration on behalf of minor—Award, application to file—Practice—Reference to Registrar.* Case in which it appeared on application to file an award that a natural guardian had on behalf of her minor sons submitted certain matters to arbitration, and in which the Court was of opinion that the cases showed that a natural guardian had power to submit to arbitration on behalf of a minor, and referred the case to the Registrar to enquire and report whether the submission and the award thereon were for the benefit of the minors. ROMON KISSEN SETT *v.* HURROLOLL SETT . **I. L. R. 19 Calc. 334**

76. ——— *Guardian's power to acknowledge a debt due by the minor—Limitation Act (XV of 1877), s. 19.* A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment. *Chinnaya* v. *Gurunatham, I. L. R. 5 Mad. 169,* followed. *Wajibun* v. *Kadir Buksh, I. L. R. 13 Calc. 235,* disapproved. SOBHANADRI APPA RAU *v.* SRIRAMULU . . . **I. L. R. 17 Mad. 221**

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GUARDIAN—*contd.*

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KAILASA PADIACHI *v.* PONNUKANNU ACHI **I. L. R. 18 Mad. 456**

77. ——— *Acknowledgment by guardian of minor—Guardians and Wards Act (VIII of 1890), ss. 27 and 29—Act XL of 1858—Guardian, powers of.* An acknowledgment of a debt by the guardian of a minor appointed under the Guardians and Wards Act, does not bind the minor, and is not such an acknowledgment under s. 19 of the Limitation Act as would give a new period of limitation against the minor. CHHATO RAM *v.* BILTO ALI . . . **I. L. R. 26 Calc. 51**

See also AZUDDIN HOSSEIN *v.* LLOYD **13 C. L. R. 112**

78. ——— *Power of guardian to bind his ward by personal covenants—Act XX of 1864, ss. 18 and 29—Guardian's authority to contract debts for the marriage of his ward without the sanction of the Court—Debts contracted for pilgrimage expenses—Guardian's power to acknowledge debts—Limitation Act (XV of 1877), s. 19.* A minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate. Act XX of 1864 gives no power to a guardian or administrator to bind his ward by personal covenants. A guardian appointed under Act XX of 1864 can pledge the property of his ward for purposes beneficial to the minor, but not as a security for money previously borrowed which the minor was under no obligation to pay. Under s. 29 of Act XX of 1864, a guardian cannot contract a debt for the marriage of his ward without the sanction of the Court. Debts contracted by the guardian of a minor for a pilgrimage not undertaken in the discharge of an urgent spiritual duty, when it was obligatory on him to perform, are not necessaries for which the minor would be held liable. A guardian has no authority to acknowledge a debt on behalf of his ward so as to give the creditor a fresh start for the period of limitation, as he is not an agent on the part of his ward within the meaning of s. 19 of the Limitation Act (XV of 1877). *Sobhanadri Appa Rau* v. *Sriramulu, I. L. R. 17 Mad. 221,* dissented from. RANMALSINGJI *v.* VADILAL VAKHATCHAND . . **I. L. R. 20 Bom. 61**

79. ——— *Liability of minor for debt incurred by guardian on his behalf—Ancestral trade carried for benefit of minor by the minor's natural guardian.* Under Hindu law, where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian, for the benefit of herself (she having a claim for maintenance) and the said minor, the minor will be bound by all acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade. RAMPERTAB SAMRA THRAI *v.* FOOLIBAI . . . **I. L. R. 20 Bom. 767**

GUARDIAN—*contd.*

2. DUTIES AND POWERS OF GUARDIANS—*concld.*

80. ——— *Guardian and minor—Pre-emption—Refusal of guardian on behalf of minor to claim pre-emption—Minor bound by such refusal.* The guardian of a minor is competent to exercise on behalf of the minor, or to refuse to exercise a right of pre-emption accruing to the minor; and, if he refuses in good faith and in the interests of the minor, the minor is bound by such refusal. *Lal Bahadur Singh* v. *Durga Singh, I. L. R. 3 All. 437,* referred to. UMRAO SINGH *v.* DALIP SINGH (1901) . **I. L. R. 23 All. 129**

81. ——— *Mahomedan Law—Sale of minor's property by de facto guardian for the benefit of the minor.* The *de facto* guardian of a minor Mahomedan girl sold certain property, which had belonged to the minor's deceased father, partly in order to pay the debts of the deceased and partly in order to pay Government revenue payable on account of the estate left by the deceased. *Held,* that the sale being for the benefit of the minor and made by the minor's *de facto* guardian was binding on her and must be upheld. *Hassan Ali* v. *Mehdi Hasain, I. L. R. 1 All. 533,* followed. *Hamir Singh* v. *Musammat Zakia, I. L. R. 1 All. 57,* distinguished. MAJIDAN *v.* RAM NARAIN (1904) . **I. L. R. 26 All. 22**

82. ——— *Minor—Account, suit for—Guardian's power to bind minor—Advances made to guardian for minor's benefit—Principal and agent—Advances made by agent to guardian of principal.* A guardian cannot bind his minor ward by a personal covenant. But where a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking the account that the agent has made advances to the guardian and the advances have been applied for the benefit of the minor, the agent ought to be allowed those advances in taking the accounts. *Waghela Rajsanji* v. *Shekh Masludin, I. L. R. 11 Bom. 551,* distinguished. SURENDRA NATH SARKAR *v.* ATUL CHANDRA ROY (1907) **I. L. R. 34 Calc. 892**

83. ——— *Transfer of Property Act (IV of 1882), s. 41—Transfer by ostensible owner—Owners of property transferred—Minor—Guardian incapable of assenting to apparent ownership of transferor.* *Held,* that the guardian of a minor owner of immoveable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of s. 41 of the Transfer of Property Act, 1882. DAMBAR SINGH *v.* JAWITRI KUNWAR (1907) **I. L. R. 29 All. 292**

3. RATIFICATION.

1 ——— **Sale by guardian**—*Acquiescence after minor comes of age.* The conveyance

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GUARDIAN—*contd.*

3. RATIFICATION—*contd.*

of property while the owner is a minor is not necessarily inoperative; if the sale is effected by the guardian and acquiesced in by the minor when he comes of age, it may be valid notwithstanding. KUMUROODIN *v.* BHADHOO . **11 W. R. 134**

2. ——— *Delay of minor on coming of age in repudiating act of guardian.* Mere delay on the part of a ward, after attainment of majority, in repudiating an alienation made by his guardian, cannot be treated as a ratification of the guardian's act, but only as evidence of ratification. RAJ NARAIN DEB CHOWDHEY *v.* KASEE CHUNDER CHOWDHRY
10 B. L. R. 324 : 18 W. R. 404

3. ——— **Contract by guardian**—*Delay of minor on coming of age in repudiating contract.* Long delay in repudiating a contract by a minor on his attaining majority, when such delay is wholly unaccounted for, is sufficient ground for inferring a ratification of the contract. BOIDONATH DEY *v.* RAMKISHORE DEY
10 B. L. R. 326 note 13 W. R. 166

DOORGACHURN SHAHA *v.* RAMNARAIN DOSS
10 B. L. R. 327 note : 13 W. R. 172

4. ——— **Act of guardian after majority of minor**—*Person remaining minor as far as public are concerned—Acquiescence—Evidence of necessity for loan.* Where a party after attaining full age allowed his mother to give him out to the world as a minor, and as his guardian to mortgage his ancestral property, and permitted the mortgagee to retain possession for five years:—*Held,* that he could not afterwards turn round and repudiate arrangements which were made for his benefit, and for which an innocent party had given valuable consideration. PURMESHUR OJHA *v.* GOOLBEE . . . . . **11 W. R. 446**

5. ——— **Mode of ratification**—*Suit to set aside sale made by mother as guardian—Minor acting for mother in former suit.* In a suit to set aside a sale effected by plaintiff's mother during his minority, it appearing that plaintiff, eleven months after attaining his majority, signed for his mother a written statement in another suit, to the effect that the property had been sold by her to the defendant, and that he in that suit conducted his mother's defence, which was that the purchaser from her was entitled to what he claimed, it was held that he must be considered to have acquiesced in and ratified the sale. KEBULKRISTO DASS *v.* RAMCOOMAR SHAH . **9 W. R. 571**

6. ——— **Transaction prejudicial to estate**—*Formal ratification, necessity of.* The guardian of a minor as manager of the minor's estate is bound in duty to abstain from entering into any arrangement beneficial to himself and detrimental to the estate; and if any such arrangement has been entered into, it is incumbent on him immediately after the minor comes of age to obtain from him not an accidental, but a distinct formal ratification. PROSUNNO COOMAR GHUTTUCK *v.* WOOMA CHURN MOOKERJEE . **20 W. R. 274**

7. ——— **Duty of minor**—*Compromise, suit to set aside—Proof of fraud.* It is not incumbent upon a guardian to contest every claim made against the infant's estate. The Judicial Committee, reversing the finding of the Courts below, refused to set aside a compromise (confirmed by a decree of Court) by the former guardian of the plaintiff of a claim against his estate for debt after sixteen years, the plaintiff having failed to prove that the suit was fictitious, and the compromise fraudulent and collusive. LEKRAJ ROY *v.* MAHTABCHUND . . . . **10 B. L. R. 35**
14 Moo. I. A. 393 : 17 W. R. 117

8. ——— **Receipt of rent under lease**—*Acquiescence in lease by guardian.* Where minors after coming of age receive rents under a lease which was granted by their guardians during their minority, they thereby ratify the lease and cannot afterwards repudiate it. RAM CHUNDER SIRCAR *v.* PRAN GOBIND BOISHNUB . . **25 W. R. 71**

9. ——— **Apparent acquiescence**—*Compromise by mother for minor sons.* The transactions into which guardians enter on behalf of their wards must secure to the latter some demonstrable advantage, or avert some obvious mischief, in order to obtain recognition in the Courts. Where a compromise was alleged to have been entered into by a mother on behalf of her two minor sons on the one hand and an adult member of the family on the other, agreeing to give the latter more than had been awarded by a judicial decision, it was *held* that the compromise was not binding on the minors. Apparent acquiescence in such a compromise by one of the minors after arriving at majority, though evidence against him, is not evidence of a conclusive character when not continued for any considerable time. DHARMAJI VAMAN *v.* GURRAV SHRINIBAS . . . . **10 Bom. 311**

10. ——— **Ratification by acquiescence**—*Minor, contract by.* *A* sued in 1885 to recover certain estates from *B*, alleging claim under his adoption which took place in 1865. In 1875 *A*, being still a minor, relinquished by deed his claim to the estates for R12,000, but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878. *Held,* that, whether the cause of action arose in 1865 or 1867, it was equally barred from 1879; that the plaintiff was bound by the deed; assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. His conduct of acquiescence, moreover, in the deed of relinquishment amounted to

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GUARDIAN—*contd.*

3. RATIFICATION—*concld.*

ratification of it. VENKATACHALAM *v.* MAHALAKSHMAMMA . . . **I. L. R. 10 Mad. 272**

4. DISQUALIFIED PROPRIETORS.

1. ——— **Suits by, and against, disqualified proprietors**—*Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 205—Act VIII of 1879, s. 23.* Under s. 205 of Act XIX of 1873, as amended by s. 23 of Act VIII of 1879, a disqualified proprietor whose property is in charge of the Court of Wards must sue and be sued in the Civil Courts by and in the name of his guardian, where a guardian has been appointed, or by and in the name of the Collector of the district in which the suit is brought, where a guardian has not been appointed, whether or not the suit has for its object to set aside an act done by the ward before the date when his property came under the charge of the Court of Wards. SHEO DIAL CHAUBEY *v.* COLLECTOR OF GORAKHPUR . **I. L. R. 5 All. 264**

2. ——— **Contract entered into by disqualified proprietor whilst his property was under the charge of the Court of Wards**—*N.-W. P. Land Revenue Act (XIX of 1873), s. 205B—Court of Wards.* S. 205 of Act No. XIX of 1873 does not cease to have effect when property to which it might apply is released from the custody of the Court of Wards. Such property cannot at any time be taken in execution of a decree obtained on a contract entered into by a ward of the Court at a time when his property was under the superintendence of the Court. HIMANCHAL SINGH *v.* JHAMAN LAL . . **I. L. R. 22 All. 364**

3. ——— **Power to enter into contracts**—*Act VIII of 1879, ss. 23, 24—N.-W. P. Land Revenue Act (Act XIX of 1873), s. 205.* A suit was brought against a disqualified proprietor for money due on a bond, given while her property was under the superintendence of the Court of Wards. The Collector was made a defendant to this suit "because the property of the defendant obligor had come under the superintendence of the Court of Wards before the execution of the bond." *Held*, that the Collector's status in the suit—namely, as representative *ad litem* of the defendant—was sufficiently described to entitle him to raise the question of the legal capacity of the defendant to enter into the bond. The mere disqualification of a proprietor to manage his estate does not carry with it a general and absolute disqualification to enter into any contracts at all. *Held*, therefore, where a person whose property was under the superintendence of the Court of Wards borrowed money and gave a bond for the payment of the same, and was sued on the bond in the name of the Collector, that the Court was competent to make a decree against such disqualified proprietor. COLLECTOR OF BENARES *v.* SHEO PRASAD **I. L. R. 5 All. 487**

GUARDIAN—*contd.*

4. DISQUALIFIED PROPRIETORS—*concld.*

4. ——— *Act XIX of 1873 (N.-W. P. Land-revenue Act), s. 205B—Attachment of property of disqualified proprietor—Profits accruing after the release of the corpus by the Court of Wards. Held*, that the prohibition contained in the second paragraph of s. 205B of Act XIX of 1873 does not apply to the rents and profits of property which may accrue after the release of the *corpus* from the superintendence of the Court of Wards. *Himanchol Singh* v. *Jhamman Lal, I. L. R. 22 All. 364*, referred to. JHAMMAN LAL *v.* HIMANCHAL SINGH (1901) . . **I. L. R. 24 All. 136**

5. LIABILITY OF GUARDIANS.

1. ——— **Act of guardian in proper management of minor's estate.** Where an act done by a guardian is one arising naturally out of the management of the minor's estate, and especially where it is concurred in by other co-sharers of the same property, the liability for such act attaches not to the guardian, but to the estate. GIREEWAR SINGH *v.* MUDDUN LALL DASS **16 W. R. 252**

2. ——— **Guardian ad litem**—*Costs, liability for.* Where a guardian *ad litem* of an infant had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purposes, and which, the evidence shows, was to his knowledge duly executed by the testatrix in sound state of mind:—*Held*, that he was liable for the costs of the suit. GOOLAM HOOSEIN NOOR MAHOMED *v.* FATMABAI **I. L. R. 8 Bom. 391**

3. ——— **Liability of widow as guardian**—*Personal liability and as representing heirs of husband.* A widow defending a suit as guardian of her minor son cannot be made liable in her own person as well as representing the heirs of her husband. BROJO MOHUN MOJUMDAR *v.* ROODRO NATH SURMAH MOJUMDAR . **15 W. R. 192**

4. ——— **Retaining attorney for minor**—*Liability of minor for costs—Privity of contract.* If a guardian or next friend of an infant retain an attorney to act for the infant, no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs. RADHA NATH BOSE *v.* SUTTOPROSONO GHOSE . . . **2 Ind. Jur. N. S. 269**

5. ——— **Liability of guardian for torts**—*Torts committed by minor.* Guardians of a minor cannot be held personally liable for torts committed by such minor. LUCHMAN DAS *v.* NARAYAN . . . . **3 N. W. 191**

6. ——— **Right to suit for torts to minor**—*Suit by father for personal injury to son.* A father, as guardian of his minor son, can sue to recover damages for personal injuries received by the son. MODHOO SOODUN *v.* KAEMOOLLAH BISWAS **9 W. R. 327**

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GUARDIAN—*concld.*

5. LIABILITY OF GUARDIANS—*concld.*

7. ——— **Liability of guardian on security bond**—*Act XL of 1858—Suit on minor's behalf against guardian's sureties—Assignment of security-bond—Act IX of 1861—Succession Act (X of 1865), s. 257.* *B* having been granted by a District Court a certificate under Act XL of 1858 in respect of the estate of a minor, the Judge of such Court called on her to furnish security, and certain persons accordingly gave security bonds to the Judge on her behalf. Subsequently *B*'s certificate was taken from her, and was granted to *A*, who brought a suit on the minor's behalf against *B*'s sureties for the value of the property intrusted to *B*. The security bonds in question were not assigned by the Judge to *A*. *Held*, that, inasmuch as the plaintiff was seeking to enforce contracts which were never made with him or any other person in the character of legal representative of the minor, he had no legal status to maintain the suit. Also that no equitable rights were created in the minor by the bonds, which would render the suit maintainable. *Quære:* Whether the Judge of a District Court is competent to call upon a person to whom he grants a certificate under Act XL of 1858 to furnish security; and whether, where he has done so and security-bonds have been given to him, he can assign them in the manner provided in s. 257 of the Succession Act, 1865. AMAR NATH *v.* THAKUR DAS
I. L. R. 5 All. 248

8. ——— **Liability of guardian for malversation**—*Suit on behalf of son to get rid of guardian.* A mother brought a suit on behalf of her minor son to recover from her step-son, the managing member of the family, the minor's share in the family property. *Held*, that the only ground upon which such a suit could be maintained was that of malversation. The Court might relieve the minor from his brother's authority and appoint another guardian, but a case requiring relief must be made out. ALIMENAMMAL *v.* ARUNACHELLAM PILLAI . . . . **3 Mad. 69**

9. ——— **Liability of guardian to render account**—*Guardian and ward—Guardian—Suit for account against guardian—Guardian and Wards Act (VIII of 1890), s. 41, cl. 4.* Where a new guardian appointed under the Guardians and Wards Act had not inspected the account submitted by the previous guardian, the latter having failed to pay the process fee for service on the former of notice to inspect them, and the Court had made no order under s. 41 (*4*) of the Act discharging the previous guardian: *Held*, that a suit for account would lie against the previous guardian. A guardian is bound to render accounts in respect of all the properties of which he took possession as guardian under the order of the Court, and for the purpose of taking the accounts an inquiry must be made as to what those properties are. KANIZ FATIMA *v.* SAJJAD HOSAIN (1906)
I. L. R. 34 Calc. 211

GUARDIAN AD LITEM.

See CIVIL PROCEDURE CODE, 1882, s. 440.
I. L. R. 31 All. 7

See CIVIL PROCEDURE CODE, 1882, ss. 443, 457 . **I. L. R. 28 All. 137**
I. L. R. 29 Mad. 58
I. L. R. 29 All. 290

1. ——— *Guardian ad litem—Procedure—Appointment of guardian ad litem invalid—Effect of invalidity on decree passed against minor defendant.* The provisions of s. 443 of the Code of Civil Procedure as to the appointment of a guardian *ad litem* for a minor defendant are imperative and where those provisions are not substantially complied with, the minor is not properly represented, and any decree, which may be passed against him, is a nullity. *Khirajmal* v. *Daim, L. R. 32 I. A. 26,* followed. *Walian* v. *Banke Behari Prasad Singh, I. L. R. 30 Calc. 1021,* distinguished. HANUMAN PRASAD *v.* MUHAMMAD ISHAQ (1905) . . **I. L. R. 28 All. 137**

2. ——— *Investment by guardians of minor's property—Principles governing investment by guardians—Indian Trusts Act (II of 1882), s. 20.* Guardians are in a fiduciary position and the Court should be guided by the rules embodied in the Trusts Act in sanctioning changes in the investment of a minor's property. The duty of guardians is primarily to preserve and not to add to the property of the minor. Where it was sought to invest monies belonging to a minor in the purchase of lands deriving their income from buildings erected thereon. *Held*, that the proposed investment not being one which trustees would be authorised to make, the Court must withhold its sanction. *Learoyd* v. *Whiteley, 12 App. Cas. 727, 739,* followed and applied. *In re* CASSUMALI (1906) . **I. L. R. 30 Bom. 591**

3. ——— *Civil Procedure Code, s. 444—Duty of Court as regards appointment of a guardian ad litem.* Where the defendant or respondent to a suit or appeal is a minor it is the duty of the Court not only to appoint a guardian but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. *Bibi Walian* v. *Banke Behari Parshad Singh, I. L. R. 21 Bom. 281,* distinguished. RAMCHANDRA DAS *v.* JOTI PRASAD (1907) . . . **I. L. R. 29 All. 675**

4. ——— *Civil Procedure Code, s. 457—Appointment of married woman whose husband is alive.* In no case can a married woman whose husband is living be appointed as a guardian *ad litem*, and if such an appointment is made *de facto*, such apparent appointment is not a mere irregularity. *Sham Lal* v. *Ghasita, I. L. R. 23 All. 459,* followed. *Kachayi Kuttiali Haji* v. *Udumpumthala Kunhi Puttra, I. L. R. 29 Mad. 58,* dissented from. KUNDAN LAL *v.* GAJADHAR LAL (1907)
I. L. R. 29 All. 728

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GUARDIAN AD LITEM—*concld.*

5. ——— *Shia Mahomedan lady—Inherent power of Civil Court.* The power to appoint a guardian *ad litem* is inherent in every Court of civil jurisdiction. Where therefore a Shia Mahomedan lady had been appointed by a Civil Court guardian *ad litem* of her infant children, it was held that the appointment must be presumed to be valid and that a sale in execution of the decree obtained in such a suit was binding on the minors. MUZAFFAR ALI KHAN *v.* PARBATI (1907) **I. L. R. 29 All. 640**

6. ——— *Appointment of guardian ad litem other than certificated guardian. Held,* that the appointment, apparently by an oversight, as guardian *ad litem* to a minor defendant of a person other than the certificated guardian amounted to no more than an irregularity and would not of itself violate either a decree passed in a suit or a sale consequent upon such decree. DAMMAR SINGH *v.* PIRBHU SINGH (1907) **I. L. R. 29 All. 290**

7. ——— *Appeal—Guardian ad litem not made a party by appellant—Limitation.* Where a guardian *ad litem* of a defendant respondent was not made a party to an appeal filed by the plaintiff, until after the period of limitation for filing such appeal had expired, it was held that the appeal was not for this reason time-barred. *Khem Karam* v. *Har Dayal, I. L. R. 4 All. 37,* followed. RUP CHAND *v.* DASODHA (1907) **I. L. R. 30 All. 55**

8. ——— *Civil Procedure Code (Act XIV of 1882), s. 447—Necessity of formal discharge from the duties of guardian ad litem—Suit to set aside a decree. Held,* that no suit will lie to set aside a decree, where fraud is neither alleged nor proved and no specific relief is asked for save and except the setting aside of the decree. *Umrao Singh* v. *Hardeo, I. L. R. 29 All. 418,* referred to. *Held,* also, that where the same person is both certificated guardian and guardian *ad litem* to minor plaintiffs, the fact that one of such plaintiffs has come of age and been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of her duties as guardian *ad litem.* To do this requires a special order under s. 447 of the Code of Civil Procedure. BANARSI PRASAD v. RAM NARAIN (1907) **I. L. R. 30 All. 105**

GUARDIAN AND MINOR.

See CIVIL PROCEDURE CODE, 1882, ss. 462, 506 . **I. L. R. 28 All. 35**

See GUARDIAN.

See GUARDIAN AND WARD.

See GUARDIANS AND WARDS ACT.

See HINDU LAW . **10 C. W. N. 1**

See LIMITATION ACT, 1877, s. 8. **I. L. R. 31 All. 156**

GUARDIAN AND MINOR—*contd.*

1. ——— *Contract for sale by guardian of minor—Subsequent sale to third party—Sanction of District Judge—Sale, void or voidable—Specific performance.* A certificated guardian of certain minors contracted to sell their property to the plaintiff for a consideration of R217, of which R30 was to be paid in cash and the balance of R187 was to redeem a mortgage upon the property executed by the late father of the minors in favour of the plaintiff. The guardian undertook to obtain the sanction of the District Judge to the transaction. She afterwards fraudulently conveyed the property by registered deed to her relative, the defendant No. 1, who was fully aware of the previous contract with the plaintiff. *Held,* that the sale to the plaintiff was not *ipso facio* void, but only voidable at the instance of any person affected thereby. That the plaintiff became entitled to obtain specific performance when, by finding that the sale to him was for the minor's benefit, the District Judge in effect sanctioned the sale. ETWARIA *v.* CHANDRA NATH MUKERJEE (1905) . **10 C. W. N. 763**

2. ——— *Guardian and minor—Arbitration—Authority of guardian to agree to a reference to arbitration on behalf of a minor. Semble :* That s. 462 of the Code of Civil Procedure does not apply to proceedings under Chapter XXXVII of the Code. A minor party therefore will be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence, although the Court has not under the provisions of s. 462 sanctioned the agreement to refer. *Sheo Nath Saran* v. *Sukh Lal Singh, I. L. R. 27 Calc. 229.* and *Chengal Reddi* v. *Venkata Reddi, I. L. R. 12 Mad. 483,* followed. HARDEO SAHAI *v.* GAURI SHANKER (1905) . . **I. L. R. 28 All. 35**

3. ——— *Arbitration—Appointment of guardian not to be settled by arbitration.* The appointment of a guardian to a minor not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration. MAHADEO PRASAD *v.* BINDESHRI PRASAD (1908) . **I. L. R. 30 All. 137**

4. ——— *Bond by guardian—Liability of minor—Bond keeping alive debt incurred for necessaries when binds minor's estate—Personal liability of minor—Limitation.* The general proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was liable. *Indur Chander Singh* v. *Radhakishore Ghose, I. L. R. 19 Calc. 507, L. R. 19 I. A. 90, Subramanya Ayyar* v. *Arumuga Chetty, I. L. R. 26 Mad. 330,* referred to. Where the promise is to pay money, which has been expended on necessaries, the estate of the minor may be liable,

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GUARDIAN AND MINOR—*concld.*

not on the promise, but because the money has been supplied. *Sundararaja Ayyangar* v. *Pattanathazami Tevar, I. L. R. 17 Mad. 306,* referred to. It is established law that a guardian cannot bind his ward's estate, except by a document purporting to bind it. *Maharana Shri Ranmalsingji* v. *Vadilal Vakhat Chand, I. L. R. 20 Bom. 61,* followed. When a third person enters into dealings with the guardian of a minor, and advances money for necessaries for the minor or for the benefit of the estate, and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor liable in law for the debt. BHAWAL SAHU *v.* BAIJNATH PERTAB NARAIN SINGH (1907) . . **I. L. R. 35 Calc. 320**
s.c. 12 C. W. N. 256

5. _____ *Minor bound by bond of guardian for existing liability binding on minor—Civil Procedure Code (Act XIV of 1882), s. 622—Material irregularity.* A bond executed by the guardian of a minor as such but which contains only a personal covenant by the guardian to pay and does not charge the minor's estate, will nevertheless be binding on the minor, if it is executed for a pre-existing debt, which is binding on him. A mistaken view of law by the lower Court is no ground for the interference of the High Court under s. 622 of the Code of Civil Procedure. But where the case has not been properly heard by the lower Court and the mistake of law was probably the result of such defective trial, the High Court will interfere on the ground that the lower Court had acted with material irregularity within the meaning of the section. DURAISAMI REDDI *v.* MUTHIAL REDDI (1908)
I. L. R. 31 Mad. 458

6. _____ *Hindu Law—Joint Hindu family—Minor co-parceners—Guardian of the family-property appointed by the Court—Guardianship ceases, when one of the co-parceners attains majority—Guardianship goes to the adult co-parcener.* Where a joint Hindu family consists of co-parceners, who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property of that group as a whole. But when, subsequently, one of that group arrives at the age of majority, the guardianship of the person appointed by the Court ceases, and the Court is bound to hand over the joint family property to the adult co-parceners, notwithstanding the fact that other co-parceners are minors. *Virupakshappa* v. *Nilgangava, I. L. R. 19 Bom. 309,* applied. *Bindaji* v. *Mathurabai, I. L. R. 30 Bom. 152,* followed. RAMCHANDRA *v.* KRISHNARAO (1908)
I. L. R. 32 Bom. 259

GUARDIAN AND WARD.

See GUARDIAN.

See GUARDIAN AND MINOR.

See GUARDIANS AND WARDS ACT (VIII OF 1890), s. 10 . **I. L. R. 29 All. 210**

GUARDIAN AND WARD—*contd.*

1. _____ *Contract—Specific performance—Specific performance of contract not favourable to minor refused.* The certificated guardian of a minor, finding that it was necessary that some of the minor's property should be sold, applied for permission to the District Judge, who sanctioned the sale for a price of R725. Subsequently the guardian discovered that this was an inadequate price, and having received an offer of R825 for the property, went again to the District Judge for sanction to the second contract, obtained sanction and sold the property for R825. *Held,* that the former contract being to the detriment of the minor could not be specifically enforced. CHITTAR MAL *v.* JAGAN NATH PRASAD (1906) . . . . **I. L. R. 29 All. 213**

2. _____ *Limitation Act (XV of 1877), s. 28, Sch. II, Art. 44—'Sale' in Art. 44 not confined to transfer of absolute ownership only—Finding in previous suit of the invalidity of a sale does not dispense with the necessity of suing to set aside such sale.* The term 'sale' in Art. 44 of Sch. II of the Limitation Act is not confined to an assignment of absolute ownership only but means an assignment for a price of the ward's interest whatever that may be. Art. 44 will therefore apply to a suit by the ward to set aside an assignment by his guardian of his right as mortgagee. *Gnanasambhanda Pandara Sannadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 279,* referred to and followed. A suit by a ward to recover properties improperly alienated by the guardian will be governed by Art. 44 and the period of limitation will not be that prescribed for a suit for possession of immoveable property. The fact that in a previous suit by the alienee against the ward, to recover some properties which had not passed to his possession under the transfer, the alienation was found invalid will not relieve the ward from the consequences of his failure to have the transfer set aside within the period allowed by law with regard to properties which had passed to the possession of the alienee. When at the time such previous suit was brought, the ward's right to such property had been extinguished under s. 28 of the Limitation Act, the decision will not have the effect of reviving the extinguished right. *Lakshmi Dass* v. *Roop Laul, I. L. R. 30 Mad. 169,* distinguished. MADUGULA LATCHIAH *v.* PALLY MUKKALINGA (1907)
I. L. R. 30 Mad. 393

3. _____ *Guardian—Liability of guardian to render account—Suit for account against guardian—Guardian and Wards Act (VIII of 1890), s. 41, cl. 4.* Where a new guardian appointed under the Guardian and Wards Act had not inspected the accounts submitted by the previous guardian, the latter having failed to pay the process fee for service on the former of notice to inspect them, and the Court had made no order under s. 41 (4) of the Act discharging the previous guardian: *Held,* that a suit for account would lie against the previous guardian. A guardian is bound to render account in respect of

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GUARDIAN AND WARD—*concld.*

all the properties of which he took possession as guardian under order of the Court, and for the purpose of taking the accounts an inquiry must be made as to what those properties are. KANIZ FATIMA *v.* SAJJAD HOSAIN (1906) **I. L. R. 34 Calc. 211**

4. ——— *Guardian and Wards Act, s. 52—Act No. IX of 1875 (Indian Majority Act), s. 3—Guardian and minor—Effect of appointment of guardian—Civil Procedure Code, s. 440.* Where a guardian has once been appointed under the provisions of Act VIII of 1890, the attainment of majority by the ward is postponed until he reaches the age of twenty-one years notwithstanding that the guardian appointed by the Court may be discharged before that time arrives. *Gordhandas Jadowji* v. *Harivalubhdas Bhaidas, I. L. R. 21 Bom. 281,* followed. *Patesri Partap Narain Singh* v. *Champalal, All. Weekly Notes (1891) 118,* distinguished. SADHO LAL *v.* MURLIDHAR (1907) . . **I. L. R. 29 All. 672**

GUARDIANS AND WARDS ACT (VIII OF 1890).

See APPEAL—ACTS—GUARDIANS AND WARDS ACT.

See ARBITRATION . **8 C. W. N. 37**

See BOMBAY CIVIL COURTS ACT, s. 16. **I. L. R. 16 Bom. 277**

See CUSTODY OF CHILDREN. **I. L. R. 16 Bom. 307**

See GUARDIAN.

See GUARDIAN AND MINOR.

See GUARDIAN AND WARD.

See MINOR—CUSTODY OF MINORS. **I. L. R. 25 Bom. 574**

See PROBATE—EFFECT OF PROBATE. **I. L. R. 19 Bom. 832**

See SUCCESSION CERTIFICATE ACT, s. 6, CL. (*d*) . **I. L. R. 28 Bom. 344**

——— **s. 1, cl. (2)**—*Scheduled Districts Act (XIV of 1874)—Agency rules—Superintendence of High Court—Civil Procedure Code, 1882, s. 622.* A petition of appeal was presented to the Governor in Council against an *ex parte* order made by the Agent to the Governor in the scheduled district of Vizagapatam, the ground of the petition being that the petitioner's vakil had not been heard. The appeal was referred to the High Court. *Held,* (i) that the Guardians and Wards Act, 1890, is in force in the agency tracts, although no notification to that effect had been made under the Scheduled Districts Act; (ii) that the High Court had jurisdiction to set aside the *ex parte* order. CHAKRAPANI *v.* VARAHALAMMA **I. L. R. 18 Mad. 227**

——— **s. 7.**

See GUARDIAN . **I. L. R. 34 Calc. 569**

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— **ss. 7, 11, 13, and 46**—*District Judge—Application for appointment of guardian—Reference to a Subordinate Judge to record evidence and submit report—Decision based upon the report—Procedure—Irregularity—Practice—Minor—Guardian.* A District Judge, upon receiving an application for the appointment of guardians to the persons and property of minors, fixed a day for hearing the same before the Subordinate Judge, and directed that Court to take evidence and report on the case. The Subordinate Judge recorded the whole evidence and submitted a report, upon the strength of which the District Judge disposed of the application. *Held,* that the procedure adopted by the District Judge was illegal and vitiated the whole inquiry. *Ganesh* v. *Kusabai, I. L. R. 23 Bom. 698,* followed. NARAYAN SHRIDHAR DHARNE *v.* RAMCHANDRA KANDDEV BELHE (1902) . . . **I. L. R. 26 Bom. 716**

——— **ss. 10, 11**—*No guardian of property to be appointed in the case of a minor, member of an undivided family governed by Aliyasunthanum Law.* The only right of a minor member of an undivided family governed by Aliyasunthanum Law is a right to be maintained in the family house; and, where there are adult members of such family, no guardian of property or such minor can be appointed by the Court under the Guardian and Wards Act. No such appointment can be made, even with the assent of the adult members, as the minor has no property in respect of which a guardian can be appointed. KAJIKAR LAKSHMI *v.* MARU DEVI (1908) **I. L. R. 32 Mad. 139**

s. 12.

See HINDU LAW—MARRIAGE—GIVING IN MARRIAGE AND CONSENT. **2 C. W. N. 521**

——— **s. 13.**

See DISTRICT JUDGE, JURISDICTION OF. **I. L. R. 23 Bom. 698**

——— **s. 14**—*Application of section—"Report," meaning of.* S. 14 of the Guardians and Wards Act (VIII of 1890) does not apply to the High Court in the exercise of its original civil jurisdiction; and the term "report" in cl. (2) of that section refers, not to a judicial reference, but to a ministerial act. *In the matter of* FAKARUDDIN MAHOMED CHOWDHRY. HAFIZ AMMINUDDIN AHMED *v.* GARTH **I. L. R. 26 Calc. 133 3 C. W. N. 91**

s. 17.

See ACT XXI OF 1850, s. 1.

1. ——— *Caste Disabilities Removal Act, s. 1—Hindu Law—Guardian and minor—Right of Hindu mother to be guardian of her infant daughter.* In the absence of any special reason to the contrary a Hindu mother has a better right to the guardianship of her infant daughter than the

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GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— s. 17—*concld.*

infant's paternal grandfather, and this right is not taken away by the fact that the mother has been outcasted. *Kanahi Ram* v. *Biddya Ram, I. L. R. 1 All. 549,* followed. KAULESRA *v.* JORAI KASAUNDHAN (1905) . **I. L. R. 28 All. 233**

2. ——— *Appointment of guardian of person of minor—Hindu Law.* According to Hindu law in the case of minors, who have lost both parents, the nearest male kinsman should be appointed their guardian, the paternal kinsmen having the preference over the maternal. The interest, well-being, and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. GULBAI, *In re* (1907) **I. L. R. 32 Bom. 50**

——— s. 24—*Court's power to make order as to marriage of minor. Quære:* Whether the marriage of a minor eight or nine years old can be regarded as falling within the scope of s. 24 of Act VIII of 1890, especially when the marriage of a minor female terminates the power of the guardian of the person? BAI DIWALI *v.* MOTI KARSON **I. L. R. 22 Bom. 509**

——— s. 29—*Mortgage of minor judgment-debtor's property—Sanction of District Judge.* The guardian of a minor judgment-debtor, appointed under the Guardian and Wards Act, must obtain the permission of the District Judge under s. 29 of the Act to sell or mortgage the property of the minor which is under attachment in execution of a decree even if the Court executing the decree gives leave under s. 305 of the Code of Civil Procedure. SARJU *v.* DISTRICT JUDGE OF BENARES (1909) **I. L. R. 31 All. 378**

——— ss. 29, 30.

See MINOR—LIABILITY OF MINOR ON, AND RIGHT TO ENFORCE, CONTRACTS.
I. L. R. 23 All. 288
I. L. R. 25 All. 59

——— ss. 29 and 31—*Guardian and minor—Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.* In all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of interest, or at least the maximum rate of interest, at which the loans are to be raised. If nothing is said in the order as to the rate of interest, the lenders are entitled only to a reasonable rate of interest on the moneys advanced. *Ganga Persad Sahu* v. *Maharani Bibi, I. L. R. 11 Calc. 379,* followed. THAKUR PRASAD *v.* GAURIPAT RAI (1908) **I. L. R. 30 All. 188**

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— s. 30.

See REGISTRATION ACT, s. 77.
I. L. R. 24 Calc. 668

and s. 2—*Retrospective effect of—Mortgage without sanction of Court.* S. 2 of the Guardians and Wards Act (VIII of 1890) does not give retrospective effect to s. 30, which therefore does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character as having been executed by a guardian under Act XL of 1858 without sanction of the Court and render it merely voidable. LALA HURO PROSAD *v.* BASARUTH ALI **I. L. R. 25 Calc. 909**

——— s. 30—*Minors Act (XL of 1858), s. 18—Guardian and minor—Lease by guardian in excess of his powers—Sale of leased property by minor on attaining majority—Suit by purchaser for possession—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 91.* The certificated guardian of a minor granted, without previously obtaining the permission of the Court, a perpetual lease of certain immoveable property forming part of the minor's estate on the 28th March 1890. The minor came of age on the 7th of December 1901, and on 21st October 1902, sold the property, the subject of the lease mentioned above. On the 22nd of July 1903, the purchaser sued for possession of the property purchased by him, asking for cancellation of the lease, if necessary. *Held,* that it was not necessary for the plaintiff to ask for cancellation of the lease as a condition precedent to his obtaining a decree for possession, and that the suit was not barred by limitation. *Mauji Ram* v. *Tara Singh, I. L. R. 3 All. 852, Girraj Baksh* v. *Kazi Hamid Ali, I. L. R. 9 All. 340, Ramausar Pandey* v. *Raghubar Jati, I. L. R. 5 All. 490,* and *Unni* v. *Kunchi Amma, I. L. R. 14 Mad. 26,* referred to by BANERJI, *J.* ABDUL RAHMAN *v.* SUKHDAYAL SINGH (1905) . . **I. L. R. 28 All. 30**

——— s. 31.

See SPECIFIC PERFORMANCE.
I. L. R. 22 Calc. 545

——— ss. 34, 35, 36 and 37—*Minor—Guardian—Administration bond passed to Judge—Refusal of the Judge to assign—Appeal.* No appeal lies from an order passed by the District Judge under s. 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond. A bond under s. 34 of the Guardians and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guar-

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GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— **s. 34**—*concld.*

dian or of the ward or on the cesser or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events. The District Judge can in his discretion under such circumstances assign such a bond to a proper person. GANPAT *v.* ANNA (1905) **I. L. R. 30 Bom. 164**

——— **ss. 34, 41**—*Guardianship, termination of—Guardian, liability of, after attainment of majority by ward—Power of District Judge—Jurisdiction.* The summary powers given by s. 34 of the Guardians and Wards Act cease as soon as the minority of the ward ceases. The object of that section is to give the Court, as representing the interest of the minor, certain summary powers for the protection of his property during minority. S. 41 cannot be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of guardianship. NABU BEPARI *v.* SHEIKH MAHOMED (1900) **5 C. W. N. 207**

——— **s. 39**—*"Instrument"—Construction of statute—Decree of Civil Court—Removal of guardian.* The word "instrument" in s. 39 of the Guardians and Wards Act (VIII of 1890) means instruments *ejusdem generis* with a will, and a decree of a Civil Court is not an instrument within the contemplation of the section. BAI HARKOR *v.* BAI SHANGAR . **I. L. R. 18 Bom. 375**

——— **ss. 39 and 52**—*Minors—Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.* A guardian of the property cannot be appointed for a minor, whose only proprietary interest is as co-parcener with adults in a joint family property. This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number. *Lingangowda* v. *Gangabai, P. J. 521,* followed. As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease. An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under s. 52 of the Guardian and Wards Act (VIII of 1890). BINDAJI *v.* MATHURABAI (1905) . **I. L. R. 30 Bom. 152**

——— **ss. 47, 48.**

See COMPROMISE—CONSTRUCTION, ENFORCING, EFFECT OF, AND SETTING ASIDE, DEEDS OF COMPROMISE. **I. L. R. 30 Calc. 613**

——— *Indian Majority Act (IX of 1875), s. 3—Power of Chamber Judge to alter, vary, modify or set aside orders made by his predecessor in Chamber under the Guardian and Wards Act—Period of minority on vacating of such orders does not extend to 20 years.* S. 48 of the Guardian and Wards Act immediately following, as it does, the section which provides for appeals is intended to give finality to contested orders and to enact that, when once an order is made, except as provided in s. 47 and saving the provisions of s. 622 of the Civil Procedure Code, the order shall be final and shall not be contested by a substantive suit or by any other form of litigation. The Guardian and Wards Act makes no provision for setting aside an order made under the Act, but judging from the analogy of English practice there can be no doubt that in these miscellaneous matters the Judge sitting in Chambers and making orders on petitions and applications has the power to vary, alter, modify or set aside his own orders when he finds that the order is one which ought not to have been made and that the order is one that requires in the interests of justice to be dealt with in that way. If an order is made under the Guardian and Wards Act and such order is subsequently set aside, the period of minority is not extended to 21 years under s. 3 of the Indian Majority Act. NAGARDAS *v.* ANANDRAO (1907) **I. L. R. 31 Bom. 590**

——— **s. 41.**

See DISTRICT JUDGE, JURISDICTION OF. **I. L. R. 17 Bom. 566**

1. ——— *Guardian and ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts.* No suit will lie by a ward against the son of his late guardian for rendition of accounts. *Rameshur Tiwari* v. *Kishun Kumar, All. Weekly Notes (1882) 6,* referred to. MANMOTHONATH BOSE MULLICK *v.* BASANTO KUMAR BOSE MULLICK **I. L. R. 22 All. 332**

2. ——— *Guardian—Order of discharge by the Court—Liability of the guardian to suit.* When a declaration is once made by the Court, under s. 41 of the Guardians and Wards Act, 1890, discharging a guardian from liability, the latter cannot be exposed to suit in connection with the management of the minor's property, except in the case of fraud discovered after the declaration. MURLIDHAR *v.* VALLABHDAS (1909) . . **I. L. R. 33 Bom. 419**

——— **s. 41, cl. 4.**

See GUARDIAN AND WARD. **I. L. R. 34 Calc. 211**

——— **s. 46.**

See ante, SS. 7, 11, 13 AND 46.
See DISTRICT JUDGE, JURISDICTION OF. **I. L. R. 23 Bom. 698**

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GUARDIANS AND WARDS ACT (VIII OF 1890)—*concld.*

——— **s. 48.**

See RES JUDICATA—ESTOPPEL BY JUDGMENT . **I. L. R. 16 Mad. 380**

——— **s. 51.**

See DISTRICT JUDGE, JURISDICTION OF. **I. L. R. 17 Bom. 566**

——— The word "guardian" in s. 51 of the Guardians and Wards Act means a guardian who was such at the time the Act came into force. VALLABDAS HIRACHAND *v.* KRISHNABAI . . **I. L. R. 17 Bom. 566**

——— **s. 52.**

See GUARDIAN AND WARD. **I. L. R. 29 All. 672**

See MAJORITY ACT, s. 3. **I. L. R. 21 Bom. 281**

See MINOR . **I. L. R. 36 Calc. 768**

——— **s. 53.**

See CODE OF CIVIL PROCEDURE, 1882, s. 244 . **I. L. R. 31 All. 572**

See MINOR—REPRESENTATION OF MINOR IN SUITS . **I. L. R. 24 Calc. 25**
13 C. W. N. 643

GUJARAT TALUKDARS' ACT (BOM. VI OF 1888).

See CIVIL PROCEDURE CODE, 1882, s. 30. **I. L. R. 28 Bom. 209**

See VALUATION OF SUIT—APPEALS. **I. L. R. 16 Bom. 408**

——— **s. 2 (*a*)**—*Talukdar—Purchaser from "talukdar"—Definition.* The term "*talukdar*," as defined by s. 2 (*a*) of the Gujarat *Talukdars'* Act (Bombay Act VI of 1888), does not include a purchaser of a *talukdar's* share sold in execution of a decree passed against him. NARANDAS PARBHUDAS *v.* PARSOTTAM VALU (1902) **I. L. R. 26 Bom. 757**

——— **s. 10**—*Application to the Talukhdari Settlement Officer to effect partition under a decree—Decree upon which no relief could have been obtained in a Civil Court.* In 1863 the appellant obtained a decree for partition, which declared his right to a one-sixth share in a certain village. The decree was never executed. In the year 1888 he presented an application to the Talukhdari Settlement Officer under s. 10 of Bombay Act (VI of 1888) for partition under the decree. *Held*, that, as the execution of the decree was barred when the Act was passed, and as no fresh suit could have been brought against the defendant upon the right declared by the decree, the application should be rejected. JAMSANG DEVABHAI *v.* GOYABHAI KIKABHAI . **I. L. R. 16 Bom. 408**

GUJARAT TALUKDARS' ACT (BOM. VI OF 1888)—*contd.*

——— **ss. 10, 11, 16 and 17**— *Talukdari Settlement Officer—Decision—Appeal—Second appeal—Subsequent suit in a Court of competent jurisdiction—Res judicata.* Certain proceedings which had arisen out of an application to the Talukdari Settlement Officer under s. 11 of the Gujarat Talukdars' Act (Bombay Act VI of 1888) went up to the High Court in second appeal. Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction. *Held*, that the question was not *res judicata*. A Talukdari Settlement Officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature. "In considering the competency of a Court for the purpose of deciding on a question of *res judicata*" the Court "must look to the powers of the Court in which the suit was instituted and not to the powers of the Court by which that suit was decided on appeal." *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee, I. L. R. 5 Calc. 832, 838*, followed. MALUHBAI *v.* SURSANGJI (1905) **I. L. R. 30 Bom. 220**

——— **s. 12**—*Representative order—Partition suit—"Known co-sharers"—All persons interested parties—Civil Procedure Code (Act XIV of 1882), s. 30.* It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the Court may be enabled to do complete justice by deciding and settling the rights of all persons interested and that the orders of the Court may be safely executed by those, who are compelled to obey them and future litigations may be prevented. This rule no doubt yields to the exigencies of particular cases and there are well-established qualifications to it, such as the power of the Court under s. 30 of the Civil Procedure Code (Act XIV of 1882) to make a representative order. The phrase "known co-sharers" in s. 12 of the Gujarat Talukdars' Act (VI of 1888) covers all persons, who are known to have an interest in the property and is not limited to those co-sharers, whose names are recorded under the Act. A person who ought to be, but is not a party to a proceeding, is not ordinarily bound by any decree or order passed therein. CHUDASAMA SUPSANGJI *v.* PARTAPSANG KENGAR (1904) . . . **I. L. R. 28 Bom. 209**

——— **s. 31.**

See EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION.
I. L. R. 17 Bom. 289
I. L. R. 19 Bom. 80
I. L. R. 20 Bom. 565

See STATUTES, CONSTRUCTION OF. **I. L. R. 17 Bom. 289**

——— **cl. 2**— *Sale in execution of a decree—Sale of talukdari estate—Sanction of Government.* A talukhdar mortgaged his talukhdari estate in

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GUJARAT TALUKDARS' ACT (BOM. VI OF 1888)—*contd.*

——— **s. 31**—*contd.*

1883, *i.e.*, prior to the passing of the Gujarat Talukhdars' Act (Bombay Act VI of 1888). In 1893 the mortgagee sued on his mortgage and, without having the sanction of the Governor in Council, obtained an order in the District Court for the sale of the mortgaged property, that Court holding that the provisions of s. 31, cl. 2, of Bombay Act VI of 1888 did not apply to the case of a mortgage effected prior to the passing of the Act. On appeal to the High Court:—*Held*, reversing the order of the District Court, that cl. 2 of s. 31 of Bombay Act VI of 1888 applied to the case, and that a sale in execution of a decree was such an alienation as came within the terms of the section and required the previous sanction of the Governor in Council. The Court, however, directed the District Judge to give the plaintiffs a reasonable time for the production of the sanction, and order that, in case they produced it, the order for sale should be affirmed, otherwise the plaintiff's application for sale should be dismissed. *Nagar Pragji* v. *Jivabhai, I. L. R. 19 Bom. 80,* and *Doshi Fulchand* v. *Malek Dajiraj, I. L. R. 20 Bom. 565,* referred to and explained. CHUDASAMA NAUDHABHAI *v.* NARAIN TRIBHOVAN . **I. L. R. 22 Bom. 884**

——— **s. 31.**—*Decree—Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), ss. 320, 323.* In execution of a money-decree against a talukdar, several villages belonging to him were attached; and the darkhast was sent to the Talukdari Settlement Officer (who combined in himself the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of talukdari lands) to be dealt with under ss. 320—325 of the Civil Procedure Code, 1882. That officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment of s. 31 of the Gujarat Talukdars' Act, 1888, was made in 1905, but in ignorance of the amendment. The Talukdari Settlement Officer then took up the position that what he had done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended s. 31, the darkhast preferred by the decree-holder should be disposed of. *Per* CHANDAVARKAR, *J.* If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or being aware of it, he thought he was consenting in virtue

GUJARAT TALUKDARS' ACT (BOM. VI OF 1888)—*concld.*

——— **s. 31**—*concld.*

of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent, and is no legal ground or excuse for withdrawing it after he has once given it. Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solemniter esse acta doneo probetur in contrarium.* In such cases "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred. S. 31 of the Gujarat Talukdars' Act (Bom. Act VI of 1888) requires that there must be (i) consent, (ii) it must be previous, and (iii) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite. PURSHOTTAM *v.* HARBHAMJI (1909) **I. L. R. 33 Bom. 443**

GURAV SERVICE.

See STRIDHAN **I. L. R. 30 Bom. 229**

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HABEAS CORPUS, WRIT OF.

See CUSTODY OF CHILDREN.
I. L. R. 16 Bom. 307
I. L. R. 23 Calc. 290

See FOREIGNERS **I. L. R. 18 Bom. 636**

1. ——— **Power of High Court to issue writ into the mofussil**—*Habeas Corpus Act, 31 Car. II, c. 2—Reg. III of 1818—Warrant of arrest of Governor General in Council.* On an application to the High Court to issue a writ of *habeas corpus* to the Superintendent (a European British subject) of the Alipore Jail: *Held*, that the Supreme Court had power to issue writs of *habeas corpus* to persons in the mofussil, and that the same power is continued to the High Court. As the person against whom the writ was applied for had acted under the written order of the Governor General in Council, the Court would not direct the writ to issue. *In re* AMEER KHAN . . **6 B. L. R. 392**

On appeal in the same case: it was held, that, assuming the power of a Judge of the High Court to issue a writ of *habeas corpus*, and assuming the right of appeal against an order refusing such writ, it appearing that the prisoner was in custody under a warrant in the form prescribed by Regulation III of 1818, the detention was legal. The detention, to be legal, need only be covered by an actually existing warrant of the Governor

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HABEAS CORPUS, WRIT OF—*contd.*

General in Council in the form prescribed, without regard to the lawfulness of the arrest. *In re* AMEER KHAN . . . . **6 B. L. R. 459**

2. ———— **Accused becoming insane during criminal trial**—*Detention in lunatic asylum after regaining sanity.* An accused person, having become insane during his trial, was placed in a lunatic asylum and was detained there after becoming sane. *Held*, that such detention was not illegal, and he was not entitled to his discharge, but should be made over to the authorities for continuation of his trial. *In the matter of* ELDRED **1 Hyde 173**

3. ———— **Return to writ**—*Custody of prisoner in jail—Return by Sheriff.* The Sheriff need not specify in his return on a *habeas corpus* that the prisoner has been continuously in his custody, and a prisoner who has not been transferred by the Sheriff to the custody of the jailor by a separate warrant, and is brought up on the writs by the Sheriff, is to be considered as in the custody of the Sheriff. SPEYER *v.* TANSSEN **Bourke O. C. 28**

4. ———— *Affidavit to controvert return—Amendment of return—Custody of minor—56 Geo. III, c. 100.* The return to the writ of *habeas corpus* must be taken to be true, and cannot be controverted by affidavit. In England, 56 Geo. III, c. 10, s. 4, allows affidavits to be used to controvert the return in criminal matters, but that statute does not apply to this country. The return to a writ of *habeas corpus* can, however, be amended. A girl under sixteen years of age has not such a discretion as enables her, by giving her consent, to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian ; but where the return to a writ of *habeas corpus* stated that the girl was above the age of sixteen (though her mother stated her to be of the age of thirteen years and nine months), the Court held that she was of years of discretion to choose for herself under whose protection she would remain. QUEEN *v.* VAUGHAN. *In the matter of* GANESH SUNDARI DEBI **5 B. L. R. 418**

But *see* KHATIJA BIBI, *In the matter of* **5 B. L. R. 557**

where it was held that the return to a writ of *habeas corpus* is not necessarily conclusive, and does not preclude enquiry into the truth of the matters alleged therein, although 56 Geo. III, c. 100, does not apply to this country.

5. ———— *Mahomedan law—Husband and wife—Custody of wife.* On an application for a writ of *habeas corpus* to bring before the Court *M*, a female infant, who was alleged to be in the unlawful custody of *S*, a Mahomedan, it was stated that *M*'s father was a Jew by birth, who had embraced the Mahomedan faith many years ago, but had since returned to the Jewish persuasion ; that her mother was a Mahomedan woman ; that she was detained by *S* on the allegation that she was married to him, but that the alleged marriage was invalid by reason of the want of consent of her father ; and that she was of the age of about nine years, and had not attained puberty : and a writ was thereupon granted. The return stated that *M*, being then about ten years of age, was married with the consent of her mother to *S* ; that after the marriage, *M* and her mother had lived with *S* until her mother, at the instigation of the father, had left the house of *S*, taking *M* with her ; that *S* had thereupon instituted a charge against the father and mother for enticing away and detaining *M*, on which the Police Magistrate considered the marriage proved, and ordered her to be delivered into the custody of *S*. The High Court refused to consider the custody illegal, and ordered the writ to be quashed. *In re Khatija Bibi, 5 B. L. R. 557*, distinguished. *In the matter of* MAHIM BIBI . . . **13 B. L. R. 160**

6. ———— *Constitution of Small Cause Courts—Privilege from arrest.* The Small Cause Court in the Presidency town is not a Court of co-ordinate jurisdiction with the High Court, but a Court of inferior jurisdiction and subject to the order and control of the High Court. Therefore, where on a prisoner being brought up to the High Court on a writ of *habeas corpus ad subjiciendum*, the return of the jailor stated that the prisoner was detained under a warrant of arrest issued in execution of a decree of the Small Cause Court : *Held*, that the return was not conclusive, but the prisoner was entitled to show by affidavit that he was privileged from arrest at the time he was taken into custody. *In the matter of* OMRITOLALL DEY . . . **I. L. R. 1 Calc. 78**

7. ———— **Right of appeal from order refusing to issue writ of habeas corpus**—*Judgment not being order passed in criminal trial—Powers of High Court hearing reference under s. 307 of the Criminal Procedure Code—Jurisdiction to commit European to jail—Letters Patent, 1865, cls. 15, 25, 26, 27, 28—Code of Criminal Procedure (Act V of 1898), ss. 307, 383, 491 and 456—Prisoners Act (III of 1900), ss. 7, 8 and 9—Judicature Act, 1873 (36 & 37 Vict., c. 66), ss. 19 and 47. Held* by the Full Bench, that the provisions in cl. 15 of the Letters Patent allowing an appeal apply to criminal as well as civil cases, and that an order of a single Judge of the High Court made in the exercise of its ordinary original criminal jurisdiction refusing an application by a prisoner under ss. 456 and 491 of the Code of Criminal Procedure for release from alleged illegal custody under a sentence of imprisonment passed by a Divisional Bench of the Court, is a "judgment not being a sentence or order passed or made in any criminal trial," within the terms of cl. 15 of the Letters Patent, and that an appeal lies from such order to the High Court. *Held*, further, that the jurisdiction which the High Court exercises in hearing a case submitted to it under s. 307 of the Criminal Procedure Code is not its original criminal jurisdiction, but it hears the

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HABEAS CORPUS, WRIT OF—*concld.*

case as a Court of reference in the exercise of the jurisdiction vested in it by cl. 28 of the Letters Patent, which is co-extensive with its appellate jurisdiction. *In re* HORACE LYALL
I. L. R. 29 Calc. 286 : s.c. 6 C. W. N. 254

HACKNEY CARRIAGE.

——— keeping horses for, without license—

See BENGAL MUNICIPAL ACT (III OF 1884), SS. 263, 273. . **5 C. W. N. 331**

HACKNEY-CARRIAGE ACT (BOM. ACT VI OF 1863).

——— s. 6—*License—License of public conveyance—Power of Commissioner of Police to grant license—Discretion to refuse license—Specific Relief Act (I of 1877), s. 45—Practice.* S. 6 of the Bombay Act VI of 1863 empowers the Commissioner of Police in Bombay to grant licenses for public conveyances, and provides that he "may in his discretion refuse to grant any such license for any conveyance which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public." Under this section the Commissioner is bound to exercise his discretion in each case. This discretion is not an absolute one, but one which is to be exercised after he has made himself acquainted with the conveyance to be licensed and has considered whether it, as an individual carriage, is fit for the conveyance of the public. Where it appeared that the Commissioner of Police had approved of a certain pattern of victoria as a public conveyance in Bombay, and refused to license victorias which did not conform to that pattern : *Held*, that his refusal on that ground was illegal, and under s. 45 of the Specific Relief Act (I of 1877), he was ordered to issue the licenses asked for. *Per* RUSSELL, *J.* Under rule 577 of the High Court Rules, all applications under s. 45 of the Specific Relief Act (I of 1877) should be made by motion, and not by petition. GELL *v.* TAJA NOORA (1903) . **I. L. R. 27 Bom. 307**

HANAFI SUNNIS.

See MAHOMEDAN LAW.
I. L. R. 34 Bom. 537

HANDWRITING.

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—HANDWRITING.
8 B. L. R. 490

See EVIDENCE—CRIMINAL CASES—HANDWRITING . **1 B. L. R. A. Cr. 13**
I. L. R. 10 Calc. 1047

See LIMITATION ACT, 1877, S. 20.
I. L. R. 26 Bom. 246

——— *Witnesses deposing to the identity of—Document—Proof—Evidence Act (I of 1872), s. 47.* In proof of a document a witness

HANDWRITING—*concld.*

stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question, which would elicit any of the several matters indicated in the explanation to s. 47 of the Indian Evidence Act (I of 1872). The witness was not cross-examined on the point. *Held*, that the law on the point is correctly stated in Taylor on Evidence to be as follows :—"A witness need not state in the first instance how he knows the handwriting since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands." It is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion, on adequate materials, as to the proof of the handwriting. SHANKARRAO *v.* RAMJI (1904) . . . **I. L. R. 28 Bom. 58**

HANSARD'S PARLIAMENTARY REPORT.

See LIBEL . **I. L. R. 36 Calc. 883**

HAQ.

See DUTIES . **2 Bom. 80 : 2nd Ed. 75**
2 Bom. 253 : 2nd Ed. 239
7 Bom. A. C. 50

See LIMITATION ACT, 1877, ART. 144 (1859, S. 1, CL. 12)—INTEREST IN IMMOVEABLE PROPERTY.
13 B. L. R. 254

See PENSIONS ACT, 1871, SS. 3 AND 4.
I. L. R. 1 Bom. 203
I. L. R. 4 Bom. 437, 443
I. L. R. 5 Bom. 408
I. L. R. 16 Bom. 731

See ZAMINDAR.
Agra F. B. 63 : Ed. 1874, 48

See ZAMINDAR, RIGHTS OF.
I. L. R. 23 All. 209

HARBOURING OFFENDER.

See PENAL CODE, S. 216B.
I. L. R. 25 All. 261

HÂT.

See CRIMINAL PROCEDURE CODE.
8 C. W. N. 781

See DECLARATORY DECREE, SUIT FOR—ORDERS OF CRIMINAL COURT.
I. L. R. 5 Calc. 7

See NUISANCE—CRIMINAL PROCEDURE CODES . . **L. R. 8 I. A. 77**
I. L. R. 3 All. 797
I. L. R. 9 Calc. 127

See PUBLIC SERVANT.
I. L. R. 31 Calc. 990

See SPECIFIC RELIEF ACT (I OF 1877), S. 9.
I. L. R. 29 Calc. 614

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HÂT—*concld.*

——— **holding of—**

See CRIMINAL PROCEDURE CODE, s. 144. **11 C. W. N. 223**

——— **suit on—**

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED AND UNREGISTERED DOCUMENTS. **I. L. R. 23 Calc. 851**

1. ——— **Sale of articles in**—*Hât—Right of p roprietor to prohibit sale of particular articles by persons not permanent stall-keepers—Rioting—Hurt.* The proprietors of a market have the right to direct that any particular kinds of things should not be sold there by a person who is not a permanent shopkeeper. RAJ KUMAR CHUCKERBUTTY *v.* EMPEROR (1906) . . . . **11 C. W. N. 28**

2. ——— **Mortgage**—*Whether the rents and profits of hât could be mortgaged—Transfer of Property Act (IV of 1882), s. 58—General Clauses Act (I of 1868), s. 2, cl. (5).* The rents and profits derivable from a *hât* can be validly mortgaged. *Surrendro Prosad Bhuttacharji* v. *Kedar Nath Bhuttacharji, I. L. R. 19 Calc. 8; Bungshodhur Biswas* v. *Mudhoo Mohuldar, 21 W. R. 383; Surendra Narain Singh* v. *Bhai Lal Thakur, I. L. R. 22 Calc. 752;* and *Sikandar* v. *Bahadur, I. L. R. 27 All. 462,* referred to. GOLAM MOHIUDDIN HOSSEIN *v.* PARBATI (1909) . **I. L. R. 36 Calc. 665**

HATH-CHITTA.

See EVIDENCE—CIVIL CASES—ACCOUNTS AND ACCOUNT BOOKS. **I. L. R. 16 All. 157**
L. R. 21 I. A. 6

See LIMITATION **I. L. R. 31 Calc. 1043**

See LIMITATION ACT, 1877, s. 19. **9 C. W. N. 83**

——— **entry in—**

See STAMP ACT, 1869, SCH. II, ART. 5. **I. L. R. 4 Calc. 885**
25 W. R. 361

1. ——— **Interpolation**—*Entry—Hat h-chitta, suit on—Entry relating to acknowledgment of debt—Material alteration—Interpolation of entry as to interest—Document merely relied on as evidence—Effect of interpolation.* Defendant had acknowledged his indebtedness to plaintiff for a certain sum found due upon an adjustment of accounts, by signing his name over an eight-anna stamp in a hath-chitta. It was found that an entry relating to interest was interpolated in the *hath-chitta,* at a subsequent date. In a suit to recover the amount acknowledged, plaintiff put the *hath-chitta* in evidence, but no reliance was placed on the entry relating to interest, nor was any interest asked for. *Held,* that plaintiff was not suing upon any instrument, which he had fraudulently altered. The entry, on which he relied and which had not been altered or tampered with, was put in merely as an acknowledgment of defendant's liability, and there being no

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question as to its genuineness, plaintiff was entitled to a decree. The authorities discriminate between cases in which the altered document is the foundation of the claim, and those in which it is only used as evidence. *Gogun Chandra Ghosh* v. *Dhuronidhur Mundul, I. L. R. 7 Calc. 616; Christa Charlu* v. *Karibasayya, I. L. R. 9 Mad. 399; Atmaram* v. *Umed Ram, I. L. R. 25 Bom. 616,* referred to. HARENDRA LAL ROY CHOWDHRY *v.* UMA CHARAN GHOSH (1905) . . . **9 C. W. N. 695**

2. ——— **Stamp-duty**—*Stamp Act (II of 1899), Sch. I, Art. 5, cl. (b), and Art. 1 and s. 23—Hat-chitta, containing implied promise to pay interest, whether acknowledgment of debt, or agreement or memorandum of agreement—Stamp-duty.* A *hat-chitta* ran as follows:—"Account *E B* (the debtor). The year 1312 B. S. Interest on this amount at the rate of one anna per month per rupee." Then followed the credit and the debit entries. *Held,* that there was an implied promise to pay interest and the document ought to be stamped as an agreement or a memorandum of agreement with an eight-anna stamp and not as an acknowledgment of a debt with a one-anna stamp only. *Udit Upadhya* v. *Bhawani Din, I. L. R. 27 All. 84,* dissented from. *Luxumi Bai* v. *Ganesh Raghu Nath, I. L. R. 25 Bom. 373,* followed. *Koonja Mohun Doss* v. *Krishna Chandra Shaha, 25 W. R. 361,* and *Brojendra Kumar* v. *Brohmomoyi Chaudhurani, I. L. R. 4. Calc. 885,* distinguished. *Sambhu Chandra Bepari* v. *Krishna Churn Bepori, I. L. R. 26 Calc. 179,* referred to. ENATULLAH BISWAS *v.* GAJARUDDI BISWAS (1907) . . **11 C. W. N. 1122**

HATH-CHITTA BOOK.

See HATH-CHITTA.

See EVIDENCE—CIVIL CASES—ACCOUNTS AND ACCOUNT BOOKS. **1 Ind. Jur. N. S. 358**

HEARING, ADJOURNMENT OF.

See COMMISSION **I. L. R. 36 Calc. 566**

HEARING OF APPEAL ON DATE OF FILING.

See APPEAL, ADMISSION OF. **I. L. R. 36 Calc. 385**

HEARSAY EVIDENCE.

See CRIMINAL PROCEDURE CODE, s. 436. **I. L. R. 28 Calc. 397**

See EVIDENCE—CIVIL CASES—HEARSAY EVIDENCE.

See EVIDENCE—CRIMINAL CASES—HEARSAY EVIDENCE . **7 W. R. Cr. 2, 25**
2 C. W. N. 672

See EVIDENCE ACT, s. 32. **I. L. R. 20 Calc. 758**

See SETTLEMENT—CONSTRUCTION OF SETTLEMENT . **I. L. R. 17 Calc. 458**

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HEARSAY EVIDENCE—*concld.*

See TRANSFER OF PROPERTY ACT, s. 107. **I. L. R. 22 Calc. 752**

——— *Evidence Act (I of 1872), s. 6, Illus. (a)—Murder—Res gestæ—Statement of eye-witness shortly after occurrence, if relevant—Same transaction—Interval of time—Physical and mental condition of person making statement.* Hearsay evidence of the statement of a by-stander as to an occurrence would be admissible in evidence as a part of the *res gestæ* only if it was made at the time the transaction was taking place or so shortly before or after it as to form part of the transaction. If the transaction had terminated when the statement was made, it would be irrelevant. In this case a chowkidar deposed that one *G* ran up to him and stated that he had seen the accused persons murder his mistress whom he had met by assignation and that he had run away from the place of occurrence to save his life. What interval of time passed between the murder and the alleged statement did not appear. *G* seemed to be quite sensible when he made the statement and the condition of his mind did not appear to be such as to exclude the supposition of his fabricating evidence or being tutored. *Held*, that the statement was inadmissible in evidence. *Sarat Dhobni's Case, I. L. R. 10 Calc. 302*, distinguished. CHAIN MAHTO *v.* EMPEROR (1906) . . . **11 C. W. N. 266**

HEIGHT LIMIT.

See CALCUTTA MUNICIPAL ACT. **13 C. W. N. 74**

HEIR.

See EVIDENCE . **I. L. R. 31 Calc. 871**

See HINDU LAW—

ALIENATION—ALIENATION BY WIDOW—ALIENATION FOR LEGAL NECESSITY OR WITH CONSENT OF HEIRS OR REVERSIONERS;

INHERITANCE—SPECIAL HEIRS.

——— **bequest to—**

See MAHOMEDAN LAW—INHERITANCE. **I. L. R. 30 Calc. 683**

HEIR OF DECEASED DEBTOR.

See MAHOMEDAN LAW—DEBTS.

See REPRESENTATIVE OF DECEASED PERSON.

HEREDITARY ALLOWANCE.

See PENSIONS ACT, s. 4.

See REGISTRATION ACT, s. 17. **I. L. R. 18 Bom. 92** **I. L. R. 21 Bom. 387**

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—IMMOVEABLE PROPERTY. **I. L. R. 21 Bom. 387**

HEREDITARY OFFICE.

See GHATWALI TENURE.

See HEREDITARY OFFICES ACT.

See JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

See MADRAS REGULATION XXIX OF 1802, s. 7 . . **I. L. R. 18 Mad. 420**

See MAHOMEDAN LAW—CUSTOM. **I. L. R. 1 Bom. 633**

See MAHOMEDAN LAW—KAZI. **I. L. R. 1 Bom. 633** **I. L. R. 3 Bom. 72** **I. L. R. 18 Bom. 103** **I. L. R. 19 Bom. 250**

See VATANDAR.

——— **land attached to—**

See HINDU LAW **I. L. R. 36 Calc. 590**

——— **suit for—**

See ACCOUNT, SUIT FOR. **I. L. R. 1 Mad. 343**

See LIMITATION ACT, 1877, s. 28 (1871, s. 29) . . **I. L. R. 1 Mad. 343**

See LIMITATION ACT, 1877, ART. 124 (1871, ART. 123).

See RIGHT OF SUIT—OFFICE OR EMOLUMENT.

See SERVICE TENURE.

1. ——— **Grant by Government in inam**—*Bom. Reg. V of 1827, s. 4—Limitation.* The grant of a village in inam by the Government cannot deprive the meymoodars of their hereditary rights. To entitle the person in possession to the enjoyment of the office and receipt of the dues from the village, it is not essential that the duties of the office should have been actually performed, if the party was prepared to discharge them when required. Claims to recover arrears of such dues are limited by s. 4, Regulation V of 1827 of the Bombay Code, to 12 years. BEEMA SUNKUR *v.* JAMASJEE SHAPORJEE **5 W. R. P. C. 121 : 2 Moo. I. A. 23**

2. ——— **Hereditary gomastah appointed to collect deshmukhi allowances**—*Derivation of his title such that the deshmukh could not dismiss him—Sanad, construction of.* As to whether a deshmukh could dismiss the holder of the paid office of hereditary gomastah, appointed to collect, in the vatan of the former, the deshmukhi allowances from the villages, it was shown by documentary evidence that the gomastah's ancestor had been appointed by the ruling power of the day, from which authority also the deshmukhi had been derived. It was also shown that the hereditary gomastah's title was independent of the deshmukh, and that the latter could not displace him. No change had been made under the British rule from what had prevailed as to this under the Peishwa; but such evidence as there was, accorded with

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HEREDITARY OFFICE—*concld.*

the above. *Held*, that the right of the gomastah to act as such and to receive the payments had either been granted or else had been so recognized and confirmed by an authority binding on the deshmukh that he could not deprive the gomastah of his office, which the Government had conferred upon him; and that the deshmukh had not the right, as against him, to collect the allowance himself directly, either from the village officers or from the treasury. RAMCHANDRA NARSINGRAV *v.* TRIMBAK NARAYAN EKBOTE . **I. L. R. 16 Bom. 374**
L. R. 19 I. A. 39

3. ———— **Form of suit.** Two persons joined in a suit, and claimed the offices of karnam and shroff as being hereditary. The offices formed portion of a permanently-settled estate of which first defendant was proprietor. The second defendant was alleged to have possession of the offices, the second plaintiff, who had the titular right to them, being thus wrongly kept out. *Held*, that it was not necessary that the suit should have been brought for a declaration, there being no doubt as to the second plaintiff's title; and that it was properly brought for possession. SADASIVA PILLAI *v.* KALAPPA MUDALIAR (1900)
I. L. R. 24 Mad. 39

HEREDITARY OFFICES ACT (XI OF 1843 AND BOM. ACT III OF 1874).

See BOMBAY REVENUE JURISDICTION ACT, S. 4 . . **I. L. R. 18 Bom. 319**

See HEREDITARY OFFICE.

See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT BE ADOPTED.
I. L. R. 27 Bom. 75

See JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

See SERVICE TENURE **3 Bom. A. C. 128**
5 Bom. A. C. 107, 202
8 Bom. A. C. 83
12 Bom. 232
I. L. R. 15 Bom. 13

1. ———— **Alienation of vatan**—*Bom. Reg. XVI of 1827, s. 20.* A mortgage by a vatandar of vatan property, executed at a time when Regulation XVI of 1827 was still in force, was in its inception void against the heir of the said vatandar, nor did it become in any way validated against the heir by reason of the repeal of that Regulation by Act III (Bombay) of 1874. KALU NARAYAN KULKARNI *v.* HANMAPA . **I. L. R. 5 Bom. 435**

2. ———— *Vatan—Restriction upon alienation by a vatandar—Mortgage invalid to what extent—Bom. Reg. XVI of 1827.* An alienation by way of mortgage of vatan property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the vatandar who mortgaged. The mortgage was in its inception void against the heir of the vatandar, and had not become validated against the heir by reason of the repeal of the sections

HEREDITARY OFFICES ACT (XI OF 1843 AND BOM. ACT III OF 1874)—*contd.*

in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874. *Kalu Narayan Kulkarni* v. *Hanmappa bin Bhimappa, I. L. R. 5 Bom. 435*, referred to and approved. The childless widow of a vatandar, deceased in 1847, was the recognized vatandar in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886, by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and he was the true heir, entitled from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step-mother, who died in 1877. The appellant contended that the vatan, as inherited by him, was free from the mortgage encumbrance, and that he was entitled to possession. *Held*, reversing the decree of the High Court, that the mortgage was void against the heir, and had no force beyond the life of the vatandar who had executed it. The decree of the Subordinate Judge to that effect and for possession was maintained. PADAPA *v.* SWAMIRAO SHRINIVAS
I. L. R. 24 Bom. 556
L. R. 27 I. A. 86
4 C. W. N. 517

3. ———— *Bom. Reg. XVI of 1827, s. 20—Adverse possession.* A sale by a vatandar of vatan property, executed at a time when Regulation XVI of 1827 was still in force, was in its inception void against the heir of the vatandar, nor did it become in any way the more valid against such heir by reason of the repeal of that Regulation by Act III (Bombay) of 1874. Adverse possession only begins to run against the heir from the time when he is entitled to succeed to the possession of the vatan property, *i.e.*, from the date of the death of the vatandar. RAVLOJIRAV *v.* BALVANTRAV VENKATESH
I. L. R. 5 Bom. 437

4. ———— *Bom. Reg. XVI of 1827—Mortgage of vatan property—Mortgagor's life-interest.* On 3rd December 1856, certain vatan property was mortgaged by the deceased defendant to the plaintiff, who obtained a decree on the mortgage in 1861, and attached the rents and profits of the vatan on the 6th October of the same year. On his (defendant's) death in 1869 his son succeeded to the estate and obtained a removal of the attachment before 1874. The plaintiff thereon applied for a fresh attachment of the property. *Held*, that, the mortgagor having only a life-interest, the vatan came into the hands of his son free of the mortgage. JAGJIVANDAS JAVERDAS *v.* IMDAD ALI
I. L. R. 6 Bom. 211

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HEREDITARY OFFICES ACT (XI OF 1843 AND BOM. ACT III OF 1874)—*contd.*

5. ——————— *Jurisdiction — Vatandar kulkarni and raiyat—Perquisites, right to.* Bombay Act III of 1874 does not deprive the Civil Court of its jurisdiction to try the question whether a vatandar kulkarni is entitled to receive perquisites from his raiyat. VISHNU HARI KULKARNI *v.* GANU TRIMBAK

I. L. R. 12 Bom. 278

1. ——————— s. 4—*Hereditary Offices Act Amendment Act (Bombay Act V of 1886), s. 2—"Hereditary office"—Village sutar—Bombay Government Resolution No. 512 of 1882.* The duties with which s. 4 of the Bombay Hereditary Offices Act (Bombay Act III of 1874) deals are confined to duties in which Government, as being responsible for the administration of the country, is directly interested. The definition of "hereditary office" does not extend to the duties of a carpenter, which, though useful to the village community, are not matters with which Government has any direct concern. *Held*, therefore, that the village *sutar* (carpenter) does not hold an "hereditary office" within the meaning of that section. YESU *v.* SITARAM . . **I. L. R. 21 Bom. 733**

2. ——————— and s. 5—*Vatandar—Persons having an "hereditary interest"—Hereditary Offices Act Amendment Act (Bombay Act V of 1886), s. 2.* *G*, by his will, devised all his property, which was vatan property, to *V*, a distant cousin. The plaintiff, as the nearest heir of *G*, claimed the property, contending that *V* had not an "hereditary interest" in the vatan within the meaning of s. 4 of the Bombay Hereditary Offices Act, that he was not a vatandar capable of taking under the will of *G* within the meaning of s. 5, and that the will of *G* was therefore inoperative. *Held*, that *V* had not "an hereditary interest" in the vatan, and that the devise to him was therefore inoperative. The expression in s. 4, "persons having an hereditary interest in a vatan," means persons having a present interest of an hereditary character in the vatan, and does not include persons who may have a *spes successionis*, however remote. "Hereditary interest" means an interest acquired by inheritance as distinguished from an interest acquired by purchase, gift, or other modes of acquisition. CHINAVA *v.* BHIMANGAUDA

I. L. R. 21 Bom. 787

3. ——————— *Daughter of a valandar, status of, during her father's lifetime—Bombay Act III of 1874, s. 5—Hereditary Offices Act Amendment Act (Bombay Act V of 1886).* The daughter of a Hindu vatandar is not during the lifetime of her father a vatandar of the same vatan within the meaning of s. 5 of Bombay Act III of 1874, as amended by Bombay Act V of 1886. MUKTABAI *v.* ANTAJI . . **I. L. R. 23 Bom. 715**

4. ——————— *Hereditary Offices Act Amendment Act (Bombay Act V of 1886), s. 2—Widow—Rights of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member—Vatan.* Under s. 2 of Bombay Act V of 1886, if there is a male member of a vatandar family, the succession goes to him in preference to a female member, and on his death the succession will go to his heirs with a similar provision. Where there is a male member qualified to inherit vatan property, he inherits, and a widow other than the widow of the last male member acquires no right to the vatan by succession or inheritance, and consequently she cannot create, transfer or revive any rights by adoption. A kulkarni vatan was owned by two brothers, *A* and *B*. *B* died first and *A* became the last male holder. *A* died in 1881, leaving a widow who held the vatan until her death in 1892. On her death, *B*'s widow took a son in adoption. The adopted son filed a suit to establish his title to the vatan against the defendant, who was a male member of the family and had been registered by the revenue authorities as the vatandar on the death of *A*'s widow. *Held*, that the plaintiff could not succeed, the defendant having a better title to the vatan than the plaintiff or his adoptive mother under s. 2 of Bombay Act V of 1886. KRISHNAJI TAMAJI *v.* TARAWA . . . **I. L. R. 24 Bom. 484**

5. ——————— ss. 4 and 5—*Vatan—Vatan in Guzerat—Service commutation settlement—Inheritance—Succession to a vatan—Succession through females—Bombay Act III of 1874, s. 5, as amended by ss. 1 and 2 of Bombay Act V of 1886—Alienation of vatan.* A vatan in Guzerat does not cease to be vatan property, as defined by s. 4 of Bombay Act III of 1874, merely because a service commutation settlement has been effected. Such a settlement does not change the nature of the property simply becase service is not demanded. As far as the power of alienation is concerned, if it is granted by the settlement it cannot be taken away by the change introduced in s. 5 of Bombay Act III of 1874 by s. 1 of Bombay Act V of 1886. S. 2 of Bombay Act V of 1886 (which amends s. 5 of Bombay Act III of 1874) gives a preference to male members of the vatan family over persons claiming through females. *Held*, that the section applies to vatan in Guzerat even though the services originally appertaining to such vatan had ceased to be demanded. One Niamatrai was a vatandar in Guzerat. He died in 1844, leaving behind him a widow, a daughter, and a separated brother. His property consisted of certain *pasaita* lands and a cash allowance attached to his vatan. In 1868 the Government effected a service settlement with the vatandar, by which the vatan property was continued to Niamatrai's heirs, free from all liability to render any services in connection with the vatan. In 1889 Niamatrai's widow died, her daughter having predeceased her. Thereupon plaintiffs, who were the sons of Niamatrai's daughter, sued to establish their title as heirs to the vatan property as against the defendants

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——— s. 4—*concld.*

who were the son's sons of Niamatrai's separated brother. *Held*, that, under s. 2 of Bombay Act V of 1886, plaintiffs, as claiming through a female, were not entitled to Niamatrai's vatan property in preference to the defendants, who were male members of the deceased vatandar's family. BAI JADAV *v.* NARSILAL (1900) . **I. L. R. 25 Bom. 470**

——— s. 5.

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 14 Bom. 404

1. ——— *Vatandars—Alienation to persons not vatandar—Validity of grant. Quære:* Whether s. 5 of the Vatandars Act, III of 1874, makes an alienation to a person outside the vatandar family void as between the grantor and grantee. NARAYAN KHANDU KULKARNI *v.* KALGAUNDA BIRDAR PATEL
I. L. R. 14 Bom. 404

2. ——— ss. 5, 7, 10, 13—*Officiator's remuneration—Civil process—Power of Collector.* The power of the Collector to procure the removal of the process of the Civil Court, or to get the Court to set aside a sale under s. 13 of the Bombay Hereditary Offices Act, No. III of 1874, extends to any vatan, or any part thereof, or any of the profits thereof, assigned or not assigned as remuneration of an officiator, but the exemption from liability to the process of the Civil Court extends only to such vatan property or profits thereof, as have been assigned as remuneration of an officiator. NILKANTH ANAJI KARGUPI *v.* BASLINGA
I. L. R. 9 Bom. 104

——— s. 7—*Agreement for payment by deputy to the vatandar out of the cash allowance for procuring the deputy's nomination—Hereditary Offices (Vatandars) Act (Bombay Act III of 1874), s. 23.* An agreement between the vatandar and a deputy nominated by him for the payment by the latter to the former, in consideration of procuring such nomination, of a sum of money out of the cash allowance received by the deputy as remuneration assigned to his office is not legal, being contrary to the spirit of s. 7 read with s. 23 of the Hereditary Offices Act (Bombay Act III of 1874). APPA *v.* SADU . **I. L. R. 18 Bom. 752**

——— s. 8.

See LIMITATION ACT, 1877, SCH. II, ART. 62
I. L. R. 7 Bom. 191
I. L. R. 8 Bom. 426
I. L. R. 9 Bom. 111
I. L. R. 10 Bom. 665

——— s. 9.

See MAHOMEDAN LAW—KAZI.
I. L. R. 18 Bom. 103
I. L. R. 19 Bom. 250

1. ——— ss. 9, 10—*Effect of certificate under s. 10.* The plaintiff sued as purchaser at a Court sale of the interest of defendant No. 1, to redeem and recover possession of the land in dispute, alleging that it had been mortgaged by defendant No. 1 to defendant No. 2. Defendant No. 1 denied the mortgage, and that he had any title to the land, which he said belonged to *R* and formed a part of *R*'s deshmukhi vatan. *R* having died, leaving a minor widow, sued as defendant No. 4 in the suit, the estate was administered by the Collector. On the application of the minor's personal guardians, the Collector was joined as a party. The Collector had also certified to the Court, under s. 10 of Act III of 1874, that the land formed part of a vatan. The District Judge rejected the plaintiff's claim and ordered the sale to be set aside. On appeal by the plaintiff to the High Court: *Held*, following *Shankar Gopal* v. *Babaji Lakshman, I. L. R. 12 Bom. 550*, that the Judge ought not to have acted on the certificate by setting the sale aside. Ss. 9 and 10 of Act III of 1874 were not applicable to the case, as the first defendant, whose interest was purchased by the plaintiff, was not a vatandar. BHAU BALAPA *v.* NANA . **I. L. R. 16 Bom. 343**

2. ——— ss. 9, 23 and 64—*Talvar—Shetsanadi—Lease—Alienation of talvar lands—Bom. Reg. XVI of 1827, ss. 19 and 20—Act XI of 1843, s. 15.* In 1866 the defendant took a lease of lands pertaining to a talvar or shetsanadi vatan (the holders of which, under Regulation XVI of 1827, ss. 19 and 20, and Act XI of 1843, s. 15, are hereditary district or village officers) from the last owner, who, as sole occupant of the talvar office, was entitled exclusively to the emoluments attached to it. When the Vatan Act (Bombay Act III of 1874) came into operation, no order as regards remuneration was made, but the plaintiff, subject to objection, was appointed to officiate. The plaintiff thereupon sued to eject the defendant. *Held*, that the lease to the defendant as a partial alienation was invalid under Regulation XVI of 1827, s. 20; that the invalidity thereof was not removed by the Collector not being called upon to declare it to be null and void under s. 9, cl. 1, of Bombay Act III of 1874; and that the plaintiff as life-owner was entitled to possession. PURSHOTTAM TALVAR *v.* MUDKANGAGAVDA SHIDANYAVDA
I. L. R. 7 Bom. 420

——— s. 10.

See RES JUDICATA—ORDERS IN EXECUTION OF DECREE.
I. L. R. 9 Bom. 328

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 622.
I. L. R. 8 Bom. 264

1. ——— **Certificate of Collector**—*Jurisdiction of Civil Court.* A certificate under s. 10 of Bombay Act III of 1874, stating that a vatan has been assigned to an officiator as his remuneration and granted by the Collector to save a vatan from attachment before judgment does not exclude the jurisdiction of the Civil Court to

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——— s. 10—*contd.*

make a decree notwithstanding that the decree may be rendered inoperative by the Collector issuing a fresh certificate. SHIDDESHVAR *v.* RAMCHANDRA RAO . . . I. L. R. 6 Bom. 463

2. ——— *Certificate of Collector—Removal of attachment made by Civil Court.* The applicant held a decree, dated the 28th June 1861, against Ismail Ali Khan and another for R3,956-13-7, of which he had already recovered R2,742-4-5. On the 24th December 1866, he applied to the Court of the Subordinate Judge at Pen for the attachment of the proceeds of a certain vatan belonging to the judgment-debtors, in satisfaction of the balance R1,214-9-2 due to him, and under his decree, on the 7th February 1868, the Court attached the proceeds by a prohibitory order to the Mamlatdar of Pen. While this attachment was pending, the Collector, on the 13th December 1878, sent a certificate to the Court, and informed it that the proceeds of the vatan were not liable to attachment under ss. 10 and 13 of Bombay Act III of 1874. The certificate referred to the profits of the vatan which had accrued due before the passing of the Act, and also to those which had been subsequently assigned by the Collector as remuneration of the officiator. The Court, on receiving it, removed the attachment and dismissed the application on the 11th January 1879. The order was affirmed in appeal. On an application to the High Court under its extraordinary jurisdiction: *Held*, that the Collector was authorized, by the first part of s. 10 of the Vatandars Act, to inform the Court by his certificate that a portion of the profits attached had been assigned by him as remuneration to the officiator, and that the Court was bound, on receiving it, to remove the pending attachment. *Held*, also, that the arrears due at the date of the Act, and which had not been assigned, fell within the latter part of the section. The High Court accordingly dismissed the application with costs. JAGJIVAN *v.* ISMAIL ALLI KHAN I. L. R. 4 Bom. 426

3. ——— *Vatan, alienation of—Certificate of Collector—Bom. Reg. XVI of 1827, s. 20.* Previously to the year A.D. 1818, *R*, the great-grandfather of the plaintiff, settled accounts with Rudrapa, the father of the defendant, in respect of debts due by himself (*R*) and his ancestors. The amount found due to Rudrapa was R20,000, and, as security for this sum, *R*, by deed, dated A.D. 1818, mortgaged to Rudrapa certain vatani lands, and also an annual allowance of R200 received by him (*R*) on account of a *rusum*. Under this deed these properties were to be held by Rudrapa in lieu of interest until repayment of the principal of R20,000. A dispute subsequently arose as to the amount of the *rusum*, and *A*, the son and successor of *R*, the mortgagor, having by attachment interrupted Rudrapa's possession (as mortgagee) of the vatani lands, he (Rudrapa) presented a petition of complaint to the Sub-Collector of *B*, who issued an order, on the 10th November 1830, to the Mamlatdar directing him to require the parties to refer their disputes to arbitration. The arbitration took place, and on the 20th August 1831 both parties executed a rajinama (exhibit No. 20), which set forth the terms of settlement agreed upon. Rudrapa was to hold the mortgaged lands and *rusum* (annual allowance) for fifty years. At the end of that period the principal debt and all interest thereon was to be deemed to have been paid off, and the lands and *rusum* were to be surrendered to the mortgagor or his heir. Under this rajinama, the mortgagee held uninterrupted possession of the mortgaged property until A.D. 1872. *A*, one of the signatories of the rajinama, died in 1843, and was succeeded as vatandar by *R*, and *R* again was succeeded by the present plaintiff, who in 1872 brought this suit against the defendant (Rudrapa's son) to recover possession of the mortgaged property. The Subordinate Judge held that the mortgage of A.D. 1818 was not genuine, and that the rajinama of A.D. 1831, being an alienation of vatani property after the passing of Regulation XVI of 1827, s. 20, was invalid as against vatandar subsequent to the grantor. He therefore made a decree for the plaintiff. On appeal, the Assistant Judge held that the mortgage of A.D. 1818 was genuine, but he agreed with the Subordinate Judge in regarding the rajinama as a fresh alienation of vatani property, and therefore invalid as against the plaintiff, having been executed since the passing of Regulation XVI of 1827, s. 20. He therefore affirmed the decree of the Subordinate Judge. The defendant thereupon filed a special appeal in the High Court, which, on the 29th September 1875, reversed the decrees of the Courts below, holding that the rajinama was not a fresh alienation of vatani lands, but a compromise of a dispute in regard to an alienation by way of mortgage in A.D. 1818 of vatan lands, and that the rajinama was therefore valid, and ought to be enforced, and was not affected by Regulation XVI of 1827, s. 20. Previously to this decree of the High Court, the plaintiff had applied for execution of the Subordinate Judge's decree, and had been put into possession of the mortgaged property on the 9th June 1873. The decrees of the lower Courts being thus reversed by the High Court, the defendant in 1876 presented a petition to the Subordinate Judge, praying a restoration of the mortgaged property to his possession. The plaintiff did not oppose his application, but the Subordinate Judge refused it on the ground that he had received a certificate from the Collector, issued under s. 10 of Bombay Act III of 1874, stating that the property, the subject of the application, formed part of a vatan. On appeal, the Assistant Judge, affirmed the order of the Subordinate Judge, being of opinion that the receipt of the certificate by the Subordinate Judge compelled him to refrain from giving effect to the

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——— **s. 10**—*contd.*

decree of the High Court. Thereupon, the defendant filed a special appeal in the High Court. *Held*, that the certificate of the Collector was unlawfully issued, and that the Subordinate Judge should proceed to give effect to the decree of the High Court of the 29th September 1875 by reinstating the defendant in possession of the premises mentioned in the rajinama. The certificate which the Collector is authorized to issue under s. 10 of Bombay Act III of 1874 should be sent to the Court by whose decree or order the vatan is affected, in the manner mentioned in the section. The Collector's certificate in this case, therefore, had not been issued to the proper Court. The restitution of the mortgaged property to the defendant in whose possession it was at the commencement of this suit in 1872, and until the execution of the erroneous decree of the Court of first instance in 1873, was not such a passing into the ownership or beneficial possession of any person not a vatandar of the same vatan as is meant by s. 10 of Bombay Act III of 1874. The alienation of the vatani property to Rudrapa having in 1831 received the sanction of the authorized officer of Government, s. 10 of Bombay Act III of 1874 did not apply,—the intention of the Act being that, whenever the alienation of an hereditary officer's vatan has received the sanction of Government, the Collector should not issue his certificate. The words "without the sanction of Government" in s. 10 of the Act qualify the whole section. Bombay Act III of 1874 does not authorize the Collector to issue his certificate for the purpose of preventing the rectification of a subordinate Court's decree by the High Court or the reinstatement of a person in possession of which he has been deprived by the execution of the erroneous decree of a subordinate Court. RACHAPA *v.* AMINGOVDA **I. L. R. 5 Bom. 283**

4. ——— *Execution of decree—Transfer of vatan property from one not vatandar—Collector's certificate prohibiting delivery of decreed property—Procedure.* The plaintiff and his brother, who were vatandar deshpandes, sued to redeem a certain property alleged to have been mortgaged by their undivided paternal aunt to the defendant. The defendant objected on the ground that the plaintiffs were not the heirs of the widow, who had left a daughter. The daughter was joined as co-plaintiff, and a decree passed in her favour and that decree was confirmed by the Special Judge. The plaintiffs, being dissatisfied with this decision, applied to the Collector for the issue of a certificate, under s. 10 of Act III of 1874, prohibiting the property from passing out of the family. The daughter in the meanwhile obtained possession of the property under the decree. Subsequently the certificate applied for by the plaintiffs was filed by them. The lower Court, feeling doubt as to whether the Collector could legally issue the certificate and how far it would operate, referred the case to the High Court. *Held*, that the Court should not act upon the certificate of the Collector. The effect of the decree being to transfer the property from the mortgagee, who was not a vatandar, to the daughter, who, according to the Collector's certificate, was also not one, s. 10 of Act III of 1874 had no application. The Collector, if he thought proper, should take proceedings under s. 6, cl. (1), of the Act. SHANKAR GOPAL *v.* BABAJI LAKSHMAN . . **I. L. R. 12 Bom. 550**

5. ——— *Certificate issued by Collector more than twelve years after death of last holder—Court bound to act on certificate—Limitation.* In execution of a decree against *N*, his lands were sold in February 1876, and *H* purchased them and took possession on 10th August 1876. *N* died in July 1877, and in February 1888 his son and heir alleging that the lands were vatan, applied to the Collector for a certificate under s. 10 of the Vatandars Act (Bombay Act III of 1874). The Collector referred the matter to his subordinates for inquiry, and the certificate was not issued until the 13th March 1890, that is, more than twelve years after the death of the last holder *N*. *Held*, that, although more than twelve years had elapsed, the Court could not refuse to act on the certificate of the Collector, as provided by s. 10 of the Vatandars Act. CHANDRA NAIK *v.* BAHINABAI **I. L. R. 17 Bom. 362**

6. ——— *Hereditary Offices Amendment Act (Bombay Act V of 1886), s. 1—Deshamukhi vatan—Commutation of service—Gordon Settlement.* S. 10 of the Hereditary Offices Act (Bombay Act III of 1874) applies to deshamukhi service vatan with respect to which the liability to serve has been commuted under the Gordon Settlement. BHAU *v.* RAMCHANDRARAO **I. L. R. 20 Bom. 423**

7. ——— *Redemption, suit for—Possession obtained by plaintiff under decree—Decree reversed in appeal—Collector's certificate under the Hereditary Offices Act (Bombay Act III of 1874).* Where an erroneous decree of the District Court is reversed by the High Court and the decree of the original Court restored, the successful party has a right to be replaced in the same position as if the District Court had not made an erroneous decree. If in obtaining this right he is restored to possession of vatan land, such a restoration does not fall within the scope of s. 10, Bombay Act III of 1874. *Rachapa* v. *Amingovda, I. L. R. 5 Bom. 382*, referred to. VENKATESH NARASINHA *v.* GOVINDRAO . . . **I. L. R. 21 Bom. 55**

8. ——— *Share of vatan—Vatan divided into takshims or shares—Execution of decree by holder of one share against holder of other—Collector's certificate based on a misunderstanding of word "vatan."* There cannot be two separate vatans in connection with one hereditary office therefore, when a vatan is broken up into shares or

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——— s. 10—*concld.*

takshims, those takshims do not constitute separate vatans. Where the Collector's certificate under s. 10 of the Vatan Act was based on a misunderstanding of the term "vatan:" *Held*, that his certificate was illegal, and could not be accepted by the Court. RAMANGAVDA *v.* SHIVAPAGAVDA **I. L. R. 22 Bom. 601**

9. ——— s. 10 and ss. 25 and 56—*Representative vatandar—Attachment—Jurisdiction of Revenue and Civil Courts—Res judicata.* A decree of the District Court at Solapur, made in 1863, declared the plaintiff to be an hereditary deputy vatandar of a certain deshpande vatan vested in the defendants as hereditary vatandars, and as such deputy entitled to receive a certain sum annually out of the income of the vatan. The plaintiff received moneys from time to time under his decree. He was not, however, subsequently to the decree, registered and treated as "a representative vatandar" under Bombay Act III of 1874, s. 56. In 1875 plaintiff made a darkhast for the attachment of a certain amount belonging to the vatan for arrears due to him under his decree. The money was accordingly attached. Subsequently the Collector issued a certificate to the Subordinate Judge, who had attached it for the removal of the attachment under Bombay Act III of 1874, s. 10. The Subordinate Judge accordingly ordered it to be removed, and his order was affirmed by the Assistant Judge on appeal. The plaintiff thereupon preferred a special appeal to the High Court. *Held*, that the lower Courts had no option but to raise the attachment on receiving the Collector's certificate. *Held*, also, that, as the plaintiff having, according to law as it stood in 1863, succeeded in then establishing his right to be an hereditary deputy deshpande, he was entitled to the benefit of s. 56 of Bombay Act III of 1874. His status as hereditary deputy vatandar was a fact which neither a Revenue nor a Civil Court could properly ignore or re-open. It was *res judicata*. GOPAL HANMANT GUMASTE *v.* SAKHARAM GOVIND . **I. L. R. 4 Bom. 254**

——— s. 13—Office of kazi—*Hereditary service vatan—Rozina allowance, its liability to attachment and sale in execution of a decree—Pensions Act (XXIII of 1871), s. 4.* The office of kazi is not a hereditary service vatan under Bombay Act III of 1874. Plaintiff obtained a money-decree against *H*, and in execution sought to attach and sell a decree obtained by *H* against *M*, which entitled *H* to receive annually a certain portion of the rozina allowance paid by Government to *M* as kazi. *H* contended that the rozina allowance was paid to *M* and his family for service as kazi, and that therefore it was not liable to the process of a Civil Court under s. 13 of Bombay Act III of 1874. This contention was upheld by both the lower Courts. *Held*, that, as the kazi's office was not a hereditary service vatan, plaintiff's rights to attach the decree obtained by *H* against *M* was not barred

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——— s. 13—*concld.*

by s. 13 of Bombay Act III of 1874. *Held*, also, that, as *H* was not liable to serve as kazi, it was not open to him to urge that the allowance in question was appropriated as service remuneration, and was not therefore transferable. *Held*, also, that, as the decree sought to be attached was passed before the Pensions Act (XXIII of 1871) came into force, plaintiff's darkhast was not barred for want of a certificate under s. 4 of the Act. DHARAMDAS SAMBHUDAS *v.* HAFASJI. **I. L. R. 19 Bom. 250**

See BABA KAKAJI SHET SHIMP *v.* NASSARUDDIN . **I. L. R. 18 Bom. 103**

——— s. 17—*Vatan—Collector's power to determine the amount of payments of a fluctuating character—Bombay Revenue Jurisdiction Act (X of 1876), s. 4, cl. (c)—Right of suit—Jurisdiction of Revenue Court—Jurisdiction of Civil Court.* The payments referred to in s. 17 of Bombay Act III of 1874 are those mentioned in s. 4, namely, "customary fees or perquisites in money or in kind, whether at fixed times or otherwise." It is the commutation of these customary and fluctuating payments that is provided for by ss. 17 to 21. But the Collector has no power under s. 17 to impose new burdens on the land-owner in cases where, the payment being constant already, there is nothing to determine. Plaintiff was the inamdar of a certain village. Defendant No. 3 was the vatandar kulkarni of the village. He enjoyed, for the performance of his duties, some inam lands and a cash allowance of R5 paid annually by the inamdar. In 1884, defendant No. 3 having failed to perform the service in person or by deputy, the Collector appointed defendant No. 2 to act as kulkarni. Defendant No. 2 officiated from 20th November 1884 to 4th December 1886. On the application of defendant No. 2, the Collector increased his remuneration according to the scale fixed for Government villages known as the Wingate scale, and ordered plaintiff to pay the increased remuneration, so as to make up the amount due under that scale. On 26th September 1890, the Collector recovered the sum of R171 from the plaintiff by attachment of his property. The plaintiff thereupon sued the Secretary of State for India in Council to recover this amount as being illegally levied. The defendant pleaded that the Collector, having determined the amount of defendant No. 2's remuneration under s. 17 of Bombay Act III of 1874, the plaintiff had no cause of action against him, and that the suit was barred under s. 4, cl. 3, of Act X of 1876. *Held*, that, as the cash payment made by the plaintiff to the vatandar was certain, and not of a fluctuating or indeterminate character, the Collector had no power to increase the remuneration of the officiator under s. 17 of Bombay Act III of 1874. *Held*, also, that the suit was not barred by s. 4 (c) of Act X of 1876. ANANTACHARYA *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 19 Bom. 581**

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——— **s. 18**—*Vatan—Suit for a declaration of right to a share in a vatan, and to participate in the emoluments of the vatan—Jurisdiction of the Civil Court to entertain such suit—Jurisdiction.* Where the plaintiffs sued to obtain a declaration that they were entitled to a third share in a *Mahárki* vatan, and to participate in the profits of the vatan: *Held*, that, under s. 18 of Bombay Act III of 1874, the Civil Court had no jurisdiction to make the declaration sought. *Parsha* v. *Lagmya, I. L. R. 13 Bom. 83*, followed. BHIVA *v.* VITHYA (1900) . . . **I. L. R. 25 Bom. 186**

——— **ss. 33-35.**

See HINDU LAW—ADOPTION—REQUISITES FOR ADOPTION—SANCTION. **I. L. R. 1 Bom. 607**

HEREDITARY OFFICES AMENDMENT ACT (BOM V OF 1886).

See HEREDITARY OFFICES ACT.

——— **ss. 1, 2**—

See HEREDITARY OFFICES ACT (BOM. ACT III OF 1874), ss. 4, 5. **I. L. R. 25 Bom. 470**

——— **s. 2.**

See HINDU LAW—REVERSIONERS—POWERS OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS—WHO MAY SUE **I. L. R. 19 Bom. 614**

See MAHOMEDAN LAW—INHERITANCE. **I. L. R. 21 Bom. 118**

HEREDITARY OFFICES REGULATION (MADRAS REGULATION VI OF 1831).

See JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO. **I. L. R. 6 Mad. 334**, **I. L. R. 13 Mad. 41**, **I. L. R. 17 Mad. 302**, **I. L. R. 21 Mad. 134**

See LIMITATION ACT, 1877, s. 28. **I. L. R. 21 Mad. 134**

See RIGHT OF SUIT—OFFICE OR EMOLUMENT . . **I. L. R. 8 Mad. 249**

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—DAMAGES. **5 Mad. 383**

——— **s. 3**—*Suit for emoluments attached to office of karnam in unsettled districts.* A suit for the emoluments attached to the office of karnam in an unsettled district is barred by the operation of s. 3, Regulation VI of 1831. COLLECTOR OF KISTNA *v.* KALAVAGUNTA CHINNAMRAGU **5 Mad. 360**

HEREDITARY SHEBAITSHIP.

See HINDU LAW—SHEBAIT. **I. L. R. 35 Calc. 226**

HEREDITARY TENURE.

See GHATWALI TENURE.

See GRANT.

See HEREDITARY OFFICE.

See HEREDITARY OFFICES ACT.

See LEASE—CONSTRUCTION.

See SERVICE TENURE.

See UNSETTLED POLLIAM. **14 B. L. R. P. C. 115**, **L. R. 1 I. A. 268, 282**

HERITABILITY.

See NON-OCCUPANCY RAIYAT. **I. L. R. 34 Calc. 516**, **13 C. W. N. 937**

See UNDER-RAIYAT . **11 C. W. N. 519**

HERITABLE AND TRANSFERABLE RIGHT.

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See MAHOMEDAN LAW. **I. L. R. 31 Calc. 319**

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See CIVIL PROCEDURE CODE, 1882, ss. 244, 622 . . **I. L. R. 28 All. 72**

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See LAND ACQUISITION ACT (I OF 1894), s. 18 . . **12 C. W. N. 98**

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See LETTERS PATENT, 1865.

See LETTERS PATENT FOR BOMBAY HIGH COURT, CL. 13 . **10 C. W. N. 185**

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See LIMITATION ACT, 1877, SCH. II, ART. 179 . . **10 C. W. N. 28**

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HIGH COURT—*contd.*

See MANDAMUS . **I. L. R. 35 Calc. 915**

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See RULES OF HIGH COURT, CALCUTTA.

——— **constitution of—**

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——— **delegation of power by—**

See LEAVE TO SUE. **I. L. R. 34 Calc. 619**

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——— **extraordinay jurisdiction of—**

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——— **power of—**

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——— **power of Coroner to commit to—**

See CORONER . **7 C. W. N. 889**

——— **power of, to prosecute under s. 476, Criminal Procedure Code—**

See CRIMINAL PROCEDURE CODE, S. 476. **13 C. W. N. 1038**

——— **power of, to stay further proceedings—**

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——— **reference to—**

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See SMALL CAUSE COURT—PRESIDENCY TOWNS—PRACTICE AND PROCEDURE—REFERENCE TO HIGH COURT.

——— **revisional powers of—**

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HIGH COURT—*concld.*

1. ——— **Expenses of witness**—*Application in Chambers—Expenses for attendance in Court.* A witness, who attends the Court on a subpœna, is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpœna, even though he only gives evidence as a witness for a party to the suit other than the party summoning him. *In re* BULLOCK (1904) . . **I. L. R. 28 Bom. 647**

2. ——— **Decision of, if binding on lower Court**—*Construction of Act—Reference to proceedings of Legislative Council.* A lower Court is legally bound to follow the decision of the High Court. SARAT SUNDARI BARMANI *v.* UMA PRASAD ROY CHOWDHRY (1904) **8 C. W. N. 578**

3. ——— **Extension of jurisdiction**—*High Court—Jurisdiction over Sambalpur District—Extension of High Court's jurisdiction to place not within jurisdiction of any High Court, if ultra vires—Interpretation of Statute—Reference to repealed Statute—28 & 29 Vict., c. 15, s. 3.* Under s. 3 of 28 & 29 Vict., c. 15, the Governor General in Council can extend the jurisdiction of a High Court or any portion of its jurisdiction to a place not originally within the jurisdiction of any High Court. The proclamation whereby the Calcutta High Court was authorised to exercise jurisdiction over the Sambalpur District, when it was transferred from the Central Provinces to Bengal was not *ultra vires.* The repealed provisions of s. 18, 24 & 25 Vict., c. 105, were referred to as throwing light on the construction of s. 3 of 28 & 29 Vict., c. 15. Construction of Statute by reference to repealed Statutes, when permissible, discussed by MOOKERJEE, *J.* BALESWAR BAGARTI *v.* BHAGARATHI DAS (1908) . . . . **I. L. R. 35 Calc. 701**
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HIGH COURT CIVIL CIRCULAR, RULE 80.

See LIMITATION ACT. **I. L. R. 31 Bom. 162**

HIGH COURT, CONSTITUTION OF.

See JUDGE OF HIGH COURT. **I. L. R. 16 All 136**

——— **High Court, N.-W. P.**—*Stat. 24 & 25 Vict., c. 104, s. 7—Letters Patent, N.-W. P., s. 2—Omission to fill up vacant appointment—Court consisting of Chief Justice and four Judges only.* By s. 2 of the Letters Patent for the High Court it was not intended that, if the Crown or the Government should omit to fill up a vacancy among the Judges under the powers conferred by s. 7 of the High Courts Act (24 & 25 Vict., c. 104), and the Court should then consist of a chief Justice and four Judges only, the constitution of the Court should thereby be rendered illegal, and the existing Judges incompetent to exercise the functions assigned to the High Court. LAL SING *v.* GHANSHAM SINGH **I. L. R. 9 All. 675**

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HIGH COURT, ESTABLISHMENT OF.

——— N.-W. P. High Court.

See REFERENCE FROM SUDDER COURT AT AGRA . . **6 B. L. R. P. C. 283**
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(*b*) CRIMINAL	4551
2. MADRAS—	
(*a*) CIVIL	4553
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3. BOMBAY—	
(*a*) CIVIL	4555
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See APPEAL . **I. L. R. 32 Calc. 572**

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9 C. W. N. 748

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See REFORMATORY SCHOOLS ACT, ss. 8, 16.
I. L. R. 28 Calc. 423

1. CALCUTTA.

(*a*) CIVIL.

1. ——— Issue of writ of fieri facias —*Suit begun in Supreme Court—24 & 25 Vict., c. 104, s. 12.* In an ordinary suit commenced in the High Court, a writ of *fieri facias* could not issue except within the limits of the Court's original jurisdiction; but in a suit originally commenced in the Supreme Court, the High Court had power, under 24 & 25 Vict., c. 104, s. 12, to issue a *fieri facias* beyond the limits of its original jurisdiction, and to sell under it property situated there. MONOMOTHO NATH DEY *v.* GRINDER CHUNDER GHOSE
24 W. R. 366

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HIGH COURT, JURISDICTION OF— *contd.*

1. CALCUTTA—*contd.*

(*a*) CIVIL—*contd.*

GRISH CHUNDER DOSS *v.* BROJO JIBAN BOSE **8 C. L. R. 4**

2. ——— **Enforcement of public duties** —*License for a provision market.* The High Court has no power to compel municipalities beyond the local limits of its ordinary original civil jurisdiction to do their duty or to restrain them from doing that which it is not in their province to do. MORAN *v.* CHAIRMAN OF MOTIHARI MUNICIPALITY **I. L. R. 17 Calc. 329**

See STRACHEY *v.* MUNICIPAL BOARD OF CAWNPORE **I. L. R. 21 All. 348**

3. ——— **Cause of action arising in district in which British subjects were subject to Supreme Court.** The High Court, previously to the issue of the Order in Council, No. 4366, dated 22nd November 1865, had jurisdiction in cases in which the cause of action arose in a district in which British subjects were formerly subject to the jurisdiction of the Supreme Court. INDIAN CARRYING CO. *v.* MCCARTHEY . **Cor. 116**

4. ——— **Irregularity in title of suit** —*Immaterial mistake.* Where a suit, cognizable by the High Court by reason of the testamentary and intestate jurisdiction of the Court, was wrongly entitled as being brought in the ordinary original civil jurisdiction :—*Held,* that the Court had jurisdiction to entertain the suit. It was a mere blunder which the Court could correct. TOYLUCK NAUTH DASS *v.* MEGNAUTH DASS **2 Ind. Jur. N. S. 245**

5. ——— **Power of execution of decree**—*Execution out of jurisdiction.* The High Court, in the exercise of its civil jurisdiction, had not the power to execute its own decree, or serve its own process, out of the local limits of such jurisdiction. SAGORE DUTT *v.* RAM CHUNDER MITTER **1 Hyde 136**

6. ——— *Civil Procedure Code (Act X of 1877), s. 649.* Although the High Court in its Appellate Side does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under s. 649 of the Code of Civil Procedure. HURRO PERSHAD ROY *v.* BHUPENDRO NARAIN DUTT **I. L. R. 6 Calc. 201: 7 C. L. R. 79**

7. ——— **Power to relieve judgment-debtor in Small Cause Court.** The High Court is not authorized by law to interfere for the relief of a necessitous judgment-debtor whose salary has been attached in execution of a decree of a Small Cause Court. HARRIS *v.* BRITAIN . **15 W. R. 534**

8. ——— **Appellate jurisdiction of High Court**—*Law in subordinate Courts.* The High Court in its appellate jurisdiction is bound to administer the law as it subsists in the subordinate Courts. COLLECTOR OF THANA *v.* BHASKAR MAHADEV SHETH . . **I. L. R. 8 Calc. 264**

9. ——— **Sonthal Pergunnahs**—*Act XXXVII of 1855, s. 2—Civil Procedure Code (Act XIV of 1882), ss. 1 and 3.* An appeal lies to the High Court from the Sonthal Pergunnahs in all civil suits in which the matter in dispute is over R1,000 in value. SORBOJIT ROY *v.* GONESH PROSAD MISSER . . **I. L. R. 10 Calc. 761**

10. ——— *Appeal in criminal cases.* The High Court has no jurisdiction to entertain appeals in civil suits tried in the Sonthal Pergunnahs. SURDHARRE LOLL *v.* MANSOOR ALLY KHAN . . . **I. L. R. 3 Calc. 298**

11. ——— **Original jurisdiction, High Court**—*Fraud—Decree—Mofussil Court—Letters Patent, 1865, cl. 12—Civil Procedure Code (Act XIV of 1882), ss. 11, 17.* The High Court has original jurisdiction, under cl. 12 of the Letters Patent and ss. 11 and 17 of the Civil Procedure Code, to entertain a suit to set aside a decree of a Mofussil Court on the ground of fraud. *Bandon* v. *Becher, 3 Cl. & Fin. 479; Queen* v. *Saddlers Company, 10 H. L. C. 404; Rajib Panda* v. *Lakhan Sendh Mahapatra, I. L. R. 27 Calc. 11, 16; Prasanna Mayi Dasi* v. *Kadambini Dasi, 3 B. L. R. (O. C.) 85; Moxon* v. *Payne, I. R. 8 Ch. App. 881,* referred to. NISTARINI DASSI *v.* NUNDO LAL BOSE (1902) **I. L. R. 30 Calc. 369**

12. ——— *Ordinary Original Jurisdiction—Administration suit—Prayer for setting aside fraudulent award and decree made thereon by a Mofussil Court, and for setting aside leases of and in Mofussil obtained by fraud—Accounts—Poojas, expenses for—Enquiry, form of—Executor's liability.* Where the primary object of a suit instituted on the Original Side of the High Court was the administration of the estate of a deceased testator resident within its jurisdiction, principal executor being also resident there and the actual administration going on there :—*Held,* that the High Court in its Ordinary Original Jurisdiction had a right to order administration of this estate and as ancillary to such an order to set aside deeds obtained by the fraud of the executor. The fact that a decree had been granted by the Court of the 24-Pergunnahs making a fraudulent award, an order of Court would not protect that decree from the jurisdiction of the High Court, when redressing that fraud. *Held,* further, for the due administration of the estate, the High Court could set aside leases of lands outside the territorial limits of its jurisdiction, these leases having been made as an incident of the same fraud. BENODE BEHARI BOSE *v.* SRIMATI NISTARINI DASSI (1905) **9 C. W. N. 96**

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HIGH COURT, JURISDICTION OF— *contd.*

1. CALCUTTA—*contd.*

(*a*) CIVIL—*concld.*

13. ——— Appellate jurisdiction— *Presidency Group—Bench taking up cases of the Presidency Group, whether it has jurisdiction to set aside decrees of the Presidency Small Cause Court—Presidency Small Cause Courts Act (XV of 1882, as amended by Act I of 1895)—Rules of the Appellate Side of the High Court, Rule II, Chapter III, column 1.* The Bench taking cases of the Presidency Group has no jurisdiction over the Court of Small Causes at Calcutta, and it has no power to set aside the decrees of the said Court. SHAMSHER MUNDUL *v.* GANENDRA NARAIN MITTER (1902)

I. L. R. 29 Calc. 498

(*b*) CRIMINAL.

14. ——— Appeal in criminal case— *Superintendent of Cachar.* The High Court had no jurisdiction to hear an appeal from a conviction and sentence by the Superintendent of Cachar in his capacity of Magistrate of the district. QUEEN *v.* RADHAKISHEN SEIN . . **W. R. 1864, Cr. 18**

15. ——— *Revision—Superintendent of Tributary Mehals—Offence committed out of British India.* The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbunj, a place not situated within the limits of British India. *Empress* v. *Keshub Mahajun, I. L. R. 8 Calc. 985,* and *Hursee Mahapatro* v. *Dinabundhu Patro, I. L. R. 7 Calc. 523,* referred to. EMPRESS *v.* HURRO KOLE

I. L. R. 9 Calc. 288

16. ——— High Court's power of revision— *Presidency Magistrate's proceedings—Order for further inquiry—Criminal Procedure Code (V of 1898), ss. 423, 435 and 439—Letters Patent, High Court, 1865, cl. (28).* The High Court has, under ss. 435 and 439, read with s. 423 of the Criminal Procedure Code, the power to revise the proceedings of a Presidency Magistrate and order a further inquiry to be made. It has the same power under cl. 28 of the Letters Patent of 1865. COLVILLE *v.* KRISTO KISHORE BOSE

I. L. R. 26 Calc. 746
3 C. W. N. 598

17. ——— Appellate and revisional jurisdiction— *Withdrawal of the operation of the Criminal Procedure Code—Scheduled Districts Act (XIV of 1874), s. 6—Assam Frontier Tracts Regulation, 1880, s. 2—Power of the Supreme Council.* The effect of the rules laid down by the Chief Commissioner of Assam under s. 6 of the Scheduled Districts Act (XIV of 1874), taken in conjunction with the notification issued by him in the exercise of the powers conferred by s. 2 of the Assam Frontier Tracts Regulation, 1880, directing that the Criminal Procedure Code should cease to operate in the North Cachar Hills from the date of the notification, is to supersede all previously existing criminal authority in that district by that of the Chief Commissioner. The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of the High Court is, as was said in *Empress* v. *Burah, I. L. R. 4 Calc. 172 : L. R. 5 I. A. 178,* "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court. *Semble :* Notwithstanding the withdrawal of the operation of the Criminal Procedure Code from a certain district, the High Court may continue to exercise appellate and revisional powers over that district. SOONDERJEE NANJEE *v.* MAYLON

I. L. R. 26 Calc. 874
3 C. W. N. 564

18. ——— Appeal from conviction of offences committed in Chitttagong Hill Tracts— *Jurisdiction of High Court to hear such appeal—Chittagong Act (XXII of 1860), s. 1—Penal Code (Act XLV of 1860), ss. 379 and 457.* There is no jurisdiction in the High Court to hear appeals in respect of sentences passed on conviction of offences committed within the districts known as the Chittagong Hill Tracts. QUEEN-EMPRESS *v.* SONAI MUGH . . **I. L. R. 27 Calc. 654**

19. ——— Criminal Revisional Jurisdiction— *Calcutta Municipal Act (Bengal Act III of 1899), s. 645 and s. 408—General Committee, power of the—Owner, determination of.* By s. 645 of the Calcutta Municipal Act (Bengal Act III of 1899) the Legislature has given power to the General Committee of the Calcutta Municipal Commissioners to determine in a case, where there are gradations of owners of persons, who may be regarded as owners, or where there is a doubt as to who is the owner bound to perform any duty imposed by the Act, which of such owners shall be deemed to be bound to perform such duty. That discretion having been by law vested in the General Committee, the High Court, in the exercise of its criminal revisional jurisdiction, has no power to set aside or question the act done in the exercise of that discretion, if those acts have otherwise been done in accordance with the provisions of the law. SHAMUL DHONE DUTT *v.* CORPORATION OF CALCUTTA (1906) . **I. L. R. 34 Calc. 30**

20. ——— Power to revise orders directing prosecution— *Jurisdiction of the Sessions Judge to set aside such orders—Criminal Procedure Code (Act V of 1898), ss. 439, 476—Indian Penal Code (Act XLV of 1860), s. 211.* A Sessions Judge has no power to set aside an order passed by a Magistrate under s. 476 of the Criminal Procedure Code. But the High Court has power to revise such orders, whether passed by Criminal or a Civil Court, under s. 439 of the Criminal Procedure Code or under its general powers of superintendence, if a

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HIGH COURT, JURISDICTION OF— *contd.*

CALCUTTA—*concld.*

(*b*) CRIMINAL—*concld.*

case for interference is made out; this power is not taken away by s. 476, cl. (2). *Queen-Empress* v. *Srinivasalu Naidu, I. L. R. 21 Mad. 124,* referred to. *Eranholi Athan* v. *King-Emperor, I. L. R. 26 Mad. 98,* dissented from. EMPEROR *v.* GOPAL BARIK (1906) . . **I. L. R. 34 Calc. 42**

21. ——— Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—*Criminal Procedure Code (Act V of 1898), ss. 423, 439—Charter Act (24 and 25 Vict., c. 104), s. 15.* The High Court has power under s. 439 read with s. 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case. *Hari Dass Sanyal* v. *Saritulla, I. L. R. 15 Calc. 608; Colville* v. *Kristo Kishore Bose, I. L. R. 26 Calc. 746; Dwarka Nath Mondul* v. *Beni Madhab Banerjee, I. L. R. 28 Calc. 652;* and *Emperor* v. *Varjivandas, I. L. R. 27 Bom. 84,* followed. *Bellew* v. *Parker, 7 C. W. N. 521,* referred to. *Charoobala Dabee* v. *Barendra Nath Mozumdar, I. L. R. 27 Calc. 126; Kedar Nath Sanyal* v. *Khetra Nath Sikdar, 6 C. L. J. 705;* and *Debi Bux Shroff* v. *Jutmal Dungarwal, I. L. R. 33 Calc. 1282,* discussed and dissented from. The High Court cannot interfere, under s. 15 of the Charter Act, with the order of a subordinate Court on the ground of an error in law, but only for an error affecting jurisdiction, that is, either a want or refusal of juirsdiction or an illegality in the exercise of it. *Tejram* v. *Harsukh, I. L. R. 1 All. 10,* and *Corporation of Calcutta* v. *Bhupati Roy Chowdhry, I. L. R. 26 Calc. 74,* referred to. Where on the admission of the accused an offence of criminal misappropriation might have been established, and the Magistrate did not consider or elicit matters of vital importance in the case:—*Held,* that there had been no proper inquiry into the charge and that there were *primâ facie* grounds for directing a further inquiry. *Ram Logan Dhobi* v. *Inglis,* unreported, and *Hari Moodi* v. *Kumode,* unreported, distinguished. MALIK PRATAP SINGH *v.* KHAN MAHOMED (1909) **I. L. R. 36 Calc. 894**

2. MADRAS.

(*a*) CIVIL.

1. ——— Power to sell immoveable property out of jurisdiction—*Law before 1865.* Prior to 1865, the High Court of Madras had power to execute a decree in a partition suit between Hindu inhabitants of Madras by selling immoveable property situated in Chingleput District. JAMUNA BHAI AMMAL *v.* SADAGOPA **I. L. R. 7 Mad. 56**

Reversing on review SADAGOPA *v.* JAMUNA BHAI AMMAL . **I. L. R. 5 Mad. 54**

HIGH COURT, JURISDICTION OF— *contd.*

2. MADRAS—*contd.*

(*a*) CIVIL—*concld.*

2. ——— Complaint against Governor and Council of Madras—*21 Geo. III, c. 70, s. 5; 39 & 40 Geo. III, c. 79, s. 3; 4 Geo. IV, c. 71, s. 17.* S. 3 of 39 & 40 Geo. III, c. 70, which provides that the Governor and Council at Madras shall enjoy the same exemption and no other from the authority of the Supreme Court at Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta, did not confer on the Supreme Court at Madras a jurisdiction over the Governor and Council of Madras similar to that conferred by 21 Geo. III, c. 21, s. 5, on the Supreme Court at Calcutta over the Governor-General and Council. *Held,* therefore the High Court, Madras, had no jurisdiction to entertain an application based on a complaint of certain acts of the Governor and Members of the Council of Madras alleged by the complainant to be injurious and oppressive. *In re* WALLACE . . **I. L. R. 8 Mad. 24**

3. ——— *Agency Court at Vizagapatam—Act XXIV of 1839—Order in execution petition—Appeal—Review—Decree—Agency Rule No. XXXI.* There is no appeal to the High Court against an order passed in execution proceedings in the Agency Court at Vizagapatam. *Semble:* that the remedy open to a party aggrieved by such an order is by petition under Rule No. XXXI of the Agency Rules for Ganjam and Vizagapatam. An order passed by the Agent in execution proceedings under the Agency Rules is not a "decree" within the meaning of those rules, and is not subject to review by the High Court. VIKRAMADEO MAHARAJULUM GARU *v.* NELADEVI PATTAMASHADEVI GARU (1902) . . **I. L. R. 26 Mad. 266**

(*b*) CRIMINAL.

4. ——— Criminal Procedure Code, s. 2—*Letters Patent, s. 28—Scheduled Districts Act (XIV of 1874), Notifications under—Agency Tracts, jurisdiction of High Court over—Agency rules—Act XXIV of 1839, s. 3.* The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency Tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor in Council, by a notification under Act XXIV of 1839, constituted the Agent a Sessions Judge under the Criminal Procedure Code. *Held,* that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the

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HIGH COURT, JURISDICTION OF—*—contd.*

2. MADRAS—*concld.*

(*b*) CRIMINAL—*concld.*

Criminal Procedure Code. QUEEN-EMPRESS *v.* BUDARA JANNI . . **I. L. R. 14 Mad. 121**

5. ——— Jurisdiction under Local Act—*Offence under Madras Act I of 1866—Act making offence triable by Magistrate—Power of local Legislature.* The prisoner was committed to a criminal sessions of the High Court for supplying liquor without a license, an act made punishable by Madras Act No. I of 1866. *Held*, that the High Court had no jurisdiction, inasmuch as the Act which creates the offence declares it to be punishable by a Magistrate. HOLLOWAY, *J.*, dissented from the judgment. *Quære:* Whether the local Legislature has power to enact that a European British subject shall be punishable by a Magistrate on summary conviction for an offence newly created by the local Legislature. REGINA *v.* DONOGHUE **5 Mad. 277**

6. ——— *Extradition and Foreign Jurisdiction Act (XXI of 1879), Ch. II—European British subjects in Bangalore—Justices of the Peace of Mysore—Transfer of criminal case—Criminal Procedure Code, 1882, s. 526.* The Civil and Military Station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879. Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore, being such Justices of the Peace, are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras. The High Court, therefore, has jurisdiction to order the transfer of a criminal case from the Court of the District Magistrate of the Civil and Military Station of Bangalore to the Court of a Presidency Magistrate at Madras. *In re* HAYES . . . **I. L. R. 12 Mad. 39**

7. ——— Superintendence of High Court—*Criminal proceedings, stay of, when civil suit on same facts pending.* The defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiff and his witnesses and such proceedings, if launched, will be stayed by the High Court in the exercise of its powers of superintendence. *Eadara Viranna* v. *The Queen, I. L. R. 3 Mad. 401,* distinguished; *In re Devuji valad Bhavani, I. L. R. 18 Bom. 581,* distinguished; and *Raj Kumari Debi* v. *Bamasundari Debi, I. L. R. 23 Calc. 610,* distinguished. ANNA AYYAR *v.* EMPEROR (1906) . **I. L. R. 30 Mad. 226**

3. BOMBAY.

(*a*) CIVIL.

1. ——— Exercise of extraordinary jurisdiction—*Superintendence of High Court under s. 15, 24 & 25 Vict., c. 104—Bom. Reg. II of 1827, s. 5, cl. 2—Mamlatdars' Courts—Bombay Act V of 1864.* Distinction between the High Court's extraordinary jurisdiction under cl. 2 of s. 5 of Regulation II of 1827, and its general power of superintendence under s. 15 of Stat. 24 & 25 Vict., c. 104, pointed out, and the occasion for the exercise of the former stated. The Mamlatdars' Courts, constituted under Bombay Act V of 1864, are subordinate Civil Courts within the meaning of cl. 2, s, 5. Reg. II of 1827. The High Court has therefore power, in the exercise of its extraordinary jurisdiction, to set aside an order made by a Mamlatdar under Bombay Act V of 1864. MAHADAJI GOVIND *v.* SONU BIN DAVLATA . . **9 Bom. 249**

2. ——— Power of High Court as Court of original jurisdiction. The High Courts are not Courts of ordinary original civil jurisdiction over the whole of the territories of the presidencies to which they belong, and there is no presumption in favour of jurisdiction beyond what is found expressly conferred by the Charters. SUGANCHAND SHIVDAS *v.* MULCHAND JOHARIMAL **12 Bom. 113**

3. ——— Inhabitant of Baroda carrying on business in Bombay by munim—*Charter of Supreme Court, Bombay, s. 41—Subjection to process of High Court.* An inhabitant of Baroda, who carries on the business of a banker at Bombay by a munim, and has a place of business there, is constructively an inhabitant of Bombay, and as such is subject to the orders and process of the High Court in the exercise of its equity jurisdiction, as provided by s. 41 of the Charter of the late Supreme Court, and continued to the High Court by the Act under which it was established. HURIVALLAB DAS KALLIAN DAS *v.* UTTAMCHAND MANIKCHAND. *In re* GOPALRAV MYRAL **8 Bom. O. C. 236**

4. ——— Suit to declare a Parsi infant marriage null and void—*Parsi Matrimonial Court—Act XV of 1865, ss. 3, 30—Letters Patent, s. 12.* In 1868 the plaintiff and defendant, then of the ages of seven and six years, respectively, went through the ceremony of marriage in the presence of their respective parents and according to the rites of their religion. The formal consent on behalf of the plaintiff was not given by his father, but by his uncle with whom he was living and by whom he had been adopted. Nineteen years afterwards the plaintiff filed this suit praying for a declaration that the pretended marriage was null and void, and did not create the status of husband and wife between the plaintiff and defendant. The defendant resisted the suit, and claimed to be the lawful wife of the plaintiff. The plaintiff and defendant never lived together as man and wife, nor was the marriage ever consummated. *Held*, that such a suit not being in the category of suits relegated to a special Court by Act XV of 1865, the jurisdiction to try it re-

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HIGH COURT, JURISDICTION OF—*contd.*

3. BOMBAY—*contd.*

(*a*) CIVIL—*contd.*

mained in the High Court, to which it had been given by s. 12 of the Letters Patent. PESHOTAM HORMASJI DUSTOOR *v.* MEHERBAI **I. L. R. 13 Bom. 302**

5. ——— Suit by Parsi husband for divorce—*Parsi Marriage Act (XV of 1865), ss. 3, 30—British India—Valid marriage out of British India—Marriage when husband is a minor—Previous consent of guardian.* The plaintiff and defendant were Parsis. The husband filed this suit in April 1891, stating that in March 1885 he and the defendant went through the ceremony of *ashirvad* at Akola in the Berar Assigned Districts. He alleged that he was at the time only nineteen years of age, and that his mother and guardian had not given her previous consent to the ceremony, nor was she present at it. He and the defendant subsequently cohabited at Bhusaval until the 8th April 1885, but since then he had not lived with the defendant. He further alleged that the defendant had been guilty of adultery, and he prayed that, if necessary, it might be declared that the *ashirvad* ceremony did not constitute a valid marriage, but that, if the marriage should be declared valid, it might be dissolved. At the hearing it was found that the requirements of s. 3 of the Parsi Marriage and Divorce Act (XV of 1865) were complied with at the marriage. So that the marriage would have been valid if it had been celebrated within British India. It was also found that the defendant had been guilty of adultery. *Held*, that the jurisdiction of the Court was not barred merely by the circumstance that the parties were married at Akola. S. 30 of the Act, 1865, applies to marriages wherever celebrated. In the present case, both the parties were domiciled within the territorial jurisdiction at the time of the marriage, and were still so domiciled, and the adultery was also committed within the jurisdiction. The Court, therefore, had jurisdiction. The delegates having found that at the marriage the requirements of s. 3 of the Parsi Marriage Act (XV of 1865) were complied with: *Held*, assuming that there was no special law or usage in the Berars on the subject as to the requisites of a valid marriage between Parsis in that district, or that, if there was such law or usage, it was in accordance with s. 3 of the Act, the marriage between the plaintiff and the defendant was valid and capable of being dissolved. DORABJI RUSTOMJI MADON *v.* JERBAI . **I. L. R. 16 Bom. 136**

6. ——— Jurisdiction over Consular Court of Zanzibar—*Power of revision—Superintendence of High Court—Appellate Court, Power of—Civil Procedure Code, 1882, s. 622—Bombay Civil Courts Act (XIV of 1869), ss. 9 and 10—Zanzibar Order in Council, 1884, arts. 7, 8, 9, 21, 27 and 30. Held* by the majority of the full Bench (JARDINE, *J.*, dissenting), that the High Court at Bombay has no power of revision over civil cases

HIGH COURT, JURISDICTION OF—*contd.*

3. BOMBAY—*contd.*

(*a*) CIVIL—*concld.*

tried by the Consular Court at Zanzibar, though it is authorized to hear appeals from the decisions of that Court as a District Court by the Zanzibar Order in Council of 1884. A power of revision is not an incident of appellate powers, but, on the contrary, can only be exercised where there is no appeal; and had it been intended to give such powers to the High Court at Bombay, it would necessarily have been expressly provided for. *Per* JARDINE, *J.*—Under any circumstances, the Consular Court at Zanzibar is bound to obey a writ issued by the High Court for certifying the papers of a civil case. Under ss. 9 and 10 of the Bombay Civil Courts Act (XIV of 1869) taken with art. 21 of the Zanzibar Order in Council of 1884 and s. 622 of the Civil Procedure Code (Act XIV of 1882), the High Court is competent to exercise revisionary jurisdiction in civil matters tried by the Consular Court at Zanzibar. KHOJA SIVJI *v.* HASHAM GULAM . **I. L. R. 20 Bom. 480**

(*b*) CRIMINAL.

7. ——— European British subject—*Offence committed in foreign territory—Penal Code.* A European British subject is liable to be tried in the High Court of Bombay for an offence against the Penal Code committed in the territories of a Native Prince in alliance with Government upon charges framed under the Penal Code. REG. *v.* CHILL . . . . **8 Bom. Cr. 92**

8. ——— Criminal cases sent from Zanzibar—*Stat. 6 & 7 Vict., c. 94—Stat. 28 & 29 Vict., c. 116—Stat. 29 & 30 Vict., c. 87—Order in Council of 9th August 1866.* The High Court at Bombay has jurisdiction to try a prisoner accused of having committed murder at Zanzibar, and sent by the British Consul at Zanzibar for trial to Bombay. EMPRESS *v.* DOSSAJI GULAM HUSEIN **I. L. R. 3 Bom. 334**

9. ——— Court of Her Majesty's Consul at Muscat—*High Court's criminal Revisional jurisdiction over the Consular Court—Order in Council, dated 4th November 1867—Criminal Procedure Code (Act V of 1888), s. 435.* The High Court at Bombay has no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat. *In re* RATTANSEE PURSHOTTUM **I. L. R. 24 Bom. 471**

10. ——— Court of Judicial Superintendent of Railways at Secunderabad—*Sanction of proceedings—Subsequent sanction, effect of—Irregular commitment accepted by High Court—Criminal Procedure Code (X of 1882), ss. 197 and 532—Power of Court of Judicial Superintendent of Railways to commit to High Court—Charges preferred by Advocate-General—Letters Patent, 1865, cl. 24—European British subjects.* The provisions of the Code of Criminal Procedure

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HIGH COURT, JURISDICTION OF —*contd.*

3. BOMBAY—*contd.*

(*b*) CRIMINAL—*contd.*

(Act X of 1882) apply to the Court of the Judicial Superintendent of Railways in His Highness the Nizam's Dominions held at Secunderabad. Where, after a magisterial inquiry, a European British subject, being a public servant within the meaning of s. 197 of the Criminal Procedure Code (Act X of 1882), was committed for trial to the High Court of Bombay by the Judicial Superintendent of Railways in His Highness the Nizam's Dominions without any previous sanction having been obtained as required by that section :—*Held*, that the proceedings were illegal and without jurisdiction, and that a sanction subsequently obtained was of no effect ; but *held*, also, that the provisions of s. 532 of the Criminal Procedure Code applied, and that the Judge presiding at the Criminal Sessions of the High Court had power, in his discretion, to accept the commitment and to proceed with the trial of the prisoner. *Per* SARGENT, *C.J.*—The Court of the Judicial Superintendent of Railways in His Highness the Nizam's Dominions is subordinate to the High Court of Bombay in all criminal matters relating to European British subjects. *Per* BAYLEY, *J.*—The Court of the Judicial Superintendent of Railways in His Highness the Nizam's Dominions is not subject to the superintendence of the High Court of Bombay within the meaning of cl. 24 of the Letters Patent, 1865, and a prisoner committed by the former Court for trial by the High Court cannot be tried on charges preferred by the Advocate-General under that clause. QUEEN-EMPRESS *v.* MORTON **I. L. R. 9 Bom. 288**

11. ——— European British subjects at Secunderabad—*Criminal Procedure Code, 1882, s. 526—Act III of 1884, s. 11—Transfer of criminal case.* The High Court of Bombay having been vested by notification of the Governor-General of India in Council, No. 178 of 23rd September 1874, with original and appellate criminal jurisdiction over European British subjects, being Christians, resident amongst other places at Secunderabad, outside the Presidency of Bombay and within the territories of His Highness the Nizam of Hyderabad, the Cantonment Magistrate of Secunderabad, in his character of a District Magistrate, is subordinate to the High Court in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of s. 526 of the Code of Criminal Procedure, Act X of 1882, as amended by Act III of 1884, s. 11 ; and the High Court possesses, by virtue of the appellate jurisdiction so vested in it, the power of transferring a criminal case pending in the Cantonment Magistrate's Court either to itself or to any criminal Court of equal or superior jurisdiction. The High Court, by an order under s. 526 of the Criminal Procedure Code (Act X of 1882), transferred the present case of defamation from the Court of the Cantonment Magistrate at Secunderabad to the High Court for trial, on the ground that no machinery for a trial by jury existed at Secunderabad. QUEEN-EMPRESS *v.* EDWARDS . . . **I. L. R. 9 Bom. 333**

HIGH COURT, JURISDICTION OF— —*contd.*

3. BOMBAY—*concld.*

(*b*) CRIMINAL—*concld.*

12. ——— Reference and appeal in a criminal case from the Schedule Districts—*Jurisdiction—Scheduled Districts—Act XI of 1846—Scheduled Districts Act (XIV of 1874).* The Collector of Khandesh, in his capacity of Political Agent for the Mehwasi Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to the Government for confirmation. The accused also appealed to the Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under Rule 35 of the Rules promulgated in 1855 under s. 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference. *Held*, that the High Court had jurisdiction. IMPERATRIX *v.* RATNYA (1897) . **I. L. R. 25 Bom. 667**

4. N.-W. P.—CIVIL.

1. ——— Legislative power of the Governor-General in Council—*Stat. 24 & 25 Vict., c. 67, s. 22—Act XVII of 1886 (Jhansi and Morar Act)—"Indian territories now under the dominion of Her Majesty"—"Said territories"—28 & 29 Vict., c. 17, preamble—32 & 33 Vict., c. 98, s. 1—Construction of statutes.* Act XVII of 1886 (Jhansi and Morar Act) is not *ultra vires* of the Governor-General in Council, and the town and fort of Jhansi are subject to the jurisdiction of the High Court for the N.-W. Provinces in the same manner as the rest of the Jhansi District. The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 & 25 Vict., c. 67) received the royal assent (*i.e.*, the 1st August 1861), were under the dominion of Her Majesty. In the preamble to the 28 & 29 Vict., c. 17, and in s. 1 of the 32 & 33 Vict., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *Postmaster General of the United States* v. *Early, Curties Rep. U. S. 86*, referred to. It must be presumed that the laws and regulations of the Governor-General in Council are known to

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HIGH COURT, JURISDICTION OF— *concld.*

4. N.-W. P.—CIVIL—*concld.*

Parliament. *Empress* v. *Burah, I. L. R. 3 Calc. 143 : I. L. R. 4 Calc. 183,* referred to. ABDULLA *v.* MOHAN GIR . . **I. L. R. 11 All. 490**

2. ——— Appeal from decree of District Judge in Oude—*Order dismissing suit for dissolution of marriage—Divorce Act (IV of 1869), ss. 3, sub-s. (3), 8, 9, 13, 17, and 55—Oude Civil Courts Act (XIII of 1879), s. 27—Oude Courts Act (XIV of 1891), s. 8—N.-W. P. and Oude Act (XX of 1890), s. 42—Notification 1203, dated 23rd September 1874—Stat. 28 Vict., c. 25, s. 3.* The High Court of Judicature for the N.-W. P. has no jurisdiction to entertain an appeal from the decree of a District Judge in Oude dismissing a suit for dissolution of marriage. *Morgan* v. *Morgan, I. L. R. 4 All. 306,* overruled. PERCY *v.* PERCY **I. L. R. 18 All. 375**

HIGH COURT, POWER OF.

See CRIMINAL PROCEDURE CODE, ss. 145, 435 . . **I. L. R. 31 All. 150**

See ENGLISH COMMITTEE. **10 B. L. R. 79, 80, 82 note**

See HIGH COURT, JURISDICTION OF.

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—LIKELIHOOD OF BREACH OF THE PEACE **I. L. R. 28 Calc. 416**

See REVISION—CRIMINAL CASES.

See SENTENCE—POWER OF HIGH COURT AS TO SENTENCES.

See SUPERINTENDENCE OF HIGH COURT.

See TRANSTER OF CIVIL CASE.

See TRANSFER OF CRIMINAL CASE.

See UNPROFESSIONAL CONDUCT. **I. L. R. 35 Calc. 317**

See VERDICT OF JURY—POWER TO INTERFERE WITH VERDICTS.

——— revisional powers of—

See HINDU LAW—INHERITANCE. **I. L. R. 34 Calc. 929**

——— to interfere with discharge by Presidency Magistrate—

See CRIMINAL PROCEDURE CODE, ss. 435, 439 . . . **13 C. W. N. 1221**

——— to interfere with verdict of jury—

See REVISION—CRIMINAL CASE—VERDICT OF JURY AND MISDIRECTION.

See VERDICT OF JURY—POWER TO INTERFERE WITH VERDICTS.

HIGH COURT REVISION SUO MOTU.

See CIVIL PROCEDURE CODE, 1882, ss. 526, 522, 622 . . **10 C. W. N. 609**

HIGH COURT RULES (ORIGINAL SIDE).

See ADVOCATE-GENERAL. **I. L. R. 30 Bom. 474**

See PRACTICE . **I. L. R. 31 Bom. 465**
I. L. R. 32 Bom. 152

——— Rules 70, 71, 72—

See BARRISTERS . **13 C. W. N. 605**

——— Rule 80 *(a 1)—Pauper, petition to sue as—Prothonotary's decision—Application to Judge in Chambers—Right to be heard.* The plaintiff filed a petition to be allowed to continue her suit *in formâ pauperis.* The petition was heard by the Prothonotary under Rule 81 of the Bombay High Court Rules. The petitioner applied under Rule 80 (*a* 1) to have the matter adjourned into Court. *Held,* that the party dissatisfied with the Prothonotary's decision is entitled to apply to the Chamber Judge to have the matter adjourned to him, and that the Judge in Chambers is bound to decide the matter for himself. MEGHBAI *v.* POONJABAI (1907) . . . . **I. L. R. 32 Bom. 163**

——— Rules 111, 112 and 162—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 59 **I. L. R. 32 Bom. 152**

——— Rule 361—*Suit against a firm—Addition of the names of partners constituting the firm—Practive and procedure—Jurisdiction of the Court to entertain suit—Letters Patent, cl. 12.* Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court : it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length. SHAW WALLACE & CO. *v.* GORDHANDAS (1905) **I. L. R. 30 Bom. 364**

——— Rule 540—*Petition—Taxing Master—Solicitors' retainer denied—Taxation of costs.* An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill. *In re Jones (1887), 36 Ch. D. 105,* followed. *In re* MADHAVJI (1908) . **I. L. R. 33 Bom. 667**

——— Rule 544—*Bill of costs—Order for taxation—Business not transacted in Court—Practice.* Rule 544 of the Rules of the High Court does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court, unless such order be by consent, and the Court has not any inherent power on which the jurisdiction can be vested. *Sayers* v. *Walond, 1 Sim & St. 97,* followed. BAI DOSSIBAI *v.* CRAWFORD, BROWN & CO. (1908) . . . **I. L. R. 32 Bom. 428**

——— Rule 577—*Costs—Taxing Master's decision on a question of costs—Review by the Chambers Judge—Third Counsel's costs in a defended long cause—Practice as to retaining of Counsel and their costs—Costs of a third Counsel*

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HIGH COURT RULES (ORIGINAL SIDE)—*contd.*

Rule 577—*concld.*

engaged to ask for transfer of case from one Judge to another—Practice. As a general rule the Judge in Chambers will not, on a review of taxation, interfere with items of taxation, which are entirely within the Taxing Master's discretion or go into details of such discretionary items ; but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances. Where two counsel are already briefed in a case, and a third is instructed to make an application to transfer the case from one Judge to another, and the order making the transfer makes no provision as to costs, the costs should on taxation be refused between party and party, though they may be allowed between attorney and client. A party to a defended long cause is entitled to appear by two counsel. If both counsel attend throughout the hearing and the other party is ordered to pay costs of the suit, their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one counsel only throughout, the full refreshers of the conducting counsel and a nominal refresher of 2 G. Ms. of the other counsel would be properly allowable against the opponent, if ordered to pay costs. If the absent counsel attends for portion of the time the case is at hearing, his refresher, proportionate to the time he attends, would also be properly allowable, in addition to the full refresher allowed to the counsel, who attends and conducts the case. Where a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If both Counsel find that they would, owing to other engagements, be unable to go in and conduct the case, when it is called on, it is obviously the duty of one of them to return the brief. If three counsel are engaged *before* the hearing, it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which counsel's fees should go between attorney and client. A solicitor engaging three counsel is entitled to have his third counsel's costs taxed between attorney and client, if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safeguard his client's interests. If a third counsel is added after the hearing of the suit has commenced, such addition must be at the cost of the party doing so. BANOO BEGUM *v.* MIR AUN ALI (1907)
I. L. R. 32 Bom. 262

Rule 859—*Limitation Act (XV of 1877), Art. 178—Application for enforcement of payment of costs by a solicitor against his client is not an application under the Civil Procedure Code*

HIGH COURT RULES (ORIGINAL SIDE)—*concld.*

Rule 859—*concld.*

—Art. 178 applies only to applications under the Civil Procedure Code (Act XIV of 1882). There is no period of limitation provided for an application by an attorney for payment of his costs under Rule 859 of the High Court Rules. Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code. *Bai Manekbai* v. *Manekji Kavasji, I. L. R. 7 Bom. 213,* followed. WADIA, GANDHY & CO. *v.* PURSHOTAM (1907)
I. L. R. 32 Bom. 1

HIGH COURT RULES (APPELLATE SIDE).

Rules 17, 18 and 25—*Civil Procedure Code (Act XIV of 1882), s. 652—Limitation Act (XV of 1877), s. 12—Presentation of memoranda of appeals, applications and appeals in execution proceedings—Accompaniments extraneous.* The accompaniments directed under Rule 25 of the Bombay High Court Rules are extraneous to the memoranda of appeals, applications and appeals in execution and the rule expressly does not fix any time at which the documents mentioned in clauses (2) and (3) are to accompany the memoranda, etc. An appeal, etc., if presented in time, is validly presented for the purposes of the Limitation Act (XV of 1877), if it is accompanied by the copies required by the Civil Procedure Code (Act XIV of 1882). *Per* CHANDAVARKAR, *J.*—No rule of the High Court can add to or modify the conditions and limitations laid down in the Limitation Act (XV of 1877). It is true that the Court has the power of making certain rules given by s. 652 of the Civil Procedure Code (Act XIV of 1882) and those rules must be "consistent with" the Code. But there is no power to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication in the Limitation Act (XV of 1877). CHUNILAL JETHABHAI *v.* DAHYABHAI AMULAKH (1907)
I. L. R. 32 Bom. 14

Rule 25—

See LEGAL PRACTITIONERS' ACT, s. 7.
13 C. W. N. 415

Part II, Ch. IV, Rule XX—

See PRIVY COUNCIL APPEAL.
I. L. R. 36 Calc. 653

Rule 515 A—

See MORTGAGE . **13 C. W. N. 787**

HIGH COURTS' CHARTER ACT (24 & 25 VICT., c. 104).

ss. 1, 9, 13, 14—

See BARRISTERS . **13 C. W. N. 605**

s. 11—

See WARRANT OF ARREST—CIVIL CASES.
I. L. R. 26 Mad. 120

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HIGH COURTS' CHARTER ACT (24 & 28 VICT., c. 104)—*concld.*

——— s. 15—

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—LIKELIHOOD OF BREACH OF THE PEACE **I. L. R. 28 Calc. 416**

See SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, S. 15.

——— *Civil Procedure Code (Act XIV of 1882), ss. 386, 622—High Court can interfere under s. 15 of the Charter Act, when the lower Court issues a commission to examine a witness on grounds other than those mentioned in the Code.* An order under s. 386 of the Code of Civil Procedure for the examination of a witness on commission can only be made on one of the grounds mentioned in the Code, and a Court usurps a jurisdiction not vested in it by law, when it orders such examination in the absence of any such ground. The High Court has power to interfere with such an order under s. 15 of the Charter Act. *Obiter:* The High Court may also interfere with such an order under s. 622 of the Code of Civil Procedure, although the order is only interlocutory. SOMASUNDARAM CHETTIAR *v.* MANICKA VASAKA DESIKA GNANA SAMMANDA PANDARA SANNIDI (1907) **I. L. R. 31 Mad. 60**

HIGH COURTS' PROCEDURE ACT, 1875 (CRIMINAL).

See CRIMINAL PROCEDURE CODE, SS. 266-336.

——— s. 147—

See TRANSFER OF CRIMINAL CASE—GENERAL CASES.

HIGHWAY.

See PORT COMMISSIONERS ACT (BENGAL ACT V OF 1870), SS. 5, 6, 31, 38, 39. **I. L. R. 33 Calc. 1243**

HILLY LAND.

See POSSESSION, SUIT FOR. **12 C. W. N. 273**

HINDU FAMILY.

See HINDU LAW **I. L. R. 33 Calc. 507**

HINDU LAW.

SEE ADVOCATE . **I. L. R. 33 Calc. 151**

See CHAMPERTY AND MAINTENANCE. **I. L. R. 31 Calc. 433**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 266 . **I. L. R. 31 Mad. 500**

See CONTRACT ACT (IX OF 1872), S. 23. **I. L. R. 27 All. 361**
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HINDU LAW—*contd.*

See CONVERTS . . **1 W. R. P. C. 1**
9 Moo. I. A. 195
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2 Agra 61
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See CUTCHI MEMONS.

See DEBUTTUR . **13 C. W. N. 805**

See EVIDENCE . **I. L. R. 31 All. 116**

See EVIDENCE ACT (I OF 1872), S. 90. **I. L. R. 33 Calc. 571**

See GRANT, PARTITION, WILL. **8 C. W. N. 105**
9 C. W. N. 1009

See KHOJA MAHOMEDANS. **I. L. R. 29 Bom. 85**

See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE, AND COMPENSATION FOR IMPROVEMENTS, ETC., ON LAND . . **I. L. R. 10 Mad. 112**

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 119 . **I. L. R. 32 Bom. 7**

See MAJORITY, AGE OF. **I. L. R. 1 Calc. 108**
10 B. L. R. 231

See OUDH LAND REVENUE ACT, 1876, S. 74 . . **I. L. R. 31 All. 73**

See OWNERSHIP, PRESUMPTION OF. **I. L. R. 9 Mad. 175**

See PRACTICE . **I. L. R. 30 Bom. 477**

See PROBATE AND ADMINISTRATION ACT, S. 50 . . . **10 C. W. N. 955**

See SALSETTE LAW, APPLICABLE IN. **I. L. R. 19 Bom. 680**

See SPECIFIC RELIEF ACT, 1877, S. 42. **8 C. W. N. 465**
L. R. 31 I. A. 67

See STRIDHAN . **I. L. R. 30 Bom. 229**

See SUCCESSION ACT, SS. 111, 116, 117. **10 C. W. N. 695**

See SUCCESSION CERTIFICATE ACT, 1889, S. 1, CL. (4) . **I. L. R. 31 All. 236**

See TRANSFER OF PROPERTY ACT, S. 6. **I. L. R. 31 All. 53**

See TRUSTEES ACT, S. 3 . **9 C. W. N. 79**

See VENDOR AND PURCHASER. **I. L. R. 12 Bom. 33**
I. L. R. 27 All. 271

See VENDOR AND PURCHASER—POSSESSION.

See WAJIB-UL-ARZ . **10 C. W. N. 730**

See WILL . **9 C. W. N. 309, 749, 784**

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HINDU LAW—*concld.*

——— **father's right in property acquired by son—**

See HINDU LAW **I. L. R. 33 Calc. 1119**

——— **house built with money furnished by son—**

See HINDU LAW . **13 C. W. N. 396**

——— **interpretation of—**

See OUDH ESTATES ACT (I OF 1869). **5 C. W. N. 602**

——— **reversion of infant to Hinduism.**

See HINDU LAW—ADOPTION—EVIDENCE OF ADOPTION **I. L. R. 30 Calc. 999**

1. ——— Sources of Hindu Law. The sources of Hindu law described and their comparative authority discussed. The various schools of Hindu Law, and their divisions and sub-divisions, enumerated and classified. GANGA SAHAI *v.* LEKHRAJ SINGH . . **I. L. R. 9 All. 253**

2. ——— Usage as a source of law. The judgment in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy, 12 Moo. I. A. 397,* gives no countenance to the conclusion that in order to bring a case under any rule of law, laid down by recognized authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. BHAGWAN SINGH *v.* BHAGWAN SINGH . . . . **I. L. R. 21 All. 412**
L. R. 26 I. A. 153
3 C. W. N. 454

HINDU LAW—ADMINISTRATION.

——— *Administrator pendente lite, liability of, to pay debt of deceased—Quasi-executor de son tort.* Under the Hindu law, as in English law, any one taking charge of property belonging to a deceased person renders himself liable for his debts. So an administrator *pendente lite,* who intermeddles with the estate of a deceased person, after he ceases to be administrator, can be sued as a *quasi-executor de son tort. Jogendernarain Deb Roykut* v. *Emily Temple, 2 Ind. Jur. (N. S.) 234,* and *Magaluri Garudiah* v. *Narayana Rangiah, I. L. R. 3 Mad. 359,* followed. KHITISH CHANDRA ACHARJYA CHOWDHRY *v.* RADHIKA MOHAN ROY (1907) . . . . **I. L. R. 35 Calc. 276**
12 C. W. N. 237

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3 Agra 103A
11 Bom. 190, 192, note
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See HINDU LAW—CUSTOM—ADOPTION.

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ADOPTION.

See LIMITATION ACT, 1877, SCH. II—

ART. 118; . **I. L. R. 25 Bom. 26**
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ART. 119; . **I. L. R. 24 All. 195**
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See ONUS OF PROOF—HINDU LAW—ADOPTION.

——— **effect of adoption—**

See HINDU LAW—WIDOW—POWER OF DISPOSITION ON ALIENATION. **I. L. R. 26 Mad. 143**

1. AUTHORITIES ON LAW OF ADOPTION.

1. ——— Authorities on Hindu Law— *Dattaka Mimansa—Kalika Purana.* In dealing with questions of the Hindu law of adoption, it is unsafe to resort to analogical arguments derived from the *arrogatio* or the *adoptio* of the Roman civil

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HINDU LAW—ADOPTION—*contd.*

1. AUTHORITIES ON LAW OF ADOPTION—*concld.*

law, and where it is necessary to recur to first principles, they should be sought for in the approved authorities of the Hindu law itself, and not in foreign systems of law. *Collector of Musulipatam* v. *Cavaly Vencata Narrainapah, 8 Moo. I. A. 529; Bhyah Ram Singh* v. *Bhyah Ugur Singh, 13 Moo. I. A. 373;* and *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar, 14 Moo. I. A. 570,* referred to. The dictum of the Lords of the Privy Council in *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy, 12 Moo. I. A. 397,* that the duty of European Judges administering the Hindu law is not so much to inquire whether a disputed doctrine is deducible from the earliest authorities as to ascertain whether it has been received by the particular school governing the district concerned, and has there been sanctioned, by usage, does not prohibit the Court from considering the question of fact whether a particular passage of the Kalika Purana upon which an argument in the Dattaka Mimansa is based is authentic by reference to other authoritative works of Hindu law. In that case no inflexible rule was laid down assigning supreme and infallible authority to the Dattaka Mimansa in questions connected with the law of adoption as followed by the Benares school of Hindu law. The authenticity of the text of the Kalika Purana, which lays down that a child must not be adopted whose age exceeds five years, is extremely doubtful. The interpretation given to that text in the Dattaka Mimansa was not necessarily intended to be universally applicable, and admits of a construction which would confine the application of the text to Brahmans intended for the priesthood; and various other equally plausible interpretations have been adopted by other authorities. This being so, it would be unsafe to act upon the text in question and upon the interpretation placed upon it in the Dattaka Mimansa so as to set aside an adoption which took place many years ago, which had ever since been recognized as valid, and under which the adoptee had ever since been in possession of his adoptive father's estate upon the single ground that at the time of the adoption the adopted son was more than five years of age. According to the Kalika Purana as interpreted by the Dattaka Mimansa of Nanda Pandita, an adoption in the Dattaka form is wholly null and void if made after the adoptee has completed the fifth year of his age. It is a mistake to hold that, according to the Dattaka Mimansa, so long as an adoption takes place while the adoptee is under six years of age, it is valid. The mistake arises from supposing that the word "panchvarshiya" used in paragraphs 48 and 53 of the Dattaka Mimansa necessarily indicates that the person referred to has passed the fifth anniversary of his birth. It indicates, on the contrary, that he is in his fifth year. *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer, 1 N. W. 103a,* dissented from. GANGA SAHAI *v.* LEKHRAJ SINGH

I. L. R. 9 All. 253

HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION.

(*a*) SANCTION.

1. ——— Gift and acceptance—*Valid adoption.* To constitute a valid adoption, there must be a gift and an acceptance. COLLECTOR OF SURAT *v.* DHIRSHINGJI VAGHBAJI . **10 Bom. 235**

See KENCHAWA *v.* NINGAPA **10 Bom. 265 note**

2. — — Sanction of ruling power—*Adoption otherwise valid—Consent of ruling power—Succession to service watan.* A formal adoption is not invalid because it has not received the sanction of the ruling power, and (where the ruling power does not interfere) an adoption without such sanction entitles the adopted son to succeed to property of the nature of a service *watan.* RAMCHANDRA VASUDEV *v.* NANAJI TIMAJI **7 Bom. A. C. 26**

3. ——— Sanction of Government—*Adoption by kulkarni—Act XI of 1843—Bom. Act III of 1874, ss. 33, 34 and 35.* The sanction of Government to an adoption by a kulkarni or his widow, or by a co-parcener in a kulkarniship or his widow, is not necessary to give it validity nor has Government any right to prohibit or otherwise intervene in such an adoption. NARHAR GOVIND KULKARNI *v.* NARAYAN VITHAL **I. L. R. 1 Bom. 607**

4. ——— Registration—*Requisite for valid adoption.* According to Hindu law, neither registration of the act of adoption nor any written evidence of that law having been completed is essential to its validity. SUTROOGUN SUTPUTTY *v.* SABITRA DYE . . **5 W. R. P. C. 109**

5. ——— ——— *Adoption by the widow of a Hindu who predeceased his father—Presence of the widowed mother-in-law at the ceremony of adoption—Acquiescence.* The widow of a Hindu, who predeceased his father, made an adoption. At the ceremony of adoption the widowed mother-in-law of the widow was present. A question having arisen as to whether the presence of the widowed mother-in-law was equivalent to consent on her part to the adoption. *Held,* that mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent had been given, bearing in mind that the consent required is a matter not of form, but of substance. BHIMAPPA *v.* BASAWA (1905) **I. L. R. 29 Bom. 400**

(*b*) AUTHORITY.

6. — ——— Adoption made without authority—*Invalid adoption.* There can be no gift in adoption where there is an absence of authority, the attempt to give being a mere nullity. There is nothing in such an attempted trans-

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(*b*) AUTHORITY—*contd.*

action to set aside; it should simply be declared null and void *ab initio*. LAKSHMAPPA *v.* RAMAVA **12 Bom. 364**

7. ——— Verbal authority—Mode of giving authority. According to Hindu law, a power to adopt may be given verbally. SOONDER KOOMAREE DEBEA *v.* GUDADHUR PERSHAD TEWAREE **4 W. R. P. C. 116 : 7 Moo. I. A. 54**

8. ——— *Absence of prohibition—Presumption—Permission to adopt. Held,* that the doctrine of Hindu law that a "permission is to be presumed in the absence of prohibition" (Dattaka Chandrika, s. 1, verse 32) relates to a giver, and not to a receiver, in adoption. TARINI CHURN CHOWDHRY *v.* SARODA SUNDARI DASI **3 B. L. R. A. C. 145 : 11 W. R. 468**

9. ——— Necessity of express authority of deceased husband—*Maxim, "quod fieri non debuit, factum valet"—Law in Benares—Mitakshara law. Held,* by the Full Bench that, according to the Benares school of Hindu law, a Hindu widow cannot make a valid adoption to her deceased husband without his express authority; that an adoption actually made by her without such express authority is illegal and void; and that the maxim, "*quod fieri non debuit, factum valet*" is inapplicable to such an adoption. TULSHI RAM *v.* BEHARI LAL . . . **I. L. R. 12 All. 328**

10. ——— Adoption by widow without special authority. *Semble:* A Hindu widow can give her son in adoption without special authority from her husband. GURULINGASWAMI *v.* RAMALAKSHMAMMA . . **I. L. R. 18 Mad. 53**

11. ——— Adoption by widow—*Adoption by daughter-in-law—Authority of father-in-law.* Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law. GOPAL BALKRISHNA KENJALE *v.* VISHNU RAGHUNATH KENJALE . **I. L. R. 23 Bom. 250**

12. ——— Widow's capacity to adopt—*Implied prohibition—Adoption by senior widow.* In the absence of express prohibition, the husband's consent to an adoption by his widow is always to be implied. The question of implied prohibition is one of legal inference from the facts found, and it is open to the Court to inquire into its correctness in second appeal. *Semble:* In the Bombay Presidency the widow's right to adopt is inherent, and not merely delegated. *Semble:* In the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband. LAKSHMIBAI *v.* SARASVATIBAI . **I. L. R. 23 Bom. 789**

HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(*b*) AUTHORITY—*contd.*

13. ——— Power to adopt—*Presumption of authority—Proof of power to adopt—Adoption on contingency.* Circumstances under which a Court will require strict proof of power to adopt, and under which it will assume the power to have been given. The acquiescence of parties interested in opposing an adoption is not *primâ facie* evidence of its validity. The precise contingency contemplated by the donor of the power must happen to make an adoption valid. MOHINDROLALL MOOKERJEE *v.* ROOKINEY DEBEE . . . . **Cor. 42**

14. ——— Presumption from acquiescence—*Consent to adoption.* Where an adoption had been acquiesced in for a period of thirty-three years, it was presumed that the necessary consent of some person competent to give away the adopted son had been obtained. ANANDRAV SIVAJI *v.* GANESH ESHVANT BOKIL . . **7 Bom. Ap. 33**

15. ——— *Proof of authority to adopt—Ceremonies—Presumption.* The Court, when it is satisfied that permission to adopt exists, will exact slight proof of the performance of ceremonies; but it cannot conversely, from the observance of ritual forms, infer that the husband's authority, which is essential in cases of adoption by a Hindu widow, has been really obtained. RADHAMADHUB GOSSAIN *v.* RADHABULLUB GOSSAIN **2 Ind. Jur. O. S. 5 : 1 Hay 311**

16. ——— *Presumption of—consent—Acts of adoptive mother.* When a Hindu lady adopted a son in the lifetime of her husband, the fact that she carried on a law-suit during his lifetime, calling herself his wife and the mother of the adopted son, and that neither the husband nor any one else denied the adoption, would be strong corroborative evidence that the adoption was made not only with the husband's consent, but that the ceremonies usual on the occasion of an adoption were done in his actual presence. TINCOWRIE CHATTERJI *v.* DENONATH BANERJEE **W. R. 1864, 155**

17. ——— Proof of authority to adopt—*Adoption by widow to deceased husband, proof of.* In an adoption made by a Hindu widow, under authority conferred upon her for that purpose by her husband, the authority must be strictly proved, and as the adoption is for the husband's benefit, the child must be adopted to him, and not to the widow alone. An adoption by the widow alone would not, for purposes of Hindu law, give the adopted child, even after her death, any right to property inherited by her from her husband. *Held,* in the present case, that the evidence did not support the contention that the adopted son of the widow had been adopted to the husband. CHOWDHRY PADAM SINGH *v.* KOER UDAYA SINGH . **2 B. L. R. P. C. 101**
12 W. R. P. C. 1
12 Moo. I. A. 350

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(*b*) AUTHORITY—*contd.*

18. ——— *Reference to deed in subsequent deed.* When a subsequent deed of permission to adopt was proved, a distinct reference made in it to a former deed of the same character which corresponded in every particular with the description of it given in the subsequent instrument was, in the absence of proof of the existence of any other document or of anything calculated to throw doubt on the former instrument, *held* sufficient to establish its identity. KISHE SUNKUR DUTT *v.* MOHA MYA DOSSEE . . **W. R. 1864, 210**

19. ——— *Evidence of adoption and power to adopt.* A writing under the hand of a deceased husband declaring that he gave his wife power to adopt, though not complete as a testamentary disposition, may yet be evidence of a declaration of fact. BROJOKISHOREE DASSEE *v.* SREENATH BOSE . . . . **9 W. R. 463**

20. ——— *Evidence of authority to adopt.* Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given was maintained. AMMI DEVI *v.* VIKRAMA DEVU
I. L. R. 11 Mad. 486
L. R. 15 I. A. 176

21. ——— **Power to adopt**—*Validity of power to widow and executors to adopt—Exercise of such power by widow with consent of the surviving executor.* A testator by his will authorized and empowered his wife to adopt a son in the following words: "I hereby authorize and empower my wife and executrix, and my executors and trustees, to whom I give full permission and liberty, to adopt after my decease a son, and in case of his death during his minority or on attaining his full age, and without leaving male issue, to adopt a second son, and in case of his death during minority or on attaining such age, and without leaving male issue, to adopt a third son, and no more, etc." *Held*, that the power of adoption was valid. The testator associated the other executors with his wife for the purpose of insuring a wise exercise of her discretion in the selection of a son for adoption, and not with the intention of making it an essential condition of adoption that they should take a part in the ceremony of adoption from which, under the Hindu law, they were precluded. *Held*, also, that the power was given to the executors *qua* executors, and therefore survived to the holders for the time being of the office of executors; the death of one of them before the power was exercised did not therefore render the power void. The power was validly exercised by the wife adopting with the consent of the surviving executor. The mere fact of the surviving executor not having actually and physically taken in adoption was not a failure to comply with the terms of the power. AMRITO LALL DUTT *v.* SURNOMOYE DASSEE
I. L. R. 24 Calc. 589
1 C. W. N. 345

Held, on appeal, that such power was bad. Under Hindu law, power to adopt can be given to a widow only, and she has no capacity to adopt save under the express permission of her husband given in his lifetime. AMRITO LAL DUTT *v.* SURNOMONI DASI
I. L. R. 25 Calc. 662
2 C. W. N. 389

Held by the Privy Council:—That no one except the widow, authorized for the purpose by her husband, can adopt a son to him after his decease is a principle in the Hindu law of adoption. The power is exerciseable by the widow alone, though restriction may be placed upon her choice of a boy by the husband's having made it a condition that persons named by him should concur in the choice. *Held*, therefore, that by this will no valid authority to adopt was given to the widow. The conjecture that the testator really meant to give authority to the widow to adopt, restricting her power merely to the extent that there should be others, his executors, who were to consent to the choice of a boy to be adopted by her, could not be accepted as a legitimate construction of the will. The authority was expressed in clear terms to be to the three. It would also be beyond the range of judicial interpretation to construe the will as meaning that the testator only intended to provide for the appointment of a male successor to him in the property. AMRITO LAL DUTT *v.* SURNOMOYE DASI
I. L. R. 27 Calc. 996
L. R. 27 I. A. 128
4 C. W. N. 549

22. ——— **Specifying a child for adoption who dies or is refused**—*Continuation of authority to adopt another person.* Where a husband authorizing an adoption specifies the child he wishes to be taken, but that child dies or is refused by his parents, the authority given warrants (at least in Bombay) the adoption of another child. The presumption is that the husband desired an adoption, and by specifying the object merely indicated a preference. LAKSHMIBAI *v.* RAJAJI
I. L. R. 22 Bom. 996

23. ——— **Termination of authority to adopt.** The authority of a widow to adopt is at an end when the estate, after being vested in her son, has passed to the son's widow. AMAVA *v.* MAHADGAUDA . . . **I. L. R. 22 Bom. 416**

24. ——— **Consent of sapinda**—*Adoption by widow—Consent of sapinda—Exercise of discretion—Effect of representation by widow that her husband had given authority, when none had in fact been given—Effect of asking consent of one of two sa-*

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(*b*) AUTHORITY—*contd.*

pindas of equal degree. Where a widow obtains the assent of a *sapinda* to an adoption, by representing that her late husband had authorized it, when in fact he had not, such assent is inefficacious in law. The assent of a *sapinda* to an adoption to be made by the widow of a deceased kinsman should be given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow who has not received her husband's authority to make the adoption. A widow whose late husband had died, without giving her authority to adopt a son, applied for such authority to one of two *sapindas* of equal degree, who were divided as between themselves, and who were both divided from the deceased. The *sapinda* (who was the senior) gave his assent to the adoption. The other was not asked. On a suit being brought for a declaration that the adoption was invalid, it was argued that, though the assent of the other *sapinda* had not been asked for at or about the time of the adoption, it must be taken that his assent had been applied for and refused, inasmuch as the circumstances and the attitude he had assumed showed that he would have refused to give it. *Held*, that the adoption was invalid. If it was the widow's duty to seek the assent of both *sapindas*, she could not be regarded as having discharged her duty, because, in her opinion, such an application would have been made in vain. The object of enjoining a widow to seek and act under the guidance of her husband's *sapindas* would be defeated if she should omit to give an opportunity to the *sapindas* concerned to advise her against making an adoption or against adopting a particular boy. If such an assent had been applied for and had been refused, and the adoption had then been made on the assent of one *sapinda*, the Court would have been in a position to decide whether consent had been withheld properly or improperly and capriciously. But it was clear that in this case the widow had been determined to ignore the other *sapinda*, and not to care for his advice or even to give him an opportunity to advise her. There is nothing improper in a *sapinda* proposing to give his assent to a widow adopting his own son, if such son be the nearest *sapinda*, and refusing to give his assent to her adopting stranger or a distant *sapinda*, if there be no reasonable objection to the adoption of his own son. In the case of an undivided family, it may be that the assent of the senior *sapinda*, having the status of managing member, will be equivalent to the assent of the family, and will be sufficient. But this consideration has no application to cases where the assent has to be sought from divided kinsmen, especially when they are divided as between themselves. SUBRAHMANYAM *v.* VENKAMMA (1903)

I. L. R. 26 Mad. 627

25. ——————— *Authority of husband to his wife to adopt—Adoption in pursuance of it—Death of son so adopted—Subsequent adoption by widow with assent of some sapindas—Validity.* A husband authorized his wife to adopt a son and died. The widow adopted a son in pursuance of that authority, but the son also died. The widow adopted a second time. Both adoptions were made with the assent of some *sapindas*; but the assent to the second adoption was of questionable validity. *Held*, that the husband's authority was not exhausted by the first adoption, and held good for the second adoption also, which was valid for that reason, independently of the assent of the *sapindas*. *Semble:* that where some *sapindas* signed a document assenting to an adoption by a widow of "any boy at any time," which was not acted on for nine years, during which period circumstances materially changed, the assent so given would not be valid. SURYANARAYANA *v.* VENKATARAMANA (1903) . . **I. L. R. 26 Mad. 681**

26. ——————— **Convert**—*Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption.* A Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism. *Quære:* Whether this holds good in the case of Brahmans, among whom the *datta-homa* ceremony is necessary. Plaintiff, a Rajput, whose natural mother was dead, and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle, to whom the natural father had given necessary authority: *Held*, that the addition was valid. SHAM-SING *v.* SANTABAI (1901)

I. L. R. 25 Bom. 551

27. ——————— **Widow**—*Power of widow to give a son in adoption—Authority to give in adoption.* According to Hindu law, a widow, even in the absence of any authority from her deceased husband, is competent to give one of her sons in adoption. *Sri Balusu Gurulingaswami* v. *Sri Balusu Rama Lakshmamma, I. L. R. 22 Mad. 398; Mhalsabai* v. *Vithoba Khandappa Gulve, 7 Bom. H. C. Appx. 26; Hurosoondree Dossee v. Chundermoney Dossee (1863), Sev. Rep. 938* and *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi, 3 B. L. R. (A. C.) 145*, referred to. *Rangubai* v. *Bhagirthibai, I. L. R. 2 Bom. 377*, distinguished. JOGESH CHANDRA BANERJEE *v.* NRITYAKALI DEBI (1903)

I. L. R. 30 Calc. 965
s.c. 7 C. W. N. 871

28. ——————— *Authority to adopt—Power of Hindu widow acting on authority from her husband—Evidence as to giving authority and carrying out its directions.* All the schools of Hindu law recognise the right of the widow to adopt a son to her husband with his assent, which may be given either orally or in writing, and when given must be strictly pursued. The widow cannot be compelled to act upon such authority, unless and until she chooses to do so;

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(*b*) AUTHORITY—*contd.*

and in the absence of express direction to the contrary there is no limit to the time within which she may exercise the power conferred upon her. In this case it was *held* on the evidence that the authority to adopt a son had been given, and its directions had been strictly pursued, the judgment of the High Court being affirmed. MUTASADDI LAL *v.* KUNDAN LAL (1905) . **I. L. R. 28 All. 377**
s.c. L. R. 33 I. A. 55

29. ———— *Adoption—Consent of sapindas obtained by false representation. Held,* that a widow, who fails to prove her husband's authority to adopt, cannot support its validity by consent given by her husband's *sapindas* on her representation that by so doing they were ratifying the husband's authority. JONNALAGADDA VENKAMMA *v.* JONNALAGADDA SUBRAHMANIAM (1905) . **L. R. 34 I. A. 22**
s.c. I. L. R. 30 Mad. 50

30. ———— **Authority given jointly to two widows to adopt**—*Character of descendibility not affected by forfeiture and regrant to heirs—Adoption—Authority given jointly to two widows to adopt valid and can be exercised by one after the death of the other—Adoption made under coercion only voidable—Adoption does not divest an adopted son of joint property of which he had become sole and absolute owner.* The question whether an estate is subject to the ordinary Hindu law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga, L. R. 17 I. A. 134 at p. 144,* referred to and followed. Where an estate acquired by sale or forfeiture by Government is regranted to the heirs of the former owner without expressing any intention to interfere with the quality of the estate in regard to its descendibility, such regrant does not affect that quality of the estate, although it would be self-acquired property in the hands of the grantee and would devolve as such: *Held,* on the evidence and the previous history of the Nidadavole estate, that such estate was partible according to the ordinary Hindu law applicable to co-parcenary property. An authority to adopt given to two widows jointly is not invalid and may be exercised by one after the death of the other. An adoption made under coercion is not void, but voidable and will be valid, if ratified subsequently, if no one's interest is prejudicially affected by such ratification before it is made. The adoption into another family of the only surviving member of a joint family, in whom the family estate has vested solely and absolutely, does not, in law, operate to divest him of his rights in such estate. VENKATA NARASIMHA APPA ROW *v.* RANGAYYA APPA ROW AND OTHERS (1905) . . . **I. L. R. 29 Mad. 437**

31. ———— **Adoption after birth of posthumous son to sole surviving co-parcener**—*Adoption by widow with authority of husband—Joint family—Mitakshara law—Gift to daughter out of joint property—Gift out of income—Right to partition.* Two brothers formed a joint family governed by the Mitakshara law as in force in Bombay and were possessed of considerable ancestral property. One of them died on 14th September 1900 without male issue but leaving his widow pregnant. The other brother died on 17th December 1900 leaving a will, dated 30th November, by which he purported to make certain dispositions of the family property and also authorized his widow to adopt a son with the consent of persons specifically mentioned in the will: "such adoption to be made even though a son is born to my brother's widow." On 18th December his brother's widow gave birth to a son, the plaintiff. On 17th February 1901, the testator's widow adopted a son to her husband with the consents directed in the will. It was contended that on the face of the will the adoption was illegal and void because the power to adopt was part of a plan for the disposition of the family property which was in contravention of the law, and the power was dependent on that plan having effect. *Held,* on the construction of the will, that the dispositions made were within the testator's competence at the date of the will and at the date of his death; they were only liable to be defeated in one event (which in fact happened), namely, his brother's widow giving birth to a son, and the will expressly said that, in that case, the adoption should still be made. It was also contended that at the time the adoption took place the family property had become vested absolutely and exclusively in the plaintiff and that the adoption could not divest it. *Held,* that the adoption being made with the authority of the husband was valid, and under the circumstances the plaintiff took the property subject to the adoption, and the adopted son became on his adoption a co-parcener with the plaintiff in the family property. *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishore Datta Deo, L. R. 3 I. A. 154,* followed. *Held,* also, that a sum of R20,000 given to his daughter, one of the defendants, by the testator and transferred to her in his lifetime, was a valid gift and justified by the circumstances of the case and as being made not out of capital but out of income. *Held,* further, that partition of the property which was asked for in case the plaintiff had no exclusive right to it was rightly refused by the Courts in India. BACHOO *v.* MANKOREBAI (1907)
I. L. R. 31 Bom. 373 : L. R. 34 I. A. 107

32. ———— **Adoption with consent of sapindas**—*Assent given on the strength of representation by widow that she had her husband's authority to adopt—Such authority found on evidence not to have been proved—Omission to ask consent of one of two of husband's nearest kinsmen, effect of.* The first appellant was the widow of a deceased Brahman who was separate in estate from

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(*b*) AUTHORITY—*concld.*

his kinsmen, two of whom were the respondents who were brothers of the deceased and also divided between themselves. The widow, representing that she had the oral authority of her husband to adopt a son, obtained the assent of the second respondent, the elder of the two brothers, who executed a deed purporting to ratify the husband's authority, and this was signed also by some remoter kinsmen of the husband; and the widow thereupon purported to adopt the second appellant as a son to her husband. The first respondent was not asked for his consent, the widow alleging, as her reason for omitting to ask him, that she knew from his attitude towards the proposed adoption that he would refuse. In a suit brought by the first respondent to have the adoption declared void both the lower Courts found that there was not sufficient evidence to prove that the widow had any authority from her husband:—*Held*, by the Judicial Committee (upholding the judgment of the High Court), that the adoption was not made with the independent approval of the natural advisers of the widow, the assent of the kinsmen who were asked having been given not in the exercise of an independent judgment on the expediency of the proposed adoption, but as a ratification of the husband's authority which did not exist; and the appellants could not now set up such ratification as an independent ground of defence. Nor had the widow justified her omission to ask for the authority of the first respondent, one of the nearest kinsmen of her husband, and holding an important position in the family. To consult him was essential to her obtaining the mind of the kinsmen on the adoption, and her reason for not consulting him was one which she was not entitled to give. Her case, therefore, failed in the quality of the consents actually obtained, and the adoption was not valid. JONALAGADDA VENKAMMA *v.* JONALAGADDA SUBRAMANIAM (1906)
I. L. R. 30 Mad. 50; L. R. 34 I. A. 22

(*c*) CEREMONIES.

33. ——— **Ceremony of putrestee jag** —*Consent of person adopted—Superior castes.* The performance of the *putrestee jag* is essential to the validity of an adoption in the Dattaka form, at least among the three superior castes. The consent of the party adopted is essential to the validity of an adoption in the kritrima form. LUCHMUN LALL *v.* MOHUN LALL BHAYA GAYAL . **16 W. R. 179**

34. ——— **Ceremony of datta homam** —*Brahmans. Semble:* The ceremony of datta homam is among Brahmans an essential element in adoption. *Singamma* v. *Vinjamuri Venkatacharlu, 4 Mad. 165,* questioned. VENKATA *v.* SUBHADRA . . . **I. L. R. 7 Mad. 548**

HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd*

(*c*) CEREMONIES—*contd.*

35. ——— *Brahmans—Giving and receiving child.* In order to establish a valid adoption in a Brahman family, proof of the performance of the datta homam is not essential. The giving and receiving a boy who is capable of being adopted is sufficient to constitute a valid adoption according to Hindu law. SINGAMMA *v.* VINJAMURI VENKATACHARLU . **4 Mad. 165**

36. ——— *Dakhani Brahmans.* In the case of Dakhani Brahmans, the "datta homam" or any other religious ceremony is not required to give validity to the adoption of a brother's son: the giving and taking of the child is sufficient for that purpose. ATMARAM *v.* MADHO RAO . . . . **I. L. R. 6 All. 276**

37. ——— *Brahmans in Bombay—Adoption of brother's son.* Among Brahmans in the Presidency of Bombay the performance of the datta homam ceremony is not essential to the validity of the adoption of a brother's son. VALUBAI *v.* GOVIND KASHINATH
I. L. R. 24 Bom. 218

38. ——— *Place for performance of ceremony.* Although, according to the Dattaka Mimansa, the ceremony of *homa*, or burnt offering, is an essential part of adoption, it is not necessary that it should take place in the dwelling of the adopted. OOMRAO SINGH *v.* MAHTAB KOONWAR
3 Agra 103

39. ——— *Adoption by widow during pollution.* Dicta in *Shosinath Ghose* v. *Krishna Sunderi Dasi, I. L. R. 6 Calc. 381: L. R. 7 I. A. 250,* as to incidents of a formal adoption discussed. Observations on the necessity of datta homam in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent. RANGANAYAKAMMA *v.* ALWAR SETTI
I. L. R. 13 Mad. 214

40. ——— A Brahman took a boy in adoption, but died before the ceremony of datta homam was performed. This ceremony was performed after the death of the adoptive father by his widow. *Held*, that the adoption was valid. SUBBARAYAR *v.* SUBBAMMAL **I. L. R. 21 Mad. 497**

41. ——— *Validity of adoption without ceremonies among Brahmans. Quære:* Whether an adoption is valid among Brahmans without the performance of the essential religious ceremonies. RAVJI VINAYAKRAV JAGGANNATH SHANKARSETT *v.* LAKSHMIBAI
I. L. R. 11 Bom. 381

42. ——— *Adoption among Brahmans—Datta homam, when it may be dispensed with.* The ceremony of datta homam is not essential to a valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same gotra. *Singamma* v. *Ramanuja*

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(c) CEREMONIES—*contd.*

Charlu, 4 Mad. 165, approved and followed. *Shoshinath Ghose* v. *Krishnasundari Dasi, I. L. R. 6 Calc. 381,* considered. GOVINDAYYAR *v.* DORASAMI . . . . **I. L. R 11 Mad. 5**

43. ——— Upanayana, ceremony of— *Second birth—Age of adoptee.* As understood in the Hindu law, adoption is itself a "second birth" proceeding upon the fiction of law that the adoptee is "born again" into the adoptive family. The male issue being favoured existence of mainly for the sake of the parent's beatitude in the future life, adoption is a sacrament justified under certain conditions when the natural male offspring is wanting. It is effected by a substantial adherence to ceremonies, but principally by the acts of giving and taking. Having taken place, its effect is the affiliation of the adoptee as if he had been begotten by his adoptive father, thus removing him from his natural into his adoptive family. In this manner, he is "born again" into the adoptive family by the rites of initiation. According to Manu, in the case of the three "twice-born" classes the turning point of the "second birth," which means purification from the sin inherent in human nature, is represented by the ceremony of upanayana or investiture of the sacred thread hallowed by the gayatri, and until the performance of this ceremony, the person concerned, though born of twice-born parents, remains on the same level as a Sudra. The ceremony is, moreover, the beginning of his education in the duties of his tribe, as prescribed by Manu. According to the Hindu law, as observed by the Benares school, the ceremony of upanayana, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, is also the ultimate limit of time when a valid adoption in the dattaka form can take place. Adoption in that form implies that the second birth has taken place in the adoptive family; and it cannot be effected after the boy's place in his natural family has become irrevocably fixed by the upanayana representing his second birth therein. The age of the boy is material only as determining the term at which the upanayana may be performed. *Kerutnarain* v. *Bhoobunesree, 1 Sel. Rep. 161,* and *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain, S. D. A. Beng. (1859), 229,* referred to. *Dharma Dagu* v. *Ram Krishna Chimnaji, I. L. R. 10 Bom. 80,* dissented from. GANGA SAHAI *v.* LEKHRAJ SINGH **I. L. R. 9 All. 253**

44. ——— Ceremonies in case of Sudras—*Necessity for ceremony. Quære:* Whether religious ceremonies are necessary to make an adoption valid among Sudras. SRINARAIN MITTER *v.* KISHEN SOONDERY DASI . . **11 B. L. R. 171**
L. R. I. A. Sup. Vol. 149

S.C. NUGGENDRO CHUNDER MITTRO *v.* KISHEN SOONDURY DASSEE . . . **19 W. R. 133**

HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(c) CEREMONIES—*contd.*

45. ——— ——— *Necessity for ceremonies.* A Hindu Sudra adopted the plaintiff, his brother's son, in 1247 (1840), who, upon the death of his adoptive father, performed his sradh and obtained possession of all his property as such adopted son. The adoption had not been questioned except in 1256 (1849), when the defendant sued the plaintiff, who was then still a minor, through his guardian, and obtained possession from the plaintiff of certain of the property of the deceased, on the ground that the adoption was invalid. The plaintiff now, within twelve years of such dispossession, sued to recover possession stating that the decree in the former suit had been obtained by the defendant in collusion with the guardian. The defence was, that the adoption was invalid, the proper ceremonies not having been performed. The Court refused to entertain such defence. *Per* BAYLEY, *J.*—Ceremonies which are necessary to be observed for a valid adoption among Hindus of the superior classes are not necessary in the case of an adoption by a Sudra. In the case of adoption by a Sudra of a brother's son, mere giving and taking may be sufficient to make the adoption valid. NITTANUND GHOSE *v.* KRISHNA DOYAL GHOSE . . **7 B. L. R 1 : 15 W. R. 300**

46. ——— *Necessity of ceremonies.* Among Sudras in Bengal, no ceremonies in addition to the giving and taking of the child are necessary to constitute a valid adoption. BEHARI LAL MULLICK *v.* INDRAMANI CHOWDHRANI **13 B. L. R. F. B. 401 : 21 W. R. 285**

Affirmed on appeal in INDRAMANI CHOWDHRANI *v.* BEHARI LAL MULLICK **I. L. R. 5 Calc. 770 : 6 C. L. R. 183**
L. R. 7 I. A. 24

Overruling BHAIRUBNATH SYE *v.* MOHESH CHANDRA BHADURY **4 B. L. R. A. C. 162 : 13 W. R. 168**

47. ——— *Adoption by widow under pollution.* Among Sudras no religious ceremonies are essential to adoption, and consequently an adoption by a Sudra widow under pollution is not invalid. THANGATHANNI *v.* RAMU **I. L. R. 5 Mad. 358**

48. ——— *Ceremonies to complete adoption.* In a suit for confirmation of a right to adopt a son and to cancel deeds of agreement to give and recieve the defendant's son in adoption: *Held,* that to complete an adoption there must be an actual giving and receiving, and that the execution of the deeds was not sufficient. SRINARAIN MITTER *v.* KISHEN SOONDERY DASI **2 B. L. R. A. C. 279 : 11 W. R. 196**

In the same case on appeal to the Privy Council it was, however, *held* that the execution of the deeds, if they were deeds of gift and adoption, and not mere agreements to give and adopt, was sufficient, and that the fact that they were not interchanged

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(c) CEREMONIES—*contd.*

was not necessary or important. SREENARAIN MITTER *v.* KISHEN SOONDERY DASSEE
11 B. L. R. 171
L. R. I. A. Sup. Vol. 149

SIDDESSORY DASI *v.* DOORGA CHURN SETT
2 Ind. Jur. N. S. 22: Bourke O. C. 360

49. ——— *Execution of mutual deeds—Actual giving and taking of child.* Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted that such giving and taking can be completed by the execution of mutual deeds without more; but *semble* that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption. In this case it was found on the evidence that it was not the intention of the parties to complete the adoption by the mere execution of the deeds. SHOSHINATH GHOSE *v.* KRISHNASUNDERI DASI
I. L. R. 6 Calc. 381: 7 C. L. R. 313
L. R. 7 I. A. 250

50. ——— **Ceremonies in case of Kshatriyas**—*Necessity of religious ceremonies.* Among Kshatriyas in the Madras Presidency, adoption without religious ceremonies is valid. *Singamma* v. *Vinjamuri Venkatacharlu, 4 Mad. 165,* followed. CHANDRAMALA PATTI MAHADEVI *v.* MUKTAMALA PATTI MAHADEVI . . **I. L. R. 6 Mad. 20**

51. ——— **Necessity for performance of ceremonies**—*Construction of will—Gift. G,* a childless Hindu, by his will, directed as follows:—"And as I am desirous of adopting a son, I declare that I have adopted *K,* third son of my eldest brother. My wives shall perform the ceremonies according to the Shastras and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property, moveable and immoveable, in my own name or benami, left by me, also that adopted son. When he comes to maturity, the executors shall make over everything to him to his satisfaction." . . . . "God forbid, but should this adopted son die, and my younger brother Nilrutton have more than one son, then my wives shall adopt a son of his. If at that time Nilrutton has not a son eligible to adoption, they shall adopt another son of Saroda and the wives and executors shall perform all the aforementioned acts." In a suit by one of *G's* widows as heir of her husband to set aside his will and recover half his property, it appeared that the abovementioned ceremonies had been performed by one widow only. *Held,* that according to the true construction of the will (which was established by the evidence) there was a gift of his property by the testator to a designated person independently

HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*contd.*

(c) CEREMONIES—*contd.*

of the performance of the ceremonies. *Quære:* Whether the performance of the ceremonies was essential to the completeness of the adoption; and if so, whether one widow was effectually empowered to perform them. NIDHOOMONI DEBYA *v.* SARODA PERSHAD MOOKERJEE
L. R. 3 I. A. 253: 26 W. R. 91

52. ——— **Proof of performance of ceremonies**—*Evidence.* In a case to set aside an adoption on the ground that the ceremonies had not been performed, where there were satisfactory evidence showing that the adoption had been continuously recognized for a series of years, and that the party adopted had been in possession, either in person or through his guardian, of the property in dispute:—*Held,* that the Court might well dispense with formal proof of the performance of the ceremonies, unless it were distinctly proved, on the part of the plaintiff, that the ceremonies had not been performed. SABO BEWA *v.* NAHAGUN MAITI
2 B. L. R. Ap. 51: 11 W. R. 380

CHOWDHRY HEERASUTOOLLAH *v.* BROJO SOONDUR ROY . . . . **18 W. R. 77**

53. ——— *Authority to adopt.* The Court, when it is satisfied that permission to adopt existed, will exact slight proof of performance of ceremonies; but it cannot conversely, from the due observance of ritual forms, infer that the husband's authority has been really obtained RADHAMADHUB GOSSAIN *v.* RADHABULLUV GOSSAIN
1 Hay 311: 2 Ind. Jur. O. S. 5

54. ——— **Subsequent performance of ceremonies**—*Omission to perform ceremonies at adoption. Quære:* Whether, where the ceremonies of an adoption are not performed at the proper time, the omission can be subsequently supplied. INDROMANI CHOWDHRAIN *v.* BEHARILAL MULLICK
I. L. R. 5 Calc. 770: 6 C. L. R. 183
L. R. 7 I. A. 24

55. ——— *Portion of ceremonies performed by relation, not by widow.* Where a widow performs the principal part of the adoption ceremony,—namely, the gift and acceptance,—the fact that at her request the religious part of the ceremony is completed by a relation does not vitiate the adoption. LAKSHMIBAI *v.* RAMCHANDRA . . . **I. L. R. 22 Bom. 590**

56. ——— **Gift and acceptance**—*Ceremonies of adoption.* In the case of an adoption under the Hindu law, if there is evidence of gift and acceptance, and it is further shown that the adoptee has been recognized for a number of years and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremonies of adoption. VYAS CHIMANLAL *v.* VYAS RAMCHANDRA . **I. L. R. 24 Bom. 473**

57. ——— **Dwyamushyayana form**—*Adoption—Succession—Natural mother. Held,* that

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HINDU LAW—ADOPTION—*contd.*

2. REQUISITES FOR ADOPTION—*concld.*

(c) CEREMONIES—*concld.*

the natural mother of a Hindu adopted into another branch of his family by the nitya dwyamushyayana form of adoption does not, on account of such adoption, lose her right of succession to her son in the absence of nearer heirs. An adoption in the absolute dwyamushyayana form depends upon and has its efficacy in the stipulation entered into at the time of adoption between the natural father and the adoptive father and does not depend upon the performance of any initiatory ceremony by the natural father. BEHARI LAL *v.* SHIB LAL (1904) . . . **I. L. R. 26 All. 472**

58. ——— Gayawal priests—*Custom—Agreement between adoptive mother and adopted son, not depending upon the validity of the adoption—Revocation of agreement—Contract of service—Termination on notice—Employment of priest.* Plaintiff, the widow of a Gayawal priest, purported to adopt the defendant, a married man, twenty-four years of age, in accordance with an alleged custom by which it was said the childless widow of a Gayawal priest is allowed to make such an adoption in order that the adopted son may get his feet worshipped by the clientele of her family for her own immediate benefit and ultimately for the benefit of the adopted son who takes by inheritance her estate as well as the estate of her husband. The son so adopted was, it was further alleged, liable according to the said custom to be dismissed for misconduct. At the time of the adoption the plaintiff executed a deed which recited the fact of the adoption having been made pursuant to the above custom and specified the circumstances under which the adoption might be cancelled. The alleged custom not having been established: *Held*, that the adoption was not valid either as a *dattak* or a *kritima* adoption, the necessary rites and ceremonies not having been performed and the defendant having already been invested with the sacred thread, married and had a son at the time of adoption, that the transaction was essentially a contract to enable the plaintiff to keep up her connection, spiritual as well as worldly, with her husband's clientele and to enjoy the benefits resulting from such connection, and this contract did not depend for its validity upon the validity of the adoption and was consequently enforceable. That the contract was not determinable at the mere choice of the plaintiff. The contingencies which in the contemplation of the parties was to terminate the contract not having arisen, the plaintiff was not entitled to rescind the contract. *Llanelly* v. *L. and N.-W. Railway, L. R. 8 Ch. App. 942, 949,* and *St. Barnabas* v. *M. I. Electric Co., 40 L. R. A. 388,* referred to. The contract in this case was not a contract of service terminable on notice. *Semble:* The obligation to employ a specified priest is rather a matter of conscience than a juristic obligation enforceable in a Court of law. LACHMI DAI MOHUTAIN *v.* KISSEN LALL PAHARI MAHATON GAYA 1906) . . . . . **11 C. W. N. 147**

HINDU LAW—ADOPTION—*contd.*

3. WHO MAY OR MAY NOT ADOPT.

1. ——— Childless Hindu—*Obligation to adopt a son.* A childless Hindu is bound to adopt a son if at all anxious for his own salvation, and what is required to be done for that end is not optional with him, but an imperative obligation. RAJENDRO NARAIN LAHOREE *v.* SARODA SOONDUREE DEBIA **15 W. R. 548**

2. ——— Husband or widow after his death—*Modes of adopting.* An adoption may be made either by a man in his lifetime or by one of his wives after his death under a power conferred upon her for that purpose by her husband. HURRADHUN MOOKERJEE *v.* MOTHOORANATH MOOKERJEE . **7 W. R. P. C. 71 : 4 Moo. I. A. 414**

3. ——— Widow succeeding as heir of son—*Effect of, on right to adopt.* A widow succeeding as heir to her own son does not lose the right to exercise the power of adoption. BYKANT MONEE ROY *v.* KRISTO SOONDEREE ROY **7 W. R. 392**

4. ——— Giving in adoption—*Mother—Paternal grandfather.* When the natural father is dead and the mother is living, she is the only person who can give in adoption. The Hindu law does not authorize the paternal grandfather or any other person to give in adoption in such a case. COLLECTOR OF SURAT *v.* DHIRSHINGJI VAGHBAJI **10 Bom. 235**

See KENCHAWA *v.* NINGAPA **10 Bom. 265 note**

5. ——— ——— *Joint giving by father and mother—Brother—Consent of father.* Amongst Hindus in the Presidency of Bombay, a valid gift in adoption can be made only by the natural father or mother of the son given or by them both conjointly. They cannot jointly or severally delegate that authority to another person so as to validate a gift by him, made after they are both deceased. Therefore, a gift in adoption by the brother of the adoptee after the decease of his father and mother, though made with the previous assent of his father, was held to be invalid. BASHOTIAPPA BIN BASLINGAPPA *v.* SHIVLINGAPPA BIN BALLAPPA . . **10 Bom. 268**

6. ——— Adoption among Jains—*Deed of adoption, validity of—Authority of widow.* *A B*, a member of the community of Jains of Marvadi origin, who form part of the inhabitants of Ahmadnagar in the Deccan, died without leaving natural born issue and without adopting any child. His wife, who survived him, resolved shortly before her death on adopting the son of *C D*, a brother of *A B*, but did not live to carry her intention into effect. After her death, *C D* and *E F* (another brother of *A B*), with the assent of the Panch or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased *A B* and his deceased wife, and an instrument of agreement wholly founded upon that adoption was executed by *E F* to *C D*, and affected to deal with the property, moveable and immoveable, of *A*

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HINDU LAW—ADOPTION—*contd.*

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B. Held, that the adoption was invalid, and that the instrument of agreement fell together with it. Adoption among Jains is, in the Presidency of Bombay, regulated by the ordinary Hindu law, as is their succession to property generally, notwithstanding their divergence from Hindus in matters of religion; and Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated; the widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease; not only a giving, but an acceptance by the man or his wife or widow, manifested by some overt act, being necessary to constitute an adoption by Hindu law. BHAGAVANDAS TEJMAL *v.* RAGMAL *alias* HIRALAL LACHMIANDAS . . **10 Bom. 241**

7. ——— *Death of only son leaving widows in lifetime of father—Subsequent death of father—Vesting of father's estate in son's widows—Adoption by son's senior widow without consent of junior widow—Divesting of estate.* By custom the Jains are governed in matters of adoption by the ordinary rules of Hindu law. Where an only son has died in his father's lifetime leaving a widow, an adoption by her after the father's death, and after she has inherited the estate, is valid. Where the son has left two widows, an adoption by the senior widow after the father's death is valid, although the younger widow does not consent and although such adoption divests the estate which she has inherited from her father-in-law. The authority of a widow to adopt is at an end when the estate, after being vested in her son, has passed to the son's widow. An adoption by a widow in a divided family cannot divest any estate other than her own and her co-widow's except, perhaps, with the consent of the heir in whom the estate has vested. AMAVA *v.* MAHADGAUDA **I. L. R. 22 Bom. 416**

8. ——— **Members of Talabda Koli caste**—*Absence of spiritual motives for adoption.* It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst the higher castes of Hindus, has no influence upon the Talabda Koli caste, that its members may not lawfully adopt. BHALA NAHANA *v.* PARBHU HARI . **I. L. R. 2 Bom. 67**

9. ——— **Naikins (dancing girls)**—*Adoption, invalidity of—Want of presupposition of husband.* The plaintiff and the defendant were naikins. The plaintiff, as the adopted daughter of the first defendant, sued to recover a share of the property in the hands of her adoptive mother which she (plaintiff) alleged to be family property. *Held*, that adoption by naikins cannot be recognized by Courts of law, and confers no right on the person adopted. An adoption by a woman presupposes a husband to whom she adopts as her representative, and a naikin, while she remains a naikin, can have no husband. MATHURA NAIKIN *v.* ESU NAIKIN **I. L. R. 3 Bom. 545**

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10. ——— **Adoption by minor**—*Power of minor to adopt or give permisison to adopt—Age of discretion.* According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son. JUMOONA DASSYA *v.* BAMASUNDARI DASSYA **I. L. R. 1 Calc. 289: 25 W. R. 235 L. R. 3 I. A. 72**

11. ——— *Age of discretion.* An adoption is not invalidated by the mere fact of the adoptive father being a minor, if he has attained the years of discretion. Such an adoption is not attended by any civil disability. RAJENDRO NARAIN LAHOREE *v.* SARODA SOONDUREE DEBIA . . . . . **15 W. R. 548**

12. ——— *Minor widow.* A widow, although a minor, is competent to adopt a son. MONDAKINI DASI *v.* ADINATH DEY **I. L. R. 18 Calc. 69**

13. ——— **Adoption by widower**—*Validity of adoption.* An adoption by a widower is valid according to Hindu law. NAGAPPA UDAPA *v.* SUBBA SASTRY . . . **2 Mad. 367**

CHANDVASEKHARUDU *v.* BRAMHANNA **4 Mad. 270**

14. ——— **Adoption by an unmarried man.** Adoption by an unmarried man is not invalid. GOPAL ANANT *v.* NARAYAN GONESH **I. L. R. 12 Bom. 329**

15. ——— **Adoption by man who has never married**—*Validity of adoption. Semble:* The Hindu law does not prohibit an adoption by a man who has not been married. CHANDVASEKHARUDU *v.* BRAMHANNA . . . **4 Mad. 270**

16. ——— **Adoption by husband with knowledge of wife's pregnancy**—*Validity of adoption.* An adoption by a Hindu with knowledge of his wife's pregnancy is not invalid. *Narayana Reddi* v. *Vardachala Reddi, Mad. S. D. A. (1859) 97*, dissented from. NAGABHUSHANAM *v.* SESHAMMA GARU . . **I. L. R. 3 Mad. 180**

17. ——— **Adoption during wife's pregnancy**—*Posthumous son, Rights of, in family property—Will limiting legal share of such son.* The adoption of a son by a childless Hindu is valid, although at the time of adoption his wife is pregnant. The possibility that a son may afterwards be born to him does not invalidate the adoption. A posthumous son takes the family property by right of survivorship, on the principle of relation back to the time of the father's death, which applies in the analogous case of inheritance and partition, and the rights of such a son stand on the same footing as those of a son *in esse* at the time of the father's death. A father, therefore, can no more interfere by his will with the right of a posthumous son to his share of the family property as fixed by law that with the right of a son *in esse* at the time of his

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death. An adopted son stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born. *R* died, leaving him surviving his widow, who was then pregnant, and the defendant, whom he had adopted few days before his death. By his will *R* directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after *R's* death, a son (the plaintiff) was born. The present suit was brought by the guardian of the plaintiff to recover the family property from the defendant. It was contended that the adoption of the defendant was invalid having taken place during the pregnancy of the plaintiff's mother, and that *R's* will, in so far as it was in prejudice of the plaintiff's right as a son, was also invalid. *Held*, that the adoption of the defendant by *R* was valid, notwithstanding that *R's* wife was pregnant at the time of the adoption. *Held*, also, that *R's* will was inoperative in so far as it reduced the plaintiff's share to a moiety of the property. On the birth of the plaintiff, the defendant, as the adopted son, became by Hindu law entitled only to one-fourth, the plaintiff, as the natural son, taking the other three-fourths. HANMANT RAMCHANDRA *v.* BHIMACHARYA **I. L. R. 12 Bom. 105**

18. ——— Vaishya who has undergone the ceremony of Vibhut Vida—*Custom as to incapability to adopt.* There is nothing in the books of authority amongst Hindus to show that a Vaishya who has undergone the ceremony of Vibhut Vida is incapable of adopting a son. If a custom to that effect exists, it should be proved by satisfactory evidence. MHALSABAI *v.* VITHOBA KHANDAPPA GULVE . . . **7 Bom. Ap. 26**

19. ——— Adoption by leper—*Validity of adoption.* The Hindu law does not prevent a leper from giving his son in adoption. ANUND MOHUN MOZOOMDAR *v.* GOBIND CHUNDER MOZOOMDAR . . . . . **W. R. 1864, 173**

20. ——— Person under pollution from death of relative—*Validity of adoption.* Objection that the respondent's adoption was not valid because the adopted son was the son of a sister, and also because it was made when the adopter was under pollution in consequence of the death of a relative. Upon a conflict of evidence as to the time of the relative's death, the Privy Council decided in favour of the respondent. The period of pollution, according to Hindu law, is sixteen days. RAMALINGA PILLAI *v.* SUDASIVA PILLAI **1 W. R. P. C. 25**
9 Moo. I. A. 506

21. ——— *Widow whose husband's corpse has not been removed—Adoption during pollution of adoptive parent—Contract Act (IX of 1872), ss. 15, 16—Coercion—Undue influence.* The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father, who (*semble*) belonged to a different gotra from her deceased husband. There were no formal declarations of giving and taking the child and datta homam was not performed. At the time when the child was handed over to the widow, her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption. *Held*, that there was no valid adoption by the widow. *Per Curiam:* Obstructing the removal of a corpse by the deceased's widow or her guardian unless she made an adoption and signed a document is an unlawful act, and amounts to "coercion" and "undue influence," such as are defined by s. 15 or 16 of the Contract Act. Dicta *in Shosinath Ghose* v. *Krishna Sunderi Dasi, I. L. R. 6 Calc. 381 : L. R. 7 I. A. 250*, as to incidents of a formal adoption discussed. Observations on the necessity of datta homam in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent. RANGANAYAKAMMA *v.* ALWAR SETTI . **I. L. R. 13 Mad. 214**

22. ——— *Adoptive mother under pollution—Adoptive mother of same gotram as natural father—Subsequent datta homam—Absence of natural father at datta homam—Validity of adoption—Estoppel.* In a suit to recover possession of certain land to which the plaintiff claimed title as the adpoted son of a deceased Saraswati Brahman, it appeared that he had been taken in adoption by the widow of the deceased acting on the authority of her late husband, that datta homam was performed subsequently, and that the plaintiff had since been recognized as the adoptive son of the deceased and had acted accordingly during a period of twenty-five years. The defendant was in possession under a claim of title as a reversionary heir, the widow having died shortly before suit. It appeared further (i) that the widow was under pollution at the time of the plaintiff's adoption, but the pollution had ceased at the time of the datta homam; (ii) that the natural father was not present at the time of the datta homam, but his wife took part in the ceremony with his consent. *Semble:* Neither of the last-mentioned circumstances invalidated the adoption, but *quære*—whether the adoption was not invalid for the reason that the plaintiff's adoptive mother was by birth a member of the same gotram as his natural father. *Held*, on the evidence, that the defendant was estopped from denying the validity of the adoption. SANTAPPAYYA *v.* RANGAPPAYYA . . . **I. L. R. 18 Mad. 397**

23. ——— Unchaste widow—*Incompetency to adopt.* A Hindu widow, who has become unchaste, is living in concubinage, and is in a state of pregnancy resulting from such concubinage, is incompetent to receive a son in adoption. SAYAMALAL DUTT *v.* SAUDAMINI DASI . **5 B. L. R. 362**

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But *see* THANGATHAMIR *v.* RAMA **I. L. R. 5 Mad. 358** where the parties, however, were Sudras.

24. ——— *Unchastity of widow after vesting of estate, effect of, on power of adoption—Suit to set aside adoption.* One *G* died leaving him surviving his widow *Y* and his undivided son *R*, who subsequently also died, leaving him surviving his widow *P* and a son *V*, who died shortly afterwards. *Y* adopted the plaintiff, and immediately afterwards *P* adopted the defendant. The plaintiff sought to set aside the adoption of the defendant, alleging that it was invalid, inasmuch as it took place subsequently to his own adoption, and because of *P* being an unchaste widow. The Court of first instance rejected the plaintiff's suit, holding his adoption invalid. The lower Appellate Court reversed the decree of the Court of first instance, and remanded the suit for re-trial. From this order of remand the defendant appealed. On appeal to the High Court :—*Held*, that the adoption of the plaintiff was invalid. After the death of *R*, his estate vested in his widow *P*, the adoptive mother of the defendant. Her existence and the vesting in her of her husband's estate rendered the elder widow *Y* incapable of adopting. The estate, having thus vested in *P*, would not be divested by her subsequent unchastity, and therefore the inquiry into her chastity was irrelevant. KESHAV RAMKRISHNA *v.* GOVIND GONESH . . **I. L. R. 9 Bom. 94**

25. ——— **Untonsured widow**—*Validity of adoption—Conflicting opinions of Shastris as to validity of adoption.* In a suit to uphold the validity of an adoption made by the defendant of the plaintiff, the defendant admitted that she had performed certain ceremonies which she intended to be an adoption of the plaintiff as son of *V* ; but she alleged that at the time of the said adoption she had not, nor had she since, undergone tonsure ; and that, according to the custom of the Daivadnya community, to which she and the plaintiff belonged, a widow could not adopt until her head had undergone tonsure. She also stated that the majority of her caste had declared the said adoption to be invalid, and she submitted the question as to its validity to the Court. *Held*, that the adoption of the plaintiff was a valid adoption. From the evidence it appeared that the requisite religious ceremonies had been performed. Before the defendant took part in them, Shastris were consulted as to whether the defendant, while untonsured, could properly do so, and on making certain expiatory gifts she was pronounced competent. Under such circumstances, the Court could not hold her to be incompetent. Even if other Shastris were of a different opinion, a Civil Court could not decide between conflicting opinions upon such a question of ecclesiastical etiquette. If an adoption be performed with all requisite rites, with the assistance of priests and in accordance with the opinions of Shastris, the Court will uphold it, even against the opinions of other Shastris expressing or entertaining contrary views. RAVJI VINAYAKRAV JAGGANNATH SHANKARETT *v.* LAKSHMIBAI **I. L. R. 11 Bom. 381**

26. ——— *Delegation of authority to adopt—Ceremony of adoption.* Under the Hindu law, the widow only can adopt a son to her husband and she cannot delegate this authority to any other relation. Where a widow performs the principal part of the adoption ceremony, namely, the gift and acceptance, the fact that at her request the religious part of the ceremony is completed by a relation does not vitiate the adoption. In the case of a young widow, the fact that she was untonsured at the time of the adoption is not such a disqualification as vitiates the adoption. LAKSHMIBAI *v.* RAMCHANDRA **I. L. R. 22 Bom. 590**

27. ——— **Rights of adoption of elder widow**—*Adoption by younger widow without consent of elder widow invalid, although child selected by both widows—Right of selection.* An adoption by a younger widow, without the consent of the eldest widow, of a boy who has previously been selected by all the widows for adoption cannot be supported against the wish of the eldest widow. A younger widow cannot adopt without the consent of the elder. *Held*, that the right of the elder widow was not merely a right of selection. Adoption, of course, implies selection of the child, but there is not complete adoption until the mutual acts of giving and receiving the child are accomplished, and until they take place, there is necessarily a *locus penitentiæ* for the elder widow of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perform the formal act of adoption of the selected child whenever it pleased her would be tantamount to enabling her to force the hand of the elder widow and compel her to complete the adoption which, at the most, was only *in fieri*. *B* died in 1865 without a son, leaving three widows, *viz.*, *L*, *A*, and *C*, of whom *L* was the eldest and *C* the youngest. The plaintiff was unanimously selected by the three widows for adoption after the death of their husband. The unanimity continued down to May 1866 ; but on the 20th June 1866 *L* declared that, if the plaintiff were adopted by *C*, she would not consent to it. On the 1st July 1866, *C* adopted the plaintiff without the consent of *L*. On the 12th August 1869, *L* adopted the defendant. On the 10th August 1881, the plaintiff filed this suit against the defendant, alleging himself to be *B's* adopted son and as such claiming possession of *B's* property. He did not deny the factum of the defendant's alleged adoption on the 12th August 1869, which constituted (the plaintiff alleged) his cause of action. The defendant contended that he himself was the adopted son of *B*, having been adopted by *L*, the senior widow. He insisted that the plaintiff's

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adoption was invalid, having been carried out without the consent of *L*, the senior widow. He further contended that the plaintiff's claim to the property was barred by limitation, it having been in possession of himself (the defendant) and *L* for more than twelve years before this suit was filed. *Held*, that the plaintiff was not the rightfully adopted son of *B*, and therefore was not entitled to the property in dispute. His adoption by *C*, the younger widow, without the consent of *L*, the senior widow, was invalid. PADAJIRAV *v.* RAMRAV **I. L. R. 13 Bom. 160**

28. ——— Adoption by a mother after the death of her son who has left neither child nor widow. Under the Hindu law, a mother is competent to adopt when her son dies leaving no widow or other heir nearer than herself. GAVDAPPA *v.* GIRIMALLAPPA **I. L. R. 19 Bom. 331**

29. ——— Adoption by widow, but ceremonies performed by deputy (by uncle) —*Validity of adoption.* Where a mother, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf: *Held*, that the adoption was not on that account invalid. VIJIARANGAM *v.* LAKSHUHAN . . . . **8 Bom. O. C. 244**

30. ——— Adoption with consent of father, but ceremonies performed by deputy—*Validity of adoption.* Where the father of a boy gave his formal consent to the adoption of his son, but was prevented by sickness from attending the adoption ceremony, and delegated to his brother the duty of making the presentation, it was held that the adoption was nevertheless valid. JAMNABAI *v.* RAYCHAND NAHALCHAND **I. L. R. 7 Bom. 229**

31. ——— Adoption made by brother in pursuance of father's agreement—*Validity of adoption.* In pursuance of a promise made by his father, *A* gave his younger brother away in adoption. *Held*, that the gift was valid. VENKATA *v.* SUBHADRA . . **I. L. R. 7 Mad. 548**

32. ——— Son, adoption by—*Son's power to adopt—Impartible estate—Failure to prove alleged custom in a family against adoption—Invalid agreement between father and father's brother, in a joint family, contrary to rights of son already born.* Two brothers, undivided under the Mitakshara, the family estate being an impartible zamindari in the possession of one of them who had a son, contracted with each other that, in the event of an indefinite failure of male issue in the line of either of them, the estate should descend in the line of the brother having *aurasa* (self-begotten) issue, and should not be alienated from the line of the latter by adoption. *Held*, that this contract did not bind the son not to adopt, or exclude from the inheritance a son adopted by him. Such a stipulation was contrary to the law declared in the *Tagore Case, 9 B. L. R. 377*, and was ineffectual to prevent the son's exercising his right of adoption. SURIYA RAU *v.* RAJA OF PITTAPUR **I. L. R. 9 Mad. 499 L. R. 13 I. A. 97**

33. ——— Adoption by wife—*Sanction to wife to adopt in husband's lifetime.* According to the highest authorities in repute in the Maratha country, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime. Comparative weight, as legal authorities on this side of India on the question of adoption, of the Mitakshara, Mayukha, Dattaka Mimansa, Dattaka Chandrika, Smriti Chandrika, Viramitrodaya, Dharmasindhu, and the Nirnayasindhu pointed out. Dictum in the case of *Collector of Madura* v. *M. Ramalinga Sathapati, 2 Mad. 220*, "that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving" (by the wife in adoption), questioned. NARAYAN BABAJI *v.* NANA MANCHAR . **7 Bom. A. C. 153**

34. ——— Power of wife to give in adoption—*Consent of Government to adoption—Non-fulfilment of conditions of adoption—Mistake.* According to the Hindu law prevailing in the Bombay Presidency, a wife is not competent to give her son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred. RANGUBAI *v.* BHOGIRTHIBAI **I. L. R. 2 Bom. 377**

35. ——— Adoption by widow—*Authority of husband—Consent of sapindas.* A widow cannot make a valid adoption without either the authority of her husband or the consent of the sapindas. ARUNDADI AMMAL *v.* KUPPAMMAL **3 Mad. 283**

36. ——— *Authority of husband—Ceremonies, performance of.* In cases of adoption in the Dattaka form, it must be proved that the widow had the authority of her husband to adopt, and that she made the adoption when the boy adopted was under six years of age, and with the prescribed ceremonies. OOMRAO SINGH *v.* MAHTABKOONWAR . . . **3 Agra 103**

37. ——— *Authority of husband—Bareilly law.* In the district of Bareilly the authority of the husband is essential to the validity of an adoption. HAIMUN CHULL SINGH *v.* KOOMAR GUNSHEAM SINGH . . **5 W. R. P. C. 69**

38. ——— *Prohibition by husband—Effect of an adoption by widow—Fraud—Concealment of rights from widow.* A Hindu widow has no power to adopt a son to her deceased husband if she has been expressly prohibited from doing so by her husband in his lifetime. *Quære:* Whether, according to the Maratha school, she can

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adopt without the authority of her husband given prior to his decease. Where a Hindu childless husband, when at the point of death, positively refused to adopt a son, and died without retracting that refusal, it was held that a subsequent adoption by his widow was null and void, as authority from her husband to adopt could not in such a case be implied (*per* WESTROPP, *J.*). Dictum of the High Court of Madras, "that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon the same footing, and was of the scope, in the case of giving and receiving" (a son in adoption by the wife), questioned. Where an adoption by a young Hindu widow is set up against her and to defeat her rights, the Court will expect clear evidence that at the time she adopted she was fully informed of those rights, and of the effect of the act of adoption upon them; and if it find that fraud or cajolery was practised upon the widow to induce her to adopt, or that there has been suppression or concealment of facts from her, it will refuse to uphold the adoption. BAYABAI *v.* BALAURF VENKATESH RAMA KANT . . . . **7 Bom. Ap. 1**

39. ——————— *Authority to adopt—Kinsmen, consent of—Prohibition to adopt.* According to the Hindu law current in the Dravida country, a widow not having her husband's permission may, if duly authorized by his kindred, adopt a son to him. The question,—who are the kinsmen whose assent will supply the want of positive authority of the deceased husband?—must depend upon the circumstances of the family in each case. There must be such evidence of the assent of the kinsmen as suffices to show that the act is done by the widow in the *bonâ fide* performance of a religious duty and not capriciously, or from a corrupt motive. The widow cannot adopt where there is a prohibition by the husband, direct or implied. COLLECTOR OF MADURA *v.* MUTU RAMALINGA SATHUPATHY

1 B. L. R. P. C. 1 : 12 Moo. I. A. 397
10 W. R. P. C. 17

S.C. in Court below, COLLECTOR OF MADURA *v.* MUTTU VIJAYA RAGUNADA MUTTU RAMALINGA SETHUPATI. ANANDAYAI *alias* KUNJARA NATCHIAR *v.* PARVATAVARDANI NATCHIAR . . **2 Mad. 206**

40. ——————— *Mithila law—Consent of husband to adoption by widow.* Under the Hindu law current in Mithila, a Hindu widow has power to adopt a son in the kritrima form, with or without her husband's consent, but such son would not, by virtue of such adoption, lose his position in his own family, nor would he succeed to the property left by the husband of his adoptive mother, but would be considered her son, and entitled to succeed to her only. COLLECTOR OF TIRHOOT *v.* HURROPERSHAD MOHUNT . . **7 W. R. 500**

SHIBO KOOEREE *v.* JOOGUN SINGH. BOOLEE SINHG *v.* BUSUNT KOOEREE . . **8 W. R. 155**

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41. ——————— *Authority of husband—Permission of relatives or younger widow—Maratha country.* In the Maratha country a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him if the act is done by her in the proper *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. An elder Hindu widow has the power to adopt a son to her deceased husband without the consent of a younger widow. RAKHMABAI *v.* RADHABAI **5 Bom. A. C. 181**

42. ——————— *Adoption by a widow whose husband died while a minor—Implied authority from minor husband—Adoption from corrupt and improper motives—Onus of proof—Adoption in Gujarat—Kadva Kunbi catse, adoption among—Custom as to adoption.* In the Maratha country a Hindu widow may, without the permission of her husband and without the consent of her kindred, adopt a son to him if the act is done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But the adoption must not have been expressly forbidden by the husband and must not have the effect of divesting an estate already vested in a third person. There is no reason for drawing any distinction, as regards the general law, between Gujarat and the Maratha country properly so called. Apart from local or caste custom, the general law in Gujarat must be taken to be as stated in *Rakhmabai* v. *Radhabai, 5 Bom. A. C. 181.* A widow has implied authority from her husband to adopt, even though her husband be a minor. Where a widow adopts, there is a presumption that she has performed the duty from proper motives, and the onus lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive. A Hindu widow in Gujarat having adopted a son to her husband, who died before the completion of his sixteenth year, and who was separated from his brother: *Held*, that the adoption was valid. The authority of the husband to adopt may be implied, although he was a minor at the time of his death. If adoption by a widow be a meritorious act "beneficial to her husband's soul," assent should be implied in the case of a minor husband, as well as in the case of one who had attained his majority. A Hindu widow having adopted a son about eight years after her husband's death, during her last illness when she was confined to her bed:—*Held*, that that circumstance alone did not afford any sufficient reason for supposing that she was not actuated by the sense of the duty she owed to her husband. The fact that the adoption was made on an inauspicious day showed the anxiety of the widow to adopt, but not the motive. PATEL VANDRAVAN JEKISAN *v.* PATEL MANILAL CHUNILAL . . . **I. L. R. 15 Bom. 565**

43. ——————— *Motives of widow in adopting—Adoption from corrupt motives—Pre-*

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sumption. In Bombay, according to the authorities, if it can be predicated of an adoption by a widow (in a case where the consent of the husband's kinsmen is not required) that the ceremony has been performed, not as a religious duty, but from sinful and corrupt motives, it is on that account invalid, and the authorities appear to impose upon the Court the duty of inquiring into the motives of the adopting widow where her motives are called in question. Whether the presumption that an adopting widow has performed her duty from proper motives ought or ought not to be deemed an irrebuttable presumption, is a question which still remains to be judicially decided. The fact that the motives of the widow were of a mixed character is not sufficient to rebut the presumption—*Patel Vandravan Jekisan* v. *Patel Manilal Chunilal, I. L. R. 15 Bom. 565.* The fact that the widow has made terms for herself with the father of the boy to be adopted, or that she has solicited a boy whose father will be likely to accede to her wishes, is not sufficient to render the adoption invalid—*Bhaiya Rabidat Singh* v. *Indar Kunwar, I. L. R. 16 Calc. 556 ; Chitko Raghunath Rajadiksh* v. *Janaki, 11 Bom. H. C. 199.* Where a widow had adopted a son and it was found by the Courts that unless she had been assured by the father and guardian of the adopted boy that she would receive R4,000, she would not have adopted him, but it was not found that she had not the special benefit of her husband in view when she made the adoption: *Held*, that the presumption that she made the adoption from motives of duty was not rebutted, and that presumption should be allowed to prevail. MAHABLESHVAR FONDBA *v.* DURGABAI . . **I. L. R. 22 Bom. 199**

44. ——— *Motive in adopting—Adoption made by a widow to defeat the claim of her co-widow to a share in her husband's estate—Validity of such adoption.* An adoption made by a Hindu widow is not invalid, merely because it is made with the object of defeating the claim of a co-widow to a share in her husband's property. BHIMAWA *v.* SANGAWA **I. L. R. 22 Bom. 206**

45. ——— *Motives in making adoption. Held* by a Full Bench (HOSKING, *J.*, dissenting), that in the Bombay Presidency a widow having the power to adopt, and a religious benefit being caused to her deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant. RAMCHANDRA BHAGAVAN *v.* MULJI NANABHAI . . **I. L. R. 22 Bom. 558**

46. ——— *Consent of kindred—Validity of adoption. Quære :* Whether the ruling in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy, 12 Moo I. A. 397,* applies to cases governed by the Mitakshara law in Northern India, and whether an adoption made by a widow after the death of the husband without his express consent, but with the consent of his near kindred, is valid, or whether the recognition of the adopted son by the next reversioner would likewise render the adoption valid. LALA PARBHULAL *v.* MYLNE . . . . **I. L. R. 14 Calc. 401**

47. ——— *Widow adopting to her deceased husband, with consent of sapindas —Effect of estate having already vested in the widow of a son.* A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of *sapindas.* That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry, 10 Moo. I. A. 179,* and *Padmakumari Debi* v. *Court of Wards, I. L. R. 8 Calc. 302 : L. R. 8 I. A. 229.* THAYAMMAL *v.* VENKATARAMA . **I. L. R. 10 Mad. 205**

48. ——— *Consent of kinsmen—Divesting of estate.* Although, as a general rule, the adoption by a Hindu widow of a son to her deceased husband is in the Maratha country good without the consent of her husband's kinsmen, when the estate of her husband is vested in her, or in her and her co-widow jointly, yet when such adoption has the effect of divesting an estate already vested in a third person, *e.g.*, the widow of her husband's deceased brother, the consent of such third person would appear to be necessary to give validity to such an adoption. *Rakhmabai* v. *Radhabai, 5 Bom. A. C. 181,* and *Collector of Madura* v. *Mutu Ramalinga Sathupathy, 12 Moo. I. A. 397,* commented on and compared. RUPCHAND HINDUMAL *v.* RAKHMABAI **8 Bom. A. C. 114**

49. ——— *Consent of relatives.* The doctrine that the consent of all her husband's relatives is requisite to make an adoption by a Hindu widow valid is erroneous. GOPAL SHRIDHAR DIKSHIT PATVARDHAN *v.* NARO VINAYAK DIKSHIT PATVARDHAN . . **7 Bom. Ap. 24**

50. ——— *Permission of husband—Theory of adoption.* According to the law prevalent in the Dravida country, a Hindu widow, without having her husband's express permission, may, if duly authorized by his kindred, adopt a son to him. *Collector of Madura* v. *Mutu Ramalinga Sathupathy, 12 Moo. I. A. 397,* referred to and approved. *Semble :* In the case of an undivided family the requisite authority to adopt must be sought within that family, and cannot be given by a single separated and remote kinsman. Speculations founded on the assumption that the law of adoption now prevalent in Madras is a substitute for the old and obsolete practice of raising up seed to a husband by actual procreation are inadmissible as a ground of judicial decision.

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HINDU LAW—ADOPTION—*contd.*

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VIRADA PRATAPA RAGHUNADA DEO *v.* BROZO KISHORO PATTA DEO . **I. L. R. 1 Mad. 69**
25 W. R. 291 : L. R. 3 I. A. 154

S.C. in Court below BROZO KISHORO PATTA DEVU *v.* VARADHI VIRAPRATAPA SHRI RAGHUNATHA DEVU . . . . **7 Mad. 301**

51. ——— *Adoption in Dravida country—Widow's power to adopt with consent of sapindas—Motives for making adoption.* According to the Hindu law, a widow who has received from her deceased husband an express power to adopt a son in the event of his natural-born son dying under age and unmarried may, on the happening of that event, make a valid adoption. *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdry, 10 Moo. I. A. 279,* distinguished. Under the law which prevails in the Dravida country, a widow, without any permission from her husband, may, if duly authorized by his kinsmen, adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. The observations of the Judicial Committee in the *Ramnad case, 12 Moo. I. A. 397,* to the effect "that there should be such evidence of the assent of kinsmen as suffices to show that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive," considered and explained. VELLANKI VENKATA KRISHNA RAO *v.* VENKATA RAMA LAKSHMI . **I. L. R. 1 Mad. 174**
L. R. 4 I. A. 1 : 26 W. R. 21

52. ——— *Authority of husband, express or implied—Right of widow to adopt—Assent of nearest sapindas.* Without the express or implied authority of the husband, a widow may make a second adoption under the sanction of the nearest *sapindas.* With such sanction a second adoption would probably not be recognized as valid in the face of an express prohibition of a second adoption on the part of the husband. When the only surviving members of the family are divided from the deceased husband, for whose benefit it is desired to make the adoption, and also from each other, and equally distant from the deceased, there seems nothing in principle to throw doubt upon the sufficiency of the assent of some of them if *bonâ fide* given, if it be shown that the consent of the others is refused from interested or improper motives or without a fair exercise of discretion. PARASARA BHATTAR *v.* RANGARAJA BHATTAR . . . . **I. L. R. 2 Mad. 202**

53. ——— *Authority of husband—Assent of sapindas.* The *sapinda* of a deceased person gave his child to the widow of the latter to be adopted in pursuance of an authority which she represented herself to have had from her husband. This natural father of the child was the eldest and managing member of a joint family consisting of himself and his three younger brothers, sons of the first cousin of the deceased. The three younger brothers disputed the validity of the adoption. Two Courts having found against the existence of an authority to the widow given by her deceased husband, the question remained whether the manager giving his child in the manner in which he had given it for adoption, he being a *spianda* and in a position to represent other *sapindas* of the deceased, was an assent by a *sapinda* to an adoption by a widow sufficient to support her adopting in the absence of an authority from her husband. It was decided that under all the circumstances under which this child had been applied for by the widow and given by the father, the assent of the latter was not one which had rendered the adoption valid as against the brothers. There was no sufficient evidence to show that the widow applied to the boy's father to give his assent as *sapinda* to an adoption, on the ground that he could not adopt without the *sapinda's* assent. It was not necessary to determine whether this *sapinda* could alone have given a valid assent, if it had been given to the widow as one having no authority from her husband to adopt; and if it had been given without his mind having been influenced by other and undue considerations. GANESA RATNAMAIYAR *v.* GOPALA RATNAMAIYAR . **I. L. R. 2 Mad. 270**
L. R. 7 I. A. 173

54. ——— *Authority of husband—Consent of sapinda.* *V*, one of the nearest male *sapindas* of *S*, gave his son in adoption to the widow of *S* in 1878. Both the giver and receiver professed to have been carrying out the directions of *S*. In 1883 a suit was brought by *N*, another *sapinda*, to set aside this adoption, and it was found that *S* had not authorized the adoption as alleged by the defendants. *Held*, that, under the circumstances, *V's* assent to the adoption did not render it valid. VENKATALAKSMAMMA *v.* NARASAYYA . . **I. L. R. 8 Mad. 545**

55. ——— *Authority to adopt—Consent to adopt given by husband's family—Adoption in undivided family—Adoption to a husband separated in estate.* A Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided co-parceners. Where the husband of a Hindu widow dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of the husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred. *N* and *J* were two Hindu brothers undivided in estate. *N* died first, leaving a widow, *K*. *J* died next, leaving two sons and a widow, *G* (the defendant). *K* adopted the plaintiff as son to her husband and herself without the consent either of *J's* two sons or his widow, *G*. On the death of *K* and the two sons of *J*, the plaintiff sued *G* (the widow of *J*) for possession of the family estate. *G* claimed the estate as heir

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of her last surviving son, and, while admitting the fact of the plaintiff's adoption by *K*, denied its validity on the ground that the members of the family had given no assent to the adoption. It was admitted that *K* had not received from her husband *N* any permission or direction to adopt a son. *Held*, that the plaintiff's adoption by *K* was invalid, inasmuch as she had not the authority of her husband or the consent of his undivided co-parceners to adopt, nor did she hold any estate in the property. RAMJI *v.* GHAMAU

I. L. R. 6 Bom. 498

56. ——————— *Undivided Hindu family—Adoption without the consent of husband or his undivided co-parceners and without the authority of her husband to adopt.* A Hindu widow, who has not the estate vested in her, is not competent to adopt a son to her husband without his authority or the consent of his co-parceners with whom he was united in estate at the time of his death. *K* and *V* were two Hindu brothers. *K* had a son who died in 1849 in the lifetime of his father, but who was then united interest with him (*K*). *K* died in 1856, leaving him surviving his two nephews, *S* and *P* (the sons of his brother, *V*), and his daughter-in-law, *Y* (the widow of his predeceased son). At the time of his death, *K* was united in estate with his nephews *S* and *P*. In 1871, *Y* adopted the plaintiff as son to her husband and herself. In 1873 the plaintiff sued *P* and the sons of *S* (who died in the meantime) for a share in the family estate. It was found that *Y* had not the authority either of her husband or of her father-in-law, *K*, or of any of his co-parceners to adopt. *Held*, that the adoption was not valid. *Held*, further, that a separated kinsman was not qualified to authorize the adoption. DINKAR SITARAM *v.* GANESH SIVRAM

I. L. R. 6 Bom. 505

57. ——————— *Assent of a majority of sapindas—Presumption of bonâ fides—Degree of relationship of sapindas to husband of adopting widow* A widow, having survived her son (who died unmarried and issueless), succeeded to his estate, and made an adoption with the assent of three out of the four of her late husband's sapindas, who were living at the time and who had been divided from the deceased and from each other. The fourth sapinda, who had refused his consent (apparently without giving reasons for such refusal), now impunged the adoption on the ground that the consent of all existing sapindas was necessary to render it valid, at all events when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here. *Held*, that the assent of every existing sapinda in such a case was not necessary, and that that of a majority would suffice. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy, 12 Moo. I. A. 397*, and *Parasara Bhattar* v. *Rangaraja Bhattar, I. L. R. 2 Mad. 202*, referred to and considered. Adoption being a proper act, it will be presumed that, when the majority give their assent, such assent was given on *bonâ fide* grounds. If, however, it be shown that the majority gave or withheld their assent from improper considerations, such assent or dissent will be of no avail to the party relying on it. Any distinction based upon the degree of relationship as to whose assent is or is not essential becomes immaterial. VENKATA-KRISHNAMMA *v.* ANNAPURNAMMA

I. L. R. 23 Mad. 486

58. ——————— *Adoption without consent of kinsmen—Adoption of a brother's son in pursuance of express authority of husband to adopt—Execution of such authority after a long time since death of husband—Agreement by widow to enjoy property for life, effect of—Acquiescence—Estoppel.* *B* and *R* were brothers and vatandar kulkarnis of a village in the Kaladgi District. *B* died leaving him surviving his widow, the defendant. On the death of *B*, *R* endeavoured to appropriate the whole vatan estate so as altogether to exclude the defendant. The defendant appealed to the revenue authorities, and *R* admitted her right to a moiety of the vatan. Subsequently in 1856 the defendant passed a document to *R* to the effect that, in consideration of receiving certain property as her share, she would not trouble *R* in the enjoyment by him of the rest of the vatan, and that she was to hold and enjoy this property for her life. The arrangement continued till 1881. In the meanwhile, the defendant adopted her brother's son and made a gift to him of the property held by her under the agreement of 1856. *R* having died, his son, the plaintiff, brought a suit against the defendant for a declaration that the adoption was invaild, as also the gift to the adoptee, and that he was entitled to the property after the death of the defendant. The Court of first instance held that the husband of the defendant and the father of the plaintiff were undivided ; that the alleged adoption was not proved ; that it was invalid, having been made without the consent of the plaintiff ; and that, after the death of the defendant, the property in the possession of the defendant should revert to the plaintiff. On appeal the lower Appellate Court found the fact of adoption proved, but held that the adoption was invalid, and upheld the decree of the Court of first instance as to the right of the plaintiff as reversioner to the property in the possession of defendant. On appeal to the High Court :—*Held* (reversing the decrees of the lower Courts), that the document passed by the defendant to the father of the plaintiff implied a previous separation between the husband of the defendant and the father of the plaintiff. The expression that she was to hold and enjoy for life merely described the ordinary estate of a Hindu widow, and did not impose any restriction on the exercise of her powers. As a widow of a Hindu separated from his brother in worship and estate, she could adopt a son, which right, even if she could forego, she did not by the document which was of a family settlement, and recognized the right of defendant as that of a widow of a separated brother. The fact of separation having thus become distinct

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and having been acted on for about twenty-eight years, the plaintiff was not at liberty to impeach it. *Held*, also, that, as the widow of *B* separated in interest from *R*, the defendant was at liberty to adopt a son without the previous sanction of *R* or the plaintiff. The fact that the adoptee was son of the brother of the defendant did not render the adoptee unfit for adoption, as it was a case from the Southern Maratha country. *Held*, further, that though so long a period as twenty-five years had been allowed to pass between the date of the death of her husband and that of adoption, that circumstance did in any way extinguish the right of the defendant to adopt under circumstances calling for adoption. GIRIOWA *v.* BHIMAJI

I. L. R. 9 Bom. 58

59. ——————— *Aaoption by widow with consent of father-in-law—Adoption in a united family— Consent of the head of the family.* The widow of a deceased co-parcener in a joint Hindu family can adopt with the sole assent of her father-in-law if he is the head of the family and natural guardian of the widow, whatever may be her motives or the effect of the adoption on the undivided kinsmen. *B* and his two sons, *N* and *V*, were members of a joint Hindu family. In 1883 *B* and *N* commenced to live separately from *V*, but the family estate was not divided. In 1886 *N* died, leaving a widow without male issue. In 1887 *N's* widow adopted the plaintiff with the consent of her father-in-law *B*, with whom she was living. *B* died shortly after the adoption. Thereupon the plaintiff as adopted son sued *V* to recover a moiety of the family estate. The defence to this suit was that the plaintiff's adoption was invalid on the ground that the adoption had not been made with the assent of all the co-parceners. *Held*, that the adoption was valid. As *B*, who was the head of the family and natural guardian of the adoptive mother, had given his assent to the adoption, the consent of the other co-parceners was not necessary. VITHOBA *v.* BAPU

I. L. R. 15 Bom. 110

60. ——————— *Adoption by widow without consent of husband—Jains of Southern India—Evidence of adoption— Proof of custom —Will of a Jain widow.* In a suit to declare plaintiff's right as the adopted son of a Jain (deceased) and as a beneficiary under the will of the adoptive mother, it appeared that the plaintiff had been taken in adoption by the widow without authority from her husband or consent of his kinsmen. *Held*, that it lay on the plaintiff to prove by evidence that the adoption was valid, and that he was entitled to take under the will according to the custom governing the family, and *held* on the evidence, that the plaintiff had failed to prove this. *Per* BEST, *J.*—If a Jain wid w succeeds to her husband's property absolutely and has the right to dispose of it as she likes, the adoption of a son to herself who may succeed to such property would be valid. Observations of HOLLOWAY, *J.*, in *Rithcurn Lallah* v. *Soojun Mull Lallah, 9 Mad. Jur. 21*, distinguished, on the ground that there was no reason for supposing that the parties to the present suit were other than natives of Southern India whose ancestors had been converted to Jainism. PERIA AMMANI *v.* KRISHNASAMI. ADINADHA *v.* KRISHNASAMI

I. L. R. 16 Mad. 182

61. ——————— *Adoption by widow of a predeceased son of owner after the estate had vested in the daughters of the deceased owner—Assent of a minor daughter in whom the estate had vested to the adoption—Ratification by the minor on attaining years of discretion—Adoption invalid—Acquiescence not equivalent to consent.* On the death of one *V*, his estate vested in his two daughters, one of whom was a minor. Six months after *V's* death, his daughter-in-law, *S* (widow of his predeceased son), adopted the plaintiff. It was alleged that the daughters consented to the adoption. *Held*, that the adoption was invalid, as the minor daughter could not give such a consent to it as would operate to divest her of her estate. *Per* FULTON and HOSKING, *JJ.*—Subsequent assent to an adoption cannot give it validity if it was invalid when made. *Per* RANADE, *J.*—The adoption of the plaintiff was invalid for the double reason that *S* had no power to adopt, as she was not the widow of the last male holder, and the nearest heirs, the daughters of the deceased *V*, were not proved to have given their consent to the divesting of the estate, which had come to them by inheritance, in favour of *S* or the plaintiff. Mere presence at the ceremony and the absence of any objection might imply an acquiescence, but mere acquiescence is not equivalent to consent. VASUDEO VISHNU MANOHAR *v.* RAMCHANDRA VINAYAK MODAK

I. L. R. 22 Bom. 551

62. ——————— *Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother.* An adoption cannot divest a person of an estate which has once vested in him unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law who is head of the family, as in *Vithoba* v. *Bapu, I. L. R. 15 Bom. 110.* Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law. *S* was the widow of *B*, who died in 1877 in the lifetime of his father *R*. Fourteen years later, *viz.*, in 1891, *R* died, leaving a widow Saibai, who succeeded to his estate

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as his heir. In March 1892 *S* adopted the plaintiff *G* as son to her husband, alleging that she had *R's* permission to do so. *G* sued for a declaration that as adopted son of *B* he was entitled to succeed as heir to the property of *R* as against the defendant *V*, who claimed to have been adopted by Saibai as son to *R*. *Held* (confirming the decree of the lower Court), that, as the adoption of the plaintiff *G* was made by *S* without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of *R*. GOPAL BALKRISHNA KENJALE *v.* VISHNU RAGHUNATH KENJALE . . . . **I. L. R. 23 Bom. 250**

63. ——————— *Adoption by widow of a predeceased son—Consent of mother-in-law—Rule that adoption must be by widow of the last full owner—Exceptions to this rule.* By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights. To this rule there are four exceptions: (i) In the case of co-widows. Though, on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be essential. (ii) In the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner. (iii) When an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent. (iv) Where there has been ratification by conduct or acquiescence. *Per* PARSONS, *J.*—The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested. One *B* died in 1878, leaving a widow *U* and a daughter-in-law *S* him surviving. His only son *D*, the husband of *S*, had predeceased him. On *B's* death, his estate vested in his widow *U*. In 1879 *S*, with *U's* consent, adopted a son (defendant No. 3). The plaintiff in this suit sued to recover certain land which formed part of *B's* estate, alleging that it had been given to him by *U*. The first defendant alleged and proved that he had bought the land from the third defendant, who was the adopted son of *S*. *Held* (dismissing the suit), that the adoption was valid, and that the first defendant was entitled to the land. PAYAPPA AKKAPPA PATEL *v.* APPANNA **I. L. R. 23 Bom. 327**

64. ——————— *Inheritance—Sonless widow—Usage of Jains—Right of widow to adopt—Status of widow who has adopted.* On the evidence given in this case:—*Held*, that, according to the usage prevailing in Delhi and other towns in the North-Western Provinces among the sect of the Jains known as Saraogi Agarwalas, a sonless widow takes an absolute interest in the self-acquired property of her husband; has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten. *Quære:* Whether on such an adoption the widow is entitled to retain possession of the estate either as proprietor or as manager of her adopted son. SHEO SINGH RAI *v.* DAKHO . **I. L. R. 1 All. 688**

Affirming decree of High Court in SHEO SINGH RAI *v.* DAKHO . . . . **6 N. W. 382**

65. ——————— *Widow of Oswal Jain sect—Adoption without authority of husband.* A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband. *Govind Nath Roy* v. *Gulal Chand, 5 Sel. Rep. 276; Bhagvandas Tejmal* v. *Rajmal, 10 Bom. 241;* and *Sheo Sing Rai* v. *Dakho, 6 N.-W. P. 382;* on appeal, *I. L. R. 1 All. 688; L. R. 5 I. A. 87,* referred to. MANIK CHAND GOLECHA *v.* JAGAT SETTANI PRAN KUMARI BIBI **I. L. R. 17 Calc. 518**

66. ——————— **Step-mother**—*Competency of step-mother to give in adoption—Adoption of an adult.* In a suit to set aside an adoption, it appeared that the person said to have been adopted was an unmarried man of forty years of age, who had already succeeded to his father's estate for twenty years at the time of the alleged adoption, and that he had been given in adoption by his step-mother without the previous consent of her husband, deceased. *Held*, that the adoption was invalid on the ground that under the Hindu law a step-mother cannot give her step-son in adoption. *Semble:* The adoption was not invalid by reason of the age of the alleged adopted son, or of his having previously taken his patrimony in his natural family. PAPAMMA *v.* VENKATADRI APPA RAU. NARASIMHA APPA RAU *v.* VENKATADRI APPA RAU **I. L. R. 16 Mad. 384**

67. ——————— **Grandmother**—*Grandmother succeeding to her grandson—Divesting of estate by adoption.* Where a Hindu grandmother succeeds as heir to her grandson who dies unmarried, her power to make an adoption is at an end. Where a Hindu dies, leaving a widow and a son, and that son himself dies, leaving a natural born or adopted son, or leaving no son but his own widow to continue the line by means of adoption, the power of the forme widow is extinguished and can never afterwards be

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revived. RAMKRISHNA RAMCHANDRA *v.* SHAMRAO YESHWANT (1902) . [I. L. R. 26 Bom. 526

68. ———— **Mother**—*Adoption by a mother succeeding to her son who has been married—Ceremonial competency of the son no bar to the adoption—Only limitation to a mother's right to adopt.* A mother succeeding as heir to her deceased son, who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage, investiture or otherwise, before his death. The real limitation on a mother's right to adopt when she succeeds as heir to her son does not depend upon the investiture, marriage or ceremonial competency of her deceased son, but upon the question whether by such adoption she derogates from any other rights save her own. Jivaj. Krishna, the holder of a *kulkarni vatan*, mortgaged the *vatan* lands to the defendants in 1879. He died in 1884, at the age of thirty, without issue. His wife had predeceased him, and his mother Tulsava therefore succeeded as heir. In 1894 she adopted the plaintiff and died shortly afterwards. In 1896 the plaintiff brought this suit to set aside the mortgage and recover the mortgaged lands. The defendants contended, *inter alia*, that Tulsava's right to adopt had been extinguished because her deceased son had been married and had attained ceremonial competency, and that the plaintiff's adoption was therefore invalid and his suit could not be maintained. *Held*, that the plaintiff's adoption by Tulsava was valid, inasmuch as it only affected her own interests and did not affect the vested rights of others. VENKAPPA BAPU *v.* JIVAJI KRISHNA (1900) **I. L. R. 25 Bom. 306**

69. ———————— *Adoption by a mother who has succeeded as heir to her son after the death of his widow.* An adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow is invalid according to Hindu law. KRISHNARAV TRIMBAK HASABNIS *v.* SHANKARRAV VINAYAK HASABNIS . . . **I. L. R. 17 Bom. 164**

70. ———— **Prostitute**—*Adoption of a girl by a prostitute—Object of such adoption not immoral or illegal—Test of validity of adoption by a prostitute—Indian Penal Code (Act XLV of 1860), s. 372—Will—Gift—Persona designata.* Manji, who was a prostitute but not a *naikin*, three days before her death adopted a girl, then thirteen years of age, as her daughter, and by her will left the latter all her property as such adopted daughter. The Court found that Manji's object in adopting was that there might be someone who, after her death, could perform her funeral ceremonies and inherit her property, and that there was nothing to show that she contemplated the girl following the profession of a prostitute. *Held*, that the adoption was valid and that the adopted daughter was entitled to the property under the will. *Per* CANDY, *J.*—The test of such an adoption would seem to be whether the natural mother of the adopted girl could be convicted under s. 372 of the Indian Penal Code (XLV of 1860) of having disposed of her daughter for the purpose of prostitution, or knowing it to be likely that she would be so employed. MANJAMMA *v.* SHESHGIRIRAO VITHALRAO (1902) **I. L. R. 26 Bom. 491**

71. ———— **Sudra leper**—*Validity of adoption by a Sudra leper in Bengal—Religious ceremonies, competency to perform.* In Bengal, a Sudra leper may adopt a child. Such an adoption was *held* valid, in the absence of any proof that the disease of the adoptive father was inexpiable or that he was in such a state as not to be able to adopt at all. SUKUMARI BEWA *v.* ANANTA MALIA (1900) **I. L. R. 28 Calc. 168**

72. ———— **Widow**—*Chudasama Gameti Garasias—Custom prohibiting adoption—Effect on adoption of the natural son having survived his father and attained ceremonial competence.* A custom, alleged to exist in the Hindu caste of Chudasama Gameti Garasias, prohibiting adoption, was held to be not proved. A member of that caste died in 1887 leaving a widow, and a son who died in 1889 between fifteen and sixteen years of age and unmarried. In 1891 the widow adopted a son to her husband. *Held*, that the adoption was valid. It was contended that the adoption was invalid on the ground that the natural son had survived his father and lived to attain ceremonial competence. Both the Courts below found that he was a minor and unmarried when he died. *Held*, that, as there appeared to be no fixed age at which a Hindu boy was supposed to have attained ceremonial competence, and as there was no proof in this case that the son had, or was treated as having, attained such competence, the objection was not sustained. VERABHAI AJUBHAI *v.* BAI HIRABA (1903) **I. L. R. 27 Bom. 492 ; s.c. L. R. 30 I. A. 234 : 7 C. W. N. 716**

73. ———————— *Co-widows—Estate vested in one co-widow by inheritance from her son—Adoption by the other co-widow.* A co-widow cannot make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested. *Rakhmabai* v. *Radhabai, 5 Bom. H. C. (A. C. J.) 181*, distinguished. *Semble:* The consent of the other widow would not validate the adoption. ANANDIBA *v.* KASHIBAI (1904) . **I. L. R. 28 Bom. 461**

74. ———————— *Adoption by widow, under authority from her husband, of her brother's grandson.* The rule of Hindu law that a Hindu cannot adopt a child, whose mother he could not lawfully have married, does not apply *e converso* to the case of an adoption made by a widow under authority from her deceased husband, such an adoption being in law an adoption made by the widow as agent on behalf of her husband. The adoption therefore by a Hindu widow, in virtue of

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a written authority to adopt given to her by her deceased husband of her brother's grandson (or son) is not according to Hindu law an invalid adoption. *Musammat Battas Kuar* v. *Lachman Singh, All. H. C. 1875, p. 117,* discussed. *Sriramulu* v. *Ramayya, I. L. R. 3 Mad. 15 ; Ragavendra Rau* v. *Jayaram Rau, I. L. R. 20 Mad. 283 ;* and *Bai Nani* v. *Chunilal, I. L. R. 22 Bom. 973,* followed. *Bhagwan Singh* v. *Bhagwan Singh, I. L. R. 17 All. 294,* and *I. L. R. 21 All. 412,* and *Chowdry Pudum Singh* v. *Koer Oodey Singh, 12 Moo. I. A. 350,* referred to. JAI SINGH PAL SINGH *v.* BIJOY PAL SINGH (1905) . . . **I. L. R. 27 All. 417**

75. ———— *Adoption by widow—Authority to adopt—Joint family—Gift to daughter out of joint property—Limits of property.* Where the widow of a deceased co-parcener in a joint Hindu family, under an authority to adopt, given to her by her husband's will, adopted a son, and prior to such adoption, a posthumous son was born to the other co-parcener. *Held* (upholding TYABJI, *J.*), that the adoption was valid. The sole surviving member of a joint Hindu family, owning property worth from R10 lacs to 15 lacs, out of the income of such property, made a gift of R20,000 to his daughter and only child. *Held* (reversing TYABJI, *J.*), that the gift was valid, and did not exceed the limits of property. BACHOO *v.* MANKOREBAI (1905) . . **I. L. R. 29 Bom. 5**

76. ———— **Adoption by senior widow without consulting junior widow**—*Validity of.* An adoption made after the death of a Hindu by his senior widow, after having obtained the consent of his sapindas, but without consulting the junior widow, is valid and cannot be impeached on the ground that such adoption has the effect of divesting the estate of the junior widow or her infant daughter. *Rakhmabai* v. *Radhabai, 5 B. H. C. A. C. J. 181 at p. 192 ; Bhimawa* v. *Sungawa, I. L. R. 22 Bom. 206 ; Amava* v. *Mahadgauda, I. L. R. 22 Bom. 416,* referred to and followed. *Subrahmanyam* v. *Venkamma, I. L. R. 26 Mad. 627,* distinguished. The consent of kinsman is required on account of the incapacity of woman to act rather than to procure the consent of all, whose interests will be defeated by the adoption. *The Collector of Madura* v. *Mottoo Ramalinga Sathupatty, 12 Moo. I. A. 397, 442.* NARAYANASAMI NAICK *v.* MANGAMMAL (1905) . . . **I. L. R. 28 Mad. 315**

77. **Jains**—*Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof. Held,* that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without any special authority to that effect, and if there are two widows the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of the *sapindas,* to give a son in adoption after the death of her husband. *Held,* also, that adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. *Manohar Lal* v. *Banarsi Das, I. L. R. 29 All. 495,* followed. *Chotay Lall* v. *Chunno Lall, L. R. 6 I. A. 15, Amava* v. *Mahadgauda, I. L. R. 22 Bom. 416, Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma, I. L. R. 22 Mad. 398,* and *Radha Mohan* v. *Hardai Bibi, I. L. R. 21 All. 460,* referred to. *Held,* also, that where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *primâ facie* case that the adoption challenged by him is invalid in law or never took place in fact. *Brojo Kishoree Dassee* v. *Sreenath Bose, 9 W. R. 463,* and *Sardar Singh* v. *Ram Kunwar, All. Weekly Notes (1902), 62,* followed. *Tacoordeen Tewarry* v. *Ali Hossein Khan, L. R. 1 I. A. 192, at page 206,* referred to. *Tarinee Churn Chowdhry* v. *Sharoda Soonduree Dossee, 11 W. R. 468, Chowdhry Pudum Singh* v. *Koer Oddey Singh, 12 W. R. P. C. R. 1, Gooroo Prosunno Singh* v. *Nil Madhab Singh, 21 W. R. 84,* and *Har Dyal Nag* v. *Roy Krishto Bhoomick, 24 W. R. 107,* distinguished. ASHARFI KUNWAR *v.* RUP CHAND (1908) . . **I. L. R. 30 All. 197**

78. ———— **Adoption by Hindu woman**—*Prostitute, adoption by—Inheritence right of—Letters of Administration.* A Hindu woman cannot under any circumstances adopt a son to herself, nor can any so-called adoption confer a right of inheritance on the adopted son. NARENDRA NATH BAIRAGI *v.* DINA NATH DAS (1909) **I. L. R. 36 Calc. 824**

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See HINDU LAW—ADOPTION—EVIDENCE OF ADOPTION . **I. L. R. 30 Calc. 999**

1. ———— **Adoption not in accordance with will**—*Adoption without consent of trustees—Invalid adoption.* A Hindu by will bequeathed his estate to a son to be adopted in a certain event by *A* with the consent of *B* or *B's* representatives, with a gift over on failure of adoption with such consent to *B* or *B's* representatives. On the happening of the event after *B's* death, *A* adopted the plaintiff without the consent of *B's* representatives who withheld their consent after a demand by *A. Held,* that this was not such an adoption as would entitle the plaintiff to take under the will, and that consequently the gift over took effect. BEEMCHURN SEIN v. HEERALALL SEAL . . . **2 Ind. Jur. N. S. 225**

2. ———— **Consanguinity**—*Adoption of son of person with whom adopter could not intermarry—Invalid adoption. Semble :* The adoption of the son of a person with whom the adopter could not have intermarried is invalid according to Hindu law. JAVANI BHAI *v.* JIVA BHAI . **2 Mad. 462**

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3. ——— *Adoption of son of person with whom adopter could not intermarry—Relationship prior to marriage.* The rule of Hindu law that a legal marriage must have been possible between the adopter and the mother of the adopted boy refers to their relationship prior to marriage. SRIRAMALU *v.* RAMAYYA **I. L. R. 3 Mad. 15**

4. ——— *Adoption of son of person with whom adopter could not intermarry—Sudras.* The rule prohibiting the adoption of one with whose mother, in her maiden state, the adopter could not have legally intermarried is not binding on Sudras. CHINNA NAGAYYA *v.* PEDDA NAGAYYA **I. L. R. 1 Mad. 62**

5. ——— *Widow adopting son whose mother her husband could not have legally married.* It is a general rule of Hindu law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted in her maiden state. MINAKSHI *v.* RAMANADA . . **I. L. R. 11 Mad. 49**

6. ——— *Sapinda relationship, limitation of.* Where the natural mother of an adopted son was seven degrees removed from the common ancestor and the adoptive father five degrees removed *ex parte paterna :—Held,* that the adoption was valid. *Quære :* Whether when the relationship is more than six degrees removed, sapinda relationship between the natural mother and the adopter does not cease. VYAS CHIMANLAL *v.* VYAS RAMCHANDRA **I. L. R. 24 Bom. 473**

7. ——— *Validity of adoption—Superior castes.* Consanguinity does not invalidate an adoption where the parties involved do not belong to any of the three regenerated castes. *Per* MITTER, *J.* NUNKOO SINGH *v.* PURM DHUN SINGH . . . . . **12 W. R. 356**

8. ——— *Boy of unregenerate classes—Baqqâls. Semble :* That baqqâls do not belong to the regenerate classes, and therefore the rule of law which forbids a Hindu to adopt a boy whose mother he could not have married does not apply to them. PHUNDO *v.* JANGI NATH **I. L. R 15 All. 327**

9. ——— **Son adopted after payment of price**—*Contract to give son in consideration of an annual allowance—Contract Act (IX of 1872), s. 23.* An adoption of a son after payment of price is not recognized in the present, the Kali Yuga. The only adoption now recognized is that of the dattaka son, or son given. A contract to give a son in adoption, in consideration of an annual allowance to the natural parents, is void under s. 23 of Act IX of 1872, inasmuch as the contract, if carried out, would involve an injury to the person and property of the adopted son, and would defeat the provisions of the Hindu law. ISHAN KISHOR ACHARJEE CHOWDHRY *v.* HARIS CHANDRA CHOWDHRY . . **13 B. L. R. Ap. 42 : 21 W. R. 381**

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10. ——— **Adult Brahman**—*Performance of upanayana—Validity of adoption. Quære :* Whether a Brahman adult, whose upanayana and marriage ceremonies have already been performed in the family of his natural father, can be adopted into another family according to Hindu law. SADASHIB MORESHVAR GHATE *v.* HARI MOORESHVAR GHATE . . . **11 Bom. 190**

11. ——— **Adoption of person on whom upanayana has been performed.** The weight of authority is against the validity of the adoption of one upon whom upanayana has been already performed. In strictness, there is no authority upon the other side. VENKATESAIYA *v.* VENKATACHARLU . . . . **3 Mad. 28**

12. ——— *Brahmans—Validity of adoption.* Among Brahmans the adoption of a son for whom the chudakarana and upanayana ceremonies have been performed in his natural family is not on that ground invalid. He notwithstanding acquires the legal status of an adopted son, the fact of those ceremonies having been already performed only rendering necessary, in a religious point of view, their re-performance and the performance of certain additional ceremonies in the adoptive family, the latter being considered to have the effect of annulling those performed in the boy's natural family. LAKSHMAPPA *v.* RAMAVA **12 Bom. 364**

13. ——— *Brahmans—Custom—Validity of adoption.* According to the custom obtaining amongst Brahmans in Southern India, the adoption of a boy of the same gotra, after the upanayana ceremony has been performed, is valid. *Venkatesaiya* v. *Venkatacharlu, 3 Mad. 28,* overruled. VIRARAGAVA *v.* RAMALINGA **I. L. R. 9 Mad. 148**

14. ——— **Adoption of a married asagotra Brahman**—*Validity of adoption—Factum valet.* The adoption of a married asagotra Brahman is not prohibited by the Hindu law in force in the Presidency of Bombay. The circumstance that there was a person better qualified than the adoptee would not by itself render such adoption invalid or prevent the principle of *factum valet* from applying. Where a rule is in effect directory only, an adoption contrary to it, however blameable, is nevertheless, to every legal purpose, good. DHARMA DAGU *v.* RAMKRISHNA CHIMNAJI **I. L. R. 10 Bom. 80**

15. ——— **Adoption among Brahmans**—*Ceremony of adoption after marriage of person to be adopted—Estoppel.* An adoption to be valid must take place before the marriage of the person adopted. In a suit for partition of family property, the plaintiff sued as the adopted son of defendant, who had, after performing the usual

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ceremony of adoption, long treated him as his adopted son. The defendant denied that the plaintiff was his adopted son on the ground (which was established by the evidence) that the plaintiff was married at the date of the ceremony of adoption. The parties were Brahmans and members of the same gotra by birth. *Held*, (i) that the adoption set up was invalid ; (ii) that the defendant was not estopped by his conduct from denying the validity of the adoption. PICHUVAYYAN *v.* SUBBAYYAN **I. L. R. 13 Mad. 128**

16. ——— Adoption of Sudra after marriage—*Validity of adoption. Quære :* Whether a Sudra can be validly adopted after marriage. VYTHILINGA MUPPANAR *v.* VIJAYATHAMMAL . . . **I. L. R. 6 Mad. 43**

17. ——— *Law in Western India—Validity of adoption.* According to the Hindu law obtaining in Western India, the adoption of a Sudra who is married at the time of his adoption is not invalid if the adopted person be a sagotra (of the same family) of the person adopting. NATHAJI KRISHNAJI *v.* HARI JAGOJI **8 Bom. A. C. 67**

18. ——— *Law in Western India—Validity of adoption.* In Western India an adoption among Sudras is not invalid, although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and therefore not a sagotra (*i.e.*, of the same family) with the adopter. Even among Brahmans, marriage does not disqualify for adoption. *Quære :* Whether the adoption of an asagotra married man belonging to any of the three regenerate classes would be invalid. LAKSHMAPPA *v.* RAMAVA **12 Bom. 364**

19. ——— Adoption of self-given adult son—*Law in Bombay Presidency—Invalidity of adoption.* Amongst Hindus in the Presidency of Bombay, an adoption of a son self-given, although he may at the time of the gift be an adult, is in the present age (the Kali Yuga) invalid. BASHETIAPPA BIN BASLINGAPPA *v.* SHIVLINGAPPA BIN BALLAPPA . . . **10 Bom. 268**

20. ——— Son older than adopting mother—*Validity of adoption. Semble :* The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory, and not mandatory. GOPAL BALKRISHNA KENJALE *v.* VISHNU RAGHUNATH KENJALE **I. L. R. 23 Bom. 250**

21. ——— Gotraja relationship—*Limit of age within which person may be adopted.* In a suit to obtain a declaration that an alleged adoption was null and void, the plaintiff based his own title upon an alleged adoption of himself. He was related to his alleged adoptive father as father's father's brother's son's son's son's son. It was contended on behalf of the defendant, who was related to the plaintiff's adoptive father as brother's son's son, that the plaintiff's relationship was not too remote to admit of his being validly adopted in preference to the defendant and other near relatives. *Held*, that the plaintiff, by reason of his natural relationship towards his adoptive father, belonged to the same gotra as the latter, and although such relationship compared with that of the defendant was remote, that circumstance could not *ipso facto* vitiate his adoption. *Bhyah Ram Singh* v. *Bhyah Ugur Singh, 13 Moo. I. A. 373*, and *Uma Deyi* v. *Gokoolanund Das Mahapattra, L. R. 5 I. A. 40*, referred to. According to the Hindu law, as observed by the Benares school, the ceremony of upanayana, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, is also the ultimate limit of time when a valid adoption in the dattaka form can take place. Adoption in that form implies that the second birth has taken place in the adoptive family ; and it cannot be effected after the boy's place in his natural family has become irrevocably fixed by the upanayana representing his second birth therein. The age of the boy is material only as determining the term at which the upanayana may be performed. *Kerutnarain* v. *Bhoobunessree, 1 Sel. Rep. 161*, and *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain, S. D. A. Beng. (1859) 229*, referred to. *Dharma Dagu* v. *Ram Krishna Chimnaji, I. L. R. 10 Bom. 80*, dissented from. According to the Kalika Purana as interpreted by the Dattaka Mimansa of Nanda Pandita, an adoption in the dattaka form is wholly null and void if made after the adoptee has completed the fifth year of his age. It is a mistake to hold that according to the Dattaka Mimansa, so long as an adoption takes place while the adoptee is under six years of age, it is valid. The mistake arises from supposing that the word panchvarshiya used in paragraphs 48 and 53 of the Dattaka Mimansa necessarily indicates that the person referred to has passed the fifth anniversary of his birth. It indicates on the contrary that he is in his fifth year. *Thakoor Oomrao Singh* v. *Thakoorance Mehtab Koonwer, 1 N. W. 103a*, dissented from. The authenticity of the text of the Kalika Purana, which lays down that a child must not be adopted whose age exceeds five years, is extremely doubtful. The interpretation given to that text in the Dattaka Mimansa was not necessarily intended to be universally applicable, and admits of a construction which would confine the application of the text to Brahmans intended for the priesthood ; and various other equally plausible interpretations have been adopted by other authorities. This being so, it would be unsafe to act upon the text in question and upon the interpretation placed upon it in the Dattaka Mimansa, so as to set aside an adoption which took place many years ago, which had ever since been recognized as valid, and under which the

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adoptee had ever since been in possession of his adoptive father's estate upon the single ground that at the time of the adoption the adopted son was more than five years of age. In such a case the onus of proof is upon the person who alleges this adoption to be invalid. *Haimun Chull Singh* v. *Koomer Gunsheam Singh, 5 W. R. P. C. 69,* referred to. In a case where the validity of an adoption was in dispute and the parties to the suit were Chhatriyas: —*Held,* that, even if it had been established that five years was the rigid and inflexible limit of age for the validity of all adoptions among the "twice-born" classes, so as to be applicable even to Chhatriyas in the circumstances of the case, it would be necessary to have a full investigation of the question whether, among the clan of the Chhatriyas to which the parties belonged, any such rigid rule prevailed. GANGA SAHAI *v.* LEKHRAJ SINGH **I. L. R. 9 All. 53**

22. ——— Brother's son—*Invalid adoption.* A woman may not affiliate by adoption a brother's son. BATTAS KOAR *v.* LACHMAN SINGH **7 N. W. 117**

23. ——— *Validity of such adoption.* Under the Hindu law, a widow may adopt her brother's son. BAI NANI *v.* CHUNILAL . . . . **I. L. R. 22 Bom. 973**

24. ——— Adoption of a daughter—*Validity of such adoption.* The adoption of a daughter by a Brahman is invalid under the Hindu law. GANGABAI *v.* ANANT **I. L. R. 13 Bom. 690**

25. ——— Adoption by naikin or dancing girl—*Custom of adoption of more than one daughter at a time—Rights of adopted daughter.* *A,* a naikin, or dancing girl, in South Canara, affiliated prior to 1849 three girls and a boy. These four persons lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. *T,* one of the girls, died in 1880, leaving certain property. *V,* claiming to be the sister by adoption of *T,* sued to recover *T's* estate from *M, T's* uterine brother. *Held,* (i) that an adoption of a daughter by a naikin or dancing girl can be recognized by the Civil Courts, and does confer rights on the girl adopted. *Mathura Naikin* v. *Esu Naikin, I. L. R. 4 Bom. 545,* dissented from; (ii) that there being no warrant for a plurality of adoptions in the analogies of Hindu law, and no special custom having been proved, *V* could not claim *T's* estate. VENKU *v.* MAHALINGA **I. L. R. 11 Mad. 393**

26. ——— Daughter's son—*Doctrine of factum valet—Invalid adoption.* Amongst Brahmans, the adoption of a daughter's son is incestuous and invalid, and cannot be supported on the authority of the maxim *factum valet quod fieri non debuit.* BHAGIRTHIBAI *v.* RADHABAI **I. L. R. 3 Bom. 298**

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In Southern India it seems to be a valid adoption. VAYIDNIADA *v.* APPU . **I. L. R. 9 Mad. 44**

27. ——— Daughter's or sister's son—*Invalid adoption—Lingayats—Factum valet, Doctrine of.* It is a general rule and fundamental principle amongst Brahmans, Kshatriyas, and Vaishyas that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not marry by reason of propinquity. The burden of proving a special custom to the contrary amongst any members of these three regenerate classes prevalent either in their caste or in a particular locality lies upon him who avers the existence of that custom. Limits within which the maxim *quod fieri non debuit factum valet* applies pointed out. Lingayats are members of the Sudra, and not of the Vaishya class. GOPAL NARHAR SAFRAY *v.* HANMANT GANESH SAFRAY **I. L. R. 3 Bom. 273**

28. ——— Eldest son—*Validity of adoption.* The adoption of an eledest son is, under the precedents of the Sudder Court, although improper, not illegal. SEETARAM *v.* DHUNOOK DHAREE SAHYE . . . . . **1 Hay 260**

29. ——— *Validity of adoption.* In a suit by a Hindu widow to recover possession of certain property dedicated to idols as heir to her deceased husband, the last shebait, it appeared that the plaintiff's husband was an adopted son of his predecessor in office, and that he was the eldest son of the first defendant who was the nearest male cognate of the adoptive father. On behalf of the defendant it was contended that the adoption of an eldest son was invalid, and that consequently plaintiff's husband did not succeed rightfully to the shebaitship. *Held,* that the adoption of an eldest son, where there are several sons, was not invalid by Hindu law. JANOKEE DEBEA *v.* GOPAUL ACHARJEA **I. L. R. 2 Calc. 365**

30. ——— *Validity of adoption.* The prohibition to the adoption of an eldest son—unlike that to the adoption of an only son—is admonitory merely, and does not create any legal restriction. Texts from original Smriti writers, with the opinions of their commentators and the decisions of the High Courts, bearing on the subject referred to and discussed. KASHIBAI *v.* TATIA . . . . **I. L. R. 7 Bom. 221**

31. ——— *Validity of adoption.* Adoption of the eldest son upheld. JAMNABAI *v.* RAYCHAND NAHALCHAND **I. L. R. 7 Bom. 225**

As to the adoption of an eldest son, *see* also NILMADHUB DAS *v.* BISHWAMBHAR DAS **3 B. L. R. P. C. 27 : 12 W. R. P. C. 29 13 Moo. I. A. 85**

and LAKSHMAPPA *v.* RAMAVA . **12 Bom. 364**

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32. ——— **Grand-nephew**—*Reflection of a son—Appointment.* A grand-nephew may be validly adopted under Hindu law. *Morun Moyee Dabea* v. *Bejoy Kishen Gossamee, W. R. F. B. 121,* followed. HARAN CHUNDER BANERJI *v.* HURRO MOHUN CHUCKERBUTTY **I. L. R. 6 Calc. 41 6 C. L. R. 393**

33 ——— *Validity of adoption.* The adoption of a grand-nephew is not repugnant to Hindu law. An adopted son cannot succeed to his adoptive maternal grandfather's estate when there are collateral male heirs. MORUN MOYEE DABEA *v.* BEJOY KISHEN GOSSAMEE **W. R. F. B. 121**

34. ——— **Half-brother**—*Invalid adoption.* The prohibition of the adoption of a half-brother has nothing to do with the possibility of a legal marriage between the son and his step-mother in her virgin state. SRIRAMULU *v.* RAMAYYA **I. L. R. 3 Mad. 15**

35. ——— **Adoption of paternal uncle's son**—*Niyoga, Custom of.* A member of an undivided Hindu family, consisting of himself, his adopted son, and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of, the land, it appeared that the adopted son was the son of the paternal uncle of the adoptive father. *Held,* that the adoption was not invalid by reason of the abovementioned circumstance. VIRAYYA *v* HANUMANTA **I. L. R. 14 Mad. 459**

36. ——— **Maternal aunt's daughter's son**—*Validity of adoption.* Neither by local usage nor by the law of Mitkshara is the adoption of the son of a maternal aunt's daughter invalid. VENKATTA *v.* SUBHADRA . **I. L. R. 7 Mad. 548**

37. ——— **Mother's sister's son**—*Validity of adoption—Sudras.* Adoption of the mother's sister's son is valid among Sudras. CHINNA NAGAYYA *v.* PEDDA NAGAYYA **I. L. R. 1 Mad. 62**

38. ——— **Cousin on maternal side**—*Adoption by one of the regenerate classes of a mother's sister's son—Benares school of law. Held,* by EDGE, *C.J.*, and KNOX, BLAIR, and BURKITT *JJ.* (BANERJI and AIKMAN, *JJ.* dissenting), that the Hindu law of the school of Benares, does not prohibit an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter, and consequently the onus of proving that such an adoption is prohibited by usage is upon him who alleges that it is illegal. The authority in the school of Benares of the Dattaka Mimansa of Nanda Pandita considered. The Mimansa is not on questions of adoption an "infallible guide" in the school of Benares, and is not followed when it imposes on the right of adoption restrictions not to be found in the recognized authorities of the school of Benares. *Held,* by BANERJI, *J.* (AIKMAN, *J.*, concurring), that the adoption by a Hindu belonging to one of the three regenerate classes of his mother's sister's son is prohibited according to the Hindu law of the Benares school. Such prohibition is not merely directory, but the adoption is absolutely interdicted and void, and cannot be validated by the rule of *factum valet. Held,* also, by BANERJI, *J.*—That the Dattaka Chandrika and the Dattaka Mimansa are works of paramount authority on questions relating to adoption as well in those parts of India which are governed by the law of the Benares School as elsewhere. BHAGWAN SINGH *v.* BHAGWAN SINGH . . . . **I. L. R. 17 All. 294**

39. ——— **Only son**—*Validity of adoption.* The adoption of an only son is, when made, valid according to Hindu law. CHINNA GAUNDAN *v.* KUMARA GAUNDAN . . **1 Mad. 54**

SHINAM GOUNDEN *v.* COOMARA GOUNDEN **1 Ind. Jur. O. S. 115**

40. ——— *Validity of adoption.* The adoption of an only son is invalid according to Hindu law. OPENDRO LAL ROY *v.* PRASANNAMAYI . . **1 B. L. R. A C. 221**

S. C. OPENDRA LAL ROY *v.* BROMO MOYEE **10 W. R. 347**

41. ——— *Invalidity of such adoption.* The adoption of an only son is, by the general Hindu law, invalid. WAMAN RAGHUPATI BOVA *v.* KRISHNAJI KASHIRAJ BOVA **I. L. R. 14 Bom. 249**

42. ——— *Effect of his afterwards becoming not the only son.* The adoption of a person who at the time of his adoption is an only son is invalid. The fact that other sons are afterwards born to his parents does not validate his adoption. RAIJI JADAV *v.* BAI MATHURA **I. L. R. 19 Bom. 658**

43. ——— *Adoption by Sudra—Validity of adoption.* The adoption by a Sudra of an only son as a kurta putro is not illegal under Hindu law. TIKDEY *v.* LALLA HUREELALL . . . . **W. R. 1864, 133**

44. ——— *Validity of adoption—Factum valet, doctrine of. Held* (TURNER, *J.*, dissenting), that the adoption of an only son cannot, according to Hindu law, be invalidated after it has once taken place. HANUMAN TIWARI *v.* CHIRAI . . . **I. L. R. 2 All. 164**

45. ——— *Maxim "quod fieri non debuit factum valet."* According to the Benares School of Hindu law, the giving in adoption of an only son is sinful, and to that extent contrary to the Hindu law; but the adoption of such a son having taken place in fact is not null and void;

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and the maxim "*quod fieri non debuit factum valet*" is applicable and should be applied to such an adoption. So *held* by the Full Bench. *Hanuman Tiwari* v. *Chirai, I. L. R. 2 All. 164*, approved and followed. BENI PRASAD *v.* HARDAI BIBI **I. L. R. 14 All. 67**

Held in the same case by the Privy Council in appeal, on the general question as to the validity by Hindu law of the adoption of the only son of his natural father, that such an adoption is valid by that law. RADHA MOHAN *v.* HARDAI BIBI **I. L. R. 21 All. 460 L. R. 26 I. A. 113 3 C. W. N. 427**

See GURULINGASWAMI *v.* RAMALAKSHMAMMA **I. L. R. 22 Mad. 398 L. R. 26 I. A. 113 3 C. W. N. 427**

46 ——————— *Construction of deed of gift—Adoption of eldest or only son.* A Hindu died after having made a hibbanama, or deed of gift, giving the bulk of his property to the eldest son of one of his brothers, designating him as his pallok-putra. The donee thereof died without issue, but leaving a widow him surviving. On the death of his widow, his cousins sued his step-brother for possession of their share of his property, on the allegation that he had been adopted by their uncle and, consequently, the relationship between him and his step-brother had been severed, and that they were equally entitled with the step-brother to succeed. The defendant denied the fact of the adoption. The High Court *held* that the intention to adopt and the fact of adoption were proved by the terms of the deed of gift. *Held* by the Privy Council reversing the judgment of the High Court, that the words of the hibbanama ["but as I had no son or daughter, I took you as my pallok-putra in the month of Aghran 1211 B.S. (1803), with the anumati (permission) of your parents, for the purpose of securing future oblations of water and funeral cake, and having brought you up like a son, performed the ceremonies of your sangskar, etc., and have constituted you my representative"] were not those which properly import the adoption of a son by gift —dattak putra. *Held*, that the presumption which arose from the religious duty of a childless Hindu to adopt was in this case opposed to as strong a presumption that a Hindu would not break the law by giving in adoption an eldest or only son. NILMADHUB DAS *v.* BISWAMBHAR DAS **3 B. L. R. P. C. 25 : 12 W. R. P. C. 29 13 Moo. I. A. 85**

47. ——————— *Sudras—Validity of adoption.* The adoption of an only son is invalid according to the Bengal school of Hindu law, and the prohibition applies as well to Sudras as to the higher castes. MANICK CHUNDER DUTT *v.* BHUGGOBUTTY DOSSEE . **I. L. R. 3 Calc. 443**

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48. ——————— *Age of adopted son—Validity of adoption. Held*, that the adoption by a Hindu widow of an only son, if valid in every other respect, cannot be set aside by reason of the adopted being an only son of an advanced age. VYANKATRAV ANANDRAV NIMBALKAR *v.* JAYAVANTRAV BIN MALHARRAV RANADIVE **4 Bom. A. C. 191**

49. ——————— *Married son—Sudras—Validity of adoption.* An adoption amongst Sudras is not necessarily invalid because the person adopted is an only son and is married, and has been given in adoption by his mother after her husband's death and without his authority. MHALSAIBAI *v.* VITHOBA KHANDAPPA GULVE **7 Bom. Ap. 26**

50. ——————— *Validity of adoption—Authority of husband, absence of.* A gift by a Hindu widow of her deceased husband's only son is invalid in the absence of an express authority conferred upon her by him during his lifetime. Such an adoption, being null and void *ab initio*, cannot be supported by the maxim *quod fieri non debuit factum valet. Quære :* Whether a gift in adoption of an only son by his father is void in the Presidency of Bombay. LAKSHMAPPA *v.* RAMAVA **12 Bom. 364**

51. ——————— *Absence of authority of husband—Validity of adoption.* In the Presidency of Bombay a widow may give in adoption a younger son where her husband has not, by direct prohibition or otherwise, indicated his unwillingness that she should, after his death, give such younger in adoption, the husband's assent to such a gift being implied. But it cannot be implied to the gift by his widow after his death of an eldest, and still less of an only, son in adoption, where he did not expressly indicate such assent in his lifetime. *Semble :* Where a father gives his only son in adoption as a dwyamushyayana, he consents to deprive himself of one-half of the spiritual benefit derivable from the performance of religious obsequies. Hence his consent cannot be implied even to such a gift when made by his widow after his death. To such a case the *factum valet* principle is wholly inapplicable because the adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*. The maxim *quod fieri non debuit factum valet* considered, and its application pointed out. There is no authority for drawing any distinction between Sudras and the other classes on the question of the legality of the adoption of an eldest or an only son. *Mhalsabai* v. *Vithoba, 7 Bom. Ap. 26*, dissented from, so far as it supported the gift in adoption by a widow of an only son without the authority of her husband. LAKSHMAPPA *v.* RAMAVA **12 Bom. 364**

52. ——————— *Lingayats—Gift in adoption by widow without an express authority from her husband.* The plaintiff, a Sudra of the Lingayat caste, sued for possession of certain

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property, alleging that he had been adopted by the defendant, a widow of the same caste. The defendant denied the adoption, and contended that it was invalid, inasmuch as he was an only son, and had been given in adoption by his widowed mother without an express authority from her husband. The plaintiff, in support of his adoption, produced two documents executed by the defendant, *viz.*, a deed of adoption and a compromise in which the defendant had ratified the plaintiff's adoption. It was found that the defendant was very young, and did not act independently in the execution of those documents. *Held*, that the adoption was invalid on two grounds, *viz.*, *1st*, that the mother had no authority to give the plaintiff in adoption, because he was the only son of her deceased husband at the time of the adoption; and, *2nály*, that the defendant (whether an infant or not) was not, either at the time of the alleged adoption or at that of the alleged ratification of it, a free agent, but was subject to undue influence. In the case of an only son the High Court refuses to imply authority in the mother to give such a son in adoption. *Quære:* Whether the plaintiff was incapable of being adopted by the defendant because his mother was a second cousin of the defendant's husband. *Bayabai* v. *Bala Venkatesh, 7 Bom. Ap. 1; Gopal Narhar* v. *Hamant Ganesh, I. L. R. 3 Bom. 273*, referred to. *Lakshmappa* v. *Ramava, 12 Bom. 364*, approved. SOMASHEKHARA *v.* SUBHADRAMAJI
I. L. R. 6 Bom. 524

53. ——————— *Adoption of an only son—Validity of such adoption among Lingayats—Custom of Lingayats.* According to the custom of Lingayats in the districts of Dharwar and Bijapur, the adoption of an only son is valid. BASAVA *v.* LINGANGAUDA
I. L. R. 19 Bom. 428

54. ——————— *Adoption of only son of divided brother—Lingayats—Adoption in dwyamushyayana form.* Amongst Lingayats, the dwyamushyayana form of adoption is not obsolete. The adoption can take place in cases in which brothers are divided as well as where they are joint. CHENAVA *v.* BASANGAVDA **I. L. R. 21 Bom. 105**

55. ——————— *Validity of adoption of only son in Gujarat—Hindu law.* The adoption of an only son is valid in Gujarat, where the Mayukha is the paramount authority on Hindu law. VYAS CHIMANLAL *v.* VYAS RAMCHANDRA
I. L. R. 24 Bom. 67

56. ——————— ——————— *Gift of son in adoption by a widow after re-marriage—Widow Re-marriage Act (XV of 1856), ss. 2 and 3.* A Hindu widow has no power, after her re-marriage, to give in adoption her son by her first husband, unless he has expressly authorized her to do so. PANCHAPPA *v.* SANGANBASAWA
I. L. R. 24 Bom. 89

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57. ——————— *Only son given in adoption by widow.* A widow is competent to give in adoption whenever the husband is legally competent to give and when there is no express prohibition from him. There principles appear to regulate the power to give in adoption (i) the son is the joint property of the father and the mother for the purposes of a gift in adoption; (ii) when there is a competition between the father and the mother, the former has the predominant interest or a potential voice; and (iii) after the father's death, the property survives to the mother. The adoption of an only son is not invalid. *Chinna Gaundan* v. *Kumara Gaundan, 1 Mad. 54*, followed. NARAYANASAMI *v.* KUPPUSAMI . **I. L. R. 11 Mad. 43**

58. ——————— *Question as to validity of adoption.* The Courts below differed as to whether the adoption, if authorized, was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption is a question that has not come before Her Majesty in Council for decision. AMMI DEVI *v.* VIKRAMA DEVU
I. L. R. 11 Mad. 486
L. R. 15 I. A. 176

59. ——————— *Only son given in adoption by his widowed mother.* The plaintiff sued for a declaration of the invalidity of an adoption made by the widow of a deceased Hindu. It appeared that the alleged adopted son was an only son. *Held*, that the adoption was not invalid under Hindu law. GURULINGASWAMI *v.* RAMALAKSHMAMMA . . . **I. L. R. 18 Mad. 53**

On appeal to the Privy Council on the general question as to the validity by Hindu law of the adoption of the only son of his natural father decided in one judgment upon these two appeals: *Held*, that such an adoption is valid by that law. The authority of a widow in reference to adoption not being identical in different schools of Hindu law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widow of his natural father that, unless there has been some express prohibition by the husband, the wife's power with the concurrence of sapindas, where the concurrence of sapindas is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper, but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband. GURULINGASWAMI *v.* RAMALAKSHMAMM
I. L. R. 22 Mad. 398

See RADHA MOHAN *v.* HARDAI BIBI.
I. L. R. 21 All. 460
L. R. 26 I. A. 113
3 C. W. N. 427

60. ——————— **Orphan**—*Invalid adoption.* According to Hindu law, an orphan cannot be adopted. SUBBALUVAMMAL *v.* AMMAKUTTI AMMAL
2 Mad. 129

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61. ——————— *Law of Western India—Invalid adoption.* According to the Hindu law prevailing in Western India, an orphan cannot be adopted. BALVANTRAV BHASKAR *v.* BAYABAI **6 Bom. O. C. 83**

62. ——— **Palak-putra**—*Invalid adoption.* The Hindu law does not allow of the adoption of a palak-putra. KALEE CHUNDER CHOWDHRY *v.* SHIB CHUNDER . . . **2 W. R. 281**

This decision was not disputed in the Privy Council on this point.

See KALI CHANDRA CHOWDHURY *v.* SHIB CHUNDER BHADURI **6 B. L. R. 501 : 15 W. R. P. C. 12**

63. ——— **Putrika-putra**—*Invalid adoption.* The adoption of a "putrika-putra" is invalid. NURSING NARAIN *v.* BHUTTON LALL **W. R. 1864, 194**

64. ——— **Sister's son**—*Andhra country—Invalid adoption.* In the Andhra country, as in Bengal, a Brahman cannot adopt his sister's son NARASAMAL *v.* BALARAMACHARLU . **1 Mad. 420**

65. ——————— *Validity of adoption.* It is now well settled law that the adoption of a sister's son by a Hindu of the Vaishya caste is valid. GANPATRAV VIRISHVAR *v.* VITHOBA KHANDAPPA . . **4 Bom. A. C. 130**

66. ——————— *Validity of adoption—Custom—Acquiescence in fact of adoption.* Suit to set aside the adoption of the first defendant, the alleged adopted son of plaintiff's undivided brother, to declare plaintiff's title to certain lands and for possession. First defendant pleaded that the question of his adoption was *res judicata*, and the Civil Judge so decided. Upon appeal, the High Court reversed the decision, and remanded the case for decision on the merits. After trial, the Civil Judge found that the fact of the adoption was satisfactorily proved, and that first defendant had done acts as adopted son since 1833 at least. It was also argued on plaintiff's part that the adoption was illegal, being that of a sister's son, and the judgment of HOLLOWAY, *J.*, in *Narasama* v. *Balaramacharlu, 1 Mad. 420*, was cited. The Civil Judge decided that this applied only to the Andhra country, and that, as the custom was common in the Dravida country, the adoption was legal, or if not legal, that it was too late to dispute it. The plaintiff appealed and the case was referred to a full Court. The Court decided that on the general principles of Hindu law, as expounded by the writers of all schools, a Brahman could not legally adopt his sister's son, but as the existence of a custom, derogating from the general law, was asserted, they directed an enquiry into the existence of the supposed custom. The Civil Judge found that a rule of customary law did exist affirming the legality of the adoption of a sister's son by a Brahman. Upon the question coming before the High Court, the finding of the Civil Judge as to the existence of the custom was reversed and the following issue sent for determination :—" Has the conduct of the plaintiff and that of the members of his family been such as to render it inequitable for him to set up as against the present defendant the rule of law upon which he now insists ?" The Judge found to the effect that there had been a long course of acquiescence by all the members of the family, the plaintiff included, in the validity of sonship asserted. *Held*, that this would be hardly enough if through the influence of that course of representation by conduct the defendant had not altered his situation so that it would be impossible to restore him to that original situation ; that he had done so ; and that, although the adoption was invalid and inadequate of itself to create communion, that communion had been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which had resulted. GOPAL AYYAN RAGHUPATIAYYAN *alias* AYYAVAYYAN **7 Mad. 250**

67. ——————— *Suit for partition of property by person in possession making a false claim thereto.* According to the Hindu law, a Brahman cannot validly adopt his sister's son. *B*, a childless Hindu and a Brahman, adopted *X*, his sister's son, and subsequently, apprehending that the adoption was invalid, executed a will, by which he left his estate to *X*. After *B's* death, *X* obtained possession, and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by *P* and *S*, two widows of *B*, who set up a right of inheritance from *X*, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by *S* against *P* for partition of the estate. *Held*, that the adoption of *X* by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed him as his heirs. PARBATI *v.* SUNDAR **I. L. R. 8 All. 1**

68. ——————— *Brahman.* The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would probably have had little difficulty in accepting the opinion of the High Court that a Brahman cannot lawfully adopt his sister's son. SUNDAR *v.* PARBATI **I. L. R. 12 All. 51 L. R. 16 I. A. 186**

69. ——————— *Bohra Brahmans—Custom.* Amongst the Bohra Brahmans of the northern districts of the North-Western Provinces there exists a valid and legal custom in virtue of which a person of that caste can adopt his sister's son. CHAIN SUKH RAM *v.* PARBATI. MANSA RAM *v.* SUNDAR . . . **I. L. R. 14 All. 53**

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70. ——— *Sister's son, mother's sister's son, and daughter's son.* The adoption of a mother's sister's son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya, and Vaisiya, equally with the adoption of a daughter's son or a sister's son is contrary to law and void. The ancient texts condemning such adoptions are not only admonitions, but have been judicially decided to be prohibitions of law for such a length of time that it is now not competent to a Court to treat them as open to question in this respect. The judgment in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy, 12 Moo I.A. 437*, gives no countenance to the conclusion that, in order to bring a case under any rule of law laid down by recognized authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. BHAGWAN SINGH *v.* BHAGWAN SINGH . **I. L. R. 21 All. 412**
L. R. 26 I. A. 153
3 C. W. N. 454

71. ——— *Custom—Brahmans—Daughter's son.* In Southern India the custom which exists among Brahmans of adopting a sister's or daughter's son is valid. VAYINDINADA *v.* APPU . . . **I. L. R. 9 Mad. 44**

72. ——— *Jain law—Validity of adoption.* The question of the validity of an adoption, the parties between whom the question arose being Jains, was decided in accordance with the law of that sect, and not in accordance with Hindu law. Under Jain law, the adoption of a sister's son is valid. HASSAN ALI *v.* NAGA MAL . . . **I. L. R. 1 All. 288**

73. ——— *Mitakshara law—Kayasthas—Sudras.* As a general principle, Kayasthas are Hindus of the Sudra class, and may, as such, adopt their sister's son. RAJ COOMAR LALL *v.* BISSESSUR DYAL **I. L. R. 10 Calc. 688**

74. ——— **Stranger.**—*Adoption of stranger where there is a brother's son—Validity of adoption.* By the Hindu law, the adoption of a stranger is valid, notwithstanding the existence of a brother's son at the time of the adoption. GOCOOLANUND DOSS *v.* WOOMA DAEE
15 B. L. R. 405 : 23 W. R. 340

In the same case on appeal before the Privy Council, it was laid down that passages in the Dattaka Mimansa and the Dattaka Chandrika, which prescribe that a Hindu wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although binding upon the conscience of pious Hindus as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has

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otherwise been regularly made. WOOMA DAEE *v.* GOCOOLANUND DOSS
I. L. R. 3 Calc. 587 : 2 C. L. R. 51
L. R. 5 I. A. 40

75. ——— **Wife's brother's son**—*Validity of adoption.* The son of a wife's brother may be adopted. SRIRAMULU *v.* RAMAYYA
I. L. R. 3 Mad. 15

76. ——— **Only son**—*Dwyamushyayana adoption—Power of a Hindu widow to give away an only son in adoption.* A Hindu widow can make a valid gift of her only son in adoption. The power of giving and taking an only son in adoption in the *dwyamushyayana* form is not confined to brothers, but may also be exercised by their widows. *Lakshmappa* v. *Ramava, 12 Bom. H. C. R. 364*, explained and distinguished. KRISHNA *v.* PARAMSHRI (1901) . . **I. L. R. 25 Bom. 537**

77. ——— **Stranger to vatandar family**—*Vatan—Adoption of a person not a member of the vatandar family—Gordon Settlement—Vatan Act (Bombay Act III of 1874).* A *sanad* with respect to *vatan* property which was subject to the Gordon Settlement contained the following clauses : "*2nd.*—No *nazrana* or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral or adopted, within the limits of the *vatandar* family ; and permission to make such adoptions need not hereafter be obtained from Government. *3rd.*—When all the sharers of the *vatan* agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the *vatan* on the payment from that time forward in perpetuity of an annual *nazrana* of one anna in each rupee of the above total emoluments of the *vatan*." It was contended that the adoption of a person who did not belong to the *vatandar* family, in respect to whose *vatan* the said sanad was granted, was invalid. *Held*, that the sanad did not prohibit such an adoption, and that the adoption in question was valid. BALAJI RAMCHANDRA DESHPANDE *v.* DATTO RAMCHANDRA (1902) . . . . **I. L. R. 27 Bom. 75**

78. ——— **Purbia Kurmis**—*Adoption—Custom—Held*, that the Purbia Kurmis, calling themselves Purbia Chattris, do not really belong to the regenerate classes and, therefore, the adoption by a member of this caste of the grandson of his father's sister is not invalid as being within the prohibited degrees of relationship. JIWAN LAL *v.* KALLU MAL (1905)
I. L. R. 28 All. 170

79. ——— **Jains**—*Adoption—Custom—Authority of widow to adopt—Adoption of married man. Held*, that according to the law and custom prevailing amongst the Jain community (i) a widow has power to adopt a son to her

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deceased husband without special authority to that effect, and (ii) a married man may lawfully be adopted. *Maharaja Gobind Nath Ray* v. *Gulab Chand, 5 S. D. A. 276; Sheo Singh Rai* v. *Dakho, I. L. R. 1 All. 688; Lakhmi Chand* v. *Gatto Bai, I. L. R. 8 All. 319; Bhagwan Singh* v. *Bhagawan Singh, I. L. R. 17 All. 294,* and *21 All. 419; Raje Vyankatrav Anandram Nimbalkar* v. *Jyavantrav, 4 Bom. H. C. A. C. J. 191; Nathaji Krishnaji* v *Hari Jagoji, 8 Bom. H. C. A. C. J. 67; Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate, 11 Bom. H. C. 190; Lakhshmappa* v. *Ramava, 12 Bom. H. C. 364,* and *Dharma Dagu* v. *Ramkrishna Chimnaji, I. L. R. 10 Bom. 80,* referred to. MONOHAR LAL *v.* BANARSI DAS (1907)
I. L. R. 29 All. 495

80. ——— Consanguinity—*Community of pravaras between the adoptive father and the natural mother of the adopted son—Difference in gotra—Limits to the rule that no one could be validly adopted whose mother the adopter could not have married in her maiden state—Nanda Pandita, authority of.* There were two *pravaras* out of three common between the natural mother of the adopted boy and the adopting father, though they belonged to different *gotras.* The parties were Chitpavan Brahmins of the Thana District. The validity of the adoption was impugned on the ground that there could be no legal marriage between the adoptive father and the natural mother of the adopted son in her maiden state. *Held,* upholding the adoption, that the rule that "no one can be adopted whose mother the adopter could not have legally married" is confined to the specific instances of a daughter's son, a sister's son and the mother's sister's son. *Per* BATCHELOR, *J.*—The authority of Nanda Pandita must be accepted except where it can be shown that he deviates from or adds to the Smritis, or where his version of the law is opposed to such established custom as the Courts recognise. RAMCHANDRA *v.* GOPAL (1908) . . **I. L. R. 32 Bom. 619**

5. SECOND, SIMULTANEOUS, OR CONDITIONAL ADOPTIONS.

1. ——— Second adoption—*Adoption while first adopted son is living.* A second adoption cannot take place in the lifetime of the first adopted son. GOPEE LALL *v.* CHANDRAOLEE BUHOOJEE
11 B. L. R. 391 : 19 W. R. 12
L. R. I. A. Sup. Vol. 131

Affirming the decision of the High Court in CHOUNDAWALEE BAHOOJEE *v.* GIRDHAREEJEE
3 Agra 226

RAMABAI *v.* RAYA . **I. L. R. 22 Bom. 482**

2. ——— *Second adoption in lifetime of first adopted son.* By Hindu law, a second adoption cannot be made during the life of a

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son previously adopted. *Rungama* v. *Atchama, 4 Moo. I. A. 1,* referred to. MOHESH NARAIN MUNSHI *v.* TARUCK NATH MOITRA
I. L. R. 20 Calc. 487
L. R. 20 I. A. 30

3. ——— Such an adoption is inoperative if made. SUDANAND MOHAPATTUR *v.* BONAMALLEE . **Marsh. 317 : 2 Hay 205**

4. ——— *Adoption while first adopted son is living.* According to Hindu law, the adoption of a second son is invalid while the first adopted son exists and retains his character of a son. LAKSHMAPPA *v.* RAMAVA . **12 Bom. 364**

5. ——— *Acquiescence of first adopted son in division of property.* According to Hindu law, a second adoption (the first adopted son still existing and remaining in possession of his character of a son) is invalid. The acquiescence of the first adopted son, after he came of age, in the division of property made by the adopting father between his two adopted sons was not equivalent to a previous consent (binding on the first adopted son) to the disposition of the ancestral property by the father, but was binding on the first adopted son with regard to other property of which the father had the power of disposing by an act *inter vivos* without the consent of the first adopted son. RUNGAMA *v.* ATCHAMA. ATCHAMA *v.* RAMANADHA BABOO . **7 W. R. P. C. 57 : 4 Moo. I. A.**

6. ——— *Relinquishment by first adopted son in favour of his adoptive mother of his rights as adopted son—Release.* The plaintiff was adopted in 1880 by *K,* the widow of one *G.* In June 1885, he executed a document which recited that he and *K* had not been on amicable terms, and that his adoption had consequently been cancelled, and that she had adopted another son (defendant No. 1) to whom she had given all rights of heirship, and declared that, in consideration of R200 paid by *K,* he delivered back to her the rights which he had obtained by virtue of his adoption and heirship. *K* died in October 1885 and the plaintiff brought this suit, as adopted son, to recover the property of *G.* The first defendant, who had been adopted by *K,* subsequently to the plaintiff's adoption, contended that he had been validly adopted, and that he was entitled to the property. He relied, *inter alia,* upon the document executed by plaintiff in June 1885. *Held,* that the plaintiff could not renounce his status as adopted son, although he might give up his right of inheritance, and that whatever estate became vested in *K* by the release came to the plaintiff on her death either as the adopted son of *G* or as heir of *K. Held,* also, that the defendant's subsequent adoption was invalid, and that nothing would pass to him by force of such adoption. MAHADU GANU *v.* BAYAJI SIDU . . . **I. L. R. 19 Bom. 239**

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7. ——————— *Adoption by a mother after the death of her son who has left neither child nor widow—Adoption by a grand-mother without the consent of her daughter-in-law.* Under the Hindu law, a mother is competent to adopt when her son dies leaving no widow or other heir nearer than herself. A Hindu of the Sudra class died, leaving him surviving his mother and the paternal grand-mother. After his death, his grand-mother adopted the defendant. Subsequently to this adoption, the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate. *Held*, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir to her son, her mother-in-law could not by any adoption divest her of her rights as such heir without her consent. The defendant's adoption was therefore invalid. GAVDAPPA *v.* GIRIMALLAPPA **I. L. R. 19 Bom. 331**

8. ——————— *Jain law—Validity of adoption.* In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent to the husband's death the defendant had adopted another person who had died prior to the adoption of the plaintiff, and without leaving widow or child. *Held*, that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu law of adoption, and the kritrima form of adoption not being recognized by the Jain community or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband. *Held*, therefore, that the adoption of the plaintiff was valid and effective. *Held*, also, that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son, so that, if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai* v. *Dakho, I. L. R. 1 All. 688*, referred to. LAKHMI CHAND *v.* GATTO BAI **I. L. R. 8 All. 319**

9. ——————— *Adoption by widow under husband's authority—Second adoption, validity of—Restrictions to widow's power—Intention—Spiritual benefit how secured—Continuation of line—Law in Madras, Bombay and Bengal.* A Madras Brahmin died intestate and without issue leaving his widow authority to adopt. He placed no specific limitation on the power to adopt, his object being to secure spiritual benefit to himself and to continue his line. The first child adopted by the widow having died when little more than two years of age: *Held*, that the widow's authority to adopt was not exhausted by the first adoption and the adoption of a second boy after the first died was valid. *Gournath Chowdhry* v. *Arnopoorna Chowdrain, S. D. A. for 1852, 332*, adversely commented on and not followed. The main factor for consideration in these cases is the intention of the husband. Any special instructions, which he may give for the guidance of his widow, must be strictly followed. Where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention. *The Ramnad Case, 12 Moo. I. A. 308 at p. 443*, referred to as indicating limitations to the application of the above rule. *Surendra Nandan* v. *Sailaja Kanta Das Mahapatra, I. L. R. 18 Calc. 385*, and the judgment of MITTER, *J.*, in *Ram Soondur Singh* v. *Surbanee Dassee, 22 W. R. 121*, approved. KANNEPALLI SURYANARAYANA *v.* PUCHA VENKATARAMANA (1906) **L. R. 33 I. A. 145 I. L. R. 29 Mad. 382**

10. ——————— *Second adoption after death of widow of first adopted son—Validity—Will—Construction—Absolute gift—Restrictive words, absence of—Gift over—Indian Succession Act (X of 1865), ss. 82, 111.* The power left to a Hindu widow to adopt more than one son in succession in the event of the previously adopted son dying without male issue, comes to an end when the first adopted son dies leaving a widow as his heiress. A second adoption made after the adoptive mother has succeeded to the estate on the death of the widow of the first adopted son is therefore invalid. *Pudma Kumari* v. *Court of Wards, L. R. 8 I. A. 229: s.c. I. L. R. 8 Calc. 302; Thayammal* v. *Venkatarama, L. R. 14 I. A. 67; s.c. I. L. R. 10 Mad. 205*, followed. *Bykanta Monee* v. *Kristo Soonderee Roy, 7 W. R. 392; Manik Chand* v. *Jagat Settani, I. L. R. 17 Calc. 518; Kannepalli* v. *Pucha, 10 C. W. N. 921; s.c. 4 C. L. J. 171*, referred to. MANIKYA MALA BOSE *v.* NANDA KUMAR BOSE (1906) **11 C. W. N. 12**

11. ——————— **Simultaneous adoption**—*Invalid adoption.* A simultaneous adoption is not valid according to Hindu law. The adoption of one son alone is actually and in itself wholly sufficient to satisfy the purpose of the law; the adoption of two is not within the scope of the power of adoption and where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each, and also at the same time. GYANENDRO CHUNDER LAHIRI *v.* KALAPAHAR HAJI **I. L. R. 9 Calc. 50 : 11 C. L. R. 297**

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HINDU LAW—ADOPTION—*contd.*

5. SECOND, SIMULTANEOUS, OR CONDITIONAL ADOPTIONS—*contd.*

In the same case in the Privy Council the case was thus stated and decided. Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him, thus expressed: "You . . . . the elder widow may adopt three sons successively and you . . . . the younger widow may adopt three sons successively." *Held*, that this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions. *Held*, also, that, supposing that the husband had intended to give such an authority, the law did not allow two simultaneous adoptions. The opinion of *W. H. Macnaghten* on the subject referred to and approved. AKHOY CHUNDER BAGCHI *v.* KALAPAHAR HAJI
I. L. R. 12 Calc. 406 : L. R. 12 I. A. 198

MONEMOTHENATH DEY *v.* ONAUTH NAUTH DEY
2 Ind. Jur. N. S. 24

s.c. in Court below . **Bourke O. C. 189**

SIDDESSORY DASSEE *v.* DOORGACHURN SETT
2 Ind. Jur. N. S. 22 : Bourke O. C. 360

DOSSMONEY DOSSEE *v.* PROSONOMOYEE DOSSEE
2 Ind. Jur. N. S. 18

where the question was only raised however, and it was assumed such an adoption would be invalid without deciding it.

See also CHOUNDAWALEE BAHOOJEE *v.* GIRDHAREEJEE . . . . . **3 Agra 226**

Affirmed by the Privy Council in GOOPEE LALL *v.* CHANDRAOOLEE BAHOOJEE . **11 B. L. R. 391**
19 W. R. 12 : L. R. I. A. Sup. Vol. 181

12. ——————— *Adoptions by each of two widows simultaneously made to one father.* By Hindu law there cannot be simultaneous adoptions by two widows of two sons to one father. SURENDRO KESHUR ROY *v.* DOORGASOONDERY DOSSEE . **I. L. R. 19 Calc. 513**
L. R. 19 I. A. 108

13. ——————— *Invalidity of gift made to a person as being the adopted son of donor, where the adoption fails—Persona designata.* A testator gave by will to each of his two wives a power to adopt, and gave his property to his sons so to be adopted, but did not provide, nor did he know who the adopted sons were to be. The adoption which subsequently took place was found to have been a simultaneous adoption by the two widows. *Held*, that such an adoption was invalid, and that the persons purporting to be the adopted sons did not answer the description in the will of adopted sons, and that therefore there was not such a sufficient designation of their persons as to enable them to take under the will. *Monemothonath Dey* v. *Onathnath Dey, 2 Ind. Jur. N. S. 24*, distinguished, and *Fanindra Deb Raikat* v. *Bajeswar Das, I. L. R. 11 Calc. 463 ; L. R. 12 I. A. 72*, followed on the question of *persona designata*. DOORGA SUNDARI DOSSEE *v.* SURENDRO KESHAV RAI
I. L. R. 12 Calc. 686

14. ——————— **Conditional adoption—** *Position of father giving son in adoption.* Where a Hindu widow, in whom had vested by inheritance the whole of her husband's property, moveable and immoveable, agreed to accept a boy in adoption on an express agreement by his father that during her lifetime she should be entitled to such property, subject, however, to the boy's maintenance and education, and upon the faith of such agreement adopted the boy, it appearing that she would not have done so at all if it had not been for such agreement :—*Held*, that the agreement was binding upon the adopted son, and that the son's proprietary right was subject to the interest thereby created in favour of his adoptive mother. *Held*, also, that under the Hindu law the power exercised by a father in giving his son in adoption is not only co-extensive with the power of a guardian, but is more like the power of an absolute proprietor. CHITKO RAGHUNATH RAJADIKSH *v.* JANAKI
11 Bom. 199

15. ——————— *Consent given to adoption on conditions—Effect of non-fulfilment of conditions.* Where the natural father of the son given in adoption wrote to the adoptive mother, a widow, giving his consent to the adoption on certain conditions :—*Held*, that a non-fulfilment of one of the conditions rendered the adoption invalid, notwithstanding that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption. RANGUBAI *v.* BHAGIRTHIBAI
I. L. R. 2 Bom. 377

16. ——————— *Agreement by natural father restricting son's interest in the inheritance of his adoptive father.* The natural father of a boy whom the widow of a deceased Hindu proposed to adopt as a son to her husband entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father. *Held*, that the agreement was not void, but was at least capable of ratification when the adopted son became of age. RAMASAMI AIYAN *v.* VENKATARAMAIYAN
I. L. R. 2 Mad. 91
L. R. 6 I. A. 196

17. ——————— *Minor adopted on conditions. Semble :*—A minor taken in adoption is not bound by the assent of his natural father to terms imposed as a condition for the adoption. LAKSHMANNA RAU *v.* LAKSHMI AMMAL
I. L. R. 4 Mad. 160

18. ——————— *Validity of adoption—Mitakshara law.* The will of *B*, a Hindu, appointed one *K*, manager of all his property and gave his widow *S* power to adopt a son, and

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HINDU LAW—ADOPTION—*contd.*

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went on to state that *S* "shall manage all the affairs with the consent of the said manager" (*K*), "and she will not be able to do any wrongful act or alienate and waste property uselessly and without his consent. If she do so, it will be cancelled by the said manager or the adopted son; and she will adopt a son with the good advice and opinion of the manager." *S*, wishing to adopt the plaintiff, sent a registered letter to *K*, who had refused to give *S* any advice or assistance, intimating her intention and asking him to come and see the ceremony performed, but he declined to receive the letter which was returned to *S* by the postal authorities, and the plaintiff was eventually adopted without the consent of *K*. *Held*, that the consent of *K* was not a condition precedent to the validity of the adoption, and that it was not invalid by reason of its having been made without *K's* advice and consent. SURENDRA NANDAN *alias* GYANENDRA NANDAN DAS *v.* SAILAJA KANT DAS MAHAPATRA **I. L. R. 18 Calc. 385**

19. ——————— *Adoption under agreement—Validity of adoption by untonsured widow—Agreement at time of adoption effacing rights of adopted son.* The defendant's husband, *V*, died intestate in 1873, leaving his widow (*L*, the defendant) and a son, *B*, him surviving. A posthumous son, *R*, was subsequently born to him, who died an infant aged four months. *B* died in July 1877, aged seven years. The plaintiff alleged that on the 18th April 1878 the defendant adopted him as the heir of her husband, *V*, and on the same date made an agreement with his (the plaintiff's) natural father, whereby he was deprived of the immediate rights in the estate of the said *V*, to which he became entitled by reason of his adoption. The agreement was in the following terms:—"Memorandum of agreement made this 18th day of April in the Christian year 1878 between *G* of Bombay, Hindu inhabitant, of the one part, and *L*, widow of *V*, also of Bombay, Hindu inhabitant, of the other part. Whereas the said *V* died intestate at Bombay on or about the 5th day of October 1873, leaving him surviving the said *L* as his only widow, a son named *B*, who was born during his lifetime, and another son, named *R*, who was born after his death as his only heirs and legal representatives him surviving. And whereas the said *R* died while he was an infant and the said *B* died at the age of seven, leaving the said *L*, his mother, as his only heir and legal representative him surviving; and whereas the said *L* is desirous of adopting a son as heir to her said husband, and has requested the said *G* to allow her to adopt one of his sons, named *S*, who has now attained the age of eleven years, on the terms and conditions hereafter mentioned, which the said *G* has agreed to do. Now these presents witness that, in pursuance of the said agreement and in consideration of the premises, the said Shas agreed to give, and the said *L* has agreed to accept, in adoption the said *S* on the express terms and conditions following, that is to say:— 1. That the said *L* shall have during her lifetime, both before and after the said *S* has attained his majority, absolute power and control over the whole of the immoveable and moveable property, estate, and effects so inherited by her as the heir and surviving legal personal representative of *B* as aforesaid, and shall be at liberty to deal with and manage the same according to her own absolute discretion, as she may, in the exercise of such discretion, deem most advantageous to the estate. 2. The said *L* shall and will during her life provide the said *S* with lodging, food, clothes, medical attendance, and all other necessaries, and will generally maintain and educate him at her own expense in a manner suitable to the position of his family, and will get him married and perform the usual ceremonies on his marriage at her own expense as aforesaid in a manner suitable to the position and respectability of the said family. 3. That after the death of the said *L*, the said *S*, his heirs, and legal representatives will be entitled to inherit for his and their own absolute use and benefit all the moveable and immoveable property, estate, and effects of which the said *L* shall be possessed at the time of her death. 4. That the terms and conditions specified and contained in cls. 1 and 2 and 3 of this agreement shall have full effect and be considered as valid and operative in every respect, any provision of law or the Hindu Shastras to the contrary notwithstanding." The plaintiff alleged that since he had attained majority he had always repudiated the validity of the agreement as affecting his rights in any way. The plaintiff also alleged that on the Dassara day of 1883 the defendant assembled her friends and relatives, and in view of the approaching majority of the plaintiff, which he attained on the 14th December 1883, announced her intention of making over to him all the estate of her deceased husband *V*; and that she thereupon renounced and waived all the benefits which she had tried to retain for herself by the agreement of the 18th April 1878, and expressed her intention to devote herself to a religious life. The plaintiff complained that recently the defendant had begun to interfere in the management of the estate, and that she had alleged that the plaintiff's adoption was invalid on the ground that her (the defendant's) head had not been shaved at the time of the adoption, and had threatened that she would proceed to adopt a son and ruin the plaintiff. He prayed for a declaration that he was the validly adopted son of, and entitled to the property which formerly belonged to, *V*, and that the defendant was only entitled to maintenance; that the agreement of the 18th April 1878 was invalid; or, in any event, that the defendant had given to the plaintiff all rights to which she

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HINDU LAW—ADOPTION—*contd.*

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might have been entitled under the said agreement, etc. The defendant admitted that she had performed certain ceremonies which she intended to be an adoption of the plaintiff as son of *V*; but she alleged that at the time of the said adoption she had not, nor had she since, undergone tonsure; and that, according to the custom of the Daivadnya community, to which she and the plaintiff belonged, a widow could not adopt until her head had undergone tonsure. She also stated that the majority of her caste had declared the said adoption to be invalid, and she submitted the question as to its validity to the Court. With regard to the agreement of the 11th April 1878, she contended that, if the adoption was valid, the plaintiff was bound by the terms and conditions contained therein, as she would not, except upon those terms and conditions, have adopted him. She further contended that on the death of her husband, *V*, his sons, *B* and *R*, became entitled to his estate, and that, upon the death of *B*, who was the survivor of the said two sons, she succeeded to the estate as heiress to *B*. *Held*, that the adoption of the plaintiff was a valid adoption. From the evidence it appeared that the requisite religious ceremonies had been performed. Before the defendant took part in them, Shastris were consulted as to whether the defendant, while untonsured, could properly do so, and on making certain expiatory gifts she was pronounced competent. Under such circumstances, the Court could not hold her to be incompetent. Even if other Shastris were of a different opinion, a Civil Court could not decide between conflicting opinions upon such a question of ecclesiastical etiquette. If an adoption be performed with all requisite rites with the assistance of priests and in accordance, with the opinions of Shastris, the Court will uphold it, even against the opinions of other Shastris expressing or entertaining contrary views. *Held*, that the effect of the agreement of the 18th April 1878 was to give the defendant the beneficial ownership of the estate for her life, with the largest possible discretionary powers of management, subject to the duty of maintaining and educating the plaintiff. *Held*, also, following *Chitho* v. *Janaki*, *11 Bom. 199*, that the agreement was valid and binding on the plaintiff, and that the defendant had not waived the benefits to which she was entitled under its provisions. RAVJI VINAYAKRAV JAGGANNATH SHANKARSETT *v.* LAKSHMIBAI

I. L. R. 11 Bom. 381

20. ——————— *Invalid agreement relating to estate of adopted son.* A talukhdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire riasat. This power having been exercised, the adoption was questioned on the ground that the widow had agreed, with the natural father of the adopted son, that she should retain the whole estate during her life. *Held*, that this had not

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rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void without invalidating the adoption. BHAIYA RABIDAT SINGH *v.* INDAR KUNWAR

I. L. R. 16 Calc. 556
L. R. 16 I. A. 53

21. ——————— *Will of a Hindu in favour of his wife made on his taking a son in adoption—Adoption made on the understanding that the dispositions of the will be observed.* A Hindu, on taking a son in adoption, executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event which happened the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land:—*Held*, that the instrument was a will. On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it:—*Held*, that the adoptive son was bound by its provisions. LAKSHMI *v.* SUBRAMANYA

I. L. R. 12 Mad. 490

22. ——————— *Adoption made the day after the adoptive father made his will—Adoptive son bound by the will—Inconsistent pleas.* A Hindu wrote his will devising certain ancestral property to his wife, and on the following day he registered it and took the plaintiff in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will, and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants, who claimed under a gift from the wife, had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in. *Held*, (i) that the defendants were not precluded from succeeding on the latter of these inconsistent pleas; (ii) that the plaintiff was not entitled to the ancestral property devised by the will to the testator's wife. *Lakshmi* v. *Subramanya*, *I. L. R. 12 Mad. 490*, followed. NARAYANASAMI *v.* RAMASAMI

I. L. R. 14 Mad. 172

23. ——————— *Adoption by widow—Agreement between adoptive mother and natural father.* A Hindu, who is taken in adoption by a widow, acting under an authority from her husband, is not bound by an agreement entered into by her with his natural father at the time of the adoption. *Bhaiya Rabidat Singh* v. *Indar Kunwar*, *I. L. R. 16 Calc. 556*, and *Lakshmi* v. *Subramanya*, *I. L. R. 12 Mad. 490*, referred to. JAGANNADHA *v.* PAPAMMA. BUCHAMMA *v.* JAGANNADHA. PAPAMMA *v.* JAGANNADHA . **I. L. R. 16 Mad. 400**

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HINDU LAW—ADOPTION—*contd.*

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24. ——————— *Gift by adoptive father at the time of adoption—Gift binding on adopted son.* Where a Hindu at the time of taking a son in adoption made a gift of a portion of his ancestral property to his daughters, and the deed of gifts as well as the adoption deed were executed on the same day, and they mutually referred to each other :—*Held*, that the plaintiff's natural father having been a party to the deed of adoption which referred to the deed of gift executed along with it, the case fell under the category of conditional adoptions which are allowed by law. *Held*, also, that the deed of gift to defendants Nos. 2 and 3 was valid and binding on the plaintiff. *Quære :* Whether the dwayamushayana form of adoption has become obsolete in the southern districts of the Presidency of Bombay. BASAVA *v.* LINGANGAUDA
I. L. R. 19 Bom. 428

See CHENAVA *v.* BASANGAVDA.
I. L. R. 21 Bom. 105

25. ——————— *When sapinda consents on condition that adopted son should not claim the property of his adoptive father, adoption not thereby invalid.* When a sapinda in giving his consent to an adoption, protects himself from loss by stipulating that the adopted son should not claim a share in the joint family property in the enjoyment of such sapinda, the consent of the sapinda is not given from corrupt or improper motives, and the adoption will be good. *Rami Reddi* v. *Rengamma, 11 M. L. J. 29*, distinguished. SRINIVASA AIYANGAR *v.* RANGASAMI AYYANGAR (1907)
I. L. R. 30 Mad. 450

6. EFFECT OF ADOPTION.

1. ——— **Effect in adopting parent's power of making will.** A Hindu adopting a son does not thereby deprive himself of any power that he may have to dispose of his property by will. There is no implied contract on the part of the adopter, in consideration of the gift of his son by the natural father, not to make a will. VENKATA SURIYA MAHIPATI RAMA KRISHNA RAO *v.* COURT OF WARDS . . **I. L. R. 22 Mad. 383**
L. R. 26 I. A. 83
C. W. N. 415

2. ——— **Retrospective effect.** An adoption by a widow has a retrospective effect, and relating back to the death of the deceased husband, entitles the adopted son to succeed to his estate. VYANKATRAV ANANDRAV *v.* JAYAVANTRAV BIN MALHARRAV RANADIVE . **4 Bom. A. C. 191**

3. ——————— *Power of adopted son to set aside gift made before his adoption.* The adoption of a son by a Hindu widow has a retrospective effect ; a son therefore adopted to her husband by a widow is entitled to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption. NATHAJI KRISHNAJI *v.* HARI JAGOJI
8 Bom. A. C. 67

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6. EFFECT OF ADOPTION—*contd.*

4. ——————— *Date from which title of son takes effect.* The title of a son adopted by a widow under authority from her husband does not relate back to the death of the husband. LAKSHMANNA RAU *v.* LAKSHMI AMMAL
I. L. R. 4 Mad. 160

5. ——— **Illatam custom**—*Status of son-in-law—Co-parcenary—Survivorship— Proof of special custom.* Although an illatam son-in-law and a son adopted into the same family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindu co-parceners having the right of survivorship. CHENCHAMMA *v.* SUBBAYA
I. L. R. 9 Mad. 114

6. ——— **Custom of adoption of Gayawals of Gaya**—*Effect on adopted son as to his rights in family of natural father.* The proved practice of the Gayawals in adopting sons did not sever the adopted child from the family of his natural father, so that he did not lose his rights therein. LACHMAN LAL CHOWDHRI *v.* KANHAYA LAL MOWAR . . **I. L. R. 22 Calc. 609**
L. R. 22 I. A. 51

7. ——— **Status of adopted son**—*Theory of adoption.* The theory of an adoption is a complete change of paternity ; the son is to be considered as one actually begotten by the adoptive father, and he is so in all respect save an incapacity to contract marriages in the family from which he was taken. NARASAMAL *v.* BALARAMACHARLU
1 Mad. 420

8. ——————— *Rights in his natural family—Inheritance.* The severance between an adopted son and his natural family is so complete that no mutual rights as to succession to property can arise between them. SRINIVASA AYYANGAR *v.* KUPPAN AYYANGAR. ROYAN KRISHNAMACHARIYAR *v.* KUPPAN AYYANGAR . **1 Mad. 180**

9. ——————— *Inheritance in adopted family.* Adoption is tantamount to the birth of a son to the adopter, and the property inherited from the adopter must be regarded as ancestral ; during the lifetime of his father a son cannot claim to have a specific share declared and defined, but is only entitled to a decree declaring the property to be ancestral. HEERA SINGH *v.* BURZAR SINGH . . . . . **1 Agra 256**

10. ——————— *Consent to subsequent adoption—Liability to deprivation of inheritance by will.* Where a Hindu has adopted a son, he acquires the right of a son in the hereditary immoveable property of the adoptive father ; and he cannot be deprived of these rights by the adoptive father afterwards assuming to adopt a second son and settling the hereditary property upon such

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HINDU LAW—ADOPTION—*contd.*

6. EFFECT OF ADOPTION—*contd.*

second adopted son, coupled with declarations that the first son was disinherited. According to Hindu law, an adoption of a second son during the lifetime of a previously adopted son is inoperative. A childless Hindu adopted *A* as his son; afterwards he adopted *B* as his son and made a will, dividing his property, ancestral as well as acquired, between *A* and *B*. *A* filed a petition denying the right of his adoptive father to adopt *B*, and protesting against the will; but afterwards he signed a consent to the will. *Held*, that, as the father afterwards endeavoured to deprive *A* of all his rights, as well those under the will as by the adoption, the consent did not bind *A*, since it was given on the basis of a family arrangement, from which the adoptive father afterwards departed. *Semble*: That if the consent were given by *A* in ignorance of his right, it would not be binding upon him. SUDANUND MOHAPUTTUR *v.* BONOMALEE DOSS . **1 Marsh. 317 : 2 Hay 205**

11. ——————— *Right of adopted son to self-acquired immoveable property of his adoptive father.* An adopted son does not stand in a better position with regard to the self-acquired immoveable property of his adoptive father than a natural-born son would occupy. PURSHOTAM SHAMA SHENVI *v.* VASHUDEV KRISHNA SHENVI **8 Bom. O. C. 196**

TARA MOHUN BHUTTACHARJEE *v.* KRIPAMOYEE DEBIA . . . . . **9 W. R. 423**

12. ——————— *Succession of adopted son—Rights among other heirs.* When an adopted son is entitled to share with heirs other than the legitimately begotten sons of his adopted father in the property of kinsmen, he takes the same share as the other heirs. The true meaning of paragraphs 24 and 25 of section V of the Dattaka Chandrika is that an adopted son and the adopted son of a natural son stand in the same position, and this rule does not extend to distinct collateral heirs. DINO NATH MOOKERJEE *v.* GOPAL CHUNDER MOOKERJEE **9 C. L. R. 379 : 8 C. L. R. 57**

13. ——————— *Succession—Sapinda relationship.* The rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural-born son. An adopted son takes by inheritance from the relatives, on the maternal side, of his adoptive father in the same manner as a son begotten would take. There is no difference as regards sapinda relationship between the adopted and natural-born son. JOY KISHORE CHOWDHRY *v.* PANCHOO BABOO **4 C. L. R. 538**

14. ——————— *Succession lineal and collateral.* According to Hindu law, an adopted son succeeds not only lineally, but also collaterally, to the inheritance of his adoptive father's relations. SUMBHOOCHUNDER CHOWDHRY *v.* NARAINI DEBIA . . **5 W. R. P. C. 100**

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15. ——————— *Termination of authority to adopt—Succession of adopted son to collaterals in gotra not that of father by adoption.* An instrument of permission (anumati patra) to a Hindu wife to adopt should she be left a widow provided that "dattaka (adopted) son shall be entitled to perform your and my sradh and that of our ancestors, and to succeed to the property." The husband and wife had a son born, who survived his father, succeeded to the property, and died before his mother, leaving a widow, who, as heir, took possession of it for her widow's estate. The mother then professed to exercise the above power and in the suit arising thereupon—*Bhoobunmoyee Debia* v. *Ramkishore Acharj Chowdhry, 10 Moo. I. A. 279*—it was decided that, the son's widow having acquired a vested interest, a new heir could not be so substituted for her. *Held*, that, although such a substitution might have been disallowed without the adoption being held invalid for all other purposes, the above decision had determined that, upon the vesting of the estate in the widow, the power of adoption was incapable of execution, and was at an end; and that this would have been the conclusion if the question of the validity of the power had been raised without any previous decision upon it. An adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, governing authorities in the Bengal school. An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption. *Sumbhoochunder Chowdhry* v. *Naraini Dibeah, 5 W. R. P. C. 100*, referred to and followed. *Held* in this case, that the adopted son of the maternal grandfather of the deceased, though the gotra into which he was adopted was not the same as the latter's, was an heir nearer to him than such maternal grandfather's grandnephew. PADMAKUMARI DEBI CHOWDHRANI *v.* COURT OF WARDS . **I. L. R. 8 Calc. 302 L. R. 8 I. A. 229**

Affirming decision of High Court in PUDDO KOOMAREE DEBEE *v.* JUGGUT KISHORE ACHARJEE **I. L. R. 5 Calc. 615**

JUGGERNATH SAHAI *v.* MUKKUM KOONWAR **3 W. R. 24**

TEENCOWRIE CHATTERJEA *v.* DINONATH BANERJEA . . . . . **3 W. R. 49**

16. ——————— *Succession of adopted son on the mother's side.* An adopted son under the law prevailing in Bengal occupies, as regards inheritance, the same position in the family of the adopter as a natural-born son (except in a few instances defined in the Dattaka Chandrika and Dattaka Mimansa), succeeding collaterally, as well as lineally, his relations by adoption. *Padma Koomari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 303*, referred to and followed. Where a natural-born son, had there been one, would have

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been entitled to succeed a maternal uncle, as being brother's daughter's son to the latter : *Held*, that an adopted son, who had been adopted by a widow under her deceased husband's authority, was entitled, in like manner, to inherit, at the death of the widow, from her father's brother. KALI KUMUL MOZUMDAR *v.* UMA SONKUR MOITRA
I. L. R. 10 Calc. 232 : 13 C. L. R. 379
L. R. 10 I. A. 138

Affirming the decision of the High Court in UMA SUNKUR MOITRA *v.* KALI KOMUL MOZUMDAR
I. L. R. 6 Calc. 265 : 7 C. L. R. 145

17. ——— *Collateral succession—Son adopted in kritrima form.* A son adopted in the kritrima form in the Mithila provinces does not become a member of the adopting family so far as collateral heirship is concerned, the relation of kritrima for the purpose of inheritance extending to the contracting parties only. He can only succeed to his adoptive mother's property. SHIBO KOOEREE *v.* JOOGUN SINGH. BOOLEE SINGH *v.* BUSUNT KOOEREE **8 W. R. 155**

COLLECTOR OF TIRHOOT *v.* HURROPERSAD MOHUN . . . . . **7 W. R. 500**

18. ——— **Rights of adopted son—** *Adoption by widow after death of natural-born son—Divesting of property.* A Hindu widow, who adopts a son after the death of her natural-born son divests herself of her estate. JAMNABAI *v.* RAYCHAND NAHALCHAND . **I. L. R. 7 Bom. 225**

BYKANT MONEE ROY *v.* KRISTO SOONDEREE ROY
7 W. R. 392

19. ——— *Divesting of property.* An adoption by the widow divests her of the right of inheritance to her husband's property and vests it in the adopted son. COLLECTOR OF BAREILLY *v.* NARAIN DAY . **3 Agra 349**

20. ——— *Second adoption—Divesting of mother's estate. Per* TREVELYAN, *J.*—By a second adoption a widow divests herself of the mother's estate in the same way that she divests herself of her widow's estate on the first adoption. AMRITO LALL DUTT *v.* SURNOMONI DASI
I. L. R. 25 Calc. 662
2 C. W. N. 389

21. ——— *Position of widow—Divesting of property.* Although the exercise of an act of adoption by the widow of a Hindu who died without male issue, and made in accordance with his request, divested the property from the widow and vested it in the adopted son, the widow sued for an undivided share in the joint property, and a decree was made directing her to be put in possession. *Held*, that the widow must be assumed to have prosecuted the suit only as guardian for her adopted son ; that the decree must be considered to be for his benefit ; and that she was put in possession as trustee for him and accountable to him as guardian and trustee for the profits of the property, being entitled herself to a maintenance out of it. DHURMO DOSS PANDEY *v.* SHAMA SOONDERY DEBIA
6 W. R. P. C. 43
3 Moo. I. A. 229

22. ——— *Divesting of property—Vested right of inheritance.* An inheritance, having once vested, cannot be defeated and divested by an adoption. ANNAMMAH *v.* MABBU BALI REDDY . . . . . **8 Mad. 108**

23. ——— *Divesting of property.* In a suit to set aside an adoption on the ground that it had been made after the estate had vested in the widow of *K*, the owner of the estate : —*Held*, the adoption was invalid. THAYAMMAL *v.* VENKATARAMA . . **I. L. R. 7 Mad. 401**

24. ——— *Succession of adopted son—Divesting of estate.* An adopted son, as such, takes by inheritance, and not by devise. A son cannot be adopted to the great-grandfather of the last taker after the lapse of several successive years, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied. When the estate of a son is unlimited, and that son marries and leaves a widow, his heir, she acquires a vested interest in her husband's property as widow, and a new heir cannot be substituted by adoption to defeat that estate, and take as an adopted son what a natural-born son would not have taken. By the mere gift of power of adoption to a widow, the estate of the heir of a deceased son vested in possession cannot be defeated and divested. BHOOBUN MOYE DEBIA *v.* RAMKISHORE ACHARJEE
3 W. R. P. C. 115 : 10 Moo. I. A. 279

GOBINDO NATH ROY *v.* RAM KANAY CHOWDHRY . . . . . **24 W. R. 183**

25. ——— *Son adopted after succession opened out—Hindu widow with permission to adopt, position of—Divesting of property.* A Hindu testator died, leaving all his property to *P* and *B*, his two sons, absolutely in equal shares. *B* died in 1845, leaving a minor son, *K*. *P* died in 1851 without male issue, leaving a widow *B D* and a daughter. *P* also left a will, by which he gave, subject to certain trusts for the worship of the family idols, all his property to his widow *B D* for her life, and on her death to his daughter's son (if any) : the daughter died without issue before her mother. *B D* died in October 1864, leaving a will, of which she appointed her brother *G* executor, and *G*, in accordance with the directions in her will, took possession of the property, which *B D* took as widow and under the will of *P*. *K* died in 1855, when still a minor, leaving a minor widow, and having made a will, by which he gave permission to his widow to adopt a son. The widow of *K* adopted a son in August 1876. In a suit brought by the plaintiff as adopted son of *K* and heir of *P* to recover the property left by *P*, the issue was

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raised whether, assuming the plaintiff to be legally adopted son of *K*, he was the heir of *P*. *Held*, that, his adoption not having taken place when the succession to the property of *P* opened out on the death of *B D*, he was not entitled to the property; his adoptive mother could not claim on the death of *B D* to hold the property as trustee for the plaintiff: and inasmuch as the property must have vested in some one on the death of *B D*, and property once vested cannot, by Hindu law, be divested, the plaintiff was not entitled to succeed. KALLI PROSONNO GHOSE *v.* GOCOOL CHUNDER MITTER **I. L. R. 2 Calc. 295**

26. ——————— *Divesting of property.* *A*, who had a son, *B*, by his wife *C*, during the lifetime of his son executed an unoomuttee puttro in favour of *C*, empowering her to adopt a son in the event of the death of *B*. *B*, on coming of age, succeeded to the ancestral and other estate of his father, who had died. Subsequently *B* died childless, and his widow succeeded as heir to her deceased husband. *C* afterwards exercised the power of adoption from her husband, and adopted *D*. *Held*, that, although, as heir to *A*, *D* could not displace the widow and full heir of *B*, and that although as heir to *B* he came after *B's* widow and mother, *D* might succeed when on their deaths he united in himself the capacities of heir to *A* and heir to *B*. JOY KISHORE CHOWDHRY *v.* PANCHOO BABOO . . . . . **4 C. L. R. 538**

27. ——————— *Adoptive son claiming share in estates already vested in another before the date of the adoption—Fraud.* Shortly before his death in 1862, *A*, by his will, gave his widow power to adopt a son. In consequence of fraud on the part of *B*, the son of a brother of *A*, in suppressing this will and setting up another, the will was not proved until 1874, when the widow exercised the power. *C*, the widow of another brother, had died in 1867, and *B* had succeeded to her estate. The adopted son now sued by his mother to recover a half share in *C's* estate, alleging that his adoptive mother, in consequence of the fraudulent act of *B* in suppressing the will under which the power of adoption was given, and by setting up a false one, was unable to exercise the power of adoption before the death of *C*, and that thus he had been deprived of the opportunity of succeeding to *C's* estate. *Held*, that, although *B* had committed fraud in suppressing the will and setting up a false one, and had so placed obstacles in the way of the adoptive mother of the plaintiff taking a son in adoption earlier, yet that, as the plaintiff was not in existence at the time the fraud was committed, such fraud was too remote so far as it affected him, and that the Court, as a Court of Equity, could not disturb the estate which had already vested in *B*. The right to succession is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir not

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conceived at the time of the owner's death. *Keshub Chunder Ghose* v. *Bishen Pershad Bose, S. D. A. 1860, p. 340*, and *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdury, 10 Moo. I. A. 279*, followed. NILCOMUL LAHURI *v.* JOTENDRO MOHUN LAHURI . **I. L. R. 7 Calc. 178 : 8 C. L. R. 401**

Held in the same case by the Privy Council, affrming the decision of the High Court, that the adopted boy could not claim to share along with the nephew the estate which had belonged to the uncle, notwithstanding the nephew's conduct in reference to the exercise of the power to adopt, inasmuch as the date of this boy's birth rendered it impossible for him, under any circumstances, to have been made an adoptive heir to the uncle. According to Hindu law, as laid down in the decided cases, an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral. BHUBANESWARI DEBI *v.* NILCOMUL LAHIRI **I. L. R. 12 Calc. 18 : L. R. 12 I. A. 137**

28. ——————— *Vested estate divested by adoption—Power to adopt.* *A*, a Hindu, having succeeded to his father's estate, died unmarried, leaving him surviving his father's mother *S* and his step-mother *N*. After *A's* death, *N*, under a power from her husband, adopted *B* as a son to *A's* father. *Semble*: That the adoption did not divest the estate of *S*, in whom *A's* estate had vested on his death. DROBOMOYEE CHOWDHARIN *v.* SHAMA CHURN CHOWDHRY **I. L. R. 12 Calc. 246**

29. ——————— *Divesting of estate taken by widow.* The defendant's husband, *V*, died intestate in 1873, leaving his widow (the defendant) and a son *B* him surviving. A posthumous son, *R*, was subsequently born to him, who died an infant aged four months. *B* died in July 1877, aged seven years. The defendant subsequently, on 18th April 1878, adopted the plaintiff. *Held*, following *Jamnabai* v. *Raichand, I. L. R. 7 Bom. 225*, that the defendant, by adopting the plaintiff, divested herself of the estate of *V*, to which she had succeeded on the death of *B*, and that the plaintiff, upon his adoption, became entitled to the property. RAVJI VINAYAKRAV JAGGANNATH SHANKARSETT *v.* LAKSHMIBAI . . **I. L. R. 11 Bom. 381**

30. ——————— *Inheritance of adopted son—Divesting estate—Effect of adoption by one of two widows.* A son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate and to divest the interest of any person in that estate, whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner; but such adopted son is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopts him. Where a man died leaving two widows

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and having given either of them the power to adopt a son, and the younger widow, on the refusal of the elder one to adopt, adopted a son:—*Held*, that the estate which was in the elder widow was divested by adoption, and that the adopted son took all the estate of his adoptive father. MONDAKINI DASI *v.* ADINATH DEY . . **I. L. R. 18 Calc. 69**

31. ——— *Divesting of estate already vested—Mitakshara law.* *B* and *R* were living as a joint family subject to the Mitakshara law. *B* died on the 28th February 1884, leaving him surviving a widow *S*, to whom he gave power to adopt a son to him, and *R* who succeeded by survivorship to *B's* share in the joint-family property. *S* adopted the plaintiff on the 27th October 1885. *Held*, that on such adoption the plaintiff became entitled to the share of his father *B*, notwithstanding that such share had already vested in *R*. *Mondakini Dasi* v. *Adinath Dey, I. L. R. 18 Calc. 69*, followed. SURENDRA NANDAN *alias* GYANENDRA NANDAN DAS *v.* SAILAJA KANT DAS MAHAPATRA . . **I. L. R. 18 Calc. 385**

32. ——— *Widow with express authority from her husband to adopt—Adoption by such widow cannot divest estate vested by inheritance devolved from a lineal heir of the husband—Adoption by elder brother's widow after younger brother's death.* *K* and his two sons, *B* and *N*, were members of an undivided family, *B* died first, leaving a widow: then *K* died. On his death *N* succeeded to the family property. *N* afterwards died, leaving him surviving his widow, the defendant *G*, who then got possession of the said property. After *N's* death, however, *B's* widow adopted the plaintiff as son to her husband, and he brought this suit against *G* to recover the property from her. He alleged that *B* in his lifetime, with the concurrence of *K*, had given express authority to his wife to adopt a son after his death. The Court of first instance gave the plaintiff a decree. On appeal, the District Judge rejected his claim. The plaintiff appealed to the High Court. *Held*, confirming the decree of the lower Court, that the plaintiff was not, by virtue of his adoption, entitled to oust the defendant *G* from the estate of her husband. At the time of his death, *N* was full owner as last survivor of the joint family. The property then devolved as his, and a subsequent adoption, however well authorized to *B*, a collateral heir of *N*, could not divest the defendant *G*, who did not claim through *B* at all. If the question had arisen between the plaintiff and *N*, the plaintiff would have been entitled to succeed. *Virada Pratapa Raghunada Deo* v. *Brojo Kishore Patta Deo, I. L. R. 1 Mad. at p. 83 : L. R. 3 I. A. at p. 193*, referred to. Adoption by a widow under her husband's authority has the effect of divesting an estate vested in any member of the undivided family of which the husband was himself a member. But it does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband.

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This rule, however, must be supplemented by the addition that the adoption, though authorized by the husband, cannot divest the estate vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime. CHANDRA *v.* GOJARABAI **I. L. R. 14 Bom. 463**

33. ——— *Effect of an adoption by a co-widow after the estate has been vested in the other widow—Divesting of estate—Sale in execution of decree—Saleable interest.* A Hindu, governed by Mitakshara law, died, leaving him surviving two widows, *G* and *B*, and a son *S* by *G*. By a will he authorized his widow, *B*, to adopt a son, in the event of dying unmarried; but he made no disposition of his property, which was left to devolve according to Hindu law. *S* died unmarried in the year 1290 (1883), and *B* adopted a son in the same year, to which adoption *G* was not a party. In the year 1296 (1889), in order to liquidate debts of their husband, the widows executed a mortgage-bond in favour of one *F*, who obtained a decree in 1299 (1892). In execution of that decree, the mortgaged properties were sold and purchased by a third party. On an application made by the auction-purchaser to set aside the sale, on the ground that the judgment-debtors had no saleable interest in the property, as it had upon the adoption vested in the adopted son. *Held*, that, as an adopted son is not entitled to claim as preferential heir the estate of any other person besides his adoptive father when such estate has vested before his adoption in some heir other than the widow who adopted him, the adoption by *B* could not have the effect of divesting *G* of the estate which had devolved upon her as heir of her son, and if that was so, it could not be said that the judgment-debtors had no saleable interest in the property, and therefore the sale could not be set aside. *Held*, also, that *G* was not under any such religious obligation to give her assent to the adoption by *B* as should have the effect of divesting her of the estate. *Lakshman Dada Naik* v. *Ramchandra Dada Naik, I. L. R. 5 Bom. 48 : L. R. 7 I. A. 18; Bhoobun Moye Debia* v. *Ram Kishore Acharjee Chowdhry, 3 W. R. P. C. 15 : 10 Moo. I. A. 279; Annammah* v. *Mabbu Bali Reddy, 8 Mad. H. C. 108; Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry, I. L. R. 12 Calc. 246; Mondakini Dasi* v. *Adinath Dey, I. L. R. 18 Calc. 69*; and *Surendra Nandan* v. *Sailaja Kant Das Mahapatra, I. L. R. 18 Calc. 385*, referred to. FAIZUDDIN ALI KHAN *v.* TINCOWRI SAHA **I. L. R. 22 Calc. 565**

34. ——— *Adoption not effectual in divesting an estate which had already vested in another person—Consent of such person to adoption.* One *D*, a separated Hindu, died in 1852 childless, leaving three widows and a daughter-in-law *V*, the widow of a predeceased son, *C*. *D's* estate was taken on his death by his widows, and ultimately became vested in *L*, the survivor of them.

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In 1871, while she was in possession, *V* adopted the plaintiff. In 1874, a decision was passed against *L*, in execution of which a large portion of her deceased husband's property passed into the possession of the defendant. In 1886, the plaintiff filed this suit against the defendant claiming, as the adopted son of *V*, to be entitled to all the estate of his adoptive grandfather *D*. *Held*, that he could not recover. His adoption by *V*, which could only be to her husband *C*, could not divest *L* of the estate which had come to her as heir of her husband, *D*. On *D's* death, the estate had vested in his widows with remainder to his collateral heirs, and even if *L* had assented to the subsequent adoption of the plaintiff by *V*, his claim would not stand against the rights of *D's* collaterals, who would succeed on *L's* death. From the moment that *D* died and his estate vested in his widows, the right of his daughter-in-law *V* to adopt for the purposes of representation was at an end. DHARNIDHAR *v.* CHINTO
I. L. R. 20 Bom. 250

35. ——————— *Adoption by widow relating back to husband's death—Divesting of estate of heir who had succeeded before the adoption.* *A* and *S* were two divided brothers. *A* died, leaving his brother *S* and a daughter-in-law (the widow of his predeceased son *G*) him surviving. On *A's* death, *S* inherited his property as his heir, but shortly afterwards *S* gave his son *M* in adoption to the widow of *G*, who duly adopted him as son to her deceased husband. *Held*, that *M* on his adoption became not only the son of *G*, but also the grandson and heir of *A*. Having been adopted with the assent of *S*, he, as the adopted grandson of *A*, divested the estate in *A's* property which had vested in *S*. *S*, by giving *M* in adoption to *G's* widow, while divesting *M* of the right to inherit as his heir, invested him with the right to inherit *A's* estate. For the purposes of inheritance, an adoption may be considered as relating back to the death of the adoptive father divesting all estates which have during the intermediate period become vested as it were conditionally in another. ANAJI *v.* RATNOJI KRISHNARAO **I. L. R. 21 Bom. 319**

36. ——————— *Adoption by widow in divided family.* An adoption by a widow in a divided family cannot divest any estate other than her own and her co-widow's, except perhaps with the consent of the heir in whom the estate has vested. AMAVA *v.* MAHADGAUDA
I. L. R. 22 Bom. 416

37. ——————— *Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow.* An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts.

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Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law who is head of the family, as in *Vithoba* v. *Bapu*, *I. L. R. 15 Bom. 110*. Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law. *S* was the widow of *B*, who died in 1877 in the lifetime of his father *R*. Fourteen years later, *viz.*, in 1891, *R* died, leaving a widow Saibai, who succeeded to his estate as his heir. In March 1892, *S* adopted the plaintiff *G*, who was older than herself, as son to her husband, alleging that she had *R's* permission to do so. The plaintiff sued for a declaration that as adopted son of *B* he was entitled to succeed as heir to the property of *R* as against the defendant *V*, who claimed to have been adopted by Saibai as son to *R*. The lower Appellate Court disallowed the plaintiff's adoption on the grounds that Saibai had not consented to it. *Held* (confirming the decree of the lower Court), that, as the adoption of plaintiff *G* was made by *S* without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of *R*. GOPAL BALKRISHNA KENJALE *v.* VISHNU RAGHUNATH KENJALE . **I. L. R. 23 Bom. 250**

38. ——————— *Adoption of the vesting of inheritance—Dayabhaga law.* One *D N L* died many years ago leaving him surviving three sons, *viz.*, *B L L*, the plaintiff, and *K C L* and *T N L*, the defendants. He also left him surviving a widow *P D*, another defendant. The suit was originally instituted against *K C L* and *P D*, the plaintiff having omitted to join *T N L* on the ground that he had been adopted by his uncle *H L*, and that consequently he had no interest in the properties in suit. But subsequently under an order of the Court *T N L* was made a co-defendant. The parties were subject to the Dayabhaga law, and the suit was for partition, the main question being as to the effect of the adoption upon the respective shares of the parties. *Held*, that under the Dayabhaga law, when the property descends upon a male owner on the death of the last full owner, he takes therein a full and distinct interest, and in no circumstances is there any abeyance of the rights of property, nor can the property, when once vested, be divested; that therefore, although adoption prior to the vesting of the inheritance entails loss of the right of claiming any share in the estate of the adopted person's natural father or natural relation, yet the interest which is once vested in a son upon the death of his father is not divested by his subsequent adoption into another family; and the parties were

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accordingly entitled to one-fourth share during the lifetime of the widow and to one-third share absolutely upon her death. *Bhoobun Moyee Debia* v. *Ramkishore Acharjee, 10 Moo. I. A. 279; Kalidas Das* v. *Krishan Chandra Das, 2 B. L. R. F. B. 103; Kally Prosonno Ghose* v. *Gocul Chunder Mitter, I. L. R. 2 Calc. 295;* and *Nilcomul Lahuri* v. *Jotendra Mohun Lahuri, I. L. R. 7 Calc. 178,* referred to. *Mondakini Dasi* v. *Adinath Dey, I. L. R. 18 Calc. 69,* and *Surendra Nandan Das* v. *Sailaja Kant Das, I. L. R. 18 Calc. 385,* distinguished and doubted. BEHARI LAL LAHA *v.* KAILAS CHUNDER LAHA . . . . **1 C. W. N. 121**

39. ——— *Mesne profits—Decree made against a widow representing estate enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.* A minor who had been adopted by a widow as a son to her deceased husband was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held,* that, as liability under the decree made when the widow fully represented the estate devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also that, it having been for the minor's benefit that the widow as guardian should appeal from a decree which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made formally a party thereto. The principle of the decision in *Dhurm Dass Pandey* v. *Shamasoondary Debia, 3 Moo. I. A. 229,* referred to and applied in this case. *Held,* also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits brought after the decree upon title, it being made clear that the suit for mesne profits was substantially brought against the minor. *Sureschunder Wum Chowdhry* v. *Jugutchunder Deb, I. L. R. 14 Calc. 204,* approved. HARI SARAN MOITRA *v.* BHUBANESWARI DEBI . **I. L. R. 16 Calc. 40 L. R. 15 I. A. 195**

40. ——— **Impartible estate**—*Rights of natural father of adopted son as reversionary heir to son's estate.* The first defendant in this suit was the adoptive mother of *N,* who died. *N* was the last holder of an impartible *zamindari,* and, on his decease, first defendant enjoyed the estate. Plaintiff now sued for a declaration that he was entitled to the estate as reversioner, in preference to a senior brother of the first defendant, basing his claim principally on the ground that he was the natural father of *N. Held,* that this relationship did not entitle plaintiff to claim as reversionary heir. In determining the decree of propinquity to the deceased adopted son, in his adoptive family in which the question of reversionary succession arose, a claimant should not be regarded as next of kin because of his relationship as natural father, which, for purposes of inheritance, is immaterial. An adopted son is, for mutual rights of succession, completely severed from his family. *Srinivasa Ayyangar* v. *Kuppan Ayyangar, 1 M. H. C. R. 180,* followed. *Quære:* As to whether such natural relationship would be efficacious to intercept an escheat to the Crown. MUTHAYYA RAJAGOPALA THEVAR *v.* MINAKSHI SUNDARA NACHIAR (1901) **I. L. R. 25 Mad. 394**

41. ——— **Successive adoptions**—*Hindu widow—Adoption of a second son after death of first, whether it divests the mother's estate—Right of reversionary heir.* A Hindu widow adopting a son under the authority of her deceased husband upon the death of a son begotten or adopted, whose estate she inherited as mother, divests herself of that estate, by the act of adoption, in favour of the son last adopted by her; and such son takes the estate immediately on his adoption. *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhury 10 Moo. I. A. 279; Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi, I. L. R. 1 Mad. 174; Ramasami Aiyan* v. *Venkata Ramaiyan, I. L. R. 2 Mad. 91; Bykant Monee Roy* v. *Kisto Soonderee Roy, 7 W. R. 392; Gobindo Nath Roy* v. *Ram Kanay Chowdhury, 24 W. R. 183; Puddo Kumari Debi* v. *Juggut Kishore Acharjee, I. L. R. 5 Calc. 615; Padma Kumari Debi* v. *The Court of Wards, I. L. R. 8 Calc. 302; Tagore* v. *Tagore, 18 W. R. 359, Jamnabai* v. *Ray Chand Nahal Chand, I. L. R. 7 Bom. 225;* and *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai, I. L. R. 11 Bom. 381,* considered. RAI JATINDRA NATH CHAUDHURI *v.* AMRITA LAL BAGCHI (1900) . **5 C. W. N. 20**

42 ——— **Estoppel**—*Adoption—Suit by adoptive mother to set aside an adoption made by her.* In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sradh* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. *Held,* that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void. *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer, 1868 N. W. P. H. C. 103A,* distinguished. *Sarat Chunder Dey* v. *Gopal Chunder Laha, I. L. R. 20 Calc. 296; Sukhbasi Lal* v. *Guman Singh, I. L. R. 2 All. 366; Durga* v. *Khushalo, All. Weekly Notes (1882) 97; Kannammal* v. *Virasami, I. L. R*

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15 Mad. 486; Ravji Vinayakrav Jaggannath Shankarsett v. *Lakshmibai, I. L. R. 11 Bom. 381,* and *Santappa* v. *Rangappaya, I. L. R. 18 Mad. 397,* referred to. DHARAM KUNWAR *v.* BALWANT SINGH (1908) . . . . **I. L. R. 30. All 549**

43. ——— Alienation by the widow prior to the date of adoption—*Adoption by a widow—Right of the adopted son to dispute the alienation.* Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. Thus, if a widow before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate. *Lakshman* v. *Radhabai I. L. R. 11 Bom. 609* and *Moro* v. *Balaji I. L. R. 19 Bom. 809,* followed. *Sreeramulu* v. *Kristamma, I. L. R. 26 Mad. 143,* not followed. RAMAKRISHNA *v.* TRIPURABAI (1908) . **I. L. R. 33 Bom. 88**

44. ——— Adoption of a married man having a son—*The son's gotra and rights of inheritance in the family of his birth.* When a married Hindu having a son, is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted. KALGAVDA TAVANAPPA *v.* SOMAPPA TAMANGAVDA (1909) **I. L. R. 33 Bom. 669**

7. FAILURE OF ADOPTION OR OMISSION TO EXERCISE POWER.

1. ——— Death of adopted son—*Estate of Hindu widow—Adopted son dying a minor.* The widow of a childless member of a divided Hindu family is entitled to a life-interest in her husband's estate after the death of an adopted son before attaining majority. SOONDER KOOMAREE DEBEA *v.* GUDADHUR PERSHAD TEWARE **4 W. R. P. C. 116 : 7 Moo. I. A. 54**

2. ——— *Widow with power to adopt—Power to adopt another son. G* executed an unoomotee potro to his wife *S* to adopt, on the failure of each adopted son, five sons in succession. After his death, *S* adopted a boy who died ten or twelve years later, after which she adopted another, whose adoption it was now sought to have declared invalid. The contention in special appeal was that, as the son first adopted lived to an age sufficiently mature to perform all the acts of spiritual benefit, to secure which the unoomotee potro was executed, and it should be presumed that he performed all those acts, the power given to *S* ceased to have any operative force. *Held,* that the contention was not supported by the Privy Council cases cited, and was opposed to the general principles of the Hindu law: a son in the situation of the first adopted son in this case cannot exhaust the whole of the spiritual benefit which a son is capable of conferring on his deceased father. RAM SOONDUR SINGH *v.* SURBANEE DOSSEE **22 W. R. 121**

3. ——— Widow with authority to adopt, position of—*Limitation.* A Hindu died after leaving directions with his widow to adopt a son. On a partition of the joint property among his brothers and widow, a certain property was allotted to the widow as her share; afterwards in 1849 the brother dispossessed her. In 1851 she adopted a son, who attained his majority in 1865, and in 1866 sued for possession of the property. *Held,* that the possession of the widow previous to the adoption was not that of a trustee for the son to be adopted so as to prevent limitation. GOBIND CHANDRA SARMA MAZOOMDAR *v.* ANAND MOHAN SARMA MOZOOMDAR . **2 B. L. R. A. C. 313**

4. ——— Failure to adopt—*Widow with power to adopt not adopting—Suit for estate as widow.* Authority was given by deed, by a childless Hindu in Bengal, to his widow to adopt a son at his decease. The widow did not exercise that power and many years after her husband's death brought a suit in her character as widow claiming his succession in the family estates. *Held,* that the mere fact of there being authority given her by her husband to adopt a son, did not, before an adoption had actually taken place, supersede and destroy her personal right as widow to sue. BAMUNDOSS MOOKERJEE *v.* TARINEE . . . . **7 Moo. I. A. 169**

5. ——— Omission to adopt—*Inheritance, widow's right to.* A husband's express authorization, or even direction, to adopt does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon. When a Hindu by his will gave his widow authority to adopt, if necessary, from one to three dattaka sons, and she, having neglected to do so, brought a suit to recover possession of her husband's property and for an account of the administration against the administrator of the estate, after having ineffectually attempted to get the letters of administration recalled and fresh letters granted her as heiress of

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her husband :—*Held*, that she was entitled to the decree she prayed for. UMA SUNDURI DABEE *v.* SOUROBINEE DABEE
I. L. R. 7 Calc. 288 : 9 C. L. R. 83

See DINO MOYEE CHOWDHRAIN *v.* REHLING
2 W. R. Mis. 25

DENO MOYEE DOSSEE *v.* DOORGA PERSHAD MITTER . . . . . **3 W. R. Mis. 6**

6. ——— *Omission of widow to adopt as directed in will—Right of inheritance.* When a widow neglects to adopt a second son on the death of the first adopted son, as directed by her deceased husband, she commits a wrong, but may nevertheless be the heiress of the first adopted son. SREEMUTTY DOSSEE *v.* TARRACHUND COONDOO CHOWDHRY . . **Bourke A. O. C. 48**

8. EFFECT OF INVALIDITY OF ADOPTION.

1. ——— **Adoption held to be invalid**—*Position of person adopted.* Where an adoption is held invalid, the natural rights of the person adopted remain unaffected. BAWANI SANKARA PANDIT *v.* AMBABAY AMMAL . **1 Mad. 363**

But *see* AYYAVU MUPPANAR *v.* NILADATCHI AMMAL . . . . . **1 Mad. 45**

2. ——— *Adoption by a widowed daughter-in-law under the direction of the father-in-law after his death—Divesting of the estate of daughters—Adoption invalid.* A Hindu testator died leaving him surviving two daughters and a widowed daughter-in-law. In his will he made the following provision—"I wanted to dispose of the above-mentioned property myself. But as I am ill, it is not possible for me to do so. Therefore the Panch should give a boy in adoption to my daughter-in-law and (thus) keep (the doors of) my house open. After the death of the father-in-law, the widowed daughter-in-law adopted a boy under the said provision. The adopted boy having subsequently brought a suit for a declaration of his title as the grandson of the testator the validity of the adoption was impeached by one of the daughters of the testator, whose interest became divested by the adoption. *Held*, that the adoption was invalid. From the fact that a husband's authority to his widow to adopt may be operative after his death, it does not follow that a father-in-law's assent survives beyond his lifetime so as to enable his son's widow to divest an estate that had already devolved by inheritance on heirs, who did not derive a title through the son. LAKSHMIBAI *v.* VISHNU VASUDEV (1905) . **I. L. R. 29 Bom. 401**

9. EVIDENCE OF ADOPTION.

1. ——— **Suit as to validity of adoption**—*Nattore Raj.* In a suit as to the validity of

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the adoption of a claimant to the Nattore Raj :—*Held*, notwithstanding a finding of the Court of first instance, that the adoption was not proved, that the evidence fully supported the adoption. CHUNDER NATH ROY *v.* GOBIND NATH ROY
11 B. L. R. P. C. 86 : 18 W. R. 221

COLLECTOR OF MOORSHEDABAD *v.* SHIBESSUREE DABEE . . . . . **11 B. L. R. P. C. 86**
18 W. R. 226

upholding the decision of the High Court.

See KISHEN MONEE DEBIA *v.* KASHEE SOONDARI DEBIA . . . . . **W. R. F. B. 106**

COLLECTOR OF MOORSHEDABAD *v.* ANUND NATH ROY. KISTOMONEE DEBIA *v.* ANUND NATH ROY
W. R. F. B. 112

2. ——— **Deeds of adoption**—*Internal probabilities—Witnesses.* Deeds of adoption executed long ago, several witnesses to the execution of which having died, should be judged of more from their internal probabilities and from the indirect evidence than from the testimony of witnesses either subscribing the deeds or present at the same time. KISHEN MONEE DEBIA *v.* KASHEE SOONDAREE DEBIA . . . **W. R. F. B. 106**

3. ——— **Suit to establish adoption**—*Test of validity of deeds of adoption.* In cases of adoption careful scrutiny is necessary. The party seeking to establish an adoption is bound to produce the best evidence procurable. The rule for testing the validity of a deed of adoption is contemporaneity of execution and publication of the deed of permission. In the absence of the original deed, all the circumstances bearing upon the alleged deed, and all the probabilities for and against its genuineness, must be considered. ROOPMONJOREE CHOWDRAIN *v.* RAMLAL SIRCAR. GREESH CHUNDER LAHOREE *v.* RAMLAL SIRCAR . **1 W. R. 144**

4. ——— **Adoption by dhurm-putr**—*Ceremony of dhurm-putr.* An adoption made by a Parsee immediately before his death would render extremely improbable the execution of a will by him a very short time previous thereto, and therefore call for very clear proof to establish its existence. Although in cases of adoption by dhurm-putr (a partial adoption) it is not indispensably necessary that a declaration should be made on the third day after the decease, yet it is usual to make such a declaration and to take a writing from the dhurm-putr. In the absence of any such writing and upon the whole evidence, the adoption in this case was pronounced to be as a paluk-putr, and not merely as a dhurm-putr. HOMABHAEE *v.* PUNJEABHAEE DOSABHEEN . **5 W. R. P. C. 102**

5. ——— **Requisition for validity of adoption**—*Registration—Acknowledgment in writing.* According to Hindu law, neither registration of the act of adoption nor any written evidence of that act having been completed is essential to its validity. In no case should the rights of wives and

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daughters be transferred to strangers or to more remote relations, unless the fact of adoption by which this transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth. Although the Hindu law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of a zamindar adopt sons, to acknowledge such adoption in writing, to give notice to the ruling power, and to invite the neighbouring zamindars and others to be present at such an adoption. SUTROOGUN SUTPUTTY *v.* SABITRA DYE . . **5 W. R. P. C. 109**

6. ——— *Deed expressing wish to adopt a particular person.* A cousin and heir to an insane proprietor having been sued for the amount of a decree, and application having been made for execution against the estate of the said proprietor after his death, it was urged, that the estate had become the property of a minor who had been adopted by the insane proprietor previously to his decease, and could not be held liable for the debts of the cousin and heir, who, moreover, had formally relinquished his right to it. The plaintiff's claim rested on the contention that the formalities required to validate an adoption had not been attended to in this case. This contention was met by the plea that the adoption was complete, but that, even if it had not been so, a document declaring the deceased proprietor's desire to adopt the minor had the effect of a testament. *Held* by the High Court, that, though the intention of the deceased proprietor to adopt the minor was clear, that intention, even as expressed in the abovementioned document, which was not testamentary in character, did not amount to an adoption in the absence of the necessary formalities. The estate was accordingly declared liable for the amount of the decree against the cousin and heir. BANEE PERSHAD *v.* COURT OF WARDS . **25 W. R. 192**

7. ——— **Evidence of conditional adoption.** In a suit in which a claim was made in virtue of an alleged adoption to the estate of a deceased Hindu, the widow made a compromise, not in writing, with the claimant where the adoption was admitted, but alleged to have been on condition that the widow should enjoy the entire property for her life without power of alienation, and that, after her death, her minor daughters should take the self-acquired property, and the claimant should succeed to the ancestral estate. *Held*, that the evidence to establish such a conditional adoption must, as in the case of a nuncupative will, be very strong. IMRIT KONWAR *v.* ROOP NARAIN SINGH . . **6 C. L. R. 76**

8. ——— **Deed purporing to effect an adoption**—*Giving and taking.* An ekrarnama executed by the natural father in favour of the adoptive father recited that the former had made over his third son to the sonship of the adoptive father, so that the latter might, whenever he would wish, fulfil the rights of adoption in accordance with the Shastras and the usage of the country, and from that day the natural father would have no claim or right in respect of the said son. *Held*, that this deed did not of itself operate to effect an adoption. It did not even amount to a giving and taking of the boy, as it contemplated the subsequent performance of the necessary rites. *Held*, further, that deeds of this kind did not take the place of the necessary evidence as to the actual adoption. MANDIT KOER *v.* PHOOL CHAND LAL . **2 C. W. N. 154**

9. ——— **Factum of adoption**—*Onus probandi. Custom among Shatriyas.*—The ruling of the Privy Council in *Shoshinath Ghose* v. *Krishna Soondari Dasi, L. R. 7 I. A. 250*, has no application to a case in which there is ample evidence, both oral and documentary, to prove the factum of adoption. Where it was sought to set aside an adoption which took place many years ago, which had ever since been recognized as valid and under which the adoptee had ever since been in possession of his adoptive father's estate, on the single ground that at the time of the adoption the adopted son was more than five years of age, it was held that the onus of proof was upon the person who alleges the adoption to be invalid. *Haimun Chull Singh* v. *Koomer Gunsheam Sing, 5 W. R. P. C. 69*, referred to. In a case where the validity of an adoption was in dispute and the parties to the suit were Shatriyas :—*Held*, that, even if it had been established that five years was the rigid and inflexible limit of age for the validity of all adoptions among the "twice-born" classes, so as to be applicable even to Shatriyas, in the circumstances of the case it would be necessary to have a full investigation of the question whether, among the clan of the Shatriyas to which the parties belonged, any such rigid rule prevailed. GANGA SAHAI *v.* LEKHRAJ SINGH . . . **I. L. R. 9 All. 253**

10. ——— **Nambudrdis**—*Marumakkatayam law—Adoption of an adult male—Form of adoption.* In a suit the parties to which were Nambudri Brahmans following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct mana for a declaration of his title to certain lands as the sole uralen of a devason. The plaintiff was an adult at the time of his adoption, and no female was adopted at the same time with the plaintiff. *Held*, on the evidence, that the plaintiff was entitled to succeed. The form and evidence of adoption considered. SUBRAMANYAN *v.* PARAMASWARAN **I. L. R. 11 Mad. 116**

11. ——— **Evidence of authority to adopt.** Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will was disputed by a junior widow, the Courts below differing as to the question

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of fact. Upon the evidence the finding of the Subordinate Judge that no such authority had been given was maintained. AMMI DEVI *v.* VIKRAMA DEVU . . . **I. L. R. 11 Mad. 486**
L. R. 15 I. A. 176

12. ——— Report of punchayet— *Evidence—Family pedigree* The question was whether a certain adoption was made. It was shown that the dispute had been referred to a punchayet, whose report, dated the 7th February 1819, was filed and preserved in the Collector's office, from whence it was produced. It did not appear whether any formal order was made on the report, and there was not in the record any order of reference or formal statement of the case to show what was the precise subject of decision. But it being clear that a minute local enquiry into the history of the family took place before a competent local tribunal, and also that the disputants signed the report, each saying that he agreed to what is stated in it, it was held that the findings in the report were strong evidence in matters of family pedigree. On a consideration of the evidence and specially of the report of the punchayet: *Held*, by the Privy Council that the adoption which was denied by plaintiff was made out. AJABSING *v.* NANABHAU VALAD DHANSING RAUL . . . **3 C. W. N. 130**

13. ——— *Old reports of punchayets—Documentary evidence—Claim to a vatan existing from Maratha rule.* Title to an inheritance devolving upon a single heir was contested between the parties representing respectively two lines of descent from the same ancestor. He had three sons, whose posterity continued in three lines till the extinction of the senior line of descendants in 1877. On this, the last of the younger of the two surviving lines claimed to have his right to the succession declared. The question was whether an ancestor of the claimant had adopted as his son a member of the family born in the senior line. The decision depended on the weight to be attached to entries in old documents. These were reports by punchayets to the Collector of the years 1819—21, preserved among the Mamlatdar's records, and they related to questions of succession between the heads of the family lines, disputing then, as were their successors now. The authenticity of the report was not impeached. But the adoption now in question could hardly have been the point then in dispute, and the entries as to it had been tampered with. The enquiry, however, into the history of the family was minute, it took place before a competent local tribunal, and the report was signed by the plaintiff's grandfather. The findings were *held* strong evidence in matters of family pedigree. The decision of the High Court, which had dismissed the suit (after bringing home the fact of the part obliteration of the entry to the plaintiff), was on the evidence maintained. AJAB SINGH *v.* NANABHAU **I. L. R. 25 Bom. 1**

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14. ——— Son of a Brahmo, adoption of—*Adoption, validity of—Onus of proof—Incapacity—Brahmo Samaj—Evidence taken on commission, reference to—Practice.* The fact of adoption being admitted, and its validity being impugned on the ground of incapacity on the part of the adopted son, it is for the party so impugning the validity of the adoption to establish the alleged incapacity. No question as to custom or usage being raised in the pleadings, the adoption must be determined by reference to the principles of Hindu law. Evidence taken on commission, until tendered and admitted as evidence in the suit, cannot be made use of by either party. *Nistarini Dassee* v. *Nundo Lall Bose, 3 C. W. N. (notes) 239,* dissented from. Inasmuch as a Hindu, having renounced Hinduism, is entitled to revert to Hinduism according to the rites of that religion, it follows that his infant son can, with his consent and approval, also revert in the same manner. Where an orthodox Hindu adopted an infant son of a member of the Sadharan Brahmo Samaj: *Held*, that, in the absence of proof of special custom, such adoption was valid under the Hindu law. *Shamsing* v. *Santabai, I. L. R. 25 Bom. 551,* followed. KUSUM KUMARI ROY *v.* SATYA RANJAN DAS (1903) . . . **I. L. R. 30 Calc. 999; s.c. 7 C. W. N. 784**

15. Evidence of Adoption— *Adoption of Daughter's son, validity of—Question not raised until too late a stage of the hearing—Estoppel by assent of Reversioner to Alienations by Widow—Power of Reversion to bind later Reversioners—Reversioners claiming not through preceding Reversioners but through last male owner—Misjoinder of Causes of Action—Civil Procedure Code (XIV of 1882), s. 578.* The appellant's right to maintain a suit to set aside alienations of certain immoveable property made by the widow and the natural mother of the last male owner, who was the daughter's son of the original owner, depended on whether, as the appellants alleged, he was also his adopted son. On this question the Courts in India differed:—*Held*, by the Judicial Committee, that on the evidence the adoption was established. It showed that, on the death of the original owner the alleged adopted son succeeded to the estate without controversy which he could only have done as adopted son, and enjoyed it and disposed of it as his own, also without controversy, down to his death in 1870: almost every document both during his life and after his death was framed entirely on the basis of the adoption. An objection to the validity of the adoption on the ground that under the Hindu law a daughter's son could not be adopted, was only put forward for the first time at the very last stage of the hearing, after all the evidence was closed and nothing but argument remained. The decision depended on whether the rule of Hindu law had been varied by family custom:—*Held*, that the District Judge was right in refusing to entertain at that late stage of the case a new

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question of that kind the solution of which must be dependent upon evidence. The main defence to the suit was that the assent of the appellants' father to the transactions in dispute, not only estopped him from contesting the validity of the alienations, but created an estoppel binding his sons, the appellants. As showing this a document dated 3rd September 1871 was produced which, after reciting that except his mother there was no heir to or claimant of the adopted son's property, stated that the widow agreed that during the mother's lifetime she should remain in possession of a half share of the property, and that after the death of the mother and the widow both the shares should devolve by inheritance on the sons of the mother, who were the natural brothers of the adopted son. This deed was signed by the father of the appellants who at that time was the only reversioner. The Courts in India differed as to the effect of his concurrence in the deed :—*Held*, that the division of her life interest with the mother was an act which did not need the assent of the appellant's father: and to provide for the descent of the inheritance after her death in a line different from that prescribed by law was a thing which the widow could not do either with or without his assent. There was, therefore, no estoppel on the reversioner, and consequently none on his sons. Another document relied on by the respondents was one of the alienations sought to be set aside. It was executed by the two ladies on 1st July 1888, and recited that they inherited the property in question from the original owner by virtue or right of succession and also by reason of the relinquishment of their rights by all the original owner's collateral heirs. They referred to the deed of 3rd September 1871 and stated that they, the executants, were absolute owners by exercising proprietary rights. They conveyed the land to the purchasers absolutely, and finally stipulated that neither they nor their heirs or descendants would ever raise any objection, nor would the original owner's collateral heirs whose rights, if any, "had been extinguished by their putting their signature to this deed, and admitting it to be correct." This deed was also attested by, amongst others, the father of the appellants. The Courts in India again differed :—*Held*, that the deed only bound the ladies and the collateral heirs of the original owner from whom they claimed to have derived title. It did not affect any title coming from the adopted son through whom the appellants claimed; they were, therefore, not estopped. The ladies, the alienees, of the four separate alienations sought to be set aside, and the natural brothers of the adopted son were all made defendants in the present suit :—*Held*, that it was very doubtful whether, on the strictest construction to be placed on the Civil Procedure Code, it could properly be said there was any misjonider of causes of action: but even if there was, s. 578 of the Code had the effect of preventing such a defect from being made a ground of appeal on which the decree of the first Court could be reversed. The decree of the Chief Court was reversed, and that of the District Judge restored. LALA RUP NARAIN *v.* GOPAL DEVI (1909).
I. L. R. 36 Calc. 780

HINDU LAW—ADOPTION—*contd.*

9. EVIDENCE OF ADOPTION—*concld.*

10. DOCTRINE OF FACTUM VALET AS REGARDS ADOPTION.

1. ——— Application of maxim— *Gift by widow without authority of husband's only son.* The maxim *quod fieri non debuit factum valet* considered and its application pointed out. The gift by a widow of her husband's only son without his express authority given during his lifetime is null and void *ab initio*, and cannot be supported by this maxim, because such an adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*. LAKSHMAPPA *v* RAMAVA
12 Bom. 364

2. ——— ——— *Adoption of daughter's son among Brahmans.* Amongst Brahmans an adoption which is incestuous and invalid, as the adoption of a daughter's son, cannot be supported on the authority of the maxim *factum valet quod fieri non debuit*. BHAGIRTHIBAI *v.* RADHABAI
I. L. R. 3 Bom. 298

3. ——— Limitation of maxim— Limits within which the maxim *quod fieri non debuit factum valet* as to adoption applies pointed out. GOPAL NARHAR SAFRAY *v.* HANMANT GANESH SAFRAY . . . **I. L. R. 3 Bom. 273**

4. ——— Recognition of maxim— *Schools of Hindu law other than Bengal.* The maxim *quod fieri non debuit factum valet* is recognized to some extent by other schools of law in India besides that of Bengal. WOOMA DAEE *v.* GOCOOLANUND DASS
I. L. R. 3 Calc. 587 : 2 C. L. R. 51

5. ——— Suit by adoptive father to set adoption aside. *Held*, that, when an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father. SUKHBASI LAL *v.* GUMAN SINGH . . **I. L. R. 2 All. 366**

6. ——— Applicability of maxim— *Nature of adoption.* The maxim *quod fieri non debuit factum valet* is applicable not only in the Dayabhaga school of Hindu law which prevails in Lower Bengal, but also in the various sub-divisions of the Mitakshara school. Its authority does not depend upon any rule of Hindu law alone, but upon the principles of justice, equity, and good conscience. There is no authority to show that it is to be applied to cases governed by the Hindu law in a manner exceeding the limits recognized by the Roman civil law in which it originated. Its application in cases of adoption should be confined to questions of formalities, ceremonies, preference in

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HINDU LAW—ADOPTION—*contd.*

10. DOCTRINE OF FACTUM VALET AS REGARDS ADOPTION—*concld.*

the matter of selection, and similar points of moral or religious significance, which relate to what may be termed the *modus operandi* of adoption, but do not affect its essence. There may be cases where matters which in other systems would be regarded as merely formal, are by the express letter of the texts made matters affecting the essence of the transaction, and such texts may be sufficiently imperative to vitiate an adoption in which they have been disregarded; but unless their meaning is undoubted, the doctrine of *factum valet* should be restricted to adoptions which, having been made in substantial conformity to the law, have infringed minor points of form or selection. Adoption under the Hindu law being in the nature of a gift, it contains three elements—capacity to give, capacity to take, and capacity to be the subject of adoption—which are essential to the validity of the transactions, and as such are beyond the scope of the doctrine of *factum valet*. *Uma Deyi* v. *Gokoolanund Das Mahapatra, L. R. 5 I. A. 40; Hanuman Tiwari* v. *Chirai, I. L. R. 2 All. 164; Singamma* v. *Vinjamuri Venkatacharlu, 4 Mad. 164; Dharma Dagu* v. *Ramkrishna Chimnaji, I. L. R. 10 Bom. 80; Lakshmappa* v. *Ramava, 12 Bom. 364;* and *Gopal Narhar Safray* v. *Hanmant Ganesh Safray, I. L. R. 3 Bom. 273,* referred to. GANGA SAHAI *v.* LEKHRAJ SINGH . **I. L. R. 9 All. 253**

7. ——— **Adoption by younger widow without consent of elder.** Where a younger widow had adopted without the consent of the elder widow it was contended that the right of the elder widow, was merely the right to select, and that in any case it was only a preferential right, and that consequently the doctrine of *factum valet* applied. *Held*, that the doctrine of *factum valet* cannot apply to the case of an adoption by a younger widow, for it is plain that, until the elder widow waives her preferential right to adopt, her right is exclusive, and that the other widows have no authority to adopt. The rule of *factum valet* applies in cases of adoption only where "there is neither want of authority to give or to accept, nor imperative interdiction of adoption." PADAJIRAV *v.* RAMRAV . **I. L. R. 13 Bom. 160**

11. TERMS OF ADOPTION.

1. ——— *Adoption—Agreement limiting property to be taken by minor adopted son—Validity.* A Hindu widow, in pursuance of authority given by her husband, since deceased, adopted plaintiff, a minor. A registered document was executed by the widow on the day of the adoption, wherein the fact of the adoption was recited and certain terms were set forth as to the manner in which the property of the deceased adoptive father should be enjoyed as between the plaintiff and the widow. By those terms it was declared that, in the event of disagreement between plaintiff

HINDU LAW—ADOPTION—*contd.*

11. TERMS OF ADOPTION—*concld.*

and his adoptive mother, the property described in the second schedule should be enjoyed by the latter during her life, and should be taken by the plaintiff after her death. The authority, under which the widow adopted, had been given orally, and merely enabled her to adopt a son, and made no reference to the manner in which the estate of the deceased should be enjoyed either by the son or the widow. The effect of the arrangement was to vest in the widow on the contingency mentioned, for her life, about a moiety of the property inherited by her from her husband. The terms embodied in this agreement were consented to by the plaintiff's natural father prior to the adoption, and it was in consequence of such consent that the adoption took place and the document was executed. Disagreements arose between plaintiff and the widow, and plaintiff, still a minor, sued through his natural father as next friend to recover all the property of his deceased adoptive father. *Held*, that the provision in the document in favour of the widow was binding on the plaintiff and the widow was entitled to enjoy the property in the second schedule during her lifetime. VISALAKSHI AMMAL *v.* SIVARAMIEN (1904) . . . . **I. L. R. 27 Mad. 13**

12. ADOPTION DURING WIFE'S PREGNANCY.

3. ——— *Adoption during wife's pregancy. Held*, that the fact that at the time of making an adoption the wife of the adopting father is pregnant does not affect the validity of the adoption. *Nagabhushanam* v. *Seshammagaru, I. L. R. 3 Mad. 180,* and *Hanmant Ramchandra* v. *Bhimacharya, I. L. R. 12 Bom. 105,* followed. *Narayana Reddi* v. *Vardachala Reddi, (1859) M. S. D. 97,* dissented from. DAULAT RAM *v.* RAM LAL (1907) . **I. L. R. 29 All. 310**

13. CONSIDERATION FOR GIVING IN ADOPTION.

——— *Adoption— Receipt of consideration by natural father for giving in adoption does not make the adoption invalid.* Where a boy, being a fit subject for adoption in the Dattaka form, is given and accepted, with the proper ceremonies for such adoption, by persons respectively competent to give and accept him, he acquires the status of an adopted son. The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an 'affiliation by sale,' a form now obsolete. *Manjaneer puthiran* is synonymous with Dattaka son. *Bhasha Rabidat Singh* v. *Indar Kunwar, I. L. R. 16 Calc.*

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HINDU LAW—ADOPTION—*concld.*

13. CONSIDERATION FOR GIVING IN ADOPTION—*concld.*

556, followed. MURUGAPPA CHETTI *v.* NAGAPPA CHETTI (1905) . . **I. L. R. 29 Mad. 161**

14. LIMITATION.

——— ——— ——— *Limitation Act (XV of 1877), Sch. II, Art. 119—Period of limitation applicable to suits where* factum *and also validity of adoption is denied.* Suits in which either the *factum* or validity of an adoption is denied are governed by the provisions of Art. 119 of Sch. II to the Limitation Act (XV of 1877). The observations to the contrary in *Ningawa* v. *Ramappa, I. L. R. 28 Bom. 94*, and *Shivaram* v. *Krishnabai, I. L. R. 31 Bom. 80*, dissented from. *Shrinivas* v. *Hanmant, I. L. R. 24 Bom. 260*, followed and applied. LAXMANA *v.* RAMAppa (1907) **I. L. R. 32 Bom. 7**

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See SALE IN EXECUTION OF DECREE—JOINT PROPERTY.

1. RESTRAINT ON ALIENATION.

1. ——— **Restraint invalid as inconsistent with Hindu law**—*Restraint by will.* A restraint on alienation put by a testator on his descendants was considered void as being unknown to, and inconsistent with, Hindu law. NITAI CHARAN PYNE *v.* GANGA DASI **4 B. L. R. O. C. 265 note**

2. ——— **Impartibility, effect of**—*Chota Nagpore Raj, alienation of portion of.* The fact that the Raj of Chota Nagpore is an impartible one does not prevent the Maharaja for the time being from alienating a portion of it in perpetuity. NARAIN KHOOTIA *v.* LOKENATH KHOOTIA **I. L. R. 7 Calc. 461 : 9 C. L. R. 243**

3. ——— *Alienation of impartible estate—Custom—Succession to raj.* Impartibility of an inheritance does not, as a matter of law, render it inalienable. The owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his own life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required. *Anund Lall Singh Deo* v. *Dheraj Guru Narain Deo, 5 Moo. I. A. 82*, followed. In the case of a titular raj, of which the lately deceased raja had made a mokurari pottah, or grant in perpetuity, of part of the zamindari lands thereto belonging, in favour of a younger son, it was found that the only custom proved was that the raj estate descended to the eldest son, to the exclusion of the other sons, and that there was no proof of a custom prohibiting such an alienation as that made by the grant. *Held*, that the mokurari grant was not invalidated by reason of the raj estate being by custom impartible. UDAYA ADITYA DEB *v.* JADAB LAL ADITYA DEB . **I. L. R. 8 Calc. 199**

4. ——— *Impartible raj estate—Power to alienate—Custom.* In regard to a

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HINDU LAW—ALIENATION—*contd.*

1. RESTRAINT ON ALIENATION—*contd.*

raj estate in Gorakhpur by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him. *Held*, that, if there had been no custom of partibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27, and the gift would have been void. But there being the above custom, the question was how far the general law was superseded, and whether the right of the son to contral the father's act in this respect was beyond the custom. *Held*, that in regard to impartible estate the son's right at birth did not exist where there was no right on his part to partition; also, that inalienability depended on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable. SARTAJ KUARI *v.* DEORAJ KUARI . . **I. L. R. 10 All. 272**
L. R. 15 I. A. 51

5. ———— *Custom—Impartible zamindari—Right of zamindar to alienate—Suit to set aside the alienation of impartible property.* The holder of an impartible zamindari governed by the law of primogeniture, having a son executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend (authorized in that behalf by the Court of Wards), now sued the assignee of the lessee to have the lease set aside. *Held, by* PARKER, *J.*, MUTTUSAMI AYYAR, *J.*, and WILKINSON, *J.*, that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into. *Per* MUTTUSAMI AYYAR and WILKINSON, *JJ.* (reversing the judgment of PARKER, *J.*), that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. *Sartaj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272*, discussed and followed. BERESFORD *v.* RAMASUBBA . **I. L. R. 13 Mad. 197**

6. ———— **Condition not to alienate—** *Restriction of enjoyment of estate.* Upon a division of family property, the parties to the division entered into an agreement that the property of any one of the parties to the agreement or their heirs dying, leaving no issue, should not be sold or transferred as a gift but should on his death be divided by the other shareholders. In a suit by one of the shareholders to recover the share to which the plaintiff was entitled under the agreement from the defendant, a purchaser from the son of the person to whom the property was allotted upon the division:—*Held*, that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents, and that the power of disposition, being a legal incident of the estate which passed to the vendor, could not be taken away by the agreement. VENKATRAMANNA *v.* BRAMMANNA SASTRULU . . . . **4 Mad. 345**

HINDU LAW—ALIENATION—*contd.*

1. RESTRAINT ON ALIENATION—*concld.*

7. ———— *Alienation and suit by alienee for mutation of names.* On the construction of an ikrarnama or deed of agreement and partition of an ancestral estate among several brothers:—*Held*, that the terms of the deed were not restrictive upon the power of each brother to alienate his separate share. *A*, one of the brothers had his share registered on the Collector's books as owner, and by deed of sale conveyed such share to his daughter, who was also his heir. The Collector on the objection of one of *A's* brothers (who denied *A's* right to alienate, on the ground that it was ancestral property), refused to register the daughter's name as proprietor. *Held*, that the Collector was bound by Bengal Regulation VIII of 1800, s. 21, to register her name as purchaser, but that such mutation of name was to be without prejudice to the question of the right of succession. COWULBAS KOONWUR *v.* LAL BAHADUR SINGH
9 Moo. I. A. 39

2. ALIENATION BY SON.

———— **Alienation without father's consent—***Mitakshara law.* Under the Mitakshara law, an alienation by a son without the father's consent is invalid. SHEO RUTTUN KOONWAR *v.* GOUR BEHAREE BHUKUT . **7 W. R. 449**

3. ALIENATION BY UNCLE.

———— **Right of nephew to object to alienation.** A nephew is not competent by Hindu law to object to any alienation of ancestral property made by his uncle. ADJOODHIA GIR *v.* KASHEE GIR . . . . . **4 N. W. 31**

4. ALIENATION BY FATHER.

1. ———— **Alienation with consent o son—***Right of grandson to object to alienation.* An alienation made by a Hindu with the consent of his son cannot under the Mitakshara law, be questioned by the grandson. BURAIK CHUTTER SINGH *v.* GREEDHAREE SINGH. . . **9 W. R. 337**

2. ———— **Grandson's right to set aside alienation—***Suit by grandsons, sons of a son adopted in kritrima form to set aside alienation.* Where the son of a certain person, who had been adopted as a kritrima son, sought to set aside certain alienations of self-acquired property which the adoptive father had made, on the double ground that as grandsons they had an interest in that pro-

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HINDU LAW—ALIENATION—*contd.*

4. ALIENATION BY FATHER—*contd.*

perty, and that the alienations were for improper purposes :—*Held*, that, as the alienations were proved to be for legitimate purposes, and the relations established by the kritrima form of adoption were confined to the contracting father and did not extend beyond them on either side, the plaintiffs in this case had no right to set aside the alienations which the adoptive father of their father had made. JUSWANT SINGH *v.* DOOLEE CHUND . . . . . **25 W. R. 255**

3. ——— Self-acquired property— *Mithila law—Separate acquisitions.* According to Mithila law, the owner of self-acquired property has full power of disposition over it. BISHEN PERKASH NARAIN SINGH *v.* BAWA MISSER **12 B. L. R. P. C. 430 : 20 W. R. 137**

4. ——— *Power of a father of a joint family to alienate—Self-acquired immoveables—Mitakshara Law.* A father, being a member of an undivided family subject to the Mitakshara, can exercise full power of disposition at his own discretion over immoveables which he has himself acquired, as distinguished from ancestral property. BALWANT SINGH *v.* RAMKISHORE **I. L. R. 20 All. 267**
L. R. 25 I. A. 54

RAO BALWANT SINGH *v.* RAMKISHORE **2 C. W. N. 273**

5. ——— *Ancestral property—Outcaste, right of.* There is a distinction between ancestral and self-acquired property under the Mitakshara law with regard to the right of a father to dispose of it. The fact of his being an outcaste would not prevent him from exercising his rights over the property to the same extent as he might otherwise have done. OJOODHYA PERSHAD SINGH *v.* RAMSARUN . . . **6 W. R. 77**

6. ——— *Ancestral property.* *A*, a Hindu, sued *B*, the widow of *C*, claiming to be entitled with others as heirs of *C* under the Mitakshara law to certain property. The suit was compromised on the terms, as to one portion of the property, that it was to be retained by *B* for life, and after her death to be divided according to specified shares between *A* and the other claimants. After *B's* death, *A* obtained possession of his share under the deed of compromise. *A* alienated the property, and during his lifetime his sons sued to set aside the alienation on the ground that it was ancestral property *Held*, that *A* took the property absolutely, and not as ancestral property. MAHABIR KOWER *v.* JUBHA SINGH **8 B. L. R. 38 : 16 W. R. 221**

7. ——— *Non-existence of son at date of acquisition.* Suit to recover a share of the property of the plaintiff's maternal grandfather. The facts found were as follows : Plaintiff's mother and 1st defendant's mother were sisters, daughters of one *M*, who having no male issue selected, in pursuance of a special custom, the 1st defendant's father as a son-in-law, who should take his property as if a son. On the death of *M*, the 1st defendant's father entered into possession of the property, and afterwards, during the minority of his son (1st defendant), associated with himself the plaintiff on promise of a share. In accordance with this agreement, the plaintiff joined the 1st defendant's family and continued for many years aiding in the management and improvement of the property, until, a short time before the present suit was brought, the 1st defendant turned the plaintiff out of doors and refused to give him the promised share. Upon these facts :—*Held per* HOLLOWAY and INNES, *JJ.*, that the 1st defendant's father was what is called in English law a purchaser and had all the powers of disposition existent over self-acquired property ; that also there was a complete adoption or ratification of the father's contract by 1st defendant and that he ought to be held to it. *Per* INNES, *J.*—That the right of 1st defendant's father to dispose of property self-acquired might depend upon whether 1st defendant was or was not in being at the date of the acquisition. CHALLA PAPI REDDI *v.* CHALLA KOTI REDDI *alias* KOTAPPA . . **7 Mad. 25**

8. ——— Property inherited by father collaterally—*Power of son to prevent alienation.* In execution of a decree against *A*, a Hindu living under the Mitakshara law, his right, title, and interest in a certain property, part of which he had acquired as heir to his nephew and cousin, was sold. A suit brought by *A's* sons to obtain possession of their share of the property, on the ground that the debt for which the sale was held had not been incurred under a legal necessity, was dismissed so far as it related to the part of the property which *A* had inherited collaterally. According to the Mitakshara, a son cannot prevent alienation by his father of property which the latter has inherited collaterally. The restriction upon the father's power of alienation only applies to the grandfather's property. NUND COOMAR LALL *v.* RAZEEOODDEEN HOSSEIN . **10 B. L. R. 183 : 18 W. R. 477**

LOOCHUN SINGH *v.* NEMDHAREE SINGH **20 W. R. 170**

9. ——— Right of father in undivided Mitakshara family. The father in an undivided family under the Mitakshara law has no interest in the ancestral property which can form the subject of a sale beyond his separated share of the proceeds having merely a life interest in a common property which he can neither give away nor sell. BHYRO PERSHAD *v.* BASISTO NARAIN PANDEY . . . . . **16 W. R. 31**

10. ——— Alienation by man without issue—*Power of the unborn son to contest alienation subsequently.* *Held*, that alienation of property made by a Hindu, who at the time of such alienation has no issue living, cannot be contested by a son who at the time of alienation was neither

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HINDU LAW—ALIENATION—*contd.*

4. ALIENATION BY FATHER—*contd.*

born nor begotten. MADHO SINGH *v.* HURMAT ALLY . . . . . **3 Agra 432**
JADO SINGH *v.* RANEE . **5 N. W. 113**

11. ——— Ancestral property—*Necessity—Effecting release from prison.* Ancestral property may be sold by a father to effect his release from prison. DULEEP SINGH *v.* SREEKISHOON PANDEY . . . . . **4 N. W. 83**

12. ——— *Right of son to set aside sale of ancestral property made for his father's debts.* *M*, a Hindu who had, on the death of his brother *S*, succeeded as exclusive proprietor to certain immoveable property which had descended to him and *S* on the death of their father, and had been held jointly by them, mortgaged the property as security for the repayment of moneys advanced to him by *S R*. The debt was not contracted by *M* for an immoral purpose. *S R* obtained a decree on the bond hypothecating the property, and in good faith brought the property to sale in execution of the decree and became the *bonâ fide* purchaser. *Held*, that a son born to *M* after the mortgage-debt was incurred was not entitled to come in and set aside all done under the decree and execution, and recover back a moiety of the estate. SALIG RAM *v.* LULTA PERSHAD . . . . . **6 N. W. 329**

13. ——— *Illegitimate son—Assignment for maintenance.* Since by the Hindu law the illegitimate son of a person belonging to one of the "twice-born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate, being in performance of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the Mitakshara. *Quære:* Whether under the Mitakshara law a father who has no child born to him is competent, without legal necessity, to alienate the whole or any part of the ancestral estate, or whether the rights of unborn children are so preserved as to render such an alienation unlawful. PARICHAT *v.* ZALIM SINGH **I. L. R. 3 Calc. 214**
L. R. 4 I. A. 159

14. ——— *Power of father over ancestral land—Gift to daughters.* A Hindu during the infancy of his son, conveyed certain immoveable ancestral property to his wife and married daughters by way of gift. After his death, the son sued by his next friend to have these alienations set aside and to recover the property. *Held*, that the alienations should be set aside altogether. RAYAKKAL *v.* SUBBANNA
I. L. R. 16 Mad. 84

15. ——— Alienation before birth of son—*Mitakshara law.* Certain property, which had been mortgaged by a Hindu governed by Mitakshara law while yet childless, was subsequently, after the birth of a son, sold in execution of a decree obtained on the mortgage after the birth, in a suit

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to which the son was not made a party. *Held*, that the son could not disturb the possession of the execution-purchaser. *Held*, also, distinguishing the case of *Luchman Dass* v. *Gridhur Chowdhry, I. L. R. 5 Calc. 855*, that in the suit upon the mortgage the son was not a necessary party. DOOLLEE CHAND *v.* WOOMA SUNKUR PURSHAD . **7 C. L. R. 429**

16. ——— Right acquired by son in ancestral property on birth—*Mitakshara law—Inheritance of share in village—Interest of son acquired on birth.* A mouzah, of which the proprietary right formerly belonged to one zamindar the ancestor of the plaintiff, was sold, whilst in the possession of the generation succeeding him, for arrears of revenue, and became the property of the Government by purchase. The Government before the birth of the plaintiff, restored it in four equal shares to the family of the old proprietors, then consisting of four members, one being the plaintiff's father, who thus obtained possession of a five-biswas share. *Held*, that whatever interest the plaintiff as son might have under the Mitakshara law in ancestral property, it could not be said that at the time of his birth there was any proportionate share in the mouzah in which he could by birth acquire an interest, except this five-biswas share. In this suit the plaintiff sought to have set aside, so far as it affected him, a decree, to which his father had consented, declaring his father's right to a five-biswas share only. *Held*, that, even supposing that the father (who was living) might have some right in him to procure an alteration of the grant, such a right was not one in which a son would by his birth acquire an interest. UJAGAR SINGH *v.* PITAM SINGH . . **I. L. R. 4 All. 120**
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17. ——— Right acquired by unborn son—*Right to ancestral property not defeated by will of father.* According to the Hindu law which obtains in the Madras Presidency, the right of a son in the womb to ancestral property cannot be defeated by a will or gift. *Quære:* Whether this rule would govern the case of an alienation for value. MINAKSHI *v.* VIRAPPA . **I. L. R. 8 Mad. 89**

18. ——— Under Hindu law, a son conceived is equal to a son born; accordingly, an alienation by a Hindu to a *bonâ fide* purchaser for value is liable to be set aside by a son, who was in his mother's womb at the time of the alienation, to the extent of his share. SABAPATHI *v.* SOMASUNDARAM . . . **I. L. R. 16 Mad. 76**

19. ——— Right of son whose share is unaffected—*Purchaser's equity for refund of purchase money.* There is no equity in favour of the purchaser of property belonging to a Hindu family entitling him to a refund of purchase money paid in respect of a share afterwards held to have belonged to a son and to be unaffected by the sale. The words "on payment" occurring in the last sentence of the judgment in *Sabapathi* v. *Somasundaram, I. L. R. 16 Mad. 76*, do not appear in

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the original judgment, and are due to a printer's error. VIRABHADRA GOWDU *v.* GURUVENKATA CHARLU . . . **I. L. R. 22 Mad. 312**

20. ——— Alienation without consent of children—*Mithila law.* Under the Mithila law, the father of a Hindu family cannot give a mokurari lease of land at a nominal rent as a reward for faithful service, when his children being infants do not consent to such grant. PRATABNARAYAN DAS *v.* COURT OF WARDS **3 B. L. R. A. C. 21 11 W. R. 343**

21. ——— Legal necessity—*Ancestral property—Mitakshara law.* To justify an alienation of ancestral property, a legal necessity for the sale must be strictly proved to have existed, and such necessity cannot be inferred from the habits and general character of a vendor. MITTRAJIT SINGH *v.* RAGHUBUNSI SINGH **8 B. L. R. Ap. 5**

NOWRUTTON KOER *v.* GOUREE DUTT SINGH **6 W. R. 193**

22. ——— *Alienation by father when binding on son—Burden of proof.* The father of an undivided Hindu family has no power to alienate the son's co-parcenary share in land in the absence of any debt. One claiming merely as the father's vendee must therefore give evidence that the alienation was made for some purpose which would bind the son, or that it was made with his consent. CHINNAYYA *v.* PERUMAL **I. L. R. 13 Mad. 51**

23. ——— *Mortgage—Loan at time of mortgage—Whether mortgage binding on the property of the mortgagor's undivided son.* In order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt, *i.e.*, a debt prior to the mortgage or sale. Where there was only a loan made at the time of the mortgage, the mortgage was *held* not to bind the son. SAMI AIYANGAR *v.* PONNAMMAL . . **I. L. R. 21 Mad. 28**

24 ——— *Alienation proportionate to the necessity.* The rule that only so much of the property should be sold as will meet the necessity does not apply to cases where the excess is small or where the money really required cannot otherwise be raised. LUCHMEEDHUR SINGH *v.* EKBAL ALI . . . **8 W. R. 75**

25. ——— *Mitakshara law—Right of son to prevent or set aside alienation by father.* According to the Mitakshara law a son has an equal right with his father in ancestral property. He can compel the father to divide the property during his lifetime, and any alienation by the father made after the birth of the son, without the consent of the son, unless for a purpose justified by the Hindu law as a legal necessity, will not bind the son. If the father, during the minority of the son, alienated any property in fraud of his

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creditors, such fraud would not bind the son, who was neither a party nor was privy to such fraud. BEER KISHORE SUHYE SINGH *v.* HUR BULLUB NARAIN SING . . . . **7 W. R. 502**

26. ——— *Suit for declaration of future right to a share in joint property.* A member of an undivided Hindu family living under the Mitakshara law in his father's lifetime brought a suit for declaration of his future right to one-sixth share in a portion of the immoveable property of the family, and to set aside an alienation of it by his father, as having been made without legal necessity. *Held*, that no such suit was maintainable. RAOL GORAIN *v.* TEZA GORAIN **4 B. L. R. Ap. 90**

27. ——— *Consent of son—Property not partible among members of joint family—Custom.* Where, in a part of the country the general law of which is the Mitakshara, a custom exists with regard to ancestral immoveable property that it is not partible among the members of the joint family, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity. RAM NARAIN SINGH *v.* PERTUM SINGH **11 B. L. R. 397 20 W. R. 189**

28. ——— *Family distress—Pious purposes—Mitakshara law.* According to the Mitakshara law, a father is not incompetent to sell immoveable property acquired by himself. Landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons, so as to enable them to dispose of it by gift or sale without the consent and to the prejudice of the grandson. The sale by a father of ancestral immoveable property, without the concurrence of his sons, is not necessarily void, though it may be avoided, unless the purchaser can show that it was made, during a season of distress, for the sake of the family or for pious purposes. In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family; and therefore, if the son seeks the aid of the Court to set aside the purchase, he must do equity and offer to repay the purchase-money, unless he can show that no part of such purchase-money or the produce of it has ever come to his hands. MUDDUN GOPAL THAKOOR *v.* RAM BUKSH PANDEY . . **6 W. R. 71, 74**

29. ——— Alienation without consent of son—*Ratification.* In a suit to recover possession of certain ancestral fields, sold during the absence of the defendant, who was united in interest, by his father, to the plaintiff in consideration of money advanced by her out of her stridhan for the purpose of building the family house of which the defendant possessed himself after his father's death:—*Held*, that the defendant, by retaining

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possession of the house, ratified the act of his father and elected to take the house in lieu of the ancestral fields, the sale of which was declared to be valid and possession thereof given to the plaintiff. GANGABAI *v.* VAMANAJI DATAR . **2 Bom. 301**

30. ——— Power of son to control father's alienation of property liable to obstruction—*Right of son at birth.* A son cannot control his father's act in respect of a property the succession to which is liable to obstruction. It is only in respect of property not subject to obstruction that the wealth of a father and grandfather becomes the property of his sons or grandsons by virtue of birth. JAWAHIR SINGH *v.* GUYAN SINGH **3 Agra 78**

31. ——— Gift by father of joint family of share of ancestral estate, moveable and immoveable. A Hindu father, while unseparated from his son, has no power, except for purposes warranted by special texts, to alienate to a stranger his undivided share in the ancestral estate, moveable or immoveable. BABA *v.* TIMMA **I. L. R. 7 Mad. 357**

32. ——— Power of son to set aside alienation—*Sale of ancestral property—Judgment-debt—Evidence of necessity.* The sale of a joint ancestral estate for the discharge of a judgment-debt incurred by a father for moneys borrowed by him, which are not shown to have been borrowed for or applied to improper purposes, is not impeachable or voidable by his sons. A judgment-debt is a *primâ facie* proof of necessity. BHOWNA *v.* ROOP KISHORE . . . . . **5 N. W. 89**

33. ——— *Ancestral property—Mitakshare law.* *T S*, a Hindu, who with his son *J N* formed a joint Hindu family, subject to the Mitakshara law, executed in favour of *D* a bond, whereby he professed to pledge a share of certain family property as security for the repayment of money advanced to him by *D*. Default being made in payment of the loan when due, *D* brought a suit on the bond against *T S*, and obtained a decree for the amount secured thereby, in execution of which decree he attached and caused to be sold the right, title, and interest of *T S* in certain other family property not covered by the bond, and himself became the purchaser thereof, and took exclusive possession of the property. In a suit brought by *J N* against *T S* and *D* to recover possession of the property purchased by *D* on the ground that no legal necessity existed for the loan :—*Held*, that *T S* had no individual right to any portion of the property which he could pass to a third person, and therefore *J N* was entitled to have the alienation set aside and to recover possession of the property. There being nothing amounting to any voluntary representation by *T S* of his having any right or interest in the property, or any representation of fact made by *T S* in order to induce *D* to advance the money, and nothing to show that there was no other property out of which the decree could be satisfied, no equity arose between *T S* and *D* such as entitled the latter to call on *T S* to divide the property with his son, so as to make the share of *T S* available by *D* to the extent of the loan. JUGDEEP NARAIN SINGH *v.* DEENDIAL **12 B. L. R. 100 : 20 W. R. 174**

s.c. on appeal. **I. L. R. 3 Calc. 198 : 1 C. L. R. 49 L. R. 4 I. A. 247**

SOOMRUN THAKOOR *v.* CHUNDER MUN MISSER **3 C. L. R. 282**

34. ——— *Power of father to alienate ancestral property.* *F*, during the minority of his son *R*, sold, in order to raise money for immoral purposes, the ancestral property of the family. The purchaser acted in good faith and gave value for such property. *Held*, by the majority of the Full Bench (SPANKIE, *J.*, and OLDFIELD, *J.*), in a suit by *R* against the purchaser and *F* to recover such property and to have such sale set aside as invalid under Hindu law, that such sale was not valid even to the extent of *F's* share, and that *R* was entitled to recover such property as joint family property. *Held, per* PEARSON, *J.*, that *R* could not recover such property, and that the purchaser, having acted in good faith, took by the sale *F's* share in such property, and might have such share ascertained by partition. CHAMAILI KUAR *v.* RAM PRASAD . **I. L. R. 2 All. 267**

35. ——— *Power of father to alienate ancestral property.* *D*, in pursuance of a promise to give his daughter a dowry, about two years after her marriage, made a gift of joint ancestral property to *G*, her father-in-law. *P*, *D's* son, sued his father and *G* to have the gift set aside as invalid under Hindu law. *Held*, that the gift not having been made with the plaintiff's consent and not being for any purpose allowed by Hindu law, was invalid, and that the plaintiff was entitled to have it set aside not to the extent only of his own share in such property, but altogether. GANGA BISHESHAR *v.* PIRTHI PAL . **I. L. R. 2 All. 635**

36. ——— *Mitakshara law—Alienations for joint debts—Waste.* Under the Mitakshara law, according to which the father and son are joint owners of the ancestral estate, the son's power to prevent alienations by the father extends only to acts of waste, and not to alienations for the payment of joint family debts and for the maintenance of the family. BISAMBHUR NAIK *v.* SUDASHEEB MAHAPATTUR . . **1 W. R. 96**

37. ——— Liability of son for father's debt—*Decree against father—Execution sale—Son's interest when not affected by such sale—Hindu law.* When ancestral property is sold in execution of a decree against a Hindu father, there are only two cases in which the son's interests do not pass under the sale—*first*, when they are not sold ; *second*, when the debt is not binding upon the sons by reason

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of its having been contracted for an illegal or immoral purpose. JOHARMAL *v.* EKNATH
I. L. R. 24 Bom. 343

38. ——— *Necessity—Minor sons—Debt contracted to enable father to earn a maintenance.* The expression "family necessity," justifying the sale of ancestral property, must be construed reasonably, and the head of the family and those dealing with him must be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor son has an interest in the property. The fact that a mortgage or a bond, to pay off which ancestral property is sold, had some time to run is not a sufficient reason to disprove an otherwise apparent family necessity. The Hindu law recognizes a debt contracted by the father of a family to enable him to earn a maintenance as one contracted under pressure of a family necessity. BABAJI MAHADAJI *v.* KRISHNAJI DEVJI
I. L. R. 2 Bom. 666

39. ——— *Impartible zamindari—Self-acquired property—Zamindari inherited from maternal grandfather.* The course of decisions in the Madras Presidency from 1818 has been to recognize equal ownership by the son in the grandfather's estate, though it may not be divided between the father and the son, and to uphold the father's alienation only to the extent of his share. *Semble:* The decision in *Gridharee Lall's case, 14 B. L. R. 187,* was not intended to vary the courses of decisions in this presidency. *Semble:* The doctrine of the pious duty of the son to pay his father's debts does not apply in the case of an impartible zamindari, where the son is not able to protect his interest as in the case of ordinary property by electing a division. MUTTAYAN CHETTI *v.* ZAMINDAR OF SIVAGIRI . **I. L. R. 3 Mad. 370**

But *held* on appeal to the Privy Council which reversed the decision of the High Court, that the estate which a son takes by heritage from his father constitutes assets by descent for the payment of his father's debt not incurred for any immoral or vicious purpose. This estate may be attached and sold in execution of a decree upon such a debt, and that it is an impartible zamindari does not alter the case. The principle that the ancestral property, in which the son acquires an interest by birth, is liable for the father's debt, unless within the above exception holds good by the Mitakshara law as administered in Madras as well as in Bombay and Bengal. *Gridhari Lall* v. *Kantoo Lall, 14 B. L. R. 187 : L. R. 1 I. A. 321,* referred to and followed. Part of an impartible zamindari inherited from a maternal grandfather was hypothecated by the zamindar as security for a debt not within the above exception.

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Held, that all the right, title, and interest which had come to his son by heritage from the indebted zamindar, as well in the hypothecated part as in the rest of the zamindari, were liable, so far as they had not been administered in payment of the father's debt, to be attached and sold in execution of a decree against the father based on his admission of the debt. A zamindari inherited from a maternal grandfather is not "self-acquired" property. *Quære:* Whether the zamindar, having inherited from his maternal grandfather, was under the same restriction, in reference to alienation as against the son, as he would have been if the property had come through the male line. MUTTAYAN CHETTI *v.* SANGLI VIRA PANDIA CHINNATAMBIAR
I. L. R. 6 Mad. 1
L. R. 9 I. A. 128 : 12 C. L. R. 169

40. ——— *Ancestral property—Son's share—Rights of co-parceners—Purchaser, right of.* Under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate, and can compel his father to make partition of such estate. The rights of the co-parceners in a joint Hindu family consisting of a father and his sons do not differ from those of the co-parceners in a like family consisting of undivided brethren, except in so far as the sons are affected by the obligation of the Hindu law to pay their father's debts, and by the fact that he is naturally the manager of the joint family estate. It is settled law in the Madras Presidency that one co-parcener may dispose of ancestral undivided estate to the extent of his own share, even by private conveyance, whether for value or by gift. In the Bombay Presidency, unauthorized alienations, voluntarily made by one co-parcener are good, even for his own share only when made for value. In Bengal, the law which prevails in the other Presidencies as to alienation by private deed has not yet been adopted, but it is now settled that the purchaser of undivided property, sold in execution of a decree during the life of the debtor for his separate debt, acquires the debtor's interest in such property, with the power of ascertaining and realizing it by partition. Under the Hindu law subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father. Accordingly, where ancestral property has passed out of the family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable and that the purchasers had notice to that effect, and a purchaser at an execution-sale, being a stranger to the suit without such notice is not bound to make enquiry beyond what appears on the surface of the proceedings. In a suit by the

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members of an undivided Hindu family governed by the law of the Mitakshara to set aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be made liable, it appeared that prior to the sale the plaintiffs had preferred a claim of objection thereto on the same grounds, and that the Court of execution had declined to adjudicate the claim, and had directed the sale to proceed, referring the claimants to a regular suit. *Held*, that the purchasers at the execution-sale must be taken to have had notice, actual or constructive, of the objections made to the sale by the plaintiffs, and of the order passed thereon by the Court, and to have purchased with knowledge of the plaintiff's claim, and subject to the result of their suit. *Held*, also, that, the property having been attached for the debt of a co-sharer during his lifetime, the sale was good for his share, but that, as it appeared on the evidence in the suit that the debt was one for which according to Hindu law, the other co-sharers could not be made liable, the sale was not good for their shares. SURAJ BUNSI KOER *v.* SHEO PERSAD SINGH

I. L. R. 5 Calc. 148
4 C. L. R. 226
L. R. 6 I. A. 88

41. ——————————— *Alienation of joint undivided family property by father—Rights of sons.* *Z*, a member of a joint Hindu family consisting of himself and his sons, in January 1869, in order to raise money to pay off family debts and for family necessities, conveyed a two-anna share out of an eight-anna share of a village belonging to the family to *B*, who sued him on such conveyance for possession of the two-anna share, and obtained a decree and possession of such share. In June 1879 the sons, and the grandson of *Z* sued *B* to recover such share. *Held*, with reference to the ruling of the Privy Council in *Suraj Bunsi Koer v. Sheo Persad Singh, I. L. R. 5 Calc. 148*, that the suit was not maintainable. DARSU PANDEY *v.* BIKARMAJIT LAL . . . **I. L. R. 3 All. 125**

42. ——————————— *Minor sons—Adult sons—Necessity for alienation.* *A*, the father and managing member of a Hindu family subject to Mitakshara law, executed bonds mortgaging a portion of the ancestral estate to the father of the defendants. At the date of the mortgages *A* had living a wife and two sons, one of whom was alleged to be an adult and the other a minor. The mortgagee instituted suits on the bonds, making *A* only a defendant, and in execution of decrees obtained by him in those suits, four portions of ancestral property were attached and sold by the Court, the sale-certificates being of the right, title, and interest of the judgment-debtor, and were purchased by the mortgagee, who got possession of the whole sixteen annas of the four portions of ancestral estate sold. In a suit by the widow and the two sons of *A* to recover their shares in the property from the representatives of the mortgagee :—*Held*, that, as *A* alone executed the mortgages and was alone made a defendant in the suits on the bond, the sale in execution as against the minor could pass the entire sixteen annas of the estate only in the event of the defendants proving that sufficient necessity existed for incurring the debt ; if no necessity was proved, only the right, title, and interest of *A* passed by the sale, although the loans might have been applied by him to immoral purposes, and the sons might, if properly proceeded against, have been bound to pay *A's* debt. As against the adult son, only the right, title, and interest of *A* would pass unless necessity were shown. *Quære :* Whether, even if necessity were proved, the interests of adult members of the family could be affected without their consent. Where, upon a sale under a decree obtained upon a mortgage-bond against the father of a Mitakshara family, property other than that included within the mortgage-bond is sold, such sale only passes the right, title, and interest of the father. The principles laid down in the cases of *Gridharee Lall* v. *Kantoo Lall, 14 B. L. R. 187 ; Suraj Bunsikoer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148 ;* and *Deendgal Lall* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198*, enunciated and discussed. PURSID NARAIN SINGH *v.* HONOOMANA SAHAY . **I. L. R. 5 Calc. 845 : 5 C. L. R. 576**

43. ——————————— *Joint Hindu family—Joint family property—Joint family debt—Execution of decree against father—Rights of sons.* *R*, a Hindu father, gave certain persons a bond in which he hypothecated the joint undivided property of his family. Such persons obtained a decree against *R* on such bond, in the execution of which " such rights and interests only as *R* had as a Hindu father in a joint undivided family " were put up for sale. *Held*, that, although *R* might have as a Hindu father a power of dealing with the interests of his sons, that circumstance would not make such interest his own, so as to pass them by a sale which affected his own interests only, and the auction-purchasers could be held only to have purchased his interests. NANHAK JOTI *v.* JAIMANGAL CHAUBEY

I. L. R. 3 All. 294

44. ——————————— *Joint Hindu family—Joint family debt—Sale of joint family property in execution of decree.* When a member of a joint Hindu family is sued for a family debt, it may be assumed that he is sued for the same as the representative of the family ; and when the decree in such a suit is substantially one in respect of the family debt and against the representative of the family, such decree may properly be executed against the family property. *Held*, therefore (STRAIGHT, *J.*, dissenting), where the father of a joint Hindu family, as the representative of the family, borrowed money for family purposes, hypothecating family property for the repayment of such money, and in a suit to recover

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such money by the sale of such property and other family property a decree was made against him, directing the sale of the hypothecated property and such other property, and such properties were sold in execution of such decree, that, having regard to these facts, it was reasonable to hold that the father was sued as the representative of the family, and such decree was made against him in that capacity, and was so executed against him, and consequently his sons were not entitled to recover their legal shares of such properties from the auction-purchaser. *Bissessur Lall Sahoo* v. *Luchmessor Singh, L. R. 6 I. A. 233,* followed. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* distinguished. *Per* STRAIGHT, *J.*—That the father alone having been a party to such suit, and the sons not having been parties thereto either personally or by a formally constituted representative, and such decree being against the father alone, the rights and interest of the sons in the family properties were not affected by the sale of such properties in execution of such decree, and the sons were entitled to recover their legal shares of such properties from the auction purchaser. *Deendyal Lal* v. *Jugdeep Narain Singh,* followed. RAM NARAIN LAL v. BHAWANI PRASAD

I. L. R. 3 All. 443

45. ——————— *Joint Hindu family—Debts contracted by father as manager of family business—Sale of ancestral property in execution of decree against father—Son's share.* *N*, a member of a joint Hindu family, consisting of himself, his wife, and his minor son, *L*, managed the joint family business, which was carried on under the style of "Atma Ram Anokhe Lal." As manager of such business, he contracted certain debts, for which he was sued as the "proprietor" of the firm of "Atma Ram Anokhe Lal," and for which decrees were passed against him in execution of which ancestral property of the family was sold. *L*, his minor son, sued to have such sale set aside and to recover his share of such property on the ground that such decrees had been passed against his father personally and only his interests in such property passed by such sale. *Held*, that, looking at the capacity in which *N* was sued and the nature of the debts for which such decrees were given, such decrees must be taken to have been passed against *N* as the managing head of the family, and *L* was therefore not entitled to recover his share of such property. PHUL CHAND *v.* LACHMI CHAND

I. L. R. 4 All. 486

46. ——————— *Mitakshara law—Ancestral property—Sale of joint family property—Debts legally contracted by father—Sale in execution of decree.* There is no foundation either in the Mitakshara law itself or in any decisions passed by the Judicial Committee for the broad proposition that in all cases under a sale in execution of a money-decree against the father in a joint family, consisting of a father and sons, whether adults or minors, nothing but the father's share passes. The result of an examination of the leading cases on the subject is, that in each such case the question as to what was sold in execution must be first determined (the mere circumstance that a decree was obtained against the father alone is not conclusive upon the point); and it should further be enquired whether the father was sued in his representative capacity or not, and if not so used, then whether the sons are entitled to set aside the sale *qua* their shares. The decision of the Privy Council in *Deen Dyal Lall* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* in no way conflicts with the principle laid down in the case of *Muddun Thakoor* v. *Kantoo Lall, 14 B. L. R. 187,* UMRICA PROSAD TEWARY *v.* RAM SAHAY LALL

I. L. R. 8 Calc. 898 : 10 C. L. R. 505

47. ——————— *Ancestral property—Father and son—Right of father to alienate for debts—Insolvency of father—Vesting order—Insolvent Act, 11 & 12 Vict., s. 7. Death of insolvent—Subsequent sale by Official Assignee—Title of purchaser—Rights of son.* A father and son were possessed of immoveable ancestral property consisting of certain houses. The father, becoming insolvent, took the benefit of the Insolvent Act and the usual vesting order, under s. 7 of the Insolvent Act, 11 & 12 Vict. c. 21, was thereupon made. Shortly afterwards the father died, and soon after his death the Official Assignee sold the houses in question to the defendant in order to raise money to pay off the deceased insolvent's debts. The son now brought a suit to recover the whole or a portion of the said houses, contesting the right of the Official Assignee to convey any interest or at least his interest in the said houses, to the purchaser. *Held*, that the sale was valid and conveyed to the purchaser the interest of the plaintiff as well as that of his deceased father. Under the Mitakshara law, a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes; and a vesting order made under s. 7 of the Insolvent Act vests that right in the Official Assignee, who can therefore give a good and complete title to such ancestral immoveable estate to a purchaser. The death of the insolvent had no effect on the proceedings in his insolvency or on the power of the Official Assignee. The ancestral estate previously vested in the Official Assignee was not therefore divested from him, and vested in the son by right of survivorship. *Semble:* In the event of the father's estate producing a surplus over and above the amount required to satisfy his debts, such surplus might be made available to answer the claims of the son in respect of his interest in ancestral immoveable property sold in the realization of the father's estate. FAKIRCHAND MOTICHAND *v.* MOTICHAND HURRUCKCHAND

I. L. R. 7 Bom. 438

48. ——————— *Mithila law—Son's interest in ancestral estate.* Ancestral pro-

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HINDU LAW—ALIENATION—*contd.*

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perty which descends to a father under the Mithila law is not exempted from liability to pay his debts because a son is born to him. Such exemption can only be pleaded when the nature of the debts incurred by the father is such as would free the son from the usual obligation of discharging his father's debts out of the ancestral estate. A decree properly obtained against the father can be executed by sale of such ancestral estate, and the interests of the sons as well as of the father will be bound by it. A purchaser at such sale is not bound to enquire into the circumstances under which the decree was made. GIRDHAREE LALL *v.* KANTOO LALL; MUDDUN THAKOOR *v.* KANTOO LALL
14 B. L. R. 187
22 W. R. 56 : L. R. 1 I. A. 321

Reversing the decision of the High Court in KANTOO LALL *v.* GIRDHAREE LALL **9 W. R. 469**

ANOORAGEE KOOER *v.* BHUGOBUTTY KOOER; SHAM SOONDER KOOER *v.* JUMNA KOOER
25 W. R. 148

RAM SAHOY SINGH *v.* MOHABEER PERSHAD; KESHO LALL *v.* MOHABEER PERSHAD
25 W. R. 185

MUNBASI KOOER *v.* NOWRUTTUN KOOER
8 C. L. R. 428

49. ——————— *Son's interest in the ancestral estate.* The interest which a son by birth acquiries in the ancestral estate of his father under the Mitakshara law does not entitle him to claim exemption from all debts contracted by the father subsequent to his birth. Such exemption can only be claimed when the debts are of an illegal nature, or have been contracted for immoral purposes. An alienation made by the father by way of mortgage or sale for the discharge of a debt for which the property would be ultimately liable falls within the meaning of the unavoidable transactions spoken of in paras. 28 and 29, s. 1, Ch. I of the Mitakshara. MUDDUN GOPAL LALL *v.* GOWRUNBUTTY; GIRDHARI LALL SAHOO *v.* GOWRUNBUTTY; POOSUN LALL SAHOO *v.* GOWRUNBUTTY
15 B. L. R. 264 : 23 W. R. 365

50. ——————— *Suit on promissory note given by father for family purposes. Per* INNES, *J.—Semble:* A suit on a promissory note made by a Hindu father would lie against sons joined in the suit with the father as defendants on an allegation that the debt was incurred for proper family purposes. RAMASAMI MUDALIAR *v.* SELLATAMMAL . . . **I. L. R. 4 Mad. 375**

51. ——————— *Nature of debts.* In a suit to set aside a sale of ancestral property in which it was contended, *firstly*, that the debt in satisfaction of which the sale had taken place was contracted for an immoral purpose; *secondly*, that a debt might be immoral either in respect of the object for which it was contracted or in respect of the means by which the money was obtained; and, *thirdly*, that in any case the judgment-debtor could only sell his own half interest and not the half interest which his son had in the property:—*Held*, that, as the debt represented liabilities which the judgment-debtor had incurred in making *bonâ fide* for his employer a contract which that employer had repudiated, it was properly binding on his son; and that the son's inchoate interest in the property, which would ripen on the father's death, was not a separate half interest in the estate, the father's whole interest in which had passed in the sale. WAJID HOSSEIN *v.* NANKOO SINGH
25 W. R. 311

52. ——————— *Right of son to set aside alienation—Immorality.* Following a ruling of the Privy Council, *Gridharee Lall* v. *Kantoo Lall, 14 B. L. R. 187*, it was *held* that a *bonâ fide* purchaser, for valuable consideration, of ancestral property sold in execution of a decree is not bound to go further back than to see that there was a decree, and that the property was liable to satisfy the decree. Where this is done, the heirs of the deceased judgment-debtor are not entitled to come in and set aside the proceedings and recover the property. A son's freedom from obligation to discharge his father's debt has respect to the nature of the debt and not to the nature of the property, whether ancestral or acquired. If the debt of the father had been contracted for any immoral purpose, the son might not be under any pious obligation to pay it. Attending nautches, and occasionally giving nautches at one's own expense, cannot be considered immorality absolving from such obligation. BUDREE LALL *v.* KANTEE LALL
23 W. R. 260

53. ——————— *Mitakshara law—Son's interest in ancestral estate—Burden of proof.* In a suit by a son to set aside an alienation of property made by his father during the son's minority, it was shown that the property in suit originally belonged to the plaintiff's grandfather, who came to a partition of his property with his brother; and, that, on the death of the plaintiff's grandfather, his two sons, the father and uncle of the plaintiff, divided the estate between them, the property in suit falling to the share of the plaintiff's father. It was sought to set aside the alienation on the ground that there was no legal necessity for effecting it. The suit was brought seven or eight years after the plaintiff attained his majority. *Held*, that, notwithstanding the partition by the plaintiff's father, the property was ancestral property in which the plaintiff at his birth acquired an interest. *Held*, also, reversing the decision of the Courts below, that the question to be tried in the suit was, according to the decision of the Privy Council in *Gridharee Lall* v. *Kantoo Lall, 14 B. L. R. 187*, not whether there was any legal necessity for the alienation, but whether the debt of the father, in satisfaction of which the alienation was made, was incurred for an

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immoral purpose, and that, under the circumstances, the onus was on the plaintiff to show that it was. *Quære:* Is a son bound to discharge debts of the father which are illegal, though not immoral. ADURMONI DEYI *v.* CHOWDHRY SIB NARAIN KUR . . . . **I. L. R. 3 Calc. 1**

54. ——————— *Sale in execution of personal decree, of decree to enforce mortgage against father—Son's right to set aside sale.* *R*, the father of an undivided Hindu family, borrowed R700 from *P* in 1867, and executed a mortgage-bond hypothecating family property to secure the debt. In suit No. 198 of 1876 *P* recovered judgment against *R* for R1,229 and costs, and the lands mortgaged were declared by the decree to be liable for the debt. In 1876 the plaintiff, one of *R's* sons, brought a partition suit (No. 622) against his father to obtain his share of the family property, *P* intervened, and was made a party. In 1877 *P* took out execution of his decree, and the mortgaged property was brought to sale and purchased by *P* for R1,200, and a sale certificate was issued under s. 259 of Act VIII of 1859, declaring the sale of the right, title, and interest of the judgment-debtor in the property mentioned therein confirmed. In suit No. 622 it was not alleged by the plaintiff that the debt was contracted by his father for purposes which would excuse a son from his obligation to pay it, but the amount which remained due on the bond of 1867 was disputed and not determined by the Munsif who held that *P* only acquired by his purchase the father's share in the land under the authority of *Deendyal Lall's Case, I. L. R. 3 Calc. 198*, or by the Subordinate Judge, who held, on the authority of *Girdharee Lall's Case, 14 B. L. R. 187*, that the plaintiff's claim against *P* was invalid, considering the decree against the father sufficient evidence of the debt. *R* also borrowed R450 from *A*, and in 1872 executed a mortgage-bond hypothecating other family lands to him as security. In 1876 *A* brought a suit (No. 35) against *R* to recover the amount due on the bond from *R* personally and by sale of the mortgaged land, and in 1877 the mortgaged lands were sold in execution of the decree and a certificate issued, in the same form as in *P's* suit, to *A*. *A* also intervened in the partition suit, and was made a party. The amount due by *R* to *A*, secured by the mortgage, was not disputed nor was it alleged that the debt was contracted for immoral purposes. The lower Courts decided the plaintiff's claim against *A* in the same way as his claim against *P*. *Held* (INNES and MUTTUSAMI AYYAR, *JJ.*, dissenting), that the decision of the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187*, is binding on and must be followed by the Courts in this Presidency, and that the liability of a son to discharge his father's debts is commensurate with the whole interest the son takes in the ancestral as well as in the self-acquired property of his father. *Held*, also, that it was necessary to determine whether the amount alleged by *P* remained due on the bond of 1876, because, if it

was established by the plaintiff that the debt was substantially less than it was asserted to be, the plaintiff might have a claim to equitable relief, inasmuch as the decree-holder brought the land to sale after the institution of the partition suit. *Held*, lastly, that if the sale to *A* was made in execution of so much of the decree as was purely personal, the plaintiff's claim was properly dismissed as against *A*, but if the sale was made in execution of the order for the enforcement of the mortgage, it could not bind the plaintiff, inasmuch as it was the duty of the mortgagee to make plaintiff a party to suit No. 35 and afford him an opportunity of redemption, but that, if the sale was set aside, the plaintiff could not claim to be placed in a better position than he would have occupied had the sale not taken place, and that, as his interest was bound by the mortgage, he would hold that interest subject to a proportionate part of the mortgage-debt. *Per* TURNER, *C.J.*—The obligation under the ancient Hindu law of the son and grandson to discharge the debt of the father and grandfather has been preserved, while the power of the father to deal with ancestral immoveable property has been curtailed. A personal obligation arising from the filial relation and independent of assets exists as well as an obligation attaching to the heritage in the hands of lineal descendants of the debtor. The question as to the extent of the son's liability is not one of contract, but the duty is an incident of inheritance. Assets available for the payment of a father's debts mean and include the whole estate in which the son by birth acquired rights. The validity of an alienation to a purchaser for consideration in Bombay, as in Madras, did not originate in any local usage, but in an exceptional doctrine established by modern jurisprudence. The duty of the son is incidental to the heritage and subsists from the inception of the son's interest therein. As a father can make a valid alienation of ancestral property so as to bind the son's interest, the law will execute the father's power for the benefit of creditors. There are substantial differences between a sale in execution for a money decree and a sale under a decree ordering a sale to enforce a mortgage. In the former case the Court proposes to sell whatever interest in the property would, under any circumstances, be available to creditors at the date of the attachment; in the latter case whatever interest the mortgagor was, under any circumstances, competent to create and intended to create at the time of the mortgage. Although a son's interest may pass by a sale in execution of a decree in a suit to which he was no party, yet the son is not concluded by the decree. It is competent to him to contest the sale in subsequent proceedings on any grounds which had he been a party, he might have advanced to protect his interest. *Per* INNES, *J.*—The question of the extent of the liability of the son is a question of contract and not a question of succession, and to be determined not by Hindu law, but by the statute law or the law of equity and good con-

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science. Since 1837 the decisions in Madras have determined that the liability of the son exists only to the extent he may have taken assets. According to the Mitakshara, the son has property by birth in the estate of his grandfather, and since 1813 the right to alienate his share without the consent of his co-parceners has been established. The father connot leave assets in the property of his son. The share of the father in ancestral estate does not accrue to the son by survivorship instead of becoming available as assets, because of the rule of Hindu law which requires the taker of wealth, whether by survivorship or inheritance, to discharge the debts. The decision in *Girdharee Lall's Case* cannot alter the law as to rights in property so as to make the son's interest the father's estate. Until the decision in *Girdharee Lall's case*, the son's freedom from liability to pay the father's personal debt in the father's lifetime was universally supposed to exist, and that decision ought not to be followed in the Madras Presidency so far as it lays upon the son the duty of discharging his father's debt in his lifetime, or so far as it limits the son's right to question charges made by the father upon the family property to the case of debts immorally contracted. The rules laid down in *Saravana Tevan* v. *Muttayi Ammal, 6 Mad. 371*, should be followed, and when a decree is against the father for his separate debts, the purchaser of ancestral property under the decree takes at most only the share or interest to which the father was entitled at the date at which the charge was created. *Per* MUTTUSAMI AYYAR, *J.*—The power of a Hindu father to sell ancestral lands is limited. The rights of co-parceners in an undivided Hindu family governed by the Mitakshara, which consists of a father and sons, do not differ from those of co-parceners in a family which consists of undivided brothers, except so far as they are affected by the peculiar obligation which the Hindu law imposes on sons of paying their father's debts. The son's duty to pay his father's debts is according to the ancient text, a legal obligation because it was enforced compulsorily by Hindu kings through their Judges, who exercised an ecclesiastical as well as a secular jurisdiction. Since 1837 in this Presidency it has been considered that, when no assets were inherited, the question of the son's liability for the father's debts was one of contract and governed, under Madras Regulation III of 1802, not by Hindu law, but by the rule of equity and good conscience. There is no case decided in the Madras Presidency before *Girdharee Lall's Case* in which the son's obligation was not treated as a mere moral duty. But, granting that the judgment may be enforced as a legal obligation, it would be a good defence under the ancient Hindu law for the son to plead that the obligation could not arise in his father's lifetime to pay a debt contracted by the father for his own purposes. The decision in *Girdharee Lall's Case* ought not to be followed in this Presidency—(i) because of the peculiar view which has prevailed, as to the nature of the pious

obligation, for more than forty years; (ii) because of the doctrine of alienability of undivided interest which has been generally recognized as a matter of equity for more than sixty years, and as a matter of right for upwards of twenty years; (iii) because the son's right of interdiction and power to defraud creditors, provided by the Mitakshara, have been taken away by recognizing that an undivided interest is on the footing of the co-parcerner's separate property for the purpose of satisfying his obligations; (iv) because it is desirable to wait for an authoritative ruling by the Privy Council in a Madras case before unsettling the law. In the procedure followed in suits brought against a Hindu father by his creditors, there is nothing special to warrant a fictitious extension of the parties. There is no legal basis for any distinction between a decree in which there is a direction for the sale of mortgaged property and a simple money decree. The interest that passes by a Court sale must be determined with reference to the decree that led to it, and cannot be determined by a future inquiry as to the character of the debt. The son's interest does not pass by reason of the direction for the sale of the mortgaged property. *Per* KERNAN, *J.*—A sale or mortgage by a father alone of ancestral property after the birth of a son, for the purpose of raising money, not for family necessity or benefit, but to pay a debt incurred by the father, not for immoral consideration, binds the son and his interest at birth, and from this it necessarily follows that the obligation of the son arises and may be made effectual against the son in the lifetime of the father. *Per* KINDERSLEY, *J.*—The obligation of the son to pay his father's debt is a part of the law of inheritance, not of contract. According to the true doctrine of the Hindu law, the obligation of the son to pay his father's debt does not arise until the father's death. It is the duty of the father to pay his own separate debts, but the decision in *Girdharee Lall's Case* goes further, and rules that even in the undivided father's lifetime, when there has been a decree against the father for debts which were neither immoral nor illegal, and ancestral immoveable property has been sold in execution of such decree or under pressure of such execution, the son cannot recover against a *bonâ fide* purchaser for value. The decision in *Girdharee Lall* v. *Kantoo Lall* should not be carried beyond the circumstances upon which the decision was passed. PONNAPPA PILLAI *v.* PAPPUVAYYANGAR . **I. L. R. 4 Mad. 1**

55. ——————— *Alienation for family purposes—Sale in execution of decree against father—Suit by son to set aside sale.* When a mortgage-debt has been contracted for family purposes by the father, and a decree passed against him and family property sold in satisfaction of the decree, the son cannot sue for his share of the property sold on the ground that he was no party to the suit. The ruling in *Girdharee Lall* v. *Kantoo Lal, 14 B. L. R. 187*, affirmed in *Suraj Bunsi Koer* v. *Sheo*

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Prasad Singh, I. L. R. 5 Calc. 148, must be followed in accordance with the decision in the Full Bench ruling in *Ponnappa Pillai* v. *Pappuvayyangar, I. L. R. 4 Mad. 1.* SUNDRARAJA AYYANGAR *v.* JAGANADA PILLAI . **I. L. R. 4 Mad. 111**

56. ——————— *Sale in execution of decree against father—Right of sons to set aside sale. Per* CURIAM (INNES and MUTTUSAMI AYYAR *JJ.*, dissenting)—In the Madras Presidency, where ancestral property has been bought at a sale in execution of a decree against the father of a Hindu family, the purchaser is not bound to go further back than to see that there was a decree against the father, and that the property was property liable to satisfy the decree if the decree had been properly given against the father. A *bonâ fide* purchaser for valuable consideration of an estate purchased in execution of a decree against the father under such circumstances is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as part of ancestral property. *Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187,* followed. SIVASANKARA MUDALI *v.* PARVATI ANNI **I. L. R. 4 Mad. 96**

57. ——————— *Sale of family property by father—Right of son to set aside sale.* In the Madras Presidency a sale of ancestral land by an undivided Hindu father to procure funds for the satisfaction of debts incurred by himself must be sustained as against the sons on the authority of the decision of the Judicial Committee of the Privy Council in *Gridharee Lall,* v. *Kantoo Lall, 14 B. L. R. 187* ; but when the sale is also disputed by a (minor) co-parcener not a son, but a nephew (the sale-deed having been executed by his uncle and his mother as *de facto* guardians), the ruling in *Gridharee Lall's Case* is not applicable, and the purchaser must show, in addition to the fact that the debts existed at the time of the sale, that the debts were such as it was incumbent on the minor to discharge. GANGULU *v.* ANCHA BAPULU . . **I. L. R. 4 Mad. 73**

58. ——————— *Alienation for family purposes—Sale in execution of decree against father—Right of son to have sale set aside.* Where a judgment-creditor of a Hindu father has purchased the right, title, and interest of the judgment-debtor in family land at a Court-sale in execution of his decree and been put in possession of the whole of the land, the son of the judgment-debtor cannot recover his share of the land in a subsequent suit unless he can show that the debt of his father, for which the property was sold, was illegal or immoral. GOPALASAMI PILLAI *v.* CHOKALINGAM PILLAI . **I. L. R. 4 Mad. 320**

59. ——————— *Sale of family property in execution of decree. Per* MUTTUSAMI AYYAR, *J.*—The decision in *Girdharee Lall* v. *Kantoo Lall, L. R. 1 I. A. 321,* does not declare that a Court is to sell the son's property in satisfaction of a decree against the father during the father's life. GURUSAMI CHETTI *v.* SAMURTA CHINNA MANNAR CHETTI. GURUSAMI CHETTI *v.* SADASIVA CHETTI . . **I. L. R. 5 Mad. 37**

60. ——————— *Right of son to set aside in execution of decree against father.* The result of the Full Bench decisions in *Ponnappa Pillai* v. *Pappuvayyangar, I. L. R. 4 Mad. 1,* and in *Gangulu* v. *Ancha Bapulu, I. L. R. 4 Mad. 73,* is that where there has been a decree against an undivided Hindu father for debt, and the right, title, and interest of the father in ancestral property has been sold under the decree, and the purchaser has been placed in possession of the entire mass of the property advertised for sale, instead of the mere interest of the judgment-debtor in the property, which was all that was advertised to be sold, a son, desiring to obtain his share of the property (which by an error of execution has thus got into the possession of the purchaser), cannot avail himself of the decision of the Judicial Committee in *Deendyal Lall* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* and is not entitled to recover his share unless he can show that the debt for which a decree was obtained against his father alone was an illegal or immoral debt. VELLIYAMMAL *v.* KATHA CHETTI **I. L. R. 5 Mad. 61**

BEER PERSHAD *v.* DOORGA PERSHAD **W. R. 1864, 310**

61. ——————— *Decree for partition and mesne profits against father—Son's liability, Suit to declare. T,* a member of an undivided Hindu family, sued *K,* the manager, to obtain his share of the family estate without making the sons of *K* parties to the suit. *K* offered to abide by the oath of *T,* and a decree was passed in *T's* favour declaring him entitled to a one-sixth share of the land, jewels, and money, and to mesne profits and interest. In execution of his decree, *T* attached lands belonging to *K* and his sons who had remained in union. The attachment was raised on the intervention of the sons of *K. Held,* in a suit to declare the shares of the sons of *K* liable for the decree against *K,* that the rule in *Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187 : L. R. 1 I. A. 321,* was not applicable, and that the suit would not lie. TIMMAPPAYA *v.* LAKSHMINARAYANA **I. L. R. 6 Mad. 284**

62. ——————— *Mortgage by father—Son's rights—Burden of proof.* In a suit by a Hindu against his two brothers to recover his one-third share of the family estate, a mortgagee, who was in possession of a portion of the estate under a mortgage executed by the deceased father of the family, was made a party to the suit. It was not proved that the mortgage-debt was incurred for the benefit of the family, nor was it proved that it was incurred for immoral or illegal purposes by the father. *Held,* that the mortgage was only binding on the father's one-fourth share, and that the

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plaintiff was entitled to recover one-fourth of the property mortgaged from the mortgagee. YENAMANDRA SITARAM ASAMI *v.* MIDATANA SANYASI
I. L. R. 6 Mad. 400

63. ——— *Burden of proof.* Where the holder of a decree against the father of an undivided Hindu family, obtained upon a bond whereby certain land was hypothecated as security for a debt, attached the land hypothecated and other land belonging to the family, and the attachment was raised on the intervention of the sons of the defendant to the extent of their shares in the land, and the decree-holder then brought a suit to have it declared that the shares of the sons were liable to be sold for the father's debt:—*Held*, that, the decree-holder having failed to prove that the debt for which he had attached the family property was incurred for the benefit of the family, the suit must be dismissed. ARUNACHALA *v.* MUNISAMI
I. L. R. 7 Mad. 39

64. ——— *Debt properly contracted—Usurious rate of interest—Purchaser at execution sale of joint family property.* In a suit by a Hindu subject to the Mitakshara law, against certain auction-purchasers at a sale in execution of a decree against the father, to recover a portion of the ancestral estate by cancellation of the sale, it appeared that the property which was mortgaged by the bond upon which the decree was passed was not put up for sale. The decree provided "that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond," and it also allowed interest at about 50 per cent., the rate in the bond, to the decree-holders. It was contended on behalf of the plaintiff that, upon a proper construction of the Privy Council ruling in *Muddun Thakoor* v. *Kantoo Lall, 14 B. L. R. 187*, the decree under which the property had been sold was an improper one. *Held*, that, under the Privy Council ruling, the purchaser is not bound to look beyond the decree. *Held*, also, that an usurious rate of interest cannot be treated, within the principles of the above case, as showing that the decree was for a debt which the son was not bound to discharge. LUCHMI DAI KOORI *v.* ASMAN SING
I. L. R. 2 Calc. 213 : 25 W. R. 421

65. ——— *Son's interest in ancestral property—Mortgage by father during minority of sons.* A Hindu, subject to the Mitakshara law and forming with his sons a joint Hindu family, mortgaged certain ancestral immoveable property during the minority of his sons. In a suit by the mortgagee against the father and sons to recover the mortgage debt "by sale of the mortgaged property, and out of other properties, as well as from the person" of the father:—*Held*, that it was incumbent upon the plaintiff to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging or which the plaintiff had at least good grounds

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for believing did justify the father in charging, the sons' interests in the ancestral immoveable property. BHEKNARAIN SINGH *v.* JANUK SINGH
I. L. R. 2 Calc. 438

66. ——— *Alienation by father to pay off antecedent debt.* An alienation of joint family property made by a father under the Mitakshara law for the purpose of paying off an antecedent debt is binding upon the sons, unless they show that the debt was contracted for immoral purposes. The case of *Bheknarain Singh* v. *Januk Singh, I. L. R. 2 Calc. 438*, being opposed to the decision of the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall, L. R. 1 I. A. 321*, as explained by that of *Ram Sahai* v. *Sheo Prosad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88*, cannot now be followed. GUNGA PRASAD *v.* SHEODYAL SINGH . . . **5 C. L. R. 224**

67. ——— The manager of a joint Mitakshara family (the family consisting of the father and minor son) raised money on the mortgage of certain family property, it not being proved, on the one hand, that there was legal necessity for raising the money, nor, on the other hand, that the money was raised or expended for improper purposes, or that the lender made any enquiry as to the purpose for which the money was required. *Held*, that, under such circumstances, a mortgagee could not enforce, by suit against the father and son, the mortgage itself during the father's lifetime, but the debt being an antecedent one, he would simply be entitled to a decree directing the debt to be raised out of the whole ancestral estate, including the mortgaged property. He would, assuming the minor to be the only son, also be entitled to a similar decree against the son after the father's death. Supposing the mortgagee under the above circumstances, to have obtained a decree against the father alone for payment and sale of the property, and at the sale to have himself become the purchaser, he could not be considered a *bonâ fide* purchaser for value, and would not be entitled to the property, as against the infant son, except to the extent of the father's interest therein. A mortgagee, under the same circumstances (but supposing the son to have attained majority at the time of the loan, and to have been made a party to the suit), would be entitled to a decree directing the debt to be raised out of the whole ancestral estate. In the case of a joint Mitakshara family consisting of two brothers and their two minor sons, the former, being the managers, raised money by executing a zurpeshgi lease of specific family property the lender making no enquiry as to the necessity for the loan; subsequently such managers took a sub-lease of the same property from the zurpeshgidar and continued in possession, and the zurpeshgidar sued for rent and obtained a decree, and in execution became the purchaser and obtained possession. It was found as a fact that the zurpeshgi and the sub-lease were merely a device by

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the managers to raise money and to continue in possession of the property, but it was not shown for what purpose the money was arised. *Held*, that the minor sons, not having been made parties to the suit by the zurpeshgidar, would be entitled to recover their shares against the purchaser. LUCHMUN DASS *v.* GIRIDHUR CHOWDHRY

I. L. R. 5 Calc. 855 : 6 C. L. R. 473

68. ——————— *Mitakshara law.* Under Mitakshara law, according to the rulings of the Judicial Committee, the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son, and its discharge is therefore such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. Such antecedent debt means a debt antecedent to the transaction, *viz.*, the sale or mortgage purporting to deal with the property. In a suit upon a mortgage by the father alone, where the sons are made parties, the decree would be good as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and the whole property would be bound, notwithstanding v. 29, chap. I, s. i, and v. 10, chap. I, s. vi of the Mitakshara. In respect of ancestral property the son is equally liable for his father's debts, if not incurred for immoral purposes, as for his own debts. The interest of an adult son, however, could not ordinarily be affected by a decree against the father alone. Where, however, an adult son, although neither an executant of the bond on which the suit was brought nor a party to such suit, yet was shown to be himself liable for a large proportion of the antecedent debt due on the bond, and by his conduct had made it apparent that he approved of and fully acquiesced in the sale of the whole ancestral property, and, moreover, that he allowed the mortgagee to take and remain in possession for upwards of eleven years and to go to expense in paying off encumbrances on the estate, it was, in a suit by the son to recover his share of such ancestral property, *held* that he was not entitled to succeed. Under the circumstances, the son ought to have been made a party to the suit brought by the mortgagee. The principles laid down by the Privy Council and in the Full Bench case of *Luchmun Dass* v. *Giridharee Chowdhry, I. L. R. 5 Calc. 855*, by the High Court, discussed. LALJEE SAHOY *v.* FAKEER CHAND

I. L. R. 6 Calc. 135 : 7 C. L. R. 97

69. ——————— *Mitakshara law —Mortgage of ancestral estate by father for family purposes—Attachment of property in execution of decree—Death of judgment-debtor prior to sale.* Where a decree on a mortgage was obtained against the father of a joint Hindu family governed by the Mitakshara law, the debt having been incurred for joint family purposes, and in execution thereof the joint family property was attached, but prior to sale the judgment-debtor died; in a suit subsequently brought by the other members of the joint family, praying for a partition of their shares, and for a declaration that such shares were not liable to be sold in execution of the mortgage-decree :—*Held*, that there could not be a partition as between a person already dead and his sons, and that the whole of the ancestral property was liable for the mortgage-debt, the only declaration to which the plaintiffs could be entitled being that they were not liable to pay the debt. GOBURDHUN LALL *v.* SINGESSUR DUTT KOER

I. L. R. 7 Calc. 52 : 8 C. L. R. 277

70. ——————— *Mitakshara law —Ancestral property—Right of mortgagee to sell.* A Hindu governed by the Mitakshara law mortgaged certain property to the plaintiffs. In a suit to recover the money due under the mortgage, and for a sale of the property brought against the mortgagor, his four sons, and the purchaser of the mortgagor's right and interest at an execution-sale, the lower Court gave the plaintiffs a decree against the mortgagor alone, holding that no necessity for the loan had been proved, but did not decide whether the property was the self-acquired property of the mortgagor or ancestral property. The High Court remanded the case for the trial of an issue upon this point. The lower Court found that the property was ancestral, and affirmed the original decree. *Held*, that assuming the property in dispute was ancestral, and that the mortgage was not valid against the sons, the plaintiffs were still entitled to recover the debt by the sale of the property of the father and the sons, because, supposing that the debt was contracted for personal purposes of the father, still the ancestral property in the hands of the sons was liable for the debt, it being not proved to have been contracted for immoral purposes. *Luchmun Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855*, followed. GUNGA PROSAD *v.* AJUDHYA PERSHAD SINGH

I. L. R. 8 Calc. 131
9 C. L. R. 417

71. ——————— *Sale or mortgage of joint family property—Suit by son to recover possession of share—Limitation—Parties—Right of purchaser at execution-sale.* A suit by a Hindu governed by the Mitakshara law, to recover possession of property sold during his minority by his father, is within time if brought within three years after he attains the age of twenty-one. A father governed by the Mitakshara law may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral. If the son seeks to set aside such alienation as to his own interest, he will have to show that the purposes of the alienation were illegal or immoral. If the son, being adult, has joined in the conveyance or led the alienee by his conduct to suppose that he assented to the alienation, he will be estopped from disputing its validity. These propositions apply to a mortgage, so as to place the purchaser at an execution-sale under a decree upon a mort-

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gage-bond in the position of an alienee by private sale. If the son has been a party to the suit in which the decree upon the mortgage-bond was obtained, he is concluded ; but if he has not been a party to the suit he is not concluded, but must show that the original debt was contracted for illegal or immoral purposes, in order to recover his share of the property from the purchaser. Where the father has neither aliened nor mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son as well as the father must be a party to the suit. When the creditor sues the father alone for a debt contracted by him alone, and in execution sells the right, title, and interest of the father only, the purchaser at this sale does not take the son's interest. RAMPHUL SINGH *v.* DEGNARAIN SINGH . **I. L. R. 8 Calc. 517 : 10 C. L. R. 489**

72. ——————————— *Joint family—Sale in execution of money-decree against father of Mitakshara family.* The mere fact of a decree being passed against the father only of a joint family governed by the Mitakshara law will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in the joint family property. Notwithstanding the decree being against the father only under certain circumstances, there may be a valid sale of a joint property belonging to the family in execution thereof. In execution of two money-decrees against *A* alone, the right, title, and interest of *A* in certain joint family property was sold, and the entire share of the joint family was taken possession of by the auction-purchasers. In a suit by the minor son and the wife of *A*, who with *A* constituted a joint family governed by the Mitakshara law, to recover possession of their shares in the property sold. *Held*, that, although the plaintiffs were not parties to the decrees in execution of which the sales took place, the mere fact of *A* being sued alone was not sufficient to justify the finding that only his right, title, and interest passed under the sales ; and that, as the facts of the case showed that the decrees were passed with reference to transactions which clearly concerned the joint family, the whole of the share of the joint family in the properties sold passed to the auction-purchaser ; the plaintiffs having failed to show that the debts, which were the foundation of the decrees in the execution of which the sales were held, were contracted for immoral purposes. *Umbica Prosad Tewary* v. *Ram Sahay Lall, I. L. R. 8 Calc. 898*, and *Ponnappa Pillai* v. *Pappuayyangar, I. L. R. 4 Mad. 1*, followed. *Ramphul Singh* v. *Degnarain Singh, I. L. R. 8 Calc. 517*, dissented from. SHEO PROSHAD *v.* JUNG BAHADUR

I. L. R. 9 Calc. 389 : 12 C. L. R. 494

73. ——————————— *Mitakshara law—Decree against the father of a joint family for lawful debts—Sale of the whole joint estate in execution of decree against one co-sharer.* *A*, a judgment-creditor, having obtained a decree against *B*, the father of a joint Hindu family governed by the Mitakshara law, in a suit to which the sons of *B* were not parties, but in which it was proved that the debt had been incurred for lawful purposes, proceeded to execute his decree by attaching and selling the joint family property. Thereupon the sons came in and objected to their interest in the property being sold in execution of a decree in a suit to which they were not parties, and, on their objection being disallowed, filed a suit against *A* and *B* to have it declared that their interest in the property was not liable to be sold to satisfy the decree. *Held*, that the debt in respect of which the decree had been passed having been contracted for lawful purposes, the judgment-creditor was entitled to execute his decree against the whole of the joint family property. *Held*, also, that the ruling in the case of *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198*, had no application to the facts of this case. RAMDUT SINGH *v.* MAHENDER PRASAD

I. L. R. 9 Calc. 452
12 C. L. R. 47

74. ——————————— *Sale by one of several co-sharers in a joint estate—How far alienation by father of joint family property is binding on sons—Antecedent debts.* Although no member of a joint Hindu family governed by the Mitakshara or Mithila law has authority, without the consent of his co-sharers, to sell or mortgage even his own share in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of himself and his sons, in order to pay off antecedent personal debts, the sons cannot avoid such alienation, unless they prove that the debts were immoral. But to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not merely in consideration of a loan or of a payment made to the father on the occasion of his making the alienation. In the case of a voluntary sale, the purchase-money does not constitute an antecedent debt such as to render that sale binding on the sons, unless they prove the transaction to have been immoral. HANUMAN KAMAT *v.* DOWLUT MUNDAR

I. L. R. 10 Calc. 528

75. ——————————— *Right of father to alienate—Suit by sons to set aside alienation.* A Hindu governed by Mitakshara law devised an 8 annas 11¼ gundas share of his ancestral estate to his son *A*, and the remainder to another son. *A*, subsequently becoming much involved, borrowed R45,000 on a usufructuary mortgage by two deeds in favour of *C* and *D* respectively, the transaction being one and the same and the money borrowed being to pay off antecedent debts. The mortgagees, having been ejected, brought a suit to recover possession with mesne profits and obtained a decree against *A*, in execution of which "the 8 annas 11¼

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gundas share of the judgment-debtor " was attached and sold and purchased by the defendant, who was put in possession of the entire property. The sons of *A*, who were minors living with him, through their mother and guardian brought a suit to have the sale set aside on the ground that under the sale to the defendant only the interest of their father passed. No objection had been made by the guardian of the plaintiffs to the defendant taking possession of the entire estate. *Held*, that the sons were not entitled to ask that the sale should be set aside. Where property acquired by a grandfather governed by the Mitakshara law is distributed among his sons, it does not become the self-acquired property of the sons so as to enable them to dispose of it without consent of the grandsons. *Muddun Gopal Thakoor* v. *Ram Buksh Pandey, 6 W. R. 71*, followed. HARDAI NARAIN *v.* HARUCK DHARI SINGH . . . . . **12 C. L. R. 104**

76. _____ *Mitakshara—Suit by sons to set aside alienation by father—Necessity—Debt due by father—Purchase-money treated as debt due by father—Refund of whole of purchase-money when necessary before sons are entitled to have sale by father set aside—Objection that whole of ancestral property is not subject-matter of suit for partition is not a technical one.* Under the Mitakshara law, the son is bound to pay out of the ancestral property in his hands the debts contracted by his father, unless he can show that the debts were contracted for an immoral purpose. When therefore *A* and *B*, sons of *C*, a family governed by the Mitakshara law, sued *C* and *D*, who had purchased some of the joint family property from *C* during the minority of *A* and *B*, for a sum of R10,000, to recover possession of their shares in such property upon partition, and when in such suit *A* and *B* failed to prove that the purchase-money, R10,000, had been obtained by *C* for immoral purposes :—*Held*, that they were not entitled to succeed without refunding the whole of the sum of R10,000 to *D*, inasmuch as, if the sale was set aside, *D* would be entitled to recover the purchase-money from *C*, and it would thus become a debt due by *C*, the father, for which, under the circumstances, the whole of the joint family property, including the property sold, would be liable in the hands of *A* and *B*, the sons. In such a suit, if it be treated as one for partition, the objection that the whole of the joint family property is not included in it is by no means a technical one, inasmuch as it is open to the Court to hold that the property sold should fall entirely within the father's share, and to allot it to the purchaser accordingly. HASMAT RAI *v.* SUNDER DAS . . . . **I. L. R. 11 Calc. 396**

77. _____ *Ancestral estate—Son's interest in Mitakshara law.* Under the Mitakshara and Mayukha, the son takes a vested interest in ancestral estate at his birth. But that interest is subject to the liability of that estate for the debts of his father and grandfather. The ancestral property of a Hindu father may be sold either by himself or by a Civil Court having jurisdiction in satisfaction of his debts not contracted for illegal or immoral purposes, and such sale will bind sons *in esse* at the time of the sale. *Girdharee Lall* v. *Kantoo Lal* and *Muddun Thakoor* v. *Kantoo Lall, L. R. 1 I. A. 321 : 14 B. L. R. 187 : 22 W. R. 56*, followed. NARAYANACHARYA *v.* NARSO KRISHNA **I. L. R. 1 Bom. 262**

KOOLDEEP KOOER *v.* RUNJEET SINGH **24 W. R. 231**

78. _____ *Sale of ancestral property by father for debts incurred for immoral purposes—Son's interest in ancestral estate.* The plaintiffs (two of whom were minors) sued to set aside the sale and recover possession of certain ancestral lands on the ground that they had been sold by their father to pay off debts contracted for immoral purposes. The documentary evidence in the case showed that the lands had been originally mortgaged by the grandfather and father of the plaintiffs to the father of the defendant for R1,600; that they had subsequently taken from him other loans which, together with the mortgage-debt, amounted to R4,400-15-0 ; that on the 23rd May 1858 an agreement (exhibit No. 38) was made between the plaintiff's father and the father of the defendant by which the former was to sell the equity of redemption in the mortgaged property to the latter in consideration of the latter realizing the former from the said debt of R4,400-15-0 and paying him the sum of R235 ; that accordingly on the 25th May 1858 the plaintiff's father conveyed the property to the defendant's father for R235 by a deed of sale (exhibit 17), which, however, did not refer either to the agreement (exhibit 38) or to the debts for R4,400-15-0. There was no allegation or evidence in the case showing that the plaintiff's grandfather had contracted the debt of R4,400-15-0 for any immoral purposes, nor that their father applied the sum of R235 to the payment of debts incurred for immoral purposes, although it was in evidence that he drank to excess. The Court of first instance dismissed the suit, holding, *inter alia*, that the plaintiffs had failed to prove the property to have been sold by their father for debts incurred for excessive drinking. One of the issues raised by the Assistant Judge in appeal was whether there was any necessity for the sale of the property by the plaintiff's father. He found this issue in the negative, and held the sale invalid, except as to the plaintiffs' father's own share. On special appeal to the High Court:—*Held*, that, on the above facts, the plaintiffs had failed to establish any case entitling them to set aside the sale of the lands by their father. *Held*, also, that it ought to have been ascertained whether the minor plaintiffs were born before the date of the sale,—*viz.*, 25th May 1858,—because if they had not been born before that date, their suit would have been unsustainable, as they never could have had any interest in the property. *Quære :* Even supposing that the plaintiffs' father

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had applied the sum of R235 to the payment of debts incurred for the immoral purpose of excessive drinking, whether the trivial amount would have justified the setting aside of the sale of the 25th May 1858, the main consideration for which was the release of the pre-existing debts for R4,400-15-0 : KASTUR BHAVANI *v.* APPA **I. L. R. 5 Bom. 621**

79. ——————— *Alienation of ancestral property by father—Son's interest in ancestral estate—Debt incurred for immoral or illegal purposes.* Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the estate of a Hindu undivided family is, in the hands of sons or grandsons, liable to the debts of the father or grandfather. In 1865 certain lands, the ancestral property of *D*, were sold under a decree passed against *D*, and were bought by *J*. These lands had been mortgaged in 1863 by *D* to *N*, in which transaction *D* had been principal and *J* his surety. In 1866, *N* sued on his mortgage, and on the 21st January 1868 a decree was made, directing the sale of the lands. Under that decree, the right, title, and interest of *J* were sold on the 1st April 1869 to *C*, and *C* afterwards sold the lands to *M*. In the present suit the plaintiffs (*D's* sons) sued *D* and *M* for possession of their two-thirds shares, alleging that the land was ancestral, and that the whole of it had been illegally sold under the decree of the 21st January 1868. Both the lower Courts held that the land was ancestral ; that the plaintiffs were united in interest with their father *D* when the mortgage-debt was contracted by the latter ; that the burden lay upon them (plaintiffs) to prove that the debt had been incurred for immoral or illegal purposes, and they fail to discharge it ; that they were therefore bound by the sale. The lower Courts accordingly dismissed the plaintiff's claim. On second appeal, the High Court affirmed the decrees of the Courts below on the grounds mentioned above. SADASHIV JOSHI *v.* DINKAR JOSHI **I. L. R. 6 Bom. 520**

80. ——————— *Father's authority to bind the interests of his sons in an ancestral property—Mortgage by father of ancestral property—Rights of a purchaser at Court sale of an undivided share of a co-parcener—Decree against father upon a mortgage of family property—Effect of decree ordering sale of mortgaged property—Purchaser at Court sale when bound to go behind decree and enquire as to whether the debt was properly incurred.* *D*, the father of the defendants, by a mortgage dated October 1869, mortgaged a house together with other property to *B*, the father of the plaintiff. *B* sued *D* upon the mortgage and obtained a decree directing the sale of the mortgaged property. The execution sale took place in July 1877, and the plaintiff (the mortgagee's son) became the purchaser of the house. On attempting to take possession, he was resisted by the defendants (sons of the mortgagor), who alleged the house to be ancestral property, and denied the plaintiff's right to more than the third share to which the father had been entitled. *Held* by the High Court on appeal, upon the authority of *Gridhareelall* v. *Kantoo Lall, 14 B. L. R. 187,* as explained in *Suraj Bunsi Koer* v. *Sheo Prasad, I. L. R. 5 Calc. 148,* that the shares of the defendants were validly bound by their father's mortgage, as it had been found by the lower Court that the debt, in respect of which the mortgage had been executed, had not been contracted by their father for improper or immoral purposes : but that, as the purchaser at the execution-sale (the plaintiff) was the mortgagee's son, the question arose whether he could be held to be stranger to his father's suit on the mortgage, and as such not bound to go behind the decree and make enquiry as to whether the debt had been improperly incurred. This would depend on the circumstances under which he and his father were living and the relation existing between them. The case was accordingly remanded for a determination of the question whether the plaintiff was a stranger to his father's suit. *Held,* that the defendants, not being joint with their father at the date of the suit, were not represented by him, and would be entitled to redeem, but only on condition, if the plaintiff insisted on it, of their redeeming the whole of the house. Unless the mortgage-deed provided for the redemption of the son's interest on payment of a proportionate part of the debt, the mortgage should be treated as one and entire ; the father's authority, according to *Gridhareelall's Case,* being to apply or charge the whole property to or with the payment of his debts not improperly incurred. Where a decree passed in a suit upon a mortgage directs the mortgaged property to be sold, the decision in *Deendyal's Case, I. L. R. 3 Calc. 198,* which limited the right, title, and interest which passed under the auction sale to the father's share does not apply. TRIMBAK BALKRISHNA *v.* NARAYAN DAMODAR . . . **I. L. R. 8 Bom. 481**

81. ——————— *Mitakshara law—Mortgage by father of joint ancestral property—Sale of joint ancestral property in the execution of a decree against father.* The undivided estate of a joint Hindu family, consisting of a father and his sons, while in the possession and management of the father, was mortgaged by him, with the knowledge of the sons, as security for the repayment of moneys borrowed and lent for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale, and sought to bring the family estate to sale in the execution of this decree. *Held,* in a suit by one of the sons to protect his share in such estate from sale in the execution of such decree, that such decree could not be regarded as against the father only, and his share in such property was not alone saleable in execution of it, but such suit and decree-

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must be regarded as against the father as representing the joint family, and the whole of the family estate was saleable in execution of such decree. *Bissessur Lal Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233,* followed. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* distinguished. DEVA SINGH *v.* RAM MANOHAR **I. L. R. 2 All. 746**

82. ——— *Mitakshara law —Mortgage by a father of ancestral property—Sale of father's rights and interest in the execution of decree.* The undivided estate of a joint Hindu family consisting of a father and his minor sons and grandsons, while in the possession and management of the father, was mortgaged by him as security for the repayment of moneys borrowed by him. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale. The right, title, and interest of the father only in the family estate was sold in the execution of this decree. The auction-purchasers having taken possession of the family estate, the sons and grandsons joined in a suit against them to recover their shares of the estate. *Held,* that the sons and grandsons were entitled to recover their shares of the estate, inasmuch as the auction-purchasers had only acquired by their auction-purchase the rights and interests of the father in the estate, and that for the same reason it was unnecessary to enquire into the nature of the debt on account of which the father's rights and interests in the estate were sold. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* followed. *Girdharee Lal* v. *Kantoo Lal, 14 B. L. R. 187,* distinguished. *Held,* also, that the rulings in those two cases are perfectly consistent. BIKA SINGH *v.* LACHMAN SINGH. **I. L. R. 2 All. 800**

83. ——— *Joint Hindu family property—Alienation of father—Sons' rights.* *G,* a member of a joint undivided Hindu family consisting of himself and his sons having wrongfully converted to his own use the property of another person, such person sued him for damages for such conversion and obtained a decree, in the execution of which *G*'s rights and interests in the family property were put up for sale and purchased by *C,* who, in execution of such decree, took possession of such property. *G*'s sons thereupon sued *C* to recover their shares, according to Hindu law, of such property. *Held, per* OLDFIELD, *J.,* that, although the father's debt was not one which the sons were in duty bound to pay, it might be that, had the family estate passed out of the family under the execution sale, the sons could not have recovered it from *C,* who was an auction-purchaser and a stranger to the suit against the father. Inasmuch as, however, the claim in that suit was not for a joint family debt, but a personal claim against the father, who was alone represented in that suit, and the decree in that suit was against him personally, and it was only his rights and interests that were put up for sale and purchased by *C,* the sons were entitled to recover from *C* their shares of the family property. *Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148,* distinguished. *Per* STRAIGHT, *J.,* that the sons were entitled to recover their shares of the family property, the decree being purely a personal decree against the father, and his rights and interests only in such property having been put up for sale and purchased by *C.* CHANDRA SEN *v.* GANGA RAM . . **I. L. R. 2 All. 899**

84. ——— *Mitakshara law —Mortgage of joint ancestral property by father—Sale of property in execution of a decree against father—Son's right.* The ancestral estate of a joint Hindu family, consisting of a father and his minor son, was mortgaged by the father, as the head of the family and manager of the estate, as security for the repayment of moneys borrowed for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the estate, and obtained a decree against him directing its sale, and sought to bring the estate to sale in the execution of such decree. *Held,* in a suit by the minor son to protect his share in the estate from sale in the execution of such decree, that the suit in which such decree was made, and such decree, being regarded as a suit against the father, and as a decree made against him as representing the family, such decree might be executed against the estate, notwithstanding the minor son had not formally been joined as a defendant in such suit. *Bissessur Lal Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233,* followed. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* distinguished. GYA DIN *v.* RAJ BANSI KUAR . . **I. L. R. 3 All. 191**

85. ——— *Joint Hindu family property—Right of son.* *B,* a member of a joint undivided Hindu family consisting of himself and his son *R,* as the manager of the family, borrowed moneys for lawful purposes and executed a bond for their repayment, in which he hypothecated a share of mouzah B, such share being ancestral property, as collateral security for their repayment, with the knowledge and approbation of *R.* The obligee of such bond sued *B* thereon and obtained a decree, which directed the sale of such share, and such share was put up for sale and was purchased by *C. R* subsequently sued *B* and his mother for partition of the family property, including such share, claiming a one-third share of such property. *C* was made a defendant in the suit, and so was *P, R*'s grandmother, who claimed to share equally with the other members of the family in such property. *Held,* that it must be presumed that *B* was sued on such bond, and that the decree in such suit was made against him as the head of the family, and *R* could not recover from *C* the share of mouzah B. RADHA KISHEN MAN *v.* BACHHA MAN **I. L. R. 3 All. 118**

86. ——— *Adult son—Mortgage of family property by father—Decree*

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HINDU LAW—ALIENATION—*contd.*

4. ALIENATION BY FATHER—*contd.*

against father—Right of son. The father in a joint undivided Hindu family governed by the law of the Mitakshara mortgaged the ancestral property of the family as security for a debt incurred by him. His son was of age at the time of the mortgage, but the mortgagee did not make the son join in the mortgage. When the mortgagee brought a suit to enforce the mortgage, he brought it against the father alone; and he obtained a decree against the father alone for the sale of the property. On the property being attached in execution of the decree, the son objected to the sale of the property, so far as his own share according to Hindu law was concerned. This objection having been disallowed, he sued the mortgagee for a declaration that such share was not liable to be sold in execution of the decree, claiming on the ground that he was not bound by the mortgage or the decree, not having joined in the mortgage or been a party to the suit in which the decree was made, and that the debt secured by the mortgage had been incurred by his father for immoral purposes. *Held*, that the son was not entitled to succeed in such suit merely because, although he was of age, he was not required by the mortgagee to join in the mortgage, and was not made a party to the suit to enforce the mortgage; but that he was in the same position as he would have been had he been a minor at the time the mortgage was made and the decree was passed, and was therefore only entitled to succeed if he showed that the debt incurred by his father was incurred for immoral purposes of his own. *Held*, further, that, inasmuch as the debt in question was incurred for necessary purposes, and as the son was aware of the mortgage and did not protest against it, but on the contrary stood by and benefited thereby, and as he was aware of the suit and did not apply to be made a party thereto, he was asking too late for the relief which he sought. *Ram Narain Lall* v. *Bhawani Prasad, I. L. R. 3 All. 443*, referred to. PHUL CHAND *v.* MAN SINGH . . . **I. L. R. 4 All. 309**

87. ——— *Alienation of ancestral property by father—Suit by son to recover his interest—Burden of proof.* Where a Hindu, a minor, governed by the law of the Mitakshara, sued to set aside an alienation of ancestral property by his father, on the ground that such alienation was made to satisfy a debt contracted for immoral purposes:—*Held* by STRAIGHT, *J.*, that the burden of proving that the debt was contracted for such purposes, and that the defendant had notice that it was contracted for such purposes, lay on the plaintiff, and that the plaintiff was not discharged from such burden because he had proved generally that his father had been guilty of extravagant waste of the ancestral property. *Hanooman Pershad Pandey* v. *Babooee Munraj Koonweree, 6 Moo. I. A. 392*; and *Suraj Bunsi Koer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148*, referred to. *Held*, also, by STRAIGHT, *J.*, that it could not be presumed from such conduct of the father that the debt in question had been contracted for immoral purposes. *Per* STUART, *C.J.*, that the plaintiff's father having been guilty of extravagant waste of the ancestral property, the burden of proof in this case lay on the defendant. As, however, there was reason to suspect that the suit was a collusive one, brought at the instance of the plaintiff's father, if not really by him, and it was very doubtful whether the alienation was objectionable on the ground taken in the name of the plaintiff, it would not be safe to give the plaintiff a decree. HANUMAN SINGH *v.* NANAK CHAND . . . . **I. L. R. 6 All. 193**

88. ——— *Mitakshara and Mithila law—Execution of decree—Sale of ancestral estate in satisfaction of father's debt—Parties to proceedings.* There is no conflict of authority as to the principle that sons cannot set up their rights, which are to take present vested interests on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt, or against his creditors' remedies for his debt, if such debt has not been contracted for an immoral purpose; the law on this point being the same under the Mitakshara and the Mithila shasters. From the above must be distinguished the question how far the joint sons can be precluded from disputing the liability attaching to their shares, where proceedings have been taken by or against the father alone. If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution-proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate. If, upon the proceedings and in regard to the intention of the parties, doubts are raised whether what has been sold is the interest of the father alone or the joint estate, the absence of the sons from the proceedings may be a material consideration. But if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution-proceedings. *Deendyal Lall* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247: I. L. R. 3 Calc. 198*, does not lay down as an invariable rule that co-parcenary interests will not pass by an execution sale unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone. This debt being one which must be taken as a joint family debt, though the suit upon it was against the father alone:—*Held*, that a claim by minor sons for exemption of their shares failed on the merits, the entire family estate having passed by the sale. NANOMI BABUASIN *v.* MODHUN MOHUN . **I. L. R. 13 Calc. 21**
L. R. 13 I. A. 1

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HINDU LAW—ALIENATION—*contd.*

4. ALIENATION BY FATHER—*contd.*

89. ——— *Effect of sale in execution of mortgage-decree and of money-decree against the father—Transfer of Property Act, s. 85.* Where the property of an undivided Hindu family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the debt. It is otherwise if the decree in execution of which the sale takes place is a mere money-decree. *Per* KERNAN, *J.* It will still be necessary in all cases where a creditor seeks in a suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit. *Girdharee Lall* v. *Kantoo Lall, L. R. 1 I. A. 321*; *Muddun Thakoor* v. *Kantoo Lall, L. R. 1 I. A. 321*; and *Deendyal Lall* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247*, discussed. *Hardi Narain Sahu* v. *Ruder Perkash Misser, I. L. R. 9 Calc. 626*, followed. *Ponnappa Pillai* v. *Pappuvayyangar, I. L. R. 4 Mad. 1*, modified. PONNAPPA PILLAI *v.* PAPPUVAYYANGAR . . **I. L. R. 9 Mad. 343**

90. ——— *Decree against father—Sale of ancestral estate in execution of money-decree.* A sale of ancestral property in execution of a money-decree obtained against a Hindu father will, if the debt was neither immoral nor illegal, pass to the purchaser the entire interest of which the father could dispose,—*i.e.*, his son's as well as his own share,—provided the purchaser has bargained and paid for such interest. The son, not being bound by the decree against his father, may contest the sale by suit, but unless he proves that the debt was not such as to justify the sale, he cannot succeed. The revised ruling of the Full Bench in *Ponnappa* v. *Pappuvayyangar, I. L. R. 9 Mad. 343*, as to sales in execution of money-decrees against the Hindu father has been overruled by the decision of the Privy Council in *Nanomi Babuasin* v. *Madun Mohun, L. R. 13 I. A. 1 : I. L. R. 13 Calc. 21.* NARASANNA *v.* GURAPPA . . . **I. L. R. 9 Mad. 424**

91. ——— *Power of the father to alienate ancestral property for pious purposes.* According to the Hindu law, the power of the father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande* v. *Babu Kanwar Singh, S. D. A. 1843, p. 24*, referred to. In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above mentioned, the son having contended that the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the lower Appellate Court for the purpose of ascertaining whether the endowment had been made *bonâ fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff. RAGHUNATH PRASAD *v.* GOBIND PRASAD **I. L. R. 8 All. 76**

HINDU LAW—ALIENATION—*contd.*

4. ALIENATION BY FATHER—*contd.*

92. ——— *Joint Hindu family—Liability of ancestral estate for satisfaction of father's debt, when not incurred for immoral purposes.* A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit, *G* died and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas, and not merely against the share therein which *G*, during his lifetime, might have got separated, the plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in *G*'s personal expenses. *Held*, that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanomi Babuasin* v. *Modun Mohun, I. L. R. 13 Calc. 21*, followed. SITA RAM *v.* ZALIM SINGH . **I. L. R. 8. All. 231**

93. ——— *Suit by sons to set aside alienation—Burden of proof.* The rule enunciated by the Privy Council in *Muddun Thakoor* v. *Kantoo Lall, 14 B. L. R. 187*, and *Suraj Bunsi Koer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148*, "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee," is limited to antecedent debts, *i.e.*, to debts contracted before the sale or mortgage sought to be impeached by the son; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of

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ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate. LAL SINGH *v.* DEO NARAIN SINGH . . . . **I. L. R. 8 All. 279**

94. ——————— *Creditor's remedy against sons how affected by reason of his having sued the father separately.* Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay. The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son. There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt. *Lachmi Narain* v. *Kunji Lal, I. L. R. 16 All. 449; Balmakund* v. *Sangari, I. L. R. 19 All. 379; Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537; Ramasami Nadan* v. *Ulaganatha Goundan, I. L. R. 22 Mad. 49; Ariabudra* v. *Dora Sami, I. L. R. 11 Mad. 413;* and *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21,* referred to. The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick* v. *Rajendro Lall, I. L. R. 3 Calc. 353; Dhunpat Singh* v. *Sham Soondar Mitter, I. L. R. 5 Calc. 292;* and *Hoare* v. *Niblett, L. R. (1891) 1 Q. B. 781,* referred to. DHARAM SINGH *v.* ANGAN LAL **I. L. R. 21 All. 301**

95. ——————— *Joint family property sold in execution of a decree on a mortgage against the father alone—Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.* A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and, having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a futher cash payment of R59, satisfied the mortgage-debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage-debt proportionate to the share in the joint family property owned by them. *Held,* that the original mortgage having become extinct, the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction-sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537,* referred to. *Dharam Singh* v. *Angan Lal, I. L. R. 21 All. 301,* followed. LACHHMAN DAS *v.* DALLU **I. L. R. 22 All. 394**

96. ——————— *Joint family—Decree against the father alone—Attachment of family property in execution of such decree—Son's interest in the family property when bound by decree against the father or by sale effected by the father.* Where in a joint Hindu family the father disposes of family property, the son's interest is bound, unless the son can show, in proceedings taken for that purpose, that the disposal of the property by his father was made under circumstances which deprived his father of his disposing power. So also, where family property is sold under proceedings taken against the father alone, the son's interest is bound unless the son can show that the sale was on account of an obligation to which he was not subject. The father is, in fact, the representative of the family both in transactions and in suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part. JAGABHAI LALUBAI *v.* VIJBHUKANDAS JAGJIVANDAS. **I. L. R. 11 Bom. 37**

97. ——————— *Joint family—Mortgage by father—Decree subsequently to father's death against eldest son as heir of father—Minor sons not parties—Sale in execution of family property other than that comprised in mortgage—Subsequent suit by minor sons to recover their shares—Minor sons when bound by decree against eldest son as heir of father.* One *K* mortgaged certain land to *B* and died, leaving four sons, *viz.*, *R* and the three minor plaintiffs. Subsequently *B* brought a suit on the mortgage against *K* by his heir *R* for the amount due, and obtained a decree, whereby it was ordered that the amount should be recovered from the mortgaged property and, if that proved insufficient, from the other estate of the deceased. The minor sons were not made parties to that suit, nor was *R* sued as representing the joint family. In execution of the decree, *B* attached and sold the whole of the joint family property, the certificate of sale showing that the right, title, and interest of *K*, deceased, by his heir *R*, was attached and sold and conveyed to the purchaser. The three minor sons subsequently brought this suit to recover some of the property, contending that their shares were not bound by the sale. *Held,* on the authority of *Bissessur Lall Shahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233,* and revers-

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HINDU LAW—ALIENATION—*contd.*

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ing the decree of the lower Court, that the property in question having been declared liable for the debt incurred by the father, the intention was that the estate in its entirety should be sold. The minor sons were therefore bound by the sale, unless they could prove that the father's debt had been incurred for an immoral and improper purpose. The case was accordingly sent back for trial of an issue upon that point, with a direction that the burden of proof should lie upon the plaintiffs. JAIRAM BAJABASHET *v.* JOMA KONDIA . **I. L. R. 11 Bom. 361**

98. ——————— *Mortgage of family property by father—Decree against father enforcing mortgage—Decree for money against father—Sale in execution of decrees—Rights of sons.* The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from such sale. One of these decrees was for enforcement of a hypothecation by the plaintiff's father of the property in suit. It was admitted on behalf of the plaintiffs in connection with this decree that, although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the moneys advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest. *Held,* that the plaintiffs were not entitled to any declaration in respect of the execution proceedings under the decree for enforcement of hypothecation. The second of the decrees above referred to was a simple money-decree for the principal and interest due upon a hundi executed by the father in favour of the decree-holder. The suit terminating in the decree was brought against the father alone, and the debt was treated as his separate debt. *Held,* that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which he could execute against the family property and not against the father's interest only, and if he could maintain such a suit, either against those members of the family against whom he desired to execute his decree or against the father as head of the family, expressly or impliedly suing him in that capacity; but that, not having taken this course, his decree was not enforcible against the plaintiff's rights and interests in the attached property. *Muttayan Chetti* v. *Sangili Virapandia Chinnatambiar, I. L. R. 6 Mad. 1,* distinguished. *Nanomi Babuasin* v. *Modun Mohun, I. L. R. 13 Calc. 21,* and *Basa Mal* v. *Maharaj Singh, I. L. R. 8 All. 205,* referred to. BALBIR SINGH *v.* AJUDHIA PRASAD **I. L. R. 9 All. 142**

99. ——————— *Son's liability for father's debts in lifetime of father—Suit against father and sons—Right in suit to decree against sons.* A creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons. *Held,* that the plaintiff could have prosecuted his claim against the sons in that suit, and have obtained a decree making their shares in the family property liable for the father's debt. RAMASAMI NADAN *v.* ULAGANATHA GOUNDAN . . . . **I. L. R. 22 Mad. 49**

100. ——————— *Decree against father for money due, the sons not being joined as defendant's—Death of father after original debt barred by limitation, the decree subsisting—Suit against the sons on the decree—Period of limitation how calculated—One cause of action.* Certain creditors, having in 1882 obtained a decree, kept alive that decree until 1893, when the judgment debtor died. They then sought to make liable the property of the deceased in the hands of the defendants, his sons and representatives, stating the cause of action against the said defendants as having arisen in 1893, the date of their father's death. The sons pleaded limitation, and the question was whether the period of limitation against the sons began to run from the date of death of their father or from the date at which the debt originally became due. On a reference being made to a Full Bench as to "whether a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's lifetime for such debt:"—*Held,* that in such a case there are not two causes of action, and such a creditor has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's lifetime for such debt, and that, in consequence, the suit was barred by limitation. *Arunachala* v. *Zamindar of Sivagiri, I. L. R. 7 Mad. 328; Natasayyan* v. *Ponnusami I. L. R. 16 Mad. 99; Ramayya* v. *Venkataratnam, I. L. R. 17 Mad. 122,* considered. MALLESAM NAIDU *v.* JUGALA PANDA **I. L. R. 23 Mad. 292**

101. ——————— *Joint Hindu family—Mortgage by father—Suit to enforce the mortgage against son's shares—Legal necessity—Burden of proof.* As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest should, if the question is raised, prove either that the money was obtained by the father for a legal necessity or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family. There is a distinction between such cases as this and cases in which a decree has been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief

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against a sale effected by their father for an antecedent debt. Where a decree is obtained against the father and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for. In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiff as to the objects for which the bond was executed by the father. *Held*, that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family, and that no evidence having been given, the suit must be dismissed. JAMNA *v.* NAIN SUKH . . . **I. L. R. 9 All. 493**

102. ——————————— *Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose —Burden of proving the nature of the debt.* The sons in a joint family under the Mitakshara cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt or against a sale in execution of a decree upon such debt, although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose. The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay, out of the family estate, his father's debt. A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title, and interest of the debtors, but of the property being such interest. On the other hand, before the sale, notice was given on behalf of the sons that the property was ancestral and joint. *Held*, in a suit on behalf of the sons against the purchaser at the sale to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan or to prove that the money was borrowed for family necessities. BHAGDUT PERSHAD *v.* GIRJA KOER

I. L. R. 15 Calc. 717
L. R. 15 I. A. 97

103. ——————————— *Joint family—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs —Son's liability to satisfy the decree as to interest and costs.* The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father. In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question. Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that therefore the estate could not be bound by the decree at all. The Court of first instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the High Court :—*Held*, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable, although where the father desires to represent the whole estate he can do so yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion. NARAYANRAV DAMODAR *v.* JAVHERVAHU

I. L. R. 12 Bom. 431

104. ——————————— *Ancestral property—Joint family—Alienations by father—Purchaser—Notice.* Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at Court-sales held in execution of decrees against the father, it is not enough for him to show that the debts for which the decrees were passed were contracted by the father for immoral purposes ; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are :—(i) What was the interest that was bargained for and paid for by the purchaser ? Was it the father's interest only, or was it the interest of the entire family ? (ii) Where the debts,

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for which the decrees were obtained, under which the property was sold, contracted for immoral purposes? and (iii) Had the purchaser notice that the debts were so contracted? *Suraj Bunsi Koer* v. *Sheo Proshad Singh, L. R. 6 I. A. 88 : I. L. R. 5 Calc. 148,* and *Nanomi Babuasin* v. *Modhun Mohun, L. R. 13 I. A. 1 ; I. L. R. 13 Calc. 21,* followed. The plaintiff sued in 1883 for partition of ancestral property consisting (*inter alia*) of certain thikans which had been sold in execution of decrees passed against his father. The plaintiff, though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution-proceedings. In the certificates of sale granted to the different purchasers, the property sold was described as being a four-anna share which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title, and interest in the above-mentioned property of the said *R* (*i.e.*, the father) was sold." There was nothing to show that the purchaser bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the thikans in question was never disturbed, though the sharers had each a separate possession of distinct portions of the ancestral property. *Held*, that, under the circumstances, the father's interest alone passed to the auction-purchasers. KRISHNAJI LAKSHMAN *v.* VITHAL RAVJI RENGE **I. L. R. 12 Bom. 625**

105. ——————————— *Joint family—Money-decree—Decree against father alone—Purchaser at execution-sale under such decree—How far such sale binding on the interest of the sons not parties to the suits or execution- proceedings.* In the case of a joint Hindu family, whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale is to enquire what the parties contracted about in the case of a conveyance or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money-decree. In the case of an execution-sale, the mere fact that the decree was a mere money-decree against the father as distinguished from one passed in a suit for the realization of a mortgage-security directing the property to be sold, is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person, who had purchased it at an auction-sale held in execution of a money-decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale, and the lower Courts decided in their favour. On appeal the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution-proceedings. KAGAL GANPAYA *v.* MANJAPPA **I. L. R. 12 Bom. 691**

106. ——————————— *Ancestral zamindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.* A sale in execution of a decree against a zamindar, for his debt, purported to comprise the whole estate in his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose. *Held*, that, the impeachment of the debt failing, the suit failed ; and that no partial interest but the whole estate had passed by the sale, the debt having been one which the son was bound to pay. *Hardi Narain Sahu* v. *Ruder Perkash Misser, I. L. R. 10 Calc. 626* (where the sale was only of whatever right, title, and interest the father had in property), distinguished. MINAKSHI NAYUDU *v.* IMMUDI KANAKA RAMAYA GOUNDAN **I. L. R. 12 Mad. 142**
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107. ——————————— *Money-decree against father—Attachment of ancestral estate.* In execution of a money-decree, ancestral property of the joint family of the judgment-debtor was attached. His sons sued to release their interest from attachment, alleging that the judgment-debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree. *Held*, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. *Nanomi Babuasin* v. *Modhun Mohun, L. R. 13 I. A. 1 : I. L. R. 13 Calc. 21,* discussed and followed. RAMANADAN *v.* RAJAGOPALA **I. L. R. 12 Mad. 309**

108. ——————————— *Liability of ancestral estate for father's debts—Improper and immoral debts of father—Evidence of general immoral character of father—Burden of proof—Pensions Act, Certificate of Collector under.* The power of the father, as representative of the family, to bind the son's interests in the family estate, except in special cases, being judicially recognized, the onus of estabishing the existence of those special circumstances necessarily lies on the sons for the purpose of defeating his creditor's remedies against the ancestral estate. The plaintiff sued to recover the balance of a debt due on a mortgage-bond alleged to have been executed in 1878 by the defendant's father (since deceased) to the plaintiff's

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father. The defendant pleaded, *inter alia*, that the loan was contracted without his knowledge and for immoral purposes, and that his share in the mortgaged property was not answerable for the debt. He also contended, as to a sum of R109-8-0 claimed by the plaintiff, that this sum was claimed in respect of saranjam, and was not recoverable by the plaintiff without a certificate under the Pensions Act. The lower Court found that the defendant's father had been a man of extravagant and vicious habits, but *held*, that the defendant had failed to prove that the debt in question had been contracted for immoral purposes. The Judge therefore awarded the plaintiff's claim. On appeal by the defendant to the High Court :—*Held*, confirming the decree of the lower Court, that the burden lay on the defendant of proving that the loan to the father secured by the mortgage-bond in the suit was for an illegal or immoral purpose, and that the defendant had not discharged this burden. The mere proof that his father had been a man of extravagant and immoral habits was not enough. *Held*, also, that, as no certificate from the Collector had been produced, as required by the Pensions Act, the claim to R109-8-0 should be disallowed. CHINTAMANRAV MEHENDALE *v.* KASHINATH **I. L. R. 14 Bom. 320**

109. ——————— *Debts contracted for immoral and improper purposes—Burden of proof—Proof of immoral habits.* In execution of a decree against the estate of *V*, his estate was sold, and it ultimately came into the hands of the plaintiff as purchaser, who sued for partition. It was contended that the decree was in respect of debts contracted by *V* for immoral and improper purposes. *Held*, that proof of immoral habits in the debtor did not throw the onus on to the plaintiff and oblige him to prove that the debt was not incurred for an illegal or immoral purpose. *Chintamanrav Mehendale* v. *Kashinath, I. L. R. 14 Bom. 320*, followed. VASUDEV MORBHAT *v.* KRISHNAJI BALLAL . . . **I. L. R. 20 Bom. 534**

110. ——————— *Mortgage effected by and decree passed against father only—Father's debt—Effect of mortgage and decree on son's rights and interests.* Where a Hindu son comes into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree —whether it be upon a mortgage-security or in respect of a simple money-debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree, or affected by the sale certificate. BENI MADHO *v.* BASDEO PATAK . . . . **I. L. R. 12 All. 99**

PEM SINGH *v.* PARTAB SINGH **I. L. R. 14 All. 179**

111. ——————— *Joint Hindu family—Money-decree against father alone for his personal debt—Attachment of joint-family property—Suit by sons to set aside attachment.* Where in execution of a simple money-decree obtained against the father only in a joint Hindu family in respect of a bond debt incurred by him personally, the decree-holders attached the whole of the joint-family property, and before sale in execution took place the sons of the judgment-debtor objected to the attachment under s. 278 of the Civil Procedure Code, and the objection having been disallowed sued for a declaration that they were entitled to a share in the property and for its release from attachment :—*Held*, that the plaintiffs were entitled to impeach the attachment upon the ground that it affected interests which the decree could not touch, and which therefore could not be attached under it, and that they were in a position to ask to have those interests exempted from the threatened sale in execution. RAM DAYAL *v.* DURGA SINGH **I. L. R. 12 All. 209**

112. ——————— *Decree against father how far binding against sons—Question of fact—Acquiescene by sons in father's defence.* In a suit against a Hindu father a decree had been obtained, the execution of which interfered with land belonging to the undivided family of which the father was the manager and his two sons members. The sons had not been joined as defendants in that suit, though they were of age at the time ; but they had known of it and had not objected to family funds being spent in its defence. On their suing for an injunction to restrain the decree-holder from executing the decree, on the ground that it was not binding on them :—*Held*, that the question how far the sons are bound by a decree against the father must be decided with reference to the particular facts of each case. If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested with the father, since in that case it will be presumed that the father represents their interests. The sons will still more clearly be bound if, being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father. KUNJAN CHETTI *v.* SIDDA PILLAI **I. L. R. 22 Mad. 461**

113. ——————— *Liability of member of joint family, though not made a party to the suit—"Personal" decree, meaning of.* Where a decree provided for the sale of specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally :—*Held*, that a junior member of the joint family, who

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was liable for his share of a debt sued on, but who was not made a party to the suit, could not successfully plead that, the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. *Beni Madho* v. *Basdeo Patak*, *I. L. R. 12 All. 99*, and *Bhawani Prasad* v. *Kallu*, *I. L. R. 17 All. 537*, referred to. HARI RAM *v.* BISHNATH SINGH **I. L. R. 22 All. 408**

114. ——— *Mortgage executed by father on the whole joint family property in respect of his own debts—Liability of sons—Burden of proof.* The father of a joint and undivided Hindu family executed a mortgage over the whole immoveable property of a joint family. The mortgagees having obtained a decree on their mortgage, and having put an attachment on the joint family property, the minor son of the mortgagor sued for a declaration that their interest in the attached property was not liable under the mortgagee's decree, inasmuch as the debts in respect of which the mortgage had been executed had been contracted for immoral purposes, and were not such as they, by the Hindu law, were under a pious obligation to discharge. *Held*, that the burden of proving that the debts in question were contracted for the purposes alleged lay on the plaintiffs. *Beni Mahdo* v. *Basdeo Patak*, *I. L. R. 12 All. 99*, followed. *Lal Singh* v. *Deo Narain Singh*, *I. L. R. 8 All. 279*; *Basa Mal* v. *Maharaj Singh*, *I. L. R. 8 All. 205*; *Subramanya* v. *Sadasiva*, *I. L. R. 8 Mad. 75*; *Hanooman Persaud Panday* v. *Munraj Koonweree*, *6 Moo. I. A. 393*; and *Bhagbut Pershad Singh* v. *Girja Keor*, *I. L. R. 15 Calc. 717*, referred to. BHAWANI BAKSH *v.* RAM DAI **I. L. R. 13 All. 216**

115. ——— *Hypothecation by father of joint ancestral estate—Property described as "haq haquq zamindari apna"—Decree enforcing hypothecation—Attachment of estate—Suit by son for declaration that only father's interest is affected by hypothecation—Burden of proof.* In a suit by the sons of a Hindu for a declaration that certain joint ancestral property was not liable to sale in execution of a decree upon a hypothecation-bond of such property executed by their father, in which the property was described as "*haq haquq zamindari apna*," and that the bond and decree were limited to the father's own interest:—*Held* by the Full Bench, that, if the plaintiffs could not show that the interest which was hypothecated was a limited interest, the Court must take it, as against the plaintiffs, that the family property was hypothecated. *Beni Madho* v. *Basdeo Patak*, *I. L. R. 12 All. 99*, and *Bhawani Bakhsh* v. *Ram Dai*, *I. L. R. 13 All. 216*, approved. PEM SINGH *v.* PARTAB SINGH . . **I. L. R. 14 All. 179**

116. ——— *Simple money-decree against father how far binding upon son's interests in the joint family property.* With reference to the question whether the whole joint-family property or only the interest of the father therein is liable under a decree obtained against a Hindu father:—*Held*, that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or of a simple money-decree, it may be presumed that the family property and not the mere undivided share of the father was sold. *Pem Singh* v. *Partab Singh*, *I. L. R. 14 All. 179*, referred to. MUHAMMAD HUSAIN *v.* DIPCHAND **I. L. R. 14 All. 190**

117. ——— *Immoral origin of debt—Suit by a decree-holder against the sons of deceased judgment-debtor whose property had passed to them.* A decree was passed against a Hindu for money dishonestly retained by him from the plaintiff's family to which he was accountable in respect of it. The judgment-debtor having died, the decree-holder sought to attach in execution property of the family which had passed into the hands of his sons by survivorship. The sons objected that such property was not liable to attachment, and the decree-holder was referred to a regular suit. He now brought a suit against the sons. *Held*, (i) that the sons were not entitled to go behind the decree except for the purpose of showing that the judgment-debt was immoral or illegal in its origin; (ii) that the judgment-debt was not of an illegal or immoral nature so as to exclude the pious obligation of the sons to discharge it. NATASAYYAN *v.* PONNUSAMI . **I. L. R. 16 Mad. 99**

118. ——— *Liability of sons during their father's lifetime for his antecedent debts—Form of decree—Transfer of Property Act, s. 88.* *Held* by the Full Bench, that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage-bond, given by the father alone after the sons were born, which purported to mortgage the joint family property, the consideration having been, with a trifling exception, money advances antecedently made by the mortgagee to him, not as manager of the family or with the authority of the sons or for family purposes, but not for purposes of immorality or for purposes which, if the father was dead, would exonerate the sons from the pious obligation of paying such debts of the father. *Held*, also, that the decree in such a suit should be a decree for sale of the mortgaged property under s. 88 of Act No. IV of 1882. BADRI PRASAD *v.* MADAN LAL **I. L. R. 15 All. 75**

119. ——— *Mortgage-bond executed by the father—Right to enforce it against the sons—Interest.* A mortgage-bond executed by the father in a Mitakshara family without the consent of his sons, who were minors at the time, the mortgage having been effected mainly to discharge an antecedent debt, and not being shown to have been for any immoral purpose, is valid and binding on the sons. *Luchmun Dass* v. *Giridhur Chowdhry*, *I. L. R. 5 Calc. 857*; *Ramayya* v. *Venkataratnam*,

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I. L. R. 17 Mad. 122, distinguished. *Girdharee Lall* v. *Kantoo Lal, 22 W. R. 56 ; Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148 ; Laljee Sahoy* v. *Fakeer Chand, I. L. R. 6 Calc. 135 ; Khalil-ul-Rahman* v. *Gobind, I. L. R. 20 Calc. 328*, approved of. The liability of the sons in a Mitakshara family to discharge the father's debt is not limited, with regard to interest, by the provision of the Hindu law, which does not authorize the taking of interest exceeding the principal in amount, the provision being inapplicable to the mofussil where the amount of the father's debt must be determined with reference to the law of the land. *Deen Doyal Poramanick* v. *Koylas Chunder, I. L. R. 1 Calc. 92 ; Luchman Das* v. *Khunnu Lal, I. L. R. 19 All. 26*, referred to. PRAN KRISHNA TEWARY *v.* JADU NATH TRIVEDY

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120. ——————— *Mitakshara family—Liability of son to pay father's debt incurred during son's minority—Representative capacity of father—Antecedent debt—Mortgage—Suit for sale on mortgage by father without joining sons—Non-joinder of parties—Transfer of Property Act (IV of 1882), s. 85—Notice of interest in mortgaged property—Civil Procedure Code (Act XIV of 1882), ss. 28, 42.* In the case of a joint Mitakshara family consisting of a father and minor son where the father executed a mortgage-bond hypothecating ancestral family property during the minority of his son, and the mortgagee, with notice of the interest of the son in the mortgaged property, brought a suit against the father alone to enforce the mortgage, without making the son a party to the suit, and obtained a decree declaring that the mortgaged property was liable to be sold in execution thereof, and where the debt was not proved to have been incurred for illegal or immoral purposes :—*Held, per* GHOSE, *J.*—That the share of the son in the ancestral property was liable for the satisfaction of such decree notwithstanding the provisions of s. 85 of the Transfer of Property Act (IV of 1882), the father having incurred the debt in his representative capacity and as managing member of the family and the son having been substantially a party to the suit in which the said decree was passed through the representation of his father. S. 85 of the Transfer of Property Act lays down only a rule of procedure ; and the words " all person " in the section could have hardly been intended to include a Mitakshara son—much less a minor son—in a suit where the father is sued in his representative capacity. *Suraj Bansi Koer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88 ; Bissessur Lal Sahoo* v. *Maharajah Luchmissur Singh, L. R. 6 I. A. 233 : 5 C. L. R. 477 ; Nanomi Babuasin* v. *Modun Mohun, I. L. R. 13 Calc. 21 : L. R. 13 I. A. 1 : Doulat Ram* v. *Mehr Chand, I. L. R. 15 Calc. 70 : L. R. 14 I. A. 187 ; Pursid Narain Singh* v. *Honooman Sahai, I. L. R. 5 Calc. 845 ; Bhagbut Pershad* v. *Girja Koer, I. L. R. 15 Calc. 717 : L. R. 15 I. A. 99 ; Mohabir Prasad* v. *Maheswar Nath Sahai, I. L. R. 17 Calc. 584 : L. R. 17 I. A. 11 ; Jagabhai Lalubhai* v. *Vijbukan Das, I. L. R. 11 Bom. 37*, relied on. *Bhawani Prosad* v. *Kallu, I. L. R. 17 All. 537*, dissented from. *Syad Emam Momtazuddin Mahomed* v. *Raj Coomar Dass, 23 W. R. 187 ; Ramasamayyan* v. *Virasami Ayyar, I. L. R. 21 Mad. 222 ; Palani Goundan* v. *Rangayya Goundan, I. L. R. 22 Mad. 207*, referred to. *Semble* : (*a*) In the case of a joint Mitakshara family consisting of a father and minor sons, the father is " necessarily " the manager of the joint family, and as such, for all purposes, is the representative of the family. (*b*) And where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity. (*c*) And that if a son, after a decree being obtained against the father upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution thereof sues to recover possession of his share, he cannot succeed unless he proves that the debt was contracted for an immoral or illegal purpose, or that it was of an illusory character. *Per* HARINGTON, *J.*—That having regard to the provision of s. 85 of the Transfer of Property Act and those of ss. 28 and 42 of the Civil Procedure Code, the mortgagee was bound to make the plaintiff (the son) a party to the mortgage-suit, and that, not having done so, he was not entitled to obtain a decree affecting the plaintiff's interest in the mortgaged property. *Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537*, followed. *Rothschild v. Commissioners of Inland Revenue, L. R. 2 Q. B. 142 ; Ramasamayyan* v. *Virasami Ayyar, I. L. R. 2 Mad. 222 ; Palani Goundan* v. *Rangayya Goundan, I. L. R. 22 Mad. 207*, referred to. LALA SURJA PRASAD *v.* GOLAB CHAND

I. L. R. 27 Calc. 724
4 C. W. N. 701

121. ——————— *Mitakshara family —Alienation of ancestral property by father—Liability of sons for father's debts—Mortgage—Suit by mortgagee against son for sale of ancestral property—Antecedent debt—Legal necessity—Illegal or immoral purpose—Money-decree—Limitation Act (XV of 1877), Art. 116, Sch. II.* In the case of a joint Mitakshara family where the father raised money on a mortgage hypothecating certain ancestral family property, and it was not proved that the money was required for payment of any antecedent debt, or that the money was raised or expended for illegal or immoral purposes, or that any enquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred :—*Held*, that the mortgage security could not be enforced against the son (the father having died), unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question. Under the above circumstances, the mort-

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gage is not binding on the son, but the debt not being proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money-decree against the defendants, not upon the mortgage-security, but upon the simple obligation created by the bond, and a suit for such a relief must, under the Limitation Act, be instituted within six years from the due date of the mortgage-bond. *Lachman Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855,* and *Khalilul Rahman* v. *Gobind Persad, I. L. R. 29 Calc. 328,* replied upon. SURJA PROSAD *v.* GOLAB CHAND

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122. ——— *Mitakshara law —Ancestral property, alienation of—Suit by mortgagee against father and minor son for sale of ancestral property—Antecedent debt—Interest, rate of.* In the case of a Mitakshara family consisting of a father and minor sons, where the father hypothecates ancestral property, there being no proved necessity, but, on the other hand, no proof of immoral or illegal purposes, and no proof that the lender made any enquiry as to the purpose, the debt itself is an antecedent debt within the rulings of the Privy Council, and the mortgagee is entitled in a suit against father and sons to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. Debts incurred in transactions the character of which is no more than imprudent or unconscientiously imprudent or unreasonable, are debts to which a pious duty attaches under the Mitakshara law. *Luchmun Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855,* explained and followed. *Gunga Prosad* v. *Ajudhia Pershad Singh, I. L. R. 8 Calc. 131,* followed. *Semble :* That "antecedent debt" in meaning of the Full Bench means, with regard to the mortgage, "debt antecedent to the transaction, and in the case of a proceeding by suit, debt antecedent to the suit." *Kalachand Kyal* v. *Shib Chunder Roy, I. L. R. 19 Calc. 392,* and *Dip Narain Rai* v. *Dipan Rai, I. L. R. 8 All. 185,* applied as to the rate of interest. KHALILUL RAHMAN *v.* GOBIND PERSHAD . . . **I. L. R. 20 Calc. 328**

123. ——— *Execution of mortgage-decree against the estate of a deceased judgment-debtor, member of a joint family under Mitakshara law—Survivorship.* On an application for the execution of a mortgage-decree the following order was made : "In this case the sale was stayed awaiting the disposal of the regular suit. It being not necessary to keep the case pending, it is ordered that, attachment being allowed to stand, the case be struck off for the present." The judgment-debtor, the father of a joint Hindu family subject to the Mitakshara law, having died, a fresh application for execution was subsequently made against his estate. The heirs of the judgment-debtor objected to the application on the ground that, the decree having been passed against their father alone, it could not be executed against the joint family estate, now theirs by operation of Mitakshara law. *Held,* that, inasmuch as there was an attachment subsisting at the time of the application, the estate of the judgment-debtor under attachment at the time of his death was liable after his death, even though it had passed to the surviving members of the joint Mitakshara family. *Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88,* relied on. *Karnataka Hanumantha* v. *Andukuri Hanumyya, I. L. R. 5 Mad. 232,* distinguished. BENI PERSHAD *v.* PARBATI KOER . **I. L. R. 20 Calc. 598**

124. ——— *Conditional contract to sell family lands—Birth of vendor's son before fulfilment of condition—Vendor and purchaser—Sale while vendor is out of possession—Suit by son to set aside alienation.* A Hindu entered into a contract to sell certain land, being family property, of which he was not in possession, as soon as possession should be obtained. Before possession was obtained, a son was born to him. A decree for specific performance was passed and executed against him, the son not being brought on to the record. In a suit by the son for partition of the property in question.—*Held,* that the plaintiff had an existing right in the property which was not bound by the decree and the subsequent proceedings, and that he was entitled to the relief sought. *Semble :* That a contract for sale of land made by a Hindu before a son is born to him is not binding on the son born before the transfer of the property takes place. PONNAMBALA PILLAI *v.* SUNDARAPPAYYAR . **I. L. R. 20 Mad. 354**

125. ——— **Suit to set aside alienation**—*Cause of action—Limitation.* A son under the Mitakshara law, whatever right he may have during his father's lifetime, may, within twelve years from his father's death, sue to recover ancestral property improperly alienated by the father. PROTAPNARAIN SINGH *v.* MONOHUR DOSS

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126. ——— *Cause of action —Limitation Act (XIV of 1859), s. 1, cl. 12.—L's* father, a Hindu, living under the Mitakshara law, alienated in 1848 ancestral immoveable property by deed of absolute sale, and possession was taken by the alienee at the time. In 1863, *L,* who was born in 1837, sued on his own account and as guardian of his minor brother *R,* who was born in 1856, to set aside the sale. The father died in 1857. *Held,* that *L*'s cause of action accrued when possession was taken under the deed of sale, and not at the father's death. *R*'s birth did not create a new right of action in *L* either alone or jointly with *R.* The suit, therefore, was barred by lapse of time. Where the alienation was by deed of conditional sale, followed by decrees for foreclosure and possession to which *L* and *R* were not parties:—*Held,* that the cause of action accrued when possession was taken under the decree. RAJA RAM TEWARI *v.* LUCHMUN PRASAD

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BEER KISHORE SUHYE SINGH *v.* HUR BULLUB NARAIN SINGH . . . **7 W. R. 502**

127. ——— *Ancestral property—Cause of action.* According to the Mitakshara law, a son has a right, during the lifetime of his father, to set aside alienations of ancestral property made without his consent. His cause of action arises from the date when possession is taken by the purchaser. AGHORI RAMASARAG SINGH *v.* COCHRANE . . . **5 B. L. R. Ap. 14**

In such a case the cause of action arises at the date of the alienation. BEER PERSHAD *v.* DOORGA PERSHAD . . . . **W. R. 1864, 215**

SEETUL PERSHAD SINGH *v.* GOUR DYAL SINGH **1 W. R. 283**

128. ——— *Alienation by father without son's consent—Enquiry as to legal necessity by mortgagee.* A mortgagee acquiring by operation of law the possession of an estate mortgaged by a Hindu father without the son's consent is bound to enquire whether the debt on account of which the mortgage was given was a legally necessary one or not; otherwise it will not avail him that the Court has on his application declared the mortgage foreclosed, or the conditional sale rendered absolute. PURMANUND *v.* ORUMBAH KOER **W. R. 1864, 143**

129. ——— *Sale effected to pay ancestral debt—Obligation on purchaser to enquire whether it could have been paid from other sources.* Under Hindu law, where there is found to be an ancestral debt, and a sale is effected to pay it, the purchaser at such sale is not bound to enquire whether the debt could have been met from other sources. AJEY RAM *v.* GIRDHAREE **4 N. W. 110**

130. ——— *Obligation on purchaser to show necessity for sale—Onus probandi.* Where a son under the Mithila law sued to set aside sales by his father:—*Held*, that the purchasers were not bound to show an absolute necessity for the sales, it being sufficient if they have acted *bonâ fide* and with due caution, and were reasonably satisfied, at the time of their respective purchases, of the necessity of the sales in order to meet debts which the father had right to discharge. The *onus probandi* in such cases will vary according to the circumstances. BHOORUM KOER *v.* SAHEBMADEE . . . . **6 W. R. 149**

131. ——— *Onus probandi.* In a suit brought by a Hindu to contest an alienation of family property made by his father, the onus of proving that the alienation is binding on the son lies upon those who claim the benefit of the alienation. SUBRAMANYA *v.* SADASIVA **I. L. R. 8 Mad. 75**

132. ——— *Mitakshara law—Ancestral property—Refund of purchase-money.* Under the Mitakshara law, when a sale of ancestral property by the father has been set aside in a suit by the son on the ground that there was no such necessity as would legalize the sale, and that the son had not acquiesced in the alienation, the son is entitled to recover the property without refunding the purchase-money, unless such circumstances are proved by the purchaser as would give him an equitable right to compel a refund. MODHOO DYAL SINGH *v.* KOLBUR SINGH **B. L. R. Sup. Vol. 1018**

S.C. MODHOO DYAL SINGH *v.* KOLBUR SINGH **9 W. R. 511**

133. ——— *Mitakshara law—Legal necessity—Ancestral property—Refund of purchase-money.* *A*, a Hindu, subject to the Mitakshara law, sold his right and interest in the undivided ancestral estate of his family without the consent of his co-sharers, and not for the benefit of the estate, but in order to pay off a personal debt. The sale was by auction to an innocent purchaser for value. *Held*, that, in a suit brought within twelve years from the date on which the purchaser obtained possession, the sons and grandsons of *A*, deceased, were entitled to recover possession without making any refund of the purchase-money. NATHO LAL CHOWDRY *v.* CHADI SAHI **4 B. L. R. A. C. 15 : 12 W. R. 446**

134. ——— *Bonâ fide purchaser from vendee of father—Refund of purchase-money.* In a suit by some members of a joint family under Mitakshara law to set aside an alienation of some of the joint family property effected by their father, it appeared that ten years had elapsed since the alienation; and that about six years before the suit was brought, the purchaser from the father sold again to the principal defendants for valuable consideration, and there was no suggestion that these defendants did not purchase *bonâ fide*, the plaintiffs apparently acquiescing in the sale, and not interrupting during that time the enjoyment of the property by the father's vendee. The Court refused to set aside the alienation. The alienation would not have been set aside at any rate without a refund of the purchase-money to the defendants. SURUB NARAIN CHOWDRY *v.* SHEW GOBIND PANDEY . . **11 B. L. R. Ap. 28**

135. ——— **Rights of minor son**—*Letters Patent—Transfer of Property Act (IV of 1882), s. 85—Mitakshara—Mortgage—Karta—Decree—Statutes, interpretation of—Notice—Civil Procedure Code (Act XIV of 1882), ss.437, 575—Joinder of parties—Redemption.* In a joint Mitakshara family, consisting of a father and a minor son, the father, as *karta* of the family, by a mortgage bond hypothecated the joint property. The mortgagee sued the father alone, on the mortgage bond, without making the minor son a party, although he (the mortgagee) had notice of the son's interest in the mortgaged property at the time. The mortgage-debt was not found to have been contracted for illegal or immoral purposes. *Held*, [dissenting

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from the judgment of GHOSE, *J.*, and affirming that of HARINGTON, *J.*, in *Lala Surja Prosad* v. *Golab Chand, I. L. R. 27 Calc. 724*], that, the provisions of s. 85 of the Transfer of Property Act being compulsory, the minor son ought to have been made a party to the mortgage suit; and for the purposes of that suit he was not represented by his father, the mortgagor. *Held*, further, that, the issue whether the debt was incurred for illegal or immoral purposes, having been decided on its merits between the plaintiff and the defendant in the present suit adversely to the minor plaintiff, it must now be taken as between him (the plaintiff) and the mortgagee to have been finally determined; and, under the circumstances, the validity of the mortgage ought not to be allowed to be contested in another suit, the plaintiff being in the same position in which he would have been had he been made a party to the mortgage suit. The only right the minor plaintiff now had was the right of redemption. *Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537*, distinguished. *Ramasamayyan* v. *Virasami Ayyar, I. L. R. 21 Mad. 222; Palani Goundan* v. *Rangayya Goundan, I. L. R. 22 Mad. 207; Devji* v. *Sambhu, I. L. R. 24 Bom. 135*, referred to. LALA SURAJ PROSAD *v.* GOLAB CHAND (1901)

I. L. R. 28 Calc. 517
s. c. 5 C. W. N. 640

136.——————*Contract by father to sell ancestral property—Specific performance of such contract—Circumstances justifying sale—Debts of father—Burden of proof of justifying circumstances—Transfer of Property Act (IV of 1882), s. 34.* By a written agreement dated 9th March, 1900, the first and second defendants (a son and his mother) contracted to sell to the plaintiff certain land which was ancestral property. The plaintiff stated that he subsequently discovered that the first defendant had a minor son whom he made a defendant in the suit (defendant 3), and he sued all three defendants for specific performance of the agreement, contending that the minor's interest was bound, inasmuch as the property was sold in order to pay family debts. *Held*, that no decree could be made against the minor defendant (defendant 3). No doubt, in order to satisfy such of his debts as would be binding on his heirs, a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, but in this case there was no evidence of debts that justified the sale. It lies on him who seeks to bind the infant to prove justifying circumstances, and this the plaintiff had failed to do. The principle laid down by s. 34 of the Transfer of Property Act (IV of 1882) has no application where the transaction is still incomplete, for it presupposes an actual transfer for consideration. JAMSETJI N. TATA *v.* KASHINATH JIVAN MANGLIA (1901)

I. L. R. 26 Bom. 326

137. ——— **Rights of son**—*Mitakshara—Joint Hindu family—Mortgage by father—Suit for sale on mortgage, son not being made a party—Subsequent suit by son for declaration that his share is not liable under the mortgage decree against father—Further plea that mortgage-debt was contracted for immoral purpose—Transfer of Property Act (IV of 1882), s. 85.* The mortgagees to a mortgage of joint family property made by the father in a joint Hindu family, consisting of father and son, brought a suit for sale against the father, without making the son a party, and obtained a decree for sale of the entire property mortgaged. The son sued the mortgagees for a declaration that his share was not bound by the decree, first, because he was not made a party to the mortgagee's suit for sale, and, secondly, because the mortgage-debt was contracted by his father for immoral or impious purposes. It was found in that suit that the mortgagees had at least constructive notice of the son's existence, and ought to have made him a party to their suit for sale. But it was also found in the son's suit that the original mortgage-debt of the father was not contracted for immoral or impious purposes. *Held*, that, although the son might have been entitled to the decree sought by him, had he contented himself with raising the first plea only, yet, inasmuch as he himself had raised the issue of the immorality of the debt, which had been found against him, and as that was the only issue which could in any subsequent suit be raised as between himself and the mortgagees, he was not in the suit entitled to any decree save a decree for redemption if he should desire to redeem. *Lala Suraj Prosad* v. *Golab Chand (1901), I. L. R. 28 Calc. 517, at p. 131*, followed. *Held*, also, that the mere fact that the son had asserted his right to a moiety of the mortgaged property, and had brought the suit above referred to, did not work a partition of the property or create any separate title in the son. *Padarath Singh* v. *Raja Ram, (1882) I. L. R. 4 All. 235*, referred to. KANHAIA LAL *v.* RAJ BAHADUR (1898) . **I. L. R. 24 All. 211**

138.——————*Mitakshara family—Liability of son for father's debt—Alienation of family property by father—Mortgage—Antecedent debt—Suit by mortgagee against father and sons for sale of mortgaged property—Limitation—Limitation Act (XV of 1877), Art. 132, Sch. II.* Where a debt has been incurred by the *karta* of a Mitakshara family for family purposes and the property of the family has been alienated to defray the debt, the sons cannot set up their rights against the purchaser, unless they are able to prove that the money in respect of which the alienation was made, was borrowed for immoral purposes; there is no distinction between debts incurred to pay off antecedent debts and those incurred to meet present necessities. The principle is applicable to partial alienations, such as mortgages. In a joint Mitakshara family composed of father and sons, the former executed a mortgage bond receipt of a loan, which the sons failed to prove to have been taken for immoral purposes. *Held*, that the mortgage bond was binding on the sons and that the

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limitation applicable to a suit on the bond in respect of the sons as well as in respect of the father was that provided by Art. 132, Sch. II of the Limitation Act. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21 : L. R. 13 I. A. 1 ; Bhagbut Pershad Singh* v. *Girja Koer, I. L. R. 15 Calc. 717 : L. R. 15 I. A. 99,* referred to. *Luchmun Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855 ; Surja Prasad* v. *Golab Chand, I. L. R. 27 Calc. 762,* and *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu, I. L. R. 29 Mad. 200,* not followed. MAHESWAR DUTT TEWARI *v.* KISHUN SINGH (1907)
I. L. R. 34 Calc. 184

139. ———— *Mitakshara family—Alienation of family property by father—Liability of son for father's debt—Mortgage of joint-family property—Suit by mortgagee against father and son for sale of mortgaged property—Decree, form of.* In a joint Mitakshara family consisting of a father and his minor son, the father mortgaged property belonging to the joint family. It was not proved that there was any legal necessity for the loan or any inquiry by the lender, nor that the loan was contracted for illegal or immoral purposes. In a suit by the mortgagee against the father and the son to enforce the mortgage, commenced within six years from the due date fixed by the mortgage: *Held,* that the mortgagee was entitled to have the security enforced as against the share of the mortgagor and also to a decree which would enable him to realize the debt by the sale of the share of the son in the ancestral property. *Luchmun Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855 ; Khalilul Rahman* v. *Gobind Pershad, I. L. R. 20 Calc. 328,* followed. The decision in *Luchman Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855,* is binding on the Court. There is a distinction between the position of the son in a suit in which a mortgage by his father is sought to be enforced against his share in the property, and his position after the alienation has been completed by an execution sale. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21 : L. R. 13 I. A. 1 ; Bhagbut Pershad Singh* v. *Girja Koer, I. L. R. 15 Calc. 717 : L. R. 15 I. A. 99 ; Suraj Bunsi Koer* v. *Sheo Pershed Singh, I. L. R. 5 Calc. 148 ; L. R. 6 I. A. 88 ; Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187 : L. R. 1 I. A. 321 ; Jamna* v. *Nain Sukh, I. L. R. 9 All. 493,* referred to. *Maheswar Dutt Tewari* v. *Kishun Singh, I. L. R. 34 Calc. 184,* dissented from. KISHUN PERSHAD CHOWDHRY *v.* TIPAN PERSHAD SINGH (1907)
I. L. R. 34 Calc. 735

140. ———— *Mitakshara—Alienation—Right of son to contest validity of alienations of ancestral property made by father or grandfather prior to son's birth—Mortgage of ancestral property—Son's right of redemption.* Under the Mitakshara school of Hindu Law, a member of a joint family can contest the validity of the alienation by his father or grandfather only of such an interest in the ancestral property as existed at his birth and vested in him by his birth. Where there is a complete transfer of property by mortgage by the father or grandfather prior to the birth of such member, the only interest that may vest on birth is the equity of redemption. BHOLANATH KHETTRY *v.* KARTICK KISSHEN DASS KHETTRY (1907)
I. L. R. 34 Calc. 372

141. ———— **Self-acquired property—** *Bequest of self-acquired property by a testator to his sons—Intention expressed by will that property should be taken in severalty, but its terms otherwise consistent with ordinary rules of inheritance—Birth of grandson and subsequent alienations by gift—Validity of alienations—Property having quality of ancestral property though taken under the will—Intention—Presumption in favour of ancestral nature of estate.* A Hindu father possessed of self-acquired property may deal with that property as he pleases, either by gift or by testamentary disposition ; and his sons cannot dispute the disposition, even though it be in favour of a stranger. Any of the observations made in *Tara Chand* v. *Reeb Ram (3 M. H. C. R. 50)* which conflict with this proposition cannot now be regarded as good law. A father may leave his self-acquired property to descend to his sons as ancestral property, or, if he makes any disposition of it in favour of a son, he is at liberty to preserve for it the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral or as self-acquired property is a question of intention, turning on the construction of the instrument of gift. If there are no words indicating the contrary intention, the natural inference should be that the father intended the sons to take his property as their ancestral estate. If partition is made by the father on the footing that the property is partible property, although there is in point of law a disposition made by the father, the intention of the father will be taken to be that the quality of the ancestral property shall remain. Plaintiff's father made voluntary gifts of certain property to the defendant after the date of plaintiff's birth. Plaintiff now sued to set these alienations aside, and to recover the property, one ground being that the property alienated was ancestral property in the hands of his father, in which plaintiff had acquired an interest by birth, and that his father had, in consequence, no power to make the alienations. The whole of the property in question had been self-acquired, originally, by plaintiff's paternal grandfather, who had disposed of it by will to his three sons, of whom plaintiff's father was one. Plaintiff, however, contended that, notwithstanding this fact, the property had the quality of ancestral property in his father's hands. From the terms of the will it appeared that the testator intended his sons to take the property in severalty, but in other respects the dispositions contained in the will were consistent with the ordinary rules of inheritance under the Hindu law. There were no

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words in the will indicating any intention that the sons should hold their shares free from the incidents of ancestral property. *Held*, that plaintiff was entitled to recover. NAGALINGAM PILLAI *v.* RAMACHANDRA TEVAR (1901)
I. L. R. 24 Mad. 429

142. ———— *Alienation by father—Ancestral and self-acquired property—Onus of proof—Suit to set aside alienation as being made without legal necessity—Conjecture and positive proof.* In a suit to set aside a deed of sale of immoveable property executed by the plaintiff's father, who had succeeded to it (*inter alia*) as the next reversionary heir on the death of the widow of the last male owner, the plaintiff alleged that the land sold was ancestral property, and that the alienation had been made without legal necessity and was therefore void. The evidence showed that the last male owner had acquired some lands in the district by purchase and others on abandonment by collateral relatives, but there was no evidence defining the boundaries of these portions respectively, that being merely a matter of conjecture. *Held*, that the onus was on the plaintiff to show that the property alienated was not self-acquired in the hands of the last male owner; and that in seeking to discharge such onus he could not, under the circumstances, be assisted by conjectures, however reasonable in place of positive proof. ATAR SINGH *v.* THAKAR SINGH (1908)
I. L. R. 35 Calc. 1039
s.c. L. R. 35 I. A. 206
12 C. W. N. 104

5. ALIENATION BY MOTHER.

1. ———— **Mortgage by a married woman of property inherited from her father**—*Legal necessity—Expenses of daughter's marriage.* Ordinarily it is the duty of the father in a Hindu family to provide for his daughter's marriage, but whether the father was not possessed of sufficient means to do so, and the mother, to raise money to meet the expenses of the daughter's marriage, mortgaged property of her own which had come to her from her father: *Held*, that the mortgage was made for legal necessity, and was a valid mortgage . RUSTAM SINGH *v.* MOTI SINGH
I. L. R. 18 All. 474

2. ———— **Woman's estate**—*Power of alienation—Gift of land on daughter's marriage.* A Hindu, in whom the whole of the family property had vested, died without issue and his mother took the estate. She subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with her daughter. The gift was not found to be otherwise than reasonable in extent. *Held*, that the gift was binding on the reversioner. RAMASAMI AYYAR *v.* VENGIDUSAMI AYYAR
I. L. R. 22 Mad. 113

HINDU LAW—ALIENATION—*contd.*

5. ALIENATION BY MOTHER—*concld.*

3. ———— **Minor's estate**—*Guardian—Adopted son—Sale by adoptive mother—Suit by son to set aside sale—Purchase money paid by vendee to mother not recoverable from the son.* A Hindu mother, while her adopted son was a minor and had a guardian of property appointed to him by the Court, alienated some of the minor's property, treating it as her own. The adopted son, on attaining his majority, sued to set aside the sale. *Held*, that the mother had no power to alienate the property, and that the sale should be set aside. *Held*, also, that, although the purchase money had been applied by the mother in payment of debts for which the plaintiff was liable, and the plaintiff had thereby benefited, yet the defendant was not entitled to recover the purchase money from the plaintiff. The debts had been paid, not as the plaintiff's debts, but as the debts of the mother, who claimed adversely to her son. NATHU PIRAJI MARWADI *v.* BALWANTRAO BIN YESHWANTRAO (1903) . . **I. L. R. 27 Bom. 390**

6. ALIENATION BY DAUGHTER.

———— **Legal necessity**—*Alienation—Hindu daughter's right to alienate property—Onus of proof—Sradh ceremony—Government revenue—Succession Certificate, costs of—Property sold for arrears of Road-cess, recovery of.* A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband which was in involved circumstances. The daughter executed a *kobala* and a mortgage of the properties, and out of the moneys thereby obtained she paid for the *sradh* ceremony of her mother, the Government revenue, the costs of a succession certificate and a rent-decree. She also executed another mortgage and used the money obtained to recover the property sold for arrears of road-cess. In a suit brought by the reversionary heir after the death of the life-tenant to set aside the *kobala* and the mortgages as having been made by the life-tenant in excess of her power of alienation :—*Held*, that it was for the defendant to show that these alienations had been made for legal necessity. *Held*, further, that the expenses of the *sradh* ceremony, the payment of the Government revenue, the costs of the succession certificate and the payment of the rent decree were made for legal necessity; but that the payment of money to recover the property sold for arrears of road-cess was not so made. *Raj Chandra Deb Biswas* v. *Sheeshoo Ram Deb, 7 W. R. 146, Shekaat Hosain* v. *Sasi Kar, I. L. R. 19 Calc. 783, Mahanund Chuckerbutty* v. *Banimadhub Chatterjee, I. L. R. 24 Calc. 27. Rupram Namasudra* v. *Iswar Namasudra, 6 C. W. N. 302*, approved. *Braja Lal Sen* v. *Jiban Krishna Roy, I. L. R. 26 Calc. 285*, distinguished. SRIMOHAN JHA *v.* BRIJBEHARY MISSER (1909) . . . . **I. L. R. 36 Calc. 753**

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW.

See HINDU LAW—

STRIDHAN—DESCRIPTION AND DEVOLUTION OF STRIDHAN.
I. L. R. 25 All. 476

WILL—CONSTRUCTION OF WILLS.
I. L. R. 28 Calc. 499

WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION.

(*a*) ALIENATION OF INCOME AND ACCUMULATIONS.

1. ——— **Alienation of income**—*Accumulations.* A Hindu widow can alienate the income of the husband's property, it forming no part of his estate; but income and accumulations are not the same thing; therefore, *quære* whether she can so deal with accumulations. *In the goods of* HARENDRANARAYAN. KAILASNATH GHOSE *v.* BISWANATH BISWAS . **4 B. L. R. O. C. 41**

2. ——— **Accumulations**—*Purchase of property out of income for maintenance of family—Reversioners.* A Hindu widow cannot alienate moveable or immoveable properties acquired by her out of the funds derived from the income of her husband's estate. Such properties descend to the heirs of the husband, and not of the widow. Where, however, a widow held under a deed which conveyed the property to her to enjoy for her lifetime and to incur all needful expenses:—*Held,* that she was entitled to invest sums out of the income for the benefit of her daughter and granddaughter in the purchase of immoveable property for their maintenance. CHOWDRY BHOLANATH THAKOOR *v.* BHAGABUTTI DEBI. BHAGABUTTI DEBI *v.* CHOWDRY BHOLANATH THAKOOR
7 B. L. R. 93: 15 W. R. 63

Reversed on the merits by the Privy Council
I. L. R. 1 Calc. 104

3. ——— *Accumulations.* It being doubtful whether the purchase of the land in dispute by the plaintiff's mother was made out of the current income (in which case it is her self-acquired property) or out of accumulations of her husband's estate:—*Held* (broadly following the principle laid down in *Soorjeemonee Dassee* v. *Denobundo Mullick, 9 Moo. I. A. 123*), that the purchase being made with moneys derived from the income of her husband's estate then lying in her hands, she was competent to alienate her right and interest in whole or in part to reconvert them into money and spend it if she choose. *Grose* v. *Amritamayi, 4 B. L. R. O. C. 1,* explained and reconciled; and *Gonda Kooer* v. *Oodey Singh, 14 B. L. R. 159,* distinguished. PUDDO MONEE DOSSEE *v.* DWARKANATH BISWAS
25 W. R. 335

4. ——— **Alienation of property purchased with funds derived from husband's estate.** A widow is not competent to alienate property which she has purchased with funds derived from her husband's estate after his death, and purchases with such funds would not belong to the widow otherwise than as the land from which the money arose belonged to her. NEHAL KHAN *v.* HURCHURN LALL . . **1 Agra 219**

HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*a*) ALIENATION OF INCOME AND ACCUMULATIONS—*contd.*

5. ——— **Alienation of house erected by widow out of savings of land inherited from husband.** A Hindu widow has no power to sell a house erected by her out of savings of her income on land inherited from her husband. FAKIRA DOBEY *v.* GOPI LALL . . **6 C. L. R. 66**

6. ——— **Alienation of property purchased with accumulations derived from husband's estate** — *Income—Accumulations. Quære:* Whether a Hindu widow has power to alienate, beyond her own life-interest, property which she has purchased from accumulations of income derived from her late husband's estate, made after his death, and while she was entitled to a Hindu widow's interest in such estate? HUNSBUTTI KOERAIN *v.* ISHRI DUT KOER
I. L. R. 5 Calc. 512: 4 C. L. R. 511

In the same case in the Privy Council it was held that a widow's savings from the income of her limited estate are not her stridhan; and if she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. But it is not always possible to fix the line which separates accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. Where, however, both the family property and property purchased by the widow out of savings from her income were alienated by her, with the object of changing the succession:—*Held,* that accretion was clearly established, and that the after-purchases were inalienable by her for any purpose that would not justify alienation of the original estate. A daughter, obtaining a transfer from her deceased father's widows of their interests in his estate, does not acquire thereby an estate valid against the title of the father's collateral heirs expectant on the deaths of the widows. ISRI DUTT KOER *v.* HANSBUTTI KOERAIN
I. L. R. 10 Calc. 324: 13 C. L. R. 418
L. R. 10 I. A. 150

7. ——— **Widow's power over land purchased out of income of husband's estate.** *Descent of lands purchased by widow out of income of life-estate.* Land purchased by a Hindu widow with money derived from the income of her life-estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control. ANUND CHUNDRA MUNDUL *v.* NILMONY JOURDAR
I. L. R. 9 Calc. 758: 12 C. L. R. 352

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*a*) ALIENATION OF INCOME AND ACCUMULATIONS—*—contd.*

8. ——— *Inheritance to property purchased by Hindu widow out of the income of her estate.* When a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. The authority upon this matter is found in *Isridut Koer* v. *Hansbutti Koerain, I. L. R. 10 Calc. 324 : L. R. 10 I. A. 150,* where a widow having made no distinction between the original estate and the after-purchases, the latter were held inalienable by her for any purpose not justifying alienation of the former. SHEOLOCHUN SINGH *v.* SAHEB SINGH **I. L. R. 14 Calc. 387 L. R. 14 I. A. 63**

9. ——— **Accumulations by Hindu widow**—*Accumulations—Period up to which they may be dealt with—Legacy to Hindu widow.* The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that she may receive them in a lump sum ; but whether she receives them as they fall due or after they have accumulated in the hands of others, her right is the same. The question to be sought for in determining her right to deal with such income and accumulations of income is one of intention. If she has invested her savings in such a manner as to show an intention to augment her husband's estate, she cannot afterwards deal with such investments, except for reasons which would justify her dealing with the original estate ; but if she has evinced no such intention, she can, at any time during her life, deal with the profits. Where she invests her income, making a distinction between the investments and the original estate, she can at any time thereafter deal with such investment, save in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the original estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. GIRISH CHUNDER ROY *v.* BROUGHTON **I. L. R. 14 Calc. 861**

10. ——— **Hindu widow's estate**—*Her right to dispose of accumulated income not made part of the inheritance—Intention of the widow in regard to it.* The executor of the will of a Hindu testator made over to the widow of the latter an aggregate sum consisting of accumulations of income accrued during eight years from her husband's death undisposed of by his will. The money was not received by her as a capitalized part of the inheritance, but as income that had been accumulated during her tenure of her widow's estate. The widow did not act showing an intention on her part to make this sum of money, the greater part of which she invested in Government securities, part of the family inheritance for the benefit of the heirs. After the lapse of about twenty years, she disposed of it as her own. *Held,* that the money so invested by the widow belonged to her as income derived from her widow's estate, and was subject to her disposition. SAODAMINI DASI *v.* ADMINISTRATOR-GENERAL OF BENGAL . **I. L. R. 20 Calc. 433 L. R. 20 I. A. 12**

(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS OR REVERSIONERS.

11. ——— **General power of widow to alienate**—*Status of widow as distinguished from that of manager—Liabilities of alienes.* A widow stands in a different position from that of a manager of a joint family. The latter can act only with the consent, express or implied, of the body of co-parceners. In the widow's case, the co-parceners are reduced to herself, and the estate centres in her. She can therefore do what the body of co-parceners can do, subject always to the condition that she acts fairly to the expectant heirs. The rights of these heirs impose, on persons dealing with a widow, the obligation of special circumspection, failing which they may find their securities against the estate to be of no avail after the widow's death. CHIMNAJI GOVIND GODBOLE *v.* DINKAR DHONDEV GODBOLE . . **I. L. R. 11 Bom. 320**

12. ——— **Legal necessity**—*Necessity, evidence of.* A sale by a Hindu widow of land inherited by her from her husband is valid only when made of necessity and for certain purposes ; but on this point, where the plaintiff in a suit to set aside such a sale has relied in the Court below solely on the ground that the land had been devised inconsistently with the exercise of the widow's power of sale, the Appellate Court will be satisfied with evidence less complete and positive than would otherwise have been required. RANGASVAMI AYYANGAR *v.* VANJULATAUMAL . . . **1 Mad. 28**

13. ——— *Suit by reversioner—Cause of action.* *A*, a Hindu widow, obtained a loan of a sum of money by mortgage of a certain parcel of property belonging to her husband. The mortgagee obtained a decree, and in execution thereof caused the property to be sold. In a suit by *A*'s daughter's son, the next reversionary heir, for a declaration that the sale was invalid as against him, the lower Appellate Court held that there was no

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cause of action. *Held*, in special appeal, that the existence of a cause of action depended upon whether the widow incurred the debt under legal necessity; and the case was remanded for trial of that question. BISTOBEHARI SAHOY *v.* LALA BAIJNATH PRASAD

7 B. L. R. 213 : 16 W. R. 49

14. ——— Alienation of ancestral property—*Jain law.* The alienation by gift by the widow of a Bindala Jain of her husband's ancestral property is invalid according to the Mitakshara, which is the ordinary law governing Bindala Jains in the absence of custom to the contrary. BACHEBI *v.* MAKHAN LAL . **I. L. R. 3 All. 55**

15. ——— *Alienation without necessity.* A conveyance of ancestral property by a Hindu widow without proof of necessity can only operate as a conveyance of her life-interest. The purchase of a kismut sold for Government revenue does not destroy the pre-existing rights of the holders of the tenure. Reversioners are as much entitled to have a sale of their share in such a kismut set aside as a sale of any other property by the widow without necessity. TARINEE CHURN BANERJEE *v.* NUND COOMER BANERJEE

1 W. R. 47

16. ——— Alienation of moveable property—*Widow's estate.* The restriction placed by the Hindu law on a widow's power of alienation of her husband's estate extends to moveable as well as immoveable property. NARASIMAH *v.* VENKATADRI . . . **I. L. R. 8 Mad. 290**

17. ——— A Hindu widow is not at liberty to defeat the rights of reversioners by alienating or wasting moveable property inherited from her husband. BUCHI RAMAYYA *v.* JAGAPATIH . . **I. L. R. 8 Mad. 304**

18. ——— Lease granted by widow—*Duration of, for widow's life.* A lease granted by a childless Hindu widow is valid and enures for the life of the widow. MOHUN KOOWUR *v.* ZORRAMUN SINGH . . . **Marsh. 166 : 1 Hay 372**

19. ——— Alienation of husband's property—*Validity of conveyance for life of widow.* Alienation by a Hindu widow of property inherited from her deceased husband is valid for the period of her own life, though the conveyance may purport to convey a greater interest. MELGIRAPPA BIN SOLBAPPA TELI *v.* SHIVAPPA BIN ERAPPA

6 Bom. A. C. 270

RAMGUTTY KURMOKAR *v.* BOISTUB CHURN MOZOOMDAR . . . . . **7 W. R. 167**

20 ——— Alienation of husband's immoveable property—*Power to make absolute alienation.* A purchaser of immoveable property from a Hindu widow, in order to show that the property is absolutely conveyed to him, ought to aver and prove that she sold it under such special circumstances as justify a Hindu widow in alienating the immoveable property of her husband without the consent of his heirs. Even if her husband were separate in estate from his father and brothers at the time of his death and died without male issue, his widow would have no power to make an absolute alienation of his estate in the absence of such special circumstances. She can only dispose of her (widow's) estate in his immoveable property, which estate determines either upon her death or remarriage, and the purchaser is not entitled to retain the property after the occurrence of either of these events. The plaintiff sued to recover possession of certain immoveable property sold to him by the first defendant, a Hindu widow. The second defendant answered that his father and the first defendant's husband were undivided brothers, and that, as a childless widow, she had no right to sell the property. Both the lower Courts upheld the sale as absolute on the ground that she was competent to make it as widow of a separate Hindu. The High Court, on second appeal, held that the decrees of the lower Courts were unsustainable, as they did not contain the limitation pointed out above, and remanded the case for the trial of the issue, whether there were any such special circumstances as would justify the absolute sale by the first defendant to the plaintiff. GURUNATH NILKANTH *v.* KRISHNAJI

I. L. R. 4 Bom. 462

21. ——— Mortgage. A Hindu, governed by the Mitakshara school of law, died on the 12th May 1867, leaving him surviving a widow *B* and a brother *R*, who was admittedly the next reversioner. In July 1867, *B* purported to adopt a son *D* to *A*, and subsequently in September 1867 obtained a certificate under Act XL of 1858. In 1872 *B* obtained a loan from the plaintiff *M* of R9,000, and to secure its repayment executed a mortgage of seven mouzahs in favour of *M* as guardian of *D*. The money was advanced and mortgage executed at the instigation of *R* and with his consent, and upon his representation that *D* was the duly adopted son of *A*, and it was admitted that the money was specifically advanced for, as well as applied towards, the payment of decrees obtained against *A* in his lifetime and against his estate after his death. *B* died in 1878. On the 14th August 1880, *M* instituted a suit against *D* upon his mortgage, and in that suit he made *S* a party defendant as being the purchaser of the mortgagor's interest in one of the mouzahs included in his mortgage. On the 26th June 1882, *M* obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged

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mouzahs. In the proceedings taken in execution of that decree *M* was opposed by *L*, who was afterwards held to be a benamidar for *S*, who claimed that he had, on the 8th November 1880, purchased five out of the seven mouzahs at a sale in execution of certain decrees against *R*. On the 29th February 1884 *L*'s claim was allowed, and on the 11th August 1884 *M* brought this suit against *L*, *S*, *R*, and *D*, and the decree-holders in the suits against *R*, for a declaration of his right to follow the mortgaged property in the hands of *S*. It was found as a fact that the adoption of *D* was invalid; that the advance by *M* to *B* was justified by legal necessity; and that *L* was the benamidar of *S*. It also appeared that *M* had himself become the purchaser of one of the mortgaged mouzahs. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgage-money from the five mouzahs in the hands of *S*. *L* and *S* appealed, and *M* filed a cross-appeal, alleging the adoption to be valid and binding on *S*. It was contended that *S*, as the representative of *R*, was estopped from denying the validity of *D*'s adoption, and thus having been a party to *M*'s first suit, the question as to the liability of the mouzahs to satisfy the mortgage-lien was *res judicata* as against him. It was also contended that the five mouzahs should not be saddled with the whole of the mortgage-debt, but that the mouzah in the hands of *M* should bear its proportionate part thereof. *Held*, that, though *B* purported to execute the mortgage as guardian for *D*, though *D* was not the adopted son of *A*, the substance of the transaction and not the form had to be looked at, and as *B* had full power to alienate for legal necessity, the mortgage was still binding on the estate of *A*; and, further, that, even if there had been no legal necessity, having regard to the fact that it was made with the consent of *R*, the next reversioner, it equally created a valid charge upon the property, but that the mouzah in the hands of *M* must bear its share of the mortgage-debt, and that the decree of the lower Court was wrong in declaring that the five mouzahs in suit were to bear the whole amount of the debt. LALA PARBHU LAL *v.* MYLNE **I. L. R. 14 Calc. 401**

22. ——— Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption—*Widow, alienation by—Alienee from widow bound to inquire if legal necessity for alienation—Evidence. Onus of proving necessity for alienation by the widow.* The plaintiff claimed, as the adopted son of one *K*, to recover possession of his adoptive father's property which had been mortgaged by his (*K*'s) widow *R* (defendant No. 1) to the third defendant *B* prior to the plaintiff's adoption by her. The property had come into *R*'s possession

incumbered with a mortgage effected by her husband, and, in order to redeem that mortgage, she mortgaged the property again to one *Y*. She subsequently paid off *Y*'s debt, amounting to R3,629, and in 1876 she mortgaged the property for R5,999 to *B*, who was put into possession. In 1881 she adopted the plaintiff, and in 1882 the plaintiff brought this suit to recover the property. He contended that *R* had no power to alienate or mortgage the ancestral immoveable property of her deceased husband, and he claimed, as the adopted son of *K*, to be entitled to the property free from the mortgages or other incumbrances with which *R* had attempted to charge it. For the defendants it was contended, *inter alia*, that the plaintiff could not impeach transactions effected by his adoptive mother prior to his adoption. *Held*, that the plaintiff, as the adopted son of *K*, had a right to impeach the unauthorised transactions of his adoptive mother *R*, who possessed only a widow's restricted power of alienation. The plaintiff was adopted by *R* to her husband, who was the last owner of the ancestral property. The plaintiff at once succeeded to that property upon his adoption, and as heir of his adoptive father was entitled to object to any alienation made by *R*, on the principle that the restrictions upon a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. *Held*, also, that the plaintiff was entitled to redeem the property on payment of such amount only as was raised by *R* for the purpose of meeting expenses necessarily incurred by her. *Held*, further, that the onus of proving the necessity for alienation lay upon *B*. The Court found that there was no evidence that any sum beyond R3,629, the amount of *Y*'s mortgage, was really required by *R*, and accordingly directed that the mortgage account should be taken between the plaintiff and *B* on the footing that the principal of the mortgage-debt was R3,629 only instead of R5,999. LAKSHMAN BHAU KHOPKAR *v.* RADHABAI . . **I. L. R. 11 Bom. 609**

23. ——— Responsibility of lender—*Power of Hindu widow to alienate—Qualified title to alienate in contracting debt by manager of estate charging it in the hands of heir—Rate of interest, as regards necessity, distinguishable.* A suit was brought by a creditor who had advanced money for the payment of Government revenue upon an estate under the management of a Hindu widow. The plaintiff's agent had received rents to a certain amount from part of the estate. *Held*, that the plaintiff ought to have taken care that this sum was applied in part reduction of the debt to him, and that it must be deducted from the amount chargeable to the estate in the hands of the

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HINDU LAW—ALIENATION—*contd.*

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(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS OR REVERSIONERS—*contd.*

reversionary heir. *Hunooman Pershad Panday* v. *Munraj Koonweree, 6 Moo. I. A. 393,* followed. The widow was borrowing in a case where it was for the plaintiff to see whether there was actually a ground of necessity for the loan. Though the loan was necessary for her, to borrow at the high rate of interest charged, considering the security which she gave, was not necessary. The rate of interest had therefore been rightly reduced to twelve per cent. HURRO NATH RAI CHOWDHRI *v.* RANDHIR SINGH

I. L. R. 18 Calc. 311
L. R. 18 I. A. 1

24. ——— *Burden of proving necessity where a Hindu widow attempts to alienate property held by her for her widow's estate.* In order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity for the alienation or at least that the grantee was led on reasonable ground to believe that there was. In a suit upon a mortgage of such property executed under the authority of a widow borrowing money, the point whether the loan was necessary was expressed in the issues in the form of a question how far the defendants' objections, grounded on the absence of necessity, were tenable. This was obviously an incorrect mode of trying the suit, because it assumed that it was for the defendants to show absence of necessity, and did not accord with the obligation upon a mortgagee, claiming under a widow, to prove a valid mortgage. It was sufficient to defeat the suit that upon the whole case there had been no proof of the lenders having fulfilled the legal obligation to inquire and satisfy himself that the widow, from whom he was taking a charge upon her husband's inheritance, had a proper justification for so charging it. *Hanooman Persaud* v. *Munraj Koonweree, 6 Moo. I. A. 393,* referred to. AMARNATH SAH *v.* ACHAN KUAR

I. L. R. 14 All. 420

S.C. LALA AMARNATH SAH *v.* ACHAN KUAR

L. R. 19 I. A. 196

25. ——— **Religious and charitable purposes**—*Power of a Hindu widow to dispose of property for religious and charitable purposes—Suit by reversioners to set aside alienation.* A Hindu widow inheriting the estate of her deceased husband, *A*, executed a deed of endowment in favour of the pujari of a thakurbari (temple) established by her deceased husband's mother. In a suit brought by the reversionary heirs of her deceased husband after the death of the widow to set aside the alienation :—*Held,* that, inasmuch as the idol was established by the mother of the deceased *K* and he had made no provision for its maintenance, and the dedication

HINDU LAW—ALIENATION—*contd.*

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was *primâ facie* one for the widow's own spiritual welfare, not for that of her deceased husband *K*, and because the property alienated was of considerable value, the alienation was not valid against the reversioners either on the ground of religious necessity, or that, being for a pious purpose, the property alienated represented only a small portion of the state inherited by the widow. *Collector of Masulipatam* v. *Cavaly Vencata Narainapah, 8 Moo. I. A. 500; Lakshmna Narayana* v. *Dasu, I. L. R. 11 Mad. 288; Puran Dai* v. *Jai Narain, I. L. R. 4 All. 482,* and *Rama* v. *Ranga, I. L. R. 8 Mad. 552,* referred to. RAM KAWAL SINGH *v.* RAM KISHORE DAS. RAM KISORE DAS *v.* RAM KAWAL SINGH

I. L. R. 22 Calc. 506

26. ——— **Mortgage**—*Mortgage of zamindari lands by zamindar's widow to secure her husband's debts—Appropriation of the assets of deceased towards payment of his debts.* In a suit on a mortgage of lands forming part of zamindari, it appeared that the zamindar died without issue, being indebted to the plaintiff, and that his widow subsequently borrowed money from the plaintiff for her own purposes, including litigation successfully prosecuted by her to make good her claim to the estate. The widow, being pressed for payment, executed the mortgage sued on, and afterwards paid to the plaintiff two sums, being the proceeds of the sale for her husband's jewels and of the execution of a decree in his favour realized after his death. These sums were appropriated to the payment of the widow's debt by the mortgagee, who, after her death, brought the present suit against the deceased zamindar's mother then come into possession of the estate, his undivided half-brothers being joined also as defendants. *Held,* (i) that the widow was entitled to mortgage the estate for the payment of her husband's debts, and was not bound to discharge them out of income ; (ii) that the two payments by the widow of money belonging to the estate of the deceased zamindar should have been applied in liquidation of the husband's debts. *Hurro Nath Rai Chowdhry* v. *Randhir Singh, I. L. R. 18 Calc. 311 : L. R. 18. I. A. 1,* referred to. RAMASAMI CHETTI *v.* MANGAIKARASU NACHIAR . **I. L. R. 18 Mad. 113**

27. ——— **Debt**—*Debt incurred by a Hindu widow for legal necessity, but without any charge on the ancestral property in the hands of the widow—Liability of ancestral property in the hands of the reversioners.* The creditors of a Hindu widow cannot, after her death, have recourse to ancestral property in the hands of the reversioners, in respect of which property the widow had enjoyed only a widow's life-estate, even though the debt sued upon was incurred for legal necessity, and was one in respect of which such property

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HINDU LAW—ALIENATION—*contd.*

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(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS OR REVERSIONERS—*contd.*

might have been made liable beyond the widow's lifetime, if in fact no instrument charging the property beyond the widow's lifetime has been executed by the widow. *Shiamanand* v. *Har Lal, I. L. R. 18 All. 471; Ramasami Mudaliar* v. *Sellattammat, I. L. R. 4 Mad. 375,* referred to. *Ramcoomur Mitter* v. *Ichamoyi Dasi, I. L. R. 6 Calc. 36,* dissented from. DHIRAJ SINGH *v.* MANGA RAM . . **I. L. R. 19 All. 300**

28. ——— Estate of Hindu widow or daughter—*Powers to alienate family estate—Ancestral family trade—Powers of manager.* The estate of a Hindu family in which, after the death of the father and his widow, a daughter held an interest for life, comprised a family trade carried on by a manager on her account. *Held,* that the restriction upon her power to alienate remained the same, notwithstanding the trade, without being relaxed on that account. Justifying necessity or good grounds, after due inquiry, for belief in its existence would have been required to render valid an alienation made by her of the family estate. The case of a widow or of a daughter, under such circumstances, differs from that of the manager or head of an undivided family who manages an ancestral trade, and has a certain power to pledge for the requirements of the business. The validity of his charge, however, on the family estate where there is a minority or non-consent among the members of the family depends on proof that the charge was necessary or was believed to be so by the mortgagee after due inquiry. The manager appointed by the daughter, on whom the family estate has devolved, has no larger power to pledge the ancestral assets than his principal. It is not incumbent on the defendant who relies on the absence of legal necessity for the borrowing by a woman holding her limited estate to plead or to prove such absence; but it is for the plaintiff to state and to prove all that will give validity to the charge. *Amarnath Sah* v. *Achhan Kunwar, I. L. R. 14 All. 426; L. R. 19 I. A. 196,* referred to and followed. SHAM SUNDAR LAL *v.* ACHHAN KUNWAR . . . **I. L. R. 21 All. 71**
L. R. 25 I. A. 183
2 C. W. N. 729

Upholding decision of High Court in ACHHAN KUAR *v.* THAKUR DAS . **I. L. R. 17 All. 125**

29. ——— Power of alienation under will—*Mortgage taken from Hindu widow—Unpaid interest claimed on her deceased husband's mortgages—Will, construction of.* A pardanashin widow executed a mortgage of part of the family estate to secure payment of the balance of interest alleged to be due on three previous mortgages which had been executed by her husband in his lifetime. Justifying necessity for her to encumber was not shown, nor enquiry by the mortgagee as to her authority. Even if the transaction had been properly explained to her, as a Hindu widow she would have exceeded her powers. By his will her husband had declared that his widow should have full powers, but that during the life of his minor son she should not have power to transfer without legal necessity; and that she should have power to mortgage to pay revenue and other debts. *Held,* that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law; and that, under the circumstances, the mortgage executed by her was invalid. Notes promising to pay interest, additional to that contracted for in the mortgages had been signed by the husband which it was held could not effect the right to redeem, being unregistered. TIKA RAM *v.* DEPUTY COMMISSIONER OF BARA BANKI . . . **I. L. R. 26 Calc. 707**
L. R. 26 I. A. 97
3 C. W. N. 573

30. ——— Gift by Hindu widow after mortgage—*Equity of redemption, alienation of.* Where a Hindu widow mortgaged immoveable property to one person and afterwards gave it in gift to another:—*Held,* that the deed of gift did not convey to the donee the widow's equity of redemption. JAGANNATH VITHAL *v.* APAJI VISHNU
5 Bom. A. C. 217

31. ——— Alienation by widow as administratix of husband—*Presumption of validity.* Where a sale of landed property was made by a Hindu widow as administratrix to the estate of her deceased husband:—*Held,* that she had power to dispose of the land for any purpose for which as administratrix she might properly do so. *Held,* also, that an improper disposal of the property was not to be presumed against the purchaser from her, but that the sale must be taken to be proper and valid, unless it appeared that to the purchaser's knowledge she was for an unlawful purpose converting the estate. *Held,* also, that, she having the right to sell as administratrix, it could not be presumed that she sold as a widow. LOGANADA MUDDALI *v.* RAMASVAMI . . . . **1 Mad. 384**

32. ——— Grounds supporting charge on inheritance by a widow for her debt—*Obligation of purchaser to show nature of transaction—Necessity.* In transactions such as the alienation by the widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate is bound at least to show the nature of the transaction, and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognized necessities.

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS OR REVERSIONERS—*contd.*

The principle is that the lender, although he is not bound to see to the application of the money, and does not loose his rights if, upon *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. This principle laid down in *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree, 6 Moo. I. A. 392,* in regard to the manager for an infant has been applied also to alienations by a widow of her estate of inheritance and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law, has made an alienation of ancestral family estate. KAMESWAR PERSHAD *v.* RUN BAHADUR SINGH
I. L. R. 6 Calc. 843 : 8 C. L. R 361
L. R. 8 I. A. 8

33. ——— **Purchaser, obligation of—** *Alienation for sum larger than necessity required. Semble :* In purchasing from a Hindu widow the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required. KAMIKHAPRASHAD ROY *v.* JAGADAMBA DASI
5 B. L. R. 508

34. ——— **Consent of reversioners—** *Moveable and immoveable property—Alienation for worship of idol.* A Hindu widow has power, with the consent of the reversionary heirs, to make a valid alienation, for religious purposes, of property, moveable or immoveable, left by her husband. Where a Hindu widow dedicated property by deed to the worship of an idol, and the property was given to trustees in trust, after the death of the widow to permit the male heirs of her late husband to receive the rents :—*Held,* that such heirs were entitled to actual possession and to the rents of the estate, provided they devoted it according to the provisions of the deed to the worship of the idol. BRAJANATH BYSAKH *v.* MATILAL BYSAKH
3 B. L. R. O. C. 92

35. ——— *Gift of immoveable property inherited from husband.* A Hindu widow who has inherited immoveable property from her husband, though possessed of a limited power of alienating portions of such property for necessary purposes or spiritual uses, cannot dispose by a gift in dharam or krishnaipau of the whole of such immoveable property without the consent of the heirs of her husband. BHASKAR TRIMBAK ACHARYA *v.* MAHADEB RAMJI . . . **6 Bom. O. C. 1**

HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS OR REVERSIONERS—*contd.*

36. ——— *Necessity— Evidence—Recital in deed of sale.* A recital in a deed of sale by a Hindu widow of her deceased husband's property setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity, nor does the attestation of a relative import his concurrence. Such a transaction may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindu law. RAJLAKHI DEBI *v.* GOKUL CHANDRA CHOWDHRY
3 B. L. R. P. C. 57 : 12 W. R. P. C. 47
13 Moo. I. A. 209

37. ——— *Want of consent of remote reversioners. Semble :* An alienation by a widow and next reversioner without the consent of subsequent reversioners is not binding on such reversioners. *Per* PIGOT, *J.* GOPEENATH MOOKERJEE *v.* KALLY DOSS MULLICK
I. L. R. 10 Calc. 225

38. ——— ——— *Effect of sale against those not consenting.* The consent of all the heirs living at the time of the execution of a bill of conveyance by a Hindu widow, either directly or by attestation, is requisite to make the sale binding against the reversioners. KARTICK KURMOKER *v.* DHUNNO MONEE GOOPTO . **W. R. 1864, 268**

39. ——— *Right of purchaser for widow's lifetime.* The consent of all the reversioners is necessary to make a sale by a childless Hindu widow valid in law ; but the purchaser is entitled to hold the property during the widow's lifetime. Only immediate reversioners are entitled to impeach a sale by a widow. RADHA *v.* KOAR
W. R. 1864, 148

CHUNDER MONEE DOSSEE *v.* JOYKISSEN SIRCAR
1 W. R. 107

40. ——— *Consent of next reversioner, effect of, as to others.* A grant by a Hindu widow, with the sanction and concurrence of the next reversioner, is valid and creates a title which cannot be impeached on the death of the widow by the person who, but for such grant, would be entitled as heir of her husband. RAJ BULLUBH SEN *v.* OOMESH CHUNDER ROOZ
I. L. R. 5 Calc. 44 : 3 C. L. R. 384

41. ——— *Consent of heirs —Legal necessity.* An alienation by a Hindu widow of immoveable property inherited from her husband is invalid in the absence of legal necessity, but the invalidity can be removed by the con-

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sent of all the heirs of the widow's husband who are likely to be interested in disputing the transaction. *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry, 13 Moo. I. A. 209 : 3 B. L. R. P. C. 57,* followed. A sale made conjointly by a Hindu widow and her daughter, who subsequently predeceased her mother, of immoveable property inherited by the widow from her husband, in the absence of legal necessity, was ordered to be set aside ; and the grandsons of the second cousins of the widow's husband held entitled to recover the property on recouping the vendees the expenses incurred on improvements. VARJIVAN RANGJI *v.* GHELJI GOKALDAS . **I. L. R. 5 Bom. 563**

42. ——— *Alienation made with consent of next reversioner—Remoter reversioners.* A gift by a Hindu widow, who has succeeded to the separate estate of her deceased husband, of such estate is not valid, and does not create a title which cannot be impeached by the remoter reversioner, because it has been made with the consent of the next reversioner. *Raj Bullubh Sen* v. *Oomesh Chunder Rooz, I. L. R. 5 Calc. 44,* and *Noferdoss Roy* v. *Modhoo Soondari Burmonia, I. L. R. 5 Calc. 732,* dissented from. *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry, 13 Moo. I. A. 209,* and *Collector of Masulipatam* v. *Cavali Vencata Narrainapah, 8 Moo. I. A. 529,* referred to. *Sia Dasi* v. *Gur Sahai, I. L. R. 7 All. 362,* and *F. A. No. 116 of 1882* distinguished. RAMPHAL RAI *v.* TULA KUARI . **I. L. R. 6 All. 116**

MADAN MOHAN *v.* PURAN MAL **I. L. R. 6 All. 288**

See BHAGWANTA *v.* SUKHI **I. L. R. 22 All. 33**

43. ——— *Evidence of necessity.* The consent of a former reversioner to a sale by a Hindu widow, though not binding evidence on a subsequent heir, is strong presumption of the existence of necessity at the time of sale, to be rebutted only by proof of fraud and collusion, or of the absence of necessity. KALEE MOHUN DEB ROY *v.* DHUNUNJOY SHAHA . . **6 W. R. 51**

44. ——— *Attestation by reversioner.* Where certain landed property in the possession of a Hindu widow was sold on the alleged ground of necessity, and the execution of the deed of purchase was attested by the then next heir, it was held that the assent implied in such attestation was not conclusive in law as to the necessity for the sale, though the fact of persons most interested in contesting such a sale being called in to execute the deed is the strongest possible proof of good faith on the part of the purchaser. MADHUB CHUNDER HAJRAH *v.* GOBIND CHUNDER BANERJI . **9 W. R. 350**

45. ——— *Attestation of onveyance by reversioner—Waste.* The fact of a

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reversioner being an attesting witness to a conveyance by a Hindu widow is an acquiescence on his part which precludes him from impeaching the sale on the ground of waste. A decree against a Hindu widow for a loan to pay Government revenue is binding on the reversioner. GOPAL CHUNDER MANNA *v.* GOUR MONEE DOSSEE . . **6 W. R. 52**

46. ——— *Widow's estate—Conveyance by presumptive heir—Ratification by widow—Effect of witnessing deed on rights of witness—Evidence of consent.* During the lifetime of a Hindu widow, her son, the then presumptive heir to the property of which she was in possession, conveyed it to purchasers by deeds to which she was not a party. Subsequently she by separate deed ratified the conveyances. This deed was witnessed by a more remote reversioner. The son died during the lifetime of his mother, and the witness to the deed of ratification became the next reversionary heir. *Held,* in a suit by him after the widow's death for possession, that at the time of the conveyances the son had a mere contingent reversionary interest in expectancy, and that the subsequent ratification by his mother could not operate as a surrender of her estate so as to change the conveyances, and make them enure as absolute conveyances, but could only amount to a conveyance of her interest. *Held,* also, that the fact that the reversionary heir witnessed the deed of ratification did not in itself amount to evidence of consent to it on his part. RAM CHUNDER PODDAR *v.* HARI DAS SEN **I. L. R. 9 Calc. 463**

47. ——— *Effect of partition by Hindu widows of their husband's estate.* Two Hindu widows, after a compromise between themselves reciting that each had obtained absolute proprietary right in her share of the husband's estate, mortgaged certain properties forming portion thereof. *Held,* that the mortgage did not bind the husband's estate in the absence of proof both of legal necessity and of *bonâ fide* inquiries by the mortgagee. DHARAM CHAND LAL *v.* BHAWANI MISRAIN . **L. R. 24 I. A. 183**
I. L. R. 25 Calc. 189

48. ——— **Consent of reversioner—** *Alienation by widow of land inherited from her husband—Reversioner—Consent of reversioner to alienation—Subsequent claim by son of consenting reversioner to set aside alienation.* One Gobind Bhagwant died, leaving him surviving a widow, Radhabai, a sister, Bhimabai, and her son, Venkatesh. Radhabai alienated to the defendant five plots of land inherited by her from her deceased husband. Two of them (Nos. 495 and 496) were sold, with the consent of Venkatesh, to defray the expenses of his marriage. The sale-proceeds

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were received by Venkatesh, and the sale-deed was attested by him. The other three plots (Nos. 497, 498 and 499) were relinquished by Radhabai in favour of the defendant, as she was unable to pay the Government assessment. The plaintiff was the son of Venkatesh, and was born after these transactions. After the sale and relinquishment in favour of the defendants Bhimabai died, then Venkatesh, and in 1889 Radhabai died. In 1897 the plaintiff brought the present suit, as reversionary heir of Govind Bhagwant against the defendant, to recover possession of the five plots of land alienated to him by Radhabai. *Held*, that the sale of the two plots Nos. 495 and 496 by Radhabai to the defendant was good, and the plaintiff was not entitled to recover them. The consent given by Venkatesh, the plaintiff's father, who was at the time the only male reversioner in existence, validated the sale. As to the remaining three plots (Nos. 497, 498 and 499), the plaintiff was entitled to recover them. There was no consent given or legal necessity for their alienation proved. VINAYAK VITHAL BHANGE *v.* GOVIND VENKATESH KULKARNI (1900)

I. L. R. 25 Bom. 129

49. ——————— *Lease by a widow—Consent of next female reversioner, how far binding on next male reversioner—Ratification.* Where a Hindu widow, with the consent of the next female reversioner, granted a lease, and subsequently, during the minority of the son of the latter, who came into possession on their death, the manager of the minor under the Court of Wards brought a suit for rent against the lessee, and also executed an *ekrarnama* confirming the lease: *Held*, that such confirmation was sufficient to render the lease valid as against the minor, at least during his minority. *Quære:* Whether an alienation by a widow with the consent of the next female reversioner is valid against the next male heir. WALIUL HASSAN *v.* GOPAL SARUN NARAIN SINGH (1902) . **6 C. W. N. 905**

50. ——————— **Duty of alienee**—*Alienation for legal necessity—Duty of person advancing money to Hindu widow—Burden of proof.* If a mortgagee advances money to a Hindu widow holding a widow's estate in the property mortgaged, after making proper inquiry for the purpose of ascertaining that the money is required for legal necessity, it is not incumbent on him to see that the money he advances is applied to meet such legal necessity, nor is he bound to ascertain that every pice of the money so advanced is actually required for a legal necessity. *Amar Nath Sah* v. *Achan Kunwar, I. L. R. 14 All. 420,* referred to. GHANSHAM SINGH *v.* BADIYA LAL (1902) . **I. L. R. 24 All. 547**

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51. ——————— . *Widow, alienation by—Putni lease—Legal necessity—Consent of reversioner—Delegation by reversioner of his power to consent to his executor.* The power reposed in the reversioner of validating an invalid alienation by a Hindu widow is one, which he is not competent to delegate to his executor. An alienation made by a Hindu widow without legal necessity is not void, but only voidable, and may be validated by the consent of the reversioner. *Modhu Sudan Singh* v. *Rooke, I. L. R. 25 Calc. 1; L. R. 24 I. A. 164,* followed. HAYES *v.* HARENDRA NARAIN (1904)

I. L. R. 31 Calc. 698

52. ——————— **Costs of litigation**—*Widow—Alienation—Arrangement between co-widows—Adopted son—Right of the adopted son to set aside the alienation.* A Hindu died leaving him surviving two widows, *C* and *B*. The two widows after a time found that they could not agree. *C* (the senior widow) passed a document to *B* (the junior widow) on the 17th July 1879, whereby *C* gave *B* possession of certain lands, houses, etc., for her maintenance. Under this arrangement *B* was to carry on the *vahivat* of the same according to her pleasure as long as she might live, and the son, who might be adopted by *C*, would at *B*'s death be entitled to "whatever moveable and immoveable property there is." In 1883 and again in 1885 *B* sold portions of this property to meet certain expenses necessarily incurred by her in litigation. *C* adopted the plaintiff in 1894, and she died in 1895. *B* died in 1902. Some time before her death the plaintiff filed a suit against the defendants, purchasers from *B*, to recover possession of the property alienated by *B*. *Held*, that, under the agreement of 1879, *B* had authority from *C* to do any act necessary for the due and proper management of the property and one of those acts was to pay the costs of the litigation and that, therefore, *B* had implied authority from *C* to alienate the property to meet these costs. *Held*, further, that, under the circumstances of the case, the burden of proof lay upon the plaintiff to show that *C* did not consent to the sale. MAHADEVAPPA *v.* BASAGAWDA (1905)

I. L. R. 29 Bom. 346

53. ——————— **Suit by reversioner**—*Alienation by widow—Declaratory suit by a reversioner of the second degree—Right of suit—Specific Act (I of 1877), s. 42—Limitation Act (XV of 1877), Sch. II, Arts. 120 and 125.* Ordinarily only an immediate reversioner can bring a declaratory suit that an alienation by a Hindu widow is not for legal necessity and that the purchase from the widow cannot be in force beyond the lifetime of the widow; but this rule has no application where the immediate reversioner is herself only the holder of

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a life estate. Although the right of the nearest reversioner, for the time being, to contest an alienation or an adoption by the widow may have been barred by limitation against him, this will not bar the similar rights of subsequent reversioners. *Bhagwanta* v. *Sukhi, I. L. R. 22 All. 33,* relied on. Where the nearest reversioner omitted to sue within the period allowed by Art. 125 of Sch. II of the Limitation Act and thus practically concurred in an alleged improper alienation, the next reversioner became entitled to maintain the suit. *Govinda Pillai* v. *Thayammal, 14 Mad. L. J. 209,* followed. ABINASH CHANDRA MAJUMDAR *v.* HARI NATH SAHA (1905) . **I. L. R. 32 Calc. 62**
s.c. 9 C. W. N. 25

54. ——————— *Alienation by Hindu widow—Limitation—Suit by reversioner for possession—Limitation Act (XV of 1877), Arts. 91, 141.* Where a reversioner sued to recover certain property, which had been alienated by a Hindu widow, the alienation having been made by deeds of sale, on the ground that they were made without legal necessity: *Held,* that as the sale-deeds were not supported by necessity and the reversioner not having elected to assent to them, it was not necessary to set them aside, and the suit was governed by Art. 14, and not by Art. 91 of the Limitation Act. *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji, I. L. R. 30 Calc. 990, Modhu Sudan Singh* v. *Rooke, I. L. R. 25 Calc. 1,* and *Narmada Debi* v. *Shoshibhusan Bit, 8 C. W. N. 802,* referred to. HARIHAR OJHA *v.* DASARATHI MISRA (1905)
I. L. R. 33 Calc. 257

55. ——————— **Legal necessity**—*Alienation by widow—Order for interest or decree in execution where decree did not allow interest—Sum for interest made part of consideration for sale deed—Res judicata—Decision in suit for pre-emption—Civil Procedure Code, s. 13.* A Hindu widow in possession of her husband's immoveable property for a widow's estate executed, on 22nd December 1868, a deed of sale of it in favour of a creditor of her husband under a decree, dated 12th July 1861. No future interest was allowed by that decree, but on 22nd October 1866 the decree-holder in execution of it obtained from the Court of the Deputy Commissioner an order for interest on the decree, which order was however set aside by the Judicial Commissioner on 15th September 1869 on the ground that a Court executing a decree had no power to alter or add to it. The consideration for the deed of sale, which was executed whilst the order granting interest was in force, was made up of R7,080, the amount her husband was liable for under the decree, R5,638 for interest on the decree, and a sum of R7,280 in cash. On 23rd December 1869, the plaintiff as reversionary heir of the husband brought a suit

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against the vendee for pre-emption, but that suit was dismissed on the ground that his right of pre-emption was not established. The widow died in 1894 and in 1899 the plaintiff brought the present suit for possession of the property and for mesne profits from her death. The defendants were the Deputy Commissioner as representing the Court of Wards, into whose charge the vendee's estate had come, and the purchaser from the Court of Wards of the greater portion of the property in suit. The defence was that the alienation was made for legal necessity, and that the suit was barred by the decision in the pre-emption suit, which operated as *res judicata.* Both Courts below found on the facts that the item of R7,080 was justified by legal necessity, and that the advance of the sum in cash as part of the consideration was not proved. *Held,* by the Judicial Committee, that the defendants claiming as they did under the vendee, and standing therefore in no higher position than his, were not entitled to base a claim to the property upon an order made in the vendee's favour, but subsequently set aside: under the circumstances the doctrine of legal necessity could not be extended to the item for interest. There should be a decree for possession and for the balance of mesne profits after deducting the R7,080 for which the property was liable. *Held,* also, that all that was in issue in the former suit was the right of pre-emption as to the widow's interest only in the property, and that the effect of the deed of sale on the reversion could not properly have been made a ground of attack in that suit: the present suit was therefore not barred by s. 13 of the Civil Procedure Code. DEPUTY COMMISSIONER OF KHERI *v.* KHANJAN SINGH (1907)
I. L. R. 29 All. 331
L. R. 34 I. A. 164

56. ——————— *Hindu woman—Limited interest.* One who claims a title under a conveyance from a Hindu woman with the usual limited interest, which a Hindu woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier; and this rule is recognised in s. 196 of the Contract

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Act. Where the defendant held possession of properties under deeds of sale from a limited owner, which were found to have been executed without legal necessity, the plaintiff's claim for mesne profits was allowed. BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU (1908) **I. L. R. 35 Calc. 420**
s.c. 12 C. W. N. 393
L. R. 35 I. A. 46

57. ——— *Widow's estate—Alienation of husband's estate without legal necessity—Consent of reversioners—Consent* ex post facto—Bhale Sultan Chattri *tribe of Oudh—Custom excluding daughter and her issues from inheritance—Proof—General custom—Evidence Act (I of 1872), s. 48.* In the absence of legal necessity a Hindu widow can alienate property to which she has succeeded on the death of her husband with the consent of the nearest reversioners for the time being. Ordinarily the consent of the whole body constituting the next reversioner should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. The consent of the reversioner is effective even when given after the execution of the deed of transfer. *Radha Sayam* v. *Joy Ram Senapati, I. L. R. 17 Calc. 896,* approved. *Ramphal Rai* v. *Tula Kuari, I. L. R. 6 All. 116,* disapproved. *Nobokishori Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102 ; Marudamuthu Nadan* v. *Srinivasa Pillai, I. L. R. 21 Mad. 128 ; Vinayak* v. *Govind, I. L. R. 25 Bom. 129,* referred to. BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH (1907) . . . **I. L. R. 30 All. 1**
s.c. 12 C. W. N. 74
L. R. 35 I. A. 1

58. ——— *Alienation of portion of estate with consent of the reversioner—Validity.* The alienation by a Hindu widow of a portion of her husband's estate without legal necessity, but with the consent of the then next reversioner is valid and binding on the actual reversioner upon the death of the widow. *Marudamutha* v. *Srinivasa Pillai, I. L. R. 21 Mad. 128,* dissented from. *Behari Lal* v. *Madho Lal, I. L. R. 19 Calc. 236, Nabo Kishore* v. *Harinath, I. L. R. 10 Calc. 1102 ; Vinayak Vithal* v. *Govind I. L. R. 25 Bom. 129 ; Bajrangi* v. *Manokurnika, 12 C. W. N. 74 ; L. R. 35 I. A. 1 ; Annada Kumar* v. *Indu Bhusan, 12 C. W. N. 49,* relied on. PULIN CHANDRA MANDAL *v.* BALAI MANDAL (1908)
I. L. R. 35 Calc. 939
s.c. 12 C. W. N. 837

59. ——— **Consent of female reversioner, if passes absolute title**—*Propriety of transaction—Presumption of law.* An alienation of her husband's estate by a Hindu widow—without legal necessity, but with the consent of the next reversioners, who, if they had succeeded to the estate, would themselves have been entitled to the limited estate of a Hindu widow, does not pass an absolute estate to the transferee. No presumption of the propriety of the transaction arises from such consent. BEPIN BEHARI KUNDU *v.* DURGA CHURN BANDOPADHYA (1908)
I. L. R. 35 Calc. 1086
s.c. 12 C. W. N. 914

60. ——— **Payment by wife of husband's debts during his lifetime**—*Voluntary payment—Joint Hindu family—Sale of property belonging to one member of a joint family—Separation—Sale set aside—Rights of persons entitled to such property after separation. Held,* that the payment by the wife of a separated Hindu of her husband's debts during his lifetime must be considered in the absence of evidence to the contrary as a voluntary payment, and will not support an alienation by the widow after her husband's death, of the estate, which has descended to her from him. *Held,* also, that the members of a joint Hindu family must be regarded, so far as concerns the dealings of the family, with persons outside it, as but one juristic person. The managing member of a joint Hindu family sold a property exclusively belonging to one member of the joint family, and the proceeds of the sale were brought into the common purse for the benefit of the family. *Held,* that on the sale of that property being set aside after the separation of that member, he could recover the whole property on payment of the whole purchase money, but that he could not claim to have it by paying only a share of the purchase money proportionate to his share in the joint family property on partition. *Sudarsanam Maistri* v. *Narasimhulu Maistri, I. L. R. 25 Mad. 149, Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75,* and *Hasmat Rai* v. *Sunder Das, I. L. R. 11 Calc. 396,* referred to. HIMMAT BAHADUR *v.* BHAWANI KUNWAR (1908) **I. L. R. 30 All. 352**

61. ——— **Widow's estate**—*Alienation of a portion of estate without legal necessity—Consent of next reversioner.* Alienation by a Hindu widow of a portion of her husband's estate, without legal necessity, but with the consent of the next reversioner is valid. *Marudamuthu Nandun* v. *Srinivasa Pillai, I. L. R. 21 Mad. 128,* discussed and not followed. *Behari Lal* v. *Madho Lal Ahir Gayawal, I. L. R. 19 Calc. 236, L. R. 19 I. A. 30,* explained. *Radha Shyam Sircar* v. *Joy Ram Senapati, I. L. R. 17 Calc. 896,* distinguished. *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102 ; Hem Chunder Sanyal* v. *Sarnamoyi Debi, I. L. R. 22 Calc. 354 ; Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarnika, I. L. R. 25 Bom. 129 ; Bajrangi Singh* v. *Manokar-*

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nika Baksh Singh, I. L. R. 30 All. 1, L. R. 35 I. A. 1, and Annada Kumar Roy v. *Indra Bhusan Mukhopadhya, 12 C. W. N. 49,* followed. PULIN CHANDRA MANDAL *v.* BOLAI MANDAL (1908) **I. L. R. 35 Calc. 939 s.c. 12 C. W. N. 837**

62. ——— *Widow's estate—Alienation by widow without consent of male reversioner—Presumption of necessity from consent of direct female reversioners—Evidentiary value of such consent.* The consent of the daughters to the alienation of immoveable property by the widow does not raise a presumption of law that the purpose, for which it was made, was proper, nor is it any evidence of the propriety of the transaction. *Held,* further, that the consent of two women, whose interest was the limited one of Hindu widows cannot bind or affect the male reversioners, who take an absolute estate. *Isri Dutt Koer* v. *Hansbutti Koerain, I. L. R. 10 Calc. 324, L. R. 10 I. A. 150; Duli Singh* v. *Sundar Singh, I. L. R. 14 All. 377;* and *Bhupal Ram* v. *Lachmi Kuar, I. L. R. 11 All. 253,* referred to. *Kooer Golab Singh* v. *Rao Kurun Singh, 14 Moo. I. A. 176, Varjiban Rangji* v. *Ghelji Gokaldas, I. L. R. 5 Bom. 563, Vinayak Vithal Bhange* v. *Gobind Venkatesh Kulkarni, I. L. R. 25 Bom. 129,* and *Abinash Chandra Mazumdar* v. *Hari Nath Shaha, I. L. R. 32 Calc. 62,* followed. *Collector of Masulipatam* v. *Cavaly Vencata Narrainappah, 8 Moo. I. A. 529, 2 W. R. P. C. 61; Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry, 13 Moo. I. A. 209; Nobo Kissore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102,* and *Bajrangi Singh* v. *Manokarnika Baksh Singh, I. L. R. 30 All. 1, L. R. 35 I. A. 1,* distinguished. BEPIN BEHARI KUNDU *v.* DURGA CHARAN BANERJI (1908) . . . **I. L. R. 35 Calc. 1086 s.c. 12 C. W. N. 914**

63. ——— *Alienation by widow of part of her widow's estate, validity of—Consent of reversioners—Transfer by reversioner of reversionary interest—Estoppel of actual reversioner claiming through one who had given consent.* An alienation, without justifying necessity, by a widow of a portion only of her limited estate, will not be validated by the consent of the next reversioners. *Marudamuthu Nadan* v. *Srinivasa Pillai, I. L. R. 21 Mad. 128,* followed. *Bajrangi Singh* v. *Manokarnika Baksh Singh, I. L. R. 30 All.,* referred to. A conveyance during the widow's life by a reversioner of his reversionary right is inoperative. A consent given by a reversioner, *bonâ fide,* and for good consideration, to an alienation by the widow will be binding on persons claiming through him. *Rangappa Naik* v. *Kamti Naik, I. L. R. 31 Mad. 366,* referred to. *Per* MILLER, *J.*—The alienation by the widow will not be good even if made with the consent of *all* the reversioners then in existence. MUTHUVEERA MUDALIAR *v.* VYTHILINGA MUDALIAR (1908) **I. L. R. 32 Mad. 206**

64. ——— **Debt justifying alienation** *—Alienation by Hindu widow—Legal necessity—Transfer to satisfy decree—Construction of—Preservation of family estate—Nature of estate taken by daughters through father with imperfect title.* The plaintiffs were the sons of the sole surviving daughter of a Hindu widow in possession of her husband's estate who had in 1857 executed in favour of the plaintiff's paternal grandfather, a bond for money advanced to the widow for family purposes including the cost of litigation which was eventually successful in preserving the estate of her husband. The defendants were purchasers from the same creditor to whom, in 1869, the mother of the plaintiffs, in satisfaction of a decree obtained against her on the bond as representing her father's estate, transferred the property in suit. In her petition to the court for permission to settle the claim in that way, she stated that the property to be assigned was "owned and possessed" by her, and that the judgment creditor was to "enter into possession as a proprietor like the petitioner." *Held,* by the Judicial Committee, that on the construction of the transfer it was intended to convey an absolute estate. *Held,* also that the debt was one for which she was justified in alienating the family property. The preservation of the estate of her husband and the costs of litigation for that purpose were objects which justified a widow in incurring debt and alienating a sufficient amount of the property to discharge it; [Mayne's Hindu law, 7th edition, para. 327] and the general principle of Hindu law that he who takes the estate becomes liable for the debts of the estate was especially applicable in a case like the present, where, but for the debts, the estate would have been lost to the plaintiffs.

Disputes which arose as to the succession to the property in suit which originally belonged to the maternal great grandfather of the plaintiffs, were settled by a compromise made on 21st July 1860, between the claimants, namely, his daughter's son, and the two daughters of a son, who predeceased him, whereby certain shares of the estate were allotted to each of them; and on the death of her sister in 1866, the surviving daughter (the mother of the plaintiffs) succeeded to her share by survivorship.

Held, on the construction of the compromise, that the granddaughters acquired under it only a life interest in the property, their right to which must be taken to have been derived through their father, notwithstanding that his own father survived him, his title, in whatsoever way it was defective, being *pro tanto* cured by the agreement

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HINDU LAW—ALIENATION—*contd.*

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(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS AND REVERSIONERS—*contd.*

of compromise. KARIMUDDIN *v.* GOVIND KRISHNA NARAIN (1909) . . **I. L. R. 31 All. 497**

65. ———— *Legal necessity—Burden of Proof.* A mere recital in a mortgage-deed executed by a Hindu widow with a qualified interest as to the existence of necessities is not enough. It is for the creditor to show either that there was legal necessity or at least that he was led on reasonable grounds to believe that there was necessity for the alienation. AJUDHIA *v.* RAM SUMER SINGH (1909) . **I. L. R. 31 All. 454**

66. ———— **Widow's estate**—*Alienation by widow—Consent of reversioner—Attestation of deed, if amounts to consent—Indian Limitation Act (XV of 1877), Sch. II, Art. 140—Ibid, IX of 1871 and XIV of 1859—Ouster of a widow—Reversioner's right, if affected by—Onus of proof, on whom lies—Transfer of Property Act (IV of 1882), s. 51—"Belief in good faith"—Enquiry by purchaser, absence of, effect of—Immoveable property in Calcutta—Crown as landlord, effect of—Compensation for improvement—Damages.* Where there was no question of legal necessity, the only way in which a widow could have transferred an absolute estate was by a sale with the consent of the next reversioner. *Nobo Kishore Sharma Roy* v. *Harinath Sharma Roy, I. L. R. 10 Calc. 1102 (1884),* followed. *Semble:* Attestation by the next reversioner of a deed by which the widow purported to convey an absolute estate is not equivalent to a consent of the reversioner to the sale. A widow sold a house in which she had a widow's interest on 29th October 1857 and after her death in 1906, the reversioner (plaintiff) sought to recover the same from the purchaser (defendant). The defendant contended that under the Limitation Act (XIV of 1859) if the widow had been ousted, limitation would have run against the reversioner (plaintiff) from the date of her ouster, which there was just time for it to do before Limitation Act (IX of 1871) and that to make out his title the plaintiff ought to shew that she was not ousted: *Held,* that the widow could not possibly be ousted after she had sold all her interest in the property and that, if such an event occurred, under the circumstances, it would lie on the defendant to prove it. Under Art. 140 of Sch. II of the Limitation Act (XV of 1877) no ouster of a widow would affect the right of a reversioner, who can bring a suit within 12 years. ABHOY CHURN GHOSE *v.* ATTARMONI DASSEE (1908) **13 C. W. N. 931**

67. ———— **Mortgage by widow**—*Hindu Law—Widow, mortgage by, without legal necessity but with immediate reversioner's consent—Validity—Doctrine of surrender.* The doctrine of surrender upon which the validity of a sale out and out of

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the whole or any portion of the inheritance with the consent of all the immediate reversioners is based, cannot legitimately be extended to the case of a mortgage where *ex-hypothesi* the widow still retains the ownership of the estate though subject to the liability created by the mortgage. *Bajrangi Singh* v. *Manokarnika Baksh Singh, 12 C. W. N. 74: s.c. L. R. 35 I. A. 1; I. L. R. 30 All. 1,* referred to. When a sale by a Hindu widow is found to be partially invalid owing to the absence of legal necessity the whole sale must be set aside, the purchaser accounting for the mesne-profits and the sums expended for legal necessity being set off against them. *Deputy Commissioner of Kheri* v. *Khanjan Singh, 11 C. W. N. 474: s.c. L. R. 34 I. A. 72,* followed. HARI KISSEN BHAGAT *v.* BAJRANG SAHAI SINGH (1909) . **13 C. W. N. 544**

68. ———— **Legal necessity**—*Alienation by Hindu widow—Alienation of a limited estate.* Where the estate which a Hindu widow purports to convey is her limited estate the mere existence of legal necessity will not operate to convey the whole estate, for a Hindu widow may if she pleases and for legal necessity convey her limited estate only. PROSUNNO KUMAR NANDI *v* UMEDUR RAJA CHOWDHRY (1908) . **13 C. W. N. 353**

69. ———— **Power to grant lease for 60 years by way of family arrangement**—*Prudent management—Terminating litigation—Legal necessity—Concurrence of husband's relations—Ratification or election by reversioner—Right of some of several reversioners to sue for their shares.* Where a Hindu widow after protracted litigation with her husband's relations, in the course of which she incurred heavy expenses, and liabilities, obtained a decree for possession of her husband's estate, and with a view to secure a prudent and effective management of the estate, the greater portion of which was still out of her possession granted a lease for 60 years to some of her husband's relations and shortly afterwards her principal opponents in the suit also accepted the arrangement by taking a sub-lease from the lessees—thus showing that all the persons who were likely to be interested in disputing the arrangement, considered it to be beneficial, and, as events showed, it did prove to be beneficial and continued for 30 years until the death of the widow. *Held,* that the widow acted within her powers of management of her husband's estate in granting the lease, and the principle of family settlements also applied to it, and a Court of justice, equity and good conscience should not set it aside. Powers of a Hindu widow to dispose of her husband's property in due course of management indicated. *Doyamoni Debi* v. *Srinibash Kundu, I. L. R. 33 Calc. 842,* and *Venkaji Shridhar* v. *Bishnu Babaji Beri, I. L. R.*

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HINDU LAW—ALIENATION—*contd.*

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(*b*) ALIENATION FOR LEGAL NECESSITY, OR WITH OR WITHOUT CONSENT OF HEIRS AND REVERSIONERS—*concld.*

18 Bom. 534, relied on. *Gobind Krishna Narain* v. *Khunni Lal, I. L. R. 29 All. 487*, and *Imrit Konwur* v. *Roop Narain Singh, 7 C. L. R. 76*, distinguished. *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry, 13 M. I. A. 209, Ramanathan Chetti v. Murugappa Chetti, 10 C. W. N. 825 : s.c. L. R. 33 I. A. 139 : 4 C. L. J. 119*, and *Helan Dasi* v. *Durga Das Mundal, 4 C. L. J. 323*, referred to. Apart from legal necessity a Hindu widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. She can make such an alienation by the entire surrender of her own interest and thereby acclerate the interest of the reversioners, or she can, as in the present case, part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity the transferee would acquire an absolute interest. The fact that some of the parties interested accepted the arrangement subsequently to its being agreed on between the others did not affect its validity. *Hem Chunder Sanyal* v. *Sarnamoyi Debi, I. L. R. 22 Calc. 354*, and *Bajrangi Singh* v. *Manokarnika Baksh Singh, 12 C. W. N. 74 : s.c. 6 C. L. J. 766*, followed. There cannot be a ratification of a lease granted by a Hindu widow by the reversioners but they may elect to affirm it. *Raja Rai Bhagwat Dayal Singh* v. *Debi Dayal Sahu, 12 C. W. N. 393 : s.c. 7 C. L. J. 335*, and *Modhu Sudan Singh* v. *E. G. Rooke, I. L. R. 25 Calc. 1*, referred to. As a reversioner sues to recover possession from alienees from a Hindu widow and not to set aside the alienation, he can maintain a suit to recover his share only of the estate and is not bound to sue to recover the whole estate. *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi, 11 C. W. N. 624 : s.c. I. L. R. 34 Calc. 329* referred to. SANKAR NATH MUKERJI *v.* BEJOY GOPAL MUKERJI (1908) . . . . . **13 C. W. N. 201**

(*c*) WHAT CONSTITUTES LEGAL NECESSITY.

70. ——— **Pious purposes**—*Legal necessity.* Hindu law does not regard "pious purposes" as the only "necessary purposes" which justify alienation of inherited property by Hindu ladies. Self-maintenance, discharge of just debts, protection or preservation of the estate, may be regarded as such "necessary purposes" also. SOORJOO PERSHAD *v.* KRISHAN PERTAB BAHADOOR **1 N. W. 49, Ed. 1873, 46**

71. ——— *Gift for pious and religious purposes.* An alienation by a Hindu widow of her deceased husband's estate for pious and religious purposes, made for her own spiritual welfare, and not for that of her deceased husband, is not valid. The power of a Hindu widow to alienate her deceased husband's estate for pious and religious purposes defined. *Collector of Masulipatam* v. *Cavali Vencata Narainapah, 8 Moo. I. A. 529*, referred to. PURAN DAI *v.* JAI NARAIN **I. L. R. 4 All. 482**

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7. ALIENATION BY WIDOW—*contd.*

(*c*) WHAT CONSTITUTES LEGAL NECESSITY—*contd.*

72. ——— **Endowment of idol by Hindu widow.** A Hindu widow cannot endow an idol with her husband's property or a portion thereof, to the detriment of the reversioners. KARTICK CHUNDER CHUCKERBUTTY *v.* GOUR MOHUN ROY . . . . . **1 W. R. 48**

73. ——— *Pious purposes—Spiritual necessities.* Although pilgrimages and sacrifices performed by a Hindu widow may be indirectly beneficial to her deceased husband, they are not ceremonies indispensable for his spiritual benefit. A sale by a Hindu widow to raise money for pious acts, not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family and the property sold is but a small portion of the property inherited from her husband, is invalid. RAMA *v.* RANGA **I. L. R. 8 Mad. 552**

74. ——— **Pilgrimage.** Where a Hindu, by will, directed that his widow should have power to sell his property for the purpose of defraying the expenses of a pilgrimage, a *bonâ fide* purchaser from the widow who, at the time of purchase, believed and had reason to believe that the widow was going on a pilgrimage, and that the property was sold and the money raised for that purpose, is not bound to give back the property at the suit of the reversioner, if there is any evidence that the widow did really go on the pilgrimage. *Per* GARTH, *C.J.* In such a case the purchase would be good even if there were no evidence that the widow had gone on a pilgrimage. RAM KANT CHUCKERBUTTY *v.* CHUNDER NARAIN DUTT . . . . . **2 C. L. R. 474**

75. ——— *Pilgrimage to Benares.* A pilgrimage to Benares is not a legal necessity to justify a sale by a Hindu widow. HURROMOHUN AUDHIKAREE *v.* AULUCK MONEE DOSSEE **1 W. R. 252**

76. ——— *Expenses of pilgrimage to Gya.* Expenses incurred by a Hindu widow for a pilgrimage to Gya and for the performance of sradh are legitimate expenses for which she can alienate her husband's property. Where the amount expended was R1,700 and the property was sold for R4,000 :—*Held*, in a suit by the heir against the purchaser to have the sale set aside, that the plaintiff not having offered to repay R1,700 and interest, his suit must be dismissed. MUTTEERAM KOWAR *v.* GOPAL SAHOO **11 B. L. R. 416 : 20 W. R. 187**

CHOWDHRY JUNMEJOY MULLICK *v.* RUSSOMOYE DASSE . **11 B. L. R. 418 note : 10 W. R. 209**

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*c*) WHAT CONSTITUTES LEGAL NECESSITY—*contd.*

77. ——— *Pilgrimage never carried out—Debt barred by limitation.* The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property. *Chimnaji Gobind Godbole* v. *Dinkar Dhondev Godbole, I. L. R. 11 Bom. 320,* and *Tarini Prasad Chatterjee* v. *Bhola Nath Mookerjee, I. L. R. 21 Calc. 190 note,* followed. In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity the alienee is sufficiently protected if he satisfies himself by *bonâ fide* inquiries of the existence of such necessity, although he may be in fact mistaken. He has not to see to the application of the money. Where, therefore, a widow borrowed money for a pilgrimage to Gya to perform her husband's sradh ceremonies, but the pilgrimage was never made, the debt was *held* to be recoverable out of the estate. UDAI CHUNDER CHUCKERBUTTY *v.* ASHUTOSH DAS MOZUMDAR **I. L. R. 21 Calc. 190**

78. ——— **Sradh of husband**—*Performance of husband's sradh at Gya.* The performance by a widow of her husband's sradh at Gya is a reasonable necessity for which she may alienate at least a portion of his estate. MAHOMED ASHRUF *v.* BROJESSUREE DOSSEE **11 B. L. R. 118 : 19 W. R. 426**

79. ——— *Sradh of husband—Marriage of daughter—Maintenance of grandsons—Payment of husband's debts.* The sradh of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are admitted by Hindu law as legitimate grounds of necessity for alienations. LALLA GUNPUT LALL *v.* TOORUN KOONWAR. CHUNDER LALA *v.* LALLA GUNPUT LALL . . . . . **16 W. R. 52**

80. ——— **Sradh of mother.** According to Hindu law, the sradh of a mother is not a legal necessity, as that of the father is, to justify a sale by a daughter to the prejudice of the daughter's son. RAJ CHUNDRA DEB RISWAS *v.* SHEESHOO RAM DEB . . . . . **7 W. R. 146**

81. ——— **Loan for grand-daughter's marriage expenses**—*Liability of reversioner.* A Hindu widow borrowed a sum of money for the purpose of defraying the marriage expenses of a grand-daughter, the child of a son who had predeceased his father. *Held,* that such sum, although it could not properly be considered a charge on the grandfather's estate, yet was one which was legally recoverable from the heirs, who, on the death of the widow, succeeded to the possession of such estate. RAMCOOMAR MITTER *v.* ICHAMOYI DASI . **I. L. R. 6 Calc. 36 : 6 C. L. R. 429**

HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*c*) WHAT CONSTITUTES LEGAL NECESSITY—*contd.*

82. ——— **Loan for investiture of minor.** *Held* (by GLOVER, *J.*), that where the family property was small, there was no reasonable necessity for contracting a large loan to provide for the minor's investiture according to the Hindu religion. DOORHYAR ROY *v.* DULSINGAR SINGH . . . . . **12 W. R. 367**

83. ——— **Joint debt of husband and wife.** For a debt contracted jointly by a Hindu wife and her husband the husband's property is liable, and therefore the widow would be entitled to sell as much of the estate as was necessary to satisfy a decree for such a debt. GOLUCK CHUNDER PAUL *v.* MAHOMED ROHIM **9 W. R. 316**

84. ——— **Payment of debts of husband.** Debts due by the husband justify alienation by the widow. KOOL CHUNDER SURMA *v.* RAMJOY SURMONA . **10 W. R. 8**

85. ——— *Bond executed by wife to pay husband's debts.* A wife and her husband's brothers jointly executed a bond for the repayment of moneys borrowed to pay a debt due by her husband and his brothers, and to carry on the cultivation of lands held by her husband and his brothers, and hypothecated the family house as collateral security for the repayment of such money. *Held,* that the wife was not justified in borrowing money to pay her husband's debt, and the want of money for cultivation of his lands would not justify her in pledging his credit for a joint loan taken by his brothers in which his liability would extend to the whole debt, nor would it justify her hypothecating his property, and the husband and his property were therefore not liable for the bond debt. PUSI *v.* MAHADEO PRASAD . **I. L. R. 3 All. 122**

86. ——— **Debt provided for by lease of ancestral property.** The existence of a debt the liquidation of which is provided for by lease of ancestral property is no justification for alienation of such property by a Hindu widow during her life-tenancy. TILUCK ROY *v.* PHOOLMAN ROY . . . . . **7 W. R. 450**

87. ——— **Existence of debts**—*Repurchase of family property.* Where the Court has expressly found the existence of debts and that the sale of ancestral property was a *bonâ fide* one, the circumstance that there was no actual pressure at the time in the shape of suits by the creditors for the recovery of their debts is not of itself sufficient to invalidate the alienation. A sale of ancestral property merely for the purpose of procuring funds for the re-purchase of other property formerly belonging to the family cannot of itself be considered as a sale for any of the necessary purposes sanctioned by law. KAIHUR SINGH *v.* ROOP SINGH . . . **3 N. W. 4**

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(c) WHAT CONSTITUTES LEGAL NECESSITY—*contd.*

88. _____ **Time-barred debt.** The payment of a time-barred debt of her deceased husband is not a valid cause for the absolute alienation by a Hindu widow of her deceased husband's immoveable estate. MELGIRAPPA BIN SOLBAPPA TELI *v.* SHIVAPPA BIN ERAPPA **6 Bom. A. C. 270**

89. _____ *Alienations by a widow of her husband's estate in order to pay his time-barred debts.* According to the Hindu law, a widow is competent to alienate her husband's estate for the purpose of paying his debts, even though they may be barred by the law of limitation. Her alienation for such a purpose are legal and binding on the reversionary heirs. CHIMNAJI GOVIND GODBOLE *v.* DINKAR DHONDEV GODBOLE **I. L. R. 11 Bom. 320**

90. _____ *Revival of a barred debt by the widow of a deceased Hindu.* It is competent to the widow of a deceased member of a joint Hindu family, inasmuch as she represents the inheritance for the time being, and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts, though they were barred at the time of its execution. KONDAPPA *v.* SUBBA **I. L. R. 13 Mad. 189**

91. _____ **Debt of widow's own contracting**—*Consent of reversioner. Semble:* A sale by a Hindu widow for a just debt, made in conformity with the Hindu law and with the consent of the reversioner, may be valid, although the debt creating the necessity for the sale was a debt not of the ancestor's time, but of the widow's own contracting. SHOOBUNKUREE DOSSEE *v.* CHAND MONEE DOSSEE . . . **7 W. R. 335**

92. _____ **Judgment-debt**—*Evidence of necessity.* A judgment-debt is *primâ facie* proof of necessity. BHOWRA *v.* ROOP KISHORE **5 N. W. 89**

93. _____ **Decrees**—*Debts, evidence of nature of.* Mere production of decrees will not establish the propriety and necessity of a sale of an ancestral property. There should be evidence of the nature of the debts in which such decrees originated. REOTEE SINGH *v.* RAMJEET **2 N. W. 50**

94. _____ *Sales of ancestral property.* The mere fact that sales of ancestral property took place in execution of decrees against the ancestor does not of itself show that the sales were for necessary or justifiable purposes. BROJO KISHORE GUGENDAR MOHAPATTUR *v.* HUREE KISHEN DOSS . . . . **10 W. R. 57**

95. _____ **Father-in-law's debts**—*Obligation of widowed daughter-in-law in possession of father-in-law's estate to pay his debts—Sale of part of estate by her for that purpose—Suit by reversioner to have sale declared void beyond her lifetime—Widow not availing herself of protection of the Dekkan Agriculturists' Relief Act.* A childless Hindu widow, having succeeded to the estate of her father-in-law, sold a portion of it in order to pay off his debts. The estate was situate in a district in the Presidency of Bomby subject to the Dekkan Agriculturists' Relief Act (XVII of 1879). The plaintiff as reversioner sued for a declaration that the sale was void beyond the lifetime of the widow. Both the lower Courts made the declaration prayed for by the plaintiff, on the ground that there was no necessity for the sale, as the widow might have availed herself of the provisions of the Dekkan Agriculturists' Relief Act. On appeal by the defendant to the High Court:—*Held,* reversing the lower Courts' decree, that the sale by the widow should be upheld. She was not bound to avail herself of the relief afforded by the Dekkan Agriculturists' Relief Act any more than of the provisions of the Limitation Act. The moral obligation which rested upon her to pay the debts of her father-in-law justified the sale. BHAU BABAJI *v.* JOPALA MAHIPATI **I. L. R. 11 Bom. 325**

96. _____ **Decree for arrears of revenue**—*Right of widow to usufruct for her own purposes.* Where an estate devolved to a widow almost unincumbered, with an ample income more than sufficient to pay a small debt due by the husband, the Government revenue, and all other expenses including the marriage of daughters, the widow was held not to be justified by any legal necessity in alienating the estate in the absence of any actual pressure, such as an outstanding decree or impending sale for arrears of revenue. LALLA BYJNATH PERSHAD *v.* BISSEN BEHAREE SAHOY SINGH . . . . . **19 W. R. 80**

97. _____ **Expenses of litigation**—*Fraudulent assignment—Suit to declare deed binding on reversioner.* A Hindu, *R C,* died possessed of considerable property, and leaving five sons. One of them died leaving a widow *B.* She brought a suit to recover her husband's share in *R C*'s estate, together with the profits thereon. The suit was conducted by *G R.* A large amount became due to him for costs. To secure this, *B* executed a bond and warrant of attorney to confess judgment. The suit failed. In order to obtain the means of bringing another suit, *B,* by deed dated 4th April 1859, assigned her interest in the estate in the right of her husband, and all benefit to be derived from the suit to be instituted, to *G*—one-half absolutely, the other in trust to retain thereout what he might advance to her for maintenance and for the costs of suit with interest at 12 per cent. and to pay her the residue. In November 1859, *G* by deed sub-assigned to *H S,* in consideration

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(c) WHAT CONSTITUTES LEGAL NECESSITY—*contd.*

that *H S* should undertake the maintenance of *B* and the management of the suit, retaining only five-sixteenths out of the eight-sixteenths assigned to him (*G*) absolutely. On 19th August 1861, *B* obtained a decree in the Supreme Court declaring her entitled to the accumulations on her husband's one-fifth share in the estate of his father *R C*, and to all profits made on such accumulations since her husband's death. In September 1861, *G R* caused judgment to be entered on the bond and execution to be issued, and the sheriff seized and was about to sell *B*'s interest in the estate of her husband. Thereupon, *B* being entirely without means, *P S*, brother of *H S*, paid off *G R*, and in consideration thereof took an assignment by deed, dated 18th December 1861, in the name of one *I S*, from *B*, of five-eighths of the half share reserved to her by the deed of 4th April 1859, but subject to the assignment by that deed to *G*. On 20th December 1869, R84,685 were paid into Court as *B*'s husband's share of the accumulation on *R C*'s property at the date of his death, and R1,55,255 as the profits made thereon since her husband's death. *P S* now sued for a declaration that the deed of 18th December 1861 was binding upon *B* and the reversionary heirs, and for an order that the precise amount due to him be ascertained and paid to him out of the moneys paid into Court. At the trial he abandoned his claim against the R84,685 on the ground that he could not prove legal necessity on the part of *B*. *Held*, that the deed could be supported only so far as it charged the profits made since *R C*'s death with the repayment of the R12,500 advanced, with interest at 12 per cent. *P S* was entitled to have that amount paid out of the R1,55,255 in Court. PANNALAL SEAL *v.* BAMASUNDARI . . **6 B. L. R. 732**

98. ——————— *Litigation—Reversioner—Mitakshara law.* *R*, a Hindu widow, who had succeeded to the estate of her deceased husband, mortgaged a portion of it to *L* as security for the repayment of money which she borrowed from him for the purpose of suing for an estate to which her deceased husband had an alleged right of succession, which he had not, however, himself sought to enforce. This suit was dismissed. *R* subsequently transferred her deceased husband's estate to his daughter *I*. *L* sued *R* and *I* to enforce the mortgage made to him by *R* by cancelment of such transfer. *Held*, that the mere fact that the mortgaged property had been transferred to *I* did not preclude her from contending, as next reversioner, that the mortgage of such property by *R* was void for want of "legal necessity;" that under the circumstances stated above there was not any "legal necessity," within the meaning of the Hindu law, for such mortgage, and such suit not having been for the benefit of the estate of *R*'s deceased husband, consequently such mortgage was not valid so far as the reversionary right of *I* was concerned; that, however, *I*'s right to the mortgaged property as transferee from *R* was subject to such mortgage. The nature of a Hindu widow's estate in her deceased husband's immoveable property, her power of alienation generally and her power of alienation in particular for the purposes of litigation, discussed. *Hunoomanpersaud Pandey* v. *Babooee Munraj Koonweree, 6 Moo. I. A. 393; Collector of Masulipatam* v. *Narrainapah, 8 Moo. I. A. 529; Grose* v. *Amirtamayi Dasi, 4 B. L. R. O. C. 1; Phool Koer* v. *Dabee Pershad, 12 W. R. 187; Roy Makhun Lall* v. *Stewart, 18 W. R. 121; Nugenderchunder Ghose* v. *Kaminee Dossee, 11 Moo. I. A. 241*; and *Baijun Doobey* v. *Brij Bhookun Lall Awusti, L. R. 2 I. A. 275*, referred to. INDAR KUAR *v.* LALTA PRASAD SINGH . . . . **I. L. R. 4 All. 532**

99. ——————— *Litigation, Expenses of—Raising funds to carry on appeal to Privy Council.* A judgment-debtor, who had been permitted to retain possession of disputed property pending an appeal to England on furnishing security for mesne profits and costs, having died, his widow offered her life-interest in his estate as such security. *Held*, that, as she was under no legal necessity to carry on the appeal to the Privy Council and did not do so for the benefit of the estate, she could not bind the estate as against the reversioner for the purpose of raising the necessary funds. PHOOL KOER *alias* KUNHIYA KOER *v.* DABEEPERSHAD . . . **12 W. R. 187**

100. ——————— *Legal expenses—Maintenance—Re-marriage of widow.* Legal expenses incurred by a Hindu widow in defending her life-estate in her husband's property constitute such a charge on the property as to make a sale thereof by her binding as against the reversioners. Where a Hindu widow is re-married, or is living with another man, it does not necessarily follow that she would not be entitled to sell her deceased husband's estate for her maintenance. AMJAD ALI *v.* MONIRAM KALITA . . **I. L. R. 12 Calc. 52**

101. ——————— **Necessity to provide maintenance for herself.** A Hindu widow cannot alienate for any purpose property entrusted to her solely that from its profits she may maintain herself. SEITH GOBIN DASS *v.* RANCHORE *alias* RUGHOBEER . . . . **3 N. W. 324**

102. ——————— **Digging tank.** The digging of a tank, though a meritorious act and a great convenience to the public, is not a legal necessity for which a widow can alienate property left to her for life only. RUNJEET RAM KOOLAL *v.* MAHOMED WARIS . . . **21 W. R. 49**

103. ——————— **Declaration of legal necessity—***Consent of husband.* A deed of gift of ancestral property not being valid under Hindu law, without the consent of all the heirs, a wife is

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*c*) WHAT CONSTITUTES LEGAL NECESSITY—*contd.*

not bound by her husband's consent to a deed of gift to their children. The wife and husband being in possession, not beneficially for themselves, but for their children, the wife's acquiescene is not to be presumed by being in possession. A mere declaration of necessity is not sufficient to justify a purchase from a Hindu widow. GUNGAGOBIND BOSE *v.* DHUNNEE . . . **1 W. R. 60**

104. ——— Loan while administering estate of husband. Where a plaintiff alleged that *M*, the deceased widow of *S*, a Hindu, while administering the estate of her deceased husband, borrowed money from plaintiff for purposes binding on the estate, and executed a promissory note to secure the payment of the same; and that the first and second defendants, as reversionary heirs of *S* and the third defendant, were in possession of the estate of *S* and refused to pay the debt incurred by *M* :—*Held*, that the plaint was properly rejected as disclosing no cause of action against the defendants. *Gadgeppa Desai* v. *Apaji Jevanrao, I. L. R. Bom. 237*, approved. *Ramcoomar Mitter* v. *Ichamoyi Dasi, I. L. R. 6 Calc. 36*, dissented from. RAMASAMI MUDALI *v.* SELLATTAMMAL **I. L. R. 4 Mad. 375**

105. ——— Loan for supplying necessities. Plaintiff sought to recover land sold by the first defendant, the widow of an undivided member of a Hindu family, and part of the consideration was the amount of a mortgage-deed executed for the purpose of supplying the necessities of the husband of the first defendant. In special appeal a decree fastening the amount of the mortgage-money upon the land was asked for. *Held*, that such a decree ought not to be made, the plaintiff not having sought for that relief, and the suit having been so conducted that the genuineness of the mortgage instrument though disputed, was treated as a subordinate matter. MADAVA NAIKAN *v.* APPAVU NAIKAN . **2 Mad. 394**

106. ——— Loan by mother—*Liability of adopted son or of the estate in his hands for a loan raised by his mother for the benefit of the estate.* *H*, a widow, who, in default of issue to her husband, was in possession of his deshgati inam, borrowed money from the plaintiff on an ordinary bond for the purpose of paying the Government assessment thereon. She subsequently adopted a son (the defendant) and died. The plaintiff sued the son to recover the money from him personally, and also sought to make the deshgati inam liable. *Held*, that the plaintiff could not recover his debts either from the defendant personally or from the deshgati inam in his possession. His only remedy was against *H's* property (if any) in the hands of the defendant. GADGEPPA DESAI *v.* APAJI JIVANRAG **I. L. R. 3 Bom. 237**

107. ——— Mortgage by widow—*Legal necessity—Loan, raising of.* A Hindu

HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*c*) WHAT CONSTITUTES LEGAL NECESSITY—*concld.*

widow, with other persons, was interested in an estate as the representative of her deceased husband. In order to meet the expenses incidental to the defence of criminal proceedings brought by a tenant alleging that his landlords had forged a *kabuliyat*, the lady, with her co-sharers, raised a loan on a promissory note. Her property was sold in execution of a decree for the money. In order to have the sale set aside, she executed a mortgage of the property, and got the sale set aside by deposit of the money so raised under s. 310A, Civil Procedure Code. *Held*, that the loan and the mortgage, having been made in the interest of the estate, were justified by legal necessity. *Semble*: Even if the loan had been raised for the protection of her person from the consequence of such a charge, the loan would be regarded as arising out of legal necessity. NOBIN CHANDRA CHAUDHURI *v.* KHERODE NATH SUR (1902) . . . . . **6 C. W. N. 648**

(*d*) SETTING ASIDE ALIENATIONS, AND WASTE.

108. ——— Suit to set aside alienation by widow as tenant for life—*Effect of petition as passing property.* By a petition filed in 1830, *N*, a Hindu, asked that certain property specified in a schedule to the petition which had up to date been in possession of himself and his ancestors, should be placed in the Collectorate book in the name of his daughter *D*, and that on her decease her daughters and other heirs should be heirs. In 1837, *N* acquired shares in a mouzah called *K*. He died in 1838, and the petition was subsequently held by the Privy Council to be a testamentary instrument. *D* sold the shares in mouzah *K*, and invested the proceeds in another mouzah. In a suit by a son of *D's* daughter against the purchasers to set aside the sale by *D*, the Subordinate Judge held that he was bound, in the first instance, to repay the whole of the purchase-money to the defendants. He further held that the after-acquired property passed by the petition. The High Court upheld the first finding of the Subordinate Judge, but expressed a doubt (it not being necessary to decide the point, as there was no cross-appeal), whether the petition could pass after-acquired property. SHEWAK RAM *v.* BHOWANI BUKSH SINGH **6 C. L. R. 140**

109. ——— Suit to set aside alienation—*Validity of alienation.* Where a Hindu brought up a boy, and, treating him as his son, purchased estates for, and in the name of, such son, but subsequently for some reason got his wife's name recorded in respect of such estates :—*Held*, that, if the record of name in favour of the wife was effected during the minority of the son, it was invalid, or, if otherwise, then the wife must be considered as having derived her title from the son and not from her husband, and in either case she was

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*d*) SETTING ASIDE ALIENATIONS, AND WASTE—*contd.*

competent to transfer it to the son, and under such circumstances the transfer made by her was not illegal under the Hindu law. NOWBUT RAI *v.* BHAGMANEE . . . . . **2 Agra 5**

110. ———— Alienation in contemplation of adoption. The power of a Hindu widow with authority from her husband to adopt, to make *bonâ fide* alienations which would be binding on the reversioners if no adoption took place, is not affected or curtailed by the fact that it is exercised in contemplation of adoption and in defeasance of the right of the son who is about to be adopted. LAKSHMANA RAU *v.* LAKSHMIAMMAL **I. L. R. 4 Mad. 160**

111. ———— Alienation by conditional sale—*Right to question validity of sale.* A conditional sale is an alienation, the validity of which a reversioner to a Hindu widow is by Hindu law entitled to question. ODIT NARAIN SINGH *v.* DHURM MAHTOON . . **W. R. 1864, 263**

112. ———— Sale without legal necessity—*Reversioners.* *R*, a Hindu, had two daughters by his wife *K*. One daughter married *S* and died in *K's* lifetime, leaving two sons, the defendants. The other daughter was alive at the date of suit. On the death of her husband, *K* succeeded to his estate and sold some land to *S* without adequate necessity. *S* mortgaged this land to *T*. *Held*, in a suit by *T* after the death of *S* and *K* against the defendants to enforce the terms of the mortgage, that the defendants were entitled to object to the validity of the sale to their father by *K*, in their own right, in answer to *T's* claim. The restrictions on the father's power to alienate ancestral property are incidents of co-percenary, whereas the right to sell possessed by a widow is but a qualified power given for certain specified purposes over the reversion created by law in favour of the ultimate male heirs. KARUPPA THEVAN *v.* ALAGU PILLAI . . **I L. R. 4 Mad. 152**

113. ———— Form of alienation—*Sale or mortgage—Necessity.* There is no rule of Hindu law which compels a widow alienating a portion of her late husband's property to have recourse to a mortgage instead of to a sale to raise funds for her maintenance. The question whether she has exceeded her powers or not depends upon the necessities of the case. NABAKUMAR HALDAR *v.* BHABASUNDARI DEBI . . **3 B. L. R. A. C. 175**

114. ———— Suit by reversioners to set aside deed of sale—*Necessity—Selling larger part of estate than necessity justifies—Sale where mortgage could suffice.* In a suit by reversioners to set aside a deed of sale by Hindu widow of part of her husband's estate, on the ground that the money which it was necessary to raise could have been raised by other means, it was held that, if the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, the sale would not be absolutely void as against the reversioners, who could only set it aside by paying the amount which the widow was entitled to raise with interest. *Held*, also, that, if a widow elects to sell when it would be more beneficial to mortgage, the sale cannot be set aside, as against the purchaser, if the widow and the purchaser are both acting honesty. PHOOL CHUND LALL *v.* RUGHOOBUNS SUHAYE . **9 W. R. 107**

115. ———— Re-payment of purchase-money to set aside sale. A sale by a Hindu widow of her husband's estate under legal necessity, cannot be set aside upon payment of the amount which it was necessary for the widow to raise, or in the proportion which that sum bears to the amount for which the estate was sold. SUGEERAM BEGUM *v.* JUDDOBUNS SUHAYE . **9 W. R. 284**

116. ———— Re-payment of sum spent for legal necessity—*Suit to set aside mortgage—Alienation by daughter—Legal necessity.* The daughter of a Hindu, while in possession of the paternal estate, borrowed a large sum of money under a mortgage of a portion of the estate. Part only of the money borrowed was devoted by her to the relief of legal necessity. After her death, the next heir sued the mortgagee to recover the property mortgaged, and to set aside the mortgage-deed. The Courts below gave a decree for possession to the plaintiff upon repayment of the amount actually spent in the relief of legal necessity. Such decree upheld on appeal. LALIT PANDAY *v.* SRIDHAR DEO NARAIN **5 B. L. R. 176 : 13 W. R. 457**

117. ———— Suit to set aside sale—*Sale for more than amount of necessity—Ancestral debt—Necessity.* *A* died leaving *B*, a grandson by a son deceased, *C*, the widow of another son deceased, and *D* and *E*, sons, him surviving. All four held separate possession of their respective shares in the estate. *C* sold her share for R995 to pay off a debt of *A's* of R670. *D* and *E* having waived their rights, *B* sued as reversioner to set aside the sale made by C. *Held*, that *C* did no wrong in selling her share to pay off the debt, and the mere fact that she sold it for more than the amount of the debt did not render the sale invalid. LALA CHATRANARAIN *v.* UBA KUNWARI. . **1 B. L. R. 201**

118. ———— Suit for rent by alienee of widow—*Suit for rent—Title—Possession by widow.* In a suit for rent by a patnidar, who claimed under a lease granted to him by a Hindu widow whose husband had died leaving a will which gave the widow no power to alienate the property:—*Held*, that the suit was properly dismissed, and that there was no necessity for the Judge to enter into any question of possession by the widow.

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*d*) SETTING ASIDE ALIENATIONS, AND WASTE—*contd.*

BANEE MADHUB GHOSE *v.* THAKOOR DOSS MUNDUL
B. L. R. Sup. Vol. 588 : 6 W. R., Act X., 71
TILLESSUREE KOER *v.* ASMEDH KOER
24 W. R. 101

119. ——— **Waste**—*Reversioners—Manager.* Waste on the part of a Hindu widow in possession being proved, it is not competent to the Court to put the reversioner in possession, assigning maintenance to the widow. A manager should be appointed to the estate accountable to the Court. The reversioner may be appointed such manager. MAHARANI *v.* NUNDOLAL MISSER
1 B. L. R. A. C. 27 : 10 W. R. 73

120. ——— *Reversionary heirs.* A conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and the conveyance is binding during the widow's life. The reversionary heirs will not be precluded, even during the lifetime of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life; nor will the reversionary heirs be deprived, during the widow's life, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable. GOBINDMANI DASI *v.* SHAMLAL BYSAK. KALIKUMAR CHOWDHRY *v.* RAMDAS SHAHA. GAURHARI GUI *v.* PEARI DASI. MACHOORAM SEN *v.* GAURHARI GUI
B. L. R. Sup. Vol. 48 : W. R. F. B. 165
LALLA CHUTTUR NARAIN *v.* WOOMA KOOWAREE
8 W. R. 273

121. ——— *Attempt at false adoption.* An attempt at a false adoption of a son is not an act of waste such as would render a widow liable to the penalty of absolute forfeiture of the property for the benefit of reversioners. KOMUL MONEE DOSSEE *v.* ALHADMONEE DOSSEE
1 W. R. 256

122. ——— *Extravagance of widow—Necessity, proof of.* Mere extravagance on the part of a Hindu widow will not affect the rights of one advancing money to her on the security of her husband's property if it be proved that the loans were advanced for necessary purposes. MATA PERSHAD *v.* BHAGEERUTHEE . **2 N. W. 78**

123. ——— *Reversioners—Cause of action.* If reversioners can make out a distinct case of waste by the widow and of positive fraud by her on her husband's estate and on themselves, they may bring a suit to have the estate protected and to have the widow removed from the management. Reversioners can maintain such a suit even if they are not the nearest reversioners. if the nearer reversioner is implicated in the alleged fraud or waste. A reversioner cannot, during the widow's lifetime, get a declaration that he as next reversionary heir is entitled to succeed to the property on her death. SHAMA SOONDUREE CHOWDHRAIN *v.* JUMOONA CHOWDHRAIN
24 W. R. 86

124. ——— *Reversioner or purchaser—Allegation of waste.* Where moneys deposited in Court had been drawn out by a party on the admission of the opposite party, and the latter sued on the allegation that, as the former had been declared by a decree of Court to have only a life-interest in the property in dispute, the money which represented that property ought to be so tied up as to prevent defendant from wasting it: *Held* (following a decision of the Privy Council in *Hurrydoss Dutt* v. *Uppoornah Dossee, 6 Moo. I. A. 433*), that it was not sufficient to allege that defendant was committing waste; the suit would not lie, unless some act of waste threatening the corpus of the property were proved. BUDHUN *v.* FUZLOOR RUHMAN . **9 W. R. 362**

125. ——— *Reversioners—Payment of money out of Court to Hindu widow.* A decree was made in favour of *K*, a Hindu widow, in a suit brought by her against *B C*, which declared that she was entitled to one-fifth share of the accumulations of the estate of the father of her husband from his death to the death of her husband, to be held by her as a Hindu widow, and to one-fifth of the subsequent accumulations absolutely. Execution of the decree was taken out, and the sum to which *K* was declared entitled was paid into Court by *B C* in March 1869. MACPHERSON, *J.*, in delivering judgment, expressed a doubt whether the suit was brought for the benefit of the plaintiff, and stated that he would consider any application to protect any rights the reversionary heirs might have in the amount received by the plaintiff. No steps, however, were taken by *B C*, by suit or otherwise, to protect the interests of the reversionary heirs in the sum paid into Court, but on *K's* applying in March 1871 to have the money paid to her out of Court, *B C*, on behalf of himself as reversionary heir, filed an affidavit in opposition to *K's* application, charging her on information and belief with leading an immoral life, and of having assigned half the amount in Court to *H S*, and expressing his apprehension of waste, and that, if the money were allowed to be taken out of Court, it would be lost to the reversioners. *Held*, that *K* was entitled to have the money paid out of Court to her. BISWANATH CHANDRA *v.* KHANTOMANI DASI . . . . . **6 B. L. R. 747**

126. ——— **Widow refusing to have anything to do with property**—*Appointment of manager.* A Hindu widow held her husband's property till within twelve years of the date of suit.

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*contd.*

(*d*) SETTING ASIDE ALIENATIONS, AND WASTE—*contd.*

At that time one of the defendants claimed the property as belonging to his own separate talukh; and she thereupon gave it up, and ever since refused to enter on it. In a suit by the reversionary heir of the husband to have the title declared and to obtain possession of the property:—*Held*, that the possession of the defendant was adverse to the widow and reversioners; that the reversionary heirs, therefore had a right to sue for a declaration of their title at any time within twelve years from the date of the adverse possession; that as the widow refused to have anything to do with the property, and the reversioners had no right to possession till after the death of the widow, the proper course for the Court to adopt was to appoint a manager to collect the assets of the estate, who should account for them to the Court; and the Court should hold them for the benefit of the reversionary heir. RADHA MOHUN DHAR *v.* RAM DAS DEY
3 B. L. R. A. C. 362 : 24 W. R. 86 note

See GUNESH DUTT *v.* LAL MUTTEE KOOER
17 W. R. 11

127. ——— Suit by reversioner to set aside deeds. A Hindu widow executed deeds of gifts, in which her late husband's mother, the nearest reversioner, concurred. After the death of the widow, but in the lifetime of the mother the next presumable reversioner sued to set aside the deeds and for possession. *Held*, that the suit was good so far as it sought to set aside the deeds; and the mother having died before decree, that no objection could be taken to the suit on the ground that the decree gave possession to the plaintiff. GOLAB SINGH *v.* RAO KURUN SINGH. RAO KURUN SINGH *v.* MAHOMAD FYEZ ALI KHAN
10 B. L. R. P. C. 1
14 Moo. I. A. 176, 187

128. ——— *Suit by reversioners to set aside alienation—Necessity.* A Hindu died in 1808, leaving five sons, and possessed of considerable property. In 1813, the four younger sons obtained a decree for partition against their elder brother, but themselves continued to live together as a joint Hindu family, and so did their widows after their death. After the death of the widow of one of the brothers, *J D*, the widow of another brother, brought a suit for partition; but subsequently, by the consent of all parties, the matters in dispute were referred to arbitration, and an award was made as follows: "Selling their (the widows') respective raiyati land, bati, or house they will pay the costs of their respective vakeels; in that way the land, bati, or house that shall remain, with the proceeds belonging to their respective shares, the raiment and food of *C D* (the widow of another brother) and *J D* will be supplied during their lives; they will be unable to make a gift, sale, etc.; should the proceeds of the land, bati, or house not be sufficient for their food and raiment and for the purity of their respective husbands in a suitable manner, the jetta dharma, then showing good reason, regulation, conformably to the dharma shastra what is expedient as necessary according to usage, informing the other shareholders they shall be able to sell the raiyati land, bati, or house of their respective shares." This award, which directed a partition according to the terms of a chinitnamah, or written description of the land, which was executed by all the parties, was made a rule of Court on 26th July 1858. *J D* took possession of her husband's share of the estate some portion of which she alienated. In a suit brought by the reversionary heirs against *J D* and the purchasers of what she had sold, it was alleged that the alienations were without necessity and contrary to the award, and it was prayed that they might be declared void as against the reversionary heirs, and that *J D* might be restrained from further alienations. *Held*, that the suit could be maintained in the lifetime of *J D*. As there was no waste proved, the prayer for an injunction to restrain further alienation was refused. KAMIKHAPRASAD ROY *v.* JAGADAMBA DASI . . . **5 B. L. R. 508**

129. ——— *Specific Relief Act (I of 1877), s. 42—Suit to set aside a mortgage—Reversionary heirs—Dispute as to nearer heir—Mortgage for a small amount which might be repaid by widow—Maintainability of suit—Declaration in a dismissed suit.* Where a Hindu widow mortgaged a portion of her husband's estate for a small sum of money which might be paid off by the widow in her lifetime, a suit by the reversionary heirs, especially when there is a dispute as to who the nearer reversionary heirs are, is premature, and is not maintainable. A Civil Court has ample discretion, under s. 42 of the Specific Relief Act, to exercise jurisdiction vested in it, and to decline to set aside, during her lifetime, an alienation made by a Hindu widow, when no proper case has been made out by the party seeking to have such alienation set aside. *Upendra Narain Myti* v. *Gopeenath Bera, I. L. R. 9 Calc. 817*, and *Isri Dut Koer* v. *Hansbutti Koerani, I. L. R. 10 Calc. 324*, distinguished. A declaration affecting the plaintiff in a suit which is dismissed is not legal. CHHOTU MAHTON *v.* SHEOBARTI KOER (1901)
5 C. W. N. 445

130. ——— Sale by widow—*Sale by widow of deceased husband's property, partly for legal necessity and partly not—Rights of next reversioner.* Where the widow of a separated Hindu sells property belonging to the estate of her deceased husband, the sale, as to a portion of the consideration therefor, being justified by legal necessity, and as to the remainder of the consideration not so justified it is competent to the next reversioner to the estate to sue for and obtain a decree that he is entitled after the death of the widow to recover the pro-

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HINDU LAW—ALIENATION—*contd.*

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perty sold by her from the vendee on payment of such portion of the consideration as represented moneys borrowed by the widow for legal necessity. *Phool Chand Lal* v. *Rughoobuns Suhaye, 9 W. R. 108,* and *Muttee Ram Kowar* v. *Gopaul Sahoo, 11 B. L. R. 415,* referred to. GOBIND SINGH *v.* BALDEO SINGH (1903) **I. L. R. 25 All. 330**

131. ——— *Suit by a reversioner to set aside a sale by a widow—Alienation by a widow—Limitation Act (XV of 1877), Sch. II, Arts. 91, 141—Question of law—Admission by a pleader on a question of law, effect of—Appeal—Practice.* When upon the death of a Hindu widow a suit was brought by the reversioner for recovery of property, which it was alleged had been alienated by the widow by a deed of sale during her lifetime without legal necessity: *Held,* that Art. 141 of the Second Schedule of the Limitation Act applied and Art. 91 had no application. A question of law, which was not argued in the lower Appellate Court, was allowed by the High Court to be urged in second appeal. PARGITER, *J.*—A sale by a Hindu widow is of itself void upon her death, whereas a lease is merely voidable at the heir's election. WOODROFFE, *J.*—All alienations by a Hindu widow made without legal necessity are voidable and not void in the sense that they are good for her lifetime and may be the subject of consent or ratification by the reversioners during such lifetime or after her death. In the absence, however, of any such ratification or consent by the reversioners the title passed *ipso facto* ceases upon the death of the widow and it is not necessary to set aside such alienations within the meaning of Art. 91 of the Second Schedule to the Limitation Act. HARIHAR OJA *v.* DASARATHI MISRA (1905) **9 C. W. N. 636**

132. ——— **Gift by widow**—*Widow, alienation by—Reversioners—Declaratory decree, suit for—Limitation Act (XV of 1877), Sch. II, Arts. 91, 120, 135—Void transaction.* Where a Hindu widow succeeding to her husband's estate had, without any authority from him, executed jointly with her mother-in-law a deed of gift purporting to dedicate the bulk of his property for the *sheba* of certain idols:—*Held,* that the transaction was altogether void. The deed of gift being *ab initio* void as against the reversionary heir, a suit by him to obtain a declaratory decree that the instrument is invalid and not binding upon him is governed by Art. 120, Sch. II of the Limitation Act, and not by Art. 91, it being not necessary for him to have it cancelled or set aside in order to obtain such declaratory relief. *Banku Behari Shaha* v. *Krishto Gobindo Joardar, I. L. R. 30 Calc. 433,* relied upon. CHOORAMANI DASI *v.* BAIDYA NATH NAIK (1905) **I. L. R. 32 Calc. 473**

133. ——— **Alienation of temple property by widow**—*Suit to declare alienation invalid and not binding on those entitled to succeed the widow as trustee after her death—Bar by limitation—Limitation (Act XV of 1877), Sch. II, Arts. 124, 141—Claim for the recovery of an hereditary office—Succession by Hindu widow to trusteeship of temple.* A temple was built and dedicated to the public by one Jagayya, who acted as trustee of it during his lifetime. He died childless and his widow succeeded him as trustee. She continued to manage the affairs of the temple until October 1885, when she transferred the right of trusteeship together with certain temple properties to the first defendant. In 1897 the widow died. The plaintiffs as the persons entitled to be trustees in succession to her brought this suit in December 1900, to establish their rights as trustees and to have the transfer in favour of the first defendant declared invalid:—*Held,* that the suit was barred under Art. 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their right as trustees, which right has ceased to exist through the operation of the Law of Limitation. *Gnanasambanda Pandara Sannadhi* v. *Velu Paddaran, I. L. R. 23 Mad. 271,* referred to. The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs who derived their title "from and through" the widow notwithstanding the fact that they are not her heirs in the strict sense of the word. PYDIGANTAM JAGANNADHA ROW *v.* RAMADOSS PATNAIK (1905) **I. L. R. 28 Mad. 197**

134. ——— **Suit by reversioner**—*Widow—Alienation—Suit by reversioner to set aside the alienation—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 91.* The plaintiff sued in 1904, as a reversioner, to recover possession of property from the defendant to whom it had been given by way of gift in 1894 by the widow of a preceding owner. It was found by both the lower Courts that the alienation was not justified by any necessity recognized by Hindu law. The defendant pleaded that the suit was barred by limitation. *Held,* that it was not open to the defendant to rely on Art. 91 of the Limitation Act (XV of 1877) as a bar to the suit. *Harihar Ojha* v. *Dasarathi Misra, I. L. R. 33 Calc. 257,* followed. RAKHMABAI *v.* KESHAV RAGHUNATH (1906) . . . **I. L. R. 31 Bom. 1**

135. ——— *Alienation by a Hindu widow—Suit by reversioner—Limitation Act (XV of 1877), Sch. II, Art. 125.* A suit by a reversioner during the lifetime of the widow to have an alienation by her declared void except for her life is governed by Art. 125 of Sch. II of the Limitation Act. *Semble:* A new cause of action does not arise when, owing to the death of the next reversioner, a remoter reversioner becomes entitled to sue. A reversioner, whose suit under Art. 125 has been barred, may still sue for possession, if he survives

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HINDU LAW—ALIENATION—*contd.*

7. ALIENATION BY WIDOW—*concld.*

(*d*) SETTING ASIDE ALIENATIONS, AND WASTE —*concld.*

the widow. MESRAW *v.* GIRJANUNDAN TEWARI (1908) . . . . . **12 C. W. N. 857**

136. ——— *When sale by a limited owner for purposes binding on the reversion, sale not to be set aside, unless purchase money refunded—Right of presumptive reversioner to set aside such sale—Widow not trustee for reversioners.* Where a Hindu widow, with a limited interest in property, sells the property under circumstances, which render the purchase binding on the reversion the actual reversioner after her death or the presumptive reversioner during her lifetime, cannot have the sale set aside without refunding the purchase money. *Obiter :* a suit to set aside such sale will be liable to be dismissed, if the plaint does not contain an offer to refund. Where a presumptive reversioner sues to set aside such a sale during the lifetime of the widow without offering to refund the purchase money, it is not competent to the Court to pass a decree that, upon the widow's death, the sale should be set aside on the person then entitled to the reversion refunding the purchase money. *Phool Chund Lall* v. *Raghubuns Suhayee, 9 W. R. 109,* followed. A widow is not a trustee for the reversioner, and, in the absence of other ways of paying off debts binding on the property, is not bound to raise money on her personal security to discharge such debts, neither is she bound to mortgage the property for that purpose, if such a course would be more prejudicial to her than a sale. SINGAM SETTI SANJIVI KONDAYA *v.* DRAUPADI BAYAMMA (1907) **I. L. R. 31 Mad. 153**

8. ALIENATION OF IMPARTIBLE ESTATE.

1. ——— **Sale in execution of decree** —*Sale of "right, title and interest" of holder of impartible zamindari and member of joint family governed by Mitakshara law—Subsequent reversal of interpretation of law under which sale was held —Change in nature of interest owned by holder of impartible estate—Change of law whether retrospective—Effect of sale under new interpretation of law.* In execution of a decree against the holder (by custom of primogeniture) of an impartible zamindari, who was a member of a joint family governed by the Mitakshara law, his "right, title and interest" in the estate was sold in 1876. By the law as then interpreted such a holder had only a limited interest, and, except for special justifiable causes (of which the debt on which the above decree was obtained was not one), no power of alienation beyond his lifetime. Subsequently this interpretation of the law was reversed by the Judicial Committee in the cases of *Sartaj Kuari* v. *Deoraj Kuari, L. R. 15 I. A. 51 ; I. L. R. 10 All. 272,* and *Rao Venkata Surya Mahipati* v. *Court of Wards, L. R. 26 I. A. 83 ; I. L. R. 22 Mad. 383,* which decided

HINDU LAW—ALIENATION—*concld.*

8. ALIENATION OF IMPARTIBLE ESTATE—*concld.*

that the holder of an impartible estate had an absolute interest in it, and made it alienable, unless a custom against alienation were proved. In a suit by a purchaser at the sale against the successor by survivorship to the judgment-debtor for possession of the subject of sale, on the ground that the plaintiff had purchased an absolute interest in it: *Held,* that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood, and that only the life-interest of the then holder passed by the sale. ABDUL AZIZ KHAN *v.* APPAYASAMI NAICKER (1904) . . **I. L. R. 27 Mad. 131**
s. c. I. L. R. 31 I. A. 1
8 C. W. N. 186

2. ——— **Alienation of impartible Raj**—*Mitakshara—Legal necessity, debt for—Custom—Successor, liability of—Pachis sawal, authority of.* Alienation by the proprietor of an impartible Raj, which is inalienable by custom, is valid if made for legal necessity; and his successor, who takes the Raj by right of survivorship, is, under the Mitakshara law, liable for the debts proved to have been contracted for legal necessity. The *Pachis sawal* is a work of authority in respect of customs prevailing among the Rajas of the Tributary Mehals of Cuttack. *Nittanund Murdiraj* v. *Sreekurun Juggernath, 3 W. R. 116,* referred to. GOPAL PROSAD BHAKAT *v.* RAGHUNATH DEB (1905) . **I. L. R. 32 Calc. 158**

9. ALIENATION OF PATIA RAJ.

——— *Patia Raj—Right of alienation—Mortgage—Succession by survivorship—Pachis sawal—Legal necessity.* It is contrary to the custom of the Patia Raj for the holder of the Raj to alienate the property of the Raj, when he has a brother as his heir. The expression *prodhan uttaradhikari* in the *Pachis sawal* includes a brother and is not confined to a son. When the brother of the last proprietor succeeded to the Raj by survivorship, he did so subject to the rule of the Mitakshara law that he was liable for debts proved to have been contracted for legal necessity. When a debt is incurred for legal necessity, the creditor discharges his duty, if he shows that there was legal necessity for the loan and he is not bound to see to the application of the money. GOPAL PROSAD BHAKA *v.* RAJAH DIBYA SINGH DEB (1905) **9 C. W. N. 330**

HINDU LAW—BABUANA GRANT.

See "BABUANA" GRANT.

See HINDU LAW—MAINTENANCE.

——— *Babuana grant—Alienability—Hindu Law—Mitakshara—Babuana property, if ancestral in the grantee's hand—Interest of co-parcener, attached before death—Claim—Release*

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HINDU LAW—BABUANA GRANT— *concld.*

from attachment—Right of decree-holder to follow property—Civil Procedure Code (Act XIV of 1882), s. 280—Regular suit. Property granted as *babuana* in accordance with the *kulachar* of the Durbhanga Raj to junior members of the family for their maintenance is alienable, subject only to the ultimate claim of the grantor as reversioner on the extinction of the grantee's descendants in the male line. *Rameshwar Singh* v. *Jibendar Singh, 9 C. W. N. 567 ; s.c. I. L. R. 32 Calc. 683,* followed. Such property is ancestral property in the hands of the grantee, and a son of the grantee acquires an interest in it at his birth. When the undivided property of a joint Mitakshara family was attached in execution of a decree against a co-parcener, the fact that the property was, before the judgment-debtor's death, provisionally released from attachment under s. 280, Civil Procedure Code, does not prevent the decree-holder from working out his rights acquired by virtue of the attachment if subsequently to the judgment-debtor's death the order under s. 280, Civil Procedure Code, is set aside in a regular suit. *Suraj Bunsi Koer* v. *Sheo Prosad Singh, L. R. 6 I. A. 88 ; Bonomali Roy* v. *Prosunno Narayan Chowdhry, I. L. R. 23 Calc. 829,* relied on. RAM CHANDRA MARWARI *v.* MUDESHWAR SINGH (1906)

I. L. R. 33 Calc. 1158
s.c. 10 C. W. N. 978

HINDU LAW—BANDHUS.

1. ——————— *Bandhus, preference among—Male Bandhus entitled lo preference over female Bandhus though nearer in degree—Accretions, what are—Accretions pass with estate—Adverse possession, title acquired by—Party holding under a deed or will, which is invalid, cannot set up a higher right than that claimable under the deed or will.* It is settled law in this Presidency that a male Bandhu is entitled to preference over a female Bandhu, even though the latter is nearer in degree. Where additions are made to an estate by a limited owner with the intention that they should form part of the estate, such additions pass with the estate and not to the heirs of such owner though made with funds over which such owner has absolute powers of disposal. Where a female, having the limited interest of a daughter or widow in an estate, spends the income, which is her absolute property, in the erection of buildings on lands belonging to the estate, it must be presumed that she intends the buildings to be an accretion to the estate and to devolve, as such, on the persons, who would be entitled to succeed to the estate. A person holding land under a deed or will which, however, does not operate in law to pass the land in question, cannot, by such possession for more than twelve years, acquire an interest in the property different from that which he would have taken, if the deed or will had been valid and operative. *Dalton* v. *Fitzgerald, L. R. 2 Ch. D. 86, 93,* referred to. *A,* who was entitled to an estate and to the management of a temple as hereditary trustee or dharma-

HINDU LAW—BANDHUS— *concld.*

karta, gave his widow *B,* by will, the estate ' because according to the law (Dharma Sastra) the kartaship (heirship) vests in my wife,' and he further directed her to conduct the dharmakartaship of the temple. *B* gave, by deed, both the estate and dharmakartaship to her daughter *C,* ' as according to Hindu law, you are the *chief heir* after me ': *Held,* that *B,* under the terms of the will of *A,* and *C,* under the terms of the deed of *B,* took no more than a woman's limited estate under the Hindu law both in the estate and in the dharmakartaship ; and that neither *B* nor *C* could acquire by possession an interest in the property higher than that, which they would have taken, if the property had passed by deed or will. VENKATA NARASIMHA APPA RAO *v.* SURENANI VENKATA PURUSHOTHAMA JAGANNADHA GOPALA ROW (1908) . **I. L. R. 31 Mad. 321**

2. ——————— **Daughter's daughter's son** —*Mitakshara—Bhinna gaura Sapinda Bandhu.* A daughter's daughter's son is a *bandhu,* and in the absence of any other heir he is entitled to succeed to the estate of the last owner. AJUDHIA *v.* RAM SUMAR SINGH (1909)

I. L. R. 31 All. 454

HINDU LAW—CHARITABLE TRUSTS.

——————— *Charitable trusts when colourable—Limitation Act (XV of 1877), Art. 91—Laches—Undue influence, deed executed under—Fiduciary relation, deed between persons standing in—Letters Patent, cl. 36.* A deed of trust can be held to be nominal only, when no charity or trust is brought into existence, when there is no proof of the application of the alleged endowments for the maintenance thereof, and the whole conduct of the parties is inconsistent with the hypothesis of a genuine trust. *Per* SIR S. SUBRAHMANIA AYYAR, *Offg. C.J.*—The provisions in a trust deed denying to the public any interest in the charities and authorising the change of the trust property are not inconsistent with the creation of a valid trust ; and even if they were, they would be only invalid conditions annexed to a valid trust. The doctrine that Courts will regard with jealousy transactions between persons standing in the fiduciary relation of parent and child will not apply when no advantage is secured to the former at the expense of the latter, and where the properties are already impressed with the trust, the appointment of the father as sole trustee is no such advantage as such a right exists under the Hindu law, *Purappavanalingam Chetti* v. *Nullasivan Chetti, 1 Mad. H. C. 415.* A party, who has not sued within the period prescribed by Art. 91, Sch. II of the Limitation Act, to set aside an instrument on the ground of undue influence cannot be heard in derogation of the rights created by it. *Kanki Kunwar* v. *Ajit Singh, I. L. R. 15 Calc. 58,* followed. One of two executants of a deed cannot, after the death of the other, set up the undue influence exercised by that other to defeat the rights of beneficiaries under the deed, when he had ample opportunities to do so in the lifetime of the other, and when, if he had done so, the other party would have had legal power to carry out his intentions in favour of the benefi-

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HINDU LAW—CHARITABLE TRUSTS —*concld.*

ciaries by other means. *Per* SANKARAN NAIR, *J.*—The provision that the public shall have no interest in the trust converts it into a private trust, if any trust is created, which can be put an end to at any time ; and the right to change the properties and to exclude or withdraw them as conferred by the deed implies a power not to create a trust so far as any or all of such properties are concerned. The above are not simply invalid provisions annexed to a valid trust, but rather negative the creation of any valid irrevocable trust at all. Where the author of an alleged trust intended to create a trust only enforceable after his death, reserving power to himself to dispose of the properties, such trust cannot, after his death, be enforced at the instance of a volunteer even so far as the properties as he may not have disposed of are concerned. A trust will be void, if the subject of it is uncertain, as when it is to attach to such properties as the author should not dispose of during his life. The doctrine applied by Courts of Equity in regard to transactions between persons standing in the fiduciary relation of father and child will apply even when the father takes only as trustee. The ground of interference in such cases is not any benefit derived by the father, but the presumption that the son was not a free agent. The rule will apply when the person claiming is a volunteer with notice of the confidential relation ; and the burden will be on such person to show that the son understood the terms and did form an independent opinion on the matter. Recitals in the deed calculated to produce irresistible moral pressure, as the alleged wishes of ancestors, etc., will be evidence of an improper exercise of parental influence, when such recitals are not true. *Per Curiam :* S. 575 of the Code of Civil Procedure does not apply in the case of appeals under cl. 15 of the Letters Patent from judgments of the High Court in the exercise of its Original Jurisdiction. Under cl. 36 of the Letters Patent, where the Judges are equally divided in opinion, the judgment of the Senior Judge will prevail. ROOP LAUL *v.* LAKSHMI DOSS (1905) **I. L. R. 29 Mad. 1**

HINDU LAW—CONTRACT.

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See VENDOR AND PURCHASER—CAVEAT EMPTOR **2 Bom. 430 : 2nd Ed. 406**

1. ASSIGNMENT OF CONTRACT.

1. ——— **Right of assignee to sue.** By Hindu law, the assignee of a debt can sue the debtor in his own name. KADARBACHA SAHIB *v.* RANGASVAMI NAYAK . . . **1 Mad. 150**

2. ——— *Small Cause Court, Madras.* According to Hindu law, not only is the beneficial interest in the subject-matter of the contract, but the contract itself, is assignable. The assignee, therefore, may sue in his or her own name. This doctrine is applicable to suits brought in the Madras Small Cause Courts. VEMBAKUM SOMAYAGEE JANAKEE AMMAL *v.* MOONESWAMY CHETTY **4 Mad. 176**

2. BILLS OF EXCHANGE.

1. ——— **Notice of dishonour**—*Suits between endorser and endorsee. Semble :* Notice of dishonour as between endorsee and endorser on bill transactions among Hindus is not necessary, unless by want of it the endorser would be prejudiced. SOMARIMULL *v.* BHAIRO DAS JOHURRY **7 B. L. R. 431**

GOPAL DAS *v.* ALI . **3 B. L. R. A. C. 198**

s.c. after remand. ALI *v.* GOPAL DAS **13 W. R. 420**

See ANUNT RAM AGURWALLA *v.* NUTHALL **21 W. R. 62**

2. ——— *Evidence of custom. Quære :* Whether notice of dishonour of a bill of exchange is necessary as between Hindus. *Semble :* It is a point to be determined by evidence of custom. SUMBOONAUTH GHOSE *v.* JUDDOONAUTH CHATTERJEE . . . . . **Cor. 88**

See PIGUE *v.* GOLAB RAM . . **1 W. R. 75**

3. ——— *Omission to give notice—Discharge of drawer.* The omission by the holder to give notice of dishonour discharges the drawer of a hundi from liability. JEETUN LALL *v.* SHEO CHURN . . . . **2 W. R. 214**

4. ——— *Rules of English law.* Although the strict rules of English law as to bills are not applicable to hundis, notice of dishonour or non-payment must be given within reasonable time to enable the drawer or endorser to protect himself against the claims of subsequent endorsers. TULSHI SAHU *v.* NURSINGRAM . **12 C. L. R. 333**

3. BREACH OF CONTRACT.

——— **Action for breach of contract**—*Act XIV of 1840.* Act XIV of 1840 did

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HINDU LAW—CONTRACT—*contd.*

3. BREACH OF CONTRACT—*concld.*

not apply to contracts between Hindus. By Hindu law a purchaser may recover in an action for breach of contract to deliver goods, not only double the earnest-money, but also damages for the non-delivery. ALVAR CHETTI *v.* VAIDILANGA CHETTI **1 Mad. 9**

4. GRANT OF LAND.

——— **Verbal grant of land followed by possession**—*Validity of transfer.* By the Hindu law a verbal grant of real estate is good if followed by possession by the grantee. The grantors of real estate were Hindus and the grantees the East India Company. *Held*, that, as the Hindu law which governed the grantor's rights allowed a verbal grant, the law of the grantees regulated the matter, and as there was possession under the grant by the grantees, the grant was valid. DOE D. SEEB KRISTO *v.* EAST INDIA COMPANY **6 Moo. I. A. 267**

See HURRISH CHUNDER CHOWDHRY *v.* RAJENDER KISHORE ROY CHOWDHRY . **18 W. R. 293** and ANONYMOUS . . **1 Ind. Jur. O. S. 135**

5. HUSBAND AND WIFE.

See HINDU LAW—RESTITUTION OF CONJUGAL RIGHTS.

1. ——— **Liability of wife for debt contracted during coverture**—*Widow—Remarriage—Liability of widow who has re-married for debt contracted during widowhood—Stridhan.* A Hindu woman who was a widow when she executed a money bond, but has subsequently re-married, is personally liable for the debt. Her liability is not restricted merely to her stridhan. NAHALCHAND *v.* BAI SHIVA **I. L. R. 6 Bom. 470**

2. ——— **Liability of wife, extent of**—*Stridhan.* A Hindu married woman who contracts jointly with her husband is liable to the extent of her stridhan only, and not personally. NAROTAM *v.* NANKA . **I. L. R. 6 Bom. 473**

3. ——— **Liability of wife for necessaries**—*Presumption of agency for husband.* In case of husband and wife living together, the presumption is that the wife is the husband's agent for contracting debts for the necessities of the family. *Per* BITTLESTON, *J.*—But by Hindu law perhaps this presumption is not so strong as it is by English. VIRASVAMI CHETTI *v.* APPASVAMI CHETTI **1 Mad. 375**

4. ——— **Liability of wife for debt**—*Wife voluntarily separated from husband.* Under the Hindu law, a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessaries), although without her husband's consent; but her liability is limited to the extent of any stridhan she may have. *Bom. Sp. Ap. 261 of 1881* (decided 2nd February 1863), and *Bom. Sp. Ap. 461 of 1869* (decided 17th January 1870), approved and followed. NATHUBHAI BHAILAL *v.* JAVHER RAIJI . . . **I. L. R. 1 Bom. 121**

HINDU LAW—CONTRACT—*concld*

5. HUSBAND AND WIFE—*concld.*

5. ——— **Hindu married woman, effect of joint and separate contract by**—*Stridhan—Separate property.* A contract entered into by a Hindu married woman jointly with her husband and separately for herself must, in the absence of special circumstances, be considered as entered into with reference to her stridhan, which is analogous to a woman's separate property in England. GOVINDJI KHIMJI *v.* LAKHMIDAS NATHUBHOY **I. L. R. 4 Bom. 318**

6. ——— **Liability of husband for wife's debts.** A husband (Hindu) is not liable for a debt contracted by his wife, except where it has been contracted by his express authority, or under circumstances of such pressing necessity that his authority may be implied. PUSI *v.* MAHADEO PRASAD . . . . **I. L. R. 3 All. 122**

7. ——— **Coverture, effect of**—*English law.* The proposition that everything acquired by a woman during coverture is the property of her husband has no foundation in Hindu law. RAMASAMI PADEIYATCHI *v.* VIRASAMI PADEIYATCHI **3 Mad. 272**

8. ——— **Hindu wife**—*Transaction in her own name—Wife's right to sue without joining husband—Presumption as to separate property—Onus of proof—Benami transaction.* A Hindu wife living with her husband brought a suit on a deed of mortgage executed in her favour. *Held*, that to enforce her rights under the deed she need not join her husband. That it is not necessary for her to show by evidence that she has separate property or separate business. That in Hindu law there is no presumption that transactions which stand in the name of the wife are the husband's transactions. MANADA SUNDARI DABI *v.* MAHANANDA SARNAKAR **2 C. W. N. 367**

9. ——— **Deed of separation**—*Agreement without consideration—Contract Act (IV of 1872), s. 25 (i).* By a registered deed executed by the defendant in favour of the plaintiff, his wife, after reciting certain quarrels and disagreements, none of which indicated such a condition of affairs as would warrant the wife, under the Hindu law, in claiming a separate residence and maintenance from her husband, he promised to pay her for a separate residence and maintenance. On a suit by the wife for arrears of maintenance due:—*Held*, that there was no consideration moving from the wife, for the promise by the husband; it was a voluntary arrangement on the part of the husband, and the present suit could not be maintained. That s. 25 of the Contract Act did not apply, the consideration of natural love and affection being directly opposed to the recitals in the document. RAJLUKHY DABEE *v.* BHOOTNATH MOOKERJEE **4 C. W. N. 488**

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HINDU LAW—CONTRACT—*contd.*

6. LIEN.

——— **Deposit of title-deeds of land in Island of Bombay**—*Creation of lien.* A lien created by verbal contract and deposit of title-deeds of immoveable property in the Island of Bombay by a Hindu in favour of a Hindu upheld. JIVANDAS KESHAVJI *v.* FRAMJI NANABHAI **7 Bom. O. C. 45**

7. MONEY LENT.

——— **Demand, money payable on**—*Limitation—Cause of action.* Where a sum was lent at interest, the principal to be payable on demand :—*Held per* NORMAN, *J.*, that by Hindu law a demand will be necessary, and limitation would run from the date of the demand. BRAMMAMAYI DASI *v.* ABHAI CHARAN CHOWDHRY **7 B. L. R. 489 : 16 W. R. 164**

(*Contra*) PARBATI CHARAN MOOKERJI *v.* RAMNARAYAN MATILAL **5 B. L. R. 396 : 16 W. R. 164 note**

8. MORTGAGE.

1. ——— **Mortgage of future crops**—*Validity of mortgage. Quære :* As to the validity in Hindu law of a mortgage of future crops. KEDARI BIN RANU *v.* ATMARAMBHAT **3 Bom. A. C. 11**

2. ——— **Mortgage without possession**—*Validity of mortgage.* A mortgage without possession is not by Hindu law absolutely invalid, but is binding between the mortgagor and mortgagee. CHINTAMAN BHASKAR *v.* SHIVRAM HARI . . . . . **9 Bom. 304**

See KRISHNAJI NARAYAN *v.* GOVIND BHASKAR **9 Bom. 275**

3. ——— **Law in Guzerat**—*Priority—Registration—Notice.* The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession, does not apply to Guzerat. Where in Guzerat the defendant, a puisne mortgagee, in possession had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law. Registration could not of itself alter this rule of Hindu law except so far as effect may be given to it by statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, *viz.*, notice to subsequent incumbrancers of the existence of a prior incumbrancer. ITCHARAM DAYARAM *v.* RAIJI JAGA . . . . . **11 Bom 41**

9. NECESSARIES.

——— **Power of widow entitled to maintenance to bind heir for necessaries.** There is no rule of Hindu law which recognizes any authority in a widow entitled only to maintenance to make contracts for necessary supplies binding upon the heir in possession of the family property and liable to maintain her. RAMASAMY AIYAN *v.* MINAKSHI AMMAL . **2 Mad. 409**

HINDU LAW—CONTRACT—*contd.*

9. NECESSARIES—*concld.*

10. PLEDGE.

1. ——— **Accidental destruction of property pledged.** By the Hindu as well as by the English law, a creditor in whose hands a pledge has accidentally perished is notwithstanding entitled to recover his debt in the absence of an agreement to the contrary. VITHORA VALAD UKBA *v.* CHOTA LAL TUKARAM **7 Bom. A. C. 116**

11. PRINCIPAL AND SURETY.

1. ——— **Suit against surety**—*Principal not sued.* A suit may be maintained against a surety, according to Hindu law, although the principal debtor has not been sued. TOTAKOT SHANGUNNI MENON *v.* KURUSINGAL KAKU VARID **4 Mad 190**

12. PROMISSORY NOTE.

1. ——— **Consideration**—*Document not importing consideration.* In a suit under the Bills of Exchange Act to recover R1,200 on a promissory note :—*Held* by PEACOCK, *C. J.*, that the suit, being between two Hindus, must be decided by Hindu law. By Hindu law a promissory note does not import consideration, and therefore, where it was proved that the defendant actually received only R700, that sum was all the plaintiff was allowed to recover. RAMLAL MOOKERJEE *v.* HARAN CHANDRA DHAR **3 B. L. R. O. C. 130**

2. ——— **Liability of minor**—*Suit on promissory note executed by mother of a minor, as his guardian, in respect of a debt for which the minor's share in the ancestral estate was liable—Liability of minor to the extent of his share in the ancestral estate.* The mother of a minor executed, as his guardian, a promissory note in respect of a debt for which the son's share in the ancestral estate was liable at the time. On a suit being brought against the minor on the note : *Held*, that the defendant was liable on the note, to the extent of his share in the ancestral estate. *Bachubai* v. *Shamji Jadowji, I. L. R. 9 Bom. 551*, and *Indur Chunder Singh* v. *Radhakishore Ghose, I. L. R. 19 Calc. 507*, distinguished. SUBRAMANIA AYYAR *v.* ARUMUGA CHETTY (1902) . . . **I. L. R. 26 Mad. 330**

13. SALE.

——— **Sale of expectancy**—*Validity of sale. Quære :* Whether under Hindu law an expectancy may be the subject of a valid sale. DOOLI CHAND *v.* BIRJ BOOKUN LAL AWASTI **10 C. L. R. 61 : 6 C. L. R. 528**

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HINDU LAW—CONTRACT—*concld.*

14. TRANSFER OF PROPERTY.

See LEASE—CONSTRUCTION.
I. L. R. 28 Calc. 720

1. ———— Exchange of land—*Necessity of written exchange.* By Hindu law an exchange of lands followed by possession need not be evidenced by writing. *Semble:* In no case does the Hindu law appear absolutely to require writing, though as evidence it regards and inculcates a writing as of additional force and value. MANTENA RAYAPARAJ *v.* CHEKURI VENKATARAJ . . **1 Mad. 100**

CRINIVA SAMMAL *v.* VIJAYAMMAL . **2 Mad. 37**

PALAMYAPPA CHETTI *v.* ARUMGAM CHETTI
2 Mad. 26

KRISHNA *v.* RAYAPPA SHANBHAGA . **4 Mad. 98**

ROOKHO *v.* MADHO DOSS
1 N. W. Ed. 1873, 59

2. ———— Mode of transfer—*Verbal transfer of property.* No special mode of transfer is required by the Hindu law; even a verbal transfer is sufficient. HURPURSHAD *v.* SHEO DYAL. RAM SAHOY *v.* SHEO DYAL. BALMOKAND *v.* SHEO DYAL. RAM SAHOY *v.* BALMOKAND
L. R. 3 I. A. 259 : 26 W. R. 55

15. VERBAL CONTRACTS.

———— Verbal contract, validity of—*Registration Act.* There is nothing in the Registration Act which renders a verbal contract between Hindus invalid or inoperative. HURRISH CHUNDER CHOWDHRY *v.* RAJENDER KISHORE ROY CHOWDHRY . . . . **18 W. R. 293**

DOE D. SEEBKRISTO *v.* EAST INDIA COMPANY
6 Moo. I. A. 267

HINDU LAW—CONVERSION.

———— *Change of religion—Effect of conversion of a member of a joint Hindu family to Muhammadanism—Regulation No. VII of 1832, s. 9—Compromise—Effect of compromise entered into by a Hindu female with a limited estate. Held,* that Regulation No. VII of 1832 did not abrogate the Hindu law as to the consequences of apostacy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce these consequences. Where, therefore, in a joint Hindu family consisting of a father and one son, the father was converted to Muhammadanism in the year 1845, the immediate effect of such conversion was to make the son sole owner of the property which up to that time had belonged jointly to him and his father. *Held,* also, that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of her deceased husband or father, is not binding on the reversioners, even though it has been followed by a decree of Court, nor is a decree on an arbitration award, one of the parties to the submission having been a Hindu widow, or daughter; but the reversioners can only be found by a decree made after

HINDU LAW—CONVERSION—*concld.*

full contest in a *bonâ fide* litigation. *Imrit Konwur* v. *Roop Narain Singh, 6 C. L. R. 76; Sheo Narain Singh* v. *Khurgo Koerry, 10 C. L. R. 337; Jeram Laljee* v. *Veerbai, 5 Bom. L. R. 885; Sant Kumar* v. *Deo Saran, I. L. R. 8 All. 365; Ram Sarup* v. *Ram Dei, Weekly Notes (1907) 33* and *Stapilton* v. *Stapilton, 1 White and Tudor 230,* referred to. GOBIND KRISHNA NARAIN *v.* KHUNNI LAL (1907)
I. L. R. 29 All. 487

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See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT ADOPT.
I. L. R. 27 Bom. 492.

See, also, THE PARTICULAR HEAD OF HINDU LAW WHICH IS APPLICABLE.

See MALABAR LAW—CUSTOM.

———— inheritance and succession—

See LETTERS OF ADMINISTRATION.
I. L. R. 28 Calc. 608.

1. GENERALLY.

1. ———— Nature of custom—*Requisites of custom.* A custom is a rule which in a particular family or a particular district has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law must be construed strictly. HURPURSHAD *v.* SHEO DYAL. RAM SAHOY *v.* SHEO DYAL. BALMOKUND *v.* SHEO DYAL. RAM SAHOY *v.* BALMOKUND
L. R. 3 I. A. 259; 26 W. R. 55

2. ———— Origin and force of customary law. The question of the origin and binding

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HINDU LAW—CUSTOM—*contd.*

1. GENERALLY—*concld.*

force of customary law discussed, and the authoritie upon the subject cited and commented upon. TARA CHAND *v.* REEB RAM . . . **3 Mad. 50**

3. ——— **Operation of Custom**—*Custom not judicially recognized, Authority of.* A custom which has never been judicially recognized cannot prevail against distinct authority. NARASAMAL *v.* BALARAMA CHARLU . . . **1 Mad. 420**

4. ——— **Effect of custom when proved to exist.** Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. SARTAJ KUARI *v.* DEORAJ KUARI **I. L. R. 10 All. 272 L. R. 15 I. A. 51**

5. ——— **Usage different from normal law and custom**—*Onus of proving usage.* When amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu law and usage of the country in which the property is located, and the parties resident, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion. Custom of adoption not in ordinary way set up. BHAGVANDASS TEJMAL *v.* RAJMAL *alias* HIRALAL LACHIMANDAS **10 Bom. 241**

6. ——— **Evidence of custom varying general law.** Where it is sought to establish the existence of a custom, modifying or varying the general law, the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who if the custom had not existed, would have been entitled; or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. RAMA NAND *v.* SURGIANI . **I. L. R. 16 All. 221**

7. ——— **Evidence of custom**—*Judicial decision. Held,* that amongst Agarwala Banias of the Saraogi sect of the Jain religion, a widow has full power of alienation in respect of the non-ancestral property of her deceased husband; but that she has no such power in respect of the property which is ancestral. *Held,* also, that, where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom. *Sheo Singh Rai* v. *Dakho, 6 N. W. 382 : I. L. R. 1 All. 688,* referred to. *Chotay Lall* v. *Chunnoo Lall, I. L. R. 4 Calc. 744,* explained, *Hoolas Rae* v. *Bhowani,* unreported, referred to in *6 N. W. 396,* and *Behari Lal* v. *Sookbasi Lal,* unreported, referred in *6 N. W. 398,* commented upon. SHIMBHU NATH *v.* GAYAN CHAND **I. L. R. 16 All. 379**

HINDU LAW—CUSTOM—*contd.*

2. ADOPTION.

1. ——— **Custom not allowing adoption governing a family not subject to Hindu law**—*Construction of gift—Burden of proof—Inheritance.* A family in Bengal, affecting to be Hindu but not Hindu by descent and origin, may be governed by customs at variance with Hindu law. A family took its origin in a tribe not Hindu and its customs differed from Hindu customs. The question having arisen whether succession in virtue of adoption was consistent with, or was contrary to, the customs of the family. *Held,* first, that, with regard to the origin and history of the family, the point for inquiry was not whether the general Hindu law was in this case modified by a family custom forbidding adoption, but was whether, with respect to inheritance, the family was governed by Hindu law or by customs not allowing an adopted son to inherit; secondly, upon the evidence that this family had retained, and was governed by, customs at variance with Hindu law, and that, whatever Hindu customs might have been introduced into it, the custom of succession upon adoption had not. Whether, if the family had been shown to be Hindu out and out, save only special customs, the evidence would have been sufficient to prove a special custom was not the question. *Held,* also in reference to the burden of proof, that, in a suit brought to maintain the plaintiff's title as heir against a defendant, who relied upon an adoption as defeating the title of the plaintiff, the burden of proving the adoption to be permitted by the family custom was upon those who alleged it to be so; whereas, if the family had been generally governed by Hindu law, the onus would have been on those who alleged the exclusion of the right to adopt. *Rajah Bishnath Singh* v. *Ram Churn Majmoadar, S. D. A. 1850 p. 20,* referred to, as showing that even in a Hindu family there might be a custom which barred inheritance by adoption. FANINDRA DEB RAIKAT *v.* RAJESWAR DAS . . . **I. L. R. 11 Calc. 463 L. R. 12 I. A. 72**

2. ——— **Adoption by untonsured widow**—*Evidence of custom—Custom of caste—Opinion of caste expressed at meeting—Validity of adoption.* For the purpose of proving that by the custom and in the opinion of the Daivadnya caste an adoption by an untonsured widow was invalid, evidence was tendered to the following effect:—(i) that there had been many instances of adoption in the caste, and in every such case the adopting mother had undergone tonsure, and that there had been no instance the other way; (ii) that the caste was divided in opinion as to the validity of the adoption, but that at a meeting of the caste it was declared by a large majority that the adoption was invalid. The Court refused to allow such evidence to be called, holding that it would merely prove what the Court, in the absence of evidence to the contrary, would assume to be the case, *viz.,* that the widows of the caste usually or invariably followed the dictates of the Hindu ceremonial on religious law, which ordains that widows shall have

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HINDU LAW—CUSTOM—*contd.*

2. ADOPTION—*contd.*

their heads, and that it would prove nothing more; and with regard to the opinion of the caste, that such opinion, even if expressed by a majority at a caste meeting, as it would not of course be binding upon the Court, ought not to affect its judgment. RAVJI VINAYAKRAV JAGANNATH SHANKERSETT *v.* LAKSHMIBAI . . **I. L. R. 11 Bom. 381**

3. ——— Plurality of adoption—*Dancing girl caste—Immoral or illegal purpose of adoption.* As a matter of private law, the class of dancing women being recognized by Hindu law as a separate class having a legal status, the usage of that class in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption, and survivorship. A dancing woman adopted two daughters, of whom the latter was adopted in the year 1854. It was found that the custom obtaining among dancing women in Southern India permits plurality of adoptions. *Held,* on second appeal, that the daughter subsequently adopted succeeded to the adoptive mother in preference to the son of the daughter previously adopted. MUTTUKANNU *v.* PARAMASAMI **I. L. R. 12 Mad. 214**

4. ——— Adoption by temple dancing woman—*Right of adopted daughter—Right of suit—Adoption made with intention of prostituting minor—Penal Code, s. 373.* Suit by the adopted daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother. On second appeal, the High Court directed the return of a finding on the issue whether the plaintiff's adoption was valid. Fresh evidence was taken, and the finding was that the adoption was made with the intention that the girl should be prostituted while she was still a minor. *Held,* that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention. KAMALAKSHI *v.* RAMASAMI CHETTI . . **I. L. R. 19 Mad. 127**

5. ——— Adoption for illegal purpose—*Devadasi.* The plaintiff sued as the adopted daughter of a deceased dancing woman to recover a share of the property left by her. It appeared that the adoption of the plaintiff, which took place in 1871, when she was six years old, was made with the intention of bringing her up to practice prostitution even during her minority. *Held,* that the adoption was invalid. SANJIVI *v.* JALAJAKSHI **I. L. R. 21 Mad. 229**

6. ——— Adoption among Saraogi Agarwallas of Barh—*Jains, Customs of, and law governing.* Where a custom to the effect that the widow of a sonless intestate (amongst the Saraogi Agarwallas of Barh) takes an absolute interest in his property is set up, it must be shown by the clearest and unvariable evidence that that particular custom applied to the particular place where the parties resideo. *Held,* in this case, that no such

HINDU LAW—CUSTOM—*contd.*

2. ADOPTION—*contd.*

custom had been proved to be prevalent amongst the Jain Agarwallas of the province of Bengal. Unless a custom be proved to the contrary, Jains are governed by the Hindu law of inheritance, and ordinarily the Mitakshara school of law would be applicable to them. *Bhagvandas Tejmal* v. *Rajmal* alias *Hira Lal Luchmidas, 10 Bom. H. C. R. 241; Mahabeer Pershad* v. *Kundan Koer, 8 W. R. 116,* followed. *Sheo Singh Rai* v. *Dakho, 6 N. W. P. 382,* distinguished. MANDIT KOER *v.* PHOOL CHAND LAL **2 C. W. N. 154**

7. ——— Adoption by widow of Oswal Jain sect without authority of husband—*Customs regulating personal rights and status of family—Effect of conversion from one sect of Hinduism to another.* The adoption of the tenets of another sect of Hinduism will not necessarily affect the laws and customs by which the personal rights and status of the family were originally governed; therefore, in the absence of evidence to the contrary, the custom which enables a Jain widow of the Oswal caste to adopt a son without the express or implied authority of her husband will not be affected by the conversion of the family to Vaishnavism. *Padmakumari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 302 : L. R. 8 I. A. 229,* distinguished. *Bhoobun Moyee Debia* v. *Ramkishore Acharjee, 3 W. R. P. C. 15 : 10 Moo. I. A. 279,* and *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee, I. L. R. 5 Calc. 615,* referred to. MANIK CHAND GOLECHA *v.* JAGAT SETTANI PRAN KUMARI BIBI . . **I. L. R. 17 Calc. 518**

8. ——— Adoption, Caste custom prohibiting—*Kadwa Kunbi caste at Ahmedabad—Conscience of the members of the caste—Nature of proof required—Uniform and persistent usage moulding the life of the caste.* A caste custom prohibiting widows from adopting is one which, before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden. A caste custom having been set up in the Kadwa Kunbi caste at Ahmedabad prohibiting widows from adopting, a large number of witnesses were examined with respect to the custom. Their evidence showed that it had not been the practice in the caste for widows to adopt; but it also showed that there had been no caste resolution forbidding such adoption. On the other hand, it was established that there had been, as a matter of fact, two previous adoptions by widows which were not actually impugned, and that the adoption in dispute had been attested by a large number of patels in the caste. *Held,* that the evidence, as a whole, led to the conclusion that "a uniform and persistent usage had not moulded the life of the caste." PATEL VANDRAVAN JEKISAN *v.* PATEL MANILAL CHUNILAL . . . **I. L. R. 16 Bom. 470**

9. ——— Power of sonless widow to adopt a son without permission of husband—*Jains—Saraogis.* Judicial decisions recognizing

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HINDU LAW—CUSTOM—*contd.*

2. ADOPTION—*concld.*

the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside. Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony: *Held*, that the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of the kinsmen was sufficiently established and that in this respect there was no material difference in the custom of the Agarwalla, Choreewal, Khondwal, and Oswal sects of the Jains; and that there was nothing to differentiate the Jains at Arrah from the Jains elsewhere. *Held*, also, that the terms Jain and Saraogi are synonymous. HARNABH PERSHAD *v.* MANDIL DASS
I. L. R. 27 Calc. 379

3. AFFILIATION OF SON (ILLATAM).

1. ——— **Status of affiliated son**—*Illatam or affiliation of a son—Districts of Bellary and Kurnool.* The custom of illatam (affiliation of a son-in-law) obtains among the Mototi Kapu or Keddi caste in the districts of Bellary and Kurnool. He who has at the time no son, although he may have more than one daughter, and whether or not he is hopeless of having male issue, may exercise the right of taking an illatam son-in-law. For the purposes of succession, the illatam son-in-law stands in the place of a son, and in competition with natural-born sons takes an equal share. *Quære:* (i) Whether a father with a son living is entitled to exercise the right. (ii) If the father is dead, whether the power may be exercised by a surviving paternal grandfather; and (iii) whether the affiliation is effected by the introduction in the family or requires for its completion marriage with a daughter. (iv) Whether the affiliation is analogous to Hindu adoption, except in so far that the illatam is regarded as member of the family into which he is admitted. (v) Whether the illatam can demand partition. HANUMANTAMMA *v.* RAMI REDDI
I. L. R. 4 Mad. 272

2. ——— **Rights of succession in his natural family.** Under the custom of illatam (affiliation of a son-in-law) which obtains amongst the Reddis or Pedda Kapu caste of Vellore, the illatam son-in-law does not thereby lose his rights of succession to the estate of his natural father's divided brother. BALARAMI REDDI *v.* PERA REDDI . . . **I. L. R. 6 Mad. 267**

3. ——— **Illatam adoption**—*Inheritance.* There is no evidence that the custom of illatam adoption exists among the Kondarazu caste

HINDU LAW—CUSTOM—*contd.*

3. AFFILIATION OF SON (ILLATAM)—*concld.*

of the Vizagapatam district. NARASIMHA RAZU *v.* VEERABHADRA RAZU . **I. L. R. 17 Mad. 287**

4. APPOINTMENT OF DAUGHTER.

——— **Power to appoint daughter**—*Onus of proof. Delegation of power.* The custom of Hindu law, under which a father, in default of male issue, might appoint a daughter to be as a son, or appoint her to raise a son for him, if not obsolete, as appears to be the opinion of the text-writers is one which in modern times does not seem to have been brought under the consideration of the Courts of justice in India. Assuming the custom to exist, inasmuch as it breaks in upon the general rules of succession, whoever claims by virtue of it to succeed as heir must bring himself clearly within it. There seems to be no sufficient authority for holding that a father may delegate the power to appoint. JIBNATH SINGH *v.* COURT OF WARDS . **15 B. L. R. 190**
23 W. R. 409 : L. R. 2 I. A. 163
Affirming case in High Court.
5 B. L. R. 442 : 14 W. R. 117

5. ASSAM, LAW IN.

——— **Similarity to Bengal law**—*Absence of proof of custom.* In the absence of any proof or custom to the contrary, the Hindu law in Assam is similar to that prevalent in Bengal. DEEPO DABEA *v.* GOBINDO DEB
11 B. L. R. 131 note
16 W. R. 42

6. CASTE.

1. ——— **Expulsion of member of caste under mistake of fact and without notice.** In a suit relating to the management of the common property of the members of a Hindu caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it. *Held*, (i) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid; (ii) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bonâ fide* but mistaken belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights. *Per* KERNAN, *J.*—A custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered is not a valid custom. KRISHNASAMI CHETI *v.* VIRASAMI CHETTI . **I. L. R. 10 Mad. 133**

2. ——— **Power of the head of a caste in respect of caste customs**—*Jurisdiction of Civil Court.* In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere. A guru as head of a caste

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HINDU LAW—CUSTOM—*contd.*

6. CASTE—*concld.*

has jurisdiction to deal with all matters relating to the autonomy of caste according to recognized caste customs. *The Queen* v. *Sankara, I. L. R. 6 Mad. 381,* and *Murari* v. *Suba, I. L. R. 6 Bom. 725,* cited and followed. GANAPATI BHATTA *v.* BHARATI SWAMI . . . . **I. L. R. 17 Mad. 222**

7. DISHERISON.

——— **Disherison in favour of son-in-law**—*Reddi caste—Illegal custom.* The custom of the Reddi caste, according to which a father-in-law may disinherit his heir in favour of a son-in-law, is bad. TAYUMANA REDDI *v.* PERUMAL CHETTI . . . . . **1 Mad. 51**

8. ENDOWMENTS.

1. ——— **Principle to be observed in dealing with Hindu endowments**—*Evidence of custom.* The important principle to be observed by the Courts in dealing with the constitution and rules or religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of litigation and to be guided by them. The custom and practice in such matters is to be proved by testimony. A zamindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom; an acknowledgment, taken in troubled times from the guardian of an infant mohunt, of a zamindar's customary right to control and remove the mohunt, is entitled to little, if any, weight as evidence of the custom. MUTTU RAMALINGA SETUPATI *v.* PERIANAYAGUM PILLAI **L. R. 1 I. A. 209**

2. ——— **Dancing girls attached to a temple inheritance**—*Temple endowment—Succession to the office of a dancing girl connected with such temple—Public policy—Right of suit.* The existence in India of dancing-girls in connection with Hindu temples is according to the ancient established usage, and the Court would not be justified in refusing to recognize existing endowments in connection with such an institution. Accordingly, where the plaintiff sued, as the adopted daughter of a dancing girl attached to a temple, to redeem and have her right to manage the inam lands assigned as the remuneration for the temple office recognized, but her claim was rejected on the ground that the adoption could not be recognized by the Civil Court: —*Held,* that the plaintiff's suit should be allowed. The lands in question were not claimed as being the property of the last incumbent, but as a part of the endowment of the temple of which she had been the manager. The alleged adoption only had effect as nominating the plaintiff to be successor in the management, and if it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should nominate her successor, the Courts of law could not refuse to recognize it, such custom being recognized in the country. TARA NAIKIN *v.* NANA LAKSHMAN **I. L. R. 14 Bom. 90**

HINDU LAW—CUSTOM—*contd.*

8. ENDOWMENTS—*concld.*

9. FAMILY, MANAGEMENT OF.

1. ——— **Right to manage family**—*Family compact, power of revocation of—Aliyasantana law—Yajaman.* The question whether, according to the Aliyasantana usage obtaining in South Canara, the senior member, male or female, or only the senior female, is the *de jure* yajaman (manager) of the family, is not concluded by authority and cannot be determined without evidence of usage. By a family compact (between all the members of an Aliyasantana family) in settlement of disputes in the family, it was agreed that the senior male for his life should enjoy the possession of the family land and protect the females. *Held,* that the senior female, assuming that she was *de jure* yajaman, could not arbitrarily revoke this arrangement. DEVU *v.* DEYI . . **I. L. R. 8 Mad. 353**

2. ——— **Aliyasantana law**—*Yajaman—The rights of the senior member of the family being a female.* The senior member of an Aliyasantana family, if a female, is *primâ facie* entitled to the yajamanship; and, in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the yajaman for the time being. MAHALINGA *v.* MARIYAMMAH **I. L. R. 12 Mad. 462**

10. IMMORAL CUSTOMS.

1. ——— **Usages among dancing girls (naikins)**—*Usage as a source of law—Functions of Courts of law and of the Legislature in giving effect to usage—Judicial decisions giving effect to usage.* Although the Courts in India are bound by charter to recognize the "usages of the Gentus," they are not limited to the sole sense of the word "usage" which shuts out all amelioration. The practices of an abandoned class are, no doubt, a usage in the sense of a tolerably uniform series of acts, but they do not therefore spring from a consciousness of compulsion, but rather from mere habit, imitation, and ignorance. Such usage is not a law, for over it presides the higher usage of the community at large from whose approval it must have derived any conceivable original validity, and in opposition to which it cannot subsist; and as the community comes to recognize certain principles as essential to the common welfare, it will no longer lend its sanction to sectional practices at variance with the principles thus recognized. It is only according to the standards of the Hindu law that a usage has coercive force amongst Hindus; and what the Hindu law is,

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HINDU LAW—CUSTOM—*contd.*

10. IMMORAL CUSTOMS—*contd.*

must, for the purposes of secular justice, depend on the general sense of the Hindu community. Although at one time in India the existence of companies of temple women may have been thought not so repugnant to the essential principles of the Vedic Code as to prevent their recognition as a source of law for themselves, it is not so at present. The popular sentiment would now no longer give validity to a usage of adoption among prostitutes, which devotes children, while still infants, to a life of infamy. The whole constitution of the class of courtesans would, it is certain, be now regarded by the great mass of the Hindu community as essentially vicious. The laws or rules by which such an association endeavours to make itself and its mischievous influence perpetual would be deemed directly opposed to "the laws of God," and the usage itself, therefore, not as valid and coercive like a law, but as essentially invalid on account of its contradiction of the law. A contrary opinion, if shown to have been held and acted on in a time gone by, could unhesitatingly be referred to error, and a practice founded on error and misconception does not by repetition become a customary law. A custom, in order not to constitute it such, but to give it coercive effect in particular instances, needs the sanction of the sovereign power waiting on the judgment of a Court. It is the function of a Judge, as a witness and as an expositor, to give a clear definition of the custom, usage, or rule as to which the opinion of the community has arrived at the requisite degree of maturity. It is the function of the State to enforce it when it is ascertained and pronounced upon by the Courts of law. Judicial decisions by which customs in India have been recognized are not to be regarded in precisely the same way as judicial decisions with reference to customs in England. In England what the Courts have definitely propounded becomes by that very process a part of the common law, that is, of the law deriving its force from the custom of the realm or of the whole community. But in India it is usage, as such, to which the Courts are commanded to give effect. A custom, however, may be adopted and abandoned, and its recognition at a particular stage, by the Courts, as a usage cannot prevent this action of the class or community. If the usage is variable at the will of the community, it must be enforced in its slowly changing phases, or else the behest of the sovereign will eventually be defeated. As the mind of the community becomes enlightened, its legal convictions will change, and this will constitute a change in its common law, as that law must from time to time be recognized and recorded in the Courts. MATHURA NAIKIN *v.* ESU NAIKIN **I. L. R. 4 Bom. 545**

2. ——————— *Immoral custom, suit to declare existence of—Public policy, custom contrary to.* In a suit by the dancing girls of a temple claiming to have by custom a veto upon the introduction of any new dancing girls into the service of that temple, and praying for an inquiry as to whether the dharmakarta of the temple was a fit and proper person to hold that office:—*Held*, dismissing the appeal, that, assuming that plaintiffs established that by the custom of the pagoda they had the rights they claimed, and that the custom in some respects fulfilled the requisites of a valid custom, the Court could not shut its eyes to the fact that by making the declaration prayed for it would be recognizing an immoral custom, *viz.*, for an association of women to enjoy a monopoly of the gains of prostitution,—a right which no Court could countenance. CHINNA UMMAYI *v.* TEGARAI CHETTI **I. L. R. 1 Mad. 168**

3. ——————— *Immoral custom, suit to declare existence of—Hereditary office with endowments or emoluments attached, suit to establish right to.* The suit was brought by a dancing girl to establish her right to the mirasi of dancing girls in a certain pagoda and to be put in possession of the said mirasi with the honours and perquisites attached thereto as set forth in schedules to the plaint annexed. The defendants denied the claim. The District Munsif, finding that the claim had been established, decreed for plaintiff, but, on appeal by the first defendant, the District Judge dismissed the suit on the authority of *Chinna Ummayi* v. *Tegarai Chetti, I. L. R. 1 Mad. 168.* On second appeal:—*Held*, that the present case was distinguishable from that of *Chinna Ummayi* v. *Tegarai Chetti*, in that there was no allegation in that case of any endowments attached to the office. That in this case the question of the existence of a hereditary office with endowments or emoluments attached to it ought to be inquired into, as that would materially affect the question of whether plaintiff had sustained injury by the interference of the first defendant. KAMALAM *v.* SADAGOPA SAMI . **I. L. R. 1 Mad. 356**

4. ——————— **Marriage by permission of caste without divorce**—*Natra marriage—Immoral custom.* A custom which authorizes a woman to contract a natra marriage without a divorce, on payment of a certain sum to the caste to which she belongs, is an immoral custom, and one which should not be judicially recognized. UJI *v.* HATHI LALA . . . **7 Bom. A. C. 133**

5. ——————— **Custom of divorce**—*Caste custom.* There is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage (*parisam*). SANKARALINGAM CHETTI *v.* SUBBAN CHETTI **I. L. R. 17 Mad. 479**

6. ——————— **Custom recognizing heirship in illegitimate son**—*Son by adulterous intercourse.* A custom recognizing a right of heirship in an illegitimate son by an adulterous intercourse would be bad. NARAYAN BHARTHI *v.* LAVING BHARTHI . . **I. L. R. 2 Bom. 140**

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HINDU LAW—CUSTOM—*contd.*

11. IMPARTIBILITY.

1. ——— **Impartible estate**— *Partition, right to.* A custom of impartibility must be strictly proved in order to control the operation of the ordinary Hindu law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition. DURRYAO SINGH *v.* DARI SINGH
13 B. L. R. 165 : 16 W. R. 142
L. R. 1 I. A. 1

2. ——— *Custom as to collateral succession.* That an estate is impartible does not imply that it is separate and so to be governed by the law applicable to separate succession. Whether the general status of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession. Since in documents between Hindus and in the Mitakshara itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes, in the event of the holder dying without issue, to his younger brother or his eldest son, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line the nearest male heir in the collateral line shall succeed. CHINTAMUN SING *v.* NOWLUKHO KONWARI
I. L. R. 1 Calc. 153 : 24 W. R. 255
L. R. 2 I. A. 263

Reversing the decision of the High Court in NATUKHEE KOERI *v.* CHOWDHRY CHINTAMUN SINGH . . . . . **20 W. R. 247**

3. ——— *Mitakshara law, custom inconsistent with.* *B S*, the father of the plaintiff, who was in possession of an estate in Lohardugga, which had been granted to his ancestor by the Raja of Chota Nagpore, was, on the 10th December 1857, after proceedings taken under Act XXV of 1857, declared to be a rebel, and it was ordered that all his property should be forfeited to Government. On the 16th April 1858, *B S*, having been arrested was tried and convicted on a charge of rebellion, and sentenced to death. The sentence was carried out on the 21st April 1858, and an order was made on the same day by the Deputy Commissioner for the confiscation of his property. On the 1st April 1872, a suit was instituted by the plaintiff, then a minor, to recover possession of the estate of his father *B S*. In his plaint he alleged that the estate was granted to the ancestor of *B S* for his maintenance, and was, by the terms of the grant, to devolve, on the death of the original grantee, on the nearest male heir, and so on in perpetuity ; and that no holder had any interest beyond his own life, and had no power of alienation. In his written statement it was alleged that the descent of the estate was governed by Mitakshara law, modified by the usage and custom of the family, by which the estate was impartible and descendible, according to the law of primogeniture, on the male heirs of the original grantee ; and that, by the Mitakshara law so modified, the plaintiff became on his birth co-owner with his father in the estate, and on his father's death became entitled to it, notwithstanding the sentence of confiscation pronounced againste *B S*. *Held*, on the case made by the plaint, that the estate was not shown to be inalienable ; the fact that the grant was for maintenance, and to the heirs male of the original grantee, would not render it so. *Held*, on the case made in the written statement, that the Mitakshara law did not apply to the case ; that law by which each son has by birth a property in the paternal or ancestral estate is inconsistent with the custom that the estate was impartible and descended to the eldest son. KAPILNAUTH SAHAI DEO *v.* GOVERNMENT
13 B. L. R. 445 : 22 W. R. 17

4. ——— *Presumption as to partibility—Burden of proof—Deshghat vatan held by desai.* In a suit for the partition of part of a deshgat vatan, brought by the younger brothers of a joint Hindu family against their eldest brother the desai, the defence was that the vatan was held by him as an impartible inheritance, subject to a right by custom that a brother should receive maintenance out of the income derived from it. *Held*, that there was no such general presumption in a favour of the impartibility of estates of this kind as to shift the burden of proof which was upon the desai to show that the vatan had, contrary to the general Hindu law, been inherited by him alone. It was for the desai to show by evidence of the nature of the tenure of the vatan that it was impartible, or to show by evidence of family custom or of district, *i.e.*, local custom, that impartibility attached to it, such evidence being strong enough to rebut the presumption of the prevalence of the general Hindu law. Where the defendant in a suit for the partition of a deshgat vatan held the hereditary office of desai and the vatan was properly appertaining to the office, the decree for partition was accompanied by a declaration that it was made without prejudice to the right of the desai to any income payable out of it, for the performance of his duties to which he might be entitled under any law in force. ADRISHAPPA *v.* GURUSHIDAPPA . . **I. L. R. 4 Bom. 494**
L. R. 7 I. A. 162

5. ——— *Alienation not for necessity.* *Held*, on the evidence in the case, that a custom entitling the holder of an impartible raj to make an alienation of a portion of the estate in favour of his wife "in token of love for her" was not established. BHAWANI GHULAM *v.* DEO RAJ KUARI . . . **I. L. R. 5 All. 542**

6. ——— *Law of succession, usage modifying.* A special usage modifying the ordinary law of succession must be ancient and

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HINDU LAW—CUSTOM—*contd.*

11. IMPARTIBILITY—*contd.*

invariable, and must be established to be so by clear and unambiguous evidence. RAMA LAKHSHMI AMMAL *v.* SIVANANANTHA PERUMAL SETHURAYAR
12 B. L. R. 396
17 W. R. 553
14 Moo. I. A. 570

SERUMA UMAH *v.* PALATHAN VITIL MARYA COOTHY UMAH . . **15 W. R. P. C. 47**

LUCHMAN LALL *v.* MOHUN LALL BHAYA GAYAL
16 W. R. 179

7. ——— *Customary law of inheritance of certain zamindaris in and about Madura—Impartible raj.* The principal issue on this appeal was whether the defendant was entitled by a custom prevailing in the Saptur zamindari, and in other zamindaris held by zamindars of the same caste connection in Madura, and neighbouring districts, to inherit the impartible raj estate of that, the Saptur, zamindari in preference to the plaintiff. Both the parties were sons of the late zamindar, being half-brothers, sons of their father by different mothers. The plaintiff was the elder of the two, but the mother of the younger had been married by the zamindar before his marriage with the mother of the elder. In virtue of his seniority the elder brother claimed. The younger defended the suit on the title that his mother's marriage with the raja had preceded the marriage of the plaintiff's mother, alleging the custom to prevail in the zamindari as above stated. The Courts below, having considered the evidence, found that the custom was proved in concurrent judgment. *Held*, that no error having been shown, and the Courts having decided with reference to what was laid down in *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar, 14 Moo. I. A. 570*, as to the requisites for the proof of such a custom, the findings below were conclusive as to its existence. SUNDARALINGASAMI KAMAYA NAIK *v.* RAMASAMI KAMAYA NAIK
I. L. R. 22 Mad. 515
L. R. 26 I. A. 55

8. ——— *Right of possessor of impartible estate to alienate.* There is no such co-parcenary in an estate impartible by custom as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth. The son's right at birth, under the Mitakshara, is so connected with the right to share in and to obtain partition of the estate that it does not exist independently of the latter right. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. In regard to a raj estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present raja's alienation of part of that estate was alleged by his son to be invalid as against him. *Held*, that, if there had been no custom of impartibility, the raja's power over the estate would have been restricted by the law declared in Mitakshara, Chap. I, s. 1, v. 27, and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom. *Held*, that in regard to impartible estate the son's right at birth did not exist where there was no right on his part to partition; also, that inalienability depended on custom or on the nature of the tenure. In this case, the evidence did not establish that by custom the estate was inalienable. SARTAJ KUARI *v.* DEORAJ KUARI . . . **I. L. R. 10 All. 272**
L. R. 15 I. A. 51

9. ——— **Impartible zamindari—** *Alienation by the owner by his will.* A zamindari in Madras, by custom descending to a single heir by primogeniture, and impartible, is not inalienable in virtue only of its impartibility, in the absence of proof of a custom having the force of law, or of some tenure attaching to the zamindari, rendering it inalienable. *Sartaj Kuari* v. *Deoraj Kuari, L. R. 15 I. A. 51 : I. L. R. 10 All. 272*, a case which is applicable in Madras, decides that where there is an impartible estate descending by primogeniture and in other respects the Mitakshara governs the rights of the parties, the eldest son does not become a co-sharer with his father, and decides that the inalienability of the estate would depend upon custom which must be proved, or in some cases upon the nature of the tenure attaching to the zamindari. *Held*, that there was no proof in this case of a custom which the Courts could recognize as having the force of law not resting on the Mitakshara, but argued to have been established by a long course of decision in the Madras Courts, against the validity of absolute alienation of an impartible zamindari. *Held*, also, that this was not a case to which should be applied the doctrine that where there is a long course of decision, that course should be supported, and the law not altered. And *held*, that, inasmuch as here there was no co-parcenary subsisting between the zamindar and any member of his family in the estate, the zamindar had power to alienate it, and that he might exercise that power by will. VENKATA SURYA MAHIPATI RAMA KRISHNA RAO *v.* COURT OF WARDS . **I. L. R. 22 Mad. 383**
L. R. 26 I. A. 83
3 C. W. N. 415

10. ——— **Impartible estate—***Power of sons to question the acts of their father when holder.* Where an estate is impartible, the sons of the present holder have, since the decision in *Sartaj Kuari* v. *Deoraj Kuari, L. R. 15 I. A. 51 : I. L. R. 10 All. 272*, recently affirmed as to this Presidency in *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards, L. R. 26 I. A. 83 : L. L. R. 22 Mad. 383*, no *locus standi* to question the acts of their father. VENKATA NARASIMHA NAIDU *v.* BHASHYAKARLU NAIDU . **I. L. R. 22 Mad. 538**

11. ——— *Family customs —Rajputs—Primogeniture—Evidence of converging*

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HINDU LAW—CUSTOM—*contd.*

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probabilities. In a Rajput family, of a clan named Jadon Thakur, long settled near Agra, holding an ancestral talukh of zamindari villages, and having their principal dwelling-place in one of such villages, the question arose whether, by a family custom, their ancestral property descended as an impartible estate, to be possessed by the eldest son of the last inheritor, or descended as an ordinary estate, under the Hindu law, to be held jointly by the sons, each having the right to claim partition. The second of a joint family of three sons now sued the elder, the youngest being a co-defendant, but not taking either side. The evidence established a family custom that the ancestral property should descend as an impartible estate, and should be possessed by a single heir at a time, who should be the eldest son. All the lines of evidence, of differing degrees of value, converged towards the same result, the existence of this custom of impartibility, and of primogeniture. Perhaps no one of these lines, taken alone, would have been conclusive in favour of this right being established in the eldest son. But when the whole evidence was considered, the converging probabilities were conclusive to maintain the right claimed by the eldest son to exclusive possession. NITR PAL SINGH *v.* JAI PAL SINGH
I. L. R. 19 All. 1
L. R. 23 I. A. 147

12. ——— **Iluvans of Palghat**—*Custom relating to partibility of property—Tiyans.* In a suit for partition amongst parties belonging to the caste of Iluvans of Palghat it having been contended that the ordinary Hindu law relating to partibility of property had no application:—*Held,* that *Raman Menon* v. *Chathunni, I. L. R. 17 Mad. 184,* relating to the Tiyans, could not be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that the Iluvans and the Tiyans had at one time been of one class. Upon the evidence adduced to the effect that the former class had for long been treating themselves as separate from the latter and that partition was enforced as a matter of right amongst the Iluvans, the Courts were entitled to find the custom relating to partibility among the Iluvans proved. VELU *v.* CHAMU
I. L. R. 22 Mad. 297

13. ——— **Impartible raj**—*Custom of inalienability, evidence of—Right of possessor of impartible estate to alienate—Dayadi pattam.* The holder of the impartible palayam of Ammayanayakanur transferred his estate to his wife by a deed of gift. The transferor had besides a son numerous dayadis, and some of the latter now sued for a declaration that the gift was not binding on them. The law of succession admittedly applicable to this palayam was the rule of dayadi pattam, according to which the person entitled to succeed on the death of a palayagar is the senior in age of his dayadis, descended from one of three brothers who originally formed a joint family together and were the founders of three lines in the family. The person entitled under this rule to inherit on the death of the transferor was one of the plaintiffs in the suit. It was contended that the palayagar had no proprietary right in the estate, but held the office of manager merely; but this contention was overruled. It was further contended that the estate admittedly impartible was by custom inalienable also. *Held,* on the oral and other evidence adduced in the case, and with reference to admissions made by the transferor and to his conduct, and on its appearing that eight out of the nine predecessors of the transferor had left either sons or widows, but nevertheless that for three centuries there had been no sale or gift, that the custom of inalienability was established, and that the gift in question was accordingly invalid as against the plaintiffs. *Sartaj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272,* discussed and explained. SIVASUBRAMANIA NAICKER *v.* KRISHNAMMAL . . . . **I. L. R. 18 Mad. 287**

14. ——— *Impartible raj not necessarily inalienable—Mitakshara law.* If amongst Hindus governed by the law of the Mitakshara a raj happens to be impartible and governed by the rule of primogeniture it does not therefore follow that it is inalienable. The condition of inalienablity depends upon special custom, or, in some cases, upon the special tenure of the raj, and must be clearly proved. *Sartaj Kuari v. Deoraj Kuari, I. L. R. 10 All. 272 : L. R. 15 I. A. 51,* referred to. RUP SINGH *v.* PIRBHU NARAIN SINGH
I. L. R. 20 All. 537

15. ——— *Impartible Raj—Custom—Onus of proof—Raj seized by Government—Subsequent re-grant effecting division of the estates—Grant to heir of former holder—Custom of exclusion of females.* The East India Company seized an impartible Raj the holder of which had been driven out of the country for acts of rebellion, and placed it under the management of their officers. Subsequently they effected a division of the Raj estate, re-instating in one portion of it the heir of the former holder, and granting the other portion to members of another branch of the same family. *Held,* that the re-instatement must, under the circumstances, be treated as proceeding from the grace and favour of the Government in the exercise of their sovereign authority, and the portion restored became thenceforth the separate self-acquired property of the heir, though with all the incidents of the family tenure of the old estate as an impartible Raj. *Beer Pertab Sahee* v. *Rajender Pertab Sahee, (1867) Moo. I. A. 1,* followed. There is no inconsistency between a custom of impartibility and the right of females to inherit; and the general law must prevail, unless it is proved that the custom extends to the exclusion of females. The onus of proving that they are excluded lies on the party alleging it. RAM NUNDUN SINGH *v.* JANKI KOER (1902) . . . . **I. L. R. 29 Calc. 828 : s.c. 7 C. W. N. 57 ; L. R. 29 I. A. 178**

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HINDU LAW—CUSTOM—*contd.*

11. IMPARTIBILITY—*concld.*

16. ——————— *Impartible raj—Family custom—Separate acquisitions of holder of impartible raj—Presumption.* One Raja Fateh Sahi was the owner of a "raj-riasat," to which by family custom the incidents of primogeniture and impartibility applied, the younger sons receiving portions of the estate by way of "babuai" allowance. The bulk of the property of the riasat was situate in the district of Saran, but there was also a not inconsiderable portion in the district of Gorakhpur. After the battle of Buxar, in 1764, the property in Saran was confiscated by the British Government; but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh, which was not ceded to the British Government, until 1801. *Held*, that the application of the customs of primogeniture and impartibility to the Gorakhpur property was unaffected by the confiscation of the property in Saran, and *semble* that, even if (which, however, was found not to have been the case) the Gorakhpur property had been altogether acquired after confiscation of the property in Saran, these customs, being part of the personal law of the family, would still govern such after acquired property. It is of the essence of family usages that they should be certain invariable and continuous, and well established discontinuance must be held to destroy them. Where, however, such a custom has been proved the onus is upon the party, who alleges the discontinuance thereof, to prove that fact. *Raj Kishan Singh* v. *Ramjoy Surma Mazoomdar, I. L. R. 1 Calc. 186*, and *Soorendro Nath Roy* v. *Musammat Heeramonee Burmoneah, 12 Moo. I. A. 81*, referred to. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom. A compromise between members of a Hindu family whereby "babuai" allowance is fixed and a dispute with regard to the family property is terminated will, if just and legal, be binding on the minor children of the parties thereto. *Pitam Singh* v. *Ujagar Singh, I. L. R. 1 All. 651*, and *Chanvirapa* v. *Danava, I. L. R. 19 Bom. 593*, referred to. If the owner of an estate, the devolution of which is governed by family custom, acquires separate property, but does not in his lifetime alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate. *Lakshmipati* v. *Kandasami, I. L. R. 16 Mad. 54*, and *Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik, I. L. R. 17 Mad. 422*, referred to. SARABJIT PARTAP BAHADUR SAHI *v.* INDRAJIT PARTAP BAHADUR SAHI (1905) . . **I. L. R. 27 All. 203**

12. INHERITANCE AND SUCCESSION.

1. ——————— **Inheritance**—*Property descending in other than ordinary way—Onus probandi.* Where ancestral property has apparently descended in the ordinary way of Hindu property, first to the son and thence to the mother, it lies on those who say it is confined to the direct descendants of the original donee to prove their case and show by some custom that that was the proper construction of the grant. MAHENDRA SINGH *v.* JOKHA SINGH **19 W. R. P. C. 211**

2. ——————— *Onus probandi—Customs varying ordinary course of descent.* An action was brought by the members of a junior branch of the family of the Maharaja of Chota Nagpore to recover possession of a fourth share of certain moveable and immoveable properties which originally formed part of an estate granted to one *A S*, a junior member of the family, for his maintenance by a former Maharaja. On *A S's* death, the eldest of his surviving sons succeeded to the thakooree guddee, and one of his younger sons, *B S*, the admitted common ancestor of the parties, obtained a portion of that estate for his maintenance, including the properties in dispute, and the last person seised of them until her death was *L S* as the representative of her deceased husband *D N*. The plaintiffs' case was that *D N* having died without issue, all the properties ought, "according to the Hindu shasters and the custom of the family," to be divided equally between all the surviving male descendants of the common ancestor, defendant's answer being that, "according to the long established custom of the family of *B S*, he (the defendant) as the representative of the eldest branch thereof was entitled solely and exclusively to the properties in dispute." *Held*, that the burden of proving the affirmative lay upon the plaintiffs, whose claim was not based upon the ordinary Hindu law of inheritance, but upon a special custom without reference to the claimant's position in the family or their capability to satisfy the conditions of heirship. *Held*, also, that, as according to the custom in the eldest branch of *A S's* family the property left by a childless member devolved on the eldest or the guddee thakoor, and as the defendant's position in *B S's* branch of the family was similar, *i.e.*, that of a thakoor, he had every right to contend that the same custom must be presumed to obtain in both until the contrary was proved. JEETNATH SAHEE DEO *v.* LOKENATH SAHEE DEO . **19 W. R. 239**

3. ——————— *Alyasantana law.—Self-acquisition, succession to.* According to custom obtaining in South Canara, the self-acquisition of a member of a family governed by the Alyasantana law devolves upon his death not upon the family, but upon his immediate representatives. ANTAMMA *v.* KAVERI . **I. L. R. 7 Mad. 575**

4. ——————— *Custom contrary to general rule as to inheritance of daughters.* The general rule of Hindu law being that if a man die separate in estate from his kinsmen without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. An alleged custom to the contrary with respect to

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HINDU LAW—CUSTOM—*contd.*

12. INHERITANCE AND SUCCESSION—*contd.*

any particular kind of property must be proved by ample and satisfactory evidence before the Courts will admit it as established. NARAYAN BABAJI *v.* NANA MANDHAR . . **7 Bom. A. C. 153**

5. ——— **Custom of bogam or dancing-girl caste in Godavari**—*Gains of prostitution—Property left by mother.* A pauper sued his sister for the partition of property valued at a large sum. The parties belonged to the *bogam* caste, residing in the Godavari district. The defendant pleaded that the property had been acquired by her as a prostitute, and denied the plaintiff's claim to it. The plaintiff obtained a decree for R100, being a moiety of the property found to have been left by their mother. *Held*, on the evidence as to the local custom of the caste, that the decree was right. By the custom of the *bogam* caste in the Godavari district property left by a mother is divisible between sons and daughters. CHANDRAREKA *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 14 Mad. 163**

6. ——— **Right of females to inherit**—*Village—Wajib-ul-urz.* The paternal grandmother of a deceased village shareholder claiming to inherit in preference to his male collateral relations, the issue was fixed with the assent of the pleaders on both sides, wheher the plaintiff, as a female, was excluded from inheriting by the custom of the family or tribe. *Held*, that this was substantially a question of fact, and that on the evidence, which included the village wajib-ul-urz, the customary exclusion of females was not proved. BURJORE *v.* BHAGANA . **I. L. R. 10 Calc. 557**
L. R. 11 I. A. 7

7. ——— **Utpat families of Pandharpur**—*Proof of family custom.* Among the members of the Utpat families of Pandharpur in the Sholapur district, daughters are excluded from succession by a long and uniform family usage. Under Hindu law, a family usage or custom, when clearly proved, outweighs the written text of the law. But the greatest care must be exercised in accepting the alleged usage or custom as proved. When it is a family custom, the evidence must clearly show that it has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience. Any special rule of inheritance proved to exist in a Hindu family, and which is ancient, uniform, and reasonable, and not repugnant to the fundamental principles of Hindu law, should not be refused recognition. Origin and growth of the rights of inheritance of the widow and daughter by general Hindu law considered. BHAU NANAJI UTPAT *v.* SUNDRABAI . . . **11 Bom. 249**

8. ——— **Exclusion of females**—*Custom excluding women from succession, proof of—Gohel Girasias—Variance between pleading and proof—Limitation.* *H*, a Gohel Girasia, died in or about 1866, leaving a widow *M* and daughter *B*, and possessed of certain lands. *M* died in 1887.

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In 1890, the plaintiffs, who were divided collaterals of *H*, sued to recover the lands alleging that they succeeded thereto on the death of *H*, widows and daughters being excluded from inheritance according to the custom among the Gohel Girasias. The lower Courts found that the lands were never in plaintiff's possession ; that *M* held them till that December 1882, since which time defendants 1—3 had them in their enjoyment as purchasers from her ; that the custom proved excluded daughters, but not widows, from inheritance ; and that the claim was within time, having been made within twelve years of the death of *M*. On second appeal to the High Court :—*Held*, (i) that the alleged customs excluding daughters was not proved ; (ii) that the plaintiffs should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows and daughters to one which only excluded daughters ; (iii) that since limitation must be applied to the planitiff's claim as they made it, and tried to prove it, *M's* possession was adverse to them, and, being for more than twelve years, barred the suit. *Basava* v. *Lingangauda, I. L. R. 19 Bom. 428 ; Bhagvandas* v. *Rajmal, 10 Bom. 241* ; *Shidhojirav* v. *Naikajirav, 10 Bom. 228 ;* and *Neelkisto v. Beerchunder, 12 Moo. I. A. 523,* referred to. DESAI RANCHODDAS VITHALDAS *v.* RAWAL NATHUBAI KESABHAI . . . **I. L. R. 21 Bom. 110**

9. ——— **Jain law**—*Proof of custom of inheritance.* When a question regarding inheritance arises between parties of the Jain sect, the Courts should enquire into the customs of the sect and be guided by the result of the enquiry. If the party alleging the custom succeeds in establishing the same to the satisfaction of the Court, then, whether the custom be at variance or in accordance with Hindu law, the Court is bound to give effect to the custom. SHEO SINGH RAI *v.* DAKHO **6 N. W. 382**

s.c. Affirmed by Privy Council.
I. L. R. 1 All. 688
L. R. 5 I. A. 87

10. ——— **Khoja Mahomedans**—*Law applicable to Khoja Mahomedans, Bombay.* It must be considered as the settled rule in Bombay that in the absence of sufficient evidence of usages to the contrary the Hindu law is applicable in matters relating to property, inheritance, and succession among Khoja Mahomedans, and this rule was held to apply in a case of Khojas at Thana, no evidence having been given in that case to show its inapplicability to the Khojas of that place. SHIVJI HASAM *v.* DATU MAVJI KHOJA . . . . . **12 Bom. 281**

11. ——— *Khoja Mahomedans—Succession—Letters of administration.* In the absence of satisfactory proof of a custom, differing from the Hindu law, the Courts of this Presidency apply to Khojas the Hindu law of inheritance and succession. If a custom opposed to Hindu law be

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alleged to exist amongst Khojas, the burden of proof rests upon the person setting up that custom. The Khojas, having been originally Hindus and converted from the Hindu religion by a dai, or missionary of the Imam of the Ismailis, to the Mahomedan religion of the Shia division and Imami Ismaili sub-division, and being partly regulated by Mahomedan law, partly by Hindu law, and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khoja community. A Khoja, having died intestate and without leaving issue, was survived by his mother (a widow), his wife, and a married sister. *Held*, that, according to the custom of the Khojas, his mother was entitled to the management of his estate and therefore to letters of administration in preference to his wife or his sister. HIRABAI *v.* GARBAI . . . . . **12 Bom. 294**

12. ——————— *Khoja Mahomedans.* In order to prove a custom of inheritance among Khoja Mahomedans at variance with the rules of Hindu law, evidence merely of the opinion of the leading members of the caste is not enough. Instances must be proved in which the alleged custom has been observed and followed. RAHIMATBAI *v.* HIRBAI . . **I. L. R. 3 Bom. 34**

13. ——— **Succession to raj**—*Impartible estate.* A raj is not necessarily impartible. In every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom must be proved. COURT OF WARDS *v.* RAJKUMAR DEO NANDUN SING **9 B. L. R. 310 note**

14. ——————— *Proof of indivisible nature of raj.* Where a party alleges a raj to be indivisible, and that he is as heir entitled to succeed to the whole, the onus of proof is on him. GIRDHAREE SINGH *v.* KOOLAHUL SINGH **6 W. R. P. C. 1: 2 Moo. I. A. 344**

15. ——— **Raj of Keonghur.** According to the family custom, the sons of a Rajah of Keonghur, by wives of a lower caste than the raja, rank after the sons by wives of the same caste as the raja. BISTOOPREA PATMOHADEA *v.* BASOODEB DUL BEWARTEE PATNAIK . **2 W. R. 232**

16. ——— **Appointment of jubraj**—*Qualifications for rajahship.* Where in a question as to the right of inheritance to a raj, it was admitted that there was a custom that the reigning raja should name a jubaraj and a burra thakur, of whom the first succeeds to the throne, and the latter to the office of jubraj; but it was contended, on the one hand, that if the reigning raja had appointed a jubraj his choice should have been guided partly

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by an alleged promise or intention on the part of the former raja and partly by the appellant's preferential title as legal heir by seniority amongst the near kindred; and, on the other, that the choice of the reigning raja was absolutely free, and could not be controlled by the wishes of the former raja:—*Held*, that, where there was evidence of a power of selection, the actual observance of seniority, even in a considerable series of successions, could not of itself defeat a custom which established the right of free choice. Where family custom required the union of two things to constitute the legal heir, *viz.*, seniority in age and nearness of kin, and the claimant has but one of these qualifications in himself, *viz.*, seniority, he does not entitle himself to succeed. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. NILKRISTO DEB BARMONO *v.* BIR CHANDRA THAKUR **3 B. L. R. P. C. 13: 12 W. R. P. C. 21 12 Moo. I. A. 523**

Affirming the decision of the High Court in BEER CHUNDER JOOBRAJ *v.* NEELKISSEN THAKOOR **1 W. R. 177**

17. ——— **Hosaipore raj**—*Confiscation of estate by Government.* On the accession of the British Government to the Dewanny, Rajah Futtah Sahie in 1767, having refused to acknowledge allegiance to, and having openly rebelled against, the Government, was expelled from his estate of Hosaipore. The Government retained the estate in its own possession until 1790, when, setting aside the sons of Futtah Sahie, it conferred the estate upon Chutterdharee, at that time the eldest surviving member of the younger branch of the family. Two of the grandsons of Chutterdharee having sued to establish their right to a moiety of his property:—*Held*, that the Hosaipore property was a raj, and that by the rule of the family it was to descend entire to a single heir; that the Government, by setting aside a particular branch of the family, did not, in intent or in fact, confiscate the property, and thereby extinguish the rights of every member of the family; that the family custom and the custom of the raj were not destroyed by the infringement of the custom by virtue of which Chutterdharee acquired the estate; and that he having acquired the estate subject to a particular custom and having himself done nothing destructive of that custom, his heirs were bound by the same custom, to the exclusion of the ordinary law of Hindu inheritance. TELUCKDHAREE SAHIE *v.* RAJENDER PROTAUB SAHIE. RAM GOPAUL SINGH *v.* TELUCKDHAREE SAHIE . **W. R. F. B. 97**

18. ——— **Succession, family usage regulating**—*Discontinuance of family custom—Beng. Regs. XI of 1793 and X of 1800.* In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it

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12. INHERITANCE AND SUCCESSION—*concld.*

was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that, although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown. *Quære:* Whether Regulation XI of 1793 or Regulation X of 1800 would govern a case where the claim rested only on a continuing family usage? *Held*, on the evidence, that from the acts of the members of the family the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure, and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. RAJKISSEN SINGH *v.* RAMJOY SUKMA MOZOOMDAR **I. L. R. 1 Calc. 186**
19 W. R. 8

Affirming decision of the High Court in RAMJOY SURMA *v.* PRANKISHEN SINGH . **2 W. R. 80**

19. ——— *Mitakshara and Mayukha Schools of Hindu law—Proof of family custom at variance with Hindu Law—Governing law of migrating families.* A family custom alleged to exist amongst the Ahban Thakurs of Oudh, in derogation of the ordinary *Mitakshara* law in force there, that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor, was held by the Judicial Committee not to be proved by four instances of the custom of comparatively modern date, which their Lordships found to be the only portions of the evidence adduced which supported it. CHANDIKA BAKHSH *v.* MUNA KUNWAR (1901)
I. L. R. 24 All. 273
s.c. L. R. 29 I. A. 70: 6 C. W. N. 425

13. MAHOMEDANS.

20. ——— **Mahomedan family adopting Hindu customs**—*Discretion of Judge.* A Mahomedan family may adopt the customs of Hindus, subject to any modification of those customs which the members may consider desirable. A Judge is not bound, as a matter of law, to apply to a

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13. MAHOMEDANS—*concld.*

Mahomedan family living jointly all the rules and presumptions which have been held by the High Court to apply to a joint Hindu family. It rests with him to decide in any particular case how far he should apply those rules and presumptions. SUDDURTONNESSA *v.* MAJADA KHATOON
I. L. R. 3 Calc. 694
2 C. L. R. 308

14. MARRIAGE.

1. ——— **Marriage, suit to declare validity of**—*Proof of custom—Necessity to raise express issue as to custom.* Where a suit to have it declared that defendant was plaintiff's wife, and was bound to live with him, was dismissed on the ground that custom required that in order to constitute such a right there should have been a second marriage:—*Held*, that an issue should have been framed as to whether or no such a custom existed. BOOL CHAND KALTA *v.* JANOKEE **24 W. R. 228**

2. ——— **Grandharb form of marriage**—*Legitimacy of children—Entry in village wajib-ul-urz.* *D* died in 1860 leaving him surviving his first wife *G*, his second wife *B*, his mother *R*, and *M*, his son, by a woman to whom he had been married by the "grandharb" form of marriage. In 1873 *R* died, and on her death *M* procured the registration of his name in respect of her one-third share, it having been previously decided in proceedings by the settlement officer that the name of each claimant should be registered in respect of a one-third share. In 1879 *B* sued *M* for possession of the one-third share held by him claiming as heir of her deceased husband *D*, and alleging that *M* was not the legitimate son of *D*, and therefore not entitled to succeed to such rights. *M* set up as a defence that he was the legitimate son of *D*, and therefore entitled to succeed; and that, assuming he was not legitimate he was entitled to succeed by the custom of the village. In support of such custom, *M* relied on the following entry in the village wajib-ul-urz:—"In this village a mistress treated as a wife and the child of such a mistress shall also have a right to transfer property and to obtain and receive property." *Held*, that *M* was illegitimate. *Held*, also, with reference to the entry in the wajib-ul-urz, that it did not necessarily place illegitimate children on an equality with legitimate as heirs; and if that was its intention, it was ineffectual, as parties could not by agreement alter the law of succession; and if the entry was regarded as evidence of custom, it was not conclusive. BHAONI *v.* MAHARAJ SINGH
I. L. R. 3 All. 738

3. ——— **Dissolution of marriage at will**—*Illegal custom.* A custom of the Talapada Holi caste that a woman should be permitted to leave the husband to whom she has first been married, and to contract a second marriage (natra) with another man in the lifetime of her first husband and without his consent, was invalid, as being entirely

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opposed to the spirit of the Hindu law. REG. *v.* KARSAN GOJA. REG *v.* BAI RUPA
2 Bom. 124 : 2nd Ed. 117

4. ——— **Marriage of female member of family of Rajah of Tipperah**—*Family custom.* A female member of the family of the Raja of Tipperah by custom does not cease to be a member of the family by marrying into another. ROOP MUNJOOREE KOOEREE *v.* BEER CHUNDER JOOBRAJ
9 W. R. 308

5. ——— **Sudra marriage**—*Ceremony of pariyam or betrothal—Illegitimate son of a Sudra—Inheritance.* The widows of a shrotriemdar, who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriemdar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reasons of his parents having performed the ceremony of pariyam before his birth. *Held*, that the performance of such ceremony did not make a legal marriage, that the defendant was illegitimate, and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half. Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance. CHINNAMMAL *v.* VARADARAJULU
I. L. R. 15 Mad. 307

15. MIGRATING FAMILIES.

——— **Presumption as to migrating family.** Hindu law is in the nature of a personal usage or custom, and probably migratory families or tribes would retain their own usages. The presumption is in favour of the continuance of the ancient family custom. SURENDRA NATH ROY *v.* HIRAMANI BURMONI
1 B. L. R. P. C. 26 : 10 W. R. P. C. 35
12 Moo. I. A. 81

16. PRIMOGENITURE.

1. ——— **Custom of Primogeniture**—*Descent of ancestral estate—Thakurs of Bombay Presidency.* A custom in the case of a petty Hindu family that the family estate shall descend to the eldest son, the second and other sons being entitled to maintenance only, cannot be supported. *Semble :* A different rule would apply to such a custom prevailing among thakurs and chiefs of the Bombay Presidency. BASVANTRAV KIDINGAPPA *v.* MANTAPPA KIDINGAPPA . . **1 Bom. Ap. 42**

2. ——— *Custom superseding general law.* A custom of primogeniture in the family of a Desoli in the Southern Mahratta

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country supersedes if clearly proved the general Hindu law of descent. SHIDOJIRAV *v.* NAIKOJIRAV
10 Bom. 228

3. ——— *Proof of custom.* Custom of primogeniture not proved. AMRIT NATH CHOWDHRY *v.* GAURI NATH CHOWDHRY
6 B. L. R. 232 : 15 W. R. P. C. 10
13 Moo. I. A. 542

4. ——— **Suit by younger brother for partition.** In a suit by younger brothers against the eldest brother for a partition of the ilaka of Rawalpore, the family usage and custom for eight generations for a zamindari estate in Bengal to descend entire to the eldest son, to the exclusion of the other sons, sustained. (RAWUT) URGUN SINGH *v.* (RAWUT) GHUNSIAM SINGH . **5 Moo. I. A. 169**

5. **Partition of deshpande vatan**—*Presumption as to impartibility of vatan—Cessation of duties attached to a vatan.* It had been the practice in a deshpande vatandar's family, extending over a century and a half, without interruption or dispute of any kind whatever, to leave the performance of the services of the vatan and the bulk of the property in the hands of the elder branch, and to provide the younger branches with maintenance only. *Held*, that such practice, being more probably due in its origin to a family or local usage than to a mere arrangement determinable at the will of any members of the family, ought to be recognized and acted upon as a legal and valid custom. RAMRAO TRIMBAK DESHPANDE *v.* YESHVANTRAO MADHASAVRAO DESPHANDE
I. L. R. 10 Bom. 327

6. ——— **Deshmukhi vatan, impartibility of**—*Partition, suit for, of such vatan.* In the middle of the seventeenth century one Veduji, the ancestor an founder of the family of the parties to the suit, then called the Mhaske family, acquired a deshmukhi vatan originally consisting of eight chavurs of inam land, which was afterwards equally divided between the two sons of Veduji, who became the heads of separate branches of the family, called, respectively, the Pimparne and the Jakhorikar branches, of which the former was the elder. In the latter part of the seventeenth or early part of the eighteenth century the older branch further acquired six chavurs of land. The parties to the suit were brothers and belonged to the elder branch. In the middle of the eighteenth century disputes arose between the Jakhorikar branch and Timbakrav, the then eldest representative of the Pimparne branch, in respect of the liability to partition of the emoluments, dignities, and property appertaining to the said vatan, and a decree was passed by the Peishwa, Raghunath Bajirav, to the effect that the representatives of the Jakhorikar branch should keep the inam lands they had, and continue to receive as before money for defraying the expenses of weddings and other household matters,

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but should have nothing further to do with the vatan, which, with the "right of eldership," was to be enjoyed by the sons, grandsons and descendants of Trimbakrav in succession. The subsequently acquired six chavurs of land, two of which were situated at Pimparne and the remaining four at Ambhora, described as sadhnukh, had been always spoken of and dealt with as connected with the vatan and the original eight chavurs, and had been enjoyed for a hundred or hundred and fifty years by Trimbakrav and his ancestors free from any right of the bhaubands, and this mode of enjoyment was recognized and affirmed by the authorities in the sanads, and also, subsequently, by the British Government. The plaintiff, who was one of the three sons of Gopalrav, now deceased, sued his eldest brother, Trimbakrav *alias* Bajirav, and his second brother, Balvantrav, for partition into three equal shares of the property appertaining to the deshmukhi and patiki vatan. Trimbakrav, the first defendant, resisted the suit on the ground that by the custom of the family he as the eldest son took the vatan and the property appertaining to it, subject only to allotments for maintenance of the younger brothers. The Court of first instance found the alleged custom proved, but with the consent of the first defendant awarded R700 to the plaintiff as his third share of the immoveable property. The plaintiff appealed to the High Court, and contended, *inter alia*, that the Peishwa's decree related to the original eight chavurs only, and not to the subsequently acquired six chavurs, and that the younger members of the Pimparne branch were not bound by that decree. *Held*, that the plaintiff's claim to partition of the deshmukhi vatan, including the six chavurs, should be disallowed, the existence of the "custom of eldership," as alleged by the first defendant, being satisfactorily established by the documentary as well as other evidence—a custom which the Jakhorikar branch unsuccessfully endeavoured to repudiate, but which the younger members of the Pimparne branch had throughout recognized until the present suit; and the fact that the assessment and other dues, as well as all the allotments, had been always paid by the eldest member of the Mhaske family was a strong circumstance in corroboration of the first defendant's allegation. The circumstances that services incidental to the vatan had been abolished could not affect the title of eldership of the first defendant as established by custom. *Held*, also, that plaintiff's claim to the miras land and the patilki vatan should be allowed, there being no evidence of a custom of primogeniture as regards them, nor were they connected with the deshmukhi vatan. Decree varied by directing the partition of the miras land and patilki vatan. GOPALRAV *v.* TRIMBAKRAV . . **I. L. R. 10 Bom. 598**

7. ——— **Evidence and proof of custom of primogeniture**—*Enjoyment of property consistent with alleged custom. Held*, on the evidence, [reversing the judgment of the High Court, that the appellants had satisfied the serious burden of proving a special family custom of descent by primogeniture. The evidence showed that for a period of nearly eighty years from the time of the British occupation of the district in which lay the estate in suit, the enjoyment had been consistent with the alleged custom, and for the earlier and greater part of that term had been inconsistent with any other legal basis. Also that in two other families in the same district, derived from the same ancestor as the parties to the suit, the alleged custom prevailed. GARURUDHWAJA PARSHAD SINGH *v.* SAPARAUDHWAJA PARSHAD SINGH **I. L. R. 23 All. 37**
L. R. 27 I. A. 238

Reversing judgment of High Court in SUPARAUDHWAJA PRASAD *v.* GURURADDHWAJA PRASAD **I. L. R. 15 All. 147**

8. ——— **Raj zamindari of Tirhoot**—A family usage for fourteen generations, by which the succession to the raj zamindari of Tirhoot had uniformly descended entire to a single male heir to the exclusion of the other members of the family, upheld. A custom for the raja in possession in his lifetime to abdicate and assign by deed the raj, title, and domain to his eldest son or next immediate male heir, held good, and a deed so assigning the raj to an eldest son (provision being made for allowances for the younger sons) sustained. GUNESH DUTT SINGH *v.* MOHESHUR SINGH **6 Moo. I. A. 164**

9. ——— **Mitakshara law**—*Joint and separate property—Impartibility.* Although an estate be not what is technically known in the north of India as a raj, or what is known in the south of India as a polliam, the succession thereto may, under a kulachar or family custom, be governed by the rule of primogeniture. Where the family to which ancestral property held in this peculiar manner belongs is subject to the Mitakshara law, and the property is not separate, the succession in the event of a holder dying without male issue is given to the next collateral male heir in preference to the widow or daughters of the deceased holder. CHINTAMUN SINGH *v.* NOWLUKHO KONWARI **I. L. R. 1 Calc. 153 : L. R. 2 I. A. 263**
24 W. R. 253

Reversing the decision of the High Court in NATUKEE KOERI *v.* CHOWDHRY CHINTAMUN SINGH **20 W. R. 247**

10. ——— **Mitakshara family**—*Debt of father—Liability of son.* Where the right of primogeniture exists in a *Mitakshara* family, the son who takes the estate by descent by virtue of that right does not become a co-sharer in the estate, and does not take by survivorship, and such an estate is not *primâ facie* inalienable. The son takes the estate with the burden of the decree obtained

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against the father, and is liable to be proceeded against in execution. *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* and *Venkata Kumari Mahapati Surya Rao* (*1899*), *3 C. W. N. 415*, followed. RAM DAS MARWARI *v.* TEKAIT BRAJA BEHARI SINGH (1902) **6 C. W. N. 879**

11. ——— Proof of custom—*Lineal primogeniture—Proof of such custom as the rule of succession to an impartible Raj—Effect of decrees not inter partes as evidence.* To prove the custom of lineal primogeniture as the rule of succession to an impartible Raj, the following evidence was relied on by the High Court :—(*a*) oral evidence to show that it was well understood in the family and in families belonging to the same group that no descendant of a younger branch could take until all the elder branches were exhausted, though no witness was able to point to any actual instance in which the rule had been either followed or departed from ; (*b*) decrees relating to disputes in families belonging to the same group in which it was decided that the rule of succession was lineal primogeniture, and which although not binding on the parties to the present suit, showed the prevalence of the custom among families having a common origin and settled in the same part of the country ; and (*c*) evidence that in the family the heir-apparent and those in immediate succession were dignified in the order of seniority with titles denoting precedence, which would naturally be attached to the lines of descent traced from them. *Held*, that the custom was proved. MOHESH CHUNDER DHAL *v.* SATRUGHAN DHAL (1901-1902) . . **I. L. R. 29 Calc. 343**
s.c. 6 C. W. N. 459 ; L. R. 29 I. A. 62

12. ——— *Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure in—" Paharaj "—" Chowdhry "—Hereditary office, land attached to—Regulation XI of 1793—Regulation XII of 1805, s. 36—Regulation X of 1800—Statements of deceased persons—Evidence Act (I of 1872) ss. 21 and 32, cl. (5)—Proof of Custom.* The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the ground that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which from a period prior to British rule the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance, and not to any share of the land. The only reliable evidence of the status of the family during the period of native rule consisted of documents of ancient date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called " nankar " were assigned as part of his remuneration. The Subordinate Judge decreed the suit

HINDU LAW—CUSTOM—*concld.*

16. PRIMOGENITURE—*concld.*

holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom :—*Held* by the Judicial Committee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only ; that the office was revocable at the pleasure of the sovereign and though generally heritable it might be conferred by him not merely on the eldest son but upon any member of the family, or indeed upon any body. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous. With regard to the history of the family and their estate after the advent of the British Government, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity. RAMAKANTA DAS MOHAPATRA *v.* SHAMANAND DAS MOHAPATRA (1909) **I. L. R. 36 Calc. 590**

17. TRUSTEE, SUCCESSION TO.

——— Inheritance to deceased trustee. By usage of Hindu law in Tinnevelly district, the eldest male heir of a deceased trustee succeeds as trustee to him from whom he inherits. PURAPPAVANALINGAM CHETTI *v.* NULLASIVAN CHETTI . . . . . **1 Mad. 415**

18. UNCERTAIN CUSTOM.

——— Uncertain and unintelligible custom—*Custom as to certain property descending to females—Sale in execution of decree. Held*, that a custom in a family that whatever property, as a garden was planted by females passed to the possession of females to the exclusion of all male heirs, was a custom uncertain and unintelligible and not one which would be upheld by the Court. Such property was not therefore exempt from sale in execution of a decree against the husband of one of the ladies who claimed it. BHAGAWAN DAS *v.* BALGOBIND SINGH . . **1 B. L. R. S. N. 9**

HINDU LAW—DAMDUPAT.

See HINDU LAW—USURY.

HINDU LAW—DAYABHAGA.

1. ——— Ayautuka stridhan—*Dayabhaga—Succession—Stridhan of childless married wo-*

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HINDU LAW—DAYABHAGA—*contd.*

man—Ayautuka—Pitridatta—Anwadheya— Mother or husband, preferential heir. Where a father granted to a married daughter a mourasi and mukurari lease of lands, reserving an annual rent of R1 :—*Held,* that the interest conveyed to the daughter was her *anwadheya ayautuka stridhan,* within the meaning of the Dayabhaga. On her death her mother was entitled to succeed to the property in preference to her husband. The rule of succession under the Dayabhaga law in regard to the *pitridatta Ayautuka stridhan* property of a childless married woman discussed. *Jadoo Nath Sircar* v. *Bassant Kumar Chowdhury, 11 B. L. R. 286 ; s.c. 19 W. R. 264 ; Hurry Mohan Shaha* v. *Shonatun Shaha, I. L. R. 1 Calc. 275 ;* and *Gopal Chandra Pal* v. *Ram Chandra Pramanik, I. L. R. 28 Calc. 311,* referred to. RAM GOPAL BHATTACHARJEE *v.* NARAYAN CHUNDER BANDAPADHYA (1905) . **I. L. R. 33 Calc. 315 s.c. 10 C. W. N. 510**

2. ——— **Self-acquisition**—*Dayabhaga—Father's right in property acquired by son—Ancestral property—Father's right to eject son from ancestral property—Improvement by son, effect of—Injunction—Decree—Form of decree—Injunction—Estoppel by conduct.* Under the Hindu law, as expounded in the Dayabhaga, the father always takes a double share in acquisitions made by a son ; if they have been made by the use of joint funds the father and the acquirer take two shares each and the rest of the brothers one share each ; but if made without the use of joint funds the acquisitions are divided half and half between the father and the son ; a father claiming a share of property acquired by his son is not bound to allow the son any share of the ancestral property in his hands. Where the defendant had made improvements and substantial additions to ancestral buildings standing on ancestral land belonging to his father, the plaintiff : *Held,* that, even if the improvements and additions were effected under circumstances, which entitled the son to their value and to a charge upon the land to the extent of such value, the plaintiff would be under no legal obligation to pay for them as a condition precedent to a decree for recovery of possession and that he would be entitled to a decree for ejectment. *Held,* further, that the defenant having trespassed upon plaintiff's property and having habitually molested him and destroyed the peace of his family, the plaintiff was entitled to an injunction restraining the defendant from entering upon any portion of the property without his consent. *Waterhouse* v. *Waterhouse, 22 Times L. Rep. 195,* not followed. Where the defendant was fully aware that the land, upon which he expended his money, was the property of the plaintiff, the latter would not be estopped from asserting his legal rights. Where, in a suit for ejectment from and injunction to restraining the defendant from entering upon property, the question of title to the property was only indirectly in issue, the injunction, which was granted, was directed to remain in force only, until the defendant obtained, if he could, a decree for possession of the property either in whole or in part. DHARMA DAS KUNDU *v.* AMULYADHAN KUNDU (1906) . **I. L. R. 33 Calc. 1119 s.c. 10 C. W. N. 765**

HINDU LAW—DAYABHAGA—*concld.*

3. ——— **Migration**—*Dayabhaga—Parties governed by the Dayabhaga migrating to the United Provinces—What law applicable—Joint family property under Dayabhaga—Burden of proof—Benami transaction.* A Hindu family originally governed by the Dayabhaga school of Hindu law which had migrated into another Province is presumed to have carried with it the customs and the law of that school. The presumption, however, is rebuttable, and the *onus* lies on the person alleging it. The presumption of the *Mitakshara* that acquisitions made in the names of individual member while the family remains joint are joint property is not applicable to a joint family under the *Dayabhaga* school. It is incumbent on a person governed by that school to prove the existence of an original nucleus with the aid of which the property sought to be partitioned has been increased and amplified. *Sarada Prosad Ray* v. *Mahananda Ray, I. L. R. 31 448,* followed. GOVIND CHANDRA DAS *v.* RADHA KRISTO DAS (1909) . . . **I. L. R. 31 All. 477**

4. ——— **Joint property**—*Dayabhaga—Land belonging to father—House built thereon with money furnished by son, if joint property—Equity.* A son who found the money with which a house was built on a plot of land belonging to his father did not thereby, according to the Dayabhaga School of Hindu Law, become jointly entitled to the property with the father. The property remained the separate property of the father. *Quære :* Whether the son had any equitable claim to compensation against the father's estate when sought to be ejected by the latter's legal representative. BEJOY KRISHNA GHOSH *v.* ASHUTOSH GHOSH (1908) **13 C. W. N. 396**

HINDU LAW—DEBTS.

See CONTRIBUTION, SUIT FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR. **I. L. R. 26 Mad. 686**

See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES. **6 C. W. N. 223**

See HINDU LAW—

ALIENATION :

CUSTOM—PRIMOGENITURE ; **6 C W. N. 879**

JOINT FAMILY—

DEBTS AND JOINT FAMILY BUSINESS ;

POWERS OF ALIENATION BY MEMBERS—MANAGER . **6 C. W. N. 429**

See INSOLVENCY ACT, SS. 7 AND 30. **I. L. R. 26 Mad. 214**

See REPRESENTATIVE OF DECEASED PERSON.

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HINDU LAW—DEBTS—*contd.*

1. ——— **Liability for debts**—*Liability of property for debts of ancestor.* According to Hindu law, a man's property is liable for his debts, and the debts of an ancestor must be satisfied before the heir has any interest in ancestral property. GUNGA NARAIN PAUL *v.* UMESH CHUNDER BOSE **W. R. 1864, 277**

2. ——— *Liability of property for debts of ancestor.* The property of a Hindu which was descended to his sons and grandsons is while in their hands, liable for his debts. SAKHARAM RAMCHANDRA DIKSHIT *v.* GOVIND VAMAN DIKSHIT . . . . . **10 Bom. 360**

3. ——— *Liability of son for father's debts.* The freedom of a son from obligation to pay a deceased father's debts has respect to the nature of the debt and not to the nature of the property inherited by son from father; and where the debt is not of an immoral kind, a judgment-creditor of a deceased father can proceed against the inherited property in execution of decree, and follow any assets which can be traced to the son's hands. OMUTHOONNISSA *v.* PURESMUN NARAIN SINGH . . . **25 W. R. 202**

See GRIDHAREE LALL *v.* KANTOO LALL **14 B. L. R. 187 : 22 W. R. 56 L. R. 1 I. A. 321**

4. ——— *Malabar Brahmans—Nambundris—Mussads—Hindu law, how far applicable—Liability of sons for father's debt.* The principle of Hindu law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Numbudris and Mussads. NILAKANDAN *v.* MADHAVAN **I. L. R. 10 Mad. 9**

5. ——— *Debts of testator—Charge on specific property.* Though the payment of debts is a charge on the property of a testator, it is not a charge on any specific portion of the property. NILKANT CHATTERJEE *v.* PEARY MOHAN DAS . **3 B. L. R. O. C. 7 : 11 W. R. O. C. 21**

See GOPAL NARAIN MOZOOMDAR *v.* MUDDOMUTTY GUPTEE . **14 B. L. R. 21**

6. ——— *Liability of son not inheriting.* According to Hindu law, a son who has not inherited his father's estate is not liable for his debts. DHERAJ MAHATAB CHAND *v.* HURRO MOHUN ACHARJEE . . **W. R. 1864, Mis. 1**

JUMMAL ALI *v.* TIRBHEE LALL DOSS **12 W. R. 41**

7. ——— *Liability of heirs for debts of ancestor.* Heirs are liable for the debts of the person from whom they have inherited to the extent of the property which they have inherited. RAJ ROOP SINGH *v.* BULDEO SINGH **2 W. R. 258**

MOOKTOKESHEE DEBIA *v.* WOOMA CHURN BHUTTACHARJEE . . . . . **12 W. R. 233**

8 ——— *Liability of heirs for debts of ancestor.* The liability of an heir for the debts of his ancestor is only to the extent of the inheritance which he has received. If he has waived all his rights to the inheritance, his property acquired *aliunde* is not liable. JOOMAI *v.* WAHID ALI . . . **W. R. 1894, Mis. 33**

9. ——— *Liability of son for father's debts—Representative of deceased Hindu—Civil Procedure Code, 1877, s. 234.* Though a son is bound by Hindu law to pay his father's just debts from any property he may possess, yet when he is made a party to a decree as representative of his deceased father for the purpose of executing it, his liability is limited to the amount of assets of the deceased which may have come to his hands and has not been duly disposed of. SANGILI VIRAPANDIA CHINNATHAMBIAR *v.* ALWAR AYYANGAR. ZAMINDAR OF SIVAGIRI *v.* ALWAR AYYANGAR **I. L. R. 3 Mad. 42**

10. ——— *Liability of grandson for debts.* The grandson of a Hindu is bound to pay the debts of his grandfather, independent of assets, but without interest, according to the doctrines of the Maharastra school. NARASIMHARAV KRISHNARAV *v.* ANTAJI VIRUPAKSH **2 Bom. 64 : 2nd Ed. 61**

But see Bombay Act VII of 1866, the Hindu Heirs Relief Act, which alters the law in this respect. That Act, however, does not apply to any case in which judgment had been pronounced before its enactment. SAKHARAM RAMCHANDRA DIKSHIT *v.* GOVIND VAMAN DIKSHIT . . **10 Bom. 361**

11. ——— *Joint Hindu family—Liability of grandsons to pay interest on their grandfather's debts—Execution of decree on mortgage.* The mortgagee from a Hindu of the joint ancestral property of the latter can enforce his mortgage against the grandson of the mortgagor for the realization of the interest secured by the mortgage in addition to the principal amount of the mortgage. *Narasimharav Krishnarav* v. *Antaji Virupaksh, 2 Bom. 64; Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21; Hanooman Persaud Panday* v. *Munraj Koonweree, 6 Moo. I. A. 393;* and *Girdharee Lall* v. *Kanto Lall, L. R. 1 I. A. 321: 14 B. L. R. 187,* referred to. LACHMAN DASS *v.* KHUNNU LALL . **I. L. R. 19 All. 26**

PRANKRISHNA TEWARY *v.* JADUNATH TRIVEDY **2 C. W. N. 603**

12. ——— *Liability of joint estate for separate debts—Assets in hands of heir.* The divided share of a Hindu in property which previously belonged to the united family is after his decease and while yet in the hands of his heir, assets for payment of the debts of the deceased. The whole of the family undivided estate would generally, when in the hands of the sons or grandsons, be liable for the debts of the father or grandfather, and previously to the passing of Bombay Act VII of 1866, the sons and grandsons were personally liable for the debts of the father and grandfather, whether they received assets or not. But there is no authority for the converse, *viz.*, that the father or

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HINDU LAW—DEBTS—*contd.*

grandfather is responsible for the debts of his son or grandson independently of the receipt of assets, unless he promise payment. The proposition of Hindu law that debts follow the assets into whosesoever hands they come must, generally speaking, be confined to separate estate, and the liability of undivided ancestral estate in the hands of sons and grandsons to the debts of the father or grandfather is exceptional. UDARAM SITARAM *v.* RANU PANDAJI . . . . . **11 Bom. 76**

13. ——— *Inheritance — Minor—Liability of son for father's debts—Bom. Act VII of 1866.* In the Presidency of Bombay under the provisions of Bombay Act VII of 1866, where a Hindu dies intestate leaving property, his son is liable to his (the father's) creditors to the extent of the value of the property, although the property may not have come into the son's possession, but remains in the hands of third persons. The father having left property, the son may recover it if it has been taken against his assent, and he ought to do so to enable him to discharge the first duty of a Hindu to his deceased father. So long as he takes no steps, it is to be presumed that the property is held with his assent. Hy may reclaim it if he will, and thus it is held to his use within the meaning of s. 2 of Bombay Act VII of 1866. KEVAL BHAGVAN *v.* GANPATI NARAIN . **I. L. R. 8 Bom. 220**

14. ——— *Son's estate liable for debt of deceased father contracted as surety —Contract Act, s. 131.* In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety-bond executed by the father :—*Held*, that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act. SITARAMAYYA *v.* VENKATRAMANNA . . . **I. L. R. 11 Mad. 373**

15. ——— *Suit against sons of Hindu debtor on a bond executed by father, not cognizable by Small Cause Court—Hindu law —Liability of son for debt of living father.* In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with the father and a decree was passed against the father and sons jointly for payment of the debt. *Held*, by the Divisional Bench, that the decree against the sons was bad. NARASINGA *v.* SUBBA **I. L. R. 12 Mad. 139**

16. ——— *Son's liability for father's debts—Decree against legal representatives of a deceased debtor—Assets.* Where a suit is brought against the son and legal representatives of a deceased Hindu for debts contracted by the latter the Court ought to pass a decree, although the deceased debtor may have left no assets. *Bapaji* v. *Umedbhai, 8 Bom. A. C. 245*, followed. LALLU *v.* TRIBHUBAN MOTIRAM **I. L. R. 13 Bom. 653**

17. ——— *Father's liability as surety—Liability of his sons for the debt for which he was surety.* Ancestral property in the hands of sons is liable for a father's debt incurred as a surety. TUKARAMBHAT *v.* GANGARAM MULCHAND GUJAR . . **I. L. R. 23 Bom. 454**

HINDU LAW—DEBTS—*contd.*

18. ——— *Debt incurred for sradh of father.* The payment of a debt incurred in conducting the sradh of a father is incumbent upon a son, whether he is of age or a minor or a posthumous son. SUKEENAAH BANOO *v.* HURO CHURN BURUJ . . . . . **6 W. R. 34**

19. ——— *Liability of son to pay barred debt of father.* *S* sued *N*, a Hindu, to recover R30 secured by a promissory note executed by *N's* deceased father in consideration of a debt for which *S* had sued the father and which had been declared barred by limitation. *Held*, that *N* was bound to pay the debt from any assets of his father received by him. NARAYANASAMI *v.* SAMIDA **I. L. R. 6 Mad. 293**

20. ——— *Liability of polliam in hands of son for debts of possessor.* In a suit to recover from the minor son of the late possessor of a polliam, of which the guardians of the minor were in possession by virtue of a fresh grant made by the Government to the minor after the death of his father, the late possessor, money lent to the father of the minor to pay off arrears of peishcush for, which the polliam was about to be attached, and for reproductive work done upon the land :—*Held*, that the income of the polliam was not liable for the debt. ARBUTHNOT *v.* OOLUGAPPA CHETTY **5 Mad. 303**

S.C. on appeal to Privy Council. OOLUGAPPA CHETTY *v.* ARBUTHNOT . **14 B. L. R. 115**
L. R. 1 I. A. 282

21. ——— *Personal debts—Charge on estate.* Debts undertaken by the holder of an ancestral and impartible polliaput in respect of decrees obtained against his mother cannot by such undertaking become a charge upon villages forming part of the estate. KOSALA RAMA PILLAI *v.* SALUCKAI TEVAR *alias* OYYA TEVAR **8 Mad. 189**

22. ——— *Loan incurred to pay ancestral debt.* Where money was borrowed by a near relative of a joint Hindu family, holding part of the ancestral property and appearing before the world as a co-parcener of the family, to pay off a *bonâ fide* ancestral debt, the loan was held to be a family and not a personal debt. BULDEO RAM TEWAREE *v.* SOMESSUR PAURAY . **7 W. R. 491**

23. ——— *Liability of heir for debts.* According to Hindu law, a creditor cannot follow the property of a deceased debtor, but he may hold the heir personally liable. UNNOPOORNA DASSEA *v.* GANGA NARAIN PAL . **2 W. R. 296**

24. ——— *Liability of heir —Lien of creditor for debts.* When a Hindu dies indebted, his estate does not in whole or in part vest in the creditor as if by hypothecation, but the entire estate absolutely passes to the heirs with full power to deal with the whole estate before satisfaction of the debts. The creditor has no lien on the estate preferential to him who takes the estate in pledge

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from the heirs, nor can he, after the alienation thereof by heirs for a *bonâ fide* and valuable consideration, follow it in the hands of the alienee. He has merely a right of suit against the heirs personally who are held liable for the same to the extent of the assets they receive by inheritance. ZUBURDUST KHAN *v.* INDURMUN . **1 Agra F. B. 71; Ed. 1874, 55**

25. ——————— *Power of heir to dispose of estate—Creditor's right to follow assets of deceased Hindu into hands of purchaser for value* Under the Hindu law the property of a deceased Hindu is not so hypothecated for his debts as to prevent his heir from disposing of it to a third party or to allow a creditor to follow it into the hands of a person who has purchased it from the heir of the deceased in good faith and for valuable consideration. *Sunbussapa* v. *Moodkapa, 8 Harr. 232* and *Naroo Huree* v. *Konbier Munohur, 8 Harr. 289,* followed. JAMIYATRAM RAMCHANDRA *v.* PARBHUDAS HATH . . . . **9 Bom. 116**

26. ——————— *Liability of heir —Certificate to collect debts—Alienation of the estate of a deceased person for the payment of his debts—Succession.* Where a peron to whom a certificate had been granted under Act XXVII of 1860 to collect the debts due to the estate of a deceased Hindu, but who had no share or interest in such estate contracted a debt for the purpose of paying debts due from such estate, and charged such estate with the payment of such debt :—*Held,* that the creditor could not, by virtue of the acts of such person, claim to recover the moneys advanced by him to such person from the heirs and estate of the deceased, even though such moneys had been applied to the liquidation of the debts of the deceased. MUNIA *v.* BALAK RAM **I. L. R. 2 All. 513**

See also HASAN ALI MEHDI HASAN **I. L. R. 1 All. 533**

27. ——————— ——————*Widow, liability of, for debts of husband.* A widow is liable for a debt contracted by her husband. Such debt may be set off against any debt due to her. GRISH CHUNDER LAHOORY *v.* KOOMAREE DABEA **1 W. R. Mis. 24**

28. ——————— *Repairs to houses held by a Hindu lady having a life-interest—Credit —Death of life-tenant before payment—Liability of estate for the debt.* A daughter succeeding to the estate of her father ordered a quantity of lime for the purpose of making repairs to certain houses on the estate; the repairs were completed, but the lady died before the debt contracted by her for the lime had been paid off. At the time of her death there remained outstanding a large sum due as rent, which the lady had neglected to collect during her lifetime. In a suit brought by the creditor against the heir of the lady and the reversionary heirs of her father's estate (into whose hands the estate had passed), he asked for a decree—(i) against the estate in the hands of the reversioners; and (ii) sought for payment out of the rents uncollected in the lady's

lifetime, or in the alternative that the lady's personal estate might be held liable. On a reference being made to a Full Bench as to whether the plaintiff could enforce his claim against the estate in the hands of the heirs of Raj Chunder generally or as against the amount of rents, which accrued due to the lady and which remained uncollected :—*Held,* by MITTER, MCDONELL, and PRINSEP, *JJ.* (GARTH, *C.J.,* and WILSON, *J.,* dissenting), that the plaintiff was certainly entitled to be paid out of the arrears of rent since collected, but that he also was entitled to enforce his claim against the heirs of the last full owner of the estate generally. HURRY MOHUN RAI *v.* GONESH CHUNDER DOSS **I. L. R. 10 Calc. 823**

29. ——————— **Trade debts incurred by Hindu widow**—*Widow carrying on business of husband—Death of widow—Liability of reversioners to trade debts properly incurred.* Trade debts properly incurred by a Hindu widow, on the credit of the assets of the business to which she has succeeded as the heiress of her deceased husband, are recoverable, after her death, out of the assets of the business, as against the reversioners who have succeeded thereto, even in the absence of a specific charge. SAKRABHAI NATHUBAI *v.* MAGANLAL MULCHAND (1901) . . **I. L. R. 26 Bom. 206**

30. ——————— **Decree**—*Mitakshara joint family—Decree against one member, whether binding on the others, and when.* A member of a Mitakshara joint family may be bound by a decree and a sale thereunder of the family property, although he is not a party. The sons of the judgment-debtors are bound, unless the debt be proved by them to have been for immoral purposes. The other co-parceners will be bound, if the creditor or the purchaser can prove that the debt was contracted for their benefit, and if the decree is substantially against them, though in form it might be against the head member or members of the family. *Hari Vithal* v. *Jairam Vithal, I. L. R. 14 Bom. 597; Sakharam* v. *Denji, I. L. R. 23 Bom. 372; Sheo Pershad Singh* v. *Saheb Lal, I. L. R. 20 Calc. 453,* and *Daulat Ram* v. *Mehir Chand, I. L. R. 15 Calc. 70,* referred to. BULDEO SONAR *v.* MOBARAK ALI (1902) **I. L. R. 29 Calc. 583 s.c. 6 C. W. N. 370**

31. *Devolution of stridhanam property of a woman on her sons, who are members of an undivided family with their father at the time—Estate taken as co-owners or tenants-in-common.* When the stridhanam property of a woman devolves on her sons who, with their father, form an undivided Hindu family at the time of the mother's death, the sons take it as co-owners or tenants-in-common without benefit of survivorship. The stridhanam property of a woman (with a single exception) primarily descends upon her daughters and, in default of daughter on the daughter's offspring, females having precedence over male offspring. It is only in default of the daughter's line that sons succeed to their mother's stridhanam. *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu, I. L. R. 25 Mad. 678,* explained. In

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the Mitakshara, no distinction is made between "obstructed" and "unobstructed" heritage in respect of the devolution of stridhanam property. The definitions of "obstructed" and "unobstructed" heritage given therein refer in terms only to the property of a male. In the Hindu Law the word "ancestor" is not used in the wide sense in which it is used in English Law as nearly equivalent to the "propositus" and as co-relative of "heir." In the Hindu Law it is used only as signifying a direct ascendant in the paternal or maternal line, and, more technically, as signifying the paternal grandfather and his ascendants in the male line. Where, on the death of a maternal uncle, his estate devolves by inheritance on his sister's sons, who at the time are undivided members of a Hindu family governed by the Mitakshara law, they take it as co-owners or tenants-in-common without benefit of survivorship. KARUPPAI NACHIAR *v.* SANKARANARAYANAN CHETTY (1904) **I. L. R. 27 Mad. 300**

32. ——————— *Execution of decree application for, against heirs of judgment-debtor—Notice—Code of Civil Procedure (Act XIV of 1882), s. 248—Waiver of objection against execution—Estoppel—Hindu Law—Mitakshara school—Debt, father's not immoral—Objection to execution on ground of joint property and devolution by the rule of Survivorship—Jurisdiction of Court to decide question—Res judicata.* Where a decree holder applied for execution of his decree and prayed for substitution of the heirs of the deceased judgment-debtor and for attachment and sale of the properties in possession of the heirs, and notice was issued under s. 248 of the Code of Civil Procedure to show cause why execution should not be issued and no cause was shown and the Court directed the issue of attachment and sale of the properties as prayed for without any objection on the part of the heirs of the judgment-debtors, who applied for and obtained time to pay up the decretal debt, and waived their right to the issue of the fresh proclamation and paid part of the decretal debt, but subsequently objected to the execution going, on the ground that the properties attached were joint family properties of a Mitakshara family, that they were in possession by right of survivorship and not as heirs of their father, and that such properties could not be sold after the death of the father in execution of a decree against him: *Held*, that there being no suggestion that the debt contracted by the father was contracted for immoral purposes, the decree-holders were entitled to recover, if not by execution, at any rate by a separate suit. That having by their acts and conduct waived their rights, if any, to oppose the levying of the debt by execution, the substituted judgment-debtors were now estopped from saying that the decree was incapable of execution against them. *Sadasiva Pillai* v. *Ramalinga Pillai, L. R. 2 I. A. 2*, relied on. *Held*, further, that the orders made by the Court directing the issue of the processes of attachment and sale proclamation were binding on the applicants also on the principle of *res judicata* and they were precluded from

questioning the validity of the said orders. *Mungal Persad Dichit* v. *Girija Kanta Lahiri, L. R. 8 I. A. 123; Lakshman Chetti* v. *Kuttyan Chetti, I. L. R. 24 Mad. 669; Bhola Nath Das* v. *Profulla Nath Koondu Chowdhury, I. L. R. 28 Calc. 122;* and *Sheoraj Singh* v. *Kameshwar Nath, I. L. R. 24 All. 282*, followed. COVENTRY *v.* TULSI PRASAD NARAYAN (1904) . . . **8 C. W. N. 672**

33. ——————— *Father's debt binding on sons even during father's lifetime—Alienations for its discharge binding on sons—Nature of mortgage debt—No distinction between mortgage given for antecedent debt and mortgage given for debt then incurred.* It is established by a uniform course of decisions under the Hindu law that a debt incurred by the father, which is not shown to be illegal or immoral, is, even during the lifetime of the father, binding on the son's interest in the family property, and that any alienation, voluntary or involuntary, made to discharge the debt is binding on the son. In the case of a mortgage-debt incurred by the father, the debt is the primary obligation and the mortgage is only a collateral security for its discharge. If the debt is binding on the son, its discharge by making an usufructuary mortgage or by enforcing the security by sale is equally binding on the son, inasmuch as he is thereby exonerated from liability to discharge the debt of the father by means of other family property. There is no distinction in principle, between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding on the son and the enforcement of the security exonerates the son from the burden of his father's debts. CHIDAMBARA MUDALIAR *v.* KOOTHAPERUMAL (1904) . . **I. L. R. 27 Mad. 326**

34. ——————— *Father's liability in respect of act constituting criminal offence—Liability of sons.* Where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence, his minor sons cannot be held liable under the rule of Hindu law as the pious duty of a son to pay his father's debts. *Pareman Dass* v. *Bhattu Mahton, I. L. R. 24 Calc. 672*, and *Mahabir Prasad* v. *Basdeo Singh, I. L. R. 6 All. 234*, followed. *Natasayya* v. *Ponnusami, I. L. R. 16 Mad. 99*, distinguished and explained. McDOWELL & Co. *v.* RAGAVA CHETTY (1904) . **I. L. R. 27 Mad. 71**

35. ——————— **Husband's debt**—*Husband's debts binding on widow in respect of assets come to her hands as legal representative—Widow's right to reside in husband's house.* Under the Hindu Law, the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or acquired, and his debts take precedence of her claim for maintenance. Where the family consists of only the husband and the wife, all debts which would bind the husband personally will necessarily be binding on the widow in respect of all the assets

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which have come to her hands as his legal representative. Where a debt has been incurred by the husband only as a surety and not for the benefit of the family, it will be binding on the assets in the hands of the widow just as it will bind the whole of the family property, if it devolves upon a son by right of survivorship. Where an undivided Hindu family consists of two or more males, related as father and sons, or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners *quoad* the share or interest of her deceased husband in the joint family property, which has come by survivorship into the hands of the surviving co-parcener or co-parceners, and though such right does not in itself form a charge, upon her husband's share or interest in the joint family property, yet, whenever it becomes necessary to enforce or preserve such right effectually, it may be made a specific charge on a reasonable portion of such joint family property, such portion not exceeding her husband's share or interest therein. Such right may also, in certain cases, be enforced against the transferee of joint family property. *Manilal* v. *Baitara, I. L. R. 17 Bom. 398,* discussed. The deceased husband of defendant executed a promissory note as a surety, and after his death a decree was obtained against the defendant, his widow, on the promissory note. The decree-holder attached a house, which had belonged to the deceased and in which the widow was residing, brought it to sale and purchased it. On his endeavouring to obtain possession the widow resisted on the ground that she had a right of residence in the house during her lifetime and could not, therefore, be ejected. *Held,* that the decree-holder was entitled to be given possession of the house and that the widow had no right of residence therein. JAYANTI SUBBIAH *v.* ALAMELU MANGAMMA (1904)

I. L. R. 27 Mad. 45

36. ——— **Son's liability**—*Money due by and decree against father—Execution proceedings after death of judgment-debtor against family property in possession of sons refused—Suit by creditor against sons—Decree obtained—Effect of decree against father as creating debt binding on sons—Limitation Act (XV of 1877), Sch. II, Arts. 52, 120—Limitation for suit against son on original debt or on decree.* Plaintiffs in 1896 obtained a decree against the father of the present defendants, who died in 1897. Execution of that decree was refused as against the family property in the possession of the defendants. Plaintiffs in 1899 instituted the present suit against defendants and obtained a decree. Questions having been referred to the Full Bench: *Held,* (i) that independently of the debt arising from the original transaction, the decree against the father by its own force created a debt as against him, which his sons, according to the Hindu law, were under an obligation to discharge, unless they showed that the debt was illegal or immoral; (ii) that if the suit had been brought on the original cause of action, the article of limitation applicable would have been the same as against the father, namely, art. 52; but as the suit had been brought on the cause of action arising from the decree against the father, the article applicable was art. 120. Observations by BHASHYAM AYYANGAR, *J.*, on the obligation of a son, under the Hindu law, to discharge debts, incurred by his father. PERIASAMI MUDALIAR *v.* SEETHARAMA CHETTIAR (1904)

I. L. R. 27 Mad. 243

37. ——— *Father's debts—Sons liability to pay.* Under Hindu law the pious obligation of a son to pay his father's debts exists whether the father is living or dead. The mere fact that a father is alive when the decree against him is sought to be executed does not absolve the son from his liability and entitled him to say that satisfaction of the decree shall not be obtained by selling his interest in the family property. When, however, the decretal debt is tainted by illegality or immorality, the son can contend that the decree is not binding upon him and establish the contention in a separate suit. GOVIND *v.* SAKHARAM (1904) . . . **I. L. R. 28 Bom. 383**

38. ——— *Mitakshara—Debts—Surety—Grandson's liability to pay debts contracted by the grandfather as a surety.* Under Hindu law as laid down in the Mitakshara, a grandson is not liable to pay a debt which his grandfather contracted as a surety, unless the latter in accepting the liability of a surety received some consideration for it. A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable. NARAYAN *v.* VENKATACHARYA (1904)

I. L. R. 28 Bom. 408

39. ——— *Joint Hindu family—Personal decree against father—Liability of son's interests in the joint family property.* When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father of the family, the interests of the sons can only be exempted from attachment and sale, if the latter can show that the debt in respect of which such decree was obtained was either tainted with immorality or was such a debt as it was not the pious duty of the sons to pay. *Ram Dayal* v. *Durga Singh, I. L. R. 12 All. 209,* overruled. *Beni Madho* v. *Basdeo Patak, I. L. R. 12 All. 99; Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden, L. R. 16 I. A. 1,* and *Mussamut Nanomi Babuasin* v. *Modun Mohun, L. R. 13 I. A. 1,* referred to. KARAN SINGH *v.* BHUP SINGH (1905)

I. L. R. 27 All. 16

40. ——— *Liability of undivided son for surety debt contracted by father.* Where a Hindu father having undivided sons incurs an obligation as surety for the payment of a debt and not for keeping the peace or for good behaviour, the whole ancestral property including the shares of the sons is liable for the discharge of

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such obligation. *Sitaramayya* v. *Venkatramanna, I. L. R. 11 Mad. 373,* and *Tukarambhat* v. *Gangaram, I. L. R. 28 Bom. 454,* followed. CHETTIKULAM VENKITACHALA REDDIAR *v.* CHETTIKULAM KUMARA VENKITACHALA REDDIAR 1905)

I. L. R. 28 Mad. 377

41. ——————————— *Liability of son for father's debt— Sale or mortgage by father binding only when there is a debt existing prior to the sale or mortgage.* A sale or mortgage of joint family property by a father is binding on the son's share only, when there is an antecedent debt, *i.e.,* a debt existing prior to and independently of the sale or mortgage. Where the debt is incurred at the time of sale or mortgage it is not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad, I. L. R. 5 Calc. 148; Chidambara Mudaliar* v. *Koothaperumal, I. L. R. 27 Mad. 326,* dissented from; *Sami Ayyangar* v. *Ponnammal, I. L. R. 21 Mad. 28,* approved. VENKATARAMANAYA PANTULU *v.* VENKATARAMANA DOSS PANTULU (1905)

I. L. R. 29 Mad. 200

42. ——————————— *Poliems— Impartible estate in the hands of a son, assets for payment of father's debts—Sale of right, title and interest which defendant alone possesses, effect of.* Impartible estate taken by a son by heritage from his father is assets for the payment of the father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts. *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar, L. R. 9 I. A. 128,* referred to. Where subsequent to the passing of Act X of 1877, in execution of a decree against the owner of an impartible estate, such estate is brought to sale and the proclamation of sale describes the property sold as 'the right, title and interest of the defendant alone' in accordance with the form in force prior to the passing of Act X of 1877, the mere use of such words, which were omitted in the Act of 1877, does not necessarily imply that the interest sold is less than the full proprietary interest. That the law as then established by judicial decisions recognised only a limited interest in the owner, does not of necessity raise the implication in such cases. The nature of the debt and other circumstances may show that the full interest including that of the sons was actually brought to sale and purchased. *Abdul Aziz Khan* v. *Appayasami Naicker, I. L. R. 27 Mad. 132,* distinguished. VEERA SOORAPPA NAYANI *v.* ERRAPPA NAIDU (1906)

I. L. R. 29 Mad. 484

43. ——————————— *Liability of sons for their father's debts—Debts incurred for immoral purposes—Money borrowed to discharge such debts —Burden of proof—Minority—Mortgage executed by a minor.* One Shanker Singh, the owner of considerable property, both moveable and immoveable, incurred heavy debts for immoral objects and without any necessity. He died on the 24th of August, 1901, leaving two sons, Sheoraj Singh and Maharaj Singh, him surviving. Shankar Singh and

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his sons were members of a joint Hindu family. To pay off his father's debts, Sheoraj Singh, professing himself to be sole owner of his father's property, mortgaged a large part thereof to the Bank of Upper India to secure a loan of R3,00,000. Maharaj Singh, the younger brother, joined in the mortgage, admitting his elder brother's right to the property mortgaged; but, at the date of the execution of the mortgage, Maharaj Singh was a minor. Subsequently the Bank of Upper India transferred their rights under his mortgage to one Balwant Singh. Balwant Singh brought a suit for sale on the mortgage against Sheoraj Singh and Maharaj Singh, and obtained a decree. Maharaj Singh appealed. *Held,* that, Maharaj Singh, being a minor at the date of the execution of the mortgage in suit, the mortgage was, as regards his interest in the mortgaged property, absolutely void. *Mohori Bibee* v. *Dharmadas Ghose, I. L. R. 30 Calc. 539,* followed. The plaintiff set up an alternative case to the effect that his suit was not based upon the mortgage alone, but also upon the pious duty of Hindu sons to pay their father's debts. *Held,* that if this case was open to the plaintiff on his pleadings which was doubtful, the debts of Shankar Singh, to discharge which was the object of the transaction now before the Court, were on the facts of the case barred by limitation. *Narainsingh Misra* v. *Lalji Misra, I. L. R 23 All. 209, Natasayyan* v. *Pannusami, I. L. R. 16 Mad. 99,* and *Ramayya* v. *Venkataratnum, I. L. R. 17 Mad. 122,* referred to, and, inasmuch as it was Sheoraj Singh and not the Bank, who had paid off Shankar Singh's debts, neither the mortgagees nor their assignee, the plaintiff, could claim the benefit of s. 74 of the Transfer of Property Act, 1882. But if this were not so, it was open to the defendant, appellant, to show that the debts originally incurred by his father were tainted with immorality, and this it was found he had succeeded in doing. It was not under the circumstances, the case not being one in which ancestral property had passed out of the hands of the joint family, incumbent upon him to go further and show that when the debts were contracted his father's creditors were aware, or might have been aware, of the immoral purposes for which the money was borrowed. *Quare:* Whether the burden of proving that the creditors had made proper inquiries with a view to satisfying themselves that the money was not being borrowed for immoral purposes did not lie on the plaintiff? *Girdhari Lal* v. *Kantoo Lal, L. R. 1 I. A. 321, Suraj Bunsi Koer* v. *Sheo Proshad Singh, L. R. 6 I. A. 88, Hunoomanpersaud Panday* v. *Masummat Babooee Munraj Koonweree, 6 Moo. I. A. 393, Beni Madho* v. *Basdeo Patak, I. L. R. 12 All. 99, Bhawani Bakhsh* v. *Ram Dei, I. L. R. 13 All. 216, Pem Singh* v. *Partab Singh, I. L. R. 14 All. 179, Musammat Jannuk Kishoree Koonwur* v. *Baboo Raghunandan Singh, 1 S. D. A. L. P. (1861) 6, 213, Mussammat Nanomi Babuasin* v. *Modun Mohun, L. R. 13 I. A. 1, Jamna* v. *Nain Sukh, I. L. R. 9 All. 493, Bhagbut Parshad* v. *Girja Koer, I. L. R. 15 Calc. 1717; Chintamanrav Mehendale* v. *Kashinath, I. L. R. 14 14 Bom. 3 0, Badri Prasad* v. *Madan Lal, I. L. R. 15 All. 75,* and *Debi Dat* v. *Jadu Rai, I. L. R. 24 All.*

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459, referred to. Where debts have been incurred for immoral purposes by the father in a joint Hindu family and then money is borrowed from a third party to pay off such debts, and such third party seeks to recover from the son the money so borrowed, the son is competent to put forward as a defence the immoral character of his father's original debts. He is not confined in his pleadings to the circumstances of the loan taken to pay off those debts. *Saravana Tevan* v. *Muttayi Ammal, 6 Mad. H. C. Rep. 371*, followed. MAHARAJ SINGH *v.* BALWANT SINGH (1906) . **I. L. R. 28 All. 508**

44. ——————— *Decree for mesne profits.* Under the Mitakshara, a son is under a pious obligation to discharge a decree for mesne profits obtained against his father by a person whom the latter wrongfully kept out of possession of immoveable property. *Natasayyan* v. *Ponnusami, I. L. R. 16 Mad. 99*, approved. PEARY LAL SINHA *v.* CHANDI CHARAN SINHA (1906) **11 C. W. N. 163**

45. ——————— *Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree.* The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter, which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son. *Held*, that the son was not liable under Hindu law, under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any express provision of the law; but the result of the suit showed that it was wrongful, and for a liability so incurred the son could not be held answerable when the estate that had come to his hands had derived no benefit from the act. Under Hindu Law, the son is not to be held liable for debts, which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father; not for those attributable to his failings, follies or caprices. DURBAR KHACHAR *v.* KHACHAR HARSUR (1908) . . . **I. L. R. 32 Bom. 348**

46. ——————— *Son's liability for father's debt incurred in transaction amounting to criminal offence.* Where an undivided Hindu father acting as the administrator of a certain estate was made liable in respect of monies received by him and not properly accounted for, the undivided son cannot escape liability for such claim on the ground that the debt was the result of a criminal act of the father, unless he shows that, in respect of the particular amounts claimed, the father had made himself amenable to the Criminal Law by doing or omitting to do anything. Proof of mere omission to account, without anything more, will not suffice to exempt the son from liability. *McDowell & Co.* v. *Raghava Chetty, I. L. R. 27 Mad. 71*, distinguished. *Natasayyan* v. *Ponusami, I. L. R. 16 Mad. 99*, followed. ERASALA GURUNATHAM CHETTY *v.* ADDEPALLY RAGHAVALU CHETTY (1908) **I. L. R. 31 Mad. 472**

47. ——————— *Son's liability for father's debts—Son liable for father's misappropriation, when such misappropriation amounts only to a breach of civil duty.* Where an undivided Hindu father misappropriates money received by him for the purpose of being paid to others in the course of a transaction entered into by him for the benefit of the family, and under circumstances which constitute such misappropriation, a mere breach of civil duty and not a criminal act, the undivided son's interest in the joint family property is liable for the repayment of the monies so misappropriated to the person entitled to be paid. *McDowell & Co.* v. *Raghava Chetty, I. L. R. 27 Mad. 71*, distinguished. KANEMAR VENKAPPAYYA *v.* KRISHNA CHARIYA (1907) . . . . **I. L. R. 31 Mad. 161**

48. ——————— *Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil Procedure Code (Act XIV of 1882), s. 276.* When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under s. 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. SUBRAYA *v.* NAGAPPA (1908) . . **I. L. R. 33 Bom. 264**

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1. CREATION OF ENDOWMENT.

1. ——— **Creation by deed of gift**—*Object of endowment—Sheba Presumption.* The presumption is that the object of an endowment by a Hindu for the worship of idols is to preserve the sheba in the family, rather than to confer a benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise. CHUNDERNATH ROY *v.* GOBINDNATH ROY . . . . **11 B. L. R. P C. 86**
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18 W. R. 226

2. ——— **Creation of religious endowment**—*Charity—Family idols—Sale of trust property in execution—Suit by trustee to recover the property—Limitation.* The Hindu law, unlike the English law with respect to charities, makes no distinction between a religious endowment having for its object the worship of a household idol and one which is for the benefit of the general public. In execution of decree against the plaintiff, as the representative of his deceased father and brother, certain lands were sold to the first defendant. The plaintiff sued to recover them, alleging that the former owner of the lands had assigned them to his (the plaintiff's) brother and himself (the plaintiff), and their descendants by a deed of gift to perpetuate the worship of the donor's household idol.

HINDU LAW—ENDOWMENT—*contd.*

1. CREATION OF ENDOWMENT—*contd.*

Held, that the plaintiff was entitled to recover the property. The gift was a valid one, creating a religious endowment under the Hindu law, and the plaintiff's suit was not to set aside the sale, but was one by the trustee of the endowment to recover the property to which the limitation of twelve years was applicable. RUPA JAGSHET *v.* KRISHNAJI GOVIND
I. L. R. 9 Bom. 169

3. ——— *Form of creation—Perpetuity—Trust—Void and inoperative devise.* A Hindu by will devised certain property, consisting of a family dwelling-house and land, to trustees for ever, for the residence, maintenance, and performance of the worship of certain family idols, and appointed his sons and their descendants in the strict male line to be shebaits of the idols for ever, making provision for their residence in the family dwelling-house; the will also contained a clause restraining any partition, division, or alienation of the property so dedicated to the worship of the idols. The testator appointed the trustees executors of his will, and by a codicil bequeathed legacies to various members of his family. In a suit against the executors to recover a legacy so bequeathed:—*Held,* that the devise of the property to the idols was void and inoperative as being a settlement in perpetuity on the male descendants of the testator and for their use, and not a real dedication for the worship of the idols. PROMOTHO DOSSEE *v.* RADHIKA PERSHAD DUTT . **14 B. L. R. 175**

4. ——— *Devise for worship of idol—Right to refund of money expended.* Devise upon trust for the use of a thakoor, with direction that the wife, daughter, and daughter-in-law of testator be allowed to live in the house for their lives and perform the worship of the idol, with limitation over to others on the decease of the survivors of them, and a sum of R16 allowed to the survivor of the first legatee for the purposes of the idol, and after her death that the same sum be applied to the expenses of the idol. When the legatee has for a time at her own expense kept up the service, she is not entitled to have the money refunded. ROYMONEY DOSSEE *v.* ROGHUNATH SEN . . . . **1 Ind. Jur. N. S. 14**

5. ——— *Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account.* A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes" within the meaning of s. 539 of the Code of Civil Procedure (Act X of 1877). The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is

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HINDU LAW—ENDOWMENT—*contd.*

1. CREATION OF ENDOWMENT—*contd.*

not required for this purpose as it is by English law. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for maladministration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*. MANOHAR GANESH TAMBEKAR *v.* LAKHMIRAM GOVINDRAM
I. L. R. 12 Bom. 247

6. ——————— *Gift to Hindu temple—Trust.* The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favour and an acknowledgment of the person whom they nominated as agent or manager. *Held*, by the Full Bench, that the gift made by the defendants constituted a trust for the purpose of the temple. *Per* EDGE, *C.J.*, and TYRRELL, *J.*—That the defendants before the Court did not constitute themselves trustees in any sense. RAGHUBAR DIAL *v.* KESHO RAMANUJ DAS
I. L. R. 10 All. 18

7. ——————— *Dedication to idol—Mode of dedication.* Under Hindu law, an idol as symbolical of religious purposes is capable of being endowed with property, but no express words of gift to such idol in the shape of a trust or otherwise are required to create a valid dedication. *Manohar Ganesh Tambekar* v. *Lakhmiram Gobindram, I. L. R. 12 Bom. 247*, approved. *Sonatun Bysack* v. *Juggutsoondree Dossee, 8 Moo. I. A. 66*, and *Ashutosh Dutt* v. *D rga Churn Chatterjee, I. L. R. 5 Calc. 438: L. R. 6 I. A. 182*, distinguished. BHUGGOBUTTY PROSUNNO SEN *v.* GOOROO PROSONNO SEN . . . . **I. L. R. 25 Calc. 112**

8. ——————— *Gift of idol and debutter land—Private endowment—Benefit of idol—Shebaits—Debutter property.* A gift of an idol and of the lands with which it is endowed (being a private endowment) made with the concurrence of the whole family to another family for the purpose of carrying on the regular worship of the idol, if made for the benefit of the idol, is not invalid, and is one binding on succeeding shebaits. KHETTER CHUNDER GHOSE *v.* HARI DAS BUNDOPADHYA
I. L. R. 17 Calc. 557

9. ——————— *Invalid endowment—Deeds made without intention that they should be acted upon—Donor not divesting himself of dedicated property.* Case in which a good title was made, by her transfer of her inheritance, through the daughter and heiress of a deceased member of a joint family of brothers, under the Dayabhaga, although her father had executed deeds dedicating his share of the family property to trustees, for the worship of the family deity; this dedication having been inoperative, because it was neither his nor his brother's intention that the deeds should be acted upon, and he had never divested himself of his share. WATSON & CO. *v.* RAMCHUND DUTT
I. L. R. 18 Calc. 10
L. R. 17 I. A. 110

10. ——————— *Mode of dedication—Debutter property—Idol—Partition subject to trust for idol.* In a suit for possession by partition the plaint stated that the common ancestor of the plaintiff and the defendant and his five sons acquired certain properties; that on the death of the ancestor, his five sons separated among themselves, and each took a certain share of land for his own expenses, and the remaining portion of the lands they held in ijmalee among themselves; that one of them became the manager of this portion of the lands, made the collections of the rents, and from the profits thereof paid the expenses of the rásh, dole, etc., festivals, and the worship of the debta, all of which were alleged to be patrimonial, and divided the balance. The defence substantially was that the whole of the ijmalee land was the property of the idol. It was found in the lower Court that a certain portion of the land was debutter and not partible, and a decree was made for partition of the remainder. *Held*, on appeal, that, as it was not shown that this latter portion of the property had been transferred from the family and dedicated to the idol, a partition of it should be made, but subject to a trust in favour of the idol. RAM COOMAR PAUL *v.* JOGENDER NATH PAUL
I. L. R. 4 Calc. 56
2 C. L. R. 310

11. ——————— *Religious endowment—Endowment to take effect after a life estate. Held*, that there is no objection to the limitation by a Hindu testator or settlor of a life estate followed by an endowment of property to religious or charitable purposes. GOBIND PRASAD *v.* GOMTI (1908)
I. L. R. 30 All. 288

12. ——————— *Endowment—Creation of Endowment—Proof of Dedication to Idols—Alienation of endowed property—Construction of grant of Debutter property—Ancient Document—Evidence Act (I of 1872), s. 90—Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation Act (XV of 1877), Sch. II, Arts. 134, 144—Bonâ fide Purchaser.* The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebait of a shrine managed by Goswamis among whom the office of Mohant had descended for more than 100 years by the rule of lineal primogeniture, in the following terms:—"To the remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character. This deed of pottah of *debutter* property is executed to the following effect. I do grant to you by way of lakheraj *debutter* the entire mouzah of Gorfalbari

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HINDU LAW—ENDOWMENT—*contd.*

1. CREATION OF ENDOWMENT—*contd.*

in pergunnah Pandra . . . By bestowing your blessings on us you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever dispossesses you, the dispossession shall be ineffectual." The evidence in the case showed that the donee received the gift as one for the service of the particular idols whose sebait he was, and that the income of the mouzah had ever since been entirely appropriated for that service. In 1860 the then Mohant describing himself as "brittibhogi-holder of *debuttar*," granted to the predecessor in title of the defendants a *mokurari pottah*, or permanent lease, of the mouzah in which it was described as "my long-standing ancestral lakheraj *debutter* property endowed for the service of the deity." In a suit brought to set aside the lease as being beyond the powers of the Mohant and therefore void, it was contended by the defendants that though the grant was to the Mohant and "by way of lakheraj *debutter*," there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descendible to his heirs:—*Held*, by the Judicial Committee (reversing the decision of the High Court), that, under the circumstances of, and on the evidence in, the case, the mouzah was *debuttur* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been originally granted. Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language. *Muddun Lall* v. *Komul Bibee, 8 W. R. 42*, followed. There was no allegation of any special circumstances of necessity to justify the grant of the lease which was subject to a fixed rent charge, payment of which had all along been made to the Mohant: *Held*, that the power of a Mohant to alienate *debutter* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity (*Prosunno Kumari Debya* v. *Golab Chand, 14 B. L. R. 450; L. R. 2 I. A. 145*), a permanent lease at a fixed rent, though adequate at the time, was "a breach of duty in the Mohant" and on the most favourable construction could only enure for the life of the grantor and was not binding on his successors. *Shibessouree Debia* v. *Mothooranath Acharjo, 13 Moo. I. A. 270*, followed. It was also contended that a mokurari lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as "purchasers" within the meaning of Article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided: *Held* (reversing that decision), that the words "purchased for a valuable consideration" in that article meant that the ownership of the property sold had been absolutely

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transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable: *Kally Dass Ahiri* v. *Monmohini Dassee, I. L. R. 24 Calc. 440.* The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under Article 134, and the suit was not barred. ABHIRAM GOSWAMI *v.* SHYAMA CHARAN NANDI (1909) . . **I. L. R. 36 Calc. 1003**

13. ——— Indirect dedication—*Custom and usage—Moral obligation.* When there has been no direct endowment to support the worship of the family idol, Hindu usage and custom, although it would create a moral obligation, such obligation will not be held as having any legal operation. SHAMLOLL SEIN *v.* HUROSOONDRY GOOPTEA **1 Ind. Jur. N. S. 36; 5 W. R. 29**

2. PROOF OF ENDOWMENT.

1. ——— Gift by person at point of death—*Proof of gift to idols.* Clear proof is necessary to support a gift, made orally by a person at the point of death, of all the donor's property to idols. BIPPRO PERSHAD MYTEE *v.* KENAE DAYEE **3 W. R. 165; 5 W. R. 82**

2. ——— Debutter property, proof of ancient and hereditary character of. Land granted to an idol cannot be held to be debutter unless it is found to be ancient hereditary debutter, publicly assigned as such prior to the donor's incumbency. SOSHIKISHORE BUNDOPADHYA *v.* CHOORAMONEE PUTTO MOHADABEE **W. R. 1864, 107**

3. ——— Treatment of, by founder and his descendants. One test of an endowment as to whether it is *bonâ fide* or nominal is to see how the founder himself treated the property, and how the descendants have since treated it. GANGA NARAIN SIRCAR *v.* BRINDABUN CHUNDER KUR CHOWDHRY . . . . **3 W. R. 142**

4. ——— Proof of actual assignment to idol—*Proceeds of land appropriated for worship.* The mere fact of the proceeds of a piece of land having been appropriated for the worship of an idol does not constitute it an endowed property, but the fact of the assignment to the idol must be specifically proved. NARAIN PERSAD MYTEE *v.* ROODUR NARAIN MUNGLE . . **2 Hay 490**

5. ——— Proof of expenditure for long time of proceeds of land on worship of idol—*Documentary evidence.* Documentary proof is not absolutely necessary to prove an endowment. The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose; but where there is apparently good evidence, going back for more than half a century that the land was given for the support of an idol

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HINDU LAW—ENDOWMENT—*contd.*

2. PROOF OF ENDOWMENT—*contd.*

proof that from that time the proceeds had been so expended would be strong corroboration. MUDDUN LALL *v.* KOMUL BIBEE . . . 8 W. R. 43

6. ——— **Use of proceeds of land for worship of idol**—*Evidence of dedication.* The mere fact that a portion of the profits of land in the possession of a party had been for some time used for the worship of an idol is no proof of an endowment and cannot impose on such party the liabilities attaching to the office of a shebait. RAM PERSHAD DASS *v.* SREEHUREE DASS 18 W. R. 399

7. ——— **Release of land by Government on ground of its appropriation to idol**—*Evidence of permanent dedication.* The mere fact of land having been released by Government on the ground of its being appropriated to the services of an idol does not impose on it the character of a religious endowment so as to exempt it permanently from being attached and sold in satisfaction of decrees against a person who may hold it. NIMAYE CHURN PUTEETUNDEE *v.* JOGENDRO NATH BANERJEE . . . . 21 W. R. 365

8. ——— **Purchase in name of idol**—*Alienation.* The plaintiff sued as the shebait of a certain idol to recover possession of a zamindari by setting aside an alienation thereof effected by his grandmother, on the ground that it was debutter property dedicated to the idol, and consequently inalienable. It appeared that the property in dispute was purchased by the grandfather of the plaintiff in the name of the idol, which was set up merely for his private worship in his own house without any priests to perform regularly any religious service for the public benefit of Hindus, and that the property had been dealt with all along as his own private property. *Held*, that this was a mere nominal endowment, and consequently the alienation thereof was not invalid. *Held*, also, that a property purchased by a man in the name of his own idol, which no one except himself has the power or right to worship, is not the property of the idol, but the property of the person who purchased it. BROJOSOONDERY DEBIA *v.* LUCHMEE KONWAREE
15 B. L. R. P. C. 176 note : 20 W. R. 95

Affirming the decision of the High Court
2 B. L. R. A. C. 155 : 11 W. R. 13

9. ——— **Land dedicated to idol**—*Alienation of land and idol—Suit for recovery of the land.* Plaintiff sued to recover certain land, alleged to be debutter and dedicated to a family idol which had been alienated together with the idol by his father and purchased by the defendant. He did not sue to recover the idol. *Held*, that the plaintiff could not recover the land without the idol and replace the latter, treating it as lost or destroyed, by a new one, inasmuch as, according to Hindu law, when an idol has once been consecrated by appropriate ceremonies, the deity of which the idol is the visible image resides in it, and not in any substituted image. DOORGA PERSHAD DOSS *v.* SHEO PROSHAD PANDAH . . 7 C. L. R. 278

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2. PROOF OF ENDOWMENT—*concld.*

10. ——— **Land enjoyed as private property, though attached to karnam**—*Suit to recover after ejectment.* Plaintiff brought a suit to recover land which had been enjoyed by her husband, the karnam of a village, but which on his death had been given to the defendant, with the office of karnam. The land had been originally attached to the office, but the plaintiff's husband for a long time before his death was enjoying the land as his private property. *Held*, that the miras of the land continued to be attached to the office, notwithstanding that it may have been for some time enjoyed as private property; that the property, being annexed to the office, was indivisible, and as the Collector, in ejecting the plaintiff, appropriated the land to the office by putting it in the possession of the karnam whom he appointed in place of hte plaintiff's husband, the plaintiff had no right to recover. SESHAIYA *v.* GAURAMMA 4 Mad. 336

3. NON-PERFORMANCE OF SERVICES.

1. ——— **Non-performance of conditions of trust**—*Effect of, on trust.* If a trust or endowment be created *bonâ fide*, the mere fact that the parties in possession of the trust or endowed property do not carry out the conditions of the trust does not invalidate the transactions. KASHESHUREE DASSEE *v.* KRISHNAKAMINEE DASSEE 2 Hay 557

2. ——— **Failure to perform services of idol**—*Result of refusal to perform—Suit for khas possession.* A party holding land assigned for the support of an idol subject to the performance of the ceremonies of worship of the idol, who fails to perform the required service, may be compelled to do so, and on refusal may be removed; but such refusal would not enable a party claiming the land under a fresh assignment from a descendant of the original grantor to recover possession by a suit. MOHESH CHUNDRA CHUKERBUTTY *v.* KOYLASH CHUNDRA CHUKERBUTTY . . 11 W. R. 443

3. ——— *Suit for khas possession.* Where land has been given as debutter land and the requisite services are not performed, all that the donor can do is to take steps to have the services performed; he cannot recover it in a suit for khas possession. GOPEENATH CHOWDHRY *v.* GOOROO DOSS SURMA . . . 18 W. R. 472

See RAM NARAIN SING *v.* RAMOON PAUREY 23 W. R. 79

4. DEALING WITH, AND MANAGEMENT OF, ENDOWMENT.

1. ——— **Principles to be observed in dealing with endowments**—*Mad. Reg. VII*

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of 1817. The important principle to be observed by the Courts in dealing with the constitution and rules of religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of ligitation and to be guided by them. The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government, and Madras Regulation VII of 1817 merely defined the manner in which that power was to be thenceforth exercised. MUTTU RAMALINGA SATUPATI *v.* PERIANAYAGUM PILLAI **L. R. 1 I. A. 209**

2. ——— **Mode of holding office and management, proof of**—*Gift of an idol—Evidence of conditions of gift.* The mode in which the offices of priest and manager have been held for many generations is material evidence of the conditions on which the original gift of an idol was made. NIMAYE CHURN POOJAREE *v.* MOOROOLEE CHOWDHURY . . . . . **1 W. R. 108**

3. ——— **Power of control of odhikaree by general body of bhukuts**—*Power of odhikaree to remove bhukuts.* In a suit by the bhukuts of the Komolabari Shaster in Assam for confirmation of their rights in that endowment and restoration of possession thereof, it was held that the plaintiffs had failed to make out their title; that by the original grant of Rajah Luckee Singh, inscribed on a copper plate, the management of the debutter property was entrusted to the odhikaree, over whom the shormoho or general body of bhukuts have no control, either in respect to his duties as the religious head of the Komolabari Shaster or in the management of its revenues. *Held,* that the odhikaree could not turn the bhukuts out of the shaster without just cause. DOOTEERAM SURMA DOOREE *v.* LUCKEE KANT GOSSAMEE . . . . . **12 W. R. 425**

4. ——— **Proprietorship of endowed property**—*Religious communities at Benares and Tirpuntal, Status of.* The mohunt of the muth at Tirpuntal, zillah Tanjore, in the Madras Presidency, sued the mohunt of the muth at Benares in the Civil Court of Zillah Benares for the right to manage as proprietor the muth and chutter affairs at Benares and the temple of Sri Kedareshur, and to recover property belonging thereto, and to have an account of receipts and disbursements relative to the same; such relief being claimed by virtue of his proprietary right as mohunt and guddeenashin of the head-quarters muth at Tirpuntal under whose jurisdiction and power the chutter institution at Benares had continued from time immemorial. The defendant denied the plaintiff's claim to the immoveable property and endowment which he represented as acquired by his ancestors, the mohunt guddeenashins at Benares and himself. He denied that he was an agent, and claimed to be the real proprietor in possession and occupation by right of

succession to his ancestors. The first Court decreed the plaintiff's claim. The High Court modified the decree, giving the plaintiff possession of certain chutters and gardens built or purchased out of funds remitted from Madras, and declaring him entitled to an account of a sum admitted to have been remitted from Tirpuntal, but holding that he had failed to make out possession of the muth, temple, or other property. *Held,* that the original foundation having been admittedly at Benares, which is the holy place, and the object having been to afford to persons, either resident in the south of India or making pilgrimage to Benares, facilities for worship and religious duties there, raised a presumption that the establishment at Tirpuntal was subordinate to that at Benares. And that it was not shown that any change had been effected in the original constitution of the community. *Held,* that the nature of the relation between the muths at Tirpuntal and Benares was that the former fed the establishment at the latter, the object of which was to afford facilities to pilgrims and others wishing to pay their devotions at Benares. The result was that the establishment at Tirpuntal collected alms and remitted them to Benares, producing complicated exchange transactions between the two establishments. *Held,* that the plaintiff had failed to establish either that he was the proprietor of the property at Benares or that the defendant was his mere agent, and that the High Court was right in limiting the relief to what was included in the decree. KASHI BASHI RAMLING SWAMEE *v.* CHILUMBERNATH KOOMAR SWAMEE . **20 W. R. P. C. 217**

5. ——— **Mode of enjoyment of endowed property**—*Decree or agreement made to bind successive owners.* A court has no power to bind in perpetuity all the successive owners of an endowment as to the mode in which their property should be managed; and the shebaits of a debutter endowment may make such arrangement for its management as is consistent with their duties, but they cannot make it binding for ever upon all their successors. BUNWAREE CHAND THAKOOR *v.* MUDDEN MOHUN CHUTTORAJ . . **21 W. R. 41**

6. ——— *Repairs of temple—Katlais or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds.* The panchayatdars or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control spent R10-8 in so doing from the funds of a katlai or endowment of which they were managers. They then sued the trustees of two other katlais for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendant's income, and asked for a declaration that the duty of executing repairs fell upon the defendants' katlais. *Held,* that, in the absence of any endowment or trust-deed regarding the katlais, the decision must be found in the usage

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of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their katlais should permit. VYTHILINGA PANDARA SANNADHI *v.* SOMASUNDARA MUDALIAR

I. L. R. 17 Mad. 199

7. ——— *Shebait, suit by, for recovery of advances made by him—Dispossession by co-shebait—Limitation Act (XV of 1877), Sch. II, Arts. 36, 120—Parties.* J, the grandfather of the plaintiffs and of some of the defendants, and great-grandfather of the remaining defendants, established certain idols and dedicated certain properties for their worship, etc., and prescribed a certain order in which his descendants were to become *shebaits.* When the office of *shebait* devolved upon plaintiff's father *B*, he was kept out of possession by defendant *P* of a portion of the *debutter* estate; and, in a suit by *B* against *P* and certain other persons, *B* having died during the pendency of the suit, a decree was passed, declaring the properties in dispute to be *debutter*, declaring that *B* was entitled to be *shebait.* *B* had to advance money out of his own estate to meet the expenses of the *debutter* estate. The plaintiffs brought the present suit, as heirs and legal representatives of *B*, for recovery of the said money, as also for money realised by *P* out of the *debutter* estate. The plaint stated that, as it was not certain who amongst the defendants was entitled to be *shebait*, all of them were made parties, but the Court was not asked to determine who was entitled to be *shebait. Held*, that the plaintiffs, as creditors of the *debutter* estate, were not entitled to any relief against defendant *P*, personally, simply on the ground of his having realized money from the *debutter* estate. *Held*, also, that the suit against *P*, personally, was barred under Art. 36, Sch. II, of the Limitation Act. *Held*, also, that, as to the suit against the *debutter* estate, the period of limitation did not begin to run from the time when the advances were made, but from the time when the plaintiff's father *B* died, and Art. 120 of Sch. II of the Limitation Act applied to the case. *Also*, that the suit was not maintainable inasmuch as it was not stated in the plant who the person was that was entitled to represent the estate as *shebait*, and the plaintiffs had not asked for the determination of the question as to who was the *shebait* for the time being. PEARY MOHAN MUKHERJEE *v.* NARENDRA KRISHNA MUKERJEE (1900)

5 C. W. N. 273

8. ——— *Endowment—Complete and partial dedication.* Where there is no evidence as to who founded a religious endowment or as to the terms or condition of the foundation, the legal inference is that the title to the property or to the management and control of the property, as the case may be, follows the line of inheritance from the founder. *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee, L. R. 16 I. A. 137*, relied upon. JAGADINDRA NATH ROY *v.* HEMANTA KUMARI DEBI (1904) . . . . **8 C. W N. 809**

s.c. L. R. 31 I. A. 23

9. ——— *Religious endowment—Trustee, creation of tenure by—Cancellation by succeeding Trustee—Notice to tenure-holder—Tender of patta at end of fasli not reasonable notice.* A trustee of a religious endowment cannot, except on special grounds, create a perpetual tenure binding on his successors in office. *Mayandi Chettiar* v. *Chokkalingam Pillay, I. L. R. 27 Mad. 295*, and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami, I. L. R. 27 Mad. 435*, followed. Where, however, a long succession of trustees had acquiesced, a succeeding trustee cannot sue to eject the tenure-holder without giving him reasonable notice of the determination of the tenure; and the tender of a patta at the end of a fasli for which it is tendered is not a reasonable notice. NARASIMHA CHARI *v.* GOPALA AYYANGAR (1905)

I. L. R. 28 Mad. 391

10. ——— *Endowment—Hereditary managers or trustees—Right of management vested by descent in two branches of a family—Relinquishment of right by junior branch to member of senior branch—Alteration thereby of turns of management—Continuous usage by senior branch—Delegation of duties of trustees.* On the death of the sole manager of a Hindu temple and endowed property attached to it, the managership of which was hereditary in his family without any benficial interest in the endowed property or income, the office devolved on his male descendants by his two wives, there being four in each branch. Until 1881-82 one member of each branch took the management for one year in alternate succession. In 1882 the members of the junior branch relinquished their rights in the management in favour of the plaintiff, who was member of the senior branch and for 19 years immediately before suit there had been a settled order of succession amongst the members of the senior branch, the plaintiff, in each period of eight years taking five turns (one in his own right and four in the turns of each member of the junior branch), and the other members of the senior branch (of whom the defendant was one) taking one turn each. On the expiration of one of the defendant's turns of management on 13th July 1899 he made over the temple to the plaintiff, but retained the endowed property. In a suit brought on 3rd September 1900 to recover possession of it: *Held*, by the Judicial Committee (upholding the decision of the Courts in India), that the unbroken usage during the time the order of succession had continued was conclusive evidence against the defendant of a family arrangement to which the Court was bound to give effect, until it was validly altered, or superseded by a new scheme effected with

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the concurrence of all parties interested. It was one, which those parties were competent to make, without applying to the Court; and it was not for the defendant at his will and pleasure to disturb an arrangement of which he had on more than one occasion taken the benefit: nor could he in this suit set up the rights of the junior branch against the plaintiff. The manager of the temple was by virtue of his office the administrator of the property attached to it as regards which he was in the position of a trustee. As regards the service of the temple and the duties appertaining to it he was in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which in course of time had become vested by descent in more than one person. In such a case in order to avoid confusion it was not unusual and certainly not improper, for the interested parties to arrange amongst themselves for the due execution of the functions belonging to the office, in turns, or in some settled order and sequence. There was no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee. RAMANATHAN CHETTI *v.* MURUGAPPA CHETTI (1906) **I. L. R. 29 Mad. 283 s.c. 10 C. W. N. 825**

11. ——————— *Public religious endowment—Shebait, how far trustee—Office or dignity, holder of—Delegation of office—Palas or turns of worship—Family arrangement—How altered—Proof of.* The manager of a Hindu temple is by virtue of his office the administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity, which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person. In such a case, in order to avoid confusion or an unseemly scramble it is not unusual, and it is certainly not improper, for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. There is no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee. The parties interested are competent to make such an arrangement without applying to the Court. A family arrangement so arrived at must hold good, until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested. Unbroken usage for a period of 19 years was held to be conclusive evidence of a family arrangement to which the Court was bound to give effect. RAMANATHAN CHETTI *v.* MURUGUPPA CHETTI (1906) **I. L. R. 29 Mad. 283 s.c. 10 C. W. N. 825**

12. ——— **Right to appoint manager—** *Religious endowment.* According to Hindu law, when a religious endowment has been founded, the right to appoint a manager or superintendent remains in the founder and his descendants, unless there is evidence to show that the founder or his descendants have made any inconsistent disposition. *Gossamee Sree Greedharreejee* v. *Rumanlolljee Goossamee, L. R. 16 I. A. 137; Sheoratan Kunwari* v. *Ram Pargash, I. L. R. 18 All. 227,* and *Mussumat Jai Bansi Kunwar* v. *Chatter Dhari Singh, 5 B. L. R. 181,* followed. SHEO PRASAD *v.* AYA RAM (1907) . . **I. L. R. 29 All. 663**

5. SUCCESSION IN MANAGEMENT.

1. ——— **Appointment of shebait—** *Power of owner to appoint.* The owner of an idol is entitled to appoint anybody he likes to perform its poojah; the mere fact of a party and his ancestors having done so for a long period creates no right in his favour. INDURJEET KOOER *v.* CHUNDEEMUN MISSER . . . . **16 W. R. 99**

2. ——— **Succession to managership** *—Devolution of property of idol on death of mohunt.* The general principle regulating the devolution of property belonging to a muth, on the death of the mohunt, is that a virtuous pupil takes the property. In some instances the mohuntship descends to a personal heir, and in others to a successor appointed by the existing mohunt; but the ordinary rule is that muths of the same sect in a district, or having a common origin, are associated together, and on the occasion of the death of one mohunt, the others assemble to elect a successor either out of the disciples of the deceased or from those of another mohunt. GOSSAIN DOWLUT GEER *v.* BISSESSUR GEER . . . . . **19 W.R. 215**

3. ——————— *Death of mutwali without nominating successor.* Where the mutwali of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. PEET KOONWAR *v.* CHUTTER DHAREE SINGH . **13 W. R. 396**

4. ——————— *Trustee with power of appointment—Failure to appoint.* *A*, a Hindu, by a deed of wukfnama (deed of endowment), after reciting that he had "erected and prepared a thakurbari (temple) and the image of thakur (idol), and also a sadavart (almshouse), and had in way of wukf (endowed property) dedicated certain property for the performance of the pujah (worship) of the said thakur and repairing of the house, flower garden, and thakurbari, and appointed his sister (*B*) the manager and mutwali (trustee) of the same, authorised *B* to spend the profits in the performance of the pujah, etc. As for the future, she (B) should appoint such person to be the manager and mutwali as may be found by her to be fit, etc., and in like manner all successive mutwalis should have the right of appointing successive mutwalis. To these his heirs should not have right to prefer any claim,

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HINDU LAW—ENDOWMENT—*contd.*

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etc.'' *B* died without having appointed any mutwali (trustee) to succeed her in the management of the trust. In a suit by the heir of *B* to obtain possession of the property covered by the deed against the heirs of *A* : *Held*, that the managership, on failure of appointment of a trustee, reverted to the heirs of the person who endowed the property. JAI BANSI KUNWAR *v.* CHATTER DHARI SINGH **5 B. L. R. 181**

5. ——————— *Custom or practice of sect.* When the property is of the nature of an endowment, a claim to succeed under the ordinary Hindu law of inheritance was not maintainable. Plaintiff might have sued to get the management of the property in preference to the defendant, a widow, by the custom or practice of the sect. GOOSAEEN SREE CHOUNDAWALEE BAHOOJEE *v.* GIRDHARJEE . . . . . **3 Agra 226**

Affirmed by Privy Council in GOOPEE LAIL *v.* CHUNDRAOOLEE BAHOOJEE . **11 B. L. R. 391**

6. ——————— *Succession to hereditary office.* *J* held the office of patil more than fifty years ago as representative of two branches descended from a common ancestor, and then united in interest, there being two other branches descended from a common ancestor and then united in interest, there being two other branches descended from the same ancestor, but severed in interest from those represented by *J. J.*, having died in 1824, was succeeded by his son *T* without any opposition from the two other branches. *T* was temporarily displaced from the office by *G*, who represented the two other branches, but recovered it in 1850. In an action brought by the plaintiff as representative of *G* in 1873 to establish his claim to the office held by *T's* sons, it was contended on behalf of plaintiff in answer to defendant's plea of limitation, that in the absence of evidence of the circumstances under which *T* succeeded to the patilship, *T* must be presumed to have been nominated to that office by all the members of the watandar family jointly, or with their assent sought and granted, and was consequently the representative of all of them. *Held*, that the succession of a son to his father in an hereditary office is primarily to be referred to a right based on the relation subsisting between them just as would be the son's succession to his father's property. GIRIAPA *v.* JAKANA . . . **12 Bom. 172**

7. ——————— *Temple—Hereditary trustee—Title—Proof—Mad. Reg. VII of 1817.* The mere succession of a son to a father in a trusteeship of a temple does not create an hereditary right. *Quare :* Whether, as long as Regulation VII of 1817 was in force, it was competent to Government absolutely to divest itself of the obligations imposed on it by that Regulation. *Venkatesa Nayudu* v. *Shri Shatagopaswami, 7 Mad. 77,* observed on. APPASAMI *v.* NAGAPPA **I. L. R. 7 Mad. 499**

HINDU LAW—ENDOWMENT—*contd.*

5. SUCCESSION IN MANAGEMENT—*contd.*

8. ——————— *Succession to office and property of deceased mohunt—Custom of institution.* In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be found in custom and practice, which must be proved by evidence. On the death of a mohunt, the right to succeed to his landed and other property was contested between two goshains. *Held*, that the claimant, in order to succeed, must prove the custom of the math entitling him to recover the office and the property appertaining to it. The evidence showed the custom to be that the title to succeed to the office and property was dependent on the successor's having been the chela approved and nominated as such by the late mohunt, and also after the death of the latter installed or confirmed as mohunt by the other goshains of the sect. *Held*, that a claimant who failed to prove his installation or confirmation was not entitled to a decree for the office and property against a person alleging himself to have been a chela who, whether with or without title, was in possession. GENDA PURI *v.* CHATAR PURI . . . **I. L. R. 9 All. 1 L. R. 13 I. A. 100**

9. ——————— *Religious institution—Succession in religious houses and among ascetics.* This was a suit brought in 1881 by the head of an adhinam for declarations that a muth was subject to his control ; that he was entitled to appoint a manager ; that the present head of the muth was not duly appointed, and his nomination by his predecessor was invalid ; and for delivery of possession of the moveable and immoveable properties of the muth to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the muth. The muth was founded by a member of the adhinam. Many previous heads of the muth had agreed to be "slaves" of the head of the adhinam, but for over 60 years the head of the adhinam had exercised no management over the endowments belonging to the math ; and in a suit (compromised) of the year 1874 the present pretensions of the head of the adhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the muth under the will of his predecessor, dated the same year, and was not a disciple of the adhinam. *Held*, (i) that the muth was affiliated to the adhinam, but the head of the adhinam is not entitled to appoint to the office of head of the muth and was not entitled to an order for delivery of the property of the muth to himself or to his appointee ; (ii) that on the evidence as to the usage in the establishments in question, the head of the muth was entitled to appoint his successor, but his election was limited to members of the adhinam ; and the head of the adhinam was entitled to enforce this rule, though he was bound to invest a disciple properly nominated by the head of the muth ; (iii) that the defendant not being a disciple of the adhinam, his appointment was invalid, and the head of the adhinam

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HINDU LAW—ENDOWMENT—*contd.*

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was entitled to see that a competent member of the adhinam was appointed in his stead. GIYANA SAMBANDHA PANDARA SANNADHI *v.* KANDASAMI TAMBIRAN . . . **I. L. R. 10 Mad. 375**

10. ——— *Construction of will—Right of shebaitship of a family deb-sheba under a will.* A testator, who died leaving widows and a daughter and also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the prosad (offerings to the deity)." One or other of the brothers then for some years managed the estate as shebait, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine " those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possesssion and an account, and also to be the shebait. *Held*, that the plaintiff's claim to a preferential title to this office depended on a sentence in the will constituting, as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this, no reason had been shown in appeal for a different conclusion. KAMINI DEBI *v.* ASUTOSH MUKERJI. ASUTOSH MUKERJI *v.* KAMINI DEBI **I. L. R. 16 Calc. 103 L. R. 16 I. A. 159**

11. ——— *Hereditary right to be shebait and to have possession of property dedicated to religious purposes—Primogeniture.* According to Hindu Law, when the worship of a thakur has been founded, the office of a shebait is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing, or circumstance, showing a different mode of devolution. *Peet Koonwar* v. *Chutter Dharee Singh, 13 W. R. 296*, referred to. It having been established that a particular worship had been founded by the plaintiff's grandfather, it followed that the plaintiff was by inheritance the shebait of that worship, there being no proof of any usage at variance with this presumption, but the custom appearing to be in accordance with it. *Held*, that the plaintiff, as such representative of the founder, was entitled, in preference to a collaterally-descended member of the founder's family, to claim the shebaitship. Also that the plaintiff was entitled, in that character, to the possession of a portrait which had been by the same founder dedicated to this worship. But that he had no right to a temple in which the portrait was kept, this temple having been given by one of the worshippers ("for the location of the Sri Sri Iswar Jios") with the condition annexed that the defendant should be shebait. The plaintiff accordingly could not claim possession of this temple, as it could only have been accepted as a gift upon the donor's terms; and this condition prevailed notwithstanding that the temple had been in part paid for by subscription among the worshippers; there being no evidence that the latter did not know of it, or had paid their money with any reference to the question who was to be shebait. GOSSAMI SRI GRIDHARIJI *v.* ROMANLALJI GOSSAMI . . . . **I. L. R. 17 Calc. 3 L. R. 16 I. A. 137**

12. ——— *Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.* The pandaram of a muth, being empowered under a decree to nominate a person to be the head of a subordinate muth subject to the approval of the subordinate Court, made a nomination and died before the subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination, and made a fresh nomination. The subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order. *Held*, that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge. GNANASAMBANDA *v.* VISVALINGA . . . **I. L. R. 13 Mad. 338**

13. ——— *Succession to a jheer of a muth—Nomination requiring assumption of the character of a sannyasi—Time fixed by decree for assumption of that character—Enlargement on appeal of that time—Evidence of custom.* The plaintiff sued for a declaration of his right as jheer of a muth and for possession of the property of the muth. The plaintiff alleged that the immemorial custom with reference to the succession to the office of jheer was that the jheer for the time being nominated his successor, and that, failing such nomination the disciples assembled at the place where he died elected his successor, and that the person so nominated became jheer by virtue of such nomination alone. The plaintiff's case was that he was nominated by the late jheer, although the nomination was not concurred in by the disciples, and that the late jheer had initiated him and directed him to become a sannyasi a day or two after his initiation, and that he was accordingly entitled to the rights and privileges of jheer. The plaintiff obtained a decree, which was, however, made contingent upon his assuming the character of a sannyasi within the period of four months. The defendant preferred an appeal against this decree, and the plaintiff preferred an appeal praying for the enlargement of the period fixed, within which he was to become a sannyasi pending the disposal of the appeal preferred by the defendant. On the plaintiff's appeal: *Held*, that the Court had power to extend

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the time as prayed. On the defendant's appeal: *Held*, (i) on its appearing that the plaintiff did not repeat the presha mantram, that his upadesam was insufficient; (ii) that the plaintiff's right, if any, to the status of jheer ceased on his omission to become a sannyasi soon after the initiation alleged; (iii) on the evidence that no similar case of succession had taken place in the history of the institution, that the plaintiff had established merely an imperfect nomination which could not be upheld on the principles deducible from the known cases of succession. RANGACHARIAR *v.* YEGNA DIKSHATUR

I. L. R. 13 Mad. 524

14. ——— *Succession to management of muth—Want of asceticism of paradesi—Removal of paradesi—Form of decree.* The plaintiff, the zamindar of Sivagunga, sued in a subordinate Court to remove the defendant from the office of head of a muth. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the muth, and it appeared that he had failed to perform the ceremonies of the institution. The muth in question came into existence under a deed of endowment or "charity grant," whereby the first zamindar of Sivagunga granted land to his guru for the erection and maintenance of a muth and the performance of certain religious exercises in perpetuity, and provided that the head of the muth should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the muth from the defendant, alleging another cause of action than his status as a married man and his misappropriation of the muth property; and in that suit it was established that the head of the muth for the time being had the right to appoint his successor, and that such appointment was not subject to confirmation by the zamindar. It appeared that the trusts of the muth had been violated and the income misapplied, and that there was no qualified disciples in whom the right of succession had vested, and that the members of the plaintiff's family were the only persons interested in the appointment. *Held*, that the proper decree was (i) to declare the plaintiff's right to appoint a qualified person with the concurrence of the rest of his family; (ii) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff's family before it was confirmed; if such appointment were confirmed, the property should be directed to be delivered to the person appointed, to be administered in accordance with the trusts and usage of the muth. *Semble:* That the paradesi or head of the muth might be a married man, provided he had been duly initiated. SATHAPPAYAR *v.* PERIASAMI . . **I. L. R. 14 Mad. 1**

15. ——— *Succession to the office of dharmakarta—Act XX of 1863, s. 14—Religious endowments—Custom and usage.* On a question of the right of succession to the office of dharmakarta of a devasthanam or temple at Rameswaram in Madura (and in such cases the only law applicable is the custom and practice, which are to be proved by evidence), both the Courts below found that, according to the established usage, the succession was provided for by each successive dharmakarta initiating a pandaram, and, whilst in office, appointing him as his successor. It followed that the appointment of a dharmakarta by one who had already ceased to hold the office (having been removed under Act XX of 1863, s. 14) was not in accordance with usage, and was therefore invalid. The persons whom the displaced dharmakarta had attempted to appoint was head of the muth from which preceding dharmakartas, as it appeared, had been taken. Besides the above cause of invalidity in the appointment in question, the evidence supported the finding that the displaced dharmakarta made his attempt to appoint the head of the muth to succeed him in office in furtherance of his own interests, and did not *bonâ fide* exercise his powers, if any. This finding invalidated the whole appointment and applied to the headship of the muth as well as to the office of dharmakarta. RAMALINGAM PILLAI *v.* VYTHILINGAM PILLAI

I. L. R. 16 Mad. 490
L. R. 20 I. A. 150

16. ——— *Succession to mohant—Succession to the "gaddi" of a temple—Nature of evidence required to prove title to succeed—Explanation of terms "nihang" and "grihast."* *Per* EDGE, *C.J.*, and MAHMOOD, *J.* The question who is entitled to succeed to the office of a deceased mohant must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased mohant belonged. It is necessary for the person claiming a right to succeed as mohant to establish that right by satisfactory evidence; he cannot derive any advantage from the weakness of his opponent's title. *Per* MAHMOOD, *J.*—It was necessary for the plaintiff in this case to prove that he was "nihang," as distinguished from "grihast," which he failed to do. Meaning of the terms "nihang" and "grihast" explained. *Genda Puri* v. *Chhatar Puri, I. L. R. 9 All. 1: L. R. 13 I. A. 100*, referred to. BASDEO *v.* GHARIB DAS

I. L. R. 13 All. 256

17. ——— *Succession as mohant of a muth at Puri—Custom—Right of a chela—Alleged disqualification of mohant to take a chela by reason of being a leper.* Two rival claimants contested the right to succeed to the office of mohant of a mourasi muth under a customary rule of succession. Both the Courts below found that the mohant for the time being had power to appoint his successor from among his chelas; that, in the absence of appointment, a chela, or, if there should be more than one, the eldest chela, would succeed; and that, should there be no chela, then a gurubhai

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or chela of the same guru with the deceased mohant would succeed. The plaintiff's case was that he had been duly taken as a chela and appointed by the last mohant, whose title was not disputed. The defendant, who was in possession, denied that the plaintiff had ever been such a chela, alleging that, even if the last mohant had attempted to take him as a chela, this act would have been invalid by reason of that mohant having been a leper. The defendant's title was that he had been taken as a chela by the mohant who had preceded the last, and had been in a position to dispute the right of succession, but had yielded it when the last mohant had taken office. He put forward an alleged will of the latter, which stated that he was to succeed and relied on his possession approved by other mohants. *Held*, that only a leprosy of virulent form could have disqualified the last mohant. As to it, there was no medical evidence; but on the facts the conclusion was that there had been no such disqualification. The statements in the alleged will were not true, and it was ineffectual to alter the title, whether the last mohant had executed it or not, having no testamentary effect; also what had been done after the death of the last mohant could not deprive the plaintiff or entitle the defendant, there being no custom to authorize the choice of a mohant in that way. BHAGABAN RAMANUJ DAS *v.* RAM PRAPARNA RAMANUJ DAS
I. L. R. 22 Calc. 843
L. R. 22 I. A. 94

18. ——— *Fort pagodas at Tanjore—Right of management on death of the senior widow of the late Maharaja of Tanjore.* After the death in 1855 of the late Raja of Tanjore without male issue, Government assumed charge of the fort pagodas, of which he was the hereditary trustee. Subsequently, his senior widow, Her Highness Kamakshi Bayi Saheba, applied that they should be handed over to her as the head of the family for the time being; the Government in 1863 made an order saying, "it is desirable that the connection of Government with the pagodas should cease; they will accordingly be handed over to Her Highness Kamakshi Bayi Saheba." The pagodas and their endowments were handed over in pursuance of that order, and were held by the senior widow till her death in 1892. On her death, Government ordered that they should be placed under the Devasthanam Committees of the circles in which they were situated. The senior surviving widow now claimed to be entitled to possession and the right of management by succession, and sued accordingly. *Held*, that Government intended to make an absolute transfer in 1863 without any reservation of a reversionary right to make a new appointment, and that, whether Her Highness Kamakshi Bayi Saheba took the trust property for a widow's estate or as stridhanam, the plaintiff was entitled to succeed. KALIANA SUNDARRAM AYYAR *v.* UMAMBA BAYI SAHEB
I. L. R. 20 Mad. 421

HINDU LAW—ENDOWMENT—*contd.*

5. SUCCESSION IN MANAGEMENT—*contd.*

19. ——— **Right of females**—*Right of females to succeed to polliam—Custom.* Females are not precluded by any rule of descent, custom, or usage of the Cumbala Tottier caste from succeeding to a polliam. COLLECTOR OF MADURA *v.* VEERACAMMOO UMMAL . **9 Moo. I. A. 446**

20. ——— *Right of female to perform services—Appropriation of annuity of endowed property.* In a suit by the widow of one of the descendants of the grantee of a varshasan annual allowance paid from the Government treasury for the performance of religious service in a Hindu temple to recover arrears due to her husband's branch of the family from another descendant who had received the whole stipend; and where it was found by the Court below that by the usage of the family the duties of the office had been performed in rotation, and the stipend distributed amongst the descendants of the grantee in certain fixed portions: *Held*, that it was not competent to the defendant (the special appellant) to raise the question of the non-divisibility of the varshasan. *Quære:* Whether the appropriation of an annuity which is in the nature of a religious endowment as private property is justified by Hindu law. *Quære:* Whether a Hindu female is competent to perform, either in person or vicariously, the services for the maintenance of which a religious endowment has been granted. KESHAVBHAT *v.* BHAGIRATHIBAI
3 Bom. A. C. 75

21. ——— *Liability of officiating priest to account for fees—Sale of hereditary office—Females.* Where a priest wrongfully officiates for another and receives fees, he is bound to account for them to the rightful priest where such fees are by custom attached to the office. The sale of an hereditary priestly office will be upheld where the purchasers are the next in succession from the vendor to such office. *Semble:* That a hereditary priestly office descends in default of males through females. SITARAMBHAT *v.* SITARAM GUNESH . . . . **6 Bom. A. C. 250**

22. ——— *Right of female to succeed to priestly office. Quære:* Whether, according to Hindu law, a woman can succeed to a priestly office? JOY DEB SURMAH *v.* HUROPUTTY SURMAH . . . . **16 W. R. 282**

23. ——— *Right of female to be adhikaree—Vyavasthas.* A woman who has given *mantras* which have been accepted and was nominated by her deceased husband to be adkikaree, is not prevented by the Hindu law from being so. Vyavasthas need not be called for, nor local testimony relied on, to prove the doctrines of Hindu law. POORUN NARAIN DUTT *v.* KASHEESSUREE DOSSEE . . . . **3 W R. 180**

24. ——— *Succession of Hindu widow as shebait—Custom.* In a suit by a Hindu widow to recover possession of certain property dedicated to idols, as heir to her deceased

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HINDU LAW—ENDOWMENT—*contd.*

5. SUCCESSION IN MANAGEMENT—*contd.*

husband, the last shebait, it appeared that the plaintiff's husband was an adopted son of his predecessors in office, and that he was the eldest son of the first defendant who was the nearest male cognate of the adoptive father. On behalf of the defendant it was contended that the right of succession to a shebaitship was not governed by the ordinary rules of inheritance, and that the plaintiff had no title thereto. *Held*, that a Hindu widow could not succeed to a shebaitship as heir to her husband without proof of special custom. In this case there was no sufficient proof of such custom. JANOKEE DABEA *v.* GOPAUL ACHARJEA

I. L. R. 2 Calc. 365

Held, on appeal to the Privy Council, that where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title. JANOKI DEBI *v.* GOPAL ACHARJIA GOSWAMI

I. L. R. 9 Calc. 766 ; 13 C. L. R. 30

25. ——————————— *Mohunt—Appointment of successors—Conditional appointment invalid.* A mohunt by his will appointed *L*, his spiritual brother, to be his successor, and after making such appointment his will thus continued: "Amongst all my disciples I think *G* is a little intelligent and clever, but of younger age than befits a mohunt. Should he receive instruction and learn the duties of mohunt under your guidance, he might probably be competent. Wherefore I direct that you will keep *G* with you, and initiate him well in the duties of a mohunt and when you feel yourself incapable of conducting the business as above, you can appoint *G* as mohunt in your place and not otherwise." *Held*, by the High Court, *first*, that a mohunt may appoint a spiritual brother, and, *L* being a spiritual brother, the appointment was valid, and he was entitled to succeed upon the testator's death. *Secondly*, that the direction for appointing *G* did not of itself vest the mohuntship in G, but that the intention of the testator was that *L* should not appoint him if he should turn out to be in his opinion incompetent. *Thirdly*, that the testator had no power to attach any such conditions to the interest his appointee should enjoy in the mohunt. For a person having a fee simple in an estate, with the power of appointing to the succession, has no right to annex to it conditions which the person who gave him the power of appointment never gave the power to annex. In the absence of such power, therefore, a mohunt who once nominates his successor has no right to give directions to his successor, when his turn to nominate comes, as to whom he should nominate. *Fourthly*, that the testator having no power to give any directions as to the person who should be *L's* successor, *L* was entitled, after he had succeeded to the guddi, to appoint as his successor a person other than *G*. *Fifthly*, that even if by custom a power to appoint two mohunts in succession had been established, still under the words of the will a discretion would have been left to *L* in the choice of his successor, and he would not have been bound to appoint *G*. It seems that in a suit for the recovery of an elective mohuntship to which the plaintiff claims to be mohunt, but does not show that he was elected, but merely that the defendant was not elected or was irregularly elected, the Court ought to dismiss the suit, and has no jurisdiction to direct a new election. *Held*, by the Privy Council on appeal, that the will did not give *G* an absolute positive, unqualified right at any time to the mohuntship, even on the incapacity of *L* to perform the duties of mohunt; that until *L* became incapable, no trust or duty was created; that even when he became incapable, it was no more than a gift in the nature of a precatory trust. *Held*, also, on the evidence, that *G* had failed to establish his own title to be mohunt, and that the suit was so framed that in it he could not recover the mohuntship on the mere infirmity of defendant's title. The only law as to mohunts and their offices is to be found in custom and practice which is to be proved by evidence. There cannot be two existing mohunts, and the office cannot be held jointly. GREEDHAREE DOSS *v.* NUNDOKISHORE DOSS

Marsh. 573 ; 2 Hay 633

And on appeal to Privy Council.

8 W. R. P. C. 25 ; 11 Moo. I. A. 405

26. ——————————— *Succession to maurasi mohunt—Appointment of mohunt—Ceremonies—Revocation of nomination of chela—Disqualification of mohnut.* In the cases of a maurasi muth, the investiture by the leading neighbouring mohunts, at the Bandhara ceremony, of one who cannot prove that he was actually appointed by the last mohunt, is not sufficient, in the absence of proof that he has a right to be so appointed as being senior chela of the last mohunt, to entitle him to succeed to the guddi. The succession to muths or religious endowments must be regulated in each case by the nature of the endowment and the rule of succession prescribed by the founder of the institution, and if this rule cannot be discovered from the original deed of gift or other documentary evidence, it must be proved in each case by showing what the usage has been on the occasion of each succession. A mohunt of a maurasi muth, by a deed of gift in 1849, made over all the property of the muth to his senior chela and invested him with the chudder of mohunti; but subsequently a dispute having arisen on account of the immoral life led by the appointee, a compromise was effected by which the former mohunt was permitted to take back the muth and the property belonging to it, the other being allowed merely to retain possession of a subordinate muth. In 1873 the mohunt died, leaving

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a will, dated 6th May 1873, by which he appointed the defendant his successor. The original appointee thereupon obtained his own confirmation as mohunt at a Bandhara ceremony by the neighbouring mohunt, and brought a suit against the defendant who was in possession for recovery of possession of the muth and the properties belonging thereto, relying on the deed of gift of 1849. *Held*, that the muth being maurasi, the plaintiff was not entitled to possession, there being no reason why the deed of gift should not be considered to have been cancelled by the compromise or by the will. Questions as to whether a claimant to a muth is a Sunjogi, or whether from his conduct and mode of life he is disqualified for the office, may be determined by a Civil Court. SITAPERSHAD DASS *v.* THAKURDAS . . . . . **5 C. L. R. 73**

27. ——————— *Succession to Managership—Chela, right of, to succeed ascetic or sanyasi—Ekrarnama by mohunt—Succession, altering of—Mohunt.* A *chela* is primarily entitled to succeed a *mohunt* of the *sanyasi* sect who has to follow a life of celibacy; but, where there are more *chelas* than one, custom and practice intervene. *Ganes Gir* v. *Umroo Gir (1807), 1 S. D. A. 291; Mahanth Rammoy Dass* v. *Mahanth Debraj Dass, 6 S. D. A. 262; Mohunt Sheo Prokash Doss* v. *Mohunt Joyram Doss, 5 W. R. Mis. 57; Genda Puri* v. *Chatar Puri, I. L. R. 9 All. 1;* and *Janoki Debi* v. *Gopal Acharjia Goswami, I. L. R. 9 Calc. 766,* referred to. An ascetic is a mere life-tenant, and cannot alter the succession to the trust by an act of his own, in connexion with the status under which he originally acquired the trust. *Mohunt Rumun Dass* v. *Mohunt Ashbul Dass, 1 W. R. 160,* and *Rup Narain Singh* v. *Junko Bye, 3 C. L. R. 112,* referred to. One *J*, who was the *mohunt* of a religious institution known as the Barhampore Paita Asthal, belonging to a sect of Vishnavas of the Ramanandi class, initiated one *A*, who had been his *chela*, with the *chadar, kanthi* and *tilak* of *mohuntship*, thereby nominating and installing him as his successor. *A*, after succeeding to the *mohuntship*, executed an *ekrarnama* in favour of the *mohunt* of Mirzapur, giving him the right of naming or appointing his own successor. *Held*, that the mode of appointment, by a *mohunt*, of a successor from out of his *chelas* was well known, and the manner of *A's* own appointment to the *guddi* indicated that such was the custom and practice of the Barhampore Paita Asthal; *also* that *A* had no power to ignore this custom and practice and give away the right of appointment to the *mohunt* of Mirzapur; and that consequently the *ekrarnama* was *ultra vires* as an exercise of *A's* right of electing his own successor. RAMJI DASS *v.* LACHHU DASS (1902) . . **7 C. W. N. 145**

28. ——————— *Succession to property of Mohunt—Chela—Succession in management of endowed property under deed of endowment—Mortgage by manager—Money advanced out of profits of dedicated property—Right of successor to sue on mortgage.* A mortgagee, who was the Mohunt of an order of bairagis or religious mendicants, by a deed of endowment dedicated certain self-acquired property to the service of an idol, of which he made himself trustee and manager, and nominated and appointed the plaintiff, who was his chela, to succeed him on his death in the trusteeship and management. In a suit on the mortgage the evidence showed that the money advanced to the defendant was part of the profits of the estate so dedicated. *Held*, by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioner of Oudh), that the plaintiff on his succession was entitled as such trustee and manager to maintain the suit and recover the money due by the defendant on the mortgage. BISHAMBAR DAS *v.* DRIGBIJAI SINGH (1905) . **I. L. R. 27 All. 581**

29. ——————— **Ascetic**—*Alteration of succession.* An ascetic, a mere life-tenant, cannot alter the succession to an endowment belonging to ascetics, by an act of his own in connection with the status under which he originally acquired the trust. RUMUN DOSS *v.* ASHBUL DOSS **1 W. R. 160**

30. ——————— **Decree against muth**—*Religious endowment—Decree against head of muth binds successor in execution proceedings—Decree on promissory note executed by head of muth binds the muth—Compromise decree, effect of—Parties to suits—Sishyas cannot be made parties.* A decree passed against the head of a muth as representing the muth is binding on his successor, who cannot dispute the validity of the decree in execution proceedings, but can do so only by a properly framed suit. *Sudindra* v. *Budan, I. L. R. 9 Mad. 80,* referred to and followed. The head of the muth represents the muth even when the suit is brought on a promissory note executed by him and he cannot therefore question the validity of the transaction. The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise. The sishyas or disciples of a muth are not co-owners with the head of the muth and have no such interest in the muth property as will entitle them to be made parties in a suit to recover property from the head of the muth. MANIKKA VASAKA DESIKAR *v.* BALAGOPALAKRISHNA CHETTY (1906) . **I. L. R. 29 Mad. 553**

6. DISMISSAL OF MANAGER OF ENDOWMENT.

1. ——————— **Dismissal of servant of pagodas by dharmakarta**—*Ground of dismissal.* The question whether there was a sufficient ground for the dismissal of a pagoda hereditary servant by a dharmakarta is one of degree and not of principle, and must therefore depend upon the circumstances of each case. KRISTNASAMY TATACHARRY *v.* GOMATUM RANGACHARRY **4 Mad. 63**

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2. ——— Deposition from office by Sovereign Prince—*Trustee of property dedicated to idol—Primogeniture—Tekait Maharaj, office of—Effect of order of deposition.* By the custom of primogeniture obtaining in his family, the plaintiff succeeded to the office of Tekait Maharaj, and came into possession of all the property dedicated to the family idol of Shri Nathji. He resided at Nathdwar within the territories of the Rana of Udepur in Mewar. Part of the dedicated property was at Poona. The first four defendants managed this portion of the property for the plaintiff. They collected the rents and transmitted them to him from time to time. In 1876 the Rana deposed the plaintiff for alleged misconduct, deported him from his territories, and proclaimed the plaintiff's son (defendant No. 5) as Tekait Maharaj. The defendant having refused to pay over the rents and to deliver the Poona property to the plaintiff, the plaintiff brought the present suit to recover possession. The plaintiff's son was made a co-defendant on his own application. The defendants denied the plaintiff's right to the property on the ground that he had been deposed and banished by the Rana, and the fifth defendant (the plaintiff's son) claimed to be Tekait Maharaj, and as such to be entitled to all the devasthan property. The lower Court made a decree in favour of the plaintiff. On appeal by the defendants to the High Court: *Held*, that the plaintiff was entitled to the property in dispute. The order of the Rana could not be regarded as a foreign judgment between the parties. That order, whatever its effect might be within the territories of the Rana, could not affect the property situated in Poona beyond his jurisdiction. It had descended to the plaintiff on the death of his father in virtue of the custom of primogeniture obtaining in his family. Whether he took it as owner or as trustee for the idol and shrine was immaterial, for in either case he had a right to possession. If he took it as owner, he had not in law lost his right as such in consequence of the Rana's act. If he held merely as a trustee, he had not yet been removed from his office by any competent tribunal. NANABHAI *v.* SHRIMAN GOSWAMI GIRDHARIJI **I. L. R. 12 Bom. 331**

3. ——— Dismissal of dharmakarta, grounds for—*Management of temple—Dharmakarta guilty of misfeasance retained in office on terms.* A suit to remove a dharmakarta, though he is held to have been guilty of misconduct in the discharge of his duties as such, may, in the absence of any proved and deliberate dishonesty on the defendant's part, be dismissed on conditions to be complied with by him. SIVASANKARA *v.* VADAGIRI . . . . . **I. L. R. 13 Mad. 6**

4. ——— Relation between the founder's representative and the mohunt—*Agreement by the mohunt on his appointment—Grounds of dismissal.* In the absence of a deed of endowment, the obligations of the head of a muth to the representative of the founder can only be deduced from the usage of the institution. In a suit by the representative of the founder to remove the defendant from the headship of a muth, it appeared that the usage was for the head of the institution for the time being to nominate his successor, and for the representative of the founder to sanction the nomination and invest the nominee with a gadi on his installation, and that the defendant had asked the plaintiff to appoint him and had undertaken on his appointment to furnish to him accounts of the income and expenditure of the muth. *Held*, that the plaintiff was not entitled to remove the defendant from office on the ground of his refusal to furnish accounts. GAJAPATI *v.* BHAGAVAN DOSS . . **I. L. R. 15 Mad. 44**

5. ——— Deposition of manager by an act of State of foreign power—*Property bequeathed to an idol—Act of Foreign State—Effect of deposition on right to property in Bombay—Trustee—Will—Power of appointment.* Under a power given to her by the will of her husband, *C* had the right to bequeath a certain house situate in Bombay. She died in 1873, and by her will she bequeathed the house in question to trustees, their heirs, etc., in trust to pay and apply the rents thereof to the shrine or gadi of Shri Nathji for ever, and she gave the trustees and their heirs, etc., the right to reside for life in the first storey of the said house free of rent. The shrine of Shri Nathji is situate at Nathdwara in the territory of His Highness the Maharana of Oodeypore. It is held in great veneration by the Vaishnava sect of Hindus, and is extremely wealthy. The plaintiff held the position of Maharaja of Nathdwara (Tikait Maharaja) up to the year 1876, and as such sat on the gadi and managed the property of the said shrine. In that year, however, he was deposed from his position by the principal authorities of Oodeypore and deported from Nathdwara, and his son, the second defendant, was raised to the gadi in his place. Since that time the plaintiff had never been permitted to go back, nor had he had anything to do with the shrine. The second defendant (his son) had since his elevation performed the worship and managed the property belonging to the shrine. The plaintiff, however, claimed in this suit to be still the legal owner and representative of the shrine, and as such entitled to the house in question and to the rents and profits thereof since the death of *C*. The first defendant was one of the trustees named in the will of *C*, to whom the house was bequeathed in trust. The plaintiff in this plaint also contended that the clause in *C's* will, giving the said trustees a right to reside in the house free of rent, was *ultra vires* of the power of appointment given to her by the will of her husband. The defendants denied that since his deposition the plaintiff was the legal owner and representative of the shrine of Shri Nathji. They

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contended that, having been deposed and deported from Nathdwara, he could no longer apply the rents to the support of the shrine, and that, if the house were given to him, the trusts of *C's* will would be defeated. They contended that the second defendant, in virtue of his position, was entitled to receive the rents, and that this suit should be dismissed. *Held*, that the plaintiff was entitled to the said house. The house was validly bequeathed to the gadi. At the date of the bequest the plaintiff was *de facto* as well as *de jure* in possession of the shrine and of its property. His deposition from the gadi was an act of a foreign State, and did not affect his right to property in Bombay. If he was regarded as owner of that property, he had not lost his right as such to the said property in consequence of his deposition, and if he was merely a trustee, he had not been removed from his office by any competent tribunal. *Held*, also, that under the will of *C* the first defendant was entitled to reside rent free in the first storey of the house in question during his lifetime. GOSWAMI SHRI GIRDHARJI *v.* MADHOWDAS PREMJI

I. L. R. 17 Bom. 600

6. ——————— *Deposition of manager by act of State of foreign power—Effect of such act on title to property outside jurisdiction—Property of idol—Appointment of new manager—Suit by latter for property of shrine.* For thirty years prior to 1876 the defendant had been the high priest of the shrine of Shri Nathji at Nathdwara in the territory of the Maharaja of Oodeypore, and as such was manager of the property of the shrine. This shrine is held in great veneration by the Vaishnava sect of Hindus, and large bequests and offerings of money, land, etc., are made to it by members of that sect. To facilitate the collection of such offerings and the employment of the funds belonging to the shrine, firms are established in various parts of India, including Bombay. The firm in Bombay was carried on under the name of *N P*, and the house in which it was carried on was built with moneys belonging to the shrine. On the 8th May 1876, by order of the Political Agent of Meywar and the Maharana of Oodeypore, he was deposed from that office for alleged misconduct and deported from Nathdwara. In his place his son, the plaintiff, was placed on the gadi as high priest. In 1878 the plaintiff brought this suit praying for a declaration that as high priest of the shrine he was entitled to the property in Bombay belonging thereto, and for delivery of the same to him, and for an injunction against the defendant, and for a receiver, etc. He obtained a rule *nisi* calling on the defendant to show cause why he should not be restrained from receiving or dealing with the moneys of the said firm of *N P* and from tampering with the books, etc. *Held*, discharging the rule, that the plaintiff, had shown no title to the property in question. The defendant was in possession, and had been for many years in possession,

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of the property. His deposition by a foreign power and the election of the plaintiff to the gadi in the place of the defendant did not transfer the title to property in Bombay from the defendant to the plaintiff. As an act of State, it could not be made the basis of an action, and it could not be regarded as a foreign judgment. GOSWAMI SHRI GOVARDHANLALJI GIRDHARLALJI *v.* GOSWAMI SHRI GIRDHARLALJI GOVINDRAIJI

I. L. R. 17 Bom. 620 note

7. TRANSFER OF RIGHT OF WORSHIP.

1. ——————— **Right of priest performing sradh.** The Hindu law does not declare that the priest who performs the sradh, however temporary his incumbency may be, is entitled to the land endowed in consideration of the continuous performance of the recurring ceremonies of sradh and other rites for the spiritual benefit of the donor. RAM CHUNDER CHUCKERBUTTY *v.* GOOROO CHURN CHUCKERBUTTY . . . . **6 W. R. 305**

2. ——————**Transfer of right of worship to stranger**—*Duration of assignment.* The right of worship of an idol, being the joint property of the members of the family of the endower, cannot be transferred to a third party, a stranger to the family, so as to endure beyond the life of the assignor. UKOOR DASS *v.* CHUNDER SEKHUR DASS

3 W. R. 152

3. ——————**Position of trustee of endowment as to transferring his trust**—*Suit for removal of appointment of trustee—Act XX of 1863.* The trustee of an endowment has not as such the power of transferring his trust to any other person. And where a trustee is empowered to appoint another trustee to act for him, he cannot transfer the right of exercising that power to another or others. The mode in which a suit for the removal or appointment of a manager to an endowment not coming within Act XX of 1863 should be brought stated. *Kali Churun Giri* v. *Golabi, 2 C. L. R. 129,* followed. RUP NARAIN SINGH *v.* JUNKO BYE . . **3 C. L. R. 112**

4. ——————— **Right to perform service of idol**—*Sale in execution of decree.* A judgment-debtor's right as shebait to perform the service of an idol cannot be sold in execution of a decree, nor can his right to the surplus profits of the sheba be sold so long as that right is unascertained and uncertain. JUGGUR NATH ROY CHOWDHRY *v.* KISHEN PERSHAD SURMA *alias* RAJA BABOO **7 W. R. 266**

5. ——————— **Right of shebait**—*Transferability of rights of worship in execution of decree.* The right of a shebait of a Hindu idol to perform the services and receive the customary remuneration is not transferable, and cannot be sold in satisfaction of a decree against the shebait. DUBO MISSEE *v.* SRINIBAS MISSER . **5 B. L. R. 617**

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S.C. DROBO MISSER *v.* SREENEBASH MISSER **14 W. R. 409**

6. ——— *Transferability of rights of worship in execution of decree.* Rights of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of a shebait. KALICHARAN GIR GOSSAIN *v.* BANGSHI MOHAN DAS . . **6 B. L. R. 727 : 15 W. R. 339**

7. ——— **Alienation of right to officiate in temple**—*Sale in execution of decree.* The right of managing a temple which is a religious endowment, of officiating at the worship conducted in it, and of receiving the offerings at the shrine cannot, in default of proof to the contrary, pass outside the family of the trustee, until absolute failure of succession in his family, and such rights are therefore not saleable in execution of decree. The principle laid down by the Privy Council in *Rajah Vurmah Vali* v. *Ravi Vurmah Valia Muttia, L. R. 4 I. A. 76,* followed. DURGA BIBI *v.* CHANCHAL RAM . . . **I. L. R. 4 All. 81**

8. ——— **Alienation of religious office**—*Right to worship idol.* There is no reason why the alienation of a religious office to a person standing in the line of succession, and free from objections relating to the capacity of a particular individual to perform the worship of an idol or do any other necessary functions connected with it, should not be upheld. The alienation, therefore, by a divided member of a Hindu family to his sister's son, of the right of worshipping a goddess and receiving a share of the offerings was upheld. MANCHARAM *v.* PRANSHANKAR **I. L. R. 6 Bom. 298**

9. ——— *Illegal transfer to proper person of same caste and sect.* The sale of a religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office, is illegal. *Mancharam* v. *Pranshankar, I. L. R. 6 Bom. 298,* discussed. KUPPA GURUKAL *v.* DARASAMI GURUKAL **I. L. R. 6 Mad. 76**

10. ——— **Transfer of religious office**—*Transferee not solely entitled in succession to transferor.* In a suit against the mooktessers or trustees of a temple, the plaintiff sought a declaration of his right to perform the puja in the temple, and an injunction restraining the defendants from interfering with the exercise of such right. It appeared that the office of pujari was hereditary in the plaintiff's family; that it had been held by the plaintiff's undivided uncle (deceased); that he transferred it in 1880 to the plaintiff's father (deceased), in succession to whom the plaintiff now claimed it. The High Court called for a finding as to whether the plaintiff's father was the sole heir next in succession to his transferor, and it was found that he had three brothers. *Held,* that the transfer of the office to the plaintiff's father was invalid, and the suit should be dismissed. NARAYANA *v.* RANGA . **I. L. R. 15 Mad. 183**

11. ——— **Right of suit**—*Suit to set aside sale in execution of decree of lands belonging to temple.* A hereditary dharmakarta of a temple, who had assigned his office to a zamindar and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity. SUBBARAYUDU *v.* KOTAYYA . **I. L. R. 15 Mad. 389**

12. ——— **Sale of office and emoluments of attending to idol.** An archaka cannot sell the office and emoluments of paricharaka, inasmuch as they are *extra commercium.* NARASIMMA THATHA ACHARYA *v.* ANANTHA BHATTA **I. L. L. 4 Mad. 391**

13. ——— *Inalienability of priestly office and turn of worship of idol—Right of sebait—Estoppel.* A priestly office with emoluments attached to it is inalienable, and it would be contrary to public policy to allow offices like this to be transferred either by private sale or by sale in execution of a decree. *Mancharam* v. *Pranshankar, I. L. R. 6 Bom. 298; Vurmah Valia* v. *Ravi Kunhi Kutty, I. L. R. 1 Mad. 235; Juggernath Roy Chowdhry* v. *Kishen Pershad Surmah, 7 W. R. 266; Drobo Misser* v. *Srinibas Misser, 5 B. L. R. 617 : 14 W. R. 402; Kali Charan Gir Gossain* v. *Bangshee Mohan Das, 6 B. L. R. 737 : 15 W. R. 339; Kuppa Gurulal* v. *Darasami Kurukal, I. L. R. 6 Mad. 76,* referred to. A person is not precluded from raising the question that his priestly office with emoluments are inalienable, because he mortgaged the same. *Juggut Mohince Dossee* v. *Sookeemonee Dossee, 10 B. L. R. 19 : 17 W. R. 41,* referred to. MALLIKA DASI *v.* RATAN MANI CHAKERVARTY . . . **1 C. W. N. 493**

14. ——— *Res extra commercium—Custom as to assignability.* The plaintiff sued for a declaration of his title as purchaser of a mirasi office in a temple to which were attached certain duties to be performed as part of a religious ceremony, and for a sum of money representing the emoluments of the office. The first defendant was the plaintiff's vendor, the second defendant claimed title to the office by purchase, the other defendants were the trustees of the temple, and they did not appear on appeal. The Court of first instance passed a decree as prayed, which was reversed on an appeal preferred by the second defendant alone. On second appeal: *Held,* that defendant No. 2 was not entitled to a decree on the sole ground that the office was *res extra commercium. Per* PARKER, *J.*—Had the trustees of the temple appeared in the Court of first appeal and raised the question of the inalienability of the office, it would have been necessary for the Court to have determined the question whether by the custom of

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the particular institution such alienations were valid. RANGASAMI *v.* RANGA
I. L. R. 16 Mad. 146

15. ——— Gift of vritti (or religious office)—*Validity of such gift—Compulsory alienation of vritti—Sale in execution—Private alienation.* A vritti cannot be sold in execution of a decree. Such a compulsory alienation is not only opposed to the Hindu law and public policy, but is also against the provisions of s. 266 of the Code of Civil Procedure (Act XIV of 1882). But private alienations are not absolutely prohibited. No general rule can be pleaded in such matters. The rules of succession depend upon each particular foundation or office, and in respect of it custom and practice must govern and prevail over the text law which prohibits both partition and alienation. RAJARAM *v.* GANESH . **I. L. R. 23 Bom. 131**

8. ALIENATION OF ENDOWED PROPERTY.

1. ——— Religious offices and temple property, transfer and alienation of—*Custom.* According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns, and of allowing alienation within certain restrictions. TRIMBAK RAMKRISHNA RANADE *v.* LAKSHMAN RAMKRISHNA RANADE . **I. L. R. 20 Bom. 495**

2. ——— Power of alienation—*Sale for benefit of property—Duty of purchasers.* The case of a person alienating property which he holds as shebait of an idol is analogous to that of a Hindu widow alienating ancestral property, and the question as regards the power of a shebait to grant a patni of a debutter land is whether, looking to all the circumstances of the case, the alienation was a prudent and wise act in respect of the purposes for which he was shebait, and in estimating the validity of a purchase of the patni rights, it ought to be considered whether the purchasers satisfied themselves as far as they could that there was a fair and sufficient ground of necessity for the alienation. JUGGESHUR BUTTOBYAL *v.* RODRO NARAIN ROY
12 W. R. 299

3. ——— Power of mohunt to alienate—*Right of successor against purchaser from mohunt.* A mohunt in charge of an endowment with only a life-interest in the property cannot create an interest superior to his own, or, except under the most extraordinary pressure and for the distinct benefit of the endowment, bind his successors in office. If a purchaser from such mohunt retained possession after the mohunt's death, the successor to the guddi would have a cause of action against him from the date of the election; and no length of possession during the vendor's lifetime

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would give the purchaser a valid title as against the present mohunt. BURM SUROOP DASS *v.* KHASHEE JHA . . . . . **20 W. R. 471**

4. ——— Power of shebait to alienate—*Position of shebait.* A shebait is in the position of trustee for the founder, and cannot create permanent encumbrances to the injury of the endowed property. No prescription derived from the trustee can in such cases run against the heirs and representatives of the founder. PROSUNNO MOYEE DOSSEE *v.* KOONJO BEHAREE CHOWDHRY
W. R. 1864, 157

5. ——— *Powers of shebait.* Where the father of the plaintiffs, who was a shebait of certain debutter property, granted a mourasi mokurari lease of a portion of that property to his co-shebait, the grandfather of the defendants such lease being granted without any legal necessity: *Held*, that such lease was wholly void. PROSUNNO KUMAR ADHIKARI *v.* SARODA PROSUNNO ADHIKARI . **I. L. R. 22 Calc. 989**

6. ——— *Effect of alienation as against successor in shebaitship.* An alienation of the debutter property by one shebait was *held* to be void as against a successor in the shebaitship. GOLUCK CHUNDER BOSE *v.* RUGHOONATH SREE CHUNDER ROY
11 B. L. R. 337 note : 17 W. R. 444

RUMONEE DEBEA *v.* BALUCK DOSS MOHUNT
11 B. L. R. 336 note ; 14 W. R. 101

7. ——— *Effect of alienation—Necessity for alienation.* Under the Hindu law, a permanent alienation by a shebait of endowed property, such as the creation of a patni, is not absolutely null and void. A permanent alienation by a shebait of endowed property under special circumstances of necessity is valid. Want of funds for repairing the temple and restoring the image of the idol is a necessity sufficient under the Hindu law to warrant such an alienation. TAYUBUNISSA BIBI *v.* SHAM KISHORE ROY
7 B. L. R. 621 : 15 W. R. 228

8. ——— *Effect of alienation—Decree obtained against shebait—Res judicata.* As a general rule of Hindu law, property given for the maintenance of religious worship and of charities connected with it is inalienable. It is competent, however, for the shebait in charge of property dedicated to the worship of an idol, in his capacity of shebait and as manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power to incur such debts is to be measured by the existing necessity for incurring them, the authority of the shebait being in this respect analogous to that of a manager for an infant heir. It being competent for a shebait to borrow

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money for necessary purposes, it follows that judgments obtained against a former shebait in respect of debts so incurred are binding upon succeeding shebaits, who form a continuing representation of the debutter property. But before applying the principle of *res judicata* to such judgments, the Court should be satisfied that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried, and decided in the suits which led to them. Execution of such judgments should be decreed only against the rents and profits of the debutter property. PROSUNNO KUMARI DEBYA *v.* GOLAB CHAND BABOO . . . **14 B. L. R. 450**
23 W. R. 253 : L. R. 2 I. A. 145

Affirming the decision of the High Court in GOLAB CHAND BABOO *v.* PROSUNNO KUMARI DEBYA in which it was held that a decree obtained *bonâ fide* against the shebait of an idol is binding on his successor . **11 B. L. R. 332 : 20 W. R. 86**

9. ———— *Purchaser of endowed property, notice to—Evidence of necessity for alienation.* A plaintiff who seeks to set aside an alienation of lands on the ground that they are debutter, *i.e.*, dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mehal have been applied for a considerable period to the worship of an idol is not sufficient proof that the mehal is debutter. The shebait or manager of a debutter estate has authority, where the purposes of the endowment require it, to raise money by alienating a part of the estate his position being analogous to that of a manager of an infant heir under the Hindu law. The written conveyance of certain lands stated them to be debutter, and to be alienated to raise money to repair the temple of the idol. In a suit to set aside the alienation, it appeared that at the time of the transaction the temple required repairs but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed, *Held*, that the sale was valid. Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced. DOORGANATH ROY *v.* RAM CHUNDER SEN
I. L. R. 2 Calc. 341
L. R. 4 I. A. 52

10. ———— **Bond by manager of muth** —*Right to charge endowed property—Necessity—Suit on bond.* A suit to recover on a bond given by the *de facto* manager of a muth as a charge on the muth having been decreed by the Subordinate Judge: *Held*, that, as the obligor had turned the previous manager out of possession, and as his own right to possession was contested at the time he executed the bond, he was in no better position than a trespasser and wrongdoer. Where a bond as a charge on a muth is given for antecedent claims against a muth, of which a portion would, but for the fresh right of suit given by the bond, have been barred by limitation, and where no proceedings have been taken for sequestration or attachment of the property there is no necessity for giving the bond, and a suit to recover cannot succeed. RAM CHURN POOREE *v.* NUNHOO MUNDUL . . . . **14 W. R. 147**

11. ———— **Alienation of pagoda property by managers**—*Purchasers from managers, duties of.* The paid managers of the affairs of a pagoda have no power as such to encumber the pagoda property, or to settle large outstanding demands against it. Persons dealing with such managers are bound to enquire into the extent of their authority. A person bound to make an enquiry, and failing to do so, will be held to have notice of all such facts as that enquiry, if made, would have brought to his knowledge. SAMBANDA MUDALIYAR *v.* NANASAMBANDAPANDARA
1 Mad. 298

12. ———— **Sale of religious office**—*Alienation of the management of a public charity—Effect of partial illegality in alienation—Suit for specific performance of agreement to partition—Form of decree.* In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price, and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangements: *Held*, that the sale by auction of the huk right was illegal, but that, as such illegality did not affect the other terms of the arrangement, it might be enforced as to the rest of the property. ALAGAPPA MUDALIAR *v.* SIVARAMASUNDARA MUDALIAR . . . . **I. L. R. 19 Mad. 211**

13. ———— **Creation of tenure at a fixed rent.** Where land is dedicated to the religious services of an idol, the rents of the land constitute in legal contemplation the property of the idol, and the shebait has not the legal property, but only the title of manager of a religious endowment, and cannot alienate the property, though he might create proper derivative tenures and estates conformable to usage. The creation of a tenure at a fixed invariable rent would be breach of duty in a shebait. SHIBESSURREE DABEE *v.* MOTHOORANATH ACHARJEE . **13 W. R. P. C. 18**
13 Moo. I. A. 270

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14. ——— **Portion of profits**—*Property, portion of profits of which is charged for religious purposes.* A property wholly dedicated to religious purposes cannot be sold ; but where a portion only of its profits is charged for such purposes, the property may be sold, subject to the charge with which it is burdened. BASU DHUL *v.* KISSEN CHUNDER GEER GOSSAIN . . . **13 W. R. 200**

15. ——— **Lease**—*Power of manager to grant patni lease.* It is doubtful whether it is competent to the manager of endowed property to grant a patni thereof. MOTEE DOSS *v.* MODHOOSOODUN CHOWDHRY . . . **1 W. R. 4**

16. ——— *Power to grant lease of endowed property.* The shebait of a religious endowment is competent to lease the endowed lands and to appropriate the proceeds for the purpose of keeping up the worship of the idol, and a mokuddum, under such a lease, is entitled to hold possession during the lifetime of the lessor or during such period as the latter continues to be the shebait of the endowed lands. ARRUTH MISSER *v.* JUGGURNATH INDRASWAMEE . . **18 W. R. 439**

17. ——— *Right of priest to grant lease in his own name.* The high priest of a religious endowment in Assam, who was only a nominee of the grantees, was held to have no right to grant leases in his own name and of his own authority. RAM DOSS *v.* MOHESUR DEB MISREE **7 W. R. 446**

18. ——— *Power to grant lease of endowed property—Khadim, tenure of endowed property by.* Unless endowed property descends to the heirs of a deceased khadim, they can have no right to manage or interfere with the property. If a khadim has only a life-interest, any lease given by him will be in force only during his lifetime, and cannot continue without the consent of the succeeding khadim, or perhaps of the mutwalli, if he has any special right to confirm leases. SUJAWUT ALI *v.* BUSHEEROODDEEN **2 W. R. 189**

19. ——— **Alienation of profits of debutter mehal.** The profits of a debutter mehal may be assigned so long as the deb-sheba is duly kept up. SIBBESSUREE DABEA *v.* BECKWITH **3 W. R., Act X, 152**

20. ——— **Grant to gosavi and his disciples**—*Right of gosavi to encumber it.* A grant to a gosavi and his disciples in perpetual succession, coupled with directions which practically make it an endowment of a muth with a limitation of the enjoyment to a particular line of celebrants of the worship therein, does not entitle an individual gosavi to encumber the endowment beyond his own life. The English law relating to superstitious uses does not apply in the case of Hindu religious endowments. KHUSALCHAND *v.* MAHADEVGIRI . . . . **12 Bom. 214**

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21. ——— **Service land**—*Property of a temple—Guravki—Sale of right, title, and interest of holder.* The property of a temple cannot be sold away from the temple ; but there is no objection to the sale of the right, title, and interest of a servant of the temple in the land belonging to the temple which he holds as remuneration for his service ; the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office on account of his failure to perform the service. LOTLIKAR *v.* WAGLE **I. L. R. 6 Bom. 596**

22. ——— **Temporary pledge of income of endowment**—*Creation of nibandha. Quare :* Whether a private individual as well as a royal personage may create a nibandha. A Hindu religious endowment cannot be sold or permanently alienated, though its income may be temporarily pledged for necessary purposes, such as the repair, etc., etc., of the temple. COLLECTOR OF THANA *v.* HARI SITARAM **I. L. R. 6 Bom. 546**

23. ——— **Mortgage of lands attached to a muth**—*Bom. Act II of 1863, s. 8, cl. 3, Effect of declaration by Government under—Power of a jangam guru to alienate land given to muth—How far such alienation is binding on his successor in the office.* The defendant was in possession of three fields (survey Nos. 222, 360, and 372) as mortgagee under mortgages executed by one *G*, who was the plaintiff's guru and his predecessor in office as jangam, or presiding lingayat priest of the muth. Two of the fields (Nos. 360 and 372) had been mortgaged in 1863. *G* died in 1874, and in 1882 the plaintiff brought this suit to recover possession of the fields on the ground that it was not competent to *G* to mortgage them beyond the period of his own life, and also on the ground that, under cl. 3 of s. 8 of Bombay Act II of 1863, they were not alienable from the muth. It appeared that in 1862 a sanad was issued by Government to *G* declaring the land in dispute to be his personal inam, and continuable for ever as transferable private property, subject only to chaothai and nazarana. This sanad was withdrawn in 1868, and another sanad was issued, declaring the land to be service emolument appertaining to the office of jangam, on condition that the holders thereof should perform the usual services to the community, and should continue faithful subjects of the British Government. The sanad stated as follows :—" As this vatan is held for the performance of service, it cannot be transferred, and, in consequence, no nazarana will be levied." The nazarana, which had been levied under the sanad of 1862 for the years from 1861-62 to 1865-66, was refunded. *Held*, that, the plaintiff was entitled to recover the land in question. The circumstance of the repayment of nazarana and chaothai for the years 1861-66, clearly showed that, in the opinion

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of the Government, a personal inam had been wrongly granted to *G* by the sanad of 1862, and there was nothing to show that *G* objected to the decision ultimately arrived at by Government. After the passing of Bombay Act II of 1863, it would not have been open to him—as it was not open to his mortgagee now—to contest that decision in any way for by s. 16, cl. (*d*), of that Act, it is competent to Government to determine any question as to whether or not any lands are held for service, and the decision of Government, when once made, is final. Since 1868 there could be no question that the lands comprised in the sanad had not been alienable by the jangam of the muth beyond his lifetime, and as they belonged to a service vatan, they were held on a tenure of successive life-estates. After the death of *G*, therefore, the plaintiff, as *G's* successor in office, was entitled to the whole of the inam land claimed by him. JAMAL SAHEB *v.* MURGAYA SWAMI . . **I. L. R. 10 Bom. 34**

24. ——— Liability of savasthan of muth for money borrowed by the svami. The svami of a muth presumably has no private property, and must be assumed to be pledging the credit of the muth when he borrows money for the purposes of the muth. Proper purposes are to be determined by the usage and custom of the muth. SHANKAR BHARATI SVAMI *v.* VENKAPA NAIK **I. L. R. 9 Bom. 422**

25. ——— Effect of exceution proceedings against successor. In 1866 *V* (the father of the plaintiff) sued his brothers *H* and *G* (one of the two sons of *H* and defendant No. 1) to establish his right to a third share of the management of certain lands granted for the maintenance of a Hindu temple. In that suit *V* obtained a decree that he should have the exclusive management every third year, but was ordered to pay costs. To enforce payment of these costs, *H* in execution of the decree, attached the third share of *V* in the management of the land. The share was accordingly sold by auction in January 1870 to a Marwadi, who afterwards in May 1870 re-sold it to the appellant *T* (another son of *H* and defendant No. 2). *V* died in 1876. In 1879 the plaintiff sued *G* and the appellant (the two sons of *H*) for his share of the management. It was contended for the defence that, as the execution sale of January 1870 was not set aside within a year, the right to treat it as void by the plaintiff was barred by lapse of time. *Held*, that in cases of endowments, when the founder has vested in a certain family the management of his endowment, each member of it succeeds to the management *per formam doni*, and that therefore, on *V's* death, the plaintiff's right to succeed to the management was quite unaffected by any proceedings in execution against *V* during his life. TRIMBAK BAWA *v.* NARAYAN BAWA **I. L. R. 7 Bom. 188**

26. ——— Mirasi karnam—*Mad. Reg. XXIX of 1802—Emoluments—Alienation.* The lands attached to, and forming the emoluments of, the office of karnam in permanently-settled estates cannot be alienated by the holder of the office to the prejudice of his successor. MUPPIDI PAPAYA *v.* RAMANA . **I. L. R. 7. Mad. 85**

27. ——— Archakas of pagoda—*Power of archakas of pagoda to alienate in order to alter form of worship—Legal necessity for alienation.* It is not competent to the archakas of a pagoda of their own authority to make an alienation for the purpose of altering the form of worship in the pagoda, or in contemplation of such alteration. Any assignment of the office must carry with it the duty of continuing the form of worship hitherto observed. VENKATARAYAR *v.* SRINIVASA AYYANGAR . . . . **7 Mad. 32**

28. ——— Liability of son for father's debt—*Service inam of father enfranchised in favour of son.* In execution of a money-decree obtained against *M*, as representative of his deceased father, the creditor attached and sold certain land which, having been in the possession of the father as the emolument of the office of karnam, was, after his death, enfranchised by Government and granted to *M* and his brother. *Held*, that the land was not liable to be sold in execution of the decree. KRISHNAYA *v.* CHINNAYA **I. L. R. 7 Mad. 597**

29. ——— Debt contracted by head of mattam—*Liability of his successor in office.* The property belonging to a mattam is in fact attached to the office of mattamdar and passes by inheritance to no one who does not fill the office. Though it is in a certain sense trust-property, the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution, he may contract debts for purposes connected with the mattam, and debts so contracted might be recovered from the mattam property, and would devolve as a liability on his successor to the extent of the assets received by him. The origin of mattams discussed and explained. SAMANTHA PANDARA *v.* SELLAPPA CHETTI . . . . **I. L. R. 2 Mad. 175**

30. ——— *Charitable endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution-purchaser.* A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incumber or alienate it, but that in case of necessity his heirs might maintain themselves out of the income while administering the trusts of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of per-

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sonal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution-purchaser as heir to the settlor. *Held*, that the plaintiff was not entitled to recover the land. *Rupa Jagshet* v. *Krishnaji Govind, I. L. R. 9 Bom. 169*, distinguished. SUPPAMMAL *v.* COLLECTOR OF TANJORE **I. L. R. 12 Mad. 387**

31. ——— Debt contracted by one claiming to be in possession as head of the institution—" *De facto" manager, power of—Cost of defending ejectment suit.* Suit on a bond in which the obligor was described as the head of a muth, and the debt thereby secured was stated to have been incurred "for the reasonable expenses of the suit which was being proceeded with, and for the good of the muth and for the said muth's own expenses." The debt have been contracted by one who was in possession of the muth under a claim that he was the duly constituted head of the institution for the purposes of defending a suit brought by the head of another religious institution to eject him and to establish certain rights over the muth. A decree for ejectment was obtained, but some of the pretensions of the plaintiff were successfully resisted. The present defendant was a receiver of the properties of the muth appointed by the Court in the course of that litigation. *Held*, that the bond was not enforceable against the property of the muth. SAMINATHA *v.* PURUSHOTTAMA **I. L. R. 16 Mad. 67**

32. ——— Alienation by manager— *Alienation by de facto manager of an endowment—Limitation Act (XV of 1877), sch. II, art. 91.* The principles of *Hunooman Persaud Pandey's Case, 6 Moo. I. A. 393*, apply to the alienation of property by the *de facto* manager of an Hindu endowment. The possession of such manager cannot be treated as adverse to the endowment. *Semble:* Art. 91 of sch. II of the Limitation Act (XV of 1877) has no application to a suit to set aside such alienation. *Unni* v. *Kunchi Amma, I. L. R. 14 Mad. 26*, and *Sikher Chund* v. *Dulputty Sing, I. L. R. 5 Calc. 363*, cited. SHEO SHANKAR GIR *v.* RAM SHEWAK CHOWDHRI **I. L. R. 24 Calc. 77**

33. ——— *Alienations by manager—Mirasi grant by manager without legal necessity.* Grants of permanent under-tenures such as mirasi, patni, mokurari, grants by managers of endowed temple lands, are not void if made for a necessary purpose. Where lands belonging to a temple were granted in miras by the manager of the temple, but not for a necessary purpose, and the successor of the grantor sued to eject the assignee of the grantee: *Held*, that the effect of such a grant was to enable the grantee to hold the lands during the lifetime of the grantor, but would not confer on him any title binding on the successor in the management of the temple lands. RAMCHANDRA SHANKARBAVA DRAVID *v.* KASHINATH NARAYAN DRAVID . . . **I. L. R. 19 Bom. 271**

34. ——— *Religious endowments—Mortgage of endowed property by de facto manager—Debt binding on the institution.* In a suit on a mortgage, dated April 1880, and comprising lands forming part of the endowment of a muth, it appeared that the mortgagor had been the rightful manager of the muth until 1876 when he was outcasted, and consequently forfeited his office. The present defendant was appointed in 1877 to succeed him in the office of manager, but the mortgagor remained nevertheless in possession, and a suit by the present defendant to eject him was pending at the date of the mortgage. The plaintiff now sought to enforce his rights under the mortgage against the defendant and the property of which the defendant had been placed in possession as the result of the suit above referred to. *Per Curium.*—The mortgagor was not disentitled to incur expenses so as to bind the rightful manager by the mere fact that the former was not *de jure* manager at the time the expenses were incurred, provided they were incurred for the preservation of the trust property or other justifiable purposes. On its appearing that the debt was incurred for the conduct of ceremonies in which the mortgagor, after his excommunication, was disqualified from taking part, and that all the circumstances of the case were known to the mortgagee: *Held*, that the plaintiff was not entitled to recover the amount of the mortgage-debt. KASIM SAIBA *v.* SUDHINDRA THIRTHA SWAMI . . . . **I. L. R. 18 Mad. 359**

35. ——— *Hereditary managers—Void alienation—Adverse possession.* The hereditary managers of the property with which a religious foundation was endowed, had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor. *Held*, that, there not being any custom of the foundation allowing such an assignment, it was beyond their legal competence, conveying no title. *Vurmah Valia* v. *Ravi Vurmah Mutha, L. R. 4 I. A. 76: I. L. R. 1 Mad. 235*, referred to and followed. The possession delivered to the purchaser was adverse to the vendors. After the twelve years' period of limitation, which expired in the lifetime of the vendor, whose son now sued to recover the hereditary managership and possession of the lands of the endowment, the suit was barred under Limitation Act XV of 1877. *Held*, that there was no distinction between the claim to the office and the claim for the property in regard to the application of art. 124 of sch. II of the Act and of s. 28. If there were, art. 144 would apply to the claim for the property. In order to fix the starting point for limitation at a date later than that of the transfer, it was contended that the office and title were held in successive life-estates. If that con-

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tention had been right, the period of limitation would have commenced at the death of the plaintiff's father. The judicial committee were of opinion that it must be assumed that the origin of the endowment was by gift from the founder, and that, in accordance with the ruling in *Juttendro mohun Tagore* v. *Ganendromohun Tagore, L. R. I. A. Sup. Vol. 47 : 9 B. L. R. 377*, heritable estates could not be created to take effect as successive life-estates, and inconsistently with the general law. This applied to both the office and the property. *Held*, that the law of inheritance did not permit the creation of successive life-estates in this endowment; the above ruling being also contrary to the judgment in *Trimbak Bawa* v. *Narayan Bawa, I. L. R. 7 Bom. 188*; and that the plaintiff could not claim to have been entitled otherwise than as heir to, and from, and through his father in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant. GNANASAMBANDA PANDARA SANNADHI *v.* VELU PANDARAM . **I. L. R. 23 Mad. 271**
L. R. 27 I. A. 69
4 C. W. N. 329

Reversing on appeal. VELU PANDARAM *v.* GNANASAMBANDA PANDARA SANNADHI
I. L. R. 19 Mad. 243

36. ——— Charge on offerings—*Right of the priest to charao (offerings to an idol)—Power of priest to bind successors by ekrar making charge on offerings for maintenance.* In a suit upon an ekrar executed by the priest of an idol for recovery of arrears of maintenance and for a declaration that the money due was realizable from the surplus of the charao (offerings to the idol) and recoverable from the defendant's successors in office: *Held*, upon a review of the Hindu law on endowments, that where an idol is an ancient one permanently established for public worship, and the offerings made to it are more or less of a permanent character, being coins and other metallic articles in the absence of any custom or express declaration by the donor to the contrary, the offerings are to be taken to be intended to contribute to the maintenance of the shrine with all its rites, ceremonies, and charities, and not to become the personal property of the priest. *Monohar Ganesh Tambekar* v. *Lakhmiram Govindram, I. L. R. 12 Bom. 247*, approved. *Held*, also, that the ekrar on which the claim was based could not be said to have been entered into for the benefit of the endowment, and whether the office of the priest was elective or hereditary, no holder of it could bind his successor by any act, unless it was for the benefit of the endowment. GIRIJANUND DATTA JHA *v.* SAILAJANUND DATTA JHA
I. L. R. 23 Calc. 645

37. ——— Grant to head of muth—*Religious endowments—Gosami muth—Grant by the head of the muth to his brother for his maintenance—Suit by a successor to recover the land—Yadasts from revenue officials—Evidence—Limitation Act (XV of 1877), s. 10.* In 1544 a village was granted to the head of a Gosami muth to be enjoyed from generation to generation, and the deed of grant provided that the grantee was "to improve the muth, maintain the charity and be happy." The office of head of the muth was hereditary in the grantee's family. In 1886 an inam title-deed was issued to the then head of the muth, whereby the village was confirmed to him and his successors tax-free to be held without interference so long as the conditions of the grant were duly fulfilled. Yadasts addressed by tahsildars to the then head of the muth in 1872 and 1882 were put in evidence to show what the object of the grant was. It was found, regard being had to usage, that the trusts of the institution were the upkeep of the muth, the feeding of pilgrims, the performance of worship, the maintenance of a watershed and the support of the descendants of the grantee. From before 1840 it had been usual for the head of the muth for the time being to make grants to his brothers or younger sons for their maintenance. In 1842 the father of the present plaintiff, being then the head of the muth granted certain lands in the village above referred to to his younger brother, the deed of grant being in terms absolute. The grantee died about thirty years before the suit and the lands in question came into the possession of his widow (defendant No. 1) and a mortgagee from her (defendant No. 2), respectively. In 1863 the plaintiff's father placed certain other lands in possession of defendant No. 3 who paid rent therefor and received pottahs for some years from the plaintiff. In a suit by the plaintiff for possession of the lands in the possession of the defendants it was pleaded, *inter alia*, that the grant of 1843 was binding on him, and that defendant No. 3 had a right of permanent occupancy. *Held*, (i) that the suit was not barred by limitation; (ii) that the yadasts above referred to were admissible as indicating the general consciousness as to the nature of the grant of the village; (iii) that the grant was an endowment in trust for the muth, and the charities connected therewith, and not merely a grant of property to the original grantee, on which certain trusts were engrafted so as to impose on him an obligation to apply a portion of the income of the village to those trusts; (iv) that the grant of 1843 was valid for the lifetime of defendant No. 1 (who had become by marriage part of the family of a descendant of the original grantee), but that the property comprised therein was liable to revert to the representative of the muth on her death; (v) that the plaintiff, although he had issued pottahs, was entitled to recover possession of the lands occupied by defendant No. 3 and not to receive rent from him merely. SATHIANAMA BHARATI *v.* SARAVANABAJI AMMAL . . . **I. L. R. 18 Mad. 266**

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38. ———— Suit to set aside execution sale—*Power of alienation—Shebait—Right of suit—Civil Procedure Code (Act XIV of 1882), s. 244—Necessity, absolute and legal—"Bhog."* Plaintiff, who was the *shebait* of an idol, borrowed in his personal capacity a certain sum of money from defendant. It was recited in the bond, and found by the Courts below, that the money was required to pay a personal debt, and for supplying the idol with *bhog.* Defendant, having obtained a money-decree, sold in execution thereof the *debutter* property. Plaintiff, in his capacity of *shebait*, brought the present suit to set aside the sale. *Held*, by MACLEAN, *C.J.* (agreeing with RAMPINI, *J.*), that the trust property could not be sold in execution in the previous suit, as the decree was against the present plaintiff personally. *Held*, also, that s. 244 of the Civil Procedure Code was no bar to the present suit, inasmuch as it was brought by the *shebait* to set aside a sale of trust property in execution of a money-decree passed against him in his private capacity. *Punchanun Bundopadya* v. *Rabia Bibi, I. L. R. 17 Calc. 711*, referred to. RAM KRISHNA MAHAPATRA *v.* MOHUNT PADMA CHARAN DEB GOSWAMI (1902) . . **6 C. W. N. 663**

39. ———— Alienation by manager—*Endowed property—Powers of alienation possessed by manager of endowed property. Held*, that, with the exception of cases which come under the operation of Bombay Act II of 1863, there is no absolute prohibition against the alienation of endowed property by the manager for the time being; but, for the necessary purposes of preserving or maintaining the endowment, alienation of the endowed property by the manager is lawful. *Hanooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree, 6 Moo. I. A. 393; Maharanee Shibessource Debia* v. *Mothooranath Acharjo, 13 Moo. I. A. 270; Tayub-un-nissa Bibi* v. *Sham Kishore Roy, 7 B. L R. 621; Prosunno Kumari Debya* v. *Golab Chand Baboo, L. R. 2 I. A. 145; Konwar Doorganath Roy* v. *Ram Chunder Sen, L. R. 4 I. A. 52; Sammanatha Pandara* v. *Seelappa Chetti, I. L. R. 2 Mad. 175; Narayan* v. *Chintaman, I. L. R. 5 Bom. 393; Shankar Bharati Svami* v. *Venkapa Naik, I. L. R. 9 Bom. 422;* and *Sheo Shankar Gir* v. *Ram Shewak Chowdhri, I. L. R. 24 Calc. 77*, referred to. PARSOTAM GIR *v.* DAT GIR (1903) **I. L. R. 25 All. 296**

40. ———— Alienation by shebait—*Debutter property—Succession in management—Joint Hindu family—Mitakshara—Right of suit.* In a family governed by the Mitakshara law a person on his birth becomes entitled jointly as *sebait* of *debutter* property held by the family. *Ukoor Doss* v. *Chunder Sekhur Doss, 3 W. R. Civil Rule 152*, approved, and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 271; L. R. 27 I. A. 69*, referred to. Wherein a family governed by the Mitakshara law the father and the uncle of the plaintiff had alienated ancestral *de butter* property for their own benefit: *Held*, that the plaintiff was entitled to maintain a suit to have it declared that the alienation was bad and ought to be set aside and possession of the property given to him. RAM CHANDRA PANDA *v.* RAM KRISHNA MAHAPATRA (1905) . . **I. L. R. 33 Calc. 507**

HINDU LAW—ENDOWMENT—*concld.*

8. ALIENATION OF ENDOWED PROPERTY —*concld.*

9. SHEBAITSHIP.

1. ———— Alienation of shebaitship by will—*Hereditary shebaitship—Shebaitship validity of disposal by Will—Usage—Family custom. Held*, by MACLEAN, *C.J.*, and MITRA, *J.*—In the absence of any local usage or family custom and where no case of necessity or clear benefit to the idol has been made out, a *shebait* of a private *debutter* is not entitled to dispose of his office of hereditary shebaitship by his will. *Mancharam* v. *Pransankar, I. L. R. 6 Bom. 298*, dissented from. *Held*, by WOODROFFE, *J.*—That the question of usage did not affect the matter and that the office of *shebaitship* could not be alienated by will. RAJESHWAR MULLICK *v.* GOPESWAR MULLICK (1907) . . . **I. L. R. 35 Calc. 226**
12 C. W. N. 323

2. ———— Alienation of shebaitship, inter vivos. An alienation (*inter vivos*) of the office of *Shebait*, by an *arpannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law. *Mancharam* v. *Pransankar, I. L. R. 6 Bom. 298*, followed. *Rajeshwar Mullick* v. *Gopeshwar Mullick, I. L. R. 35 Calc. 226*, distinguished. *Khetter Chunder Ghose* v. *Hari Das Bundopadhya, I. L. R. 17 Calc. 557*, and *Rajaram* v. *Ganesh, I. L. R. 23 Bom. 131*, referred to. NIRAD MOHINI DASSI *v.* SHIBADAS PAL DEWASIN (1909) . **I. L. R. 36 Calc. 975**

HINDU LAW—EXECUTOR.

———— Executor de son tort—*Hindus.* The principles of English Law relating to an executor *de son tort* are equally applicable to Hindus. *Jogendra Narain* v. *Emily Temple, Ind. Jur. 2 N. S. 235*, followed. *Suddasook* v. *Ram Chunder, I. L. R. 17 Calc. 620-9; Prasunno* v. *Kristo, I. L. R. 4 Calc. 342; Janaki* v. *Dhanu Lal, I. L. R. 14 Mad. 454*, referred to. RADHIKA MOHON ROY *v.* BONNERJEE (1905) . . **10 C. W. N. 566**

HINDU LAW—FAMILY DWELLING-HOUSE.

See EXECUTION OF DECREE—MODE OF EXECUTION—JOINT PROPERTY.

See PARTITION—MODE OF EFFECTING PARTITION . **I. L. R. 3 Calc. 514**
I. L. R. 23 Bom. 73
I. L. R. 26 Calc. 516

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HINDU LAW—FAMILY DWELLING-HOUSE—*contd.*

——— **widow's right of residence in—**

See HINDU LAW—WIDOW.

I. L. R. 31 Mad. 500

1. ——— Right of widow to reside in family-house. *Maintenance—Obligation of sons to provide her with residence.* Although a Hindu widow is entitled to look to her sons to furnish her with a residence, she cannot insist on a right to live in any particular house. MOHUN GEER *v.* TOTA

4 N. W. 153

2. ——— *Right of son to eject widow—Doctrine of factum valet.* A Hindu died leaving a widow and an adopted son, who continued, after his death, to reside in the same dwelling-house in which they had resided with the deceased during his lifetime, and which formed a portion of his estate. The son being an infant, the widow had the management of the house, and let a portion of it to tenants at a monthly rent. Subsequently the son sold the house, as his property by inheritance, to a stranger, who gave the widow and tenants a week's notice to quit. *Held*, that the son, even if he had attained his majority, could not evict the widow, or authorize a purchaser to do so, without providing some other suitable dwelling for her; nor in any case could the tenants be turned out without a month's notice. It seems that the passage in *Katyayana, 3 Colebrook's Digest, p. 133,* is a restriction, and not a moral precept only, and that the heir of the deceased has not such a right in the dwelling of the family that he can at once, of his pleasure, turn out the females of the family, or sell it and give the purchaser a right to turn them out. MANGALA DEBI *v.* DINANATH BOSE

4 B. L. R. O. C. 72 : 12 W. R. P. C. 35

3. ——— *Co-parcener's widow—Right of co-parcener's widow to live in the dwelling-house—Disagreement between widows, no ground for the eviction of either.* Under the general rule of Hindu law prevailing in the Bombay Presidency, a co-parcener's widow is, in the absence of any special circumstances, entitled to reside in the family dwelling-house. The plaintiff sued to recover possession of a portion of the family dwelling-house in the actual possession and enjoyment of the defendant, who was the childless widow of his undivided brother. The plaintiff had offered her a residence in another house on condition of her vacating the part of the house in dispute. Pending the suit, the plaintiff died and was subsequently represented by his widow. Both the lower Courts awarded the plaintiff's claim on the ground of disputes between the two widows and also on the ground of the inconvenience and unhealthiness of the part of the house in the defendant's possession. The plaintiff had not suggested these points in his plaint, nor had the defendant complained of the unhealthiness of the premises. On appeal by the defendant to the High Court :—*Held*, reversing the decrees of the lower Courts, that the defendant had a right as a co-parcener's widow to live in the family house, and that there were no special circumstances exempting the case from the general rule of Hindu law—the mere fact of disputes existing between the defendant and the plaintiff's widow not justifying the eviction of the defendant. BAI DEVKORE *v.* SANMUKHRAM

I. L. R. 13 Bom. 101

4. ——— *Right of a widow to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.* A house, being ancestral property of a Hindu family, was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the co-parceners for the time being, but since the death of such co-parcener's father :—*Held*, that the widow of the latter, who resided in the said house during her husband's lifetime, was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death. *Venkatammal* v. *Andyappa, I. L. R. 6 Mad. 130,* distinguished. RAMANADAN *v.* RANGAMMAL . . **I. L. R. 12 Mad. 260**

5. ——— *Widow's right of residence in her husband's house after his death—House mortgaged by plaintiff's husband in his lifetime and sold in execution—Auction-purchaser with notice of widow's claim to reside, right of.* In execution of a decree upon a mortgage effected by the plaintiff's husband in his lifetime, the house in dispute was put up to auction, and purchased by the defendant. The defendant was aware that the plaintiff (the mortgagor's widow) was residing in the house at the time of the Court-sale. In a suit brought by the plaintiff to establish her right to reside in the house in question :—*Held*, that in the absence of any allegation that the mortgage effected by the plaintiff's husband was not for the benefit of the family, or was in any way in fraud of the plaintiff's rights, the defendant as auction-purchaser took the house free from the plaintiff's right of residence as a Hindu widow, notwithstanding the fact that the had notice of her claim. MANILAL *v.* BAI TARA . . **I. L. R. 17 Bom. 398**

6. ——— *Right of auction-purchaser to eject widow.* A Hindu widow, who resides with her husband and the members of his family in the family dwelling-house while he is alive, is entitled to reside therein after his death, and cannot be ousted by the auction-purchaser of the rights and interests in the house of her husband's nephew. GAURI *v.* CHANDRAMANI . **I. L. R. 1 All. 262**

7. ——— *Ancestral property—Mortgage—Sale in execution of decree.* *L*, a Hindu, mortgaged the dwelling-house of his family, such dwelling-house being ancestral property. *Held*, in a suit against *L's* mother and wife

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HINDU LAW—FAMILY DWELLING-HOUSE—*concld.*

to enforce the mortgage brought after *L's* decease, that the mortgage could be enforced. *Mangala Debi* v. *Dinanath Bose, 4 B. L. R. O. C. 72,* and *Gauri* v. *Chandramani, I. L. R. 1 All. 262,* distinguished. BHIKHAM DAS *v.* PURA **I. L. R. 2 All. 141**

8. ——— *Auction-purchaser, right of.* The widow of a member of a joint Hindu family can claim a right of residence in the family dwelling-house, and can assert such right against the purchaser of such house at a sale in execution of a decree against another member of such family. *Gouri* v. *Chandramani, I. L. R. 1 All. 262,* and *Mangala Debi* v. *Dinanath Bose, 4 B. L. R. O. C. 72,* followed. TALEMAND SINGH *v.* RUKMINA **I. L. R. 3 All. 353**

9. ——— On the 29th June 1876, the plaintiff obtained a money-decree by consent against *R*, the father-in-law of the defendant. On the 24th of July 1876, the plaintiff attached a house of *R*. On the 12th October 1876, the defendant sued *R* for maintenance, and alleged that the house in question was the property of her deceased husband and *R*, and she claimed the right to continue to live in it. On the 10th of November 1876, and during the pendency of the defendant's suit against *R*, the house was sold under the plaintiff's decree against *R*, and the plaintiff himself became the purchaser. On the 20th of June 1877, the defendant obtained a decree against *R* in terms of the prayer of her plaint. On the 27th of August 1879, the plaintiff brought the present suit to eject the defendant from the house: *Held*, that what the plaintiff bought from *R* was his right, title, and interest in the house, which being subject to the decree in the defendant's pending suit, the plaintiff's purchase was likewise subject to the same, and the circumstance that the plaintiff had placed a prior attachment on the house made no difference. The plaintiff therefore could not eject the defendant during her lifetime. PARVATI *v.* KISANSING **I. L. R. 6 Bom. 567**

10. ——— *Purchaser from the heir with knowledge—Widow's right of residence a charge on the property.* Where a purchaser purchases a house, the property of a Hindu family, from the heir, with full knowledge that the widow is residing and being maintained in it, such purchaser cannot ask for the summary eviction of the widow from the house, even though there may be other property in the hands of the heir out of which her maintenance could be derived, but the purchaser takes the house subject to the right of the widow to continue to reside therein. *Lakshman Ramchandra Joshi* v. *Satyabhamabai, I. L. R. 2 Bom. 494,* distinguished. DALSUKHRAM MAHASUKHRAM *v.* LALLUBHAI MOTICHAND . **I. L. R. 7 Bom. 282**

HINDU LAW—GIFT.

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1. REQUISITES FOR GIFT . . .	4880
2. GIFTS MORTIS CAUSA . . .	4885

HINDU LAW—GIFT—*contd.*

	Col.
3. POWER TO MAKE AND ACCEPT GIFTS .	4886
4. CONSTRUCTION OF GIFTS . .	4892
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See HINDU LAW—

JOINT FAMILY—NATURE OF, AND INTEREST IN, PROPERTY; **6 C. W. N. 651**

MAINTENANCE—RIGHT TO MAINTENANCE—CONCUBINE; **I. L. R. 26 Bom. 163**

WILL—CONSTRUCTION OF WILLS.

See HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS—MANAGER . **I. L. R. 18 Bom. 177** **I. L. R. 19 Bom. 803**

See HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS—OTHER MEMBERS . . **I. L. R. 1 All. 429**

See HINDU LAW—WILL—POWER OF DISPOSITION—DISHERISON. **I. L. R. 1 Bom. 561** **I. L. R. 5 Bom. 48**

See MALABAR LAW—GIFT.

——— **construction of gifts; additions to ornaments, made subsequent to marriage—**

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES **I. L. R. 28 Calc. 311**

1. REQUISITES FOR GIFT.

1. ——— **Gift of freehold to heirs—** *Words of inheritance.* By Hindu law no words of inheritance are necessary to pass a freehold interest in land to the heirs. ANUNDOMONEY DOSSEE *v.* DOE D. EAST INDIA COMPANY **4 W. R. P. C. 51 : 8 Moo. I. A. 43**

2. ——— **Gift to wife**—*Words of inheritance—Husband and wife—Immoveable property.* It is not necessary in Hindu law, in order that a wife should take an absolute estate in immoveable property under a deed of gift from her husband, that the gift should be made with such words of limitation as are ordinarily use to convey an estate of inheritance. The intention of the husband may be expressed in other ways, and is a matter of construction merely. *Koonj Behary Dhur* v. *Prem Chand Dutt, I. L. R. 5 Calc. 684 : 5 C. L. R. 561,* distinguished. RAM NARAIN SINGH *v.* PEARY BHUGUT **I. L. R. 9 Calc. 830 : 13 C. L. R. 109**

3. ——— **Verbal grant of land with possession.** A verbal grant of land followed by possession is valid under the Hindu law. ANONYMOUS . . . **1 Ind. Jur. O. S. 135**

4. ——— **Possession, necessity of**—*Seisin, absence of.* The absence of seisin is no objec-

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HINDU LAW—GIFT—*contd.*

1. REQUISITES FOR GIFT—*contd.*

tion to the validity of a gift by a Hindu. Where a cadet member of the Doomraon family gave, for the support of his illegimate sons, certain properties which he purchased out of the savings and profits of his appanage, even admitting that he was in possession of such properties during his lifetime, his possession would be that of a trustee for his illegitimate sons. MOHESHUR BUKSH SINGH *v.* GUNOON KOONWAR . . . . . **6 W. R. 245**

5. ——— - **Gift of land.** A gift of land is not complete, by Hindu law, without possession or receipt of rent by the donee. HARJIVAN ANANDRAM *v.* NARAN HARIBHAI . **4 Bom. A. C. 31**

6. ——— *Gift of land—Receipt of rent.* To make a gift of land complete under the Hindu law, there must be either possession or receipt of rent by the donee. The receipt of rent may be by an agent, and if the transaction is *bonâ fide*, it is immaterial that such agent has before the gift received the rent for the donor. BANK OF HINDUSTAN, CHINA, AND JAPAN v. PREMCHAND RAICHAND. AMEDBHAI HUBIBHAI *v.* PREMCHAND RAICHAND . . . . . **5 Bom. O. C. 83**

7. ——— *Possession retained by donor—Transfer of possession—Symbolical transfer.* A gift by a Hindu unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title or permitting the donee to receive rents, is not in itself a valid transaction even though the deed of gift be registered. DAGAI DABEE *v.* MOTHURA NATH CHATTOPADHYA **I. L. R. 9 Calc. 854 : 12 C. L. R. 530**

8. ——— *Gift of land—Registration, effect of.* The plaintiff sued for possession of certain lands alleging that they had been given to him under a deed of gift registered. It was found that no possession was given to him under the deed. It was contended for him that his title was complete without possession, as the deed had been registered, and that the object of the rule as to possession was to give publicity to the transaction. *Held*, that the plaintiff was only entitled to the land of which he had been put into possession. According to Hindu law, in order to give complete validity to a gift of land as between donor and donee, the donee must be put into possession. Registration gives the donee neither actual, constructive, nor symbolical possession, and therefore cannot be regarded as equivalent to delivery and acceptance. VASUDEV BHAT *v.* NARAYAN DAJI DAMLE **I. L. R. 7 Bom. 131**

9. ——— *Want of change of possession—Trust.* An instrument was executed by the defendant, a Hindu, to his wife, stipulating that the defendant and his wife should continue to enjoy certain immoveable property jointly, with a right of survivorship; and containing a promise by the defendant to surrender the property to his wife if he married again. *Held*, that the instrument did not operate by way of gift, there being no change in the possession of the property nor as a declaration of trust, and that it did not create a binding obligation which the law would enforce. *Quære:* Whether the Hindu law admits of the applicability of the principle on which Courts of Equity in England hold voluntary declarations of trust to be binding against the declarant. VENKATACHELLA MANIYAKARER *v.* THATHAMMAL **4 Mad. 460**

10. ——— *Gift not followed by actual possession.* A Hindu merchant made an absolute and immediate gift of all his property to the widow of his daughter's grandson who live with him, and in regard to whom he stood *in loco parentis.* It did not appear that the gift had been followed by possession, and the donor continued to carry on the business in his own name, until his death, which happened some two years afterwards. *Held*, that the gift was valid. *Anunchand Rai* v. *Kishen Mohun Bunoja, 1 Sel. Rep. p. 152*, cited and followed. TARA BEBEE *v.* GHASIRAM **3 C. L. R. 247**

11. ——— *Gift giving right to obtain possession. Held*, that, consistently with the authorities in the Hindu law, a gift, where the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession; and that where a donee, or vendee, is, under the terms of the gift, or sale, entitled to possession, there is no reason why such gift or sale, though not accompanied by possession, whether of moveable or immoveable property (where the gift or sale is not of such a nature as would make the giving effect to it to be contrary to public policy), should not operate to give the donee, or vendee, a right to obtain possession. KALIDAS MULLICK *v.* KANHAYA LAL PUNDIT **I. L. R. 11 Calc. 121 : L. R. 11 I. A. 218**

12. ——— *Construction of deed of gift—Gift with possession.* *S*, on 23rd September 1874, executed an instrument of gift in favour of his two daughters and his adopted son, whereby he gave them "his houses and shops and other moveable and immoveable property and his loan transactions" in equal one-third shares. At this time he was possessed of a one-third share in a certain partnership business. After the death of *S*, *M*, one of the daughters, sued *N*, the adopted son, for one-third of her father's property including his share in the partnership business. *Held*, that, inasmuch as the donor had relinquished the subject of the gift, so far as he could, and had vested it in the donees, possession under the gift had passed to *M*. *Held*, also, on the construction of such instrument, that it did not give *M* a share in her father's partnership business. MANBHARI *v.* NAUNIDH **I. L. R. 4 All. 40**

13. ——— *Delivery of deed of gift of immoveable property sufficient to pass title.*

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HINDU LAW—GIFT—*contd.*

1. REQUISITES FOR GIFT—*contd.*

The delivery to the donee of immoveable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession of such property being taken by the donee. *Manbhari* v. *Naunidh, I. L. R. 4 All. 40,* followed. BALMAKUND *v.* BHAGWAN DAS **I. L. R. 16 All. 185**

14. ——— *Attestation of deed, effect of.* In 1873, *R*, a Hindu, executed a deed of gift of his immoveable property to his daughter *M* (defendant No. 1). The deed was attested by the plaintiff. In 1878 *R* mortgaged to the plaintiff some of the land comprised in the deed of gift. *R* died in that year, and in 1882 his grandson conxeyed the equity of redemption to the plaintiff, who was already in possession of the mortgaged land as mortgagee. In the year 1888, the plaintiff being dispossessed by *M* and the second defendant, to whom she had sold the land, he brought the present suit to recover possession. The defendants relied upon the gift. *Held*, that the plaintiff was entitled to possession. At the time of the mortgage to him in 1878 *R* had not completed his gift to *M* by giving possession. He was therefore in a position to give the plaintiff a good title. It had not been shown that *M* had ever been treated as the owner of the equity of redemption. *Held*, also, that the circumstance that the plaintiff attested the deed of gift in 1873 could not affect his title, as the gift had not been completed by delivery of possession. ABAJI GANGADHAR *v.* MUKTA . **I. L. R. 18 Bom. 688**

15. ——— *Declaration by donor to one in physical possession.* Where one of several joint donees is already in physical occupation of the subject-matter of an intended gift, a declaration by the donor to the donee so in occupation, assented to by such donee, that he has parted with the possession in favour of the donees, converts mere occupation into possession, and amounts to a valid gift under the Hindu law. BAI KUSHAL *v.* LAKHMA MANA . . **I. L. R. 7 Bom. 452**

16. ——— *Delivery of possession—Transfer of Property Act, s. 123—Immoveable and moveable property.* Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property, that law has been abrogated by s. 123 of the Transfer of Property Act. The first paragraph of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Semble :* The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer. DHARMODAS DAS *v* NISTARINI DASI . . **I. L. R. 14 Calc. 446**

17. ——— *Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor.* One *G* being possessed of certain lands which were his self-acquired property, died in 1878. On his deathbed he told his son, *P* (the plaintiff's father), to give these lands to his (*G's*) daughter, the defendant. In the following year (1879) *P* by a registered deed of gift gave the lands to the defendant. The deed contained the following recital :—"Our valid (father) *G* has made a gift to you of his self-acquired lands, Nos. 101 and 102, of mouzah Vadgaon for your own and your children's maintenance, and has directed me (*P*) to execute an instrument according to law. I (*P*) hereby execute a deed of gift to you." Shortly after the execution of this document, the defendant was put into possession of the lands, and she admittedly continued in possession down to the commencement of this suit in 1888. The plaintiffs, who were the minor children of *P*, now sought to recover these lands from the defendant, alleging that on the death of their grandfather *G* the lands had devolved by inheritance upon his son *P* (their father), and contending that the latter had no power to make a gift of these to the defendant. The lower Court found that the question of *P's* competency to give the lands did not arise, as they had already been given to the defendant by his father *G*, and that *P* was simply an instrument in carrying out the wishes of his father and in executing the deed of gift to the defendant. On appeal, the District Judge considered that the point for determination was whether the gift by *G* to the defendant was valid by Hindu law, not having been accompanied by possession. He held the gift to be valid. On special appeal to the High Court :—*Held*, dismissing the appeal, that whether the gift by *G* to the defendant was to be regarded as a gift, possession being afterwards given to the defendant, or whether *G* was to be regarded as having constituted himself a trustee and having made *P* a trustee to carry out his wishes, the defendant was in lawful possession of the lands, and that the plaintiffs had neither by Hindu law nor otherwise any legal or equitable claim to have the deed of gift to the defendant cancelled. BHASKAR PURSHOTAM *v.* SARASVATIBAI . . **I. L. R. 17 Bom. 486**

18. ——— *Gift without delivery of possession—Transfer of Property Act (IV of 1882), ss. 123, 129—Immoveable property—Acceptance of gift—Registration.* *P* executed a deed of gift of certain property in favour of the plaintiff in 1877 before the Transfer of Property Act was passed, and the deed was duly registered. In 1881 *P* sold certain portions of the same property to the defendants, and gave possession to them of such portions. *P* died six years after the execution of the deed of gift, and after his death some of the title deeds of the property covered by the deed of gift came into possession of the plaintiff. Both the lower Courts found that there had been no delivery of possession given by the donor nor acceptance by the donee. In a suit brought five years after the death of *P* for possession of the property, the subject of the alleged gift :—*Held*, that mere registration was not sufficient to make the gift complete accord-

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HINDU LAW—GIFT—*contd.*

1. REQUISITES FOR GIFT—*concld.*

ing to the Hindu law, under which some possession or acceptance by the donee was necessary; there being neither possession nor acceptance, the suit should be dismissed. *Dagai Dabee* v. *Mothuranath Chattopadhya*; *I. L. R. 9 Calc. 854*; *Kishto Soondery Debea* v. *Kishtomotee, Marsh. 367*; and *Harjivan Anandram* v. *Naran Haribhai, 4 Bom. H. C. 31*, referred to. *Dharmodas Das* v. *Nistarini Dasi, I. L. R. 14 Calc. 446*, approved. LAKSHIMONI DASI *v.* NITTYANANDA DAY . **I. L. R. 20 Calc. 464**

19. ——— *Gift of immoveable property without possession—Mutation of names without objection of donor.* A gift of immoveable property, followed shortly afterwards (pursuant to the terms of the gift) by mutation of names without any objection being made by the donor, was not invalid by Hindu law for the mere reason that the donor did not deliver actual possession. *Kalidas Mullick* v. *Kanhaya Lal Pundit, I. L. R. 11 Calc. 121*, and *Dharmadas Das* v. *Nistarini Dasi, I. L. R. 14 Calc. 446*, referred to. RAM CHANDRA MUKERJEE *v.* RUNJIT SINGH . **I. L. R. 27 Calc. 242**
4 C. W. N. 405

20. ——— *Transfer of Property Act (IV of 1882), s. 123—Gift—Transfer of possession not necessary when gift of immoveable property registered—Evidence Act (I of 1872), s. 111—Gift to an agent—Undue influence—Mental capacity of donor. Held*, that, assuming that delivery of possession was essential under the Hindu law to compete a gift of immoveable property, that law has been abrogated by s. 123 of the Transfer of Property Act, in cases where the instrument of gift has to be registered. *Dharmodas Das.* v. *Nistarini Dasi, I. L. R. 14 Calc. 446*, followed. *Held*, also, that there is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that a gift was made in his favour, by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. PHUL CHAND *v.* LAKKHU (1903)
I. L. R. 25 All. 358

21. ——— **Gift of moveable property—** *Delivery of possession—Registration of deed of gift—Transfer of Property Act (IV of 1882), ss. 123, 129—Registration.* The rule of Hindu law, that delivery of possession is essential to complete a gift, is abrogated by s. 123 of the Transfer of Property Act (IV of 1882). *Dharmodas Das* v. *Nistarini Dasi, I. L. R. 14 Calc. 446*, followed. BAI RAMBAI *v.* BAI MANI . . **I. L. R. 23 Bom. 234**

2. GIFTS MORTIS CAUSA.

1. ——— **Donatio mortis causa**—*Gift inter vivos.* A Hindu on his death-bed, a few days before he died, caused certain Government paper to be given to his son in his presence in these words: "Bring out the papers and give them to my son," but he did not make or direct endorsement thereof.

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Subsequently, being asked to endorse them, he said, "I am very weak; how can I sign so many papers? When I get a little strength, I will sign them. What cause have you for being anxious?" *Held*, by PHEAR, *J.*, that it was a good *donatio mortis causa.* A *donatio mortis causa* has not the same signification here as in England. *Held*, on appeal by PEACOCK, *C.J.*—The gift was not governed by the strict principles of English law, but by the Hindu law. By English law there was a valid *donatio mortis causa*; assuming it to be a gift *inter vivos*, it was a valid gift by Hindu law, and the principal and interest secured by the Government papers, and not the mere paper passed to the donee. By MACPERSON, *J.* The circumstances amounted to a gift by a nuncupative will made in contemplation of death. UPENDRA KRISHNA DEB *v.* NABIN KRISHNA BOSE . . **3 B. L. R. O. C. 113**

S.C. KRISHNA DEB *v.* WOOPENDRA KRISHNA DEB . . . . **12 W. R. O. C. 4**

2. ——— *Giving with intention to pass property.* The Hindu law makes no distinction in favour of gifts in contemplation of death, as respects the legal requisites to constitute a perfect disposition by gift. Those requisites are a giving, either orally or by writing with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's lifetime. When all these requisites have been fulfilled, there is nothing in Hindu law to prevent, effect being given to a gift in contemplation of death. The theory of the *donatio mortis causa* considered. VISALATCHMI AMMAL *v.* SUBBU PILLAI
6 Mad. 270

3. ——— **Deed of gift made on death-bed**—*Proof of such deed.* In establishing the validity of a deed of gift taken from a woman stricken with a mortal disease and in expectation of death, proof at least of equal strictness, as is required to prove a testamentary disposition, must be given, and the proof to support such a transaction ought to be sufficient to establish that she knew what she was about, and intended to make such disposition of her property. THAKOOR DAYHEE *v.* RAI BALACK RAM
10 W. R. P. C. 3
11 Moo. I. A. 139

3. POWER TO MAKE AND ACCEPT GIFTS.

1. ——— **Self-acquired immoveable property**—*Benares law—Gift to one child to exclusion of others.* Under the the Benares law, a man's immoveable property, though self-acquired, is not within his power of disposal so absolutely by gift in his lifetime as to enable him to give it all to one son or grandson to the exclusion of the rest. MAHASOOKH *v.* BUDREE **1 N. W. Ed. 1873, 153**

2. ——— **Gift of portion of zamindari after marriage to daughter.** A deed of gift of land forming part of a zamindari, executed by the

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HINDU LAW—GIFT—*contd.*

3. POWER TO MAKE AND ACCEPT GIFTS—*—contd.*

zamindar in favour of his daughter five years subsequent to her marriage, is not valid. SIVANARANJA PERUMAL SETHURAYAR *v.* MUTTU RAMALINGA SETHURAYAR. ATTULAKSHMI AMMAL *v.* SIVANARANJA PERUMAL SETHURAYAR . **3 Mad. 75**

3. ——— Gift of separate property to Hindu widow—*Interest of Hindu widow—Power of alienation—Gift to agent as reward—Want of consideration.* *C*, a Hindu, subject to the Mitakshara law, died leaving a widow *R*, but no issue. In his lifetime he had transferred to *R* by gift mouzah R, a portion of his real estate. After his death *J* and *P*, his brothers, sued *R* for possession of mouzah R as being ancestral property. Their suit was dismissed, the Sudder Court finding it to be separate property. That Court found that *R* had acquired mouzah R from *C* by gift, and that *R* only took under this gift a life-interest in it. *J* and *P* having died, *R* made a gift of mouzah R to her agent a reward for his faithful services. In a suit by *N*, son of *J*, as the heir of his uncle *C*, to set aside this gift to the agent as illegal. *Held*, on the finding, that *R* had acquired the property from her husband by gift, that she did not take an absolute interest in the property under the gift, and her husband's heirs could question the validity of the gift to the agent. *Held*, also, that the gift to the agents, being made only out of motives of generosity, was invalid. RUDR NARAIN SINGH *v.* RUP KUAR **I. L. R. 1 All. 734**

4. ——— Gift by married woman to kinsman—*Gift of immoveable property by woman without consent of her husband.* Plaintiff sued to enforce a gift to him of immoveable property by a woman leaving under his guardianship as against her husband. *Held*, that such taking of the woman's property by her kinsman is wholly repugnant to Hindu law. *Quære:* Can a woman, without the consent of her husband, during coverture, absolutely alienate her own landed property? DANTULURI RAYAPPARAZ *v.* MALAPUDI RAYUDU **2 Mad. 360**

5. ——— Gift among Parsis—*Gift to married woman.* Among Parsis a gift may be made to the separate use of a married woman or of a woman about to be married. MERBAI *v.* PEROZBAI **I. L. R. 5 Bom. 268**

6 ——— Leper, gift by. By Hindu law a person becoming a leper is not incapable of making a gift of property to which he had previously succeeded. SAMACHURN AUDICAREE BYRAGEE *v.* ROOP DASS BYRAGEE . . . **6 W. R. 68**

7. ——— Gift to one son to exclusion of others—*Mitakshara law—Self-acquired immoveable property.* A Hindu son, subject to the Mitakshara law of inheritance, sued to obtain a declaratory decree for a moiety of a house which the father had conveyed by deed of gift to plaintiff's brother, being the self-acquired immoveable property of his father, on the ground that under the Hindu law a father is not permitted to make a gift of immoveable property to one son to the injury of the other. *Held* (reviewing all the authorities and precedents on the subject), that, although prohibition of such a gift, on moral or spiritual grounds, may be implied by the texts of Hindu law, yet, where it is not declared that there is absolutely no power to do such acts, those acts, if done, are not necessarily void, and that therefore an exclusive gift to one son by the father of self-acquired immoveable property is not illegal. SITAL *v.* MADHO . . . . **I. L. R. 1 All. 394**

8. ——— Gift by co-sharers without consent of others. *Held*, that on the Bombay side of India a member of an undivided Hindu family cannot, without the consent of his co-parceners, make a gift of his share in the undivided property or dispose of it by will. GANGUBAI KOM SIDHAPPA *v.* RAMANNA BIN BHIMANNA **3 Bom. A. C. 66**

VRANDAVANDAS RAMDAS *v.* YAMUNABAI **12 Bom. 229**

9. ——— Gift of undivided share by a co-parcener—*Voluntary alienation—Alienation to strangers and relatives.* The rule of Hindu law which forbids voluntary alienations of the family estate by a Hindu co-parcener applies as well to gifts to relatives as to gifts to strangers. PONNUSAMI *v.* THATHA . . **I. L. R. 9 Mad. 273**

10. ——— Gift to concubine—*Validity of gift.* *G*, a member of an undivided Hindu family, died leaving him surviving two nephews, *V A* and *V R* and *Y*, a concubine of *G*. *V A* lived with *G* at the time of his death, and had the whole of *G's* property, moveable and immoveable, left in his (*V A's*) possession. *V A*, before his death, made a gift of the said property to *Y* in consideration of her having been *G's* concubine for many years. In a suit brought by *V R* to recover the whole property from *Y*, she claimed it by virtue of the gift to her by *V A*. *Held*, that the gift was invalid as against *V R*, who was entitled to the whole property, subject to the maintenance of *Y* as a concubine of *G* for many years; the High Court also directed the said maintenance to be secured for her (*Y*) by investment of a sufficient part of the property in trust for that purpose. VRANDAVANDAS RAMDAS *v.* YAMUNABAI . . . **12 Bom. 229**

11. ——— Gift to idiot—*Validity of gift.* There is no prohibition in the Hindu law against a gift to an idiot. Although an idiot child cannot take by right of inheritance, a gift by a parent to an idiot child to operate after the parent's death is valid. KOOLDEBNARAIN SHAHEE *v.* WOOMA COOMAREE . . **Marsh. 357 : 2 Hay 370**

12. ——— Genuine gift by father-in-law to his widowed daughter-in-law—*Gift by way of affection of a small share of moveable property acquired by the donor while living in union with*

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HINDU LAW—GIFT—*contd.*

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his sons and grandson—Gift valid—Hindu law. Where there is a genuine gift by a father-in-law to his widowed daughter-in-law by way of affection, out of a small share of moveable property most of which was acquired by the donor while living in union with his sons and grandsons, the gift cannot be impeached as being opposed to the principles of Hindu law. HANMANTAPA *v.* JIVUBAI

I. L. R. 24 Bom. 547

13. ——— Gift of ancestral property by father to stranger—*Suit by minor son to recover.* Where a Hindu made a gift of certain land, which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born seven months after the date of the gift :—*Held,* that the gift was invalid as against the plaintiff, and that he was entitled to recover the land from the donee. RAMANNA *v.* VENKATA

I. L. R. 11 Mad. 246

14. ——— Gift to widow by member of joint Hindu family—*Joint Hindu family—Maintenance—Construction—Gift presumed to be of life-estate only.* Disputes having arisen between the sole surviving members of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possession of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house that she had been put in possession of the house and was in sole proprietary possession thereof; and that he had no connection whatever with it. Subsequently the widow executed a deed of gift purporting to convey to the donee an absolute proprietary title to the house. After her death, the brother-in-law brought a suit against the donee to recover possession of the house on the ground that the deed of gift could not convey to him more than the life-interest of the widow donor. *Held,* that the deed of gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family entitled only to maintenance. *Rabutty Dossee* v. *Shibchunder Mullick, 6 Moo. I. A. 1,* and *Dinonath Mukerji* v. *Gopal Churn Mukerji, 8 C. L. R. 57,* referred to. *Held,* also, having regard to the rules of the Hindu law regarding the possession by widows of joint family property in lieu of maintenance and to the experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed of gift, had any such absolute right of ownership as would entitle her to alienate the property for any interest beyond a life-estate. *Held,* further, that there was nothing in the deeds under which the donor obtained possession of the property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property ; and that her estate therefore could at best be regarded as a life-estate, and the deed of gift as binding upon the plaintiff during her lifetime but not further. GANPAT RAO *v.* RAM CHANDRA . . . **I. L. R. 14 All. 296**

15. ——— Voluntary gift to relative in consideration of natural affection—*Alienation by undivided member of joint family.* A member of an undivided Hindu family, consisting of himself, his adopted son, and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of, the land, it appeared that the sale was not justified by any circumstances of family necessity ; and that the adoption (which was disputed) was a valid one. During the pendency of the suit the undivided uncle died having made a gift of his property to his daughter-in-law, not for value, but in consideration of natural affection. *Held,* referring to *Baba* v. *Timma, I. L. R. 7 Mad. 357,* and *Ponnusami* v. *Thatha, I. L. R. 9 Mad. 273,* that the gift by the undivided uncle to his daughter-in-law was invalid, and that the plaintiff was entitled to a moiety of the land sold to him. VIRAYYA *v.* HANUMANTA

I. L. R. 14 Mad. 459

16. ——— Gift of land on daughter's marriage—*Woman's estate—Power of alienation.* A Hindu in whom the whole of the family property had vested died without issue, and his mother took the estate. She subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with her daughter. The gift was not found to be otherwise than reasonable in extent *Held,* that the gift was binding on the reversioner RAMASAMI AYYAR *v.* VENGIDUSAMI AYYAR

I. L. R. 22 Mad. 113

17. ——— Donor not in possession—*Donee not placed in possession—Gift of an undivided share—Stranger to the gift disputing its validity—Adverse possession—Limitation—Misjoinder of parties—Plaintiff's discretion as to addition of parties—Practice—Procedure.* The plaintiff's father and uncles were members of a joint Hindu family, but in 1870 they separated and partitioned the family property, with the exception of certain land which was kept joint and was applied to the maintenance of their mother during her lifetime. It remained in the possession of the plaintiff's father, who was the eldest of the family. The mother died in 1877, but the land still remained joint and continued in the possession of the plaintiff's father. On the 15th November, 1877, the plaintiff's uncles, *M* and *J*, by a registered deed, gave to their nephew, the plaintiff, their undivided shares in this land. They were not, as already stated, in possession and they did not deliver possession of their shares to the plaintiff or to anyone on his behalf. The plaintiff's father (their co-sharer)

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was in possession, and he continued in possession after the gift was made. The plaintiff was at that time, and until 1892, a minor, and lived with his father as a member of a joint family. On the 1st January, 1887, his father mortgaged the whole of the land to the second defendant, who at once entered into possession. Subsequently the land subject to this mortgage was sold in execution of a decree against the plaintiff's father, and was purchased by one Kirpashankar Ranchhor. In 1892 the plaintiff attained his majority, and on the 2nd January, 1899, he filed this suit against his father (defendant 1) and his father's mortgagee (defendant 2) to recover the land which had been given to him on the 15th November, 1877. Kirpashankar was not made a party to this suit. The lower Court rejected the plaintiff's claim on the ground that the gift to the plaintiff by *M* and *J* of their undivided shares of land not in their possession, and of which the plaintiff was not put into possession, was invalid. They also held that Kirpashankar should have been a party, and that the plaintiff's claim was barred by limitation, inasmuch as the mortgagee, had held adverse possession since the 1st January, 1887, *i.e.*, more than twelve years. On appeal to the High Court: *Held* (reversing the decree of the lower Court), that (i) The gift to the plaintiff in 1877 was valid: the donors, in relinquishing their claim to their undivided shares, had done all that was practically necessary, and by the registered deed of gift had done all that they could do, and the possession of the father was practically the only mode in which the plaintiff who was then an infant, could accept or exercise possession: the donors never objected and made no attempt to revoke their gift: no division was necessary, as the whole of the land was in the possession of the plaintiff's father. (ii) The fact that the shares were undivided did not render the gift invalid: this was not a gift by members of an undivided family to an outsider as in *Vrandavandas* v. *Yamunabai, 12 Bom. H. C. R. 229*: it was a gift by persons who were not members of an undivided family (the plaintiff's uncles having previously separated from his father) to the plaintiff, a member of another co-parcenary: no consent was necessary to validate the alienation, nor was there anyone who did or could object. (iii) The plaintiff's claim was not barred by limitation: the property did not pass to the mortgagee until the 1st January, 1887, and this suit, instituted on the 3rd January, 1899, allowance being made for the vacation, was therefore in time. (iv) The auction-purchaser was not a necessary party: the plaintiff was not bound to sue every possible claimant to the land: if he chose to leave the question that might arise between him and the auction-purchaser to future settlement, he did it at his own risk: he was *dominus litis.* JOITARAM RAMKRISHNA *v.* RAMKRISHNA NANDLAL (1902) . . . **I. L. R. 27 Bom. 31**

18. ———— **Mitakshara gift**—*Gift of considerable portion of moveable or immoveable joint family property invalid—Acquiescence.* An undivided member of a Hindu family governed by the Mitakshara Law has no power to alienate any considerable portion of the moveable or immoveable properties belonging to the joint family by way of gift to the female members of the family. When the portion so alienated in not severed from the family property, but the income alone is given to the donees, the objecting co-parcener is not barred by acquiescence from questioning the alienation merely because he did not object to the payment of such income. *Bachoo Harkishondas* v. *Minkorebai, I. L. R. 29 Bom. 51* distinguished. *Ramaswmy Ayyar* v. *Vengidusami Ayyar, I. L. R. 22 Mad. 113,* distinguished. KAMAKSHI AMMAL *v.* CHAKRAPANY CHETTIAR (1907) **I. L. R. 30 Mad. 452**

19. ———— **Gift to daughter by mother** —*Widow's estate—Power of Gift of house to daughter at her dwiragaman or gowna ceremony—Ceremony connected with marriage but not essential to it—Deferred dowry—Extent.* The *dwiragaman* ceremony (called *gowna* in Behar) is treated in works of authority as a ceremony of importance closely connected with marriage, though it cannot be suggested that a marriage ceremony is incomplete without it. It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *dwiragaman* ceremony, and such gift is binding on the reversionary heirs of the husband. Gifts made at the time of the *dwiragaman* ceremony may rightly be regarded as dowry deferred and there is no substantial difference between such gifts and gifts made at the time of the marriage before the nuptial fire or when the bride is conducted from her father's house to her husband's. The question what portion it is reasonable to give to a daughter on the occasion of her marriage, has to be determined with reference to what would have been the share of the unmarried daughter under the rules laid down in the Mitakshara, Chap. I, s. 7, paras. 5 to 14. CHURAMAN SAHU *v.* GOPI SAHU (1909) **13 C. W. N. 994** **I. L. R. 37 Calc. 1**

4. CONSTRUCTION OF GIFTS.

1. ———— **Mode of construction**—*Deed of gift.* A deed of gift should be interpreted by itself according to the hole of its context, to the expressions it contains, and to the intention of the party making it. Any other direct evidence to explain the surmised or alleged intention of the donor is inadmissible. COLLECTOR OF MOORSHEDABAD *v.* ANUND NATH ROY. KISHENMONEE DABEE *v.* ANUND NATH ROY . . **W. R F. B. 112**

2. ———— **Limitation of gift**—*Words "angoja santan."* The words "angoja santan"

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occurring in a deed of gift would limit the gift to the male issue of the donee. BUGOLA MOYEE *v.* BHOWANI CHURN PAUL . . . **5 W. R. 119**

3. ——— Qualifying words—*Intention to give whole property.* Where, from the whole tenor of a deed of gift, it appeared that the real intention of the donor was to pass all her property, qualifying words used in the deed were held not to control its operation. KALEE DOSS ROY *v.* KHIRODA SOONDUREE DEBIA . **16 W. R. 300**

4. ——— Deed professing to be a will—*Deed of absolute gift.* A deed professing to be a will, but making a gift of property during the testator's lifetime, *held* to be a deed of absolute gift. HURRO SOONDUREE DOSSEE *v.* CHUNDER MOHINEE DOSSEE . . . . **3 W. R. 200**

5. ——— Gift to woman without express words—*Power of donee to alienate.* In the case of gifts, as in the case of wills, the well-established rule must be followed that, in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enable to alienate. ANNAJI DATTATRAYA *v.* CHANDRABAI **I. L. R. 17 Bom. 503**

See ANANDIBAI *v.* RAJARAM CHINTAMAN PETHE **W. R. 22 Bom. 984**

6. ——— Gifts to daughter as stridhanam. A Hindu executed in favour of his daughter an instrument in the following terms: "I have hereby given to you to be enjoyed as stridhanam after my death 2,320 fenams out of 6,000 fanams which remain as kanom on the land T .... The proportionate rent on 2,320 fanams is 365 paras. This quantity of paddy .... shall be enjoyed by you and your sons and grandsons hereditarily by receiving the same from my sons." After certain clauses restricting the mode of enjoyment and the power of alienation, the instrument proceeded, "In the event of the said kanom being paid, that money shall be received by my sons, and shall be invested on some other property which may be approved of by you and your sons and by my sons, and from that property you may receive income yearly and enjoy the same." In a suit by a grandson of the donee to recover his share of the income: *Held*, that the instrument was not invalid under Hindu law, and that the plaintiff was entitled to a decree. KRISHNA AYYAN *v.* VYTHIANATHA AYYAN **I. L. R. 18 Mad. 252**

7. ——— Construction of will making gift—*Absolute gift.* Where it was plain, as far as the words of a will went, that the testator (a Hindu) intended to make an absolute gift of his property in favour of his widow and daughter, saying that after his death they should be proprietors, and his entire estate should devolve upon them, the Court held itself bound, with reference to the rulings of the Privy Council, to regard the gift as an absolute gift, unless it could be shown (and this was not done) that by the Hindu law a gift to a female meant a limited gift, or carried with it the effect of creating an estate exactly similar to the "widow's estate" under the law of inheritance. KOLLANY KOER *v.* LUCHMEE PERSHAD . **24 W. R. 395**

8. ——— Nature of gift to widow—*Construction of will. Held*, on the construction of a will, that the testator did not give his widow a full proprietary right which she could transmit to her daughter, so as to entitle the latter's husband to succeed to the estate on her dying childless. PERTAB SINGH *v.* KHOOSIAL SINGH . **2 Agra 90**

9. ——— Absolute gift. *A*, a Hindu, executed a dan-patro (deed of gift) of a talukh in favour of his youngest wife, *B*, wherein he stated: "You are my youngest wife, and your two sons are minors; therefore, for your charitable expense (dan o khairath) and for the maintenance of your minor sons, I make a gift of the above talukh to you. You, from this day becoming possessor thereof, after deduction of the Government revenue, with the balance of the profits, will perform acts of charity (dan o khairath) and maintain the sons. For this purpose I execute this dan-patro." *A* died leaving *C* a son by his first wife, two minor sons by *B*, and *B* his widow. The minor sons of *B* died unmarried and without issue. *B* made a gift of the property to *D*, her daughter's son. In a suit by *C* against *B* and *D* for a declaraton of his reversionary right to the property after death of *B*:—*Held*, that the gift to *B* under the dan-patro was absolute. PABITRA DASI *v.* DAMUDAR JANA **7 B. L. R. 697 : 24 W. R. 397 note**

10. ——— ——— *Alienation, suit to set aside.* *A*, a Hindu living under the Mitakshara law, executed a petition to the Collector, stating that he was in possession of all his ancestral property; that his only son was dead; that he had no wife; that his son had left a widow, *B*, and two daughters, and no other children or heirs; the petitioner went on to state, "I declare her (*B*) my heir; and as, with the exception of the said *B*, I have no other heir or malik, nor can there be any, of which circumstances, I have already preferred information in my petition of 16th April 1830, and life is uncertain, I consequently request that the name of *B*, the widow of my late son, be registered in the Collectorate mutation book as proprietor and malguzar in the place of my name with regard to the property," etc. "Further, as of *B* there are two daughters, who after marriage, by the blessings of Providence, may be blessed with children, they and their children, therefore, are and will be heirs and maliks. But as long as I live, I shall keep the management of my own affairs in my own hands, and look after all the transactions of dihat, etc., myself, as heretofore." *B* sold and conveyed parcels of the property. In a suit by her daughter's son against the purchasers for a declaration of his reversionary right to the property sold:—*Held*, that, under the terms of the

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petition, there was an absolute gift to *B*, and that, as the gift was not fettered by any restrictions, the alienation by *B* was good and valid. CHATTAR LAL SINGH *v.* SHEWUKRAM
5 B. L. R. 123 : 13 W. R. 285

A contrary construction was put on this document in the case of *Mahomed Shamsool Hoda* v. *Shewakram* (*7 B. L. R. 700 note : 14 W. R. 315*), which was a suit by a grandson of the testator against a purchaser from the widow to set aside the alienation ; and the Court held that the widow only took an estate for life, and after her the daughters took absolutely as joint owners. COUCH, *C.J.*, and MITTER, *J.* (BAYLEY, *J.*, dissenting). And this decision was affirmed by the Privy Council. MAHOMED SHAMSOOL HODA *v.* SHEWUKRAM . **14 B. L. R. 226 : L. R. 2 I. A. 7 22 W. R. 409**

11. ——— Gift to wife—*A*, a Hindu, executed a deed of gift of certain villages in favour of his wife in the following terms : "The undermentioned villages have been granted as a gift to the Maharani for her necessary deohri expenses." The wife died a childless widow. *Held*, that the gift from her husband was for life only, and that the villages in question were not liable, in the hands of her husband's heirs to her debts. *Held*, also, that the husband's heir was entitled to her moveable property as her heir, and that such property was in his hands chargeable with her debts. SHEOTUHUL RAM *v.* RAM NARAIN SINGH . **5 C. L. R. 291**

12. ——— Gift to widow—*Duration of a grant held by a Hindu widow made to her by her husband in his lifetime.* On the distribution of compensation under the Land Acquisition Act, 1870, the title of a widow to a village she alleging it to be her property by absolute right, as a jaghir granted to her by her husband came into contest. Her late husband's adopted son, being now possessed of the zamindari within which the village was disputed her right alleging that the grant had been only for her maintenance and claiming the whole compensation. The terms of the grant, if any had been expressed, were unknown. No written grant was produced. The judicial committee pointed out that an inquiry directed by the Appellate Court below as to whether a local custom existed for zamindars to grant to their wives for life only and if such custom was valid, was inappropriate inasmuch as no custom at all in its legal sense of something exceptional to the general law, was in question. The power of the husband as zamindar to have made such a grant for life or for more was not in dispute. All that was known was that the widow had received rents for about twenty-six years. There was no sufficient evidence for holding that the village had been alienated in perpetuity. The judgment of the District Judge, dividing the compensation equally between the parties, was maintained, the widow being treated as holding for life. BRAJA

HINDU LAW—GIFT—*contd.*

4. CONSTRUCTION OF GIFTS—*contd.*

KISORA DEVU GARU *v.* KUNDANA DEVI PATTA MAHADEVI GARU . . **I. L. R. 22 Mad. 431 L. R. 26 I. A. 66 3 C. W. N. 378**

13. ——— Gift to daughter's sons, grandsons, etc.—*Claim of daughter's daughter—Construction of deed of gift.* A Hindu directed his wife to settle certain property after his decease upon their daughter. She did so by deed of gift (hibba nama), giving it to their daughter, "to be enjoyed by her, her sons, and grandsons, etc., one after another ; the other heirs not to have any concern with it." *Held*, that the plaintiff as the daughter's daughter had no right to share therein with her brothers, the daughter's sons. SRINATH GANGOPADHYA *v.* SARBAMANGALA DEBI
2 B. L. R. A. C. 144 : 10 W. R. 488

14. ——— Gift of land to a daughter—*Presumption as to interest taken by donee.* In a suit to recover possession of certain land, the plaintiff claimed title under a gift made to his mother, deceased, by her father, whose sons and grandsons, the defendants, had entered into possession on the death of the donee which took place less than three years before suit. The deed of gift was not produced, and it did not appear that the donee who had been placed in possession of the land and had retained it for thirty-seven years, was a widow at the time of the gift. *Held*, that the plaintiffs were entitled to a decree, there being no ground to presume that a life-interest merely was intended to pass under the gift. RAMASAMI *v.* PAPAYYA
I. L. R. 16 Mad. 466

15. ——— Gift to daughter with remainder to grandsons—*Right to mesne profits uncollected in lifetime of daughter—Mesne profits.* A Hindu by a deed dated in 1840 gave his daughter, a childless widow, an estate for life in certain property, with remainder on her death to his brother's grandsons. The daughter was put in possession, was dispossessed in 1858, and died in 1862. Under the terms of the deed, the property then went to the survivor of the two grandsons, who in 1864 sold his rights and interests in the property. In 1865 the purchaser brought a suit and recover possession from the defendants. His representatives now sued for mesne profits of the property from 1860 to 1865. *Held*, that the plaintiffs were not entitled mesne profits which had accrued due, but were uncollected in the lifetime of her daughter ; that such mesne profits would go to her heirs, who would alone be entitled to them. GURU PRASAD ROY *v.* NAFAR DAS ROY
3 B. L. R. A. C. 121

16. ——— Gift on contingency—*Lapse of gift.* By an ikrar executed by *A*, a Hindu widow, in favour of *B*, a son of another wife of her deceased husband, after reciting that her husband had given her a taluk as stridhan, but that he had not empowered her to adopt a son, it was thus directed :

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HINDU LAW—GIFT—*contd.*

4. CONSTRUCTION OF GIFTS—*contd.*

"You are the son of my co-wife; you are still living; the funeral cake will be preserved to us by you; and on my death the talukh is your rightful property. After my death, out of the whole profits for my two daughters, separating by demarcation raiyats with jummas to the extent of R200, whatever shall remain you shall gain." *Held*, that the vesting of the gift was contingent upon *B* surviving *A*; and that upon the death of *B* during the lifetime of *A*, the gift lapsed. KISHTO SOONDERY DEBEA *v.* KISHTOMOTEE . **Marsh. 367 : 2 Hay 405**

17. ——— Gift in ikrarnamah—*Succession as heiress—Survivorship.* An ikrarnamah, to which *I K* and *T K* were parties, contained the following stipulation: "After death of me, *I K*, my deceased son's widow, *D K*, will be the heiress; and after the death of me, *T K*, my estate shall devolve on Mussamuts *R K* and *D K* in equal moieties; should both *R K* and *D K* die, then their share shall be enjoyed and appropriated by the surviving ladies, but none of them shall ever be able to make gift or alienation to anybody. After the demise of us, five ladies, Mussamut *N*, daughter of my deceased son, *P B* and *N K*, daughter of *I K*, shall be heiresses and proprietors in equal shares." *Held*, that, according to the true construction of the ikrarnamah, *N K* was not entitled to succeed as heiress until after the death of all the ladies, and therefore that her son could not, after her death, claim through her while *R K* was alive. JOYPROKASH BHUGGUT *v.* BHUGWAN DASS . . . . . **Marsh. 589**

18. ——— Gift of land as "kasi or badi"—*Reversion of gift to grantor—Canarese Mapilla marriage.* Upon the marriage of his daughter, a Canarese Mapilla executed to the husband a deed of gift of certain land to be enjoyed, but not alienated, by the wife and her issue from generation to generation. It was recited in the deed that the gift was mode as "kasi or badi." The former term implies that the property reverts to the grantor on the dissolution of the marriage; the latter means a gift to a bride by her relations. The wife died in 1877, leaving a daughter, who also died before suit. The grantor sued the husband to recover the land on the ground that it reverted to him on the death of his daughter in 1877. *Held*, that, upon the true construction of the deed of gift, the grantor could not recover. ISMAIL BEARI *v.* ABDUL KADER BEARI . . . . **I. L. R. 6 Mad. 319**

19. ——— Gift charging profits of estate—*Corrody—Settlement.* In 1845 a Hindu executed a document called a sanad attested by witnesses, whereby he agreed to pay to his sister, and after her death to her daughter, R10 per annum, from the produce of an estate inherited by him from his maternal grandmother. *Held*, that a *corrody* or charge on the profits of the estate was created which bound the estate in the hands of the widow of the grantor. CHATTI CHALAMANNA *v.* PANDRANGI SUBBAMMA . . . . **I. L. R. 7 Mad. 23**

HINDU LAW—GIFT—*contd.*

4. CONSTRUCTION OF FIGTS—*contd.*

20. ——— Gift conditional on liability for maintenance—*Liability of son for maintenance of family.* Where a father executed a deed of gift in favour of his son with the condition that the son should take the property subject to the same liability in respect of the maintenance of the family as it was subject to in the hands of the father:—*Held*, that this was not an obligation entered into by father or son as a matter of contract, but a reservation in the father's gift which did not give the son a greater right to be maintained at the expense of the father, or in the family-house, than he had before. HUREEHUR MOOKERJEE *v.* RAJ KISHEN MOOKERJEE . . . . . **23 W. R. 236**

21. ——— Gift to Brahmans—*Restriction against alienation—Rule of perpetuities.* According to Hindu law, a restriction against alienation in a gift of land to Brahmans is inoperative as being a condition repugnant to the nature of the grant. Where a grantor creates a secular estate with a religious motive, the grant does not stand on the same footing with a religious endowment, and is not exempt from the rule as to perpetuities. ANANTHA TIRTHA CHARIAR *v.* NAGAMUTHU AMBALAGAREN **I. L. R. 4 Mad. 200**

22. ——— Construction of gift as to quantity of estate given. The rule as to the construction of the language in which a gift is made, independently of the "Transfer of Property Act," Act IV of 1882 (which may, or may not have been expressed so as to lay down, in favour of absolute gifts, a rule more positive), is that indefinite words of gift are calculated to convey all the interest of the grantor it being also necessary to read the whole of an instrument in order to gather the intention. A gift being thus expressed,—"I put a stop to my interest in those talukhs, and withdraw my enjoyment thereof, and I make them over to you:"—*Held*, that this must be read with what preceded it, *viz.*, "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control;" and that the words of gift must be taken to be limited by the purpose of the gift; the whole taken together showing that the donor's intention was that the donee should take the property for life only. KALIDAS MULLICK *v.* KANHAYA LAL PUNDIT . . . . . **I. L. R. 11 Calc. 121**
L. R. 11 I. A. 218

23. ——— Gift to designated person—*Construction of will—Persona designata.* *G*, a childless Hindu, by his will directed as follows: "And as I am desirous of adopting a son, I declare that I have adopted *K*, third son of my eldest brother. My wives shall perform the ceremonies according to the shastras, and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property, moveable and immoveable, in my own name or benami left by me, also that adopted son:

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HINDU LAW—GIFT—*contd.*

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when he comes to maturity, the executors shall make over everything to him to his satisfaction . . . . God forbid, but should this adopted son die, and my younger brother *N* have more than one son, then my wives shall adopt a son of his. If at that time *N* has not a son eligible for adoption, they shall adopt another son of *S*, and the wives and executors shall perform all the aforementioned acts.'' In a suit by one of *G's* widows as heir of her husband to set aside his will and recover half his property, it appeared that the abovementioned ceremonies had been performed by one widow only. *Held*, that according to the true construction of the will (which was established by the evidence) there was a gift of his property by the testator to a designated person independently of the performance of the ceremonies. NIDHOOMONI DEBYA *v.* SARODA PERSHAD MOOKERJEE

L. R. 3 I. A. 253 : 26 W. R. 91

24. ——— Gift to "adopted son"—*Invalid adoption—Motive from gift—Persona designata. Held*, upon the true construction of an angikarpatro whereby an estate was given to the donee in virtue of his being "adopted son" of the donor, that the gift did not take effect, inasmuch as the adoption was invalid. The distinction between what is description only, and what is the reason or motive for a gift or bequest, may often be fine ; but it must be drawn from a consideration of the language and the surrounding circumstances. *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee, L. R. 3 I. A. 253*, distinguished. FINANDRADEB RAIKAT *v.* RAJESWAR DAS

I. L. R. 11 Calc. 463 : L. R. 12 I. A. 72

See VENKATA SAYA MAHIPATI RAMA KRISHAN RAO *v.* COURT OF WARDS.

I. L. R. 22 Mad. 383
L. R. 26 I. A. 83

where this case is distinguished.

25. ——— Transfer of shares in joint family estate by the head of the family and his sons to minor grandson—*Partial failure of gift, effect of.* In a joint family, under the Mitakshara, consisting of a grandfather, his son, and that son's son, in pursuance of a family arrangement, the first, with the consent of the second, made by deed a gift of the whole of the ancestral estate to the third, including with him possible brothers that might be born thereafter. The father, in lieu of his share in the ancestral estate, received money for the payment of debts incurred by him. Possession was given to the minor through his mother, appointed by the deed of gift to be his guardian. The minor then died, and the mother retained possession. The family estate, on the death of the grandfather, was attached by one of the father's creditors who held a decree against him ; and in a suit to avoid the deed of gift it was held that the transfer to the minor, having been made in good faith and for good consideration, was valid ; and that, though the gift to possible brothers could not take effect, the gift by the head of the family with the consent of the son to the next generation, of which the only existing member, *viz.*, the minor grandson, was put into possession, was valid. It was not a partition, for (according to the Mitakshara, Ch. I, s. 5, v. 31) there could be no partition directly between grandfather and grandson while the father was alive. But it was a family arrangement partaking so far of the nature of a partition that the father received a portion and was thenceforth totally excluded ; and *quoad ultra*, the grandfather surrendered his interest to the grandson. RAI BISHENCHAND *v.* ASMAIDA KOER

I. L. R. 6 All. 560 : L. R. 11 I. A. 164

26. ——— Gift to a class—*Construction of family settlement—Rule for gift to unborn grandsons—Partial failure of gift, effect of.* Where the intention of a donor is to give a gift to two named persons capable of taking that gift, although it is also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, the part of the gift which is capable of taking effect should be given effect to, notwithstanding that the intention of the donor cannot be carried out in its entirety. Principle in *Rai Bishen Chand* v. *Asmaida Koer, L. R. 11 I. A. 164 : I. L. R. 6 All. 560*, followed. *Semble :* As a general rule, where there is a gift to a class, some of whom are, or may be, incapacitated from taking, because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking. *Soudaminey Dassee* v. *Jogesh Chandra Dutt, I. L. R. 2 Calc. 262*, and *Kherodemoney Dassee* v. *Doorgamoney Dassee, I. L. R. 4 Calc. 455*, questioned. RAM LAL SETT *v.* KANAI LAL SETT

I. L. R. 12 Calc. 663

27. ——— Vested and contingent interest. A will made by a Hindu contained the following clause :—"I bequeath to my elder daughter R25,000, subject to the condition that she shall invest the same in lands....shall enjoy the produce....and shall transmit the corpus intact to her male descendants.'' Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff, her husband, but no male issue, her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest. *Held*, that, as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed. SRINIVASA *v.* DANDAYUDAPAMI . . **I. L. R. 12 Mad. 411**

28. ——— Conveyance by a Hindu without male issue—*Adoption pendente lite—Adoption from improper motive—Will.* A conveyance by a Hindu, without male issue at the date thereof, will bind his subsequently born or adopted male issue. Such issue at birth takes a vested interest in such property only as is that of their father at

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HINDU LAW—GIFT—*contd.*

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that time. *C*, a Hindu Brahmin without male issue, executed, on the 10th September 1856, a bakshishpatra (a deed of gift) to *M* containing words to the following effect: "I have given to you as gift and charity my property at —, together with my moveable property. [Here follow the particulars of the property.] The garden and house, etc., etc., I have given to you as gift this day of my own accord, and I have made the same over to you. You shall pay the Government assessment and village expenses, and you and your grandsons should enjoy the same property generation after generation and live in peace there. As long as I live, I will take the profits and you should maintain me as if I were one of the members of your family.....I have no ownership whatever in the property; the ownership belongs to you from this day. This day I owe no money to any body. Whatever property there may be after my death, other than that described above, is all given to you. No person has any claim thereto; the entire ownership belongs to you. I have given in writing this deed in sound mind and of my own accord." The document was registered on the 4th October, 1856. *M* was put in possession of the property and managed it for some time. He paid the Government assessment and held receipts for the same. On the 6th January, 1858, *C* addressed a letter to the Assistant Magistrate of the place, purporting to revoke the bakshishpatra, and he (*C*) was restored to possession by that officer. In 1859, *M* brought a suit (No. 446 of 1859) against *C* for the property. Before any decree was passed in it, *C*, on the 6th June, 1859, adopted the plaintiff, who was then eight years of age. The plaintiff was not made a party to that suit. On the 2nd April, 1860, the Munsif made a decree in favour of *M*, holding that *C* had executed the bakshishpatra and given possession of the property to *M* under it. He directed the property to be restored to the possession of *M*, to be held according to the terms of the bakshishpatra. *C* appealed, but subsequently withdrew his appeal, admitting the execution of the bakshishpatra and agreeing to give over the property to *M* according to the terms of the Munsif's decree. *M* accordingly obtained possession of the property. On the 16th March, 1874, the plaintiff brought the present suit against the grandson of *M* (*M* then being dead) for a moiety of the property on the ground that *C*, his adoptive father, could not alienate more than one-half of the property. Both the lower Courts allowed the plaintiff's claim, the Court of first instance being of opinion that the document was a gift, and did not bind the plaintiff, and the Appellate Court holding that it was not a gift, but a will, and that it had been revoked by the testator before his death. On appeal to the High Court:—*Held*, that the document was a conveyance and not a will, and that it vested the property in *M*, the donee, subject to a trust regarding any surplus that remained of the income after payment of the Government assessment and village expenses in favour of *C* as long as he lived, and that the donor could not revoke it, inasmuch as the document contained no power of revocation. *Held*, also, that, inasmuch as the plaintiff had been adopted before the hearing and decree in suit No. 446 of 1859 and might have been made a party to it, but was not, he could not be bound by proceedings in that suit, and that he was therefore at liberty to re-open the question whether the bakshishpatra was intended by *C*, when executing it, to operate as a deed or as a will. An adoption *pendente lite* is not to be regarded in the same light as an alienation *pendente lite*. If a legitimate son has been born to *C* during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must have been made a party, and a son adopted during the suit is in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to the Hindu law in the Presidency of Bombay. The circumstances that *C* might have adopted the plaintiff for the purpose of endeavouring to defeat the bakshishpatra did not alter the case. As a sonless Hindu, he had a right to adopt a son, and he was not under any obligation to *M* not to adopt; and, even if he had so contracted, *quære*, whether such a contract would affect the validity of the adoption. RAMBHAT *v.* LAKSHMAN CHINTAMAN . . **I. L. R. 5 Bom. 630**

29. ——— Contingent gift to a class— *Construction of settlement—Successive interests—Member of the class in existence on failure of prior interest—Rule in the Tagore Case.* A karar, executed to the father of *S*, a minor grandson of the executant, after reciting that the executant had appointed *S* to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to *S* on his attaining majority and proceeded as follows: "If the said *S* shall have descendants, neither your male descendants nor any one else shall have any interest in any of the property hereinmentioned. If the said *S* happen to be without descendants, the male offspring of my daughter *K*, your wife, shall enjoy the property equally, but no others shall have any interest therein; such is the swatantra karar executed with my free will and pleasure." *S* attained his majority, but died without issue. His elder brother sued for possession of the property under the above clause. *Held*, that, since the plaintiff was a person capable of taking, subject to the life-interest, at the time when the gift was made, he was entitled to succeed. *Semble:* If the gift to the plaintiff had failed, the property would have reverted to the heirs of the settlor on *S*'s death without issue. *Ram Lall Sett* v. *Kanai Lall Sett, I. L. R. 12 Calc. 663*, followed. MANJAMMA *v.* PADMANABHAYYA . . **I. L. R. 12 Mad. 393**

30. ——— Hindu widow's power of alienation—Operation of gift by her to two donees, one of whom could not take— *Inheritance in a village community in Oudh—Wajib-ul-urz modifying the Mitakshara law.* A clause in the wajib-ul-urz of a village in Oudh authorized any

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co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter, being to modify the law otherwise prevailing, *viz.*, the Mitakshara and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer. *Held*, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow. The gift was to the daughter and to her husband jointly. *Held*, that, the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey* v. *Tayleur* (*Ambler, 138*), which, not depending on any peculiarity of English law, was applicable here. NANDI SINGH *v.* SITA RAM

I. L. R. 16 Calc. 677
L. R. 16 I. A. 44

31. ———— Gift to donees jointly. Where property is given jointly to two persons living as members of a joint Hindu family, each donee takes an interest in the property which passes to his heirs at his death, and not to the other donee by survivorship. BAI DIWALI *v.* PATEL BECHARDAS (1902) . . . **I. L. R. 26 Bom. 445**

32. ———— Gift to idol—*Will, construction of—Idol not in existence at the time of the testator's death—Direction to executors to establish thakur—Gift to a class.* The rule laid down in the case of *Tagore* v. *Tagore, 9 B. L. R. 377*, that the donee of a gift under a will, by Hindu law, must be a person capable of taking at the time when the gift takes effect, applies in the case of a juridical person, such as an idol. An idol has no juridical existence unless it has been consecrated by the appropriate ceremonies and so has become spiritualized. Before this the deity of which the idol is the visible image does not reside in the idol. *Doorga Proshad Dass* v. *Sheo Proshad Pandah, 7 C. L. R. 278*, followed. A gift to an idol not in existence at the time the gift takes effect is invalid. *Upendra Lal Boral* v. *Hem Chunder Boral, I. L. R. 25 Calc. 405*, followed. That which cannot be done directly by gift cannot be done by the intervention of a trustee. *Krishna Kamini Dassee* v. *Ananda Krishna Bose, 4 B. L. R. (Old Cases), 231; Rajendra Dutt* v. *Sham Chunder Mitter, I. L. R. 6 Calc. 10*, referred to. A gift for the daily worship of the *thakur* is invalid. A dedication of the residue of an estate to the *sheva* of a *thakur* is invalid. A direction in a will to establish a *thakur* at such a place as the executor should think fit is a valid direction. A bequest in a will "to such of my grandsons as shall be alive at the death of my daughter, in equal shares, for and during their respective lives," if more than one, or "to such grandson alone for life," if there be only one, is invalid. Where a gift is made to a class, some of whom are incapable of taking, the rule is that the disposition fails as to all. *Leake* v. *Robinson, 2 Merivale Rep. 363*; and *Pearks* v. *Moseley, L. R. 5 App. Cases 714*, referred to. The rule applies even though all the members of a class are born before the gift takes effect, if it was antecedently possible that they might have not been so born, and the fact that the gift might have included objects too remote is fatal to its validity irrespective of the event. *In re Dawson, L. R. 39 Ch. D. 115*, referred to. A clause in a will, restraining the beneficiaries from alienating the property given to them under the will, is invalid. ROJOMOYEE DASSEE *v.* TROYLUKHO MOHINI DASSEE (1901)

I. L. R. 29 Calc. 260
s.c. 6 C. W. N. 267

33. ———— Gift to wife—*Powers of alienation of donee—Construction of document.* Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property. A conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and "put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik) together with land revenue, miscellaneous items, etc." Then came this provision :—"In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my lifetime or after my death. No objection taken by any person shall be held as fit to be allowed in this respect. *Held*, that notwithstanding the use of the word "malik," the document did not confer an absolute power of alienation on the donee, but, she was not empowered to transfer the property either by sale or mortgage, unless a legal necessity arose for doing so. *Lalit Mahan Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 831*, referred to. JAMNA DAS *v.* RAMAUTAR PANDE (1905)

I. L. R. 27 All. 364

34. ———— Gift to daughter out of joint property—*Limits of propriety—Joint family—Hindu Law.* The sole surviving member of a joint Hindu family, owning property worth from R10 lacs to R15 lacs, out of the income of such property, made a gift of R20,000 to his daughter and only child. *Held* (reversing TYABJI, *J.*), the gift was valid, and did not exceed the limits of propriety. BACHOO *v.* MANKOREBAI (1904)

I. L. R. 29 Bom. 51

35. ———— Will—*Unregistered memorandum of an oral gift—Subsequent disposal by will—Presumption of advancement—Indian Trusts Act*

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(II of 1882), s. 82—Transfer of Property Act (IV of 1882), s. 123. According to the law, as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife, or of an advancement for her benefit. *Per* BATTY, *J.*—In India, as a general rule, the criterion as to ownership of property is the source from which the purchase money was supplied; but it is not the sole criterion, and depends on the presence or absence of rebutting circumstances. Among Hindus the grounds against assuming advancement are specially unfavourable to the claim of a widow to an absolute estate. A Hindu widow brought a suit against the executor of her husband's will for a declaration that she was the sole owner of a house, which was purchased in her name by her husband and which was subsequently otherwise disposed of by her husband in his will. *Held*, that the plaintiff had not established her title to the house and that the disposal by will was valid. BAI MOTIVAHOO *v.* PURSHOTAM DAYAL (1905) **I. L. R. 29 Bom. 306**

36. ———— Settlement on persons then in existence at close of a life— *Trusts Act (II of 1882), s. 6—Transfer of Property Act (IV of 1882), ss. 14, 15 and 123—Trust validly created by registered instrument without delivery of possession—Ss. 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law.* *R* by a registered deed of settlement settled property in trust and after making various provisions for the maintenance of himself and his wife and his grand-daughters *V* and *R*, further provided that, on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters, who attain 18 and the daughters of the grand-daughters, who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given R1,000, and a male child on attaining that age he was to be given his share of the property. The settlor did not give possession of the properties to his trustees, but remained in possession till his death. In a suit by the reversioners of *R* to set side the settlement as null and void. *Held*, that a transfer of property and a valid declaration of trust were effected by the registered deed though unaccompanied by physical delivery of possession and that nothing in s. 6 of the Trusts Act was in conflict with this view. *Held*, also, that the settlement by way of remainder in favour of the sons of *V* and *R* (such sons being in existence at the date of the settlement) was valid under the Hindu Law. A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good. *Sreemutty Soorjumoney Dossu* v. *Denobundoo Mullick, 9 M. I. A. 134*, followed. A bequest to a class, some of whom could not take, is not void, but will enure for the benefit of such of the class, who can take. The rule in *Leake* v. *Robinson, 2 Mer. 363*, does not apply to the wills of Hindus. *Bhagabati Barmanya* v. *Kali Charan Singh, I. L. R. 32 Calc. 992*, referred to and followed. *Ram Lal Set* v. *Kanai Lal Set, I. L. R. 12 Calc. 663*, referred to and followed. Ss. 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated and do not apply to Hindu wills. In determining the validity or otherwise of dispositions of property under ss. 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad, although, as events actually happened, it was not so postponed. RANGANADHA MUDALIAR *v.* BAGHIRATHI AMMALL (1906) . **I. L. R. 29 Mad. 412**

37. ———— Estate of inheritance— *Gift—Construction of deed of gift—Immoveable property—Life-estate—Gift to a married woman—Ayautuka Stridhan, descent of—Petition—False statement—Decree—Mesne profits.* A deed of gift of immoveable property made by a Hindu in favour of his sister after her marriage was to the following effect:—"you shall pay the annual Government revenue and get your name registered ..... and enjoy possession during your lifetime. On your death your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale will successively vest in your husband, sons, grandsons and others." *Held* (affirming the decision of the High Court), that on its true construction the deed conveyed an estate of inheritance. The words were sufficient to show that the heirs were to succeed as such notwithstanding that they were not enumerated in the proper order. The property being "ayautuka stridhan," and the donee having no son, it would descend to her only unmarried daughter, the plaintiff. Where the husband of the donee, who was the plaintiff's natural guardian, had obtained possession by an untrue representation in his petition for mutation of names that his wife had died childless, mesne profits were held to have been rightly decreed from the date of his wife's death, and not limited to the three years before suit. BASANTA KUMARI DEBI *v.* KAMIKSHYA KUMARI DEBI (1905) . . **I. L. R. 33 Calc. 23 s.c. 10 C. W. N. 1**

38. ———— Gift to widow, construction of. *A* and *B* brought a suit against *C* for division of what *A* and *B* alleged to be joint family property and *C* alleged to be his divided property. *A* died and *V*, his widow, was brought on the record as his representative. *V* and *B* withdrew from the suit on *C* giving them jointly some lands under a deed, which recited that *C* gave the lands as a matter of favour at the request of *V* and *B* to be enjoyed by *V* and *B* in equal portions with the right of gift, sale, etc. *V* revised her share to *D*. In a suit by *B* to recover the lands from *D*: *Held, per* MILLER, *J.* There was nothing in the circumstances of the case to raise any presumption based on the sex of *V* that the gift to *V* was one for

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HINDU LAW—GIFT—*contd.*

4. CONSTRUCTION OF GIFTS—*contd.*

life only, in the face of the express words of the deed which purport to convey an absolute estate : *Per* WALLIS, *J.* In construing such documents, the situation of the parties and their rights at the time must be taken into consideration. There is nothing in the circumstances or the document to show that *C* intended to enlarge the widow's interest in the property given her to full ownership. The words 'you shall enjoy the said lands with the rights of gift, sale, etc.' do not necessarily indicate such an intention. *V* therefore took only a widow's estate in the properties given by the deed. *Dinonath Mukerji* v. *Gopal Churn Mukerji, 8 C. L. R. 57,* referred to ; and *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick, 6 Moo. I. A. 1,* referred to. SAMBASIVA AYYAR *v.* VISVAM AYYAR (1907) **I. L. R. 30 Mad. 356**

39. ——— *Gift to widow, construction of.* When a suit brought by a Hindu widow against her deceased husband's co-parceners for possession of her divided husband's share was compromised and certain lands were given to her and another donee in equal shares as full owners and the instrument recited that the gift was made out of motives of generosity. *Held, per* Sir ARNOLD WHITE, *C.J.*, and MILLER, *J.* (WALLIS, *J.*, dissenting), that the widow took an absolute and alienable interest in her share of the lands given. The gift being made in the same terms to the two donees, there was no reason to suppose that the gift to the widow alone was restricted. Although the suit was brought to recover only a widow's estate, it was competent to the defendant by way of compromise to convey an estate in full ownership, and where the instrument in clear words conveys such an interest, no presumption in favour of a restricted gift ought to be made from the nature of the suit. *Sreemutty Rabutty Dassee* v. *Sibchander Mullick, 6 Moo. I. A. 1,* distinguished. SAMBASIVA AYYAR *v.* VENKATASWARA AYYAR (1907) . **I. L. R. 31 Mad. 179**

40. ——— *Gift—Construction of deed of gift—"Malik"—Gift to widow as "malik wa khud ikhtiyar"—"Absolute ownership"—Heritable and alienable estate—No distinction between male and female donee.* A Hindu executed a deed of gift of immoveable property, to take effect after his death, to each of his two wives and his daughter-in-law, "as owners (maliks) with proprietary powers." One of his widows on coming into possession of her share made a will disposing of it in favour of her brother. In a suit by the next heirs of the donor questioning her power of alienation : *Held,* that, on the true construction of the deed, the widow took a heritable and transferable estate in the property. The use of the word "malik" implies "absolute ownership" unless there is anything in the context or surrounding circumstances to qualify such meaning : and it was not so qualified by the fact that the donee was a widow. In this case the context rather strengthened the presumption that the word was intended to bear its proper technical meaning. *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy, L. R. 24 I. A. 76, I. L. R. 24 Calc. 834,* and *Kallany Kooer* v. *Luchmee Pershad, 24 W. R. 395,* followed. SURJAMANI *v.* RABI NATH OJHA (1907) . **I. L. R. 30 All. 84**
s.c. L. R. 35 I. A. 17

41. ——— **Gift to reversioner for the time being, if passes absolute title.** If a Hindu widow transfers her interest to the then reversioner, the latter can hold the property against the person, who is the reversioner, when the widow dies. *Gunga Pershad Kur* v. *Shumbhoo Nath Burmun, 22 W. R. 393 ; Nobo Kissore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102,* followed. ANNADA KUMAR ROY *v.* INDRA BHUSAN MUKHOPADHYA(1907) . . **12 C. W. N. 49**

5. REVOCATION OF GIFTS.

1. ——— **Gift made under mistake of law**—*Right to revoke gift.* By Hindu law a man may make a gift of any of his property binding as against himself. Even when a deed of gift is voidable, on the ground of fraud, accident, or mistake, it is a question for the discretion of the Court whether cancellation or delivery up ought to be ordered. Where a Hindu made a gift to a person whom he said he had taken as his manasaputra :—*Held,* that he could not set it aside on the ground that he erred in supposing that the donee could perform his funeral rites. ABHACHARI *v.* RAMA CHANDRAYYA **1 Mad. 393**

2. ——— **Gift on condition**—*Revocation of gift on failure of condition, power of.* Under Hindu law, if a person make a gift to another in expectation that the donee will do some work in consideration of the gift, it follows that, if the donee fail to do that which it has conditioned he should do, the gift is revocable. MAHADEO PUNDIT CHEYDEE *v.* BADAMO . . . . . **5 N. W. 5**

3. ——— **Revocation of gift by will.** When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete, and he cannot revoke it by a subsequent will. RAJARAM *v.* GANESH . . . **I. L. R. 23 Bom. 131**

HINDU LAW—GUARDIAN.

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I. L. R. 18 Mad. 415
I. L. R. 22 Calc. 545
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HINDU LAW—GUARDIAN—*contd.*

1. RIGHT OF GUARDIANSHIP.

1. ——— **Age of discretion**—*Father's right to custody of child.* The legal age of discretion of Hindus in India is uniformly sixteen years. Up to that age the father has an undoubted right to the custody of his male children. *Re* HEMNATH BOSE . . . . **1 Hyde 111**

2. ——— **Guardian of adopted son**—*Act XX of 1864—Natural and adoptive parents.* The natural father of a minor who has been adopted into another family is not by Hindu law his proper guardian when either of the adoptive parents is living and willing to act as guardian. The residence of the minor with the adoptive parents is a part of the consideration for their adoption of a son, and, unless serious ill-treatment or incompetency on their part be proved, they and the survivor of them are the proper guardians. LAKSHMIBAI *v.* SHRIDHAR VASUDEB TAKLE . **I. L. R. 3 Bom. 1**

3. ——— **Guardian of daughter**—*Koolin Brahmin.* A Koolin Brahmin is not so much the natural guardian of his daughter as her mother. MODHOOSOODUN MOOKERJEE *v.* JADAB CHUNDER BANERJEE . . . . . **3 W. R. 194**

4. ——— **Mother**—*Mithila law—Minor—Certificate of guardianship.* Under Mithila law, the mother of a minor is entitled to a certificate of guardianship in preference to the father. JUSODA KOER *v.* LALLA NETTYA LALL **I. L. R. 5 Calc. 43**

5. ——— *Power of father to appoint another person than mother.* The Hindu law does not prohibit a father from appointing, by writing or by word, any other person than the mother to be the guardian of his minor children. SOOBAH PIRTHE LAL JHA *v.* SOOBAH DOORGA LAL JHA. SOOBAH DOORGAH LAL JHA *v.* NEELANUND SINGH . . . . . **7 W. R. 73**

6. ——— **Paternal grandmother**—*Step-mother. Held,* that the paternal grandmother has the right to the guardianship of a Hindu minor in preference to the step-mother. *Held,* also, in the present case, that the paternal grandmother, with the assent of the nearest male relative, had, in preference to the step-mother, power to dispose of the minor in marriage. RAM BUNSEE KOOMAREE *v.* SOOBK KOOMAREE . **2 Ind. Jur. N. S. 193 7 W. R. 321**

7. ——— **Mother-in-law**—*Deceased son's widow.* A Hindu widow is the proper guardian of her deceased son's widow in the absence of any person claiming a preferential title to succeed to the estate of the latter. BAI KESER *v.* BAI GANGA **8 Bom. A. C. 31**

8. ——— **Husband and wife**—*Infant wife—Marriage.* According to Hindu law, after marriage, a husband is the legal guardian of his wife's person and property, whether she is a major or minor. The marriage of an infant being under the Hindu law a legal and complete marriage, the husband has the same right as in other cases to demand that his wife shall reside in the same house as himself, except, under special circumstances, such as absolve the wife from the duty. KATEERAM DOKANEE *v.* GENDHENEE . **23 W. R. 178**

HINDU LAW—GUARDIAN—*contd.*

1. RIGHT OF GUADIANSHIP—*contd.*

9. ——— **Right of relatives (after parents are dead) to custody of child**—*Nearest paternal relatives—Selection of guardian by Court.* The claims of relatives to the guardianship of a minor stand upon quite a different footing from those of parents. The nearest paternal relatives have no legal right to the immediate custody of a child on the death of its parents. In the absence of father or mother or guardian appointed by the father, the selection of a guardian for a Hindu minor is to be made by the Court, as it represents the ruling power. KISTO KISSOR NEOGY *v.* KADER MOYE DASSEE . . . . **2 C. L. R. 583**

See BHIKUO KOER *v.* CHAMELA KOER **2 C. W. N. 191**

10. ——— **Proximity of connection**—*Outcaste.* Proximity of connection does not necessarily entitle a person to the office of guardian. A person out of caste is not a proper person to be the guardian of Hindu minors. FUGGOO DAYE *v.* RANAH DAYE . . . **4 W. R. Mis. 3**

11. ——— **Loss of caste**—*Act XXI of 1850—Suit to obtain custody of minor from father who intends to marry her to an impotent man.* A Hindu who has been deprived of caste by the members of his brotherhood on account of intending, for a money consideration, to give his infant daughter in marriage to a man both old and impotent, does not, under Hindu law, thereby forfeit his right as guardian to the custody of such daughter. Even if there were a rule of Hindu law which in such a case inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced. Where accordingly, because a Hindu had been deprived of caste for the reason above mentioned, a person sued to have the custody of the infant himself as her guardian in lieu of her father, and as such to be declared empowered to arrange for her marriage to a suitable husband basing his suit on Hindu law :—*Held,* that such suit was not maintainable. KANAHI RAM *v.* BIDDYA RAM **I. L. R. 1 All. 549**

12. ——— **Father converted to Christianity.** A father is not precluded from being custodian of his children by the fact that he has become a convert to Christianity. MUCHOO *v.* ARZOON SAHOO . . . **5 W. R. 235**

13. ——— **Immorality of father**—*Keeping concubine.* A Hindu goldsmith kept a concubine and had a family by her, and then married and had legitimate issue, but continued to keep the concubine in his house. *Held,* that this circumstance alone did not justify a Court in refusing him

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HINDU LAW—GUARDIAN—*contd.*

1. RIGHT OF GUARDIANSHIP—*concld.*

the custody of his legitimate children. JUMMALAPUDI KALIDAS *v.* ATTALUR SUBBAMMA **I. L. R. 7 Mad. 29**

14. ——— Right of guardianship—*Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.* The plaintiff and *R*, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was *R's* father, until the year 1880. In 1877 a daughter, *S*, had been born to them. In 1880 the plaintiff was convicted of theft and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1884 he requested his wife *R* to join him with their daughter. *R* refused, and she and *S* continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November 1885, *S* having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters demanded his daughter *S* from the defendants, who, however, refused to deliver the girl to the plaintiff. In May 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter *S* married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a rule *nisi* for an injunction against the defendants. *Held*, that, pending the hearing of this suit, he was entitled to the injunction asked for. NANABHAI GANPATRAV DHAIRYAVAN *v.* JANARDHAN VASUDEV . **I. L. R. 12 Bom. 110**

15. ——— Guardian of Hindu widow—*Grant of certificate of administration under Act XL of 1858.* The relations of her deceased husband are entitled to be the guardians of a Hindu widow in perference to her paternal relations. A certificate of administration under Act XL of 1858 was therefore granted to one of the former in perference to the latter. KHUDIRAM MOOKERJEE *v.* BONWARI LAL ROY . . . **I. L. R. 16. Calc. 584**

2. POWERS OF GUARDIANS.

1. ——— Power of Hindu mother acting as manager for minor. *Power of alienation. Held*, that a Hindu mother, acting as manager of the estate of a minor, has no more authority to alienate or charge that estate than the managing member of an undivided Hindu family. DALPAT SINGH *v.* NANABHAI **2 Bom. 333 : 2nd Ed. 306**

2. ——— Contract made without authority—*Necessity for sale.* Under the Hindu law, a contract made by a guardian without authority cannot bind the minor. Even if it is desirable that a minor should have any benefit, such as increase to a very small income, from some undertaking or enterprise, *e.g.*, obtaining a lease of certain rents, that circumstance is not sufficient to constitute a necessity for the mother and guardian to mortgage the minor's ancestral property with a view to secure such benefit. RADHA PERSHAD SINGH *v.* TALOOK RAJ KOOER . **20 W. R. 38**

HINDU LAW—GUARDIAN—*contd.*

2. POWERS OF GUARDIANS—*contd.*

3. ——— Power to deal with estate of minor—*Minor—Act XL of 1858—Mother.* The mother and guardian of a Hindu minor, though not a guardian appointed under Act XL of 1858, when acting *boná fide* and under the pressure of necessity may sell his real estate to pay ancestral debts and to provide for the maintenance of the minor. SOONDER NARAIN *v.* BENNUD RAM **I. L. R. 4 Calc. 76**

4. ——— *Minor—Mother—Act XL of 1858.* The mother and guardian of a Hindu minor, although a certificate of guardianship has not been granted to her under Act XL of 1858, may deal with the estate of the minor within the limits allowed by the Hindu law. ROSHAN SINGH *v.* HARKISHAN SINGH **I. L. R. 3 All. 535**

See ABHASSI BEGUM *v.* RAJROOP KONWAR **I. L. R. 4 Calc. 33 : 2 C. L. R. 249**

5. ——— Compromise made by a father as guardian of his natural son—*Suit by son to set aside compromise—Minor adopted by religious celibate.* *C*, who was the head of a Lingayat muth, died in 1862. The plaintiff, who was then a minor, claimed through his natural father, *R*, to be *C's* heir. This claim was disputed by *V* on behalf of his son, the defendant, who was also a minor. In 1863, pending legal proceedings between them, *R* and *V* compromised the dispute, and agreed that the muth and the property appertaining to it should be divided between the plaintiff and the defendant in equal shares. In the present suit the plaintiff thought to set aside the compromise made on his behalf by his natural father, *R*, on the ground that *R* had no authority to make it, and that there was no necessity for it. *Held*, that the plaintiff's natural father was his proper guardian to assert his rights as adopted heir against rival claimants, and that the compromise was binding. NIRVANAYA *v.* NIRVANAYA . . **I. L. R. 9 Bom. 365**

6. ——— Partition by minor's mother as guardian—*Partition made during minority—Suit to set aside a partition on the ground of fraud.* A partition made by a mother as the guardian of her minor son, a member of an undivided Hindu family, is valid, and if just and legal will bind the minor. When the minor arrives at full age, he may apply to have the division set aside if it can be shown to be illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity. CHANVILAPA *v.* DANAVA **I. L. R. 19 Bom. 593**

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HINDU LAW—GUARDIAN—*contd.*

2. POWERS OF GUARDIANS—*contd.*

7. ———— **Power of mother as guardian of minor to sell her deceased husband's estate**—*Minor's estate—Effect of omission of the minor's name in the sale deed.* Under Hindu law the mother, as guardian of her minor son, has authority to sell her husband's estate in order to pay off his debts, and the omission of any reference to the minor in the deed of sale does not render it ineffectual if it is proved that it was her intention to deal with the son's interest, and not merely with any interest which she might have herself. MURARI *v.* TAYANA . **I. L. R. 20 Bom. 286**

8. ———— **Authority of guardian to borrow money for funeral ceremonies of minor's father**—*Liability of the estate for such debt.* On the death of his father, the minor defendant was taken charge of by one *N*, his father's cousin, who also took possession of the estate of the deceased. To defray the expenses of the funeral ceremonies of the deceased, *N* borrowed money from the plaintiff, who now sued to recover the amount from the estate of the deceased. *Held*, that *N*, as nearest male relative and guardian, according to Hindu law, of the orphan minor, had authority to bind the estate in the hands of the minor so far as the loan was necessary to secure the proper performance on the funeral ceremonies of the minor's father. NATHURAM *v.* SHOMA CHHAGAN **I. L. R. 14 Bom. 562**

9. ———— **Uncertificated guardian, powers of**—*Manager of joint Hindu family, powers of—Sale by de facto guardian of lunatic's share.* Act XXXV of 1858 does not affect the general provisions of Hindu law as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic, may, in case of necessity, sell joint family property including the lunatic's share, although he does not hold a certificate under the said Act. *Ram Chunder Chuckerbutty* v. *Brojonath Mozoomdar, I. L. R. 4 Calc. 929,* followed in principle. *Court of Wards* v. *Kupulmun Singh, 10 B. L. R. 364 : 19 W. R. 163,* disapproved. KANTI CHUNDER GOSWAMI *v.* BISHESWAR GOSWAMI . . . **I. L. R. 25 Calc. 585 2 C. W. N. 241**

10. ———— **Mortgage, by guardian, of minor's property**—*Duty of mortgagee to inquire as to necessity for loan.* Where the guardian of a minor Hindu purports to mortgage the minor's property on behalf of his ward, the lender is bound to ascertain whether the guardian is acting for the benefit of the minor. It is only, however, when there has been at the time of the loan due inquiry as to the necessity for it, that the lender can obtain a charge over the minor's property. DALIBAI *v.* GOPIBAI (1902) **I. L. R. 26 Bom. 433**

11. ———— **Specific performance, suit for**—*Agreement to sell immoveable property—Agreement by Hindu mother as natural guardian of infant son—Son's death—Suit against mother as heir—Legal necessity—Specific Relief Act (I of 1877), s. 18—Transfer of Property Act (IV of 1882), s. 43.* As natural guardian of her infant son, a Hindu mother has no power to sell immoveable properties belonging to the infant except for legal necessity. Where, there being no legal necessity, a mother contracted to sell immoveable property belonging to her infant son not in her personal capacity, but as the mother and next friend of the latter, and subsequently on the infant's death inherited the property : *Held*, that a suit for specific performance of the contract could not be maintained against her. Neither s. 18 of the Specific Relief Act nor s. 43 of the Transfer of Property Act applied to the case. RASH MONI DASSI *v.* SOORJA KANTA ROY CHOWDHURI (1905) . . **9 C. W. N. 1019**

HINDU LAW—GUARDIAN—*concld.*

2. POWERS OF GUARDIANS—*concld.*

HINDU LAW—HUSBAND AND WIFE.

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See REPRESENTATIVE OF DECEASED PERSON . . **I. L. R. 25 Mad. 385**

See HINDU LAW—RESTITUTION OF CONJUGAL RIGHTS.

1. CONJUGAL RIGHTS.

1. ———— **Conjugal rights**—*Wife—Conjugal rights, suit for enforcement of—Residence of wife at her parental house—Agreement contrary to Hindu law and opposed to public policy—Conditions imposed by decree on husband—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), s. 37, cl. (1)—Contract Act (IX of 1872), s. 23.* The duty imposed upon a Hindu wife to reside with her husband, wherever he may choose to reside, is a rule of Hindu law and not merely a moral duty. An ante-nuptial agreement on the part of the husband, that he will never be at liberty to remove his wife from her parental abode, would defeat that rule of Hindu law, and is invalid on that ground, as well as on the ground that it is opposed to public policy. TEKAIT MON MOHINI JEMADAI *v.* BASANTA KUMAR SINGH (1901) **I. L. R. 28 Calc. 751 : s.c. 5 C. W. N. 673**

2. ———— **Suit for restitution of conjugal rights**—*Desertion—Cruelty—Insanity of husband—Limitation—Act XV of 1877 (Limitation Act), s. 23, sch. ii, arts. 34, 35, and 120.* The texts of the Hindu law relating to conjugal cohabitation and imposing restrictions upon the liberty of the wife, and placing her under the control of her husband, are not merely moral precepts, but rules of law. The rights and duties which they create may be enforced by either party against the other, and not exclusively by the husband against the wife.

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HINDU LAW—HUSBAND AND WIFE —*contd.*

1. CONJUGAL RIGHTS—*concld.*

The Civil Courts of British India, as occupying the position in respect of judicial functions formerly occupied in the system of Hindu law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband. It is not necessary, as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant. The provisions of arts. 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits of this description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Mahomedans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with s. 23 of the Limitation Act. Desertion by a wife of her husband is permitted by the Hindu law under certain circumstances, but the insanity of the husband will not justify his desertion by the wife. In any case, desertion does not terminate the relation of husband and wife. A suit for restitution of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant. BINDA *v.* KAUNSILIA

I. L. R. 13 All. 126

3. ——— *Conjugal rights, restitution of—Cruelty—Matrimonial offence—Safety of wife in peril. Per* HARINGTON, *J.*—It would not be safe to say that whatever is a defence to an action for restitution of conjugal rights in the case of a European would also be in every case a defence in the case of a Hindu, but the Court is not bound, in the case of Europeans and Indians alike, to order a wife to return to her husband if there is reasonable ground for apprehending that a return to that husband will imperil her safety. *Per* MOOKERJEE, *J.*—The conduct of a Hindu husband, who brings a low caste woman as his mistress in the house to live with him as a member of the family, and expels his wife and son from the family residence, amounts to cruelty within the meaning of the law, which justifies the wife to live separate from her husband and deprives the husband of his right to a decree for restitution of conjugal rights. The husband would not be entitled to succeed even if his conduct did not amount to cruelty but constituted a grave matrimonial offence. DULAR KOER *v.* DWARKA NATH MISSER (1905) . . **I. L. R. 34 Calc. 971**

HINDU LAW—HUSBAND AND WIFE —*concld.*

2. MISCELLANEOUS CASES.

1. ——— **Succession**—*Effect of a wife deserting her husband and becoming a prostitute. Held*, that the fact of a Hindu woman having deserted her husband and become a prostitute did not have the result of entirely severing all connection between herself and her husband. The husband therefore might still be heir to property acquired by the wife since she left him. *Subbaraya Pillai* v. *Ramasami Pillai, I. L. R. 23 Mad. 171*, and *Bisheshur* v. *Mata Gholam, N.-W. P. H. C. 300*, followed. *Musammat Ganga Jati* v. *Ghasita, I. L. R. 1 All. 16*, referred to. *Tara Munnee Dossea* v. *Motee Buneanee, 7 Sel. Rep. 273*, and *In the goods of Kaminey Money Bewah, I. L. R. 21 Calc. 697*, dissented from. NARAIN DAS *v.* TIRLOK TIWARI (1906) . . . . **I. L. R. 29 All. 4**

2. ——— **Guardianship**—*Rights of husband as legal guardian of wife—Custom for wife to remain in custody of parents until maturity.* Though a husband is the legal guardian of his wife from the moment of his marriage with her, he is, by the general custom prevailing among the Hindu community in the Madras Presidency, not entitled to the actual custody of his wife until she attains maturity, unless such custody should be necessary in the interests of the girl. ARUMUGA MUDALI *v.* VIRARAGHAVA MUDALI (1900)

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——— impartible property—

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——— religious persons (ascetics)—

See LETTERS OF ADMINISTRATION. **I. L. R. 28 Calc. 608**

1. AUTHORITIES ON LAW OF INHERITANCE.

1. ——— **Law in Western India**—*Comparative authority of Mitakshara and Mayukha in South Maratha country.* In Western India, on questions of inheritance, the first place is assigned to the Mitakshara, and only a subordinate, though still an important one, to the Mayukha, on the authority of the responses delivered officially by the shastris of the Courts and oral statements of persons learned in the Hindu law of this Presidency. *Babaji Kashinath* v. *Anandrav Bhaskar, unreported,* commented upon. KRISHNAJI VYANKTESH *v.* PANDURANG. PANDURANG *v.* KRISHNAJI VYANKTESH **12 Bom. 65**

2. ——— **Commentaries and text-books**—*Mitakshara—Mayukha — Usage.* The commentaries and text-books embody, in many instances, the rules formed and enforced by custom, but custom, even on Hindu principles, may and must have power without their aid. They do not govern the usage of the country, save by a reflex process; it is the usage which adopts them, and they are law only because of this adoption, in the sense and within limits according to which their rules are accepted. Not merely the reception, but the exact extent of the reception, of any law book is governed by usage. In the Maratha country the Mitakshara is the principal authority upon Hindu law; but in doubtful cases it may properly be construed by the light of the Mayukha, the usage of the country having adopted the latter as well as the former. This course was followed in *Vinayak Anandrav* v. *Lakshmibai, 1 Bom. 118,* where a different construction of the Mitakshara was allowed to prevail in Bombay from that which had been adopted for Bengal. BHAGIRTHIBAI *v.* KAHNUJIRAV . . . . **I. L. R. 11 Bom. 285**

3. ——— **Comparative authority of the Mitakshara and the Mayukha in the Ratnagiri District.** The Ratnagiri District forms part of the Maratha country where the doctrines of the Mitakshara are paramount, and where the Mayukha, notwithstanding the eminent position it has gained, is still a secondary authority. BALKRISHNA BAPUJI APTE *v.* LAKSHMAN DINKAR **I. L. R. 14 Bom. 605**

JANKIBAI *v.* SUNDRA . **I. L. R. 14 Bom. 612**

2. LAW GOVERNING PARTICULAR CASES.

1. ——— **Mitakshara law**—*Presumption where that law prevails.* In the absence of all evi-

HINDU LAW—INHERITANCE—*contd.*

2. LAW GOVERNING PARTICULAR CASES —*contd.*

dence to the contrary, a Hindu must be considered to be governed by the Mitakshara law where it prevails. JUGO BUNDHOO TEWAREE *v.* KURUM SINGH . . . . . **24 W. R. 341**

2. ——— **Lands transferred to district having different law of succession**—*Presumption against change of law.* When lands situate in one district are arbitrarily transferred by Government to another having a different system of law in matters of succession, the owners of those lands cannot be presumed to change their observances with their districts; the presumption being against such change. PRITHEE SINGH *v.* COURT OF WARDS . . . . . **23 W. R. 272**

3. ——— **Local or family custom.** In a case where the question was as to the right of succession to an estate held by *S*, the common ancestor of the plaintiff and the defendant, which estate was formerly within zillah Beerbhoom and subject to the law of the Dayabhaga, but was transferred to zillah Bhagulpore, the High Court refused to go into the question of the transfer, and *held* the case was to be governed by the Mitakshara law, as being that in force in zillah Bhagulpore. The Privy Council remanded the case for a decision on the effect of the transfer, and as to whether the succession thereby became regulated by the Mitakshara law, or whether, by reason of any local or family custom, it continued to be governed by the Dayabhaga. SHEO SOONDOOREE *v.* PIRTHEE SINGH **21 W. R. 89**

s.c. in High Court, PIRTHEE SINGH *v.* SHEO SOONDERY . . . . . **8 W. R. 261**

4. ——— **Law governing case**—*Inheritance—Bengal or Mithila law.* The question being whether the succession in this case was regulated by the Bengal or Mithila law:—*Held,* in accordance with the Court below, after an examination of the whole evidence, that the Mithila law was applicable. PADMAVATI *v.* DOOLER SINGH **7 W. R. P. C. 41 : 4 Moo. I. A. 259**

5. ——— **Dayabhaga or Mitakshara.** The question being whether the descent in the family in this case was to be regulated by the Dayabhaga or the Mitakshara:—*Held,* upon the evidence, that the Dayabhaga applied to the decision of the cause. DIBEAH *v.* KOOND LUTA **7 W. R. P. C. 44 : 4 Moo. I. A. 292**

6. ——— **Mithila law**—*Preference of paternal to maternal lines—Migration.* By the Hindu law in force in Mithila or Tirhoot the right of succession vests in the descendants in the paternal line in preference to those in the maternal line; and such law continues to regulate the succession to property in a family who have migrated from that district, but have retained the religious observances and ceremonies of Mithila. A suit having been instituted to recover the estate of a Hindu Mithilese by the maternal first cousin of the

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HINDU LAW—INHERITANCE—*contd.*

2. LAW GOVERNING PARTICULAR CASES —*concld.*

last male proprietor who claimed to be entitled according to the law in force in Bengal:—*Held*, by the judicial committee, affirming the judgment below, that, according to all the authorities, the shasters of Mithila were to govern the succession, and that by them the party in possession, being descended in the sixth degree in the paternal line, was to be preferred to one in the maternal line; notwithstanding that part of the property was locally situate in Bengal, and that the last proprietor was domiciled there. RUTCHEPUTTY DUTT JHA *v.* RAJUNDUR NARAIN RAE . **2 Moo. I. A. 132**

7. ———— Evidence showing what law governs family—*Inheritance.* Proof of the fact that, in matters connected with succession, the law of the country of domicile has been adopted by a family, negatives any presumption arising from the observance of ancient customs in other matters. CHUNDRO SEEKHUR ROY *v.* NOBIN SOONDUR ROY **2 W. R. 197**

8. ———— Usage of the country. No statute law exists regulating the devolution of property amongst Hindus. The law, therefore, to be applied in cases of inheritance is the usage of the country in which the suit arises (*see* Bom. Reg. II of 1826, s. 26). The commentaries and text-books embody in many instances the rules formed and enforced by custom, but custom, even on Hindu principles, may and must have power without their aid. They do not govern the usage of the country, save by a reflex process; it is the usage which adopts them, and they are law only because of this adoption in the sense and within the limits according to which their rules are accepted. Not merely the reception, but the exact extent of the reception of any law book is governed by usage. BHAGIRTHIBAI *v.* KAHNUJIRAV . . . **I. L. R. 11 Bom. 285**

3. SPECIAL LAWS.

(*a*) COORG.

1. ———— Inheritance, law of—*Mitakshara law.* The ex-Rajah of Coorg died in England in 1859, leaving considerable moveable property which he had himself acquired and accumulated, chiefly by means of his pensions and some ancestral jewels and ornaments. By his last will and testament he left all his property to trustees in trust to pay thereout certain legacies, and to divide the residue in certain proportions among various members of his family. Some difficulty having arisen after his death regarding the distribution of his estate, the Court of Chancery stated a case and propounded certain questions under 22 and 23 Vict., c. 63, for the opinion of Her Majesty's late Supreme Court at Fort William in Bengal, with reference to the Hindu law as administered by that Court, and so far as the same was applicable to the facts set forth in the case stated. The first and chief question

HINDU LAW—INHERITANCE—*contd.*

3. SPECIAL LAWS—*contd.*

(*a*) COORG—*concld.*

propounded was—"What school of Hindu law would govern the succession to the estate of the deceased Rajah, and the rights and interests of the members of his immediate family with reference to the will and facts stated, and also supposing he had died without having made any testamentary disposition of his property?" In answer to this question, the Court held that the doctrines of the Benares School of Hindu law, as laid down in the Mitakshara, should govern the decision of the case regarding the succession to the estate of the deceased Rajah, on the ground that the Mitakshara is the leading authority of Hindu law throughout Southern India as well as Benares, and that the Court had no reason to suppose that the doctrines of the Mitakshara had been in any way varied or altered by any text-book recognized as an authority in Coorg, although some variations prevail in various parts of Southern India. The Court were further of opinion that the doctrines of the same school of Hindu law would govern the case, supposing the Rajah died without having made any testamentary disposition of his property. The succession to the property of a Hindu is governed by the laws which regulate his religious rites and ceremonies, and not by the domicile of himself or his family. LOGIN *v.* PRINCESS VICTORIA GOURAMMA OF COORG . . . **1 Ind. Jur. O. S. 109**

(*b*) CUTCHI MEMONS.

2. ———— *Absence of special custom.* In the absence of proof of any special custom of inheritance, the Hindu law of inheritance applies to Cutchi Memons. ASHABI *v.* TYEB HAJI RAHIMTULLA . . **I. L. R. 9 Bom. 115**

ABDUL CADUR HAJI MAHOMED *v.* TURNER **I. L. R. 9 Bom. 158**

See, however, *In re* ISMAEL **I. L. R. 6 Bom. 452**

3. ———— *Custom—Joint family—Joint and ancestral property.* Cutchi Memons are governed by the Hindu law of inheritance in the absence of proof of special custom. A custom alleged to exist among Cutchi Memons of recognizing no difference between ancestral and self-acquired property held not proved. Four brothers of the Cutchi Memon community carried on trade with capital inherited from their father. Large profits were made in the course of business. It was alleged that some of the profits were made by means of borrowed capital, and some arose out of a commission business in which the capital of the firm was not used at all; and it was contended that such profits could not be considered as ancestral funds. It appeared, however, that the entire business was carried on by the same firm. There were common books, common expenses, and a common staff.

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3. SPECIAL LAWS—*contd.*

(*b*) CUTCHI MEMONS—*concld.*

The borrowed money was put into the general cash with the original capital. *Held*, that the whole property was ancestral. Augmentations which blend, as they accrue, with the original estate partake of the character of that estate. Moreover, the loans in question and the extension of business to which they led might have produced heavy losses instead of great profits, and the family property would have been liable to debts so incurred. The family property being thus subject to liabilities arising from the loans, was entitled to participate in any benefits resulting from them. MAHOMED SIDICK *v.* AHMED. ABDULA HAJI ABDSATAR *v.* AHMED . . . . **I. L. R. 10 Bom. 1**

(*c*) JAINS.

4. ———— **Widow claiming separate property of husband.** In the absence of evidence to the contrary, the rules of inheritance of the Jains must be taken to be the same as those of the orthodox Hindus in that part of the country in which the property is situate. Therefore, where the widow of a Jain claimed as heiress of her husband, who was separate in estate, property situate in a district in which the Mitakshara prevails:—*Held*, that she was entitled to succeed. LALLA MAHABEER PERSHAD *v.* KUNDUR KOONWAR **2 Ind. Jur. N. S. 312 : 8 W. R. 116**

5. ———— **Custom.** In the absence of proof of special custom varying the ordinary Hindu law of inheritance, that law is to be applied to Jains. CHOTAY LALL *v.* CHUNNOO LALL **I. L. R. 4 Calc. 744 : 3 C. L. R. 465**

BACHEBI *v.* MAKHAN LALL **I. L. R. 3 All. 55**

LALLA MAHABEER PERSHAD *v.* KUNDUR KOONWAR . **2 Ind. Jur. N. S. 312 : 8 W. R. 116**

MANDIT KOER *v.* PHOOL CHAND LAL **2 C. W. N. 154**

RUKHAB *v.* CHUNILAL AMBUSHET **I. L. R. 16 Bom. 347**

6. ———— **Mitakshara law**—*Absence of special custom.* They are governed by Mitakshara law in the absence of custom to the contrary. BACHEBI *v.* MAKHAN LAL . **I. L. R. 3 All. 55**

7. ———— **Gujarati Jains settled in Belgaum**—*Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Dassa Porwad caste of Jains.* The Courts in India have always recognized the existence of four castes, *viz.*, Brahmins, Kshatriyas, Vaishyas, and Shudras. Jains are dissenters and are mostly of Vaishya origin. A Jain converted into orthodox Hindu faith returns to the caste from which he traces his first descent. The four main divisions of Jains are: Pramar, Oswal, Agarwal, and Khandewal. Unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. Ordinary Hindu law is that of the three superior castes. Under the ordinary Hindu law, illegitimate sons do not inherit, but are only entitled to maintenance. *Held*, that a Jain of the Dassa Porwad caste was governed by the general Hindu law applicable to the three regenerate castes, being, though not a Brahmin, certainly not a Shudra, but a Vaishya by origin, and having as such carried this law with him from Gujarat to the Belgaum District. *Held*, therefore, that his widow was his sole heir, and that his illegitimate sons were only entitled to maintenance. *Quære:* Whether even among Shudras the widow is altogether excluded from inheritance by illegitimate sons? *Rahi* v. *Govinda, I. L. R. 1 Bom. 97*, doubted. AMBABAI *v.* GOVIND . . . **I. L. R. 23 Bom. 257**

(*d*) KANARA.

8. ———— **Inheritance of females**—*Aliyasantana law.* In Kanara females only are recognized as the proprietors of family property. The Aliyasantana system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females. MUNDA CHETTI *v.* TIMAJU HENSU . . . **1 Mad. 380**

(*e*) MOLESALAM GIRASIAS.

9. ———— **Hindu converts to Mahomedanism**—*Retention of Hindu law and usages.* The Hindu law of inheritance and succession applies to Molesalam Girasias who were originally Rajput Hindus, but were subsequently converted to Mahomedanism. FATESANGJI JASVATSANGJI *v.* KUVAR HARISANGJI FATESANGJI . **I. L. R. 20 Bom. 181**

(*f*) NAMBUDRIS.

10. ———— **Law governing Nambudri Brahmins.** Nambudri Brahmins are governed by Hindu law, as modified by special customs adopted by them since their settlement in Malabar. VASUDEVAN *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 11 Mad. 157**

(*g*) NIHANGS.

11. ———— **Nihangs in Gorakhpur**—*Alleged mode of succession to property by survivorship among a brotherhood of Nihangs—Failure to prove that the deceased, who possessed property, was a member.* The plaintiffs claimed that they as members of a fraternity of Nihangs were, on the decease of another member, entitled to the succession to the property possessed by him according to rules of inheritance prevailing in their religious brotherhood. They thus claimed to exclude the defendant,

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HINDU LAW—INHERITANCE—*contd.*

3. SPECIAL LAWS—*contd.*

(*g*) NIHANGS—*concld.*

an alleged son of the deceased. This son, who was a minor, was in possession through his mother and guardian. The Judicial Committee, without deciding as to the alleged mode of succession to property among Nihangs forming this brotherhood, affirmed the decision of the High Court that it had not been proved that the deceased was a member of the sect, and on this ground the dismissal of the suit was maintained. GAJRAJ PURI *v.* ACHAIBAR PURI
I. L. R. 16 All. 191
L. R. 21 I. A. 17

(*h*) RAJBANSIS.

12. ———— Family adopting Hindu religion—*Custom.* In the absence of any custom to the contrary, or of any satisfactory evidence to show what form of Hindu law they have adopted, the members of a family who have adopted the Hindu religion are governed by the school of Hindu law in force in the locality where they reside. *Fanindra Deb Raikat* v. *Rajeswar Das, I. L. R. 11 Calc. 463 : L. R. 12 I. A. 72.* RAM DAS *v.* CHANDRA DASSIA . **I. L. R. 20 Calc. 409**

(*i*) SADHS.

13. ———— Inheritance, law of—*Absence of special custom. Held,* that the Hindu law of inheritance was presumably applicable to the parties, and the defendant had not shown that any custom among the Sadhs having the force of law prevailed opposed to the Hindu law. GOPI CHAND *v.* SUJAN KUAR . . **I. L. R. 8 All. 646**

(*j*) SAKULDIPI BRAHMINS.

14. ———— Mitakshara law. The tribe of Brahmins called Sakuldipi living in various parts of Northern India are governed by the Mitakshara school of Hindu law. RUDER PERKASH MISSER *v.* HARDAI NARAIN SAHU
9 C. L. R. 16

(*k*) SARAOGIS.

15. ———— Custom—*Saraogis—Alleged custom of exclusion of daughters from inheritance to their fathers, set up but not proved. Semble:* That no custom exists in the North-Western Provinces of India amongst the members of the *Saraogi* community by reason of which females are excluded from inheriting the property of their fathers. BANSI LAL *v.* DHAPO (1902)
I. L. R. 24 All. 242

(*l*) SUNI BORAH MAHOMEDANS.

16. ———— Hindu converts to Mahomedanism—*Effect of conversion—Custom and usage of inheritance.* The Suni Borah Mahomedan community of the Dhandpudra talukh in Gujarat are governed by the Hindu law in matters of succession and inheritance. BAI BAIGI *v.* BAI SANTOK
I. L. R. 20 Bom. 53

HINDU LAW—INHERITANCE—*contd.*

3. SPECIAL LAWS—*concld.*

(*l*) SUNI BORAH MAHOMEDANS—*concld.*

4. MIGRATING FAMILIES.

1. ———— Hindu family migrating—*Presumption as to law applicable.* In a case where a Hindu family migrates from one territory to another, if they preserved their ancient religious ceremonies they also preserve the law of succession. The presumption is, until the contrary be proved, that the family so migrating have brought with them, and retain, all their religious ceremonies and customs; especially when the family is shown to have brought with it its own priests, who, and descendants after them, continued their ministrations down to the period of contest. JUNARUDDEEN MISSER *v.* NOBIN CHUNDER PERDHAN
Marsh. 232 : 1 Hay 534

S.C. OOTUM CHUNDER BHUTTACHARJEE *v.* OBHOY CHURN MISSER. NOBIN CHUNDER PERDHAN *v.* JANARDHUN MISSER . . **W. R. F. B. 67**

SONATUN MISSER *v.* RUTTUN MOLLAH
W. R. 1864, 95

2. ———— Laws of origin and domicile. Hindu families are ordinarily governed by the law of their origin, not by that of their domicile. The presumption is in favour of the law of origin until the adoption of the law of a new domicile is proved. LUKKEA DEBEA *v.* GUNGAGOBIND DOBEY . . . . **W. R. 1864, 56**

PIRTHEE SINGH *v.* SHEO SOONDUREE
8 W. R. 261

S.C. in Privy Council, where it was remanded. SHEO SOONDUREE *v.* PIRTHEE SINGH
21 W. R. 89

3. ———— Adoption of local custom. Where a Hindu family came from the Punjab accompanied by their priests at a time when they were not governed by the Bengal law, and it was afterwards alleged that they were now governed by that law, the onus of proving the allegation was held to be with those who made it. The mere adoption of local customs and observances of occasional local festivals and ceremonies would not prove that the law which originally governed a family had been set aside and another law substituted. HURO PERSHAD ROY CHOWDHRY *v.* SHIBO SHUNKUREE CHOWDHRAIN . **13 W. R. 47**

See SURENDRA NATH ROY *v.* HIRAMANI BURMONI
1 B. L. R. P. C. 26
10 W. R. P. C. 35 : 12 Moo. I. A. 81

4. ———— Presumption of importing its own laws—*Rebutting presumption.* The presumption that a Hindu family, immigrating

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HINDU LAW—INHERITANCE—*contd.*

4. MIGRATING FAMILIES—*contd.*

into Bengal from the North-Western Provinces, imports its own customs and law as regulating the succession and the ceremonies of Hindu law in that family, may be rebutted by showing that, except as regards marriage, all other ceremonies are performed according to the law of the Bengal school and by Bengal priests. RAM BROMO PUNDAH *v.* KAMINEE SOONDERY DOSSEE . . . **6 W. R. 295**

5. ———— **Presumption as to change in law.** When a family originally migrated from the Mithila province to the province of Bengal, the presumption is that they have preserved the religious rights and customs prescribed by the Mitakshara law, unless the contrary be proved. KOOMUD CHUNDER ROY *v.* SEETAKANTH ROY **W. R. F. B. 75**

6. ———— **Migration from N.-W. P. to Bengal**—*Mitakshara and Dayabhaga laws. Held,* that, although a family migrating from the North-West Provinces to Bengal would ordinarily remain governed by the Mitakshara law, the Dayabhaga law was, under circumstances of this case, applicable to a family so migrating. HEERAMONEE BRAHMINEE *v.* NUFFAREE BRAHMINEE **1 Hay 292**

The Privy Council, however, without deciding which law prevailed, seem to have doubted whether the decision of the High Court was correct on the evidence. SURENDRANATH ROY *v.* HIRAMANI BURMONI . . . **1 B. L. R. P. C. 26 10 W. R. P. C. 35 : 12 Moo. I. A. 81**

7. ———— *Presumption as to law governing family settling in province other than that of its origin—Mitakshara and Dayabhaga laws—Succession to ancestral estate—Impartible zamindari—Brother—Widow—Succession to self-acquired property by Mitakshara law.* If Hindu families migrate from one part of the country to another, the presumption is that they carry with them the laws and customs as to succession prevailing in the province from which they came. Where a family migrated from the North-Western Provinces, where the *Mitakshara* law prevailed, and settled in the Jungle Mahals of Midnapore: *Held,* that the presumption is that it continued to be governed by the *Mitakshara* law. *Held,* also, that this presumption is supported by (*a*) previous instances of succession in the family which had followed that law rather than the *Dayabhaga* law; (*b*) testimony as to the observance of rites and ceremonies, at marriages, births and deaths, which showed a strong body of affirmative evidence in favour of the continuance and against the relinquishment of *Mitakshara* law in the family; and (*c*) documentary evidence pointing to the same conclusion. *Held,* further, that, the succession being governed by the *Mitakshara* law, the brother and not the widow was entitled to succeed to the ancestral estate of the last male holder of an impartible *zamindari* which by custom was held by one member of the family.

HINDU LAW—INHERITANCE—*contd.*

4. MIGRATING FAMILIES—*concld.*

Held, also, that immoveable property which had been purchased by the Court of Wards during the minority of the last holder, out of the savings from the ancestral estate, were his self-acquired property, there being no sufficient evidence of any intention to incorporate it with the ancestral *zamindari* estate. Succession to such property follows the rule of the *Mitakshara* law as to self-acquired property. PARBATI KUMARI DEBI *v.* JAGADIS CHUNDER DHABAL (1902)
I. L. R. 29 Calc. 433 : s.c. 6 C. W. N. 490 L. R. 29 I. A. 82.

5. MODIFICATION OF LAW.

1. ———— **Consent**—*Modification of operation of law.* The operation of the law of inheritance can be modified by consent of the parties. MAHERBAN SINGH *v.* SHEO KOONWAR . **1 Agra 106**

2. ———— **Waiver of rights**—*Absence of special custom.* In the absence of any evidence of special custom :—*Held,* that a nephew could not inherit the tenant-right from his uncle whose legal heirs were his sons, nor could the latter transfer their right of inheritance to their cousin, or confer on him such a right by consenting to his occupation of the land. OMRAO SINGH *v.* PERTAB **3 Agra 143**

3. ———— *Waiver of rights acquired by operation of law. Held,* that the plaintiffs were competent to waive their right of inheritance, and that on the construction of a wajib-ul-urz it was not designed to give the widow a right of inheritance in the joint estate in preference to that of the brothers of the deceased contrary to Hindu law. DAL CHUND *v.* SOONDER **2 Agra 173**

4. ———— **Conditions in wajib-ul-urz altering law of inheritance**—*Document intended to record village rights.* Conditions in village administration papers, purporting to interfere with or alter the ordinary rules of descent, will not be enforced. The law of inheritance, whether Hindu or Mahomedan, is a part of the law of this country, and as such overrides the provisions of a document which was not designed to record more than the rights of the village community. Small sections of society cannot be allowed to make special laws of descent for themselves. SARUPI *v.* MUKH RAM **2 N. W. 227**

5. ———— **Private arrangement**—*Alteration of law.* A son by birth or adoption can for adequate reasons be disinherited; but the course of devolution prescribed by the law cannot be altered by a private arrangement; on the disherison of the son, the son's son becomes his grandfather's lawful heir. BALKRISHNA TRIMBAK TENDULKAR *v.* SAVITRIBAI . . . **I. L. R. 3. Bom. 54**

6. ———— **Deed containing restrictions on inheritance.** A deed which attempts to create

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HINDU LAW—INHERITANCE—*contd.*

5. MODIFICATION OF LAW—*concld.*

a new line of inheritance by excluding all heirs other than direct male heirs is contrary to Hindu law and invalid. LAKSHMAKKA *v.* BOGGARAMANNA
I. L. R. 19 Mad. 501

6. GENERAL RULES AS TO SUCCESSION.

1. ——— **Preference of heirs**—*Ability to confer spiritual benefits—Capacity to offer oblations.* The rule of succession as laid down in the Dayabhaga rests upon the great principle of the entire Hindu law of succession to property that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations, either immediately or mediately, confers the right to inherit temporal wealth. MUTTU VIZIA RAGUNADA RANI KOLUNDAPURI NACHIAR *alias* KATTAMA NACHIAR *v.* DORASINGA TEVAR
6 Mad. 310

2. ——— **Spiritual benefit rendered by heir.** *Per* MAHMOOD, *J.*—There is no difference between the Mitakshara and the Bengal schools of Hindu law regarding the principle that the right of inheritance is based on the spiritual benefit which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs. JANKI *v.* NAND RAM . . . . **I. L. R. 11 All. 194**

3. ——— **Bengal school**—*Oblations, offering of.* According to the Bengal school of law, inheritance goes to him who offers oblations to the deceased, or to ancestors of the deceased, in which oblation the deceased would participate. Where more than one person offers such oblations, succession goes to him who offers oblations to the father of the deceased, and an heir who offers such an oblation will be preferred to an heir who offers oblations to the grandfather and great-grandfather of the deceased. PRAN NATH SURMA JOWARDAR *v.* SURUT CHUNDER BHUTTACHARJEE
I. L. R. 8 Calc. 460 : 10 C. L. R. 484

4. ——— *Dayabhaga—Consanguinity—Spiritual benefit.* Under the Bengal school of Hindu law, inheritance depends on consanguinity so far as the near relatives are concerned, but in the case of remoter relations the law falls back on the principle of spiritual benefit. NOGENDRA NANDINI DASSI *v.* BENOY KRISHNA DEB (1902)
I. L. R. 30 Calc. 521 : s.c. 7 C. W. N. 121

5. ——— **Heir of last full owner.** The rule of Hindu law is that in the case of inheritance the person to succeed must be the heir of the last full owner. On the death of the last full owner, his wife succeeds as his heir to a widow's estate ; and on her death the person to succeed is the heir at that time of the last full owner. BHOOBUN MOYE DEBIA *v.* RAM KISHORE ACHARJEE
3 W. R. P. C. 15 : 10 Moo. I. A. 279

HINDU LAW—INHERITANCE—*contd.*

6. GENERAL RULES AS TO SUCCESSION—*contd.*

6. ——— **Mitakshara**—*Survivorship—Inheritance—Succession (Property Protection) Act (XIX of 1841)—District Judge, jurisdiction of—Irregularity—High Court, revisional powers of.* A Hindu governed by the Mitakshara law died leaving him surviving a widow, a daughter by a previous wife, and two brothers. On his death the brothers applied under Act XIX of 1841 to the District Judge for the delivery of possession of the deceased's property on the ground that it formed part of the property in the joint names of their deceased brother and themselves. The District Judge granted their application. The widow contested this claim, and now applied to the High Court to have the order of the District Judge set aside. *Held*, that on the death of a member of a Hindu family governed by Mitakshara, there is only an accession to his property by the other members by survivorship and no succession by inheritance : and that the provisions of Act XIX of 1841 had no application to the present case ; and the District Judge should not have taken any action under this Act but have left the parties to seek their remedy by a proper suit for establishment of their title. *Jusoda Koonwar* v. *Gouree Byjnath Pershad, 6 W. R. Mis. 53*, followed. *Held*, further, that the District Judge acted in the present case (supposing him to have jurisdiction to hear the application) illegally and with material irregularity ; and that the petitioner was prejudiced thereby. *Held*, also, that the High Court had full jurisdiction in revision to set aside the order of the District Judge. *Fulchand* v. *Kismesh Koer, 4 C. W. N. Notes ccxvi*, and *Abdul Rahiman* v. *Kutti Ahmed, I. L. R. 10 Mad. 68*, referred to. SATO KOER *v.* GOPAL SAHU (1907) . **I. L. R. 34 Calc. 929**

7. ——— **Spiritual efficacy, doctrine of**—*Inheritance—Propinquity—Affection—Natural justice—Mitakshara, principle of, applicable, where Dayabhaga silent—Reunion.* Mere spiritual benefit is not always the guiding principle of inheritance under the Bengal school of Hindu law. Propinquity has also been accepted in the Bengal school as a principle of succession. *Toolsee Dass Seal* v. *Luckhymoney Dassee, 4 C.W.N. 743*, referred to. In cases not contemplated by Jimutavahana or his followers, the law should be interpreted on rational lines consistently with the principles followed in similar cases, and the decision of our Courts should not be based on a blind adherence to the principle of spiritual efficiency as it may lead to the violation of other recognised principles consistent with natural justice. In all cases of absence of any express texts or precedents under the Dayabhaga law, Courts should have recourse to the theory of propinquity and natural love and affection, as adopted by Vijnaneswara and the commentators of the more ancient and orthodox schools of Hindu law. Reunion, the Sanskrit word being *samsrista*, implies a state of union or jointness, a partition and a subsequent

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HINDU LAW—INHERITANCE—*contd.*

6. GENERAL RULES AS TO SUCCESSION—*concld.*

state of jointness amongst co-parceners by mutual consent and through affection, and one, who is never joint, cannot afterwards be said to be reunited or *samsrist. Balabux* v. *Rukmabai, I. L. R. 30 Calc. 7 ; L. R. 30 I. A. 130,* followed. AKSHAY CHANDRA BHATTACHARYA *v.* HARI DAS GOSWAMI (1908) . . . . **I. L. R. 35 Calc. 721 s.c. 12 C. W. N. 511**

7. GENERAL HEIRS.

(*a*) BANDHUS.

1. ——— **Enumeration of bandhus** —*Mitakshara.* The enumeration of bandhus, or cognate kindred, given in Mitakshara II, s. 6, art. 1, is not exhaustive. GRIDHAREE LALL ROY *v.* GOVERNMENT OF BENGAL **1 B. L. R. P. C. 44 : 10 W. R. P. C. 31**

Reversing decision of High Court in GOVERNMENT *v.* GRIDHAREE LAL ROY . . **4 W. R. 13**

2. ——— *Bandhu ex parte paterna—Bandhu ex parte materna—Son of a sister—Sister's daughters.* Suit filed in 1891 to recover possession of certain land, the property of a Hindu, who died an infant, leaving him surviving his adoptive mother, who entered into possession and enjoyed the property till her death in 1890. It appeared (i) that in 1861 the deceased and his adoptive mother had conveyed absolutely certain of the properties to the widow of one of his first cousins on his adoptive father's side for her maintenance and that of her daughter, and that it had been assigned by her to *A, B,* and *C ;* (ii) that other portions of the property had been conveyed in 1889 by the same persons, with the concurrence of *D,* as a gift to the daughters of the adoptive sisters of the deceased ; (iii) that *D* was the son of a sister of the adoptive mother. The plaintiffs were grandsons of the brother of the deceased's adoptive father, being respectively the sons of his daughters. *Held,* (1) that the plaintiffs, being bandhus *ex parte paterna,* were preferential heirs to *D,* who was a bandhu *ex-parte materna ;* (2) that the sister's daughters had no title, whether by the law of inheritance or under the gift asserted by them. SUNDRAMMAL *v.* RANGASAMI MUDALIAR **I. L. R. 18 Mad. 193**

3. ——— **Father's sister's daughter's son**—*Bhinna gotra-sapinda—Succession of cognates. H,* a Hindu, died leaving a widow and a son of a first cousin, *viz.,* the son of his father's sister's daughter. *Held,* that, on the death of the widow, the latter, *viz.,* the son of his father's sister's daughter, being a bandhu or bhinna gotra-sapinda of *H,* was entitled to succeed to his property. In regard to the succession of cognates, there seems no difference in the rules laid down in the Mayukha and the Mitakshara, and under the Mitakshara law succession depends upon propinquity and not upon religious efficacy. PAROT BAPALAL SEVAKRAM *v.* MEHTA HARILAL SURAJRAM **I. L. R. 19 Bom. 631**

HINDU LAW—INHERITANCE—*contd.*

7. GENERAL HEIRS—*contd.*

(*a*) BANDHUS—*concld.*

4. ——— **Maternal uncle**—*Succession of bandhu—Priority of mother's half-brother over sons of father's paternal aunt—Mitakshara law.* The statement of bandhus entitled to inherit given in the Mitakshara, Ch. II, s. 6, is not an exhaustive one. The maternal uncle of the deceased is omitted, but the sons of that uncle are specified. The omission to mention a maternal uncle does not signify that he is excluded from the first class of bandhus. The grounds of the judgment in *Gridhari Lal Roy* v. *Government of Bengal, 1 B. L. R. P. C. 44 : 12 Moo. I. A. 448,* apply not only to the heirship of a maternal uncle as against the claim in default of heirs, but also apply equally to questions between nearer and more remote bandhus. A maternal uncle is accordingly an heir, though not specified in the Mitakshara list, and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than he is. A mother's brother by the half-blood stands on the same footing as her whole brother in regard to priority over more remote bandhus. A half-brother may be postponed to a whole-brother, but there is no ground for his postponement to more distant kinsmen. MUTHUSAMI MUDALIAR *v.* SIMAMBEDU MUTHUKUMARASWAMI MUDALIAR . **I. L. R. 19 Mad. 405 L. R. 23 I. A. 83**

5. ——— **Daughter's son's son**—*Mitakshara—Succession of bandhus—Daughter's son's son entitled to preference over daughter's daughter's son—Variance between pleading and proof.* A plaintiff who sues on and fails to prove an alleged gift, may rely on his title by inheritance. Under the Mitakshara law among persons claiming to succeed as bandhus, preference may be extended so as to prefer all other considerations being equal, that claimant between whom and the stem there intervenes one female link to that claimant who is separated from the stem by two such links. A daughter's son's son will have preference over a daughter's daughter's son. TIRUMALACHARIAR *v.* ANDAL AMMAL (1907) **I. L. R. 30 Mad. 406.**

(*b*) GENTILES AND COGNATES.

6. ——— **Preference of heirs**—*Gentiles —Cognates.* In looking for an heir under Hindu law the gentiles must be exhausted before the cognates are entitled to succeed. DIGDAYI *v.* BHATAN LAL **5 B. L. R. 448 note ; 11 W. R. 500**

(*c*) SAMANODAKAS.

7. ——— **Definition of samanodakas** —"*Gotra*" *of deceased person.* "Samanodakas"

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HINDU LAW—INHERITANCE—*contd.*

7. GENERAL HEIRS—*contd.*

(*c*) SAMANODAKAS—*concld.*

(or persons allied by a common oblation of water) belonging to the "gotra" (race or general family) of a deceased person are, according to Hindu law, sufficiently cognate to succeed to property in default of parties nearer of kin. NURSING NARAIN *v.* BHUTTUN LALL **W. R. 1864, 194**

8. ——— *Preference of, to bandhus or bhinna gotra-sapindas—Vatan service, alienability of, beyond lifetime by will—Effect of subsequent change in the tenure rendering it alienable.* The word "samanodakas," meaning literally those participating in the same oblation of water, includes descendants from a common ancestor more remotely related than the thirteenth degree from the propositus. One *P* died childless, devising his entire property, including his right to receive annually a certain desaigiri cash allowance, to the plaintiff's husband after the death of his (testator's) widow, *B A*. The testator and the plaintiff's husband were great-grandsons of one *K* by his son and daughter respectively. The plaintiff's husband having predeceased *B A*, she made another will in favour of the plaintiff. Subsequently *B A* died. The plaintiff thereupon brought a suit against the defendants, claiming the aforesaid cash allowance and arrears under these wills and as heir of *P*. The defendants, who were distant cousins of *P*, being related to him beyond the thirteenth degree, *inter alia* contended that the wills were invalid, as *P*, when he made the will, had only a life-interest in the vatan, which was a service vatan, and that they were nearer heirs to *P* than the plaintiff who was a bhinna gotra-sapinda or bandhu of *P*. Both the lower Courts rejected plaintiff's claim. The plaintiff appealed to the High Court. *Held*, confirming the decree of the lower Court, that plaintiff's claim should be disallowed. The alienation by will by *P* of what was then a vatan held for service, being in its inception invalid as against his heirs, did not become valid because of a change in the tenure of the estate after his life-interest had terminated. *B A*, the widow of *P*, had nothing more than a widow's estate incapable of alienation beyond her lifetime, and therefore the wills executed by her were invalid. The case was one to be determined by the Hindu law of inheritance. The defendants, though more than thirteen degrees removed from *P*, were included in the term "samanodakas," and as such had a claim to the estate of *P* superior to that of the plaintiff or her deceased husband as his bandhus. BAI DEVKORE *v.* AMRITRAM JAMIATRAM **I. L. R. 10 Bom. 372**

9. ——— **Collateral distant relation** —*Right to share.* A descendant of a brother of the original acquirer, and a descendant not less than six generations, are not entitled under Hindu law to a share of the property. CHYTUN MYTEE *v.* LUKHEE CHURN PATNAIK . . . . **8 W. R. 258**

HINDU LAW—INHERITANCE—*contd.*

7. GENERAL HEIRS—*contd.*

(*d*) SAPINDAS.

10. ——— **Definition of sapindas.** The author of the Mitakshara in v. 3, s. 5, Ch. II, uses the word "sapinda" in the sense of "connection by particles of one body," and not in the sense of "connection by funeral oblations." In order to determine whether a person is a "sapinda" of the propositus within the meaning of the definition given by the author of the Mitakshara in Acharakanda (chapter treating of rituals), it is necessary to see whether they are related as "sapindas" to each other, either through themselves or through their mothers and fathers. UMAID BAHADUR *v.* UDOI CHAND *alias* MUNMUN **I. L. R. 6 Calc. 119 : 6 C. L. R. 500**

11. ——— **Sapindas tracing relationship to common ancester through two females.** The widow of a Hindu having acquired property from her husband, and having died issueless without disposing of it, the plaintiffs claimed, as the heirs of the husband, to recover it from the defendants, who were the brother and sister of the widow. The plaintiffs were found to be the sons of the daughter's daughter of the husband's paternal grandfather. *Held*, that, inasmuch as plaintiffs were sapindas of the deceased husband, it was immaterial that their relationship to the common ancestor should have to be traced through two females. They must therefore be held to be his bandhus and, as such, entitled to succeed to the property left by the widow. VENKATAGIRI *v.* CHANDRU **I. L. R. 23 Mad. 123**

12. ——— **Preference among sapindas.** Amongst sapindas the nearest sapinda excludes those more remote. KHETTUR GOPAL CHATTERJEE *v.* POORNOO CHUNDER CHATTERJEE **15 W. R. 483**

13. ——— **Extent of right of succession of sapindas.** Regarding the right of succession of sapindas :—*Held*, that the relationship extends to the sixth in descent below the point of divergence of the two lines. The rule laid down by the Smriti Chandrika and the literal language of the Mitakshara in Ch. II, s. 5, not followed. PARASARA BHATTA *v.* RANGARAJA BHATTA **I. L. R. 2 Mad. 202**

14. ——— **Gotraj-sapindas**—*Males excluding females.* The females in each line of gotrajas are excluded by any males existing in that line within the limits to which the gotraj relationship extends. RACHAVA *v.* KALINGAPA **I. L. R. 16 Bom. 716**

15. ——— *Succession among the remoter gotraj-sapindas—Succession per capita and per stirpes.* Among the remoter gotrajsapindas the inheritance goes *per capita* and not *per stirpes.* NAGESH *v.* GURURAO . **I. L. R. 17 Bom. 303**

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HINDU LAW—INHERITANCE—*contd.*

7. GENERAL HEIRS—*concld.*

(*d*) SAPINDAS—*concld.*

16. ———— **Grandson of brother**—*Mitakshara—Succession—Question of priority between the son of the paternal uncle of the deceased and his brother's grandson. Held*, that, according to the Hindu law of the *Mitakshara* school, the grandson of a brother is a nearer *sapinda* than the son of a paternal uncle. *Sambhoo Dutt Singh* v. *Jhoottee Singh, (1855) S. D. A. L. P. 382; Rutcheputty Dutt Jha* v. *Rajunder Narain Rae, 2 Moo. I. A. 133; Kureem Chand Gurain* v. *Oodung Gurain, 6 W. R. C. R. 158; Oorhya Kooer* v. *Rajoo Nye, 14 W. R. 208; Bhyah Ram Singh* v. *Bhyah Ugur Singh, 13 Moo. I. A. 373*; and *Suba Singh* v. *Sarfaraz Kunwar, I. L. R. 19 All. 215*, referred to. *Surya Bhukta* v. *Lakshminarasomma, I. L. R. 5 Mad. 291*, dissented from. KALIAN RAI *v.* RAM CHANDAR (1901) . . . . **I. L. R. 24 All. 128**

8. SPECIAL HEIRS.

(*a*) MALES.

1. ———— **Adopted son**—*Kinsmen.* An adopted son represents his adoptive father, and is entitled to the share which his father would have obtained. When he comes to share with heirs other than the legitimately-begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would take. TARA MOHUN BHUTTACHARJEE *v.* KRIPA MOYEE DEBIA **9 W. R. 423**

2. ———— *Right of one of family from which he was adopted.* A member of a Hindu family cannot, as such, inherit the property of one taken out of that family by adoption. The severance of an adopted son from his natural family is so complete that no mutual rights as to succession to property can arise between them. SRINIVASA AYYANGAR *v.* KUPPAN AYYANGAR. RAYAN KRISHNAMACHARIYAR *v.* KUPPANNAYYANGAR **1 Mad. 180**

3. ———— *Adoptive mother's father—Brother.* An adopted son does not succeed to the estate of his adoptive mother's father in preference to the son's son of the brother of the adoptive mother's father. CHINNARAMAKRISTNA AYYAR *v.* MINATCHI AMMAL **7 Mad. 245**

4. ———— *Mitakshara law.* An adopted son under Dattaka Mimansa and Mitakshara succeeds to property to which his adopted mother succeeded as the heiress of her father. SHAM KUAR *v.* GAYA DIN . **I. L. R. 1 All. 255**

5. ———— *Succession of adopted son to relatives of adoptive mother.* According to Hindu law, an adopted son takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son. *Morun Moyee Debea* v. *Bejoy Kristo Gossamee, W. R. F. B. 121*, and *Chinnaramakristna Ayyar* v. *Minatchi Ammal, 7 Mad. 245*, overruled. UMA SUNKER MOITRO *v.* KALI KOMUL MOZUMDAR **I. L. R. 6 Calc. 256 : 7 C. L. R. 145**

Confirmed by Privy Council, KALI KOMUL MOZUMDAR *v.* UMA SUNKER MOITRO **I. L. R. 10 Calc. 232 : 13 C. L. R. 379 L. R. 10 I. A. 138**

JOYKISHORE CHOWDHRY *v.* PANCHOO BABOO **4 C. L. R. 538**

6. ———— *Share on death of one more than three generations from common ancestor.* An adopted son is not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor. MOKUNDO LALL ROY *v.* BYKUNT NATH ROY **I. L. R. 6 Calc. 289 : 7 C. L. R. 478**

7. ———— *Collateral inheritance.* An adopted son inheriting collaterally along with collateral heirs is entitled to receive the same share as the other heirs. The Dattaka Chandrika, s. 5, paras. 24 and 25, cannot be construed as an express text limiting the share of an adopted son inheriting collaterally to half the share taken by the other collateral heirs. DINONATH MOOKERJEA *v.* GOPAL CHUNDER MOOKERJEA **8 C. L. R. 57 : 9 C. L. R. 379**

8. ———— *Succession of adopted son of one daughter and natural son of another—Grandfather's estate.* The adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather. *Uma Sunker Moitro* v. *Kali Komul Mozumdar, I. L. R. 6 Calc. 256*, followed. SURJO KANT NUNDI *v.* MOHESH CHUNDER DUTT . . . **I. L. R. 9 Calc. 70**

9. ———— *Natural son born after adoption.* An adopted son is entitled to one-fourth of the estate of the adoptive father if a natural son is born after the adoption. RUKHAB *v.* CHUNILAL AMBUSHET . **I. L. R. 16 Bom. 347**

10. ———— *Share of adopted son where a son is subsequently born—Mitakshara—Vyavahar Mayukha.* In Western India, both in the districts governed by the Mitakshara and those especially under the authority of the Vyavahar Mayukha, the right of the adopted son, where there is a "legitimate son" born after the adoption, extends only to a fifth share of the father's estate. In a suit by an adopted son to recover his share in his adoptive father's estate, a son having been born to the adoptive father subsequently to the plaintiff's adoption, the Court of first instance awarded the

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share. *Held*, that, under the circumstances and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal. GIRIAPA *v.* NINGAPA
I. L. R. 17 Bom. 100

11. ——— Affiliated son (Illatam)—*Custom of illatam—Reddi caste of Nellore.* Under the custom of illatam (affiliation of a son-in-law) which obtains among the Reddis or Pedda Kapu caste of Nellore, the illatam son-in-law does not thereby lose his rights of succession to the estate of his natural father's divided brother. BALARAMI REDDI *v.* PERA REDDI
I. L. R. 6 Mad. 267

12. ——— *Burden of proof.* *N*, a Hindu, who had admittedly been taken as illatam into the family of his father-in-law, died, leaving property which he had acquired by virtue of his illatam marriage. He was succeeded by his son, who died without issue, leaving only a sister surviving him. In a suit by the brother of *N*, who was the managing member of his family, to recover the property from the sister of the last holder:—*Held*, that, as an illatam can succeed to property in his natural family, his natural relatives can succeed to his property, and as the paternal uncle is preferable as an heir to the sister, the plaintiff was *primâ facie* entitled to recover notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim. RAMAKRISTNA *v.* SUBBAKKA
I. L. R. 12 Mad. 442

13. ——— *Custom—Survivorship.* The father (since deceased) of the second defendant took into his family an illatam son-in-law, who died leaving a son. After the death of the son one of his two daughters (who were his only children) sued to recover a one-fourth share of the property left by the second defendant's father. *Held*, that the plaintiff was entitled to recover in the absence of proof of a custom by which the rights of the plaintiff's father should have passed by survivorship to the second defendant. MALLA REDDI *v.* PADMAMMA . . . **I. L. R. 17 Mad. 48**

14. ——— Brother's daughter's son—*Mitakshara law.* A brother's daughter's son succeeds as heir, under the Mitakshara, in the absence of nearer heirs. DURGA BIBEE *v.* JANAKI PERSHAD
10 B. L. R. 341 : 18 W. R. 331

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

15. ——— *Great-grandson of paternal grandfather.* By the Hindu law the great-grandsons of the paternal grandfather are entitled to succeed as heirs to the deceased proprietor, and are to be preferred to the brother's daughter's son, because, although the former can offer but one oblation and the latter two, yet that offered by the former is offered to a paternal ancestor, and is therefore of superior religious efficacy to those offered by the latter, which are to maternal ancestors only. GOBIND PROSHAD TALOOKDAR *v.* MOHESH CHUNDER SURMA GHUTTUCK
15 B. L. R. 35 : 23 W. R. 117

See In the matter of OODOY CHURN MITTER
I. L. R. 4 Calc. 411

And JUGGUT NARAIN SINGH *v.* COLLECTOR OF MANBHOOM . **I. L. R. 4 Calc. 413 note**

16. ——— *Bengal school of Hindu law—Sapinda.* According to the Bengal school of Hindu law, a brother's daughter's son is a sapinda, and is therefore a preferable heir to the great-great-great-grandfather's great-great-great-grandson. DIGUMBER ROY CHOWDHRY *v.* MOTI LAL BUNDOPADHYA
I. L. R. 9 Calc. 563 : 12 C. L. R. 204

(*Contra*) CHOORAL MONEE BOSE *v.* PROSONNO COOMAR MITTER . . . **1 W. R. 43**

17. ——— *Dayabhaga school—Great-grandson of paternal grandfather.* A brother's daughter's son does not succeed in preference to a great-grandson of the paternal grandfather of the deceased. HARIDAS BUNDOPADHYA *v.* BAMA CHURN CHATTOPADHYA
I. L. R. 15 Calc. 780

18. ——— Brother's son's daughter's son—*Brother's son's son's son.* The right of inheritance of a brother's son's daughter's son is inferior to that of a brother's son's son's son. KASHEE MOHUN ROY *v.* RAJ GOBIND CHUCKERBUTTY . . . . **24 W. R. 229**

19. ——— Cousin—*Uncle's son—Childless daughter.* According to the Hindu law, an uncle's son succeeds in preference to a childless widowed daughter. TARAMONEE GUPTEA *v.* LUKHEEMONEE DASSEA . . . **Marsh. 29 : 1 Hay 67**
1 Ind. Jur. O. S. 22

20. ——— Paternal great-aunt's grandson—*Bandhu.* According to the Hindu law of succession in force in the Madras Presidency, the grandson of a paternal great-aunt of the deceased inherits to him as a bandhu. SETHURAMA *v.* PONNAMMAL . . **I. L. R. 12 Mad. 155**

21. ——— First cousin's daughter's son—*Sapindas—Collateral succession.* The sapinda relationship exists between the daughter's son and the son's son of two first cousins; the former therefore is an heir to the latter. *Uma*

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

Sunker Moitra v. *Kali Kamal Mozumdar, I. L. R. 6 Calc. 256 : 1 C. L. R. 145,* affirmed on appeal by the Privy Council, *I. L. R. 10 Calc. 232 : 13 C. L. R. 379 : L. R. 10 I. A. 138,* and *Padmakumari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 302 : L. R. 8 I. A. 229,* relied on. MANIK CHAND GOLECHA *v.* JAGAT SETTANI PRANKUMARI BIBI . . . . **I. L. R. 17 Calc. 518**

22. ——— **Son of paternal uncle—** *Widow of another paternal uncle.* By the Hindu law the sons of a paternal uncle inherit in preference to the widow of another paternal uncle of the propositus. RACHAVA *v.* KALINGAPA **I. L. R. 16 Bom. 716**

23. ——— **Cousin in third degree.** *Held,* that a cousin in the third degree has no right of inheritance in the presence of cousins in the second degree. MAHABEER PERSHAD *v.* RAM SURUN . . . . . **3 Agra 6**

24. ——— **Sapindas**—*Bandhus—Mitakshara law—Descendants in third degree from common ancestor—Second cousins.* The plaintiffs were descended in the third degree from *M,* who was *R's* maternal great-grandfather, and *R* was descended in the third degree from *M,* who was the plaintiff's maternal great-grandfather. *Held,* with reference to the definition of bandhu and sapinda in the Mitakshara (by which school of Hindu law the parties were governed), that the plaintiffs were *R's* sapindas through his mother, and *R* was the plaintiff's sapinda directly ; and being thus mutually related as sapindas, the plaintiffs were heritable sapindas and bandhus of *R, ex parte materna,* and on his death without issue were entitled to his property as his heirs. BABU LAL *v.* NANKU RAM . . **I. L. R. 22 Calc. 339**

See SHEOBARAT KUARI *v.* BHAGWATI PRASAD **I. L. R. 17 All. 523**

25. ——— **Daughter's son**—*Brother's son.* A daughter's son is one of the nearer sapindas and in the line of heirs before a brother's son according to Hindu law. KRISHNAMMA *v.* PAPA **4 Mad 234**

26. ——— Under the Hindu law, where property is proved to be a separate and divided property, the daughters and daughter's son are the legal heirs entitled to it, and not more remote relations to the deceased. BURYAR SINGH *v.* HUNSEE . . . . . **2 Agra 166**

See GOLAB KOONWER *v.* SHIB SAHAI **2 Agra 54**

and HIMUNCHULL *v.* MAHARAJ SINGH **1 Agra 210**

27. ——— *Zamindari karnam—Order of succession to hereditary office.* A woman, who had been appointed to succeed her husband, the holder of the hereditary office of karnam in a zamindari, died leaving the defendant, her daughter's son, and the plaintiff, the son of her late husband's paternal uncle. *Held,* that the defendant was entitled to succeed in preference to the plaintiff. *Krishnamma* v. *Papa, 4 Mad. 234,* followed. SEETARAMAYYA *v.* VENKATARAZU **I. L. R. 18 Mad. 420**

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

28. ——— *Death of widow of last male proprietor.* A daughter's son is on the death of the widow of the last male proprietor a preferable heir to descendants in the third or fourth remove. HIMUNCHULL *v.* MAHARAJ SINGH **1 Agra 210**

BURYAR SINGH *v.* HUNSEE . **2 Agra 166**

29. ——— *Law at Benares.* *Held,* that, according to Hindu law current at Benares, the daughters' sons inherit in default of qualified daughters ; and that, if there be sons of more than one daughter, they take *per capita* and not *per stirpes.* RAM SAWRUTH PANDEY *v.* BASDEO SINGH . . . . . **2 Agra 168**

So in Madras. MUTTU VIZIA RAGUNADA RANI KOLUNDAPURI NACHIAR *alias* KATTAMA NACHIAR *v.* DORA SINGHA TEVAR . . **6 Mad. 310**

30. ——— *Succession to cultivator—Distant relation.* Distant relation (such as those who are called distant sapindas and samanodakas) of a deceased raiyat is not entitled to succeed by inheritance to the cultivation of a hereditary raiyat. *Held,* with reference to the above principle, that the son of the daughter is too remote to succeed to the tenure of cultivating occupancy held by his maternal grandfather. RAM SURUN SOKOOL *v.* SHEORUTUN KOORMEE . **2 Agra, Pt. II, 166**

31. ——— *Mother's sisters.* According to Hindu law, a deceased daughter's son has no right of inheritance to the estate of his maternal grandfather during the life of any of his mother's sisters. RAMDAN *v.* BEHAREE LALL **1 N. W. 114 : Ed. 1873, 200**

32. ——— *Mitakshara law.* According to Mitakshara law, a daughter's son takes his maternal grandfather's estate as full proprietor, and on his death such estate devolves on his heirs, and not on the heirs of his maternal grandfather. His gotraja sapindas, or the persons related to him through his father, have therefore preferential right to succeed him to the persons related to him through his mother. SIBTA *v.* BADRI PRASAD **I. L. R. 3 All. 134**

33. ——— *Adopted son of daughter—Brothers.* According to Hindu law, a person cannot succeed as the adopted son of a daughter who has brothers alive, and who cannot be an appointed daughter if she had brothers when she married. Nor can he succeed as claiming under a bought son. YACHEREDDY CHINNA BASSAVAPA *v.* YACHEREDDY GOWDAPA . **5 W. R. P. C. 114**

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

34. ——— *Great-grandson.* A daughter's son does not inherit where there is a great-grandson of the deceased alive. GOOROO-GOBINDO CHOWDHRY *v.* HUREE MADHUB ROY **Marsh. 308 ; 2 Hay 401**

35. ——— *Estate of maternal grandfather—Daughter.* A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R's* brothers, *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After *K's* death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently *S*, *M's* son, who had been born after *K's* compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession, and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being alive, he was entitled to possession after her death only, and upon these findings gave him a decree declaring his right to possession on *M's* death. The lower Appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit. *Per* MAHMOOD, *J.*, that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family during the existence of a daughter, whether she were his own mother or his maternal aunt: and that the claim for possession was therefore rightly dismissed. *Amritolal Bose* v. *Rajoneekant Mitter, 15 B. L. R. 10 ; Sibta v. Badri Prasad, I. L. R. 3 All. 434 ;* and *Baijnath* v. *Mahabir, I. L. R. 1 All. 608,* referred to. SANT KUMAR *v.* DEO SARAN . **I. L. R. 8 All. 365**

36. ——— *Estate of sonless Hindu.* In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter that the daughter's son's right of inheritance initiates ; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son. DHARUP NATH *v.* GOBIND SARAN. GOBIND SARAN *v.* DHARUP NATH **I. L. R. 8 All. 614**

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

37. ——— **Father**—*Law in Gujarat—Mother.* In Gujarat the right of succession to the estate of a Hindu who is separate in interest, and who at his death, leaves a father and mother, but no issue or widow, devolves upon the father, in preference to the mother. KHODABHAI MAHIJI *v.* BAHDHAR DALA . . . **I. L. R. 6 Bom. 541**

38. ——— **Father's brother's daughter's son.** A father's brother's daughter's son cannot inherit according to Hindu law. GOBINDO HUREEKAR *v.* WOOMESH CHUNDER ROY **W. R. F. B. 176**

RAJ GOBIND DEY *v.* RAJESSUREE DOSSEE **4 W. R. 10**

39. ——— *Sapinda.* A father's brother's daughter's son is entitled to be recognized as an heir according to the Hindu law current in the Bengal school. GURU GOBIND SHAHA MANDAL *v.* ANAND LAL GHOSE MAZUMDAR **5 B. L. R. F. B. 15 : 13 W. R. F. B. 49**

40. ——— *Whether preferential heir to mother's brother's son.* Under the Bengal school of Hindu law, the father's brother's daughter's son as heir is preferential to the mother's brother's son. BRAJA LALL SEN *v.* JIBAN KRISHNA ROY . . . **I. L. R. 26 Calc. 285**

41. ——— *Spiritual benefit—Father's father's brother's son.* The father's father's brother's son of a deceased person stands nearer to him in right of succession than his father's brother's daughter's son ; the former is therefore preferentially entitled, on the death of the deceased person's widow, to a certificate under Act XXVII of 1860, enabling him to collect the debts due to the estate. GOPAL CHUNDER NATH COONDOO *v.* HARIDAS CHINI . **I. L. R. 11 Calc. 343**

42. ——— **Father's father's sister's grandson**—*Gujarat—Father's father's sister's grandson—Mother's sister's son preferential heir—Moveables inherited by widow—Testamentary power of disposition—Mayukha.* In Gujarat a mother's sister's son is the preferential heir to a father's father's sister's grandson. Under the Mayukha a widow has no testamentary power of disposition over moveables, which have been inherited by her from her husband. *Gadadhar Bhat* v. *Chandrabhagabai, I. L. R. 17 Bom. 620,* followed. CHAMANLAL *v.* GANESH MOTICHAND (1904) **I. L. R. 28 Bom. 453**

43. ——— **Father's sister's son**—*Great-grandson of great-great-great-grandfather.* A father's sister's son does not inherit when opposed to the great-grandson of the great-great-great-grandfather of the deceased. JIBNATH SINGH *v.* COURT OF WARDS . **5 B. L. R. 442 : 14 W. R. 117**

s.c. on appeal to Privy Council **15 B. L. R. 190 : 23 W. R. 409**
L. R. 2 I. A. 163

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

44. ——— **Grandfather**—*Paternal aunt—Maternal grandfather.* Under the Hindu law obtaining in the Madras Presidency, the maternal grandfather of a deceased Hindu succeeds to him in preference to his paternal aunt. CHINNAMMAL *v.* VENKATACHALA . . **I. L. R. 15 Mad. 421**

45. ——— **Grandson**—*Mitakshara law.* Under the Mitakshara law, a grandson (his father being dead) shares equally with a son the self-acquired property of the grandfather. LUCHOMUN PERSHAD *v.* DEBEE PERSHAD . **1 W. R. 317**

46. ——— *"Sons" as used in the Mitakshara.* The term "sons" used in Mitakshara, Ch. II, s. 4, § 7, and s. 5, § 1, does not include grandsons. SURAYA *v.* LAKSHMINARASAMMA . . . **I. L. R. 5 Mad. 291**

47. ——— *Grandson of brother—Mitakshara law.* Under the Mitakshara law, a brother's grandson may be an heir. OORHYA KOOER *v.* RUJOO NYE SOOKOOL . **14 W. R. 208**

KUREEM CHAND GUSAIN *v.* OODUNG GUSAIN **6 W. R. 158**

48. ——— *Law in Madras Presidency—Paternal uncle's son.* According to the Hindu law of succession current in the Madras Presidency, a paternal uncle's son succeeds to the inheritance before a brother's grandson. SURAYA *v.* LAKSHMINARASAMMA . **I. L. R. 5 Mad. 291**

49. ——— *Grandson of maternal grandfather's brother.* According to Hindu law, the grandson of a brother of a grandfather of the deceased is heir to his property in default of nearer heirs. BRAJA KISHOR MITTER MOZUMDAR *v.* RADHA GOBIND DUTT **3 B. L. R. A. C. 435 : 12 W. R. 339**

50. ——— *Grandson of sister—Maternal uncle's son—Right to sue as reversioner.* The plaintiff sued as the nearest reversionary heir of one *V*, deceased, to obtain a declaration that certain alienations made by the widow (who was defendant No. 1) in favour of defendant No. 2 were not binding on the reversion. Defendant No. 3 was the son of *V's* sister's son, and was joined in the suit, because he claimed to be a nearer heir than the plaintiff, who was the son of *V's* maternal uncle. *Held*, that both the plaintiff and defendant No. 3 were athma bandhus of the deceased, but defendant No. 3 was the nearer reversionary heir. BALUSAMI PANDITHAR *v.* NARAYANA RAU **I. L. R. 20 Mad. 342**

51. ——— *Grandsons of daughter of alienor's deceased husband—Bandhus—Reversioners. Held*, in a suit to set aside an alienation made by a Hindu widow of property which had been of her deceased husband in his lifetime, that the sons of the son of a daughter of the alienor's late husband were, their father and grandmother being dead, reversioners, and, as such, entitled to sue to set aside the alienation made by the widow. *Krishnayya* v. *Pichamma, I. L. R. 11 Mad. 287*, and *Babu Lal* v. *Nanku Ram, I. L. R. 22 Calc. 339*, referred to. SHEOBARAT KUAR *v.* BHAGWATI PRASAD **I. L. R. 17 All. 523**

52. ——— *Grandson of mother's maternal uncle—Bandhu.* According to the Hindu law of succession in force in the Madras Presidency, the grandson of the maternal uncle of the deceased's mother is in the line of heirs. RATNASUBBU *v.* PONNAPPA . **I. L. R. 5 Mad. 69**

53. ——— **Great grandson**—*Son of son's son—Daughter's son.* According to the Hindu law of descent, the son of a son's son is preferred, in the order of succession, before a daughter's son. GOOROOGOBINDO CHOWDHRY *v.* HURREEMADHUB ROY . . **Marsh. 398 : 2 Hay 401**

54. ——— *Sons of grand-daughter.* According to the Hindu law which prevails in Madras, the sons of a grand-daughter are excluded from the inheritance. The plaintiff brought a suit for a moiety of the estate of his deceased second cousin, who left no issue or nearer kindred, claiming through his maternal great-grandfather. *Held*, that the plaintiff was not entitled to inherit the estate of the deceased. KISSEN LALA *v.* JAVALLA PRASAD LALA . . **3 Mad. 346**

55. ——— *Daughter's son's son—Great-grand-daughters—Bandhu. N*, the daughter of *J*, inherited his property under Hindu law. *N* had a son who predeceased her, leaving a son *K*. *Held*, that *K*, being a bandhu, was entitled to the property of *J* on the death of *N* in preference to the daughters of *N*. KRISHNAYYA *v.* PICHAMMA **I. L. R. 11 Mad. 287**

56. ——— *Great-grandson of great-great-great-grandfather—Mitakshara law—Great-grandson—Bandhu—Gentiles—Father's sister's son.* The great grandson of the great-great-great-grandfather of the deceased is, according to the Mitakshara, a nearer heir to the deceased than his father's sister's son. JIBNATH SINGH *v.* COURT OF WARDS . **5 B. L. R. 442 : 14 W. R. 117**

s.c. on appeal to the Privy Council **15 B. L. R. 190 : 23 W. R. 409 L. R. 2 I. A. 163**

57. ——— **Great-great-grandson of grandson**—*Samanodaka. D*, being the grandson's great-great-grandson of the common ancestor, who was the ninth in ascent from *K*, deceased was reckoned as a samanodaka and among the heirs of *K*. KALIAN SINGH *v.* PANKUAR **7 N. W. 338**

58. ——— **Great-great-great-grandson of great-great-great-grandfather**—*Mitakshara law—Gentiles.* According to the Mitakshara, the great-great-great-grandson of the great-great-great-grandfather of the deceased is entitled to

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

succession as one of the gentiles. BYHA RAM SINGH *v.* AGAR SINGH
5 B. L. R. 293 : 14 W. R. P. C. 1 13 Moo. I. A. 373

59. ——— **Half-blood relatives**—*Distinction between whole-blood and half-blood—Sapinda relations other than brothers and their sons.* The distinction of whole-blood and half-blood applies, according to the rule of succession of the Mitakshara founded on propinquity of blood, to sapinda relations other than the brother and his sons. *Samat* v. *Amra, I. L. R. 6 Bom. 394,* not followed. SUBA SINGH *v.* SARAFRAJ KUNWAR
I. L. R. 19 All. 215

60. ——— **Half-brothers**—*Brothers of the whole-blood and of the half-blood.* By the Hindu law current in Bengal a brother of the whole-blood succeeds in the case of an undivided immoveable estate in preference to a brother of the half-blood. Overruling *Tiluck Chunder Roy* v. *Ram Luckhee Dossee, 2 W. R. 41 ; Koylash Chunder Sircar* v. *Gooroo Churn Sircar, 3 W. R. 43 ; Gooroo Churn Sircar* v. *Koylash Chunder Sircar, 6 W. R. 93.* RAJKISHORE LAHOORY *v.* GOBIND CHUNDER LAHOORY. RAMMONEY DOSSEE *v.* GOBIND CHUNDER LAHOORY
I. L. R. 1 Calc. 27 : 24 W. R. 234

ISHEN CHUNDER CHOWDHRY *v.* BHYRUB CHUNDER CHOWDHRY . . . **5 W. R. 21**

61 ——— **Nephew of half-blood**—*Brothers of whole and half-blood.* A nephew of the half-blood is excluded from succession by brothers of the whole and half-blood. PRITHEE SINGH *v.* COURT OF WARDS . **23 W. R. 272**

62. ——— **Brothers of whole and half-blood.** Where two uterine brothers and a half-brother are members of a joint Hindu family, and one of the two former dies, the brother of the half-blood is not entitled to receive anything out of the share of the deceased. CHEYT NARAIN SINGH *v.* BUNWAREE SINGH . **23 W. R. 395**

63. ——— *Rule of succession as between relatives of the whole-blood and half-blood—Brothers—Brother's sons—Collaterals.* The plaintiffs (along with others not parties to the suit) were relations of the half-blood to the propositus, and the defendants were his relations of the whole-blood ; but, counting from the ancestor, the plaintiffs were sapindas of the fifth degree, and some of the defendants sapindas of the sixth, and the rest sapindas of the seventh degree of the propositus. *Held,* that, there not being any special provision in the Mitakshara or the Mayukha in respect of person of the half-blood other than brothers and their sons, the general rule applies, that the nearest sapinda succeeds in the absence of special local custom to the contrary, and therefore the plaintiffs were the heirs of the propositus to the exclusion of the defendants or any of them. SAMAT *v.* AMRA . . **I. L. R. 6. Bom. 394**

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

64. ——— *Dayabhaga law.* According to the Dayabhaga, a brother of the whole-blood in a joint family succeeds in preference to the brother of the half-blood to the share of a deceased brother. *Rajkishore Lahoory* v. *Gobind Chander Lahoory, I. L. R. 1 Calc. 27 : 24 W. R. 234,* approved. SHEO SOONDARY *v.* PIRTHEE SINGH . . . . **L. R. 4 I. A. 147**

65. ——— **Sons of half sisters**—*Succession to estate of deceased brother—Half-blood and whole-blood.* Under the Bengal school of Hindu law, sons of sisters of the half-blood are entitled to succeed equally with sons of sisters of the whole-blood to the property of a deceased brother. BHOLANATH ROY *v.* RAKHAL DASS MUKHERJI
I. L. R. 11 Calc. 69

66. ——— **Uncles of whole-blood and half-blood.** For the purpose of inheritance, an uncle of the whole-blood is not entitled to preference over one of the half-blood. One *B*, a minor, died leaving him surviving two paternal uncles, one of whom was an uncle of the whole-blood and the other of the half-blood. The nephew and the uncles were found to be divided from each other. *Held,* that the two uncles were entitled to inherit the property of their deceased nephew in equal shares. *Samat* v. *Amra, I. L. R. 6 Bom. 394,* considered. *Suba Singh* v. *Sarofraz Kunwar, I. L. R. 19 All. 215,* not followed. VITHALRAO KRISHNA VINCHURKAR *v.* RAMRAO KRISHNA VINCHURKAR
I. L. R. 24 Bom. 317

67. ——— **Husband**—*Childless wife—Gift at marriage.* If a Hindu wife dies childless, all property given to her by her father at the marriage ("before the nuptial fire") goes to the husband. "Given before the nuptial fire" is only a term to signify all gifts during the continuance of the marriage ceremonies. BISTOO PERSHAD BURRAL *v.* RADHA SOONDAR NATH . . **16 W. R. 115**

68. ——— *Husband, heirs of—Childless widow—Nagar Pissa Vania caste.* Property inherited from her deceased husband by a childless widow among the Nagar Vissa Vanias, at her death intestate, devolves on the relations in blood, on the mother's side, of the husband in preference to the heirs and next-of-kin of the widow. *In the goods of* NATHIBAI. JAIKISHEN DAS GOPAL DAS *v.* HARKISEN DAS HULLODHAR DAS . . . . **I. L. R. 2 Bom. 9**

69. ——— **Nephew**—*Mitakshara law.* Under the Mitakshara, a nephew succeeds, not as the heir of his father, but as the direct heir of his uncle. BROJO MOHUN THAKUR *v.* GOUREE PERSHAD CHOWDHRY . . . . **15 W. R. 70**

70. ——— In default of brothers, brother's sons succeed, taking according to

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

numbers, and not by representation as grandsons; but brothers' sons are totally excluded by the existence of brothers. BROJOKISHOREE DOSSI *v.* SREE NATH BOSE . . . **9 W. R. 463**

71. ——— *Brother—Joint undivided family.* Where, in an undivided Hindu family living under the Mitakshara law, a person dies without leaving issue, but leaving a brother and a nephew, the son of a predeceased brother, the latter is not excluded from succession by the former. BHIMUL DOSS *alias* LALL BABOO *v.* CHOONEE LALL . . **I. L. R. 2 Calc. 379**

72. ——— *Property purchased by widow benami for a relation—Stepson.* A stepson made over property to his stepmother for her support. Out of the produce she bought properties for her nephew in the names of other parties. *Held*, under the circumstances, that the purchased property on her death went to the nephew, and not to the stepson, as heir of her husband. CHANDRANATH ROY *v.* RAMJAI MAZUMDAR **6 B. L. R. 303 : 15 W. R. P. C. 7**

73. ——— *Deceased brother's son.* A brother's son succeeds as heir in preference to a sister or a grand-daughter (daughter of a predeceased son). Both under the Mayukha and the Mitakshara, the sister comes in as a gotraja sapinda, and as such must be postponed to the brother's son, who is a sapinda. MULJI PURSHOTUM *v.* CURSANDAS NATHA **I. L. R. 24 Bom. 563**

74. ——— *Succession to cultivator.* On the death of a raiyat having right of occupancy, a nephew may succeed to his holding by right of inheritance if he were residing with him in the village, and not elsewhere. DOORGA PERSHAD *v.* DOOCHUR PERSHAD . . **3 Agra 188**

75. ——— *Succession to tenant-right—Custom.* In the absence of any evidence of special custom a nephew cannot inherit the tenant-right from his uncle, whose legal heirs were his sons. OMRAO SINGH *v.* PERTAB **3 Agra 143**

76. ——— *Interest of Members in share that lapses.* Though a Hindu family may be joint and in union, all the members do not necessarily share in a portion that may lapse,—*e.g.*, a brother's son takes his own share as well as the lapsed share of a brother's son in preference to the grandsons of another brother. MADHO SINGH *v.* BINDESSERY ROY . **3 Agra 101**

77. ——— **Separated son**—*Father's widow—Inheritance not subject to obstruction.* Under the Mitakshara law, a divided son (no undivided sons surviving) is entitled to succeed to his father's share in preference to his father's widow. The son's right of inheritance under Hindu law is distinguished from that of all other heirs, in that it is "a pratibandha," not liable to obstructions, and the functions assigned to the son, and the character ascribed to him in the religious system of the Hindus, explain the preference in the succession accorded to him. RAMAPA NAICKEN *v.* SITHAMMAL . . . **I. L. R. 2 Mad. 182**

78. ——— *Relinquishment of share by son—Disherison—Private arrangement—Widow—Separated son.* The effect of a Hindu son relinquishing for a sum of money his share in the property of his father, natural or adoptive, and agreeing not to claim it during or after his father's lifetime is to place him in the position of a separated son. The relinquishment does not amount to disherison. If therefore the father on such relinquishment makes an alienation of his estate, it will take effect, but otherwise his separated son will inherit in preference to his widow. BALKRISHNA TRIMBAK TENDULKAR *v.* SAVITRIBAI **I. L. R. 3 Bom. 54**

79. ——— *Mitakshara—Partition—Right of son, born after partition, to father's property.* The property acquired by a Hindu governed by the law of the Mitakshara after a partition has taken place between him and his sons devolves on his death, when he leaves a son born after partition, on such son, to the exclusion of the other sons. NAWAL SINGH *v.* BHAGWAN SINGH **I. L. R. 4 All. 427**

80. ——— *Sons of a separated brother—Vyavahara Mayukha, Ch. iv, s. 8—Widow of a united brother's son.* The sons of a separated brother inherit in preference to the widow of the son of an undivided brother. NAHALCHAHD HARAKCHAND *v.* HEMCHAND **I. L. R. 9 Bom. 31**

81. ——— **Separated grandson**—*Partition—Self-acquired property of grandfather, Descent of—United sons, Right of.* As between united sons and a separated grandson, the succession on the grandfather's death to the property, both ancestral and self-acquired, left by him goes, in preference according to Hindu law, to the united sons. FAKIRAPPA *v.* YELLAPPA **I. L. R. 22 Bom. 101**

82. ——— **Separated brothers**—*United brother—Survivorship, right of.* Two Hindu brothers who hold the ancestral estate in common with a third brother may nevertheless hold self-acquired property in common between themselves in such a manner as to give a right of survivorship to one of themselves. Leaving out of the question the survivor's right to succeed, and looking at the half share of the deceased brother as having been held separately on his own account, his heir in respect of that property would be his widow, and during her lifetime the third brother could have no right of succession. SHAM NARAIN *v.* COURT OF WARDS . . . . **20 W. R. 197**

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

83. ——— *Separated brother.* *A*, one of four brothers in joint possession of ancestral property, separated himself in food, worship, and estate, leaving his three brothers jointly possessed of their undivided three-fourth shares, *A* died unassociated, leaving a son and heir *B*. The three brothers continued and died associated, two without heirs and a third leaving a son and heir *C*. *Held*, that *B* had no claim to any part of the undivided three-fourth shares as against *C*, who took the whole absolutely. JADUB CHUNDER GHOSE *v.* BENODBEHARY GHOSE . . **1 Hyde 214**

84. ——— **Reunion**—*Succession of reunited members.* In a Hindu family, when, after partition, certain members of the family reunite: *Held*, that, if a reunion actually takes place between the proper parties, their representatives and descendants, however remote, will remain joint until a fresh partition takes place. The members of the reunited family and their descendants succeed to each other to the exclusion of the members of the unassociated or not reunited branch. TARA CHAND GHOSE *v.* PUDUM LOCHUN GHOSE
5 W. R. 249 : 1 Ind. Jur. N. S. 207

85. ——— *Requisites for proof of reunion.* According to Hindu law, mere living together in one residence or joint trade does not constitute a reunion after partition, but there must be junction of estate. When such reunion is satisfactorily established, Courts are bound to give a preference to the reunited parceners to the exclusion of the members or their issue who have not been so reunited. GOPAL CHUNDRA DAGHORIA *v.* KENARAM DAGHORIA . . . **7 W. R. 35**

86. ——— *Reunion of descendants of members—Reunion not affecting inheritance.* *Held*, that after separation reunion in order to affect the inheritance must be made by the parties or some of them who made the separation. If any of their descendants think fit to unite, they may do so; but such a union is not reunion in the sense of the Hindu law, and does not affect the inheritance. VISVANATH GUNGADHUR *v.* KRISHNAJI GUNESH
3 Bom. A. C. 69

87. ——— *Separated brother.* Of three brothers forming together a joint Hindu family, one separated himself therefrom, and died leaving a son, the plaintiff. The other two with their families remained joint; one died leaving a son, the defendant; the other died leaving a widow. On the widow's death, this suit was brought to establish the plaintiff's right as one of the two next reversionary heirs. *Held*, that a separated brother does not inherit, and that the defendant was alone entitled to succeed. *Quære:* as to the effect of reunion in inheritance. KESABRAM MAHAPATTAR *v.* NANDKISHOR MAHAPATTAR
3 B. L. R. A. C. 7 : 11 W. R. 308

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

88. ——— *Separated and reunited brothers—Widow.* A Hindu died leaving a widow, a brother, and two nephews the plaintiff and the defendant. The brother was the defendant's father; he and the widow were since dead, the widow having died in the brother's lifetime. The plaintiff claimed to be entitled to a moiety of the estate of the deceased by inheritance. The defendant claimed the whole on the ground that the deceased lived as a reunited or associated brother with his (the defendant's) father, whereas the plaintiff was the son of a separated brother of the deceased. *Held*, that the material issue to be tried in the case was whether the widow lived in a state of reunion with the defendant, as her husband had done with the defendant's father, or whether she at the time of her death lived separate from him, though in the same family house. RAMHARI SARMA *v.* TRIHIRAM SARMA
7 B. L. R. 337 : 15 W. R. 442

89. ——— *Succession, application of the law of.* Where there has been a reunion between persons expressly enumerated in the text of Brihashpati, *viz.*, father, brother, and paternal uncle, and where their descendants continue to be members of the reunited Hindu family, the law of inheritance applicable to the latter is the same as in the case of the death of any of those between whom the reunion took place. *Tara Chand Ghose* v. *Pudum Lochun Ghose, 5 W. R. 249 : 1 Ind. Jur. N. S. 207; Gopal Chunder Daghoria* v. *Kenaram Daghoria, 7 W. R. 35;* and *Ramhari Sarma* v. *Trihiram Sarma, 7 B. L. R. 336 : 15 W. R. 442*, referred to. ABHAI CHURN JANA *v.* MANGAL JANA . . . . **I. L. R. 19 Calc. 634**

90. ——— *Divided brothers of the full-blood—Son of a reunited half-brother.* In 1872 a partition took place between the members of a joint Hindu family, being three brothers of the full and three of the half-blood. Two of the brothers, being the sons of different mothers, subsequently reunited. The elder took the plaintiff in adoption, and died during the infancy of the plaintiff. The reunited half-brother retained possession of their joint property till his death, when the present suit was instituted to recover his share in the property. The two uterine brothers of the deceased resisted the plaintiff's claim. *Held*, that the plaintiff was entitled to a one-third share. RAMASAMI *v.* VENKATESAM . . **I. L. R. 16 Mad. 440**

91. ——— *Presumption—Marriage of daughter into another family.* A partition having taken place among three brothers, *A*, *B*, *C*, the members of a joint family, two of the brothers, *A* and *B*, subsequently reunited. *A* died leaving two grandsons. On the death of *B* leaving a daughter, who married but subsequently died without male issue, the grandsons and the sole representative of *C*, who also had died, claimed to be entitled as one of the reversionary heirs of *B* to one-

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

third of his property. *Held*, that, the daughter of *B* having married into another family, no presumption could be drawn from the reunion of *A* and *B* that the co-parcenary continued as between the defendants of *A* and *B* up to the death of *B's* daughter. KRODESH SEN *v.* KAMINI MOHUN SEN **10 C. L. R. 161**

92. ——— **Sister's daughter's son**—*Inheritance—Mitakshara—Sister's daughter's son.* A sister's daughter's son is an heir according to the Mitakshara. UMAID BAHADUR *v.* UDOI CHAND *alias* MUNMUN **I. L. R. 6 Calc. 119 : 6 C. L. R. 500**

93. ——— **Sister's son**—*Mitakshara.* In the absence of nearer relatives, a man may be heir to his mother's brother as regards property subject to the Mitakshara. AMRITA KUMARI DEBI *v.* LUKHINARAYAN CHUCKERBUTTY **2 B. L. R. F. B. 28**

S.C. OMRIT KOOMAREE DABEE *v.* LUCKHEE NARAIN CHUCKERBUTTY . **10 W. R. F. B. 76**

94. ——— *Mitakshara and Mithila law.* A sister's son, except in Bengal, is no heir according to the Mitakshara or the Mithila school. JOWAHIR RAHOOT *v.* KAILASSOT **1 W. R. 74**

95. ——— A sister's son is not an heir according to law. BHEEM RAM CHUCKERBUTTY *v.* HUREE KISHORE ROY **1 W. R. 359**

96. ——— *Death of last female heir of uncle.* If a sister's son is alive at the death of his uncle's last preceding female heir who succeeded to the property, he takes the succession. SEETA RAM GOSSAIN *v.* FAKEER CHAND CHUCKERBUTTY . . . . . **15 W. R. 433**

See RASHBEHAREE ROY *v.* NIMAYE CHURN **W. R. 1864, 223**

97. ——— *Mother's sister's son.* According to the general principles of Hindu law, a sister's son is a preferential heir to a mother's sister's son, as being capable of conferring greater spiritual benefits upon the soul of the deceased. GONESH CHUNDER ROY *v.* NIL KOMUL ROY **22 W. R. 264**

98. ——— According to the Mitakshara, a sister's son cannot inherit. THAKOORAIN SAHIBA *v.* MOHUN LALL **7 W. R. P. C. 25 : 11 Moo. I. A. 386**

99. ——— *Law in Madras.* According to the Hindu law in force in the Madras Presidency, a sister's son does not inherit. DOE D. KULLAMMAL *v.* KUPPU PILLAI . **1 Mad. 85**

100. ——— ——— *Bandhu.* According to the Hindu law of succession in force in the Madras Presidency, a sister's son is in the line of heirs. *Semble:* He is a bandhu. CHELIKANI TIRUPATI RYANINGARU *v.* SURANENI VENCATA GOPALA NARASIMHA RAU . . **6 Mad. 278**

101. ——— *Sapinda.* A sister's son does not succeed as a sapinda. STRINIVASA AYYANGAR *v.* RANGASAMI AYYANGAR **I. L. R. 2 Mad. 304**

102. ——— *Mitakshara law. Held*, that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. *Thakoorain Sahiba* v. *Mohun Lall, 11 Moo. I. A. 386 ; Rao Kurun Singh* v. *Mahomed Fyaz Ali Khan, 10 B. L. R. P. C. 1 ; 14 Moo. I. A. 176, 187 ; Amrita Kumari Debi* v. *Lukhi Narayan Chuckerbutty, 2 B. L. R. F. B. 28 ; Gridhari Lall Roy* v. *Bengal Government, 1 B. L. R. P. C. 44 ; Naraini Kuar* v. *Chundi Din, I. L. R. 9 All. 467 ;* and *Umaid Bahadur* v. *Udoi Chand, I. L. R. 6 Calc. 119*, referred to. RAGHUNATH KUARI *v.* MUNNAN MISR **I. L. R. 20 All. 191**

103. ——— *Bandhu.* According to the Hindu law current in the Madras Presidency, assuming that a sister is entitled to inherit as a bandhu, the claims of a sister's son are superior. *Kutti Ammal* v. *Radakrishna Aiyan, 8 Mad. 88*, approved. LAKSHMANAMMAL *v.* TIRUVENGADA MUDALI . . **I. L. R. 5 Mad. 241**

104. ——— *Mitakshara law.* By the Mitakshara, a male descendant in the fifth degree from the great-grandfather of the propositus succeeds to the exclusion of the sister's son. GOLAB SING *v.* RAO KURUN SING. RAO KURUN SING *v.* MAHOMED FYAZ ALI KHAN **10 B. L. R. P. C. 1 14 Moo I. A. 176, 187**

105. ——— *Mitakshara.* According to the Mitakshara, a sister's son, who is a bandhu and not a sapinda similar to a daughter's son, cannot inherit until the direct male line down to and including the last samanodaka, *i.e.*, fourteen degrees of the direct male line, has been exhausted. *Kooer Golab Singh* v. *Rao Kuran Singh, 10 B. L. R. 1 ; Bhyah Ram Singh* v. *Bhyah Ugur Singh, 13 Moo. I. A. 373 ;* and *Lakshmanammal* v. *Tiruvengada, I. L. R. 5 Mad. 241*, referred to. NARAINI KUAR *v.* CHANDI DIN . . **I. L. R. 9 All. 467**

106. ——— **Step-sister's son.** A step-sister's son is entitled to inherit under the Hindu law in force in the Madras Presidency. SUBBARAYA *v.* KYLASA . . . . **I. L. R. 15 Mad. 300**

107. ——— **Uncle**—*Maternal uncle—Father's maternal uncle.* The maternal uncle and the father's maternal uncle will take as heirs in preference to the Crown. GRIDHARI LALL ROY *v.* GOVERNMENT OF BENGAL . **1 B. L. R. P. C. 44 10 W. R. P. C. 31**

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*contd.*

Reversing decision of High Court in GOVERNMENT *v.* GRIDHAREE LALL ROY . . . **4 W. R. 13**

108. ——— *Maternal uncles—Mother's sister's sons—Bandhus.* Maternal uncles are included in the class of bandhus, and succeed in priority to mother's sister's sons. MOHANDAS *v.* KRISHNABAI . **I. L. R. 5 Bom. 597**

109. ——— *Paternal uncle—Illatam—Burden of proof.* *N*, a Hindu, who had admittedly been taken as illatam into the family of his father-in-law, died leaving property which he had acquired by virtue of his illatam marriage. He was succeeded by his son, who died, without issue, leaving only a sister surviving him. In a suit by the brother of *N*, who was the managing member of his family, to recover the property from the sister of the last holder:—*Held*, that, as an illatam succeeds to property in his natural family (*Balarami* v. *Pera, I. L. R. 6 Mad. 267*), so his natural relatives can succeed to his property, and a paternal uncle being a preferable heir to a sister, the plaintiff was *primâ facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim. RAMAKRISTNA *v.* SUBBAKKA **I. L. R. 12 Mad. 442**

110. ——— **Maternal uncle of the half-blood**—*Father's paternal aunt's son—Kindred of half-blood—Bandhus.* Under the Hindu law of inheritance prevailing in the Madras Presidency, a maternal uncle of the half-blood is entitled to succeed in preference to the son of the father's paternal aunt. The former is an atma bandhu, the latter is pitru bandhu. MUTTUSAMI *v.* MUTTUKUMARASAMI . . **I. L. R. 16 Mad. 23**

111. ——— **Brother's grandson**—*Brother's grandson preferred to widow of a daughter's son.* The widow of a daughter's son is not entitled to succeed to the estate of her husband's maternal grandfather in preference to the maternal grandfather's separated brother's grandson. VALLABHDAS JAMNADAS *v.* SAKARBAI (1900) **I. L. R. 25 Bom. 28**

112. ——— **Husband, heirs of**—*Dayabhaga—Heir—Whether husband or brother is the preferential heir to moveable property obtained from her father, after her marriage, by a childless woman—Nuptial presents—Whether additions made to ornaments subsequent to marriage should be treated as part of the nuptial presents.* According to the Bengal School of Hindu law, the brother is the preferential heir to the husband to moveable property obtained, from her father after her marriage, by a woman who has died childless. *Judoo Nath Sircar* v. *Bussunt Coomar Roy Chowdhry (1873), 19 W. R. 264*, referred to. Additions, made subsequent to her marriage, to ornaments given by a father to his daughter at the time of her marriage must be treated as being in the nature of gifts subsequent to marriage, and as not being governed by the law applicable to nuptial gifts. GOPAL CHANDRA PAL *v.* RAM CHANDRA PRAMANIK (1901) **I. L. R. 28 Calc. 311**

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*a*) MALES—*concld.*

113. ——— **Paternal great-grandfather's grandson**—*Succession—Paternal aunt.* Under the Hindu law, as prevailing in the Bombay Presidency, the grandson of the paternal great-grandfather of the propositus is entitled to succeed, in preference to the paternal aunt. GANESH VAMAN KULKARNI *v.* WAGHU VALAD RAJARAM (1903) . . . **I. L. R. 27 Bom. 610**

(*b*) FEMALES.

114. ——— **General rules**—*Succession of female heirs—Nature of property.* It is not the universal rule that a Hindu woman cannot inherit so long as there is a male representative of the family. Her right to inherit depends on the nature of the property. If the property be the joint property of an undivided Hindu family, females are only entitled to maintenance; but if the property be held as a separate or divided property, it devolves upon the female heirs in their proper order of succession. SOORJOON *v.* ISHREE BRAHMAN . **3 N. W. 74**

115. ——— *Exclusion of female heirs—Mitakshara law—Joint property.* When it is sought to exclude female heirs from succession to a husband or father under the Mitakshara, on the ground that the estate is joint, it must be shown to have been so at the time of the husband's or father's death, and not merely at the death of predeceasing brother, the father of the claimant. PITUM KOONWAR *alias* MUNAR BEBEE *v.* JOY KISHEN DOSS . . . . **6 N. W. 101**

116. ——— *Limited estate in immoveable property inherited by females who have become members of family by marriage—Absolute estate in immoveable property taken by females who have not become members of family by marriage—Nature of estate taken by widow, mother, grandmother, daughter, sister, maternal great-niece.* A maternal great-niece inheriting property is in the same position, as regards the nature of the estate taken by her, as a daughter or a sister. The rule which, in the Presidency of Bombay, restricts the alienation of property by a widow succeeding to her husband or a mother succeeding to her son, does not apply to women who have not become members of the family by marriage, *e.g.*, a daughter takes an absolute estate in the property which she inherits from her father, and a sister takes a like estate in property inherited from her brother. The above rule, which restricts the alienation of property by a widow inheriting from her husband or by a mother inheriting from her son would seem to be applicable to a grandmother inheriting from her grandson, or to the widow of a sapinda, for they,

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

like the widow and mother, enter by marriage into the family whence the property comes which they inherit. The plaintiff sued to recover the moveable and immoveable property left by his brother's widow, *L*, who died without issue. The property in question had been given to *L* and her grandmother *R*, jointly by *R's* sister, *M* (*L's* maternal grand-aunt), who executed to them a deed of gift dated 17th December 1843. On her death, *R* and *L* took possession, and remained in joint possession until the death of *R*, which occurred in 1867. *L* was thenceforward, until her death, on April 19th, 1869, in sole possession. The plaintiff had obtained a certificate of heirship to *L* under Bombay Regulation VIII of 1827. The defendants were *L's* first cousins once removed. They claimed under a deed of gift executed to them dated 27th February 1869 and duly registered. The Subordinate Judge allowed the plaintiff's claim, holding the deed of gift to be *ultra vires* both as to the moveable and immoveable property. On appeal to the District Court, the Judge varied the decree of the lower Court, holding the deed of gift to be *ultra vires* only as to the immoveable property, and he varied the decree by awarding to the plaintiff as heir of *L* the immoveable property only. On appeal to the High Court, the only question argued was the nature of the estate taken by *L* in the immoveable property, her absolute right to the moveable property being admitted. *Held*, that, whether *L* took by grant or by inheritance from *M* without issue, she took an absolute estate, and, being as she was without issue, had complete power to execute the deed of gift in favour of the defendants. TULJARAM MORARJI *v.* MATHURADAS . **I. L. R. 5 Bom. 662**

117. ——————— *Law of inheritance in Bombay Presidency—Female taking absolute estate.* In Bombay, if not in other provinces in India, a female may take by inheritance from a male an absolute as opposed to a life-estate and one excluding any interest of the next heir as such of the propositus. BHAGIRTHIBAI *v.* KAHNUJIRAV . . **I. L. R. 11 Bom. 285**

118. ——— **Brother's son's daughters.** A brother's son's daughters are not heirs according to Hindu law. RADHA PEAREE DOSSEE *v.* DOORGA MONEE DOSSIA . . . **5 W. R. 131**

119. ——— **Daughters**—*Mitakshara law—Son's daughter.* According to the Mitakshara law a daughter or son's daughter does not inherit. KOOMUD CHUNDER ROY *v.* SEETAKUNT ROY **W. R. F. B. 75**

120. ——————— *Widow.* The daughter has no right where there is a widow of the deceased. MUTTU VIZIA RAGUNADA RANI KOLUNDAPURI NACHIAR *alias* KATTAMA NACHIAR *v.* DORASINGA TEVAR . . . . **6 Mad. 310**

121. ——————— *Descendants in third and fourth degree.* A daughter is, on the death of the widow of the last male proprietor, a preferable heir to descendants in the third and fourth remove. HIMUNCHULL *v.* MAHARAJ SINGH . **1 Agra 210**

BURYAR SINGH *v.* HUNSEE . . **2 Agra 166**

See GOLAB KOONWER *v.* SHIB SAHAI **2 Agra 54**

122. ——————— *Absence of male issue or widow.* The general rule of Hindu law is that, if a man die separate in estate from his kinsmen without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. NARAYAN BABAJI *v.* NANA MONOHAR . . . . **7 Bom. A. C. 153**

123. ——————— *Unmarried daughter.* According to the Mitakshara law, a maiden daughter does not succeed to her father in preference to her paternal uncle. TOOLSEE *v.* MOHADEB RAOT . . . . . **6 W. R. 197**

124. ——————— *Unmarried or married daughters.* Unmarried or married daughters, on whom as a class paternal property devolves, take a joint life-interest with rights of survivorship. The estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs; and on the death of the last surviving daughter the sons take the property equally. MUTTU VIZIA RAGUNADA RANI KULUNDAPURI NACHIAR *alias* KATTAMA NACHIAR *v.* DORASINGA TEVAR . **6 Mad. 310**

125. ——————— *Self-acquired immoveable property—Widow.* A Hindu died possessed of self-acquired property in land, leaving no sons or sons' sons, but one widow, a daughter by the widow, and another daughter by an elder wife, deceased. The last died in the widow's lifetime, leaving two sons. *Held*, that the daughters as co-heiresses took an estate in remainder vested in interest on their father's death, and that such vested right, on the death of one of them during the widow's lifetime, passed by inheritance to her sons, who upon the widow's death became entitled to enter into possession of their mother's half as her representatives. The widow in Western India has only a particular estate for life in the immoveable separate property of her deceased husband. JAMIYATRAM *v.* BAI JAMNA . . **2 Bom. 10, 2nd Ed. 11**

Dissented from in LAKSHMIBAI *v.* GANPAT MOWBA . . . . **5 Bom. O. C. 128**

126. ——————— *Daughters as co-heiresses—Power of alienation or dealing otherwise with property—Compromise—Reversioners.* According to the law of the Dayabhaga, when several daughters inherit the estate of their father, they are competent to enter into any arrangement regarding their respective rights in that estate, provided that such arrangement does not interfere with the rights of the reversionary heirs except by way of accelerating their succession. KAILASH CHANDRA CHUCKERBUTTY *v.* KASHI CHANDRA CHUCKERBUTTY . . . . **I. L. R. 24 Calc. 339**

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

127. ——————————— *Childless widowed daughter.* A childless widowed daughter, having no possibility of continuing the line of inheritance, can never inherit. LUKHEEMONEE DOSSEE *v.* TARAMONEE GOOPTEA
1 Ind. Jur. O. S. 22
Marsh. 29 : Hay 67

128. ——————————— *Mitakshara law. Semble :* According to the Mitakshara law, a married daughter with male offspring is entitled to inherit in preference to a sonless widowed daughter. GOCOOLANUND DASS *v.* WOOMA DAEE
15 B. L. R. 405 : 23 W. R. 340

In the same case on appeal to the Privy Council it was held that in the case of inheritance by daughters on default of nearer heirs no preference is awarded by the authorities recognized by the Benares school of Hindu law in Upper India to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow. *Semble :* Under the law of the Benares school, a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy. WOOMA DAEE *v.* GOCOOLANUND DASS
I. L. R. 3 Calc. 587 : 2 C. L. R. 51
L. R. 5 I. A. 40

129. ——————————— *Barren daughters.* Sonless or barren daughters are not excluded from inheritance by their sisters who have male issue. SIMMANI AMMAL *v.* MUTTAMMAL
I. L. R. 3 Mad. 265

130. ——————————— *Married daughters—Daughter having son—Priority—Unendowed daughter.* As between two married daughters, the circumstance of having a son is no qualification on this side of India, giving the married daughter having a son a prior claim to the inheritance of her parent's property over the married daughter not having a son ; such priority of claim depending on the several daughters being respectively endowed (sadhan) or unendowed (nirdhan), the unendowed daughter having the preference. BAKUBAI *v.* MANCHHABAI . . . . . **2 Bom. 5**

131. ——————————— *Test of daughter's priority.* On this side of India having male issue does not determine the right to inherit. Comparative poverty is the only criterion for settling the claims of daughters to their father's estate. A nirdhan (unendowed) daughter has preference over a sadhan (endowed) daughter. *Bakubai* v. *Manchhabai, 2 Bom. 5,* followed. POLI *v.* NAROTUM BAPU
6 Bom. A. C. 183

132. ——————————— *Right of succession of daughters to father's estate. Held,* that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. *Bakubai* v. *Manchhabai, 2 Bom. 5,* and *Poli* v. *Narotum Bapu, 6 Bom. A. C. 183,* followed. Where, therefore, two of four daughters brought suits claiming each a moiety of their father's estate, to the exclusion of the two remaining daughters, and such remaining daughters resisted such suits on the ground that they were entitled to the whole estate, being poor and needy, while their sisters were rich, and it was found that such remaining daughters were, as compared with their sisters, poor and needy, the Court dismissed such suits. AUDH KUMARI *v.* CHANDRA DAI . . . **I. L. R. 2 All. 561**

133. ——————————— *Mitakshara, Ch. I, s. 3, v. 11, and Ch. II, s. 9, v. 13—Daughter's right of succession to father's estate—Meaning of "unprovided" for.* The estate of a deceased Hindu governed by the law of the Mitakshara was in the possession of one of his daughters, who was in poor circumstances. His other daughter, who was well off and possessed of property, claimed to share in such estate, contending, with reference to the law of the Mitakshara, that, as no provision had been made for her by her father, she was "unprovided" for within the meaning of that law, and therefore entitled to share in such estate. *Held,* that such expression must be construed irrespective of the sources of provision or non-provision. DANNO *v.* DARBO . . . . **I. L. R. 4 All. 243**

134. ——————————— *Succession among daughters—Test of right to inherit—Comparative poverty.* In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter. TOTAWA *v.* BASAWA . . . . . **I. L. R. 23 Bom. 229**

135. ——————————— *Married daughters.* Married daughters are not excluded from succession by either the Dayabhaga or Mitakshara. BENODE KOOMAREE DEBEE *v.* PURDHAN GOPAL SAHEE . . . . . **2 W. R. 176**

136. ——————————— *Law of inheritance in Presidency of Bombay—Daughter, interest of, in Bombay, in property inherited from her parents.* Under the Hndu law as prevailing in the Presidency of Bombay, a daughter inheriting from a mother or a father takes an absolute estate, which passes on her death to her own heirs, and not to those of the preceding owner. BHAGIRTHIBAI *v.* KAHNUJIRAV . **I. L. R. 11 Bom. 285**

137. ——————————— *Exclusion of sons by daughters in succession to stridhan property—Mitakshara law—Mayukha law.* According to the Mitakshara, the daughter takes an absolute estate which classes as her stridhan, and descends to her own heirs, *i.e.,* to her daughters to the exclusion of her sons. The plaintiff sued, as the heir of her mother, *V,* to recover certain property which *V*

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had inherited from her father. The defence was that plaintiff's brothers excluded her title. *Held*, that, the case being governed by the Mitakshara (which, and not the Mayukha, is the chief authority in the Ratnagiri District), the property in dispute descended to *V's* daughter (the plaintiff), and not to *V's* sons. JANKIBAI *v.* SUNDRA
I. L. R. 14 Bom. 612

138. ——— *Widow.* A Hindu, an inhabitant of Bombay, entitled to separate moveable and immoveable property, died without male issue, leaving a widow, four daughters, and brother, and the male issue of other deceased brothers. *Held*, that the widow was entitled to the moveable property absolutely and to the immoveable property for life. Subject to the widow's interest, the immoveable property descended to the daughters absolutely, in preference to the brother and the issue of the deceased brothers. PRANJIVANDAS TULSIDAS *v.* DEVKUVARBHAI
1 Bom. 130

139. ——— *Unmarried daughter—Subsequent marriage and issue.* According to the Hindu law current in Bengal, in default of son, grandson, great-grandson, or widow, the unmarried daughter succeeds in preference to married daughters; and if the unmarried daughter should subsequently marry and die leaving male issue, her son will succeed to the exclusion of the married sisters and their male issue. RADHA KISHEN MANJEE *v.* RAM MUNDUL . **6 W. R. 147**

140. ——— *Dancing girls, Property left by—Sister.* By Hindu law, on the death of one of two sisters to whom the joint hereditary office of dancing girls attached to a pagoda had passed on the death of their mother, the share of the deceased sister in the office devolves on her daughter, and not on the surviving sister by survivorship. KAMAKSHI *v.* NAGARATHNAM
5 Mad. 161

141. ——— *Daughter's estate—Stridhan—Jain law—Mitakshara.* Under the Mitakshara law, the estate which a daughter takes in property inherited by her father is only a qualified estate, and on her death such property descends to the heirs of her father, and not to her own heirs. CHOTAY LALL *v.* CHUNNOO LALL
12 B. L. R. 235 ; 29 W. R. 490

s.c. on appeal to Privy Council
I. L. R. 4 Calc. 744 : L. R. 6 I. A. 15
3 C. L. R. 465

142. ——— *Daughter, Alienation by.* A daughter inheriting property from her father takes a life-interest only in such property, and has no power of alienation beyond her lifetime. The heir of the father on her death takes the property as heir of the ancestor, and not as her heir. DEO PERSHAD *v.* LUJOO ROY
14 B. L. R. 245 note : 20 W. R. 102

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(*b*) FEMALES—*contd.*

143. ——— *Mitakshara law.* Under the Mitakshara law, the unmarried daughter succeeds only in priority of her married sisters, not to the ultimate exclusion of such sisters' right of inheritance from their father. Therefore, where a Hindu under the Mitakshara died leaving two daughters, one married and the other unmarried, and the latter succeeded to the father's estate, and then married and subsequently died, leaving a son and her sister, surviving her: *Held*, that the sister was entitled to the property as the next heir of the father. DOWLUT KOOER *v.* BURMADEO SAHOY
14 B. L. R. 246 note : 22 W. R. 54

144. ——— *Succession by daughter before her marriage—Subsequent marriage and birth of son—Death of such daughter—Succession of married sister.* On the death of a daughter who had succeeded before her marriage to her father's estate, to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister who has, or is likely to have, male issue, and not upon her own son. TINUMONI DASI *v.* NIBARUN CHUNDER GUPTA
I. L. R. 9. Calc. 154 : 12 C. L. R. 376

145. ——— **Daughters**—*Maharashtra School —Succsssion—Place of daughter in the list of heirs. Held*, that, according to the *Maharashtra* school of Hindu law, the daughter is a preferential heir to the widow of a predeceased brother's son, or to the adopted son of such widow, where no authority for the adoption has been given by the deceased husband of the adopter. *Nihalchand Harakchand v. Hemchand, I. L. R. 9 Bom. 31*, referred to. SITA RAM *v.* CHINTAMAN (1902)
I. L. R. 24 All. 472

146. ——— *Daughter's power of alienation.* Under the Hindu law, a daughter who succeeds to an absolute and several estate in her father's immoveable property may, if she has no issue, make a gift of that property in her lifetime or devise it by will, and her devisee is entitled to hold it against her own heirs or the heirs of her father. HARIBHAT *v.* DAMODARBHAT
I. L. R. 3 Bom. 171

147. ——— *Daughter's power of alienation.* According to the law of the Presidency of Bombay, the daughter of a Hindu dying without male issue takes absolutely, and may alienate lands by deed or devise them by will. BABAJI *v.* BALAJI GANESH . **I. L. R. 5 Bom. 660**

148. ——— *Daughter's righ of survivorship—Joint estate—Widows—Difference in the law of Bombay and the other Presidencies.* In these parts of the Presidency of Bombay where the doctrines of the Mayukha prevail, daughters take not only absolute, but several estates, and consequently, when without any issue, may dispose of such property during life or may devise it by will. The rule is different in Bengal and Madras,

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HINDU LAW—INHERITANCE—*contd.*

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where daughters take by inheritance a joint estate with rights of survivorship. Result of the application of the Bombay rule to widows stated. BULAKIDAS *v.* KESHAVLAL . **I. L. R. 6 Bom. 85**

149. ——— *Childless daughter—Joint estate—Survivorship.* *R*, holding estates in Bengal jointly with his brothers as an undivided Hindu family, died, leaving a widow, *S*. and three unmarried daughters, *B*, *S M*, and *N*, On her husband's death, *S* continued to reside with her brothers, and was supported out of the income of the joint estate. All the daughters married during the lifetime of *S*, and *B* become a widow without having had a child. After *S's* death and during the lifetime of *S M*, *N* also became a childless widow. *S M* died after her mother, leaving a son *R K*. *R K*, on attaining majority, sued to recover, with mesne profits, a four-anna share of the ancestral estates to which he claimed to be entitled on his mother's death as heir of *R*, and from which he alleged he had been dispossessed by the representatives of *R's* brothers, whom he made defendants in the suit, joining *B* and *N* with them as co-defendants. *Held*, that *B*, being a childless widow at the time of her mother's death, could take no interest in her father's estate. *Held*, also, that on their mother's death *S M* and *N*, as heirs of their father, took a joint estate in his succession, and on *S M's* death the estate which had come to her and *N* jointly survived to *N*, since the fact of the latter being at that time a childless widow did not destroy the right of survivorship which she had previously acquired by inheritance. AMIRTOLALL BOSE *v.* RAJONIKANT MITTER **15 B. L. R. 10 : 23 W. R. 214 L. R. 2 I. A. 113**

150. ——— *Right of daughter's son to maternal grandfather's estate—Reversioners.* So long as a daughter not disqualified, or in whom a right of inheritance has once vested, survives, a daughter's son acquires no right by inheritance in his maternal grandfather's estate. *Amirtolall Bose* v. *Rajonikant Mitter, 15 B. L. R. 10*, followed. Where therefore *R* died leaving issue, two daughters, *B* and *P*, and *P* died shortly after *R*, leaving sons, and while *B* was alive her sons and the sons of *P* sued as the heirs of *R* to set aside a mortgage of his real estate made by *B* as the guardian of her minor sons and by *A*, the father of *P's* sons, as their father and guardian, such suit was held not to be maintainable. BAIJ NATH *v.* MAHABIR . . **I. L. R. 1 All. 608**

151. ——— **Daughter-in-law**—*Succession to mother-in law.* A daughter-in-law is not the heiress of her mother-in-law according to Hindu law. BANDAM SETTAH *v.* BANDAM MAHA LAKSHMY **4 Mad. 180**

152. ——— *Priority of daughter-in-law to a paternal first cousin.* A Hindu widow, who had inherited the estate of her separated husband, died leaving her surviving a widowed daughter-in-law and a first cousin of her deceased husband, *i.e.*, his paternal uncle's son. In a suit brought by the daughter-in-law to recover possession of certain immoveable property left by the deceased widow :—*Held*, that in the Presidency of Bombay the daughter-in-law was entitled to succeed to the property in priority to the paternal first cousin of her deceased husband. VITHALDAS MANICKDAS *v.* JESHUBAI . **I. L. R. 4 Bom. 219**

153. ——— *Mitakshara law.* Under the Mitakshara and usages obtaining in the District of Behar, a daughter-in-law, whose husband has predeceased his father, is not in the line of heirs of her father-in-law. *Per* MITTER, *J.*—A daughter-in-law, not being a joint owner with her father-in-law, cannot after his heath take his estate by right of survivorship. ANANDA BIBI *v.* NOWNIT LAL . . . **I. L. R. 9 Calc. 315**

154. ——— *Mayukha—Property given to a woman by a stranger—Devolution of such property—Daughter's daughters not entitled to it—Son's widow preferred as gotrajasapinda.* By the law of inheritance laid down in the Mayukha, a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds, therefore, in preference to the daughters of a deceased daughter. BAI NARMADA *v.* BHAGWANTRAI **I. L. R. 12 Bom. 505**

155. ——— **Father's sister**—*Mother's brother—Bandhus.* According to the Hindu law current in the Madras Presidency the father's sister is not entitled to inherit in preference to the mother's brother. *Semble : per* WILKINSON, *J.*—The father's sister is a bandhu. NARASIMMA *v.* MANGAMMAL . . . **I. L. R. 13 Mad. 10**

156. ——— **Father's half-sister**—*Succession—Mother's brother.* In the Bombay Presidency the father's half-sister succeeds in priority to the mother's brother. SAGUNA *v.* SADASHIV PANDU MORE (1902) . **I. L. R. 26 Bom. 710**

157. ——— **Grand-daughter**—*Mitakshara law.* According to Mitakshara law, a son's daughter does not inherit. KOOMUD CHUNDER ROY *v.* SEETAKUNT ROY . **W. R. F. B. 75**

158. ——— *Bandhu—Son's daughter.* A son's daughter is entitled to inherit to her grandfather as a bandhu. NALLANNA *v.* PONNAL . . . **I. L. R. 14 Mad. 149**

159. ——— *Daughter's daughter.* On the principle laid down in *Nallanna* v. *Ponnal, I. L. R. 14 Mad. 149*, a daughter's daughter is, in the absence of preferential males heirs, entitled to succeed to her grandfather as a

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HINDU LAW—INHERITANCE—*contd.*

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bandhu. RAMAPPA UDAYAN *v.* ARUMUGATH UDAYAN . . . **I. L. R. 17 Mad. 182**

BANSIDHAR *v.* GANESHI **I. L. R. 22 All. 338**

160. ———— *Daughter of predeceased son—Great-grandson of a brother—Gotraja-sapinda—Bandhu.* According to Hindu law, the daughter of a predeceased son of the propositus is not a gotraja-sapinda, and is not entitled to inherit in preference to the great-grandson in the male line of a separated brother. VENILAL *v.* PARJARAM . . . **I. L. R. 20 Bom. 173**

161. ———— **Mother.** By Hindu law the mother is a possible heir under certain circumstances. TARA SOONDUREE *v.* RASH MUNJUREE **12 W. R. 78**

162. ———— *Mother's inheritance from son.* According to Hindu law, a mother inheriting from her son has not an absolute property in the estate, but merely a life-interest, without power of alienation. BACHIRAJU *v.* VENKATAPPADU . . . . . **2 Mad. 402**

163. ———— *Widowed mother's estate as heir of son. Held,* that in a separate family a Hindu mother succeeding to her son's immoveable property takes in it the same estate as a Hindu widow takes in the immoveable property of her husband dying without male issue. A Hindu died leaving by his first wife, who predeceased him, three sons, from whom he had separated, his second wife, and a minor son by the latter. The minor son died in infancy. *Held,* that the mother succeeded to the immoveable property of her minor son, but took only a life-interest in it. NARSAPPA LINGAPPA *v.* SAKHARAM KRISHNA . **6 Bom. A. C. 215**

164. ———— *Mother's right to succeed to a childless son's property—Priority of the mother over the father—Mitakshara law—Mayukha law—Law in Ratnagiri District.* In the Ratnagiri District the Mitakshara is the paramount authority on Hindu law. Under the Mitakshara, the mother of a childless separated Hindu comes in the order of succession next after his widow and before his father. The rule of the Mayukha, that the father is to be preferred to the mother, being directly opposed to the rule of the Mitakshara, cannot prevail in the Ratnagiri District. BALKRISHNA BAPUJI APTE *v.* LAKSHMAN DINKAR **I. L. R. 14 Bom. 605**

165. ———— *Mother inheriting to her son takes a limited estate—Funeral ceremonies of mother—Son's religious duty to perform them—Their expenses are charged upon the son's estate—Mitakshara—Interpretation.* Under the Hindu law applicable in Bombay a mother succeeding as heir to her son takes a limited estate. The duty of performing the funeral ceremonies of a mother, that is *pindadána* or offering the funeral oblations, is laid down as a religious injunction binding on her son in absolute terms by the Hindu law. The duty is independent of any assets left by her. The expenses of performing the funeral ceremonies are, therefore, a charge on the son's estate. According to Vijnaneshwara, where an act is directed to be done and the omission to do it is stated to be sinful, the direction imposes upon the person directed an imperative and absolute obligation to do the act. *V*, a Hindu died, leaving him surviving his mother *B*, who succeeded to his property. B made a will in favour of her daughter's daughter *P*, who succeeded to the property on her death and performed her funeral ceremonies. The plaintiff, a reversionary heir of *V*, alleging that *B* took only a life-interest in the property, sued to recover its possession. *Held,* that the plaintiff was entitled to recover the possession of *V's* property as *V's* heir, only on condition of fulfilling the obligation binding the estate, *viz.*, of compensating *P* for the expenses she had incurred in performing the funeral ceremonies of *B*. VRIJBHUKANDAS *v.* BAI PARVATI (1907) **I. L. R. 32 Bom. 26**

166. ———— **Grandmother**—*Paternal grandmother inheriting property from maiden grand-daughter—Estate taken by grandmother—Power to dispose by will.* A paternal grandmother in Gujarat, inheriting moveable and immoveable property from her maiden grand-daughter, takes an absolute interest in such property, and on her death the property goes to her heir and not to the heir of the grand-daughter, and the grandmother can dispose of such property by will. GANDHI MAGANLAL MOTICHAND *v.* BAI JADAB **I. L. R. 24 Bom. 192**

167. ———— **Niece**—*Sister's daughter—Appointed daughter.* According to Hindu law, a sister's daughter cannot become an "appointed daughter" nor her son a "putrika putra," nor is the adoption of a "putrika putra" valid in the present day. NURSING NARAIN *v.* BHUTTUN LALI. **W. R. 1864, 194**

168. ———— *Husband's nieces—Bandhu.* A Hindu widow, married according to one of the approved forms, died without issue, leaving her surviving the plaintiffs, who were the daughters of her husband's deceased brother, and the first defendant, who was the adopted son of her sister's daughter, and the second defendant, who was the adopted son of her maternal uncle, and the third defendant, who was the widow of her brother. The defendant having taken possession of her stridhanam property on her death, the plaintiffs now sued as heirs under the Hindu Law for possession. *Held,* that the plaintiffs were entitled to succeed. VENKATASUBRAMANIAM CHETTI *v.* THAYARAMMAH . . . **I. L. R. 21 Mad. 263**

169. ———— **Sister**—*Mitakshara law.* According to the law of the Mitakshara, none but females expressly named can inherit, and the sister

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of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate. *Gauri Sahai* v. *Rukko, I. L. R. 3 All. 45*, followed. JAGAT NARAIN *v.* SHEO DAS . **I. L. R. 5 All. 311**

170. ——— *Sister's daughter.* According to Hindu law, neither a sister nor a sister's daughter can inherit. KALI PERSHAD SURMA *v.* BHOIRABEE DABEE . **2 W. R. 180**

ANUND CHUNDER MOOKERJEE *v.* TEETOORAM CHATTERJEA . . . . **5 W. R. 215**

171. ——— *Mitakshara law—Male gotraja-sapindas.* According to the Mitakshara law, a sister is not in the line of heirs, and is not entitled to succeed in preference to male gotraja-sapindas. JULLESSUR KOOER *v.* UGGUR ROY . **I. L. R. 9 Calc. 725 : 12 C. L. R. 460**

172. ——— *Brother.* A sister cannot succeed her brother as heir by Hindu law. RUKKINI DASI *v.* KADERNATH GHOSE **5 B. L. R. Ap. 87**

RAMDYAL DEB *v.* MAGNEE . **1 W. R. 227**

ANUND CHUNDER MOOKERJEE *v.* TEETORAM CHATTERJEA . . . . **5 W. R. 214**

173. ——— *Law of Bombay—Sons of separated brother.* A Hindu, an inhabitant of Bombay, entitled to separately acquired moveable and immoveable property, died, leaving a widow, an infant son, three daughters and a brother. The son died in infancy, and without having married. *Held*, that the widow, as mother of the son, inherited his property, as to the moveables absolutely, as to the immoveables for life with remainder to the sisters of the son as his heirs absolutely; and that, as against the defendants (the widow and daughters), the plaintiffs, as sons of a separated brother, had by Hindu law no claim as heirs to any part of the property according to the law in the Bombay Presidency. In a separated family sisters take as heirs to an unmarried and intestate brother in preference to relations of the father. Marriage does not exclude them from the inheritance. VINAYAK ANANDRAV *v.* LAKSHMIBAI **1 Bom. 117**

On appeal to the Privy Council.
3 W. R. P. C. 41 : 9 Moo. I. A. 516

174. ——— *Law of Western India—Viramitrodaya.* Under the Hindu law prevailing in Western India, as sister succeeds to the estate of her deceased brother in preference to a separated and remote male relative of the deceased. The Viramitrodaya is an authority in Benares rather than in Bombay, and its doctrine—that, where there has been an intervening holder between a brother and sister or a father and daughter, the inheritance opens, and the sister and daughter are excluded, and the next male heirs come in—has not been followed in this Presidency. DHONDU GURAV *v.* GANGABAI . . . **I. L. R. 3 Bom. 369**

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

175. ——— *Sisters take absolutely in severalty—Daughters.* In the Bombay Presidency sisters take by inheritance from a brother absolute estates in severalty. On the death of a son without leaving wife or child, his estate goes to his mother, and on her death to his sisters as his heirs. The sisters take an absolute estate in severalty, and not as joint tenants. RINDABAI *v.* ANACHARYA . . **I. L. R. 15 Bom. 206**

176. ——— *Cousin on paternal side once removed.* Under the Hindu law, a sister succeeds as heir to the estate of her deceased brother, in preference to his cousin on the paternal side one degree removed. *Krishnaji* v. *Pandurang, 12 Bom. 65*, referred to and distinguished. BIRU *v.* KHANDU . . . **I. L. R. 4 Bom. 214**

177. ——— *Sister's right of succession in preference to step-mother or paternal first cousin.* Under the Hindu law as prevailing in the Presidency of Bombay, a full-sister is the heir of her deceased brother, in preference either to his step-mother or paternal first cousin. *Vinayak Anandrav* v. *Lakshmibai, 1 Bom. 117 : 3 W. R. P. C. 41 : 9 Moo. I. A. 516 : Shakharam Sadashiv Adhikari* v. *Sitabhai, I. L. R. 3 Bom. 353*, followed. LAKSHMI *v.* DADA NANAJI **I. L. R. 4 Bom. 210**

178. ——— *Sisters endowed and unendowed, equal right of.* Hindu sisters, when they succeed, take equally. An unendowed sister has no prior right of succession over an endowed sister, such as an unendowed daughter has over an endowed daughter. BHAGIRTHIBAI *v.* BAYA **I. L. R. 5 Bom. 264**

179. ——— *Daughter of a predeceased son.* In the island of Bombay the sister's place as heir is to be determined by the text of Mayukha. Both under the Mayukha and the Mitakshara, the sister comes in as a gotraja-sapinda, and as such must be postponed to the brother's son, who is a sapinda. MULJI PURSHOTUM *v.* CURSANDAS NATHA . **I. L. R. 24 Bom. 563**

180. ——— *Right of sister to inherit in preference to half-brother—Estate taken by a mother in her son's immoveable property—Mitakshara and Mayukha, authority of.* A Hindu died possessed of certain immoveable property situated in the district of Thana, in the Northern Konkan, leaving him surviving a mother, a full-sister, and a separated half-brother. His mother succeeded to his estate, and held it till her death. The half-brother then sued for a declaration of his right to the estate of his deceased brother. *Held*, that the full-sister and not the half-brother was entitled to succeed as heir to the estate of her deceased brother. *Held*, also, that the decision in *Vinayak Anandrav* v. *Lakshmibai, 1 Bom. 117 : 9 Moo. I. A. 516*, must be regarded as of general authority in the

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Presidency of Bombay, except where an invariable and ancient special usage to the contrary is alleged and proved. *Semble :* The law of the Mayukha should prevail in the Northern Konkan. *Krishnaji* v. *Pandurang, 12 Bom. 65,* and *Lallubhai Bapubhai* v. *Mankubhai, I. L. R. 2 Bom. 418,* referred to. It is settled law that a mother succeeding, on the death of her son, to his immoveable property takes only such a limited estate in it as a Hindu widow takes in the immoveable property of her husband dying without male issue, and that, on her death, her son's heir succeeds to such property, SAKHARAM SADASHIV ADHIKRI *v.* SITABAI **I. L. R. 3 Bom. 353**

181. ——— A sister may succeed to her brother and sue for the recovery of property unlawfully alienated by their mother which the latter inherited on the death of her son. KUTTI AMMAL *v.* RADAKRISTNA AIYAN **8 Mad. 88**

182. ——— *Priority of sister and half-sister.* In the Presidency of Bombay the sister and half-sister inherit in priority to the step-mother as well as to the brother's wife and the paternal uncle's widow. The law as to the succession of a full-sister in the Presidency of Bombay does not rest solely upon either the Mitakshara or the Mayukha, but is built upon both taken conjointly. The case of *Vinayak Anandrav* v. *Lakshmibai, 1 Bom. 117 : 9 Moo. I. A. 516,* decided that in the Presidency of Bombay the term "brothers" occurring in the Mitakshara (ch. II, s. 14, pl. i) should be taken to include sisters. As the term "brothers," while including sisters, introduces them after brothers, so the term "half-brothers" must be regarded as including half-sisters and as bringing them in after half-brothers. KESSERBAI *v.* VALAB RAOJI **I. L. R. 4 Bom. 188**

183. ——— *Half-sister—Sapinda.* In competition with a sapinda of the deceased, a half-sister cannot succeed according to the Mitakshara. KUMARAVELU *v.* VIRANA GOUNDAN . . . . . **I. L. R. 5 Mad. 29**

MOTHOORANATH MOZOOMDAR *v.* EUSUFF ALI KHAN . . . . . **14 W. R. 356**

184. ——— *Dharwar district—Succession—Sister—Brother's widow.* In the district of Dharwar a sister is preferred as an heir to a brother's widow. RUDRAPA *v.* IRAVA (1904) **I. L. R. 28 Bom. 82**

185. ——— **Sister's daughter**—*Dayabhaga—Heirship—Sister's daughter's son—Succession. Certificate Act (VII of 1889)—Primâ facie title.* When a person alleging to be the sister's daughter and sister's daughter's son of a deceased Hindu governed by the Dayabhaga law, applied for a certificate under Act VII of 1889 to collect the debts due to the deceased. *Held,* without expressing a final opinion on the question, that *primâ facie* a sister's daughter and a sister's daughter's son are not heirs under the Dayabhaga law, and are therefore not entitled to the certificate. KRISHNA PADA DUTT *v.* SECRETARY OF STATE FOR INDIA (1908) . . . **12 C. W. N. 453**

186. ——— **Prostitute**—*Rule of inheritance affected by manner of life—Maraver prostitutes—Act XXI of 1850.* A married Maraver woman deserted her husband and lived in adultery with another man, to whom she bore four children. Of those children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land. *Held,* that the sister succeeded to the deceased in preference to the brother. SIVASANGU *v.* MINAL **I. L. R. 12 Mad. 277**

187. ——— *Prostitute—Succession to property of degraded woman.* In the absence of any local custom or usage to the contrary a woman of the town is no heir to her deceased sister, who was also a woman of the town. *Sivasangu* v. *Minal, I. L. R. 12 Mad. 277,* distinguished. A woman of the town, who is a Hindu by birth, does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu law. SARNA MOYEE BEWA *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 25 Calc. 254 2 C. W. N. 97**

188. ——— **Son's widow**—*Property of father-in-law.* Where a son predeceased his father, and the son's widow subsequently succeeds to her father-in-law's property as his heir, she takes the same estate in it as she does in property inherited by her from her husband. GADADHAR BHAT *v.* CHANDRABHAGABAI . **I. L. R. 17 Bom. 690**

189. ——— **Step-mother**—"*Mother*"—*Mitakshara—Law in Bombay.* The step-mother is not included by the Mitakshara within the term "mother." But, although a step-mother cannot in the Presidency of Bombay be introduced as an heir under the term "mother," yet, as the widow of a gotraja-sapinda of the propositus, and therefore, according to the doctrine of the Mitakshara and the Mayukha, a gotraja-sapinda herself, she cannot be regarded as altogether excluded from the succession to a step-son. *Quære :* At what points in the list of heirs the step-mother, the brother's wife, and the paternal uncle's wife succeed in the Presidency of Bombay. KESSERBAI *v.* VALAB RAOJI **I. L. R. 4 Bom. 188**

190. ——— *Step-mother preferable to widow of half-brother.* As between the

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

widows of specified heirs who are gotraja-sapindas, the step-mother, being the widow of the father who is higher on the list than the half-brother, is preferable to the widow of the half-brother. RAKHMABAI *v.* TUKARAM . **I. L. R. 11 Bom. 47**

191. ——— *Mitakshara law—Succession to step-son.* According to the Mitakshara school of Hindu law, a step-mother, not being one of the females expressly named in the Mitakshara and not being included under the term "mother" in Ch. II, s. 3, v. 1, cannot inherit from her deceased step-son. *Gauri Sahai* v. *Rukko, I. L. R. 3 All. 45; Jagat Narain* v. *Sheo Das, I. L. R. 5 All. 311; Lala Joti Lal* v. *Durani Koer, B. L. R. Sup. Vol. 67; Kessarbai* v. *Balab Raoji, I. L. R. 4 Bom. 188;* and *Kumaravelu* v. *Virana Goundan, I. L. R. 5 Mad. 29,* referred to. RAMA NAND *v.* SURGIANI . **I. L. R. 16 All. 221**

192. ——— *Right of step-mother to succeed to her step-son in preference to his paternal first cousin.* A step-mother succeeds to the property of her step-son in preference to the step-son's paternal uncle's son. RUSSOOBAI *v.* ZULEKHABAI . . **I. L. R. 19 Bom. 707**

193. ——— *Paternal uncle.* Under the Hindu law which obtains in the Presidency of Madras, a step-mother does not succeed to the estate of her step-son in preference to a paternal uncle. *Kumaravelu* v. *Virana Goundan, I. L. R. 5 Mad. 29,* and *Muttammal* v. *Venga Lukkshmi Ammal, I. L. R. 5 Mad. 32,* approved. MARI *v.* CHINNAMMAL . . **I. L. R. 8 Mad. 107**

194. ——— *Sagotra-sapindas.* According to Hindu law current in the Madras Presidency, a step-mother does not succeed to the estate of her step-son in preference to his grandfather's brother's grandson. RAMASAMI *v.* NARASSAMA . . . **I. L. R. 8 Mad. 133**

195. ——— *Sapindas—Mitakshara law.* In competition with a sapinda of the deceased, a step-mother cannot succeed according to the Mitakshara. KUMARAVELU *v.* VIRANA GOUNDAN . . . **I. L. R. 5 Mad. 29**

196. ——— *Paternal grandmother.* A Hindu step-mother is not entitled to succeed to a deceased step-son before a parternal grandmother MUTTAMAL *v* VENGA LAKSMIAM MAL **I. L. R. 5 Mad. 32**

197. ——— **Step-mother and step-grandmother**—*Mitakshara law.* According to Mitakshara, in a divided family a step-mother cannot succeed to the estate of her step-son or a step-grandmother to the estate of her step-grandson. LALA JOTI LAL *v.* DURANI KOWER. LAL KOWER *v.* JAIKARAN LAL **B. L. R. Sup. Vol. 67 : W. R. F. B. 173**

198. ——— **Widow and Co-widow**—*Heir on exhaustion of all specified heirs.* The members of the "compact series" of heirs specifically enumerated take in the order of enumeration preferably to those lower in the list, and to the widows of any relatives whether near or remote, but where the group of specified heirs has been exhausted, the right of the widow is recognized to take her husband's place in competition with the representative of a remoter line. NAHALCHAND HARAKCHAND *v.* HEMCHAND **I. L. R. 9 Bom. 31**

199. ——— *Brother of husband.* According to the Dayabhaga, a Hindu widow is the heiress of her husband in preference to his brother. CHUNDER KANT SURMAH *v.* BUNSHEE DEB SURMAH . . . . **6 W. R. 61**

200. ——— *Right to succeed to family property.* A Hindu widow's right to succeed to her husband's ancestral undivided property is only as his immediate heir. A widow can only inherit family property where there has been a partition among the co-parceners, of whom her husband was one, or where the whole property has vested in her husband by the death of all the other co-parceners. The widow of an undivided Hindu, who leaves a co-parcener him surviving, has, like the widow of a divided Hindu who leaves male issue, merely a right to maintenance. Where therefore a widow sued for a Palaiyappattu as heir to the surviving brother of her husband: *Held,* that the suit must be dismissed. PEDDAMUTTU VIRAMANI *v.* APPU RAU . . . **2 Mad. 117**

201. ——— *Daughters.* A Hindu widow, whether childless or not, stands next in the order of succession on failure of male issue. Where *A* had two wives, *B* and *C*, and *B* predeceased *A*, leaving three daughters, and *C* survived *A* and was childless: *Held,* that *C* succeeded to *A's* property in preference to the three daughters. PERAMMAL *v.* VENKATAMMAL . **1 Mad. 223**

202. ——— *Estate of husband's brother. Held,* that under Hindu law a widow was not entitled to inherit the estate of her husband's brother, and she, having no *locus standi* in Court, could not question the title of the party in possession of the disputed estate. CHOORA *v.* BUSUNTEE . . . . **1 Agra 174**

203. ——— *Estate of husband's uncle. Held,* that a widow cannot, under Hindu law, claim to inherit the estate left by her husband's uncle, and could not consequently question the title of the defendant (widow of another brother's son), who was admittedly in possession of the estate claimed. GOUREE *v.* OOMRAO KOONWAR **1 Agra 149**

204. ——— *Jain law—Sonless widow.* A sonless widow of a Saragi Agarwala takes, by the custom of the sect, an absolute interest in the self-acquired property of her husband. SHEO SINGH RAI *v.* DAKHO . **6 N. W. 382**

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

Affirmed by Privy Council in s.c.
I. L. R. 1 All. 688

205. ——————— *Khojas—Sister.* The widow of a Khoja Mahomedan who has died childless and intestate succeeds to her husband's estate in perference to his sister. RAHIMATBAI *v.* HIBBAI . . . . . **I. L. R. 3 Bom. 24**

206. ——————— *Husband's brother—Mitakshara law.* Where the Mitakshara law prevails, the widow of a member of a joint Hindu family cannot succeed to her husband in preference to the husband's brother, and is no heir to her brother-in-law, or to his widow, after their death. BANEE PERSHAD *v.* MAHABOODHY **7 W. R. 292**

207. ——————— *Property acquired by funds derived from ancestral estate.* Where property is acquired by the members of a joint Hindu family from funds derived from the ancestral property and held by them in joint possession, on the death of one of them his share does not devolve on his widow. TEEKNOO *v.* MOONIAH
7 W. R. 440

208. ——————— *Separate estate of husband.* In the case of property of which part is the common property of a joint Hindu family and part the separate acquisition of a deceased brother, his widow, in default of male issue, succeeds to his separate estate. KATTAMA NAUCHEAR *v.* RAJAH OF SHIVAGUNGAH
2 W. R. P. C. 31 : 9 Moo. I. A. 539

209. ——————— *Right of widow to succeed to husband's share of partnership property.* Ordinary co-partnership property is not subject to the rule of Hindu law which excludes a widow from the succession at her husband's death to a share of the joint property of an undivided family. RAMPERSHAD TEWARRY *v.* SHEO CHURN DOSS. THOOKRA *v.* RAMPERSHAD TEWARRY
10 Moo. I. A. 490

210. ——————— *Wives of gotraja-sapindas—Law of Western India.* According to the Hindu law obtaining in Western India, the wives of all gotraja-sapindas and samanodakas have rights of inheritance co-extensive with those of their husbands immediately after whom they succeed. LAKSHMIBAI *v.* JAYRAM HARI
6 Bom. A. C. 152

211. ——————— *Right of survivorship.* The canon of the Hindu law of Northern India in regard to the succession of widows is "that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue." The limit of the "co-heirs" must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. Collateral kinsmen answering the above

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

description have interests which pass *inter se* by right of survivorship, and a widow's right as heir is excluded by the test when any of such collateral kinsmen survive her husband. The governing principle of the rule is co-parcenary survivorship, which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor. YENUMULA GAVURIDEVAMMA GARU *v.* YENUMULA RAMANDORA GARU . **6 Mad. 93**

212. ——————— *Sapindas—Law in Bombay.* In the Presidency and Island of Bombay the wife is a sapinda as well as a gotraja of her husband, and, if he die (without leaving a son or grandson), she, on the subsequent death of his separated sapinda and in the absence of any specially designated heir entitled to preference, ranks in the same place in the order of succession to the property of such separated sapinda as her husband would have occupied if he were living. Thus the widow of first cousin *ex parte paterna* of the deceased propositus was held prior in order of succession to a fifth male cousin *ex parte paterna* of the same. Or, in other words, a wife becomes by her marriage a sagotra-sapinda of her husband and his gotraja-sapindas, and in that capacity succeeds as a widow to property which he would have taken as a sapinda before the male representative of a remoter branch. The Institutes of Manu, the Mitakshara, and the Mayukha, although of great authority in the Presidency of Bombay, are all subject to the control of law and usage. No one of them is, as a whole, in full force in any part of the Presidency. In all of them there are precepts which, if they ever were practical law, have, for a time beyond the memory of living men, been obsolete. LALLUBHAI BAPUBHAI *v.* MANKUVARHBAI . **I. L. R. 2 Bom. 388**

In the same case on appeal it was *held* by the Privy Council,—By the Hindu law in force in Western India the widow of a collateral relation, although she is not specified in the texts amongst the heirs to members of her husband's family, may come into the succession as one of the classes of gotraja-sapindas of that family. According to the law of the Mitakshara as accepted in Western India, the right to inherit in the classes of gotraja-sapindas is to be determined by family relationship, or the community of corporal particles, and not only by the capacity of performing funeral rites. The High Court having affirmed as a right, according to the law actually prevalent in Western India, the claim of a widow of a first cousin, on the father's side, of the deceased to inherit his estate as a gotraja-sapinda, it was held that there was no reason for withholding from that doctrine the force of law; the right of the widow being mainly rested on the ground of positive acceptance and usage. In this case the widow of a first cousin of the deceased, on the father's side, was held to have become by her marriage gotraja-sapinda of her husband's cousin's

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HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral gotraja-sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor. LALLUBHAI BAPUBHAI *v.* CASSIBAI

I. L. R. 5 Bom. 110 : 7 C. L. R. 445
L. R. 7 I. A. 212

213. ——— *Heirs after widow's death—Female heir—Widow of gotraja-sapinda—Stridhan.* *N* and *H* were divided brothers. *H* died first, leaving a son named *T*. *N* afterwards died childless, leaving his widow *J*, who took possession of *N's* property. *T* died childless, leaving only his widow *B M*, who succeeded to the property on *J's* death. After the death of *B M*, the plaintiff, who was the son of *T's* sister, sued to recover the property from the defendants, who were distant samanodaka relations of *N*. It was contended on the plaintiff's behalf that on *J's* death *B M* took the property as her stridhan acquired by inheritance, and that the plaintiff, as bandhu of her husband *T*, was heir to *B M*, who died without issue. *Held* (confirming the decree dismissing the suit), that on *J's* death (*N* and *H* being divided) *B M* succeeded to the property as a gotraja-sapinda, being the widow of *T*, the nephew of *N*. As such, she took only a life-interest in the property, and had no absolute interest in it as in her stridhan proper. In the Presidency of Bombay female heirs who by marriage enter into the gotra of the male whom they succeed (including widow) mother, grandmother, the widow of a gotraja-sapinda, etc.), take only a widow's estate in property which they inherit from the last male owner. Whether the estate inherited by these female heirs is called their stridhan or not, their restricted rights over it are admitted by all schools. MADHAVRAM *v.* DAVE TRAMBAKLAL BHAWANISHANKAR

I. L. R. 21 Bom. 739

214. ——— *Succession of co-widows.* Where a Hindu dies intestate, leaving no issue and several widows, the widows succeed equally, and are entitled to equal shares in his estate, and the ordinary course would be to grant them a joint administration. RAMIA *v.* BHAGI . **1 Bom. 66**

S.C. *In the goods of* DADOO MANIA

1 Ind. Jur. O. S. 59

215. ——— *Right of co-widows—Right of senior widow.* According to Hindu law current in Southern India, two or more lawfully married wives (patnis) take a joint estate for life in their husband's property with rights of survivorship and equal beneficial enjoyment. The position of senior widow gives her, as in the case of other co-parceners, a preferable claim to the care and management of the joint property. JIJOYIAMBA BAYI SAIBA *v.* KAMAKSHI BAYI SAIBA. BAYI SAIBA *v.* JIJOYIAMBA BAYI SAIBA

3 Mad. 424

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HEIRS—*contd.*

(*b*) FEMALES—*contd.*

216. ——— *Survivor of joint widows—Grandson of deceased widow.* A Hindu died, leaving no son, but two widows, *K* and *R*. A dispute having arisen, *K* brought a suit against *R* and obtained a decree dividing equally between them the lands of the deceased husband. *K* took possession of her moiety and held the same till her death, when *R* took possession. In a suit by the sons of the deceased daughter of *K* against *R* for the share formerly held by *K* :—*Held*, that they were not entitled in preference to *R*, the surviving widow. RINDAMMA *v.* VENKATARAMMAPPA

3 Mad. 268

217. ——— *Co-widows—Joint tenants for life.* According to the Hindu law of inheritance, the separate property of a person dying without male issue and leaving more than one widow is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship. The view that, according to the custom prevailing in Southern India, the senior widow by date of marriage succeeds in the first instance, the others inheriting in their turn as they survive, but being only entitled in the meantime to be maintained by the first, is not supported by the decisions of the Courts, nor by the sanction of any text-writer of paramount authority in the Madras Presidency. GAJAPATHI NILAMANI *v.* GAJAPATHI RADHAMANI

I. L. R. 1 Mad. 290 : 1 C. L. R. 97
L. R. 4 I. A. 212

218. ——— By Hindu law two widows of one and the same husband take a joint interest in one undivided estate, and although the widows may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition converting the joint estate into an estate in severalty. *Semble :* The interest of one of two such widows cannot be sold. *Jijoyiamba Bayi* v. *Kamakshi Bayi, 3 Mad. 424 ; Rindamma* v. *Venkataramappa, 3 Mad. 268 ; Nilamani* v. *Radhamani, I. L. R. 1 Mad. 290 ;* and *Bhugmandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487*, followed. KATHAPERUMAL *v.* VENKABAI

I. L. R. 2 Mad. 194

219. ——— *Co-heirs—Right of survivorship.* Under the Mitakshara law, an unseparated grandfather's great-grandson's grandson will exclude a widow from inheriting the estate of her husband. *Yenumula Gavuridevamma Garu* v. *Yenumula Ramandora Garu, 6 Mad. 93,* and *Naragunty Lutchmee Davamah* v. *Vengama Naidoo, 9 Moo. I. A. 66*, cited. RATAN DABEE *v.* MODHOOSOODDUN MOHAPATOR

2 C. L. R. 328

220. ——— *Mitakshara law—Estate inherited by two Hindu widows from deceased husband—Alienation by one widow.* When their Lordships of the Privy Council have seen fit

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HINDU LAW—INHERITANCE—*contd.*

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(*b*) FEMALES—*contd.*

to place a definite construction upon any point of Hindu law, the High Court is bound by such construction until such time as their Lorsdships may think fit to vary the same. According to the Mitakshara law, the estate which two Hindu widows take by inheritance from their deceased husband is not several, but joint. The senior of two such Hindu widows is not a manager of such estate and competent, for purposes of legal necessity, to alienate it without the consent of the other. *Bhugwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487,* and *Gajapathi Nilamani* v. *Gajapathi Radhamani , I. L. R. 1 Mad. 290,* referred to. RAM PIYARI *v.* MULCHAND . . . **I. L. R. 7 All. 114**

221. ——————— *Brother's widow —Survivorship—Benares school of law.* According to the law and usage of the Benares school of Hindu law, a brother's widow has no place in the line of heirs, nor is she entitled to succeed by right of survivorship. *Bhugnee Daiee* v. *Gopaljee, 1 S. D. A. N.-W. P. (1862), 396,* not followed. *Ananda Bibee* v. *Nownit Lal, I. L. R. 9 Calc. 315,* followed in principle. JOGDAMBA KOER *v.* SECRETARY OF STATE FOR INDIA . **I. L. R. 16 Calc. 367**

222. ——————— *Joint family—Widow's right—Maintenance—Gotraja-sapinda.* The widow of an undivided brother does not take a life-estate. She is only entitled to maintenance. She may perhaps succeed her brother-in-law as a gotraja-sapinda. MANJAPPA HEGADE *v.* LAKSHMI **I. L. R. 15 Bom. 234**

223. ——————— *Son's widow—Grandson's widow.* A Hindu died leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently his grandson died a minor, leaving his widow (also a minor) him surviving. *Held,* that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property. BAI AMRIT *v.* BAI MANIK **12 Bom. 79**

224. ——————— *Cousin's widow as heiress—Female gotraja-sapinda.* In a suit on a mortgage executed by a Hindu, since deceased, to the plaintiff, it appeared that the mortgage premises had been the property of *A,* whose daughter, since deceased, was the mortgagor's wife and had executed a will purporting to devise the property to him. The suit was defended by *B,* who was the widow of a great-grandson of *A's* great-grandfather, and she claimed title to the property against the plaintiff under the law of inheritance. *Held,* that *B* had no title to the mortgage premises. BALAMMA *v.* PULLAYYA . . **I. L. R. 18 Mad. 168**

225. ——————— *Widow of paternal uncle—Nephew.* The widow of a paternal uncle is, according to Hindu law, no heir to her nephew. UPENDRA MOHAN TAGORE *v.* THANDA DASI . . . . **3 B. L. R. A. C. 349**

S.C. WOOPENDRO MOHUN TAGORE *v.* THANDA DOSSIA . . . . . **12 W. R. 263**

226. ——————— *Widow of paternal uncle—Mitakshara law—Females.* According to Mitakshara law, none but females expressly named can inherit and the widow of the paternal uncle of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate. GAURI SAHAI *v.* RUKKO . **I. L. R. 3 All. 45**

227. ——————— *Succession on death of adopted son.* On the death of a son adopted by a Hindu as the son of one of his two wives, the property descends (the adoptive mother having died before the son) not to the other wife, but to the next legal heir. KASHEESHUREE DEBIA *v.* GREESH CHUNDER LAHOREE . **W. R. 1864, 71**

228. ——————— *Succession on death of adopted son.* If the adoptive mother survives an adopted son before he attains majority, she has a life-interest in the property of her husband. SOONDER KOOMAREE DEBIA *v.* GUDADHUR PERSAHD TEWAREE **4 W. R. P. C. 116 : 7 Moo. I. A. 54**

229. ——————— *Son validity adopted.* In a case where a valid adoption makes the adopted son the legal heir, the widow has no right but that of maintenance. RUTNA DOBANI *v.* PURLADH DOBEY . . . **7 W. R. 450**

230. ——————— *Preference of the adoptive mother in inheriting the family estate through the adopted son over a senior co-wife.* A Hindu, having two wives, adopted a son in conjunction with the co-wife who was the junior in marriage of the two, having chosen her to be present at the adoption with himself. The husband next died; and after him the adopted child, having inherited the impartible family estate, also died. The two widows survived them both. *Held,* affirming the decisions of the Courts below, that the junior co-wife, having taken part in the adoption by her husband at his selection, inherited the impartible family estate upon the death of the adopted son in preference to the co-wife who was senior in marriage but who had not been conjoined in the adoption. *Kasheeshuree Debia* v. *Greesh Chunder Lahoree, W. R. (1864) 71,* referred to and approved. ANNAPURNI NACHIAR *v.* FORBES **I. L. R. 23 Mad. 1 3 C. W. N. 730**

231. ——————— *Re-marriage of widow Succession to a son of first marriage, notwithstanding remarriage—Hindu Widow's Re-marriage Act (XV of 1856), ss. 2 and 5.* The widow of a Hindu married a second time. Subsequently to her re-marriage, her son by her first marriage died childless. *Held,* that she was entitled to succeed

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HINDU LAW—INHERITANCE—*contd.*

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(*b*) FEMALES.—*contd.*

to his property, notwithstanding her re-marriage. CHAMAR HARU DALMEL *v.* KASHI (1902) **I. L. R. 26 Bom. 388**

232. _____ *Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to stridahn—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, Chapter IV, s. 10, placita 28 and 30, construction of.* By the Hindu law of the Bombay School, *viz.*, the Mitakshara subject to the doctrine to be found in the Vyavahara Mayukha where the latter differs from it, a co-widow is entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son. A deed executed by a Hindu in favour of his future wife conveyed immoveable property to her, "her heirs, executors, administrators, and assigns" on the condition that, if she died "without leaving issue of the intended marriage, who shall succeed to a vested interest" in the property, and without exercising a power of appointment given her by the deed, then "the property shall vest in her legal heirs, according to the Hindu law of the Bombay School." *Held*, that she took an absolute estate of inheritance in the property. The true construction of *placitum* 30 of Chapter IV, s. 10 of the Vyavahara Mayukha, and one that brings it into harmony with the Mitakshara, and also reconciles it with *placitum* 28, is that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated by Brihaspati, who are blood relations of the husband, namely, the husband's sister's son, the husband's brother's son, and the husband's brother will succeed to the woman's property and in the other case, the relations of the father will succeed. The order of succession is not indicated in the series of heirs enumerated by Brihaspati. The solution is to be found by reference to *placitum* 28 in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow nor any other sapinda of the husband is excluded. The words "and the rest" mean or include the other relations of the husband or father. The co-widow therefore takes in her right place and is a preferential heir to the husband's brother or husband's brother's son. BAI KESSERBAI *v.* HUNSRAJ MORARJI (1906) . . . **I. L. R. 30 Bom. 431**
s.c. L. R. 33 I. A. 176
10 C. W. N. 802

233. _____ *Inheritance—Special heirs—Females—Estate inherited by two widows—Alienation by one widow—Widow—Power of widow—Alienation by one of two co-widows—*

HINDU LAW—INHERITANCE—*contd.*

8. SPECIAL HIERS—*concld.*

(*b*) FEMALES—*concld.*

Parties adding plaintiffs—Non-joinder—Joinder of plaintiff after time for bringing suit has expired—Effect of co-contractors—Limitation Act (XV of 1877), s. 22. Where two Hindu widows, *D M* and *D R*, who on the death of their husband took under the Mitakshara law a joint estate in the property of the husband, afterwards by arrangement between themselves divided the property between them, intending to give to each so far as the other was concerned full power of alienation in the event of legal necessity, and one of them, *D R*, made a gift of her share in the estate to the reversioners, who thereafter in certain transactions proceeded on the assumption that there was a partition between the widows, not only of possession of the property included in the husband's estate, but also of the title. *Held*, that a mortgage executed in favour of the plaintiff by *D M* of her share without the consent of *D R*, was binding on the property hypothecated under it so far as the interests of *D R* and the reversioners were concerned, to the extent that the debt was incurred for legal necessity. The addition after the expiry of the period of limitation of an infant member of a Mitakshara family as plaintiff to a suit on a mortgage is not fatal to the suit. *Guruvayya Gouda* v. *Dattatraya Anant, I. L. R. 28 Bom. 11*, followed. THAKURMANI SINGH *v.* DAI RANI KOERI (1906) . . **I. L. R. 33 Calc. 1079**

9. CHILDREN BY DIFFERENT WIVES.

1. _____ **Children by different mothers of same caste.** The Hindu law of inheritance makes no distinction between the legitimate children of mothers of the same caste. NUGENDUR NARAIN *v.* RUGHOONATH NARAIN DEY **W. R. 1864, 20**

2. _____ **Sons by different mothers—**—*Priority in time of marriage—Primogeniture.* As regards the rights of sons by different wives to inherit, whether in co-parcenary or as sole heir (except, perhaps, the son of the first wife), the priority in point of time of their mothers' marriages has never been regarded when the wives were equal in caste and rank, and the rule of primogeniture was and is the same in the case of sons of several wives of equal caste and rank as in the case of sons by one. SIVANANANJA PERUMAL SETHURAYER *v.* MUTTU RAMALINGA SETHURAYER. ATHILAKSHMI AMMAL *v.* SIVANANANJA PERUMAL SETHURAYER **3 Mad. 75**

Affirmed by the Privy Council in RAMALAKSHMI AMMAL *v.* SIVANANANTHA PERUMAL SETHURAYER **12 B. L. R. 396 : 17 W. R. 553**
14 Moo. I. A. 570

10. ILLEGITIMATE CHILDREN.

1. _____ **Illegitimate children—** *Issue of illegal intercourse.* Illegitimate sons are

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10. ILLEGITIMATE CHILDREN—*contd.*

excluded by the Hindu law from inheriting when the intercourse between their parents was in violation of, or forbidden by, law. VENCATACHELLA CHETTY *v.* PARVATHAM . . **8 Mad. 134**

2. ——— *Illegitimate son and daughters—Property of mother.* A Hindu woman having daughters by one paramour and a son by another died leaving a house. The daughter sued the son and his assignee for possession of the house in succession to their mother. It was *inter alia* pleaded for the defence that the plaintiffs could not recover the house for the reason that it had been derived from the putative father of the first defendant, but this was not proved. *Held*, that the plaintiffs were entitled to recover. *Semble:* That the decision would have been the same even if the allegation on which the above plea was based had been established. ARUNAGIRI MADALI *v.* RANGANAYAKI AMMAL . **I. L. R. 21 Mad. 40**

3. ——— *Maintenance, Right to—Sudras—Issue of Pat marriage.* The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus (Brahmans, Kshatriyas, and Vaishyas) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children, in certain cases at least, do inherit. The extent to which this right exists considered, and the texts of Hindu law books bearing on the point referred to. According to Vijnyaneshvara, the author of the Mitakshara (Ch. I, s. 12), the father of an illegitimate son by a Dasi among Sudras may, in his (the father's) lifetime, allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the Dasi is entitled to half the share of a legitimate son, and, if there be no legitimate son and no legitimate daughter or son of such a daughter, the illegitimate son by the Dasi takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half of the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor. The dictum of LORD CAIRNS in *Gajapathi Radhika* v. *Gajapathi Nilamani, 13 Moo. I. A. 497 : s. c. 6 B. L. R. 202 : 14 W. R. P. C. 33,* reversing *2 Mad. 339 :* "Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claims, unless some special custom governed the case, which is not in proof, would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow,"—commented upon and explained. The terms Dasi and Dasiputra, as defined by various writers on Hindu law, discussed, and the rights by inheritance of a Dasiputra considered. The condition that, in order to

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10. ILLEGITIMATE CHILDREN—*contd.*

entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter or share in it, she should, according to Jimuta Vahana, and Nilkantha, be an unmarried woman, has in practice been discarded in the Presidency of Bombay. In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. *G*, a Sudra woman, was married to *T*, also a Sudra, by Pat marriage, without having received a chhor chiti (release) from her first husband, who was then living, or obtained any other sanction of her Pat with *T*. *Held*, that the intercourse between *G* and *T* was adulterous, and that therefore the plaintiff, their son, being the result of such intercourse, was not entitled to take as heir even to the extent of half a share, and was not a Dasiputra within the scope of Yajnyavalkya's text, or recognized as such by other commentators. He was, however, held entitled to maintenance, as he had been recognized by *T* as his son. RAHI *v.* GOVINDA VALAD TEJA **I. L. R. 1 Bom. 97**

4. ——— *Sudras.* In the case of Sudras the law has been and still is that illegitimate sons succeed their fathers by right of inheritance. PANDAIYA TELAVER *v.* PULI TELAVER **1 Mad. 478**

5. ——— *Illegitimate sons of Jain of Dassa Porwad class—Right to maintenance.* Under the ordinary Hindu law, illegitimate sons do not inherit, but are only entitled to maintenance. *Held*, that a Jain of the Dassa Porward caste was governed by the general Hindu law applicable to the three regenerate castes, being though not a Brahmin, certainly not a Sudra, but a Vaishya by origin, and having as such carried this law with him from Gujarat to the Belgaum District. *Held*, therefore, that his widow was his sole heir, and that his illegitimate sons were only entitled to maintenance. *Quære:* Whether even among Sudras the widow is altogether excluded from inharitance by illegitimate sons. *Rahi* v. *Govinda Walad Teja, I. L. R. 1 Bom. 97*, doubted. AMBABAI *v.* GOVIND . **I. L. R. 23 Bom. 257**

6. ——— *Sons of Sudra.* The illegitimate sons of a Sudra are as such entitled to one half af a son's share. KESHOREE *v.* SAMARDHAN . . . . . **5 N. W. 94**

7. ——— *Sons of Sudra.* The illegitimate son of a Sudra, being the offspring of an incestuous intercourse (intercourse between a father-in-law and his daughter-in-law), is not entitled to inherit or share in the family property according to Hindu law. *Semble:* To entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been a continuous one, and the woman must have been an unmarried woman. Therefore the illegitimate son of a Sudra by a Sudra woman living with him in

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10. ILLEGITIMATE CHILDREN—*contd.*

adultery is not entitled to a share in or to inherit the family property. DATTI PARISI NAYUDU *v.* DATTI BANGARU NAYUDU . . **4 Mad. 204**

8. ——— *Sons of Sudra—Brother's son. Semble:* An illegitimate son of a Surdra by his concubine is his heir in preference to a brother's son. KRISHNAMMA *v.* PAPPA **4 Mad. 234**

9. ——— *Sons of Sudra.* The son of a Sudra by a slave-girl is not entitled to share with legitimate sons in the inheritance of an uncle by the father's side. NISSAR MURTOJAH *v.* DHUNWUNT ROY . . . **Marsh. 609**

10. ——— *Sons of Sudra.* According to the doctrines of the Bengal school of Hindu law, a certain description only of illegitimate sons of a Sudra by an unmarried Sudra woman is entitled to inherit the father's property in the absence of legitimate issue, *viz.*, the illegitimate sons of a Sudra by a female slave or a female slave of his slave. NARAIN DHARA *v.* RAKHAL GAIN **I. L. R. 1 Calc. 1 : 23 W. R. 334**

11. ——— *Son of Sudra by concubine—Bengal school of law.* According to the Bengal school of Hindu law, the son of a Sudra by a kept woman or continuous concubine does not inherit his father's estate. *Narain Dhara v. Rakhal Gain, I. L. R. 1 Calc. 1,* followed. *Inderan Valungypuly Taver* v. *Ramaswamy Pandia Talaver, 3 B. L. R. P. C. 1 : 13 Moo. I. A. 141,* explained. *Rahi* v. *Govinda Valad Teja, I. L. R. 1 Bom. 97 ; Sadu* v. *Baiza, I. L. R. 4 Bom. 37 ; Datti Parisi Nayudu* v. *Datti Bungaru Nayudu, 4 Mad. H. C. 204 ; Krishnayyan* v. *Muttusami, I. L. R. 7 Mad. 4037 ; Sarasuti* v. *Mannu, I. L. R. 2 All. 134 ;* and *Hargobind Kuari* v. *Dharam Singh, I. L. R. 6 All. 329,* explained and distinguished. KIRPAL NARAIN TEWARI *v.* SUKURMONI **I. L. R. 19 Calc. 91**

12. ——— *Mitakshara law—Illegitimate daughters.* The illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. Under the Mitakshara law, the son of a female slave by a Sudra takes the whole of his father's estate, if there be no sons by a wedded wife, or daughters by such a wife, or sons of such daughters. If there be any such heirs, the son of a female slave will participate to the extent of half a share only. *Held,* therefore, that *M,* the illegitimate son of an Ahir by a continuous concubine of the same caste, took his father's estate in preference to the daughters of a legitimate son of his father who died in the father's lifetime. SARSUTI *v.* MANNU **I. L. R. 2 All. 134**

13. ——— *Sudras—Right of illegitimate sons.* *V* and *S* were undivided Hindu brothers of the Sudra caste. *V* died before *S,* leaving two illegitimate sons by *A,* an unmarried Sudra woman kept as a continuous concubine. *S* left two widows. *Held,* that, although the illegitimate sons of *A* would be entitled to inherit the estate of *V,* they could neither exclude the right of survivorship of *S* nor succeed to the estate of *S.* KRISHNAYYAN *v.* MUTTUSAMI **I. L. R. 7 Mad. 407**

14. ——— *Sudras—Sons born of a kept woman.* Sons born of a woman continuously kept by their father as a concubine (and whose connection with their father is neither adulterous nor incestuous) are, in the case of a Sudra's estate, entitle to equal shares with legitimate sons in a suit for partition, if it is the wish of the father that they should so participate. Cl. 2 of s. XII, Ch. I, Part II of the Mitakshara, does not refer alone to the self-acquired property of the father. KARUPPANNAN CHETTI *v.* BULOKAM CHETTI **I. L. R. 23 Mad. 16**

15. ——— *Mitakshara—Sudra family—Dasi-putra or son by a slave-girl—Right of survivorship—Illegitimate son.* In a Sudra family of the Mitakshara school, a dasi-putra or illegitimate son by a slave-girl is a co-parcener with his legitimate brother in the ancestral estate and will take by survivorship. JOGENDRO BHUPUTI *v.* NITTYANUND MAN SINGH **I. L. R. 11 Calc. 702**

16. ——— *Illegitimate son.* The illegitimate son of a married woman by a Gosavi with whom she is living in adultery while undivorced from her lawful husband cannot inherit his father's property. NARAYAN BHARTHI *v.* LAVING BHARTHI . . **I. L. R. 2 Bom. 140**

17. ——— *Sudras—Illegitimate sons—Collateral succession—Mitakshara law.* Amongst Sudras governed by the Mitakshara law an illegitimate son does not inherit collaterally to a legitimate son by the same father. *Sarasuti* v. *Mannu, I. L. R. 2 All. 134 ; Jogendra Bhuputi* v. *Nittyanand Man Singh, I. L. R. 11 Calc. 702 : I. L. R. 18 Calc. 151 ; Sadu* v. *Baiza Nissar, Murtojah* v. *Dhunwant Roy, Marsh. 609 ;* and *Krishnayyan v. Muttusami, I. L. R. 7 Mad. 407.* SHOME SHANKAR RAJENDRA VARERE *v.* RAJESAR SWAMI JANGAM . . **I. L. R. 21 All. 99**

18. ——— *Rights of an illegitimate son of a Sudra—Position of legitimate, adoptive, and illegitimate sons and daughter's sons compared.* *A,* the son of a deceased zamindar, sued *B* and *C,* his widow and brother, for possession of the zamindari, which was impartible. *A* was found to be an illegitimate son of the late zamindar. *Held,* that he could not exclude his father's co-parcener or widow from succession to the impartible zamindari. *Krishnayyan* v. *Muttusami, I. L R. 7 Mad. 407,* and *Kulanthai Natcher* v. *Ramamani* (unreported), in which it was ruled that a widow's claim to inherit would exclude that of an illegitimate son, approved and followed. *Sadu* v. *Baiza I. L. R. 4 Bom. 37,* and *Jogendro Bhuputi* v.

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Nittyanund Man Singh, I. L. R. 11 Calc. 702, distinguished. PARVATHI *v.* THIRUMALAI **I. L. R. 10 Mad. 334**

19. ——— *Determination of caste—Children of mixed marriages—Status of son of Kshatriya by Sudra woman.* Although the illegitimate children of members of the regenerate classes are excluded from inheritance by the Mitakshara, the absence of legal marriage is no bar to the determination of their caste with reference to the law applied to Anulomajas (children born of mixed marriage). The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra, but of a higher caste called Ugra. BRINDAVANA *v.* RADHAMANI **I. L. R. 12 Mad. 72**

20. ——— *Sudras—Illegitimate son.* *Held,* that an Ahir, who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a Sudra. *Vencatachella Chetty* v. *Parvathammal, 8 Mad. 134; Parisi Nayudu* v. *Bangaru Nayudu, 4 Mad. 204; Viraramuthi Udayan* v. *Singaravelu, I. L. R. 1 Mad. 306; Rahi* v. *Govinda, I. L. R. 1 Bom. 97;* and *Narayan Bharthi* v. *Laving Bharthi, I. L. R. 2 Bom. 140,* referred to. DALIP *v.* GANPAT **I. L. R. 8 All. 387**

21. ——— *Sudras—Succession—Illegitimate son's right to succeed to the whole estate.* The plaintiff was one of three daughters of one *S*, a Lingayet, who died in 1870, leaving immoveable property. The defendants were his illegitimate sons. After his death, his widow, one of his daughters, and the defendants continued to live together in union, and managed the property jointly. The widow died in 1880, and the defendants took possession of all the property. In 1885 the plaintiff brought this suit claiming to recover it alleging that one of her sisters was disentitled from inheriting by disease; that the other was rich, and that the defendant's illegitimacy excluded them. The Court of first instance rejected the plaintiff's claim. The District Judge in appeal held that she was entitled to one-sixth of the property only, and the defendants to one-half. The defendants appealed to the High Court, contending that, on the death of the widow, the entire property survived to them. *Held,* that the defendants were not entitled to more than the half to which they succeeded immediately on the death of their father, *S*. The other half went either to the widow or to the daughters. If it went to the widow, she plainly took it as one of a class of persons who exclude the illegitimate son's right to more than half (Mayne's Hindu law, para. 466, 4th ed.). If it went to the daughters on the father's death, there was no evidence to show that the defendants had had adverse possession of it as against the plaintiff before the widow's death in 1880. SHESGIRI *v.* GIREWA . . . **I. L. R. 14 Bom. 282**

22. ——— *Succession to outcasted Brahmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow—Doctrine of justice, equity, and good conscience.* *K*, a Brahmin, lived with a Bania widow, for which offence he was outcasted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. *K* died in his new home and left the widow and their sons in possession of the property which he had acquired. This being so, the brothers of the deceased *K* sold the property which had been thus acquired by him to one *R K*. *R K* thereupon sued his vendors and the surviving sons of *K* by the widow, together with their mother and the widow of a deceased son, for recovery of the property. *Held,* that the sons of *K* by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by *K* as against the brothers of deceased who had remained in caste. RADHA KISHEN *v.* RAJ KUAR . . . **I. L. R. 13 All. 573**

23. ——— *Estate of Rajpoot—Illegitimate son.* An illegitimate son of a Rajpoot is not entitled to succeed to the property, left by the deceased Rajpoot, but the property being divided, the mother is entitled to succeed in preference to the nephews who could only sue to protect the property if the mother dealt with it in any manner not authorized by Hindu law. PUHOOP SINGH *v.* KHOOMAN . . . **3 Agra 313**

24. ——— *Khatri class—Illegitimate son—Maintenance.* *Held,* that the appellant had failed to establish the alleged marriage of his father with his mother, and that consequently his claim as a legitimate son of the late Rajah of Ramnuggur could not be sustained; that he was not entitled to inheritance as the illegitimate son of the Rajah, because his father, who was a Rajpoot was a Khatri, or one of the three regenerate or twice-born races whose illegitimate sons could not inherit; but that he was entitled to maintenance out of his father's estate. CHUTURYA RUN MURDUN SYN *v.* PURLUHAD SYN **4 W.R. P. C. 132 : 7 Moo. I. A. 18**

See ROSHAN SINGH *v.* BALWANT SINGH **I. L. R. 22 All. 191**

25. ——— *Saygi marriage—Byahi marriage.* By the custom of a Hindu family no distinction was made between the issue of a Saygi marriage and a Byahi marriage. *Held,* that the issue of the son of a Saygi wife first married was entitled to inherit the property of the grandfather, in priority to the issue of a son of a subsequent Byahi wife. RADAIK GHASERAIN *v.* BUDAIK PERSHAD SINGH . . . **Marsh. 644**

26. ——— *Joint family consisting of illegitimate sons of Christian father—Succession under razeenamah.* Illegitimate sons of a Christian father by different Hindu women, although by agreement they may constitute themselves parceners in the enjoyment of their property after the

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manner of a joint Hindu family, are not a joint Hindu family according to Hindu law. On the death of each, his lineal heirs representing their parent would, by the effect of the agreement, enter into that partnership; collaterals, however, not so entering by succession, unless the Hindu law gave in such a case a right of inheritance to collaterals. In a partition suit instituted by one of the illegitimate children a deed of compromise was executed by the parties which provided for the mode of enjoyment and against the sale, mortgage, lease, or security of any separate share. *Held*, (i) that these provisions of the deed did not extend to prevent alienation by devise, nor effect the right of inheritance; and (ii) that the arrangement between the parties included the right of survivorship, the claim of the State only arising on failure of heirs of the last survivor. MYNA BOYEE *v.* OOTTORAM **2 W. R. P. C. 4 : 8 Moo. I. A. 400**

Varying decision of High Court in MAYNA BAI *v.* UTTARAM . . . . . **2 Mad. 196**

27. ——— *Sudras—Illegitimate son—Mitakshara law—Suit for partition by illegitimate son—Dasiptura—Right of illegitimate sons among Sudras—Position of a son by a female slave.* Under the *Mitakshara* School of Hindu law, an illegitimate son of a Sudra, nor born of a female slave, cannot claim a share in the family property, where his putative father has already parted with his interest in the property during his lifetime. *Kirpal Narain Tewari* v. *Sukurmoni, I. L. R. 19 Calc. 91*, and *Narain Dhara* v. *Rakhal Gain, I. L. R. 1 Calc. 1*, referred to. *Jogendra Bhupati Hurrochundra* v. *Nityanand Man Singh, I. L. R. 18 Calc. 151*, distinguished. *Semble:* Under the *Mitakshara* law, an illegitimate son of a Sudra, by a female slave, does not occupy the same position as a son lawfully begotten. He does not at his birth acquire a joint interest with his father in the ancestral family property. It is only after the father's death that he may claim a share in the family property, and during his father's lifetime he may take a share by his father's choice: see *Jogendro Bhupati Hurrochundra* v. *Nityanand Man Singh, I. L. R. 18 Calc. 151, 155*, referred to. RAM SARAN GARAIN *v.* TEK CHAND GARAIN (1900) . . . . **I. L. R. 28 Calc. 194**

28. ——— *Sons by concubine—Division of property by brothers—Two sons born to one divided brother by concubine—Decease of both illegitimate sons, leaving sons of their own—Claim by divided brother against the grandsons for property of the deceased divided brother.* Plaintiff and *R* were divided brothers in a family of Sudras. *R* kept a permanent concubine, by whom he had two illegitimate sons. Both of these sons predeceased *R*, leaving legitimate sons of their own then surviving. *R* then died. Plaintiff now sued, claiming to be his heir, to recover his property, which was in the possession of *R's* grandsons. *Held*, that plaintiff was not entitled to recover. *Quære:* Whether an illegitimate son of an illegitimate son could, on the principle of *jus representationis*, represent the illegitimate son if, before the inheritance opened, the latter predeceased his father. RAMALINGA MUPPAN *v.* PAVADAI GOUNDAN (1901) . **I. L. R. 25 Mad. 519**

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11. DANCING-GIRLS AND PROSTITUTES.

1. ——— **Succession to property of dancing-girl**—*Devadasi—Outcaste—Adopted niece—Brother.* On the death of a prostitute dancing-girl, her adopted niece belonging to the same class succeeds to her property, in whatever way it was acquired, in preference to a brother remaining in caste. NARASANNA *v.* GANGU **I. L. R. 13 Mad. 133**

2. ——— **Property acquired by dancing-girls**—*Gains of prostitution.* In a suit by a brother against his sister for a share of property, valued at a large sum, on the ground that it was ancestral property left by their mother, it was found that the parties belonged to the bogam or dancing-girl caste residing in the Godavari district, and that the property had been acquired by the defendant as a prostitute. *Held*, that the plaintiff was not entitled to any share in property so acquired. He was, however, held entitled to a moiety of a small portion which had belonged to the mother. CHANDRAREKA *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 14 Mad. 163**

3. ——— *Murali—Married sisters—Exclusive right claimed by Murali as unmarried daughter to inherit her father's property—Prostitution—Kanya—Maiden—Mitakshara—Vyavaharamayukh—Act XXI of 1850.* A *Vaghya* (male dedicated to the God Khandoba) had three daughters, one of whom was a *Murali* (female dedicated to the God Khandoba) and two married. After the *Vaghya's* death his *Murali* daughter, who lived by prostitution and had children by promiscuous intercourse, claimed her father's property as heir to the exclusion of her sisters under the rule of Hindu law that an unmarried daughter inherits to her father before his married daughter. The first Court allowed the claim. On appeal by one of the defendants (married daughters), the Judge varied the decree by allowing the plaintiff a third share in the property. On second appeal by the plaintiff the appellate decree was confirmed, there being no appeal or cross-objection by the defendants against that portion of the decree whereby the plaintiff was allowed to share her father's property equally with her married sisters. *Held*, further, that a woman, who in her maiden condition becomes a prostitute being neither a *kanya* (unmarried) nor a *kulastri* (married), but being at the same time notwithstanding her prostitution a qualified heir as held in *Advyapa* v. *Rudrava, 4 Bom. 104*, would be entitled to succeed to her father's property only in default of either married or unmarried daughters. TARA *v.* KRISHNA (1907) **I. L. R. 31 Bom. 495**

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4. ——— **Effect of a wife deserting her husband and becoming a prostitute.** *Held*, that the fact of a Hindu woman having deserted her husband and become a prostitute did not have the result of entirely severing all connection between herself and her husband. The husband therefore might still be heir to property acquired by the wife since she left him. *Subbaraya Pillai* v. *Ramasami Pillai, I. L. R. 23 Mad. 171*, and *Bisheshur* v. *Mata Gholam, N.-W. P. H. C. 300*, followed. *Mussammat Ganga Jati* v. *Ghasita, I. L. R. 1 All. 46*, referred to. *Tara Munnee Dossea* v. *Motee Buneanee, 7 Sel. Rep. 273*, and *In the goods of Kaminey Money Bewah, I. L. R. 21 Calc. 697*, dissented from. NARAIN DAS *v.* TRILOK TIWARI (1906) . . . **I. L. R. 29 All. 4**

12. IMPARTIBLE PROPERTY.

1. ——— **Impartibility**—*Succession to raj.* Partibility in the general rule of Hindu inheritance, the succession of one heir, as in the case of a raj, the exception. EAST INDIA COMPANY *v.* KAMACHEE BOYE SAHIBA . **4 W. R. P. C. 42**

S.C. SECRETARY OF STATE FOR INDIA *v.* KAMACHEE BOYE SAHIBA . . **7 Moo. I. A. 476**

2. ——— *Mitakshara law—Rules governing succession.* For determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estates, though the estates can be held by only one member of the family at a time. JOGENDRO BHUPATI HURROCHUNDRA MAHAPATRA *v.* NITYANAND MAN SINGH . **I. L. R. 18 Calc. 151**
L. R. 17 I. A. 128

3. ——— *Rules for succession to impartible estate—Custom—Seniority—Mitakshara law—Nearness of kin—Brothers of whole and half-blood.* In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where therefore the family property is impartible and belongs to a co-parcenary family consisting of all the brothers of the deceased propositus, whether of the whole of half-blood in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. SUBRAMANYA PANDYA CHOKKA TALAVAR *v.* SIVA SUBRAMANYA PILLAI
I. L. R. 17 Mad. 316

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4. ——— *Rule of selection as between an elder son by a wife of an inferior class of caste and a junior son by a wife equal in caste—Dagger wife—Meaning of the term "bhoga stress"—Custom showing preference in succession for the sons by a senior wife to those by a junior wife.* In case of disputed succession to indivisible property between sons who are born of mothers of the same caste, but of different classes therein, the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder son of a wife of lower class. Thus, when a Sudra marries a woman of his caste, but of an inferior class, as a *dagger* wife in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of the mother being of a higher class. A valid custom prevails among the Kumbla zamindars, whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of the marriage and not the age of the wife. RAMASAMI KAMAYA NAIK *v.* SUNDARALINGASAMI KAMAYA NAIK
I. L. R. 17 Mad. 422

5. ——— **Primogeniture.** Succession in consequence of primogeniture amongst Hindus in India seems to be the rule only in the case of large zamindaris and estates which partake of the nature of principalities. BHUJANGRAV BIN DAVALATRAV GHORPADE *v.* MALOJIRAV BIN DAVALATRAV GHORPADE . . **5 Bom. A. C. 161**

6. ——— **Custom**—*Son's right at birth—Right of co-parcenary.* There is no such co-parcenary in an estate impartible by custom as under the law of the Mitakshara governing the descent of ordinary property attaches to a son on his birth. The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of, the estate that it does not exist independently of the latter right. SARTAJ KUARI *v.* DEORAJ KUARI **I. L. R. 10 All. 272**
L. R. 15 I. A. 51

See VENKATA SURYA MAHIPATI KRISHNA RAO *v.* COURT OF WARDS . **I. L. R. 22 Mad. 383**
L. R. 26 I. A. 83

and VENKATA NARSASINHA NAIDU *v.* BHASHYAKARLU NAIDU . . **I. L. R. 22 Mad. 538**

7. ——— **Succession to raj, nature of.** On the question of the extent to which property of the nature of an impartible raj is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely:—*Held*, that such a usage does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners

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HINDU LAW—INHERITANCE—*contd.*

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to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the whole, dependent upon the same contingency as the rights of survivorship of co-paceners *inter se* to the undivided share of each, and to a provision for maintenance in lieu of co-parcenary shares. YENUMULA GAVURIDEVAMMA GARU *v.* YENUMULA RAMANDORA GARU . **6 Mad. 93**

8. ———— **Impartible raj**—*Joint Hindu family—Power of Rajah to alienate—Primogeniture—Suit by eldest son to set aside alienation.* Where there is no local or family custom overriding the general law, the succession to a raj or impartible zamindari, according to Hindu law, goes by primogeniture. In the absence of any custom to the contrary, a raj or impartible zamindari is, according to Hindu law, not separate property, but joint family property. *Shivagunga case, 9 Moo. I. A. 543; Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar, 12 Moo. I. A. 570; Doorga Pershad Singh* v. *Doorga Konwari, I. L. R. 4 Calc. 190; Yanumula Venkayamah* v. *Yanumula Boochia Vankondora, 13 Moo. I. A. 333;* and *Periasami* v. *Periasami, L. R. 5 I. A. 61,* followed. *Tipperah case, 12 Moo. I. A. 523,* observed on. BHAWANI GHULAM *v.* DEO RAJ KUARI **I. L. R. 5 All. 542**

See PERIASAMI *v.* PERIASAMI.
L. R. 5 I. A. 61
I. L. R. 1 Mad. 312

Reversing decision of the High Court in PAREYASAMI *alias* KOTTAI TEVAR *v.* SALUKAI TEVAR *alias* OYYA TEVAR.

9. ———— **Raj estate**—*Evidence proving title by inheritance to raj estates—Estate held as separate under the Hindu law—Widow's interest therein—Act XI of 1857 (Offences against the State)—Confiscation of property.* A raj estate was claimed by the appellant as the nearest agnatic kinsman of the last Rajah in possession, who had died without male issue, but leaving a widow and a daughter by her, both of whom died before this suit. The respondent, who had obtained possession, under a gift from the widow, denied the claimant's relationship to the Raja. He also alleged that no title could have descended to the claimant from father to son, as the father's property had been confiscated on his conviction of an offence against the State, and sentence under Act XI of 1857. *Held,* that, as the widow had taken the estate as the result of her husband's having owned it as his separate property, the respondent, whose only title was through her, had not established, that a right of survivorship had accrued to the plaintiff's father on the death of the Rajah in 1853; therefore there was no right of that kind which could have been confiscated by the sentence which was passed in 1862. Nor had the father any right of inheritance that could be enforced during the life of the widow, who outlived him. The separation of the estate, as held by the late Rajah, negatived both the confiscation and limitation. The claimant, to prove his title, relied upon a pedigree not stated in any document produced that had existed in the family before this sult. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two mouzahs of the raj estate. The Rajah called upon to answer in proceedings at settlement had not given a direct denial to the alleged relationship. On the contention that there were steps in the pedigree as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge or proofs of other statements within s. 32 of the Indian Evidence Act (I of 1872), and as to which the evidence was insufficient:—*Held,* that the evidence, taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased Rajah as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the raj estates on the widow's death; this opinion being founded on the documentary evidence. BEJAI BAHADUR SINGH *v.* BHUPINDAR BAHADUR SINGH. BEJAI BAHADUR SINGH *v.* KOUNSAL KISHORE PRASAD . . **I. L. R. 17 All. 456**
L. R. 22 I. A. 139

10. ———— *Succession to raj—Grant by Government—Beng. Reg. XI of 1793—Rights of junior members of family.* The land sued for was originally an impartible raj, and by family custom descended on the death of each successive Rajah to his eldest male heir. It was confiscated by Government, and in 1790, when the decennial settlement was made, was permanently conferred on *A*, a Hindu. *A* in his lifetime, by his acts and otherwise, showed that he wanted the estate to descend to a single heir, and shortly before his death he made *B*, the son of his eldest grandson, such heir, and left a testamentary paper in furtherance of that object. The present suit was brought by some of the grandsons of *A*, who claimed to be co-heirs with *B* under the ordinary Hindu law of inheritance, and contend that the will was a forgery; that *A* had no power to make it; and that the special law of inheritance ceased when the first proprietor was expelled. It was found from the acts of the Government, and its dealings with the property, that *A* derived his title by grant from the Government, who had full dominion over the estate. The estate consequently must be taken to have been the separate and self-acquired property of *A*, and the nature of the estate granted was held to be a fresh grant of the family raj, as it had existed before the confiscation, with its customary rule of descent, the omission of the title of raj in the grant (there being no sanad in this case) not affecting the case, the title of Rajah not being absolutely essential to the tenure of the estate as a raj. Regulation XI of 1793 did not apply to this case, in which the grant was made before the pass-

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ing of that Regulation, which, moreover, does not affect the descent of large zamindaris held as raj, or subject to family custom. The grant being of the nature found, it was further held that the question as to whether *A* had by law power to make a will did not really arise in this case, the only person who could impeach the will being the eldest grandson of *A*, who had waived his right in favour of his son *B*, there being no inchoate rights of inheritance in the junior members of the family. BEERPERTAB SAHEE *v.* RAJENDAR PERTAB SAHEE **9 W. R. P. C. 15 : 12 Moo. I. A. 1**

11. ——— *Power of Rajah holding impartible raj—Relinquishment—Position of son on relinquishment.* There is no difference between the position of a Rajah holding an impartible raj and that of an ordinary zamindar in respect of his power to relinquish the property in favour of his next legal heir. Such a relinquishment is not forbidden by the Hindu law. Where the effect of such a relinquishment is to give the property entirely into the hands of the son, he can during his father's lifetime question and challenge any acts done, and any acts that are alleged to have been done, by his father, and which are denied by the father. LUCHMEE NARAIN SINGH *v.* GIBBON **14 W. R. 197**

12. ——— **Impartible raj**—*Succession in joint family to ancestral impartible estate—Right of nearest male collateral—Exclusion of widow where the family is joint, and the estate not separate—Custom—Right of females to inherit.* Impartible ancestral estate is not, merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint. *Chintamun Singh* v. *Nowlukho Konwari, I. L. R. 1 Calc. 158 : L. R. 2 I. A. 263,* referred to and followed. A female cannot inherit impartible ancestral estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs a rule of law not dependent on custom; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them. *Hiranath Koer* v. *Ram Narayan Singh, 9 B. L. R. 274,* approved. Where a raj estate, ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession :—*Held,* that the nearest male collateral relation of the last Rajah, who died without male issue, was entitled to succeed in preference to the Rajah's widow. This relation, *viz.*, a brother of the late Rajah's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. *Held,* that he had not thereby been deprived of his right of succeeding as a member of the joint family. The raj estate in question originated in the partition of a more ancient one, with others out of which minor estates were formed. If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be drawn. Such minor estates might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families, evidence of a special family custom in one is not evidence of a similar family custom in another. RUP SINGH *v.* BAISNI . **I. L. R. 7 All. 1 : L. R. 11 I. A. 149**

13. ——— *Succession to raj—Tributary Mehals of Cuttack. Beng. Reg. XI of 1816, s. 3.* According to the Pachees Sawal, a brother of the Rajah of Attgurh, one of the tributary mehals of Cuttack, has a preferential title over the Rajah's son by a phoolbebahi wife to succeed to the raj. The effect of a devise of his estates by a Rajah would be to alter the course of succession, and, therefore, contrary to s. 3, Regulation XI of 1816. NITTANUND MURDIRAJ *v.* SREEKURUN JUGGERNATH BEWARTAH PATNAICK . **3 W. R. 116**

14. ——— **Mode of succession to impartible estate**—*Priority of marriage—Priority of birth—Custom—Evidence.* By the general Hindu law, where a subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons, the succession as between sons by different wives (other than the first wife) of equal caste is to be determined by the priority of birth of the sons, and not by the priority of marriage of their respective mothers; and therefore, with respect to the succession to an impartible zamindari in the district of Tinnevelly in the Presidency of Madras, the son of the third wife is, in the absence of proof of any special custom or family usage to the contrary, to be preferred as heir to a subsequently born son of the second wife. RAMALAKHSHMI AMMAL *v.* SIVANANANTHA PERUMAL SETHURAYER . **12 B. L. R. 396 : 17 W. R. 553 14 Moo. I. A. 570**

Affirming decision of High Court in SIVANANANJA PERUMAL SETHURAYER *v.* MUTTU RAMALINGA SETHURAYER . . . . **3 Mad. 75**

15. ——— *Mode of succession—Priority of sons by different mothers.* Where there is a plurality of wives equal in caste, the sons of each wife (not being the first wife) take precedence according to the dates of their respective births, and without reference to the dates of the marriages of their respective mothers. BHUJANGRAV BIN DAVALATRAV GHORPADE *v.* MALOJIRAV BIN DAVALATRAV GHORPADE **5 Bom. A. C. 161**

16. ——— **Undivided impartible ancestral property.** Plaintiff, claiming title by succession both as heir by the general Hindu law and according to family custom, sued to recover the Totavalli estate in the zillah of Rajahmundry. Defendant, the widow of the person last in the en-

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joyment of the estate, pleaded that the plaintiff was not of the royal stock, but merely a dependent of the family; that he had an elder brother alive, and therefore could not sue, and that, in accordance with her husband's instructions, as contained in his will, she was about to adopt a son. She also alleged that plaintiff should have become a party to an appeal pending before the Privy Council from the decree in suit No. 3 of 1860, under which the defendant's husband had recovered possession of the estate from the widow of the prior possessor, *J D*. The lower Court found that the plaintiff was an undivided member of the family in which the right to the estate was vested, and a dayadi of the defendant's late husband in the 12th degree through their common ancestor, *B D*, and decreed in plaintiff's favour. Pending this appeal, the Privy Council delivered judgment in the appeal from the decree in suit No. 3 of 1860, to which plaintiff and defendant had become parties. *Held*, in accordance with the judgment of the Privy Council, that the estate was acquired not by *J D*, but by his father, *B D*, the common ancestor, through whom plaintiff traced his kinship, and has ever since enjoyed as ancestral property derived from the said *B D*. That accordingly the question of succession raised in this suit, similarly to that in the appeal before the Privy Council, was determinable by the law regulating the devolution of indivisible ancestral property, which had vested in the last possessor. That the objection to the plaintiff's title as heir by the general law was thus reduced to the questions: Whether his alleged kinship to the last possessor was proved; and if so, whether, according to the ordinary course of legal succession to such property, he, or the defendant, as the widow of the last possessor, was heir to the estate. That upon the first question plaintiff had proved his kinship to the last possessor, and upon the second that plaintiff was heir to the estate, in preference to the defendant, the widow of the last possessor. The sound rule to lay down with respect to undivided or impartible ancestral property is that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the law of partition, are co-heirs, irrespective of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near sapindas in the male line, the family heritage, both partible and impartible, passes to the survivors or survivor, to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir, relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property. YENUMULA GAVURIDEVAMMA GARU *v.* YENUMULA RAMANDORA GARU . . . . . **6 Mad. 93**

17. ——— Impartible zamindari—*Personal property of zamindar.* The rule of impartibility applicable to zamindaris does not extend to personal property of a zamindar left at his death, and such property is divisible amongst his sons after his death. RAJESWARA GAJAPUTTY NARAINA DEO MAHARAJALUNGARU *v.* VIRAPRATAPAH RUDRA GUJAPUTTY NARAINA DEO MAHARAJALUNGARU **5 Mad. 31**

18. ——— *Separate estate.* The mere impartibility of an estate in not sufficient to make the succession to it follow the course of succession of separate estate. *Shivagunga case, 9 Moo. I. A. 539 : 23 W. R. P. C. 31,* explained. YANUMULA VENKAYAMAH *v.* YANUMULA BOOCHIA VANKONDORA . . . **13 W. R. P. C. 21**
13 Moo. I. A. 333

19. ——— *Impartible zamindaris, succession to—Custom.* The succession to a zamindari which is admitted to be in the nature of a principality, impartible and capable of enjoyment by only one member of the family at a time, is governed (in the absence of a special custom of descent) by the general Hindu law prevalent in the part of India in which the zamindari is situated, with such qualifications only as flow from the impartible character of the subject. The succession to such a zamindari may be governed by a particular or customary canon of descent. The course of succession, according to the Hindu law of the south of India of such a zamindari, where the family was in other respects an undivided family, was held to be that the husband dying without male issue, his widow inherited it. In the case of property of which part is the common property of a joint Hindu family and part the separate acquisition of a deceased brother, his widow (in default of male issue) succeeds to his separate estate. KATTAMA NAUCHEAR *v.* RAJAH OF SHIVAGUNGA
2 W. R. P. C. 31 : 9 Moo. I. A. 539

20. ——— *Impartibility of zamindari shown by evidence—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Mad. Reg. XXV of 1802.* The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before and in the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government. On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case, 12 Moo. I. A. 1,* was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by

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the rule of primogeniture. SRIMANTU RAJA YARLAGADDU MALLIKARJUNA *v.* SRIMANTU RAJA YARLAGADDU DURGA . **I. L. R. 13 Mad. 406**
L. R. 17 I. A. 134

21. ——— *Zamindari formerly held under raj—Zamindari originally existing before 1759—Grant by Government in 1802, and again in 1835, of the same zamindari—Absence of intention to grant it as impartible—Sanad-i-milkiyat-i-istimrari.* Although it might be taken that the Mirangi zamindari was formerly held on a military tenure under a raj, and that it continued to be held on the same tenure after it had been incorporated in another zamindari, and subsequently when, by conquest, it became part of the Vizianagram mindari, which was dismembered in 1795, and even if impartibility was the rule then applicable to the estate, yet the subsequent dealings with the zamindari, the nature and terms of the grants under which it was held after 1802, and the absence of proof of its having been impartible during the present century, also the character of the estate, which was in no way distinguishable from that of an ordinary zamindari assessed to the revenue, all led to the conclusion that the zamindari was now partible. It was clear from the kabuliat, or instrument of assent to the sanad-i-milkiyat-i-istimrari of 25th April 1804, that the latter was in the ordinary form of such grants, and there was no ground for inferring that the Government intended to create an impartible zamindari, or to restore an old one with impartibility attached. In 1835 there was, for a second time, such a dealing with the estate by the Government, in granting it again by sanad, as showed that there was no intention to the effect above mentioned. The case of the *Hansapur Zamindari, 12 Moo. I. A. 1,* situate in Behar, as to which their Lordships in 1867 held that it must be taken to retain its previous old quality of impartibility, after having been granted in 1790, was distinguished. SATRUCHARLA JAGANNADHA RAJU *v.* SATRUCHARLA RAMABHADRA RAZU
I. L. R. 14 Mad. 237

ZAMINDAR OF MARANGI *v.* SATRUCHARLA RAMABHADRA RAJU . . . **L. R. 18 I. A. 45**
Affirming the decision of the High Court in JAGANATHA *v.* RAMABHADRA
I. L R. 11 Mad. 380

22. ——— *Impartible zamindari—Obstructed inheritance—Interest of holders of—Inheritance by daughter's sons.* In a suit to recover possession of the impartible zamindari of Shivaganga, it appeared that the istimrar zamindar died in 1829, and that after an interval of wrongful possession by his brother and his descendants, his daughter established her title to succeed him and was placed in possession in 1864. She died in 1877, leaving the present plaintiff, her son and three daughters her surviving. A suit was then brought by the father of the present defendant, who was the son of her elder sister (deceased), against the present plaintiff and the daughter of the late Rani for possession of the zamindari to which he claimed to be entitled by right of inheritance. A decree was passed for the plaintiff in that suit, under which he obtained possession of the zamindari and retained it until his death in 1883, when he was succeeded by the present defendant. The plaintiff now sued as above, claiming that the right to the zamindari had devolved on him, and not on the defendant, on the death of the plaintiff in the former suit. *Held,* (i) that the defendant's father had not succeeded to a qualified heritage, nor to a mere right of management of joint family property in which the plaintiff had a right of survivorship, but that he had succeeded to the estate as full owner, and had therefore become a fresh stock of descent; (ii) that accordingly nearness or remoteness of relationship to the istimrar zamindar was immaterial, and the defendant's right of succession was not affected by the fact that the whole class of the istimrar zamindar's daughter's sons had not been exhausted MUTTUVADUGANATHA TEVAR *v.* PERIASAMI
I. L. R. 16 Mad. 11

23. ——— *Adoption by a zamindar in conjunction with one of his two wives—Right to succeed to adoptive son.* The holder of the impartible zamindari of Uthumalai, who married two wives, subsequently made an adoption in conjunction with his junior wife. The zamindar died in August 1891, and the adopted son died an infant without issue in December of the same year. *Held,* that the junior wife, having taken part in the adoption, was entitled to the impartible estate in preference to her co-wife. ANNAPURNI NACHIAR *v.* COLLECTOR OF TINNEVELLY **I. L. R. 18 Mad. 277**

24. ——— *Succession to impartible zamindari—Survivorship.* Heritage to an impartible zamindari is to be traced according to the ordinary rules of the Hindu law of inheritance unless some further family custom exists, beyond the custom of impartibility, although the estate will be in the possession of only one heir at a time. It was contended for the appellant that, in tracing the right heir to the proper stock entitled to the inheritance, a rule was applicable to an impartible estate, different from that applied to a partible one; and that, when once the heritage to an impartible estate had become obstructed, on the death of each successive owner, the true successor was the heir of the last owner of the originally unobstructed estate, though this did not apply to a partible estate. But for such a distinction no authority was cited, nor any principle suggested; and it was not upheld. The parties to this suit, first cousins once removed, contested the right to inherit an impartible zamindari, which had been acquired by their common ancestor, who had left two daughters by two different wives. The plaintiff was the son of the younger daughter; the defendant's father was the son of the elder. The younger half-sister survived the elder, and in 1863 was judicially declared to have

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inherited alone the impartible zamindari. On her death, the elder daughter's son, in litigation ending in 1881, made good his title to the impartible zamindari, being the descendant in the elder line. *Held*, that this son of the elder daughter became, as the last male owner, the stock from which descent had now to be traced, and that the ancestor was no longer that stock. And *held*, that the son of this last male owner had a title to the zamindari on his father's death in consequence of the full and complete ownership of the latter, who had himself become a fresh root of title. This decision disposed of the only question that was argued on this appeal. But the decision of the Courts below that the plaintiff could not claim the inheritance in virtue of survivorship was also affirmed. The judgment below, on this part of the case, was based on this, that no family co-parcenary had existed to give rise to survivorship, as the sons of daughters could not form a family co-parcenary, which could only consist of the descendants of a paternal ancestor. MUTTUVADUGANADHA TEVAR *v.* PERIASAMI TEVAR . . **I. L. R. 19 Mad. 451**
L. R. 23 I. A. 128

25. ——— **Impartible estate**—*Effect of, on nature of property—Joint and separate property.* The impartibility of property does not *per se* destroy its nature as joint family property, or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate. DOORGA PERSHAD SINGH *v.* DOORGA KONWARI **I. L. R. 4 Calc. 190 : 3 C. L. R. 31**
L. R. 5 I. A. 149

s.c. in the High Court. DOORGA PERSHAD *v.* DOORGA KOOEREE . . **20 W. R. 154**

26. ——— *Impartible estate—Primogeniture—Custom.* The principles on which is founded the judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Ammal, 14 Moo. I. A. 570,* as to the succession to an impartible inheritance, apply with equal force, whether the first-born son is born of a first married wife or of a wife afterwards married. The text of Manu, Ch. IX, v. 125, distinctly shows that among sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother. In v. 122 of the same chapter the words "but of a lower class" added by the gloss of Cullnea Bhatta are to be read as correctly inserted in the text. Two wives of a Palayagar of an impartible poliem having died before his marriage with a third and fourth wife, it was contended that the third being in the position of a first married or "royal" wife, her son was entitled to succeed to his father in preference to an elder son born of the fourth. *Held*, that the elder son, though born of the fourth wife, was entitled by primogeniture under the rule above referred to, and that it was accordingly immaterial to consider whether or not this third wife was in the position of a first married wife. What might be the effect of one wife being "of a lower class" than another was not in question. PEDDA RAMAPPA *v.* BANGARI SESHAMMA
I. L. R. 2 Mad. 286 : 8 C. L. R. 315
L. R. 8 I. A. 1

27. ——— *Mitakshara law—Exclusion of females from succession—Impartible joint ancestral property—Custom.* A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed as heirs. This is a rule of law, and not dependent on custom. A custom modifying the law must be a custom to admit females, not a custom to exclude them. HIRANATH KOER *v.* RAM NARAIN SINGH
9 B. L. R. 274 : 17 W. R. 316

Upholding on appeal s.c. . **15 W. R. 375**

But *see* DURGA PRASAD SINGH *v.* DURGA KUNWARI . **9 B. L. R. 306 note : 13 W. R. 10**

where to a ghatwali estate which descended from the father to the eldest son, the younger sons having allowances made to them, a widow was held entitled to succeed as heir to her son.

28. ——— **Devolution of impartible property**—*Right of nearest co-parcener of senior line—Impartible estate—Original incidents of impartibility—Expulsion of occupants—Restoration under British rule after lapse of time during which enjoyment suspended—Continuance of incidents of impartibility.* Under the law of *Mitakshara*, when impartible property passes by survivorship from one line to another, it devolves, not necessarily on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. The holder of an impartible *zamindari* had three wives. By the first he left no issue : by the second he had issue *M*, *R* and *P* ; by the third he had issue *V*. Upon the death of the *zamindar*, he was succeeded, first by *M*, then by *M's* son, and then by *R*, who held the estate for many years. When *R* died, possession of the estate was taken by the grandson of his whole brother *P*, whereupon *V's* son claimed it, contending that he stood in a nearer class of heirs. *Held*, that the grandson of *P* was the nearest co-parcener of the senior line, and was entitled in preference to *V's* son, who belonged to the junior line. *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru, I. L. R. 4 Mad. 250,* followed. *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai, I. L. R. 17 Mad. 316,* referred to. The question as to *onus* of proof of partibility considered. An estate had been held, up till the year 1765, as an impartible *palayam*, by one member only of a family, and not as subject to the ordinary rule of Hindu law. In 1765, the *palayagar* (being the ancestor of the present holder) was expelled from possession by the Nawab of the Karnatic, and fled to Mysore, returning in 1780, and

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holding a precarious possession of the *palayam* until 1783, when he supported the East India Company. In 1785, he was replaced in possession, as a "renter," but upon failure to pay *kist* the *palayam* was placed under the control of a manager until the country was restored to the Nawab. In 1790, the East India Company again assumed control of the country, and the *palayagar* again held possession of the estate as a "renter" under the Company. In 1792, the *palayagar* died, he being the same *palayagar* who had been expelled in 1765. He was succeeded by his son, who died in 1801, the year in which the Company took possession of the country, leaving a younger brother of the half-blood him surviving. The Government, in 1802, declared its intention of appointing the half-brother to succeed to the *palayam* on a *zamindari* tenure, and subsequently directed that the half-brother should be instated in the *palayam* as soon as a *sanad* of investiture could be prepared. The question of restoration was however kept under consideration, and, as a temporary measure, the *palayagar* was granted an allowance of ten per cent. on the net revenue of the *palayam*. This was paid until 1814, when the Board of Revenue, reiterating its intention to restore the *palayagar* to the management of his *palayam* under a new arrangement, proposed to grant him a *jaghir* bringing in an average of thirty-three per cent. of the gross collections, and subject to a nominal rental assessment. This proposal was consented to by the *palayagar;* but the arrangement was again varied, the *palayagar* receiving ten per cent. of the gross collections. In 1817, instructions were issued to the effect that villages should be given over to the *palayagar* of a value equal to the average gross amount of his then income, from whatever source derived. It was also declared that the villages were to be given on *zamindari* tenure. The approval of the Government having been obtained, a conditional *sanad* was granted in December 1817, and the half-brother of the last *palayagar* was put in possession. The first defendant, in whose possession the *zamindari* was at the date of suit, was a descendant from the *palayagar* last referred to, tracing his descent from the family of the grantee of the *sanad*, by his second wife. Plaintiff and second defendants were descendants from the family of the grantee by his third wife. Plaintiff now sued for partition, when the plea was raised that the *zamindari* had been from its origin an impartible estate, and that the *sanad* granted in 1817 had not altered the incident of impartibility which had always attached to it: *Held*, that the estate was impartible. KACHI YUVA RANGAPPA KALAKKA THOLA UDAYAR *v.* KACHI KALYANA RANGAPPA KALAKKA THOLA UDAYAR (1901) . . . **I. L. R. 24 Mad. 562**

29. ——————— *Mitakshara family—Succession—Impartible estate—Survivorship—Civil Procedure Code (Act XIV of 1882), s. 234—Execution of decree—Representative of deceased person—Assets.* The rule of succession to an impartible estate is that of the general Hindu law, which governs the succession to a partible estate, with such qualifications only as flow from the impartible character of the property. *Katama Natchiar* v. *Raja of Sivagunga, 9 Moo. I. A. 539; 2 W. R. (P. C.) 31*, and *Jogendro Bhupati Hurrochandra Mahapatra* v. *Nityanand Man Singh, I. L. R. 18 Calc. 151: L. R. 17 I. A. 128*, followed. *Satraj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272: L. R. 15 I. A. 51*, and *Venkata Surya Mahipati Ram Krishna* v. *Court of Wards, I. L. R. 22 Mad. 383: L. R. 26 I. A. 83*, distinguished. The interest, which a deceased member of a Mitakshara family had in an impartible raj as proprietor, is not assets in the hands of his successor; and proceedings under s. 234 of the Code of Civil Procedure cannot be taken against the latter as representative of the deceased. *Juga Lal Chaudhuri* v. *Audh Behari Prasad Singh, 6 C. W. N. 223*, followed. *Ram Dat Marwari* v. *Tekait Braja Behari Singh, 6 C. W. N. 879*, dissented from. KALI KRISHNA SARKAR *v.* RAGHUNATH DEB (1904) **I. L. R. 31 Calc. 224**

30. ——————— *Mitakhara law—Descent of impartible property—Rule of primogeniture—Evidence—Palayam, nature of—Acceptance by palayagar of sanad under Madras Regulation XXV of 1802, effect of succession to palayam—Zamindari of Udayarpalayam—Maintenance, amount of—Privy Council, practice of.* When impartible property passes by survivorship from one line of descent to another it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru, I. L. R. 4 Mad. 250*, approved. The question whether an estate is subject to the ordinary law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga, L. R. 17 I. A. 134: I. L. R. 13 Mad. 406*, followed. The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate:—*Held*, in the evidence and circumstances of the case, and in accordance with the above principles, that the zamindari of Udayarpalayam represented the ancient palayam of Udayar, which was in its origin and up to the expulsion of the Palayagar in 1765 an impartible estate held by one member of the family only and not subject to the ordinary rule of Hindu law; and that notwithstanding the acceptance by the palayagar in 1817 of such a sanad and the fact that it was circumscribed in extent, the palayam retained its character of impartibility and descended to the first defendant, a grand-nephew in the senior line, in preference to the plaintiff, a nephew in a junior line of descent, as it was granted and accepted as equivalent in value to the ancient

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palayam. The Judicial Committee will not interfere in a question as to the amount of maintenance, which is matter to be dealt with by the Courts in India. KACHI KALITANA RANGAPPA KALAKKA THOLA UDAYAR *v.* KACHI YUVA RENGAPPA KALAKKA THOLA UDAYAR (1905)

I. L. R. 28 Mad. 508
L. R. 32 I. A. 261

31. ——— *Impartible estate, succession to—Liability of son for debts of father—Civil Procedure Code, Act XIV of 1882, s. 234—Impartible estates does not pass by survivorship but as separate property and constitute assets within the meaning of s. 234, Civil Procedure Code—Custom of non-alienability cannot be set up in execution proceedings—Mortgage decree not impeachable in execution proceedings—Attachment, effect of—Does not create a charge.* A decree against a father can, when the father dies before the decree is fully executed, be executed against the son as representative by attaching any separate property of the father inherited by the son. The joint family property in the hands of the son cannot however be so attached and sold. The owner for the time being of an impartible estate is the exclusive owner of such estate, subject to any custom restricting his powers of alienation and no other member of the family has any joint interest in it. Such estate devolves on the son not by survivorship as joint property but as the separate property of the father. Where such property devolves on a son from his father and the son as representative is proceeded against under s. 234, Civil Procedure Code of 1882, in execution of decrees obtained against his father, the inherited estate will be assets for the purposes of s. 234 of the Civil Procedure Code of 1882. *Nachiappa Chettiar* v. *Chinnayasami Naicker, I. L. R. 29 Mad. 458,* not followed. *Raja of Kalahasti* v. *Achigadu, I. L. R. 30 Mad. 454,* approved. Where an impartible estate in the hands of a son is attached in execution of decrees obtained against his father, it is not open to the son in execution to take objection on the ground that such estate is by custom inalienable. Such objection can only be taken by way of a separate suit. Such a custom does not necessarily imply the existence of coparcenary rights which will make the property joint family property. *Ramasami Naick* v. *Ramsami Chetti, I. L. R. 30 Mad. 255,* referred to. A decree for sale under the Transfer of Property Act cannot be impeached in execution proceedings but only by separate suit. *Kuriyali* v. *Mayan, I. L. R. 7 Mad. 255,* dissented from. Attachment of property in execution does not give any title and confers on the attaching creditor no higher right than to have the property kept *in custodia legis* pending the determination of his rights. ZAMINDAR OF KARVETNAGAR *v.* TRUSTEE OF FIRUMALAI, TIRUPATI, ETC., DEVASTANAMS (1909)

I. L. R. 32 Mad. 429

32. ——— **Impartible poliem**—*Evidence of impartibility—Pannai lands attached to the poliem—Maintenance and marriage expenses of junior member of the family of poligar.* The stepbrother of the holder of a poliem in the Madura district, of which the gross income was about R15,000 a year, sued him for a partition of the estate and in the alternative for maintenance. It appeared that the poliem had been held on military tenure from the sixteenth century, that it had never been partitioned, and that the custom of impartibility obtained in a large number of similar poliems in the same district. In 1821 and in 1842 enquiries were made of members of the zamindar's family and other persons connected with the zamindari as to the nature of the estate, and their recorded answers showed that they understood the estate to be impartible, and that it descended to a single heir. *Held,* (i) that the poliem was impartible; (ii) that the plaintiff was entitled to decree for a monthly payment to him of R60 for his maintenance. The plaintiff's claim extended to certain pannai lands within the limits of the zamindari; some of which had been handed down from zamindar to zamindar since 1831, others having been purchased by the plaintiff's father. The High Court found that they had been recognized and dealt with as part and parcel of the zamindari. *Held,* that the pannai lands were impartible, and the plaintiff was not entitled to a share in them or in the cattle, etc., used for cultivating them. The plaintiff further claimed a sum of R4,000, the amount of a loan alleged to have been contracted by him for the purposes of his marriage. It appeared that the cost of the marriage had been defrayed by the bride's brother. *Held,* also, that the plaintiff was not entitled to a decree on this account, although if he had incurred debts for the purposes of his marriage, the defendant would have been liable. LAKSHMIPATHI *v.* KANDASAMI

I. L. R. 16 Mad. 54

33. ——— *Impartible poliem—Primogeniture—Property of joint family—Survivorship.* An impartible poliem governed by the rule of primogeniture, though possessed exclusively by one member of the family, is the joint property of the family, and, in the event of a death, passes by survivorship. When on the death of a polliagar, the right of exclusive possession passes from one line of descent to another, it devolves, in the absence of proof of special custom of descent, upon the nearest co-parcener in the senior line, and not necessarily on the co-parcener nearest in blood. *Semble:* The ruling of the Judicial Committee of the Privy Council in the *Tipperah case, 12 Moo. I. A. 523,* proceeds upon grounds which are in conflict with the rulings of the same tribunal in Madras cases and with the law of Southern India and Benares respecting the impartibility of property of a joint Hindu family. NARAGANTI ACHAMMAGARU *v.* VENKATACHALAPATI NAYANIVARU

I. L. R. 4 Mad. 250

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HINDU LAW—INHERITANCE—*contd.*

13. JOINT PROPERTY AND SURVIVORSHIP.

1. — **Joint property**—*Succession per capita and per stirpes.* Where property is acquired while a Hindu family is joint according to the Bengal law, the inheritance goes *per capita* and not *per stirpes.* RAMGUTTY DOSS *v.* NUNDO COOMAR DOSS . . . . . **2 W. R. 11**

RUTTUN KRISTO BOSOO *v.* BHUGOBAN CHUNDER BOSOO . . . . . **18 W. R. 32**

2. ——— *Mitakshara law—Joint and self-acquired property.* A Hindu subject to the Mitakshara dying possessed of a share in joint family property and also of separately acquired property, the two will not necessarily devolve on the same heir; but they may either descend to different persons, or, if descending to the same persons, may descend in a different way and with different consequences. PITUM KOONWAR *alias* MUNAR BIBEE *v.* JOY KISHEN DASS **6 W. R. 101**

3. ——— *Separate enjoyment of self-acquired property—Succession to self-acquired immoveable property.* By the law current in the Madras Presidency, an undivided Hindu is entitled during his lifetime to the separate enjoyment of his self-acquired immoveable property; but on his death without male issue such property, unless it has been previously disposed of, devolves on his surviving co-parceners, and his widow is only entitled to maintenance. VARADIPERUMAL UDAIYAN *v.* ARDANARI UDAIYAN . **1 Mad. 412**

4. **Survivorship**—*Joint undivided family.* There being a community of interest and unity of possession between all the members of a united family having common property, it follows that on the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and common possession. But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation therefore of a right to take such property by survivorship fails. KATTAMA NAUCHEAR *v.* RAJAH OF SHIVAGUNGA **2 W. R. P. C. 31 · 9 Moo. I. A. 539**

SHIB NARAIN BOSE *v.* RAM NIDHEE BOSE **9 W. R. 87**

5. ——— *Mitakshara law.* The principle of survivorship under Mitakshara law is limited to two descriptions of property, *viz.*, (i) That which is taken as unobstructed heritage, and property acquired by means of it; and (ii) that which forms the joint property of re-united co-parceners. Property inherited by brothers from their maternal grandfather is not of those descriptions. JASODA KOER *v.* SHEO PERSHAD SINGH **I. L. R. 17 Calc. 33**

6. ——— *Mitakshara law—Succession.* When, in an undivided Hindu family living under the Mitakshara law, a brother dies without having issue, but leaving brothers and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but on partition the whole estate, including the interest of the brother so dying, is divisible, and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken had he survived the period of distribution. DEBI PARSHAD *v.* THAKUR DIAL . . **I. L. R. 1 All. 105**

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13. JOINT PROPERTY AND SURVIVORSHIP —*contd.*

7. ——— *Property, ancestral and self-acquired—Joint tenancy.* When property is held in co-parcenary, the share of an undivided co-parcener who leaves no issue goes, according to Hindu law, to his undivided co-parceners, whether the property is ancestral or acquired by the co-parceners as joint tenants. RADHABAI *v.* NANARAV . . . **I. L. R. 3 Bom. 151**

8. ——— *Inheritance of illegitimate son among Sudras—Co-parceners.* A Hindu of the Sudra caste died in 1850 leaving two widows, *B* and *S*, a son Mahadu, and daughter Darya, the children, respectively, of *B* and *S*, and an illegitimate son Sadu. Sadu and Mahadu continued to live together for some time after their father's death; but subsequently, owing to domestic quarrels they lived separately, and Sadu was allowed by Mahadu a portion of the family property under an agreement in writing. They were, however, joint and undivided in estate, and continued to be so until the death of Mahadu in 1865. In a suit by Sadu as heir of his father and brother for the whole of the ancestral property:—*Held*, by a Full Bench (WESTROPP, *C.J.*, KEMBALL and PINHEY, *JJ.*), that after the death of their father, Mahadu and Sadu succeeded as co-parceners to the whole property, subject to the maintenance of *B*, *S*, and Darya, if she were then unmarried, and in that event also to her reasonable marriage expenses,—Sadu, however, as an illegitimate son, taking only half a share. *Held*, also, that inequality of shares did not prevent co-parcenary and succession by survivorship, and that, as Mahadu and Sadu were co-parceners from the death of their father until the death of Mahadu, the usual result of co-parcenary followed on the occurrence of the latter event, *viz.*, the surviving co-parcener (*i.e.*, the plaintiff Sadu) took the whole property. *Rahi* v. *Govinda walad Teja, I. L. R. 1 Bom. 97*, followed. SADU *v.* BAIZA . . **I. L. R. 4 Bom. 37**

9. ——— *Mitakshara law—Sudras—Illegitimate son—Impartible property.* Under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply; and the illegitimate son, having survived the legitimate, was held entitled by survivorship to succeed

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to the family estate, which was impartible and appertained to a raj, on the death of his brother without male issue. *Sadu* v. *Baiza, I. L. R. 4 Bom. 47*, referred to and approved. JOGENDRO BHUPATI HURROCHUNDRA MAHAPATRA *v.* NITYANAND MAN SING . . . . **I. L. R. 18 Calc. 151**
L. R. 17 I. A. 128

10. ——— *Inheritance—Daughter's sons, nature of estate taken by—Inheritance treated as joint property.* The estate of *V*, a Hindu, having descended to *D* and *R*, sons of the daughter of *V*, was held by them as joint tenants. *D* having died, *R* by will devised the estate to the plaintiff. *Held*, that, although the shares which devolve on the two sons of a daughter may not come to them as co-parcenary property, yet, inasmuch as *D* and *R* had treated the estate as co-parcenary property, the survivor, *R*, was competent to dispose of the estate by will. GOPALASAMI *v.* CHINNASAMI . . . **I. L. R. 7 Mad. 458**

11. ——— *Co-parceners—Liability of property for debts.* According to the rulings of the High Courts of Madras and Bombay, the undivided interest of a co-parcener is not liable for his separate simple debts after his death, but lapses to the survivors on his death. KOTTA RAMASAMI CHETTI *v.* BANGARI SESHAMA NAYANIVARU **I. L. R. 3 Mad. 145**

12. ——— *Joint family estate, succession to—Title of member by survivorship—Effect of award and record at settlement of widow's estate for life—Land Revenue Act, C. P. (XVIII of 1881), s. 87.* Where a Hindu and his widow had successively held the estate in suit as joint family estate in co-parcenary with the appellant or his predecessor :—*Held*, that the appellant succeeded at the widow's death. Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8-anna share of the estate for her lifetime, that did not operate a separation in title or alter its devolution. S. 87 of the Land Revenue Act, Central Provinces (XVIII of 1881) did not affect the appellant's claim, for the award related solely to the widow's interest. REWA PRASAD SUKAL *v.* DEO DUTT RAM SUKAL . . . **I. L. R. 27 Calc. 515**
L. R. 27 I. A. 39

13. ——— *Obstructed heritage—Succession per capita—Succession on extinction of a divided branch of a family.* On the death, without issue, of a Hindu who has divided from the rest of his family, his property passed in succession to his widow and mother. On the death of the latter, the nearest surviving reversioners were the plaintiff's husband and the first defendant's father, both since deceased, and their first cousin. The plaintiff now claimed a one-third share of the property abovementioned as the heiress of her husband, who left no issue. It appeared that the plaintiff's husband and his co-reversioners

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were divided. *Held*, that the plaintiff was entitled to recover. *Semble :* That she would have been entitled to recover even if her husband had not been divided from his co-reversioners. SAMINADHA PILLAI *v.* THANGATHANNI . **I. L. R. 19 Mad. 70**

14. ——— *Obstructed inheritance—Inheritance passing to daughter's son—Presumption of joint property.* The daughter's sons of a deceased Hindu take the property of their maternal grandfather as an inheritance liable to obstruction, and consequently take it without rights of survivorship *inter se*. Where property enjoyed in common by persons capable of forming a joint Hindu family was in its origin separate property, there is no presumption that such property has subsequently become joint property. *Muttayan Chetti* v. *Sivagiri Zamindar, I. L. R. 3 Mad. 370 ;* and *Sivaganga Zamindar* v. *Lakshmana, I. L. R. 9 Mad. 188*, doubted. CHELIKANI VENKATARAMANAYAMMA GARU *v.* APPA RAU BAHADUR GARU . . **I. L. R. 20 Mad. 207**

15. ——— **Gift to donees jointly**—*Death of donee—Survivorship—Joint tenancy—Tenancy in common.* Where property is given jointly to two persons living as members of a joint Hindu family, each donee takes an interest in the property which passes to his heirs at his death, and not to the other donee by survivorship. Two brothers, living in union as a joint Hindu family, were jointly given certain property. One of them died childless, leaving a widow. *Held*, that the widow was entitled to a moiety of the property as heir of her husband, and that it did not pass to the other brother by survivorship. BAI DIWALI *v.* PATEL BECHARDAS (1902) . . . **I. L. R. 26 Bom. 445**

16. ——— **Grandsons**—*Two grandsons through the same daughter take estate as joint ancestral estate. Held*, that, under the *Mitakshara* law, the two sons of a Hindu's only daughter succeed on their mother's death to his estate jointly, with benefit of survivorship, as being joint ancestral estate. *Jasoda Koer* v. *Sheo Pershad Singh (1889), I. L. R. 17 Calc. 33 ;* and *Saminadha Pillai* v. *Thangathanni (1895), I. L. R. 19 Mad. 70*, overruled. VENKAYYAMMA GARU *v.* VENKATARAMANAYYAMMA (1902)
I. L. R. 25 Mad. 678
s.c. L. R. 29 I. A. 156
7 C. W. N. 1

14. OCCUPANCY RIGHTS.

1. ——— **Remote heirs**—*Right of occupancy.* The strict Hindu law of inheritance does not universally apply to the descent of occupancy rights. Mere title by the law of inheritance is not to be regarded in determining the descent of an occupancy holding. A remote heir, not in

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possession, cannot on the death of the raiyat claim the holding. BOODHOO RAE *v.* LAL BEEBEE **2 N. W. 126**

JATEE RAM SURMAH *v.* MUNGLOO SURMAH **8 W. R. 60**

2. ——— *Remote heirs—Occupancy raiyat.* Remote heirs are not allowed to succeed to a right of occupancy. Sons, or immediate heirs, residing with the raiyat in the village, succeed on his death. PEM KOOER *v.* UPPER BALEE SING . . . . **2 N. W. 86**

15. RELIGIOUS PERSONS (ASCETICS, GURUS, MOHUNTS, ETC.).

1. ——— **Ascetics**—*Succession to property of ascetics—Right of occupancy.* Although the High Court has, under the Hindu law, admitted the right of a disciple to succeed to the effects of an ascetic, it may be a question whether the Court does not go beyond that law when it permits a disciple to succeed to the property of an ascetic who leaves a large property, or any property which, if he conformed to the spirit of his religion, he could not have acquired. But, however this may be, a tenant-right of occupancy is on a different footing from property which is exclusively the estate of a deceased ascetic, and the principles which govern the hereditary right of succession to a tenant-right of occupancy are such as an ascetic, if he conform to the spirit of his religion, cannot carry out. SOORUJ KOMAR PERSHAD *v.* MAHADEO DUTT . **5 N. W. 50**

2. ——— *Succession to the property of ascetics.* The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely upon fellowship and personal association with that other, and a stranger, though of the same order, is excluded. KHUGGENDER NARAIN CHOWDHRY *v.* SHARUPGIR OGHORENATH . . **I. L. R. 4 Calc. 543**

3. ——— *Property left by ascetic—Rules relating to ascetic persons of the Sudra caste.* It being clearly implied by all the authorities that a Sudra cannot enter the order of yathi or saniasi, the devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world, is regulated by the ordinary law of inheritance, in the absence of proof of any general or special usage to the contrary. DHARMAPURAM PANDARA SANNADHI *v.* VIRAPANDIYAM PILLAI **I. L. R. 22 Mad. 302**

4. ——— **Guru**—*Disciple leaving master and going to distant country.* The disciple of a guru who leaves his spiritual master without permission, and goes to a distant country and breaks off all intercourse with his preceptor, manifesting at the same time an intention to absent himself permanently, is not entitled, on his preceptor's death, to share in the succession to the preceptor's estate. SOOGUN CHUND *v.* GOPAL GIR . **4 N. W. 101**

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15. RELIGIOUS PERSONS (ASCETICS, GURUS, MOHUNTS, ETC.)—*contd.*

5. ——— *Chela.* Amongst saniasis generally no chela has a right as such to succeed to the property of his deceased guru. His right of succession depends upon his nomination by the deceased in his lifetime as his successor, which nomination is generally confirmed by the mohunts of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a guru does not nominate his successor from among his chelas, such successor is elected and installed by the mohunts and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased. *Nirunjun Barthee* v. *Padaruth Barthee, S. D. A. N.-W. P. (1864)*, 512, followed. Where, therefore, a chela sued for possession of a village belonging to his deceased guru, founding such suit on his right of succession as chela without alleging that he had been nominated by the deceased as his successor and confirmed, or that he had been elected as successor to the deceased, such suit was held to be unmaintainable. MADHO DAS *v.* KAMTA DAS . . **I. L. R. 1 All. 539**

6. ——— *Priest—Disciple.* In certain cases a priest may, according to Hindu law, be the heir of a deceased disciple. JUGDANUND GOSSAMEE *v.* KESSUB NUND GOSSAMEE **W. R. 1864, 146**

7. ——— *Gosavi—Succession to the estate of a Gosavi in the Dekkan—A Gosavi's right to nominate his successor by a written instrument.* A guru in the Dekkan has a right to nominate his successor from amongst his chelas (disciples) by a written declaration. TRIMBAKPURI GURU SITALPURI *v.* GANGABAI **I. L. R. 11 Bom. 514**

8. ——— **Mohunt**—*Chela—Heir of deceased mohunt.* According to Hindu law, a chela is the heir of a deceased mohunt, and as such entitled to a certificate to enable him to collect his debts. SHEOPROKASH DOSS *v.* JOYRAM DOSS **5 W. R. Mis. 57**

9. ——— *Chela—Heirs of deceased mohunt.* Where the mohunt of a byragee muth died without having any chela :—*Held*, that ordinarily his successor was appointed by the mohunts of other byragee muths, and that enquiry should be made as to the existence of a particular custom by which it was alleged that the property of the deceased passed to the brother of his spiritual preceptor. RAMDOSS BYRAGEE *v.* GUNGA DOSS **3 Agra 295**

10. ——— *Succession to the office and property of a deceased mohunt—Custom of the muth or institution.* In determining the right of succession to the property left by the deceased head of a religous institution, the only law to be observed is to be found in custom and practice, which must be proved by evidence. On the death of a mohunt, the right to succeed to his landed and

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HINDU LAW—INHERITANCE—*contd.*

15. RELIGIOUS PERSONS (ASCETICS, GURUS, MOHUNTS, ETC.)—*concld.*

other property was contested between two goshains. *Held*, that the claimant, in order to succeed, must prove the custom of the muth entitling him to recover the office and the property appertaining to it. The evidence showed the custom to be that the title to succeed to the office and property was dependent on the successor's having been the chela, approved and nominated as such by the late mohunt, and also, after the death of the latter, installed or confirmed as mohunt by the other goshains of the sect. *Held*, that a claimant who failed to prove his installation or confirmation was not entitled to a decree for the office and property against a person alleging himself to have been a chela, who, whether with or without title, was in possession. GENDA PURI *v.* CHATAR PURI . . . . . **I. L. R. 9 All. 1**
L. R. 13 I. A. 100

11. ——— Head of religious institution—*Succession—Custom and practice.* The right of succession to the property left by the deceased head of a religious institution depends upon custom and practice, which must be proved by evidence in each case. *Greedharee Doss* v. *Nundo Kissore Doss, 11 Moo. I. A. 405; Genda Puri* v. *Chatar Puri, I. L. R. 9 All. 1*, and *Ramalingam Pillai* v. *Vythilingam Pillai, I. L. R. 16 Mad. 490*, referred to. RAMJI DASS *v.* LACHHU DASS (1902)
7 C. W. N. 145

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE.

(*a*) GENERAL CASES.

1. ——— Sapratibandha property. Sapratibandha (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir. NARASIMHA RAZU *v.* VEERABHADRA RAZU . **I. L. R. 17 Mad. 287**

2. ——— Suspension of inheritance—*Unborn sons—Child in the womb, right of.* Proprietary right is created by birth, and not by conception. A child in the womb takes no estate. In cases where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception is ascertained. If the child be still-born, the estate goes, not to his heir, but to the heir of the last owner. A son or grandson's right or prohibition to his unseparated father making a gift, donation, or sale of effects inherited from his grandfather cannot be exercised in favour of an unborn son. GOURA CHOWDHRAIN *v.* CHUMMUN CHOWDHRY . . . . **W. R. 1864, 340**

3. ——— *Unborn son—Pregnancy—Adoption.* According to Hindu law, the right of inheritance is not suspended by pregnancy or until adoption. DUKHINA DOSSEE *v.* RASH BEHAREE MOJOOMDAR . **6 W. R. 221**

HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*a*) GENERAL CASES—*contd.*

4. ——— *Son not born when succession opened out.* A sister's son, in order to have a preferential title over his paternal uncle, must have been born or conceived when the succession opened out. It is contrary to a Hindu law that mother should be a trustee for a son who may hereafter be conceived. RASH BEHAREE ROY *v.* NIMAYE CHURN . . **W. R. 1864, 223**

5. ——— *Unbegotten heir.* An inheritance cannot remain in abeyance for an unbegotten heir (such not being a posthumous son). The succession must vest in the heirs existing at the time of the death of the person whose inheritance descends. KOYLASNATH DOSS *v.* GYAMONEE DOSSEE
W. R. 1864, 314

6. ——— Divesting of estate—*Heir born after death of ancestor.* By Hindu law an estate once vested cannot be divested in favour of the son of an excluded person born after the death of the ancestor. Such ruling does not apply to the case of a son of an excluded person if, having been begotton and being in the womb at the time of the ancestor's death, he is afterwards born capable of inheriting. KALIDAS DAS *v.* KRISHNA CHANDRA DAS . **2 B. L. R. F. B. 103 : 11 W. R. O. C. 11**

See, also, BAPUJI *v.* PANDURANG
I. L. R. 6 Bom. 616

7. ——— Exclusion from inheritance—*Proof of ground for exclusion.* The party who seeks to exclude one of the heirs to property from a share of the inheritance is bound to prove the cause of the exclusion. FUTTICK CHUNDER CHATTERJEE *v.* JUGGUT MOHINEE DABI
22 W. R. 348

8. ——— *Disqualification—Onus probandi—Presumption.* *K K* died leaving a widow (*A*), three sons (*R*, *K*, and *P*), and a daughter (*W*). *R* and *K* died unmarried, and *P*, who survived them, left a widow (*C M*). *W's* son, *K C*, sued *C M* for 5 annas 15 gundas of the joint family estate. One of the pleas raised for the defence was that the sons, *R* and *K*, were disqualified from inheriting, and 1 anna 15 gundas was claimed as the exclusive property of defendant's husband under an alleged gift. *Held*, that the presumption of Hindu law was against the alleged disqualification and *R* and *K* having an admitted right to succeed, it was for the defendant to prove by positive evidence that they did not succeed by reason of the said disqualification. CHUNDEE MONEE DABIA *v.* KRISTO CHUNDER MOZOOMDER
18 W. R. 375

9. ——— *Disqualified heir—Widow of the disqualified heir—Exclusion from inheritance—Rule as to construction of Hindu Law texts.* The wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification,

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(*a*) GENERAL CASES—*concld.*

whether she claim as heir to a deceased person, through her husband or otherwise, if she is herself free from any of the defects, which exclude a person from inheritance under Hindu law. It is a canon of interpretation in Hindu law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it. *Per Curiam.* According to a well-known rule of interpretation in Hindu law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text. GANGU *v.* CHANDRABHAGABAI (1907) . **I. L. R. 32 Bom. 275**

(*b*) ADDICTION TO VICE.

10. ——— *Addiction to vice as unfitting son for inheritance.* Vague and general evidence of plaintiff's gambling and licentious propensities is not sufficient to justify a finding that he has disqualified himself by "addiction to vice" for the performance of obsequies and such like acts of religion, and such evidence must disclose something like habitual maltreatment, or active and malignant hostility, to authorize a Court to pronounce the plaintiff "a professed enemy of his father" for the purpose of declaring him to have forfeited his right of inheritance by misconduct. KALKA PERSHAD *v.* BUDREE SAH . **3 N. W. 267**

(*c*) BLINDNESS.

11. ——— *Son of blind man.* A Hindu died in 1832, leaving an only son, who had been blind from his birth, and two widows, the survivor of whom died in 1849. On the death of the surviving widow, the nephew succeeded as heir, the blind son being by Hindu law excluded from inheritance. The blind man having married, a son was born to him in 1858. The blind man died in 1861. *Held* by NORMAN, *J.*, that on the birth of the blind man's son he became entitled to the inheritance from which his father had been excluded. *Held*, on appeal (by a Full Bench), that by Hindu law an estate once vested cannot be divested in favour of the son of an excluded person born after the death of the ancestor. Such ruling does not apply to the case of the son of an excluded person if, having been begotten and being in the womb at the time of the ancestor's death, he is afterwards born capable inheriting. KALIDAS DAS *v.* KRISHNA CHANDRA DAS . . **2 B. L. R. F. B. 103**
11 W. R. O. C. 11

12. ——— *Incurable blindness.* *Semble :* A daughter who becomes incurably

(*c*) BLINDNESS—*concld.*

blind in her infancy has no right to inheritance, but only to maintenance. BAKUBAI *v.* MANCHHABAI
2 Bom. 5

13. ——— *Congenital blindness—Blindness after birth.* The blindness which under the Hindu law as recognized in Bengal excludes an afflicted person from inheritance, refers to congenital blindness, and not to loss of sight which has supervened after birth. MOHESH CHUNDER ROY *v.* CHUNDER MOHUN ROY
14 B. L. R. 273 : 23 W. R. 78

14. ——— *Congenital blindness—Person not born blind.* According to the Hindu law as prevailing in the Bombay Presidency blindness to cause exclusion from inheritance must be congenital. Therefore, where the widow of a childless intestate, though proved to have been totally blind for some years before the death of her husband, was admitted not to have been born blind :—*Held*, that such blindness did not prevent her from inheriting the property of her husband on his decease. MURARJI GOKULDAS *v.* PARVATIBAI
I. L. R. 1 Bom. 177

15. ——— *Incurable blindness.* Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance. UMABAI *v.* BHAVU PADMANJI . . . **I. L. R. 1 Bom. 557**

(*d*) DEAFNESS AND DUMBNESS.

16. ——— **Deaf and dumb person.** According to Hindu law, the son of a deaf and dumb man, born after the death of his grandfather, cannot succeed to the estate descended from his grandfather. *A* died leaving four sons. One, *B*, was born deaf and dumb. *B* lived in commensality with his brothers. Some time after *A's* death a son was born to *B*. *Held*, that *B's* son was not entitled to succeed as heir to a share of the property descended from *A*. PARESHMANI DASI *v.* DINANATH DAS . . **1 B. L. R. A. C. 117**
11 W. R. O. C. 19 note

17. ——— *Deafness and dumbness from birth—Divesting of estate—Son of excluded person.* One *B*, a Hindu, died leaving him surving *L*, his undivided son born deaf and dumb, and the defendant, *P*, his (*B's*) brother's son. *L* being disqualified from inheriting, the defendant *P*, at *B's* death, succeeded to the entire family estate, and subsequently sold a part of it. *L* subsequently married and had a son, the plaintiff, who sued to recover his half share in a certain village. *Held*, that, according to Hindu law obtaining in Western India, the family estate vested in the defendant *P*, at the death of *B*, to the exclusion of his deaf and dumb son, and the subsequent birth of the plaintiff did not divest the defendant

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HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*d*) DEAFNESS AND DUMBNESS—*concld.*

of the inheritance which had solely vested in him. BAPUJI *v.* PANDURANG **I. L. R. 6 Bom. 616**

18. ——— *Sons of deaf and dumb person—Partition—Disqualified heirs—Birth of qualified heir.* Under the Hindu law of inheritance which obtains in Southern India, the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share of the family state in the lifetime of their father, notwithstanding that they were born after the death of their grandfather. In such a case the estate vests on the death of the grandfather in the qualified heirs, subject to the contingency of its being divested on the recovery of the disqualified, or the birth of a qualified heir. KRISHNA *v.* SAMI . **I. L. R. 9 Mad. 64**

19. ——— *Deaf and dumb son—Exclusion from inheritance—Vesting of the estate in the widow of the least male holder—Subsequent birth of a son to one of the disqualified sons—Divesting of estate.* M, a Hindu, died leaving him surviving a widow and three sons *C* and two others, all of whom were born deaf and dumb. His widow succeeded to the estate the sons being disqualified from inheriting. Later on *C* married and a son was born to him. The widow thereafter sold the property of the plantiffs, who now sued to recover possession from the wife and son of *C*. It was contended for the defendants that the widow succeeding to her husband, took only a widow's estate and that that estate was divested by the after-born son of *C*. *Held*, that the plaintiffs were entitled to succeed. Both in fact and in contemplation of law *C's* son had no existence when the estate vested in the widow ; and his subsequent birth could not divest the estate. *Held*, that *C's* son stood in no better position than would have been occupied by his father *C*, if the latter's disqualification had been removed after the widow had succeeded to the inheritance ; and in that case the widow's title would prevail, inasmuch as it was superior to *C's*, while his disqualification endured. PAWADEWA *v.* VENKATESH (1908)
I. L. R. 32 Bom. 455

20. ——— **Dumbness**—*Inheritance—Exclusion from inheritance.* Dumbness, if from birth, is a cause of disinherison in females as well as in males. A Hindu widow born dumb is, according to the law prevailing on this side of India, incapable of inheriting from her husband. Such widow is, however, entitled to her stridhan and to maintenance out of the property of her deceased husband. Case remanded to have the widow made a party to the suit, that it might be determined whether she was born dumb, and if so, that the amount of her stridhan and of her maintenance might be ascertained. VALLABHRAM SHIBNARAYAN *v.* BAI HARIGANGA
4 Bom. A. C. 135

HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*e*) INCONTINENCE.

See HINDU LAW—WIDOW—DISQUALIFICATION—UNCHASTITY.

21. ——— *Daughters right of succession.* Under the Hindu law prevailing in the Presidency of Bombay, a daughter is not debarred by incontinence from succession to the estate of her father. Smriti writers and commentators on Hindu law and judicial decisions on the question of a daughter's right of succession referred to and discussed. ADVYAPA *v.* RUDRAVA
I. L. R. 4 Bom. 104

(*f*) INSANITY.

22. ——— *Mental incapacity—Idiotcy.* The mental incapacity which disqualifies a Hindu from inheriting on the ground of idiotcy is not necessarily utter mental darkness. A person of unsound mind, who has been so from his birth, is in point of law an idiot. The reason for disqualiyfing a Hindu idiot is his unfitness for the ordinary intercourse of life. TIRUMAMAGAL AMMAL *v.* RAMASVAMI AYYANGAR . . **1 Mad. 214**

23. ——— *Idiotcy—Madness.* The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied. The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence or endued with the business capacity to manage their affairs properly. *Tirumamagal Ammal* v. *Ramasvami Ayyangar, 1 Mad. 214*, distinguished. SURTI *v.* NARAIN DAS
I. L. R. 12 All. 530

24. ——— *Mitakshara family—Suit by lunatic father to recover family property—Disability to sue.* A lunatic, a member of a joint Mitakshara family, cannot sue to recover property belonging to the joint family, he being, under the Mitakshara law, disqualified from inheritance, and therefore entitled to no share or partition in the property, but only to maintenance. RAM SOONDER ROY *v.* RAM SAHYE BHUGUT
I. L. R. 8 Calc. 919

25. ——— *Congenital insanity—Partition.* It is not necessary that madness or insanity should be congenital to disqualify a person from inheritance ; a co-parcener, therefore, who has become insane whilst in possession will lose his share on partition. RAM SAHYE BHUKUT *v.* LALLA LALJEE SAYHE
I. L. R. 8 Calc. 149 : 9 C. L. R. 457

26. ——— *Incurable insanity.* In order to exclude a person from inheritance under the Hindu law on the ground of insanity, it is sufficient to show that when the succession open-

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HINDU LAW—INHERITANCE—*contd.*

18. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*f*) INSANITY—*contd.*

ed he was mad, and not in a condition to perform the funeral oblations. Proof that his insanity was was incurable is not necessary. DWARKANATH BYSAK *v.* MAHENDRANATH BYSAK
9 B. L. R. 198 : 18 W. R. 305

27. ——————— *Condition of mind at time succession opens out.* The condition of a minor's mind at the time the succession opens out to him is to be looked to ; therefore, where a party obtained a decree declaratory of his right to succeed to certain property as reversioner on the death of the widows, and on their death he had become insane :—*Held,* that he was not entitled to execute the decree. BRAJA BHUKAN LAL AHUTSI *v.* BICHAN DOBI . **9 B. L. R. 204 note : 14 W. R. 330**

28. ——————— *Condition of mind at time succession opens out.* In order to exclude a person from inheritance under the Hindu law on the ground of insanity, it is sufficient to prove insanity at the time when succession to the property opens out. WOOMA PERSHAD ROY *v.* GRISH CHUNDER PROCHUNDO . **I. L. R. 10 Calc. 639**

29. ——————— *Condition of mind at time succession opens out—Incurable insanity.* A person is disqualified under Hindu law from succeeding to property if he is insane when the succession opens, whether his insanity is curable or incurable. Under the same law, when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption. Under the same law, although a person becomes qualified to succeed to property after the disqualification of insanity ceases, he cannot resume property from an heir who has succeeded to it in consequence of his disqualification when the succession opened. DEO KISHEN *v.* BUDH PRAKASH
I. L. R. 5 All. 509

30. ——————— *Lunatic.* Although, according to Hindu law, a lunatic has no rights of inheritance, he is not debarred from taking an estate duly conveyed to him. GOURENATH *v.* COLLECTOR OF MONGHYR. COURT OF WARDS *v.* RUGHOOBUR DYAL. SHEOPERSHAD NARAIN *v.* COLLECTOR OF MONGHYR . . . **7 W. R. 5**

31. ——————— *Possession of property by lunatic.* A Hindu lunatic may be possessed of property, though he cannot take it by inheritance. COURT OF WARDS *v.* KUPUIMUN SINGH
10 B. L. R. 364 : 19 W. R. 164

32. ——————— *Insanity subsequent to inheriting of property—Committee in lunacy under Act XXXV of 1858—Mortgage of joint family property by Mitakshara law.* Under the Mitakshara law, a person who has succeeded to the inheritance of property does not lose his right on his becoming insane at a subsequent time. *Ram Sahye Bhukhut* v. *Lalla Laljee Sahyee, I. L. R. 8 Calc. 149 ; Ram Soonder Roy* v. *Ram Sahye Bhugui, I. L. R. 8 Calc. 919,* distinguished. *Balgobinda* v. *Lal Bahadur, S. D. A. 1854, 244 ; Deokishen* v. *Budhprakash, I. L. R. 5 All. 509 ; Banku* v. *Pattamma, I. L. R. 14 Mad. 289 ;* and *Moniram Kolita* v. *Kery Kolitani, I. L. R. 5 Calc. 776 : L. R. 7 I. A. 115,* referred to. The father and head of a joint family under the Mitakshara law having become insane, two of his grandsons, acting as committee appointed under Act XXXV of 1858, mortgaged the joint family property on behalf of the lunatic, with the sanction of the Judge. The mortgagee sued upon the mortgage, and obtained a decree against them both in their own capacity and as guardians of their grandfather. *Held,* that the act of the committee might well be regarded as the act of the father and head of the family, and the debt having been contracted for the benefit of the family, the whole family was bound by the mortgage and decree, and that the sale in execution thereof passed the entire property. ABILAKH BHAGAT *v.* BHEKHI MAHTO . . . . **I. L. R. 22 Calc. 864**

HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*f*) INSANITY—*concld.*

33. ——————— *Proof of insanity—Appointment of guardian under Act XXXV of 1858—Disability to sue.* Exclusion, under the Hindu law, of a claimant from the inheritance on the ground of insanity cannot be inferred merely from his being described in the plaint as insane, or from his suing by a guardian certified under Act XXXV of 1858. Although he might be incompetent to commence the suit or to proceed with it except by a guardian, this did not establish that he was excluded when the succession opened. RAN BIJAI BAHADUR SINGH *v.* JAGATPAL SINGH. JAGATPAL SINGH *v.* RAN BIJAI BAHADUR SINGH. BISHESHAR BAKSH SINGH *v.* RAN BIJAI BAHADUR SINGH
I. L. R. 18 Calc. 111
L. R. 17 I. A. 173

(*g*) LAMENESS.

34. ——————— **Lameness**—*Exclusion from inheritance—Lameness of a member of an undivided family—Effect on right of inheritance.* Lameness which is not congenital is no bar to the right of inheritance which a member of an undivided Hindu family ordinarily possesses. *Quære :* Whether lameness which is congenital would be a bar. VENKATA SUBBA RAO *v.* PURUSHOTTAM (1902)
I. L. R. 26 Mad. 133

(*h*) LEPROSY.

35. ——————— *Incurable leprosy.* Incurable leprosy of the sanious or ulcerous type, contracted before partition, excludes the person afflicted with it from a share in the ancestral estate. ANANTA *v.* RAMABAI
I. L. R. 1 Bom. 554

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HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*h*) LEPROSY—*concld.*

36. ——— *Virulent and aggravated form of leprosy.* It is only when leprosy assumes a virulent and aggravated type that it is by Hindu law made a ground for disqualification for inheritance. JANARDHAN PANDURUNG *v.* GOPAL PANDURUNG . . . **5 Bom. A. C. 145**

37. ——— *Disease of a mild and not virulent form.* Leprosy of a mild type was held not to affect the co-parcenary rights of a member of a Hindu family. It is only where the disease is of a virulent type that it effects a disqualification to inheritance. RANGAYYA CHETTY *v.* THANIKACHALLA MUDALI . **I. L. R. 19 Mad. 74**

38. ——— *Expiation—Onus of proof.* Where a party who claimed to be heir-at-law to the estate of a deceased Hindu was opposed on the ground that he was disqualified from inheriting by leprosy, but volunteered to state that he had performed the penance required by the shastras for the expiation of the disease, he was held to have admitted thereby that the leprosy was of that grievous nature which demanded expiation before he could succeed to the inheritance, and to lie under the onus of proving the fact that expiation had been performed. BHOOBUNESSUREE DABEA *v.* GOUREE DOSS TURKOPUNCHANUN . **11 W. R. 535**

39. ——— *Evidence of incurable disease.* When it is contended that a Hindu is incapable of inherting by reason of an incurable disease, as leprosy, the strictest proof of the disease will be required. ISSUR CHUNDER SEIN *v.* RANEE DOSSEE . . . **2 W. R. 125**

NULLIT CHUNDER GOHOO *v.* BAGOLA SOONDUREE DOSSEE . . . . . **21 W. R. 249**

40. ——— *Leprosy after vesting of estate—Divesting of property.* A leper's property to which he has succeeded by inheritance before the disease is not divested from him ; he can make a valid gift of it. SHAMA CHURN ADHICAREE BYRAGEE *v.* ROOP DOSS BYRAGEE . **6 W. R. 68**

(*i*) MARRIAGE.

41. ——— **Mohunts**—*Forfeiture of Mohuntship by marriage.* Among the Gossains of the Decean and certain other places, marriage does not work a forfeiture of the office of mohunt and the rights and property appendant to it. GOSAIN RAMBHARTI JAGRUPBHARTI *v.* SURAJBHARTI HARIBHARTI . . . **I. L. R. 5 Bom. 682**

42. ——— **Hindu widows**—*Hindu widow, custom of marriage of—Forfeiture of estate.* A Hindu widow, on remarriage, forfeits the estate inherited from her former husband, although, according to custom prevailing in her caste, a remarriage is permissible. *Murugayi* v. *Viramakali, I. L. R. 1 Mad. 226,* followed. *Matungini Gupta* v. *Ram Rutton Roy, I. L. R. 19 Calc. 289,* referred to. *Har Saran Dass* v. *Nandi, I. L. R. 11 All. 330,* dissented from. RASUL JEHAN BEGUM *v.* RAM SURUN SINGH . **I. L. R. 22 Calc. 589**

HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*i*) MARRIAGE—*concld.*

43. ——— *Marriage of Hindu widow after conversion—Marriage Act (III of 1882), s. 2—Hindu Widows Marriage Act (XV of 1856), s. 2—Forfeiture of property of first husband—Act XXI of 1850.* A Hindu widow inherited the property of her husband taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration, as required by s. 10 of that Act, that she was not a Hindu. *Held,* by the majority of the Full Bench (PRINSEP, *J.*, dissenting), that by her second marriage she forfeited her interest in her first husband's estate in favour of the next heir, all rights which any widow may have in her deceased husband's property by inheritance of her husband being expressly determined by s. 2 of the Hindu Widows' Remarriage Act (XV of 1856) upon her re-marriage. *Gopal Singh* v. *Dongazee, 3 W. R. 206,* overruled. PRINSEP, *J.*—S. 2 of Act XV of 1856 does not apply to all Hindu widows re-marrying, but only to Hindu widows remarrying as Hindus under Hindu law as provided by the Act. MATUNGINI GUPTA *v.* RAM RUTTON ROY **I. L. R. 19 Calc. 289**

44. ——— *Remarriage—Widow's Remarriage Act (XV of 1856), ss. 2, 3, and 4—Castes in which remarriage is allowed—Forfeiture of property inherited from son.* Under s. 2 of the Widows' Remarriage Act (XV of 1856) a Hindu widow belonging to a caste in which remarriage has been always allowed, who has inherited property from her son, forfeits by remarriage her interest in such property in favour of the next heir of the son. VITHU *v.* GOVINDA **I. L. R. 22 Bom. 321**

(*j*) OUTCASTS.

45. ——— *Act XXI of 1850—Exclusion from caste.* Since the passing of Act XXI of 1850, exclusion from caste, whether by renunciation of religion or from any other cause, is no longer a ground for exclusion from inheritance. BHUJJUN LALL *v.* GYA PERSHAD **2 N. W. 446**

46. ——— *Convert—Act XXI of 1850.* Before the passing of Act XXI of 1850, the property possessed or acquired by a Hindu convert to Mahomedanism prior to his conversion passed to his nearest heir professing the Hindu religion. MEWA KOONWER *v.* LALLA OUDH BEHAREE LALL . . . . . **2 Agra 311**

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HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*j*) OUTCASTS—*contd.*

47. ——— *Marriage with Mahomedan—Forfeiture of property—Act XXI of 1850.* The Hindu law disentitling a widow to inherit on re-marriage and marriage with a Mahomedan does not apply to a widow who became a Mahomedan before her marriage with a Mahomedan. According to s 3, Act XXI of 1850, and s. 9, Bengal Regulation VII of 1832, conversion does not involve forfeiture of inheritance. GOPAL SINGH *v.* DHUNGAJEE . . . **3 W. R. 206**

48. ——— *Change of religion—Degradation—Death of husband while outcast—Dissolution of marriage—Suit by widow to recover husband's estate.* In 1850 *K* married *S*, both being Brahmans. *K* subsequently became a convert to Christianity. In 1881 *K* died and *S* claimed his estate. *Held*, that, according to Hindu law, *K* died an outcast and degraded, and that, as his degradation was unatoned for, the marriage became absolutely dissolved, and no right of inheritance remained to *S*. SINAMMAL *v.* ADMINISTRATOR-GENERAL OF MADRAS **I. L. R. 8 Mad. 169**

49. ——— *Exclusion from caste—Act XXI of 1850.* Exclusion from caste of Hindu for an alleged intrigue does not involve deprivation of his civil rights to hold, deal with, and inherit his property (Act XXI of 1850). KARUTHEDATTA *alias* PULLAKATT MEELAKADAN NAMBOODRI *v.* MELE PULLAKATT VASSA DEVAN NAMBOODRI . . . **1 Ind. Jur. N. S. 236**

50. ——— *Exclusion from caste— Act XXI of 1850. Held*, that the mere fact that the plaintiffs (whose right by near relationship to maintain the suit was established) are out of caste, and that the men of pure blood of their tribe do not eat with them is of itself no ground of exclusion from inheritance, s. 1, Act XXI of 1850, having annulled any such disqualification. TAIJ SINGH *v.* KOUSILLA . . . **1 Agra 90**

51. ——— *Persons descended from outcasts.* The doctrine of Hindu law that outcasts are incapable of inheritance has no bearing upon the case of the members of new families which have sprung from persons so degraded. TARA CHUND *v.* REEB RAM . . **3 Mad. 50**

52. ——— *Divesting of property—Exclusion from caste.* It is a general rule of Hindu law that when the descent of an estate has taken place before the cause of exclusion from caste has arisen, the estate is not divested by the owner becoming an outcast. An estate which a mother has inherited from her son is not divested by reason of her subsequent unchastity. DEOKEE *v.* SOOKHDEO . . . . **2 N. W. 361**

53. ——— *Hindu becoming a byragee.* A Hindu becoming a *byragee*, if he chooses to retain possession of, or to assert his right to, property to which he is entitled, may be doing an act which is morally wrong, but in which he will not be restrained by the Court, inasmuch as such an act does not exclude him from any rights he may have in such property. JAGANNATH PAL *v.* BIDYANAND **1 B. L. R. A. C. 114 : 10 W. R. 172**

TEELUCK CHUNDER *v.* SHAMA CHURN PROKASH **1 W. R. 209**

54. ——— *Hindu becoming a byragee.* A Hindu, by becoming a *byragee*, does not divest himself of all title in his family estate, which on his death devolves on his heirs, and not on a kept mistress, although she may have performed his funeral rites on account of his being an outcast. KHOODERAM CHATTERJEE *v.* ROOKHINEE BOISTOBEE . . . . . **15 W. R. 197**

55. ——— *Act XXI of 1850—Suit by person born a Mahomedan as reversioner in a Hindu family.* Act XXI of 1850 does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of s. 1 protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This applies to a case where a person born a Mahomedan, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu law a share in his father's family. BHAGWANT SING *v.* KALLU . **I. L. R. 11 All. 100**

(*k*) PARTICIPATION IN CRIME.

56. ——— *Succession to property of deceased—Death caused by murder—Participation in crime by next heir—Effect on right of succession.* Defendant, the mother of *S*, had been charged, with another accused, with having murdered *S*. Defendant was acquitted, but the other accused was convicted. Plaintiff, as the next in succession to *S* (after the defendant) now sued for a declaration of his right to the property of *S* on the ground that the defendant was not entitled to the property, inasmuch as she had, as plaintiff alleged, been a party to the murder. The Subordinate Judge dismissed the suit without trying the question whether the defendant had been a party to the murder. *Held*, that the question should have been tried. The question whether the Hindu, who has been party to a murder, is prevented from succeeding to the estate of the person murdered is not answered by the Hindu Law. But the principle that no one shall be allowed to benefit by his own wrongful act is of universal application. If the defendant was a party to the murder, her wrongful act, while not preventing the vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those,

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HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*contd.*

(*k*) PARTICIPATION IN CRIME—*concld.*

who would be entitled to it, were the guilty heir out of the way. The text or Yagnavalkya, which is the foundation of the Mitakshara law of inheritance, enunciates but a general rule, the effect of which is liable to be nullified more or less by facts other than the two postulated therein, namely, the demise of a male owner of property without co-parceners and the survival of the relation specified in the text. What such facts are has to be ascertained either with reference to the rules embodied in other Hindu texts or with reference to principles, which it is the duty of the Court to follow as a tribunal bound to administer the law of justice, equity and good conscience in cases not provided for specifically. VEDANAYAGA MUDALIAR *v.* VEDAMMAL (1904) **I. L. R. 27 Mad. 591**

(*l*) REFUSAL TO ADOPT.

57. ——— *Widow's refusal to adopt.* A widow's refusal to comply with a direction to adopt is no ground of forfeiture as regards her rights of inheritance. UMA SUNDARI DABEE *v.* SOUROBINEE DABEE **I. L. R. 7 Calc. 288 : 9 C. L. R. 83**

(*m*) UNCHASTITY.

See HINDU LAW—WIDOW—DISQUALIFICATION—UNCHASTITY.

58. ——— **Mother's unchastity.** The texts which pronounce that Hindu females are debarred from inheriting by unchastity are confined in their application to the widow as such, and do not impose a condition on the succession of the mother. KOJIYADU *v.* LAKSHMI **I. L. R. 5 Mad. 149**

59. ——— *Mother's unchastity.* An estate which a mother has inherited from her son is not divested by reason of her subsequent unchastity. It is a general rule of Hindu law that, when the descent of an estate has taken place before the cause of exclusion from caste has arisen, the estate is not divested by the owner becoming an outcast. This rule would not under Hindu law apply to a wife who has become unchaste. But there is no authority to show that it does not apply to a mother. DEOKEE *v.* SOOKHDEO **2 N. W. 361**

60. ——— *Mother's unchastity—Inheritance to property of son.* A mother, guilty of unchastity before the death of her son, is, by Hindu law, precluded from inheriting his property. RAMNATH TOLAPATTRO *v.* DURGA SUNDARI DEBI . . . **I. L. R. 4 Calc. 550**

61. ——— **Unchaste daughter**—*Bengal school of Hindu law.* According to the Bengal school of Hindu law, a daughter who is unchaste is precluded from inheriting the property of her father. RAMANANDA *alias* HARIS CHANDRA CHOWDHRY *v.* RAIKISHORI BARMANI **I. L. R. 22 Calc. 347**

HINDU LAW—INHERITANCE—*contd.*

16. DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—*concld.*

(*m*) UNCHASTITY—*concld.*

62. ——— *Degradation of daughter on account of incontinence—Effect on her right to inherit the stridhanam property of her mother.* Under the Hindu law, the degradation of a daughter on account of incontinence does not put an end to her right to inherit the *stridhanam* property of her mother. *Semble :* That the same rule is applicable when the question involved is the right of inheritance to the property of the father. ANGAMMAL *v.* VENKATA REDDY (1902) . **I. L. R. 26 Mad. 509**

63. ——— *Disqualification of daughter—Unchastity—Inheritance—Marriage with Mahomedan during lifetime of undivorced Hindu husband—Legitimacy of issue—Act XXI of 1850.* Where a Hindu married woman embraced Islamism and married a Mahomedan according to the forms of Mahomedan law, and had sons by him during the lifetime of her Hindu husband without having been divorced from the latter :—*Held,* that as the sons were illegitimate, she was in the position of an unchaste daughter, and was, under Hindu law, disqualified from inheriting her father's property. *Dhan Bibi* v. *Lalon Bibi, I. L. R. 27 Calc. 801,* and *Ramananda* v. *Raikishori Barmani, I. L. R. 22 Calc. 347,* referred to. The provisions of Act XXI of 1850 cannot save her right of inheritance, because she had not lost such right by reason of her renouncing or being excluded from the Hindu communion. *Bhagwant Singh* v. *Kallu, I. L. R. 11 All. 100,* distinguished. SUNDARI LETANI *v.* PITAMBAR LETANI (1905) . **I. L. R. 32 Calc. 871 9 C. W. N. 1003**

64. ——— **Prostitutes**—*Law governing succession to her property.* A woman of the town who is a Hindu by birth does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu law. SARNA MOYEE BEWA *v.* SECRETARY OF STATE FOR INDIA . . . **I. L. R. 25 Calc. 254 2 C. W. N. 97**

17. PRIMOGENITURE, RULE OF.

——— *Orissa, land tenure in—Inheritance—Primogeniture, rule of—Custom—Regulation XI of 1793—Regulation X of 1800—Regulation XII of 1805, s. 36—Bhunyan—Paharaj—Killa—Garh—Hereditary office, estate attached to—Evidence Act (I of 1872), ss. 13 (b), 32 (3) & (5), 49, 90—Statements of persons, who are dead—Usage, opinion as to—Ancient document, custody of—Regulation VII of 1882, s. 9.* The rule of primogeniture may exist by family custom, although the estate

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HINDU LAW—INHERITANCE—*concld.*

17. PRIMOGENITURE, RULE OF—*concld.*

may not be a raj or a polliam. *Chintamun Singh* v. *Nowlukho Konwari, I. L. R. 1 Calc. 153 : L. R. 2 I. A. 263*, followed. The law, as prescribed in the Regulations, expressly allows the rule of primogeniture to prevail in the district of Cuttack in cases in which by established usage succession to the entire estate devolves to a single heir, provided the rule is shown to have been in existence at the time of Regulation XII of 1805, and has not since been departed from. *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar, I. L. R. 1 Calc. 186 : 19 W. R. 8*, referred to. Words like *Bhunyan* and *Paharaj* used as titles of the owners of an estate in Orissa, and words like *Killa* and *Garh* used as descriptive of the estate were held, when read in connection with passages from standard works of reference on land tenure in Orissa, and taken in connection with the evidence adduced in the case, to furnish a proper basis for the inference that the estate, being attached to and devolving with some office, descended only to the eldest son as the public holder of the office. The statement in a genealogical table filed by a member of a family, who is dead, regarding the descendants of another member of the family, before any question arose as to the latter, is relevant under s. 32 (5) of the Evidence Act. SHYAMANAND DAS MOHAPATRA *v.* RAMA KANTA DASS MOHAPATRA (1905)

I. L. R. 32 Calc. 6

18. RE-UNION.

——————————— *Re-union—Inheritance—Heirs—Special heirs—Mitakshara—Re-union not affecting inheritance.* According to the Mitakshara, re-union is restricted to three classes of cases, namely, (i) between father and son, (ii) between brothers and (iii) between maternal uncle and nephews. Under the Hindu law as laid down in the Mitakshara, there cannot be a valid re-union between first cousins, who were originally joint, but had subsequently separated. *Visvanath Gangadhar* v. *Krishnaji Ganseh, 3 Bom. H. C. (A. C. J.) 69 ; Lakshmibai* v. *Ganpat Moraba, 4 Bom. H. C. (O. C. J.) 150 ; Abhai Churn Jana* v. *Mangal Jana, I. L. R. 19 Calc. 634 ; Balkishen Das* v. *Ram Narain Sahu, I. L. R. 30 Calc. 738 : L. R. 30 I. A. 139 : 7 C. W. N. 578*, referred to. BASANTA KUMAR SINGHA *v.* JOGENDRA NATH SINGHA (1905)

I. L. R. 33 Calc. 371
s.c. 10 C. W. N. 236

HINDU LAW—INTEREST.

See HINDU LAW—DAMDUPAT ; USKRY.

——————————— *Interest—Mitakshara—Debtor wrongfully withholding payment—Demand by creditor—Interest Act (XXXII of 1839)—Indian Contract Act (IX of 1872).* The plaintiff sued to recover a sum of money with interest from the date of demand from the defendant, who held the money in deposit for her. There was no agreement between the parties to pay interest. The

HINDU LAW—INTEREST—*concld.*

first Court dismissed the claim as to interest ; but the lower Appellate Court allowed interest on the amount of the deposit from the date of the demand by plaintiff to the date of payment. The parties to the suit were Hindus governed by law of the Mitakshara. *Held*, that, under special circumstances, interest may be awarded by Courts in India, by way of damages. *Held*, further, that under Hindu Law as it is to be found in the Mitakshara there is annexed to each contract of debt, in which there is no agreement to pay interest, the term or incident that such loss shall be made up by the debtor, if he wrongfully withholds payment after demand : and that the incident was annexed to every such contract at the date when the interest Act (No. XXXII of 1839) came into force. *Held*, further, that the parties being Hindus governed by the Mitakshara that constituted a special circumstance justifying the award of interest. *Hurropersaud Roy Chowdhry* v. *Shamapersaud Roy Chowdhry, L. R. 5 I. A. 31*, applied. SAUNADANAPPA *v.* SHIVBASAWA (1907)

I. L. R. 61 Bom. 354

HINDU LAW—JAINS.

1. ——————— Performance of funeral ceremonies—*Hindu Law—Jains—Minor son—Widow.* According to Hindu Law, which applies in this respect to Jains, the son of a deceased person has the preferential right to the performance of the monthly, six-monthly and anniversary ceremony of the deceased. It is not only his right, but his religious duty. In default of the son (which term includes the grandson and great-grandson), it is the duty of the widow to get them performed, where the husband has died in division and the widow becomes his heir. The widow is not only interested in the performance of the ceremonies, but where the son is a minor it is her religious duty to see that they are duly performed. SUNDARJI DAMJ *v.* DAHIBAI (1905) . . . **I. L. R. 29 Bom. 319**

2. ——————— Jains governed by Hindu law. In the absence of any special custom, Jains are governed by the ordinary Hindu law. KALGAVDA TAVANAPPA *v.* SOMAPPA TAMANGAVDA (1909) . . . **I. L. R. 33 Bom. 669**

HINDU LAW—JOINT FAMILY.

Col.

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—
   (*a*) GENERALLY . . . 5026.
   (*b*) EVIDENCE OF JOINTNESS . 5037.
   (*c*) EVIDENCE OF SEPARATION . 5045.
2. NATURE OF, AND INTEREST IN, PROPERTY—
   (*a*) ANCESTRAL PROPERTY . . 5056.
   (*b*) SELF-ACQUIRED PROPERTY . 5070.
3. NATURE OF JOINT FAMILY AND POSITION OF MANAGER . . . 5076.
4. DEBTS AND JOINT FAMILY BUSINESS 5081.

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HINDU LAW—JOINT FAMILY—*contd.*

Col.

5. POWERS OF ALIENATION BY MEMBERS—
   (*a*) MANAGER . . . . 5093.
   (*b*) FATHER . . . . 5107.
   (*c*) OTHER MEMBERS . . . 5111.
6. SALE OF JOINT FAMILY PROPERTY IN EXECUTION, AND RIGHTS OF PURCHASERS . . . . . 5124.
7. SUITS FOR POSSESSION . . . 5155.
8. PARTITION . . . . . 5157.

See EXECUTION OF DECREE—MODE OF EXECUTION—JOINT PROPERTY.

See HINDU LAW—

ALIENATION—ALIENATION BY FATHER; CUSTOM—IMPARTIBILITY; DEBITS . . **6 C. W. N. 370**

MITAKSHARA.

PARTITION—

REQUISITES FOR PARTITION; **I. L. R. 30 Calc. 231**

RIGHT TO PARTITION—GRANDSON; **7 C. W. N. 688**

EFFECT OF PARTITION. **I. L. R. 24 All. 48**

See INSOLVENCY ACT, SS. 7 AND 30. **I. L. R. 26 Mad. 214**

See LETTERS OF ADMINISTRATION. **I. L. R. 27 Bom. 140**

See LIMITATION ACT, 1877, SCH. II, ART. 64 . . . **I. L. R. 25 All. 67**

See MALABAR LAW—JOINT FAMILY.

See MINOR—REPRESENTATION OF MINORS IN SUITS . **I. L. R. 23 All. 459**

See ONUS OF PROOF—LIMITATION AND ADVERSE POSSESSION. **I. L. R. 25 Bom. 362**

See PARTIES—PARTIES TO SUITS—JOINT FAMILY.

See PARTNERSHIP—SUITS RESPECTING PARTNERSHIPS. **I. L. R. 27 Bom. 157**

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION. **6 C. W. N. 841**

See SALE IN EXECUTION OF DECREE—JOINT PROPERTY;

DISTRIBUTION OF SALE-PROCEEDS. **I. L. R. 23 All. 106**

——— debts, and joint family business—

See HINDU LAW—PARTITION—EFFECT OF PARTITION **I. L. R. 24 Mad. 555**

HINDU LAW—JOINT FAMILY—*contd.*

——— debts, and joint family business—*concld.*

See LIMITATION ACT, 1877, S. 19—ACKNOWLEDGMENT OF DEBTS. **I. L. R. 25 Mad. 220**

——— nature of joint family, and position of manager—

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—PRINCIPAL AND AGENT . **I. L. R. 26 Mad. 544**

See PARTITION—JURISDICTION OF CIVIL COURTS IN SUITS RESPECTING PARTITION . . **I. L. R. 28 Calc. 769**

——— powers of alienation by members—

See HINDU LAW—ALIENATION—ALIENATION BY FATHER.

——— power of manager—

See ARBITRATION—REFERENCE OR SUBMISSION TO ARBITRATION. **I. L. R. 27 Bom. 287**

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY.

(*a*) GENERALLY.

1. ——— **Presumption**—*Parties not Hindus residing in Hindu country—Presumption governing family. Per* MITTER, *J.*—When parties who are not Hindus reside in a Hindu country, and, adopting the customs of Hindus, have lived as Hindu families do, joint in food and estate, they will be governed by a Hindu law of co-parcenary, and the legal presumptions applicable to the position of a joint Hindu family will be applied to them. *Abraham* v. *Abraham, 9 Moo. I. A. 195,* and *Vellai Mira Ravuttan* v. *Mira Moidian Ravuttan, 2 Mad. 414,* followed. *Suddurtonnessa* v. *Majada Khatoon, I. L. R. 3 Calc. 694 : 2 C. L. R. 308,* explained. *Achina Bibee* v. *Ajeejoonissa Bibee, 11 W. R. 45,* and *Moonshee Sirdar* v. *Molungo Sirdar, 24 W. R. 1,* followed as to manner of dealing with evidence of joint ownership. RUP CHAND CHOWDHRY *v.* LATU CHOWDHRY . . . . **3 C. L. R. 97**

2. ——— *Status of Hindu family—Onus probandi.* The original status of all Hindu families must be presumed to be joint and undivided. The onus probandi is on those who put forward claims upon the basis of separation and self-acquisition. BILASH KOONWAR *v.* BHAWANEE BUKSH NARAIN . . . **W. R. 1864, 1**

PRANNATH CHOWDHRY *v.* KASHINATH ROY CHOWDHRY . . . . **W. R. 1864, 169**

BEER NARAIN SIRCAR *v.* TEENCOWRIE NUNDEE **1 W. R. 316**

NILMONEY BHOOYA *v.* GUNGA NARAIN SHAHUR ROY . . . . **1 W. R. 334**

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*a*) GENERALLY—*contd.*

MOONYE SURMAH *v.* LOMUN SURMAH. **2 W. R. 288**

KATTAMA NAUCHEAR *v.* RAJAH OF SHIVAGUNGAH **2 W. R. P. C. 31 : 9 Moo. I. A. 539**

BIPRO PERSHAD MYTEE *v.* KENA DEYEE **5 W. R. 82**

DHURM CHUND SHATEA *v.* RAJMOHISHEE DEBEE **5 W. R. 145**

LUKHUN CHUNDER *v.* MODHOO MOOKHEE DOSSEE **5 W. R. 278**

SREENATH NAG MOZOOMDAR *v.* MON MOHINEE DOSSIA . . . . . **6 W. R. 35**

NUND RAM *v.* CHOOTOO . . **1 Agra 255**

GANE BHIVE PARAB *v.* KANE BHIVE. **4 Bom. A. C. 169**

BAI MANCHA *v.* NAROTAMDAS KASHIDAS **6 Bom. A. C. 1**

SHEO RUTTUN KOONWUR *v.* GOUR BEHARY BHUKUT . . . . . **7 W. R. 449**

RADHA RUMON KOONDOO *v.* PHOOL KOOMAREE BIBEE . . . . . **10 W. R. 28**

GOBINDNATH SEIN *v.* GOBIND CHUNDER SEIN. **10 W. R. 393**

DHAROO SOOKLAIN *v.* COURT OF WARDS. **11 W. R. 336**

KOONJ BEHAREE PATTUCK *v.* GYADEEN PATTUCK **11 W. R. 361**

PEAREE LALL *v.* BUKHOREE LALL. **12 W. R. 121**

BROJONATH PAUL CHOWDHRY *v.* SREEGOPAL PAUL CHOWDHRY . . . **12 W. R. 468**

SHUSHEE MOHUN PAUL CHOWDHRY *v.* AUKIL CHUNDER BANERJEE . . **25 W. R. 232**

INDER COOMAR DOSS *v.* DOOLAL CHUNDER DOSS **18 W. R. 258**

DROBO MOYEE *v.* TARACHAND PAL **18 W. R. 459**

BABOOLALL JHA *v.* JUMA BUKSH **22 W. R. 116**

BHUGOBUTTY MISRAIN *v.* DOMUN MISSER **24 W. R. 365**

3. _____ *Onus probandi.* The presumption of the Hindu law in a joint undivided family is that the whole property of the family is joint estate, and the onus lies upon a party claiming any part of such property as his separate estate to establish that fact. GOOPEE KRIST GOSAIN *v.* GUNGAPERSAUD GOSAIN **6 Moo. I. A. 53**

4. _____ *Presumption as to property acquired while family is joint.* The presumption is that all acquisitions made while a family is joint are made from the joint funds, and the burden is upon the person who alleges that any property is self-acquird to prove that allegation. RAMPHUL SINGH *v.* DEG NARAIN SINGH **I. L. R. 8 Calc. 517 : 10 C. L. R. 489**

SHIB PERSHAD CHUCKERBUTTY *v.* GUNGA MONEE DEBEE . . . . . **16 W. R. 291**

5. _____ *Joint nucleus.* Where a family is joint and there is a nucleus from which property may be acquired, the presumption is that property acquired by any member is joint property, and the onus is with those who allege that it is self-acquired. PRAN KRISTO MOZOOMDAR *v.* BHAGEERUTEE GOOPTIA . . **20 W. R. 158**

JUGODUBMA DEBIA *v.* ROHINEE DEBIA. ROHINEE DEBIA *v.* DIGAMBUR CHATTERJEE **23 W. R. 522**

6. _____ *Onus of proof—Suit for share of ancestral property.* In a suit for a share of ancestral property, the onus is on the defendants to prove their allegation of separation at a certain time, they having admitted that the family was joint up to that time, and claiming the property as separately acquired subsequent to that date. BISSUMBHUR SIRCAR *v.* SOORODHUNY DOSSEE . . . . . **3 W. R. 21**

TREELOCHUN ROY *v.* RAJKISHEN ROY **5 W. R. 214**

7. _____ *Evidence of partition of joint family—Presumption—Concurrent decision on fact—Practice of Privy Council—Ground of appeal.* In a suit to enforce an alleged right of one brother against another to separate proprietary possession of a share in joint family estate, the concurrent findings of the Court below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests. The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged as a ground of appeal, that the Courts below, in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family. RAM CHARAN *v.* DEBI DIN **I. L. R. 13 All. 165**

8. _____ *Suit for share of joint property—Allegation of separation and exclusion.* In a suit for partition of joint family property, the defendants pleaded that the plaintiff's branch of the family had been separated more than thirty years ago. The plaintiff proved that the family property was joint, and that he had a share in it. *Held,* that under the circumstances it lay on the defendants to prove plaintiff's exclusion from the joint estate for more than twelve years

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*a*) GENERALLY—*contd.*

and an exclusion known to the plaintiff. JIVANBHAT *v.* ANIBHAT . **I. L. R. 22 Bom. 259**

9. ——— *Presumption—Evidence of separation.* The father and the son under the Mitakshara law are in the position of a joint Hindu family, and where ancestral estates are admitted to exist, the presumption of law is that all the property they are in possession of is joint property, until it is shown by evidence that one member of the family is possessed of separate property. The burden of proof, therefore, is on the member alleging self-acquisition. SUDANUND MOHAPATTUR *v.* SOORJOOMONEE DAYEE . **11 W. R. 436**

This case went to the Privy Council, but it was decided on a point which made the decision of this point unnecessary.

See SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER . . . . **12 B. L. R. 304**
20 W. R. 377 : L. R. I. A. Sup. Vol. 212

10. ——— *Presumption—Suit for share in joint property.* In a suit to establish the plaintiff's right to a share in joint properties belonging to a family subject to the Mitakshara law, where a part of the property sued for was admitted to be joint :—*Held,* that the presumption of Hindu law was that the residue of the property was also joint, and that the onus lay with the defendants to prove separate acquisition without the aid of joint funds. Where the members of a Hindu family are living in a joint family-house, enjoying in common the produce of part of the joint property, the separate possession by any member of a specific portion of the joint property ought not to be treated as an exclusive or adverse possession against the other members. HEERA LALL ROY *v.* BIDYADHUR ROY . . . **21 W. R. 343**

11. ——— *Presumption as to property being joint.* As a result of litigation, a decree was passed establishing the title of *R* as a brother by adoption to *L* and a co-sharer of his family property ; but no possession was actually directed to be given to *R* except of the zamindari which was the principal family estate. Subsequently an execution-creditor of *R* took possession of two lots, which were no part of the zamindari proper, the one having been acquired as a separate inheritance by an ancestor and the other having been purchased by *L* in the name of the priest of the family. *Held,* that *R*'s title to the two lots was the same as his title to the zamindari, and that the burden of proof lay upon those who insisted that the two lots did not form part of the joint family estate. CHAND HURREE MAITEE *v.* NORENDRO NARAIN ROY . . . . **19 W. R. 231**

12. ——— *Waste land—Self-acquisition.* When waste land was taken up and cultivated by the father of an undivided Hindu family, and the question was whether it was family property or self-acquired :—*Held,* that the burden of proof lay on those who asserted that it was self-acquired. SUBBAYYA *v.* CHELLAMMA **I. L. R. 9 Mad. 477**

13. ——— *Presumption—Raj—Separate estate.* In the case of an ordinary joint undivided family the presumption would be that the property is joint, but where a plaintiff, though admitting the family is undivided, contends that the family estate is a raj and has always been held by one member separate and distinct from the others, who are only entitled to maintenance, the undivided nature of the family alone on this contention can raise no presumption as to the joint nature of the estate so as to shift the burden of proof from the plaintiff to the defendant, a presumption inconsistent with the contention itself. But if under such circumstances the head of the family alleges that he has made purchases in the name of a single member, and that allegation is traversed, the onus will be on the party making the allegation to prove his case. RAJENDER PERTAB SAHA *v.* BEER PERTAB SAHA . . . **W. R. 1864, 111**

14. ——— *Property originally separate enjoyed in common.* Where property enjoyed in common by persons capable of forming a joint Hindu family was in its origin separate property, there is no presumption that such property has subsequently become joint property. *Muttayan Chetti* v. *Sivagiri Zaminadr, I. L. R. 3 Mad. 370 :* and *Sivaganga Zamindar* v. *Lakshmana, I. L. R. 9 Mad. 188,* doubted. CHELIKANI VENKATARAMANAYAMMA GARU *v.* APPE RAU BAHADUR GARU **I. L. R. 20 Mad. 207**

15. ——— *Presumption—Purchase of property with joint funds, Held,* by the majority of the Court (JACKSON, *J.*, dissenting), that the existence of joint family property being admitted, the presumption was that all acquired property belonged to the family, and that the onus was on the defendant in this case, who set up a plea of self-acquisition, to prove that the joint estate was so small that, after providing for the maintenance of the family, nothing remained to form a fund for the purchase of other properties for the benefit of the joint family. TARACHURN MOOKERJEE *v.* JOY NARAIN MOOKERJEE . . **8 W. R. 226**

16. ——— *Presumption as to house built by member of joint family—Claim to exclusive possession.* Where a member of a family claims an exclusive right to a house which he has built, the presumption of Hindu law against his claim arises only if the family is joint, having possession of joint property. GUNGADHUR CHATTERJEE *v.* SOORJO NAUTH CHATTERJEE . **15 W. R. 446**

17. ——— *Loan contracted by manager of joint family—Presumption.* There is no presumption that a loan contracted by the

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*a*) GENERALLY—*contd.*

manager of a joint Hindu family has been contracted for a family purpose. SOIRU PADMANABH RANGAPPA *v.* NARAYANRAO BIN VITHALRAO
I. L. R. 18 Bom. 520

18. ——— *Proof of separate acquisition—Adverse possession.* Where both parties are descendants of the same common ancestor, and plaintiff proves that the property belonged to that common ancestor, and separation between the parties has taken place within statutable limit it lies on the opposite party asserting it to be divided to show exclusive title by separate acquisition by some ancestor, apart from the right of succession by inheritance from the common ancestor, or a distinct severalty of interest and a clear adverse possession for more than twelve years. BAINEE SING *v.* BHURTH SINGH . **1 Agra 162**

19. ——— *Evidence as to the continuance of the joint holding of property—Inheritance and survivorship under the Mitakshara law.* A daughter, in the absence of sons, claimed to inherit, after the deaths of her father's widows, estate which she alleged to have belonged to him separately. This estate had been at one time in his possession jointly with his only brother, they having been members of a joint family under the Mitakshara. On the death of one of the brothers, who died before the claimant's father leaving sons, the latter became entitled thereto jointly with the survivor. In order to establish this claim to inherit her father's share on his subsequent death: *Held*, that it was for her to adduce evidence that there had been a separation between her father and his co-sharer or co-sharers. As the evidence stood, the inference was that the previous joint holding had continued till her father's death. PRIT KOER *v.* MAHADEO PERSHAD SINGH
I. L. R. 22 Calc. 85
L. R. 21 I. A. 134

20. ——— *Evidence—Person claiming a share, onus of proof as to—Presumption as to property of member of joint family.* The plaintiff as a joint member of the defendant's family sued to set aside a release obtained from him by the defendant and for partition, etc. The plaintiff was the son of one *L*, and the defendant was the plaintiff's nephew and grandson of *L*, being the son of *T*, an elder brother of the plaintiff. The plaintiff alleged that *L* and his brother *J* were joint and had carried on a family business; that *J* died childless, and that on *L*'s death in 1868 the whole family property passed into the hands of *T*, his eldest son, on whose death it came into the possession of the defendant as eldest male member of the family, although belonging to a younger generation than the plaintiff. The defendant denied that any part of the property in his hands was ancestral property. He alleged that the property of *L* was self-acquired, and that *L* had, by his will, devised the whole of his property, except R25,000, to his son *T* (the defendant's father), on whose death it had come to the defendant. *Held*, that there was no evidence to prove that the property left by *L* at his death was joint property. It might be that *L* was joint with his brother *J*, but it did not follow that they possessed joint property. Although presumably every Hindu family is joint in food, worship and estate, there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property, the onus of proof of the existence of joint property lies on the claimant. The plaintiff, alleging that there was joint property, was bound to make out his case, which he had failed to do. TOOLSEYDAS LUDHA *v.* PREMJI TRICUMDAS
I. L. R. 13 Bom. 61

21. ——— *Presumption as to joint character of all property.* When a family is joint, it cannot be presumed that all the property in the hands of any member is joint. SADABURTH PERSHAD SAHOO *v.* LOTF ALI KHAN. PHOOLBAS KOOER *v.* LALL JUGGESSUR SAHI. BIKRAMJEET LALL *v.* PHOOLBAS KOOER. RAMDHYAN KOONWAR *v.* PHOOLBAS KOER . . . **14 W. R. 339**
Upheld on review . . . **18 W. R. 48**

22. ——— *Purchase from one member. Notice of joint character of property.* Presumably, every Hindu family is joint in food, worship, and estate; and this presumption applies in the absence of any evidence of a nucleus of joint property, and even without evidence that the family is undivided. A purchaser, therefore, from one member of a Hindu family is affected with notice of the claims of the other members. GOBIND CHUNDER MOOKERJEE *v.* DOORGAPERSAD BABOO
14 B. L. R. 337 : 22 W. R. 248
BEER NARAIN SIRCAR *v.* TEENCOWRIE NUNDEE
1 W. R. 316

23. ——— *Sale and subsequent re-purchase by member of joint family.* The rule of Hindu law in cases of joint family property (*i.e.*, that it must be presumed to be joint until proved to be the contrary) is applicable to a case where the property has passed by sale into the hands of third parties, and has been redeemed by private purchase by one of the former shareholders. GOROO PERSAUD ROY *v.* DABEE PERSAUD TEWAREE
6 W. R. 58

24. ——— *Suit for joint property—Presumption.* In a suit to recover possession of a share of joint property sold in execution, on the ground that the judgment-debtor (plaintiff's brother) was the owner of only a portion, where defendant pleaded that the whole property had been made over by the grandfather, by a deed of gift, to the judgment-debtor:—*Held*, that the plaintiff was

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*a*) GENERALLY—*contd.*

entitled to the presumption of co-partnership, and the onus lay with the defence to prove that the property had passed absolutely to the judgment-debtor. GOPEE LALL *v.* BUGWAN DOSS **12 W. R. 7**

25. ——— *Presumption as to purchase of property.* When a property is purchased in the name of one of the members of a joint Hindu family, the presumption, according to Hindu law, is that it is purchased with money derived from joint funds. BANEE MADHUB BOSE *v.* SOODHA MADHUB BOSE . . . . . **2 Hay 333**

26. ——— *Presumption as to purchase of property.* The presumption being that an estate purchased by one of several Hindu brothers living in commensality is the joint estate of all, if a plaintiff seeks to dispossess the other brothers under a title acquired from the brother in whose name the estate was purchased, the onus of proving that it was the sole property of such brother lies upon him. ANUND MOHUN ROY *v.* LAMB . . . **Marsh. 169 : 1 Hay 374**

NURONATH DAS ROY *v.* GODA KOLITA **20 W. R. 342**

27. ——— ——— *Purchase made when family is joint.* Purchases made when a family is joint by individual members thereof are presumably made out of the common funds, and for the common benefit. And it is incumbent on any member of the family alleging that a purchase made whilst such family was joint was made out of his separate funds to establish his allegation by proof. HAIT SINGH *v.* DABEE SINGH . **2 N. W. 308**

28. ——— *Separate acquisition—Presumption.* The plaintiffs sued to have their rights declared under a mokurari-maursai lease obtained by *I*, father of the defendant, but it was said with joint funds and for the joint family, which consisted of *I* and his two brothers, fathers of the plaintiffs. The defence was that the lease was granted to *I* after the dissolution of commensality. The existence of any nucleus of joint property was not proved. *Held*, that, where one member of a joint family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption is, not that he was in possession of it as separate property acquired by him, but as a member of a joint family. Therefore, the burden of proof was on the defendant to show that I had acquired the property separately, and that it was property which could by law be treated as a separate acquisition. TARUCK CHUNDER PODDAR *v.* JOGESHUR CHUNDER KOONDOO **11 B. L. R. 193 : 19 W. R. 178**

29. ——— *Purchase by son—Joint funds—Presumption.* In the case of a purchase by a son undivided in interest from his father, the legal presumption, in the absence of evidence to the contrary, would be that the purchase was made with the joint funds. NARAYAN DESHPANDE *v.* ANAJA DESHPANDE **I. L. R. 5 Bom. 130**

30. ——— *Purchase with joint funds—Execution of decree.* A purchase by a member of a Hindu joint family with the joint funds is a purchase on account of the joint family, and property so bought may be taken in execution for a joint family debt. BISSESSUR LALL SAHOO *v.* LUCHMESSUR SINGH . . **L. R. 6 I. A. 233**

31. ——— *Joint property—Presumption that family is joint.* The presumption of Hindu law is that every family is joint, and that all property possessed by the family is joint. A member of an undivided family may, however, acquire separate property, but the burden of proof lies upon him to prove the independent character of the acquisition. The essence of his exclusive title is that the separate property was acquired by his sole agency without employing what is common to the family. MOOLJI LILLA *v.* GOKULDAS VULLA **I. L. R. 8 Bom. 154**

32. ——— *Presumption as to family being joint—Joint enjoyment of property.* The normal condition of a Hindu family being joint, it must be presumed to remain joint, unless some proof of a subsequent separation is given ; and where property is shown to have been once joint family property, it is presumed to remain joint until the contrary is shown ; but the mere fact of a family being joint is not enough to raise a presumption in law that property acquired by one member of that family is joint property. Where *A*, as purchaser ; claimed a share in property as being joint family property :—*Held*, that *A* was not only bound to show that the family was joint, but that the property in question became joint property when acquired, or that at some period since its acquisition it had been enjoyed jointly by the family. SHIU GOLAM SINGH *v.* BARAN SINGH **1 B. L. R. A. C. 164 : 10 W. R. 19**

33. ——— *Separate acquisition.* In a suit by a purchaser to recover a share in certain property of one of three brothers, who were admittedly living in commensality, the plaintiff alleged the property was purchased by his vendor and the other brothers with joint funds, the defendants alleging that it was bought by one of them other than the plaintiff's vendor with his separate funds. *Held*, that the onus was on the plaintiff to show that there was a joint fund from which the property could have been purchased. KHILUT CHUNDER GHOSE *v.* KOONJ LALL DHUR **11 B. L. R. 194 note : 10 W. R. 333**

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*a*) GENERALLY—*contd.*

34. ——— *Separate acquisition—Presumption—Nucleus. Semble:* When property has been purchased by an individual member of a joint Hindu family, the burden of proof is on those who claim it to be joint property to show that there was a nucleus of joint property out of which it could have been purchased. DENONATH SHAW *v.* HURRYNARAIN SHAW . . **12 B. L. R. 349**

35. ——— *Acquiescence in property being considered joint.* Certain Hindus descended from a common ancestor, after having lived in commensality and joint estate, separated, no deed of separation being executed or reservation expressed of any kind. About eleven years after one of the parties to the separation sued the others, alleging that certain immoveable property, which stood in the name of the defendants or their ancestor, had remained in the possession of the defendants on the allegation of exclusive purchase; but that it could be proved to have been acquired by joint ancestral income during the time the family was joint. *Held,* that the common presumption of Hindu law in favour of members of a joint family did not apply to such a case, and it lay on the plaintiffs to show why they were silent so long. Where other property was proved to have been separately acquired by the members of the family, it was held that there was no more presumption of joint than of separate acquisition. BADUL SINGH *v.* CHUTTURDHAREE SINGH . . **9 W. R. 558**

36. ——— *Purchase by Hindu widow in husband's lifetime—Presumption.* Where the widow of one of three brothers claimed two-thirds of a dwelling-house which had been the joint family property of the three brothers, on the ground that one-third fell to her as widow of the deceased and mother and guardian of his son, and that she had purchased the other third share from one of the brothers out of her own stridhan during the lifetime of her husband:—*Held,* that, though it was equally difficult to prove that the purchase-money was stridhan, or that it was the joint property of the three brothers, yet, in the absence of evidence that the brothers had other joint property from which they derived joint profits, of which the purchase money could be treated as a part, the sale of the second third share to plaintiff under a genuine and valid instrument duly conveyed it to her and made it her property. GONESH JUNONE DEBIA *v.* BIRESHUR DHUL . **25 W. R. 176**

37. ——— *Proof of separate acquisition in joint family.* Where the members of a joint Hindu family derived considerable property from an ancestor after whose death these members of the family lived long together, the purchases of the property in dispute by the plaintiff could not be treated as his separate acquisitions made from the money which had come to him with his wife, and by means of funds arising from that money. KRISTNAPPA CHETTY *v.* RAMASAWMY IYER . . . . . **8 Mad. 25**

38. ——— *Separate acquisition—Purchase in name of son.* Where the ancestor of a joint Hindu family purchased a property in the name of his youngest son, the onus was held to be on those claiming under the youngest son to prove that the property was his separate possession. JOYNARAIN ROY *v.* PUNCHANUND **W. R. 1864, 10**

39. ——— *Purchase in name of son—Presumption.* When a father and son lived as a joint family, and property was purchased in the name of the son, the presumption is that the property was joint estate, and purchased in the name of the son with a resulting trust in favour of the father. The burden of proving that it was separate estate is on those who claim it as such. POORNIMAH CHOWDHRAIN v. DROPODEE DOSSEE **W. R. 1864, 103**

40. ——— *Presumption of joint property—Cesser of commensality.* Suit to obtain a declaration of the plaintiff's right to a share of an estate which he claimed to be joint family property and to have his share allotted to him; the defendant contending that it was not joint property, but separate acquisition after the separation of the family. *Held,* that the cesser of commensality was only material to the determination of the issues in the case is so far as it removed or qualified the presumptions which the Hindu law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate, and that, though a cesser of commensality had taken place, the property claimed was joint family property. ANUNDEE KOONWAR *v.* KHEDOO LALL **14 Moo. I. A. 412 : 18 W. R. 69**

41. ——— *Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.* Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character. NANABHAI GANPATRAV DHAIRYAVAN *v.* ACHRATBAI . . **I. L. R. 12 Bom. 122**

42. ——— *Self-acquisition—Partition—Burden of proof—Findings of fact—Findings based upon presumptions only—Second appeal—Practice.* In a suit for partition, brought in 1898, the plaintiffs claimed a share in the income of a certain *inam* village which had been purchased

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*a*) GENERALLY—*concld.*

by the defendant in 1873. The defendant pleaded (*a*) that it was his self-acquired property, and (*b*) limitation. The Court of first instance rejected the claim, but in appeal the Judge held that the burden of proving self-acquisition and exclusive enjoyment lay upon the defendant, and that, in the absence of such proof, the presumption was in favour of the plaintiffs. He therefore reversed the decree and awarded the plaintiff's claim. On appeal to the High Court: *Held* (reversing the decree, and remanding the case for re-trial), that the burden of proof lay on the plaintiffs. It was for them to show that the purchase had been made out of ancestral funds, and they were also bound to prove that they had been in receipt of their share of the income. That burden could not be shifted on to the defendant, who acquired the property and in whose name and possession it had admittedly been for years. VINAYAK NARSINVH *v.* DATTO GOVIND (1900) **I. L. R. 25 Bom. 367**

(*b*) EVIDENCE OF JOINTNESS.

43. ——— Presumption of union— *Near and remote relationship of members.* Presumption of union in a Hindu family is stronger as between brothers than as between cousins, and the presumption is weaker the further from the common ancestor the descent has proceeded. MORO VISHVANATH *v.* GANESH VITHAL . **10 Bom. 444**

44. Commensality—" *Ijmalee,"* *meaning of.* The word "ijmalee" expressed joint tenancy, even where commensality is not implied. PEAREE MONEE BIBEE *v.* MADHUB SINGH **15 W. R. 93**

45. ——— *Evidence of joint occupation.* Where part of the family property is proved to be joint, and the members live in commensality, there is a very warrantable presumption, according to Hindu law, that the family is joint. GOLAM MUSTAFA KHAN *v.* SHEO SOONDUREE BURMONEE . . . . . **15 W. R. 304**

46. ——— *Onus probandi—Presumption.* The mere fact of a Hindu family living in commensality is not sufficient to raise a presumption of their property being joint. The existence of joint funds out of which the property might have been purchased must also be proved to raise the presumption of the property being joint. RADHIKA PRASHAD DEY *v.* DHARMA DASI DEBI **3 B. L. R. A. C. 124 : 11 W. R. 499**

47. ——— *Possession as between brothers and sisters in native families—Evidence of enjoyment of income.* In dealing with the question of possession as between brothers and sisters in native families regard must be had to the conditions of life under which such families live, and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *primâ facie* proof of possession. *Fazal Karim* v. *Umda Bibi, All. Weekly Notes (1884) 171,* referred to. INAYAT HUSEN *v.* ALI HUSEN . **I. L. R. 20 All. 182**

HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*contd.*

48. ——— *Presumption of joint ownership.* There can be no presumption o joint ownership from the mere fact of commensality. KHILUT CHUNDER GHOSH *v.* KOONJLALL DHUR **11 B. L. R. 194 note : 10 W. R. 333**

49. ——— *Purchase—Presumption arising from commensality.* The mere fact of one person living jointly or in commensality with others affords no presumption that property purchased by that person was purchased with the joint funds. KRISTO CHUNDER KURMOKAR *v.* RUGHOONATH KURMOKAR **12 B. L. R. 352 note : 10 W. R. 328**

50. ——— *Suit for possession of property alleged to be joint.* In a suit to establish the right of the plaintiff's judgment-debtor in certain lands in regard to which a claim was set up in the execution stage on the ground of their being self-acquired property, it was held that the plaintiff having proved commensality and joint trade, and the existence of some property in the family before separation, the onus was on the defendant to rebut the *primâ facie* case made out. CHUNDRO TARA-DEBIA *v.* BUKSH ALI **11 W. R. 305**

51. ——— *Son-in-law merely living in house of father-in-law.* The presumption of Hindu law as to joint property cannot apply in a case where the property is claimed through a son-in-law merely living in the house of his father-in-law and not shown to be joint in family or funds in any legal sense. DOSSEE MONEE DOSSEE *v.* RAM CHAND MOHUR . **7 W. R. 249**

52. ——— Business with joint funds carried on by members of family—*Establishment of business—Self-acquired property—Partnership—Onus probandi. D,* one of five brothers, constituting an undivided Hindu family, but having no ancestral estate, acquired personal property with which, with the aid of his brothers, he established and carried on a banking business at five different places. Such circumstances, under the general principles of Hindu law, *held,* to constitute a joint family property in which the brothers were entitled to share. The burden of proof that such was only an ordinary partnership and not a jointly-acquired family property lies on the party claiming it to have been separately acquired. RAMPERSHAD TEWARRY *v.* SHEO CHURN DASS. SHEO CHURN DASS *v.* RAMPERSHAD TEWARRY. THOOKRA *v.* RAM PERSHAD TEWARRY . . **10 Moo. I. A. 490**

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*contd.*

53. ——— Use of names of all members in deed of purchase—*Presumption as to joint property.* Where it was admitted that in the title-deed, by which certain property in dispute was held, the names of all the brothers in a Hindu family were used as purchasers, and that in subsequent proceedings (mutation and partition) before the Collector the names of all the other members were similarly used as owners:—*Held*, that there was sufficient grounds for presuming joint property until the contrary was established. LALLA KALEE SAHOY *v.* LALLA KUMLA SAHOY **24 W. R. 351**

54. ——— Payment of a joint jumma—*Possession—Joint possession, evidence of.* The mere fact that a joint jumma is payable to Government is not evidence of joint possession. SURBESHUR MUSTOFEE *v.* RAMLOCHUN CHUCKERBUTTY **2 Hay 81**

55. ——— Payment by one brother to another without receipt—*Presumption of joint property—Onus probandi.* The fact of one brother (plaintiff's husband) remitting certain sums of money to another brother (defendant) and no receipts being taken for them, and no accountability being stated, leads to the conclusion of the brothers being joint in property and in mess. *Per* MARKBY, *J.*—So also the fact of the two brothers being sued jointly upon a bond given by both, and of defendant discharging the debt alone, raises the presumption that the defendant discharged the debt out of the joint funds. HURISH CHUNDER MOOKERJEE *v.* MOKHODA DEBIA . . . **17 W. R. 565**

56. ——— Separate debts contracted by manager—*Presumption that debt is joint.* The condition of a Hindu family is *primâ facie* joint, and therefore property held by the managing member of a Hindu family is *primâ facie* joint; but as there is nothing to prevent the individual managing member from contracting debts on his own account, there is no presumption that a debt contracted by him is joint. SUNKUR PERSHAD *v.* GOURY PERSHAD . . . . **I. L. R. 5 Calc. 321**

57. ——— Presumption as to nature of property where the family is joint. Where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt. JAGMOHANDAS KILABHAI *v.* ALLU MARIA LUSKAL **I. L. R. 19 Bom. 338**

58. ——— Presumption as to nature of debt where the family is joint. Where a debt advance from the funds of a joint Hindu family and due to that family is a bond-debt, it is not necessary that it should appear in the bond that the funds were those of a joint family. *Jagmohandas Kilabhai* v. *Allu Maria Duskal, I. L. R. 19 Bom. 338,* followed. PATESHURI PARTAP NARAIN SINGH *v.* BHAGWATI PRASAD **I. L. R. 17 All. 578**

HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*contd.*

59. ——— Possession of tank—*Presumption from previous possession.* In a suit to recover a share of a tank, on the allegation of its being joint family property:—*Held*, that the mere fact of plaintiff's having at some previous time been in possession could be no proof of his title or shift the onus on defendant. HURISH CHUNDER BHUTTACHARJEE *v.* NUFUR CHUNDER KOOER **9 W. R. 461**

60. ——— Onus probandi—*Suit for possession of joint property.* Where a party sues for a moiety of certain property on the ground that it is joint property, the onus is on him to prove that the property is joint, failing which his suit is liable to be dismissed. SOOBHUDRA DOSSEE *v.* BOLORAM DEWAN . **W. R. F. B. 57 : 1 Ind. Jur. O. S. 82**

61. ——— ——— *Suit for property acquired from proceeds of alleged joint trade.* In a suit for property acquired from the proceeds of an alleged joint trade, the joint character of which is neither admitted nor proved, the onus lies in the first instance on the plaintiff, who is not entitled under the circumstances to the ordinary presumption of Hindu law arising from the existence of joint family estate. HURISH CHUNDER DASS *v.* GOUREE PERSHAD CHATTERJEE . **16 W. R. 163**

62. ——— ——— *Evidence of separate acquisition.* The plaintiff sued for partition of certain property, alleging it to be joint family property. It consisted of a house in Bombay and certain fields at Vavla in the Thana District, outside the jurisdiction of the Court. As to the house in Bombay, the first defendant alleged that it was his self-acquired property; that he had purchased it in his own name in 1863 out of his private funds; that there were no family funds, and that neither his father nor his brothers (the latter of whom were then very young) were in a position to contribute anything towards the purchase; that by his invitation his father and brother had lived with him in the house; that his father had died then and that one of his brothers had subsequently left the house and with his family had gone to reside elsewhere; that the plaintiff (the youngest brother of the first defendant) had continued to occupy a room in the house by the first defendant's permission up to the date of suit. The plaintiff, on the other hand, relied on the fact that the house was purchased and used as a family residence, while the father and sons were all living in union; that it was bought in the name of the eldest son (defendant No. 1), who was then the manager of the family; that the father lived and died there; and that he himself (the plaintiff) and his family had continued to live there, even after he had separated in food from his brother (defendant

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*contd.*

No. 1). *Held*, that the house was liable to partition. No doubt, the onus of proof was upon the plaintiff. The facts, however, proved by him or admitted by the first defendant raised a strong presumption that the house was family property, and against it there was only the first defendant's statement that the house was bought with his own money. But there was nothing to show that he kept a private fund apart from the family funds. He was the manager of the family and he kept no separate accounts. BALARAM BHASKARJI *v.* RAMCHANDRA BHASKARJI **I. L. R. 22 Bom. 922**

63. ——— *Suit for partition—Plea by defendants that some of the property in suit was their self-acquired property.* In a suit for partition of property alleged to be the property of a joint Hindu family, of which the plaintiff was a member, the defendants, while admitting that some of the property scheduled in the plaint was joint property, pleaded that the bulk of the property in suit, of which they were in possession, was their own self-acquired property. *Held*, that the burden of proof was on the defendants to show that such property was their self-acquisition. *Gajendar Singh* v. *Sardar Singh, All. Weekly Notes (1896) 23 ; Dhurm Das Pandey* v. *Shama Soondri Dibiah, 3 Moo. I. A. 229,* and *Gobind Chunder Mookerjee* v. *Doorgapersaud Baboo, 14 B. L. R. 337 : 22 W. R. 248,* referred to. KANHIA LAL *v.* DEBI DAS . **I. L. R. 22 All. 141**

64. ——— *Joint property, suit to recover—Onus of proof—Limitation Act, 1877, Arts. 127, 144.* The plaintiff sued for a share in certain property on the allegation that his ancestor *K* and the defendant's ancestor *R* were uterine brothers who, while they were living in commensality, purchased the property in question with their joint funds in the name of *R* ; and that subsequently *K* left his home, and then his daughter, the plaintiff's mother, enjoyed the property jointly with *R* until her death, when the plaintiff succeeding to his right and interest applied to have his name registered as a joint proprietor, but his application was refused ; hence this suit. The defence was that *R* brought the property in question with his own funds after he and his brother *K* had separated ; that *R*, and afterwards the defendants, had been in exclusive possession for more than twelve years ; and that the suit was barred by limitation. *Held* (reversing the judgment of FIELD, *J.*), that the onus was on the plaintiff to prove that the property was joint property. Before a plaintiff can bring his case within Art. 127 of Sch. II of the Limitation Act, 1877, it is incumbent on him to show that the property in which he seeks to recover a share is "joint property." OBHOY CHURN GHOSE *v.* GOBIND CHUNDER DEY . . **I. L. R. 9 Calc. 237**

65. ——— *Suit for possession of property alleged to have been joint family property—Separation—Burden of proof.* Three brothers, *M*, *P*, and *H*, once constituted a joint Hindu family. After the death of all of them the descendants of *M* sued the descendants of *H*, in effect to obtain their share of the property which had been of *P* in his lifetime. In their plaint they alleged that the family was still joint. By their evidence, however, they set up a separation between themselves and *H* shortly after the death of *P*. The defendants, on the other hand, alleged that some twenty or twenty-five years before suit, after the death of *M*, there had been a separation between the plaintiffs on the one side and *P* and *H* on the other. *Held*, that, the plaintiffs having set up a case which was inconsistent with the presumption of the family remaining joint, it was for them to prove that the separation took place as they alleged. *Obhoy Churn Ghose* v. *Gobind Chunder Dey, I. L. R. 9 Calc. 237,* referred to. RAM GHULAM SINGH *v.* RAM BEHARY SINGH . . **I. L. R. 18 All. 90**

66. ——— **Evidence of re-union after separation**—*Presumption of re-union after division.* Where a division has taken place amongst the members of a Hindu family, one of whom is a minor, the circumstance that the father and minor continue to live together, and that their shares become mixed, does not conclusively constitute a state of re-union between the father and the minor, but is evidentiary matter only to prove the re-union. KUTA BULLY VIRAYA *v.* KUTA CHUDAPPA VUTHAMULU . . . **2 Mad. 235**

67. ——— *Separation and partition as far as one member is concerned.* Where the partition of a family property is made simply for the purpose of determining what the share of one member is, and after his succession the other members continue to live together and mess together, remaining to all intents and purposes as they were before, these others must be presumed to have re-united. PETAMBUR DUTT *v.* HURRISH CHUNDER DUTT **15 W. R. 200**

See JADAB CHUNDER GHOSE *v.* MOTEE LALL GHOSE . . . . . **1 Hyde 214**

68. ——— **Branch of family remaining joint after separation**—*Onus of proof—Presumption as to branch of family remaining joint when separation has taken place between it and other branches of joint family.* Each branch of a family, whose original stock has been divided, may continue to be a joint family within the meaning of the Hindu law, subject to all the presumptions arising from that state, and when such a state of facts exists, the onus of proving a separation is on those who allege it, the presumption still being, in the absence of such proof, that the branch of the family remained joint amongst themselves. BATA KRISHNA NAIK *v.* CHINTAMANI NAIK **I. L. R. 12 Calc. 262**

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*contd.*

69. ——————— *Sole possession by one member of portion of joint property by consent.* Although the members of a joint Hindu family have all, in strict law, a right to participate in every portion of the joint property that right may be modified by the conduct of the parties, *e.g.*, when a particular member is allowed to retain sole possession of a garden and to improve and beautify it and to adopt it to his own purposes. COLLECTOR OF 24-PERGUNNAHS *v.* DEBNATH ROY CHOWDHRY **21 W. R. 222**

70. ——— **Purchase of property by one member benami**—*Presumption.* Property purchased by a member of an undivided family with money belonging exclusively to himself is his separate acquisition in which the other members are not entitled to share. BOONIADI LALL *v.* DEWKEE NUNDON LALL . . . **19 W. R. 223**

71. ——— **Support of relatives and payment of marriage expenses**—*Presumption.* If the property is separate, the presumption operates no longer, and each member is separate owner of what he possesses. Even in the case of a separate family blood relationship within certain degrees imposes a moral duty, though not a legal duty, towards dependent relatives. The support on a liberal scale of poor relatives and even payment of their marriage expenses are not in themselves without other evidence proof of a joint family. MOOLJI LILLA *v.* GOKULDAS VULLA **I. L. R. 8 Bom. 154**

72. ——— **Evidence rebutting presumption**—*Exception to rule of onus in Hindu joint family—Admitted partition or non-acquisition with joint funds.* Although Hindu law presumes joint tenancy to be the primary state of a Hindu family, and the general rule is that the burden of proof that partition has taken place lies upon him who asserts it, there are exceptions to this general rule, *e.g.*, when it is admitted or proved that property in dispute was not acquired by the use of patrimonial funds, the party alleging such property to be joint must prove his averment. So, too, when it is admitted or proved that partition has already taken place, the presumption is that it has been a complete partition, and it lies upon a person alleging that family property, in the exclusive possession of one of the members of the family after such partition, is liable to be partitioned, to make good his allegation by proof. NARAYAN BABAJI *v.* NANA MANOHUR . . . . **7 Bom. A. C. 155**

73. ——————— *Suit for property after separation.* After a general separation in food and a partition of estate, and after the brothers have commenced to live separately, if any one of them comes into Court alleging that a particular portion of property originally joint continues to remain so, the onus of proof lies on him. RAM

HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*contd.*

GOBIND KOOND *v.* HOSSEIN ALI . **7 W. R. 90**
PREM CHUND DAN *v.* DARIMBA DEBIA **15 W. R. 238**

74. ——————— *Evidence to rebut.* When the presumption or joint property in a joint Hindu family is rebutted by production of an exclusive and separate title, the party against whom such a title is produced is bound to show that the title is not really exclusive and separate. LOKENATH SURMA *v.* OOMA MOYEE DEBEE **1 W. R. 107**

75. ——————— *Allegation of separation—Suit for possession.* Plaintiff alleged that she and her deceased husband's minor brother had, with his other three surviving brothers, held joint possession, but that these three had wrongfully sold the land to the other defendants, and she prayed for possession by reversal of the sale. The purchasers appeared and filed a written statement to the effect that the vendors had separated from their father in his lifetime, and that they (the purchasers) had been in succession to the vendors for more than twelve years in possession. *Held*, that the onus lay on the plaintiff, who would have to show not only that she represented one of the heirs of her husband's father, but also that the land in dispute was part of the estate left by the father at his death. PHOOKUN PANDEY *v.* SOOKKIA . . . **10 W. R. 436**

76. ——————— *Partial separation.* The presumption of Hindu law that a family remains joint until a separation is proved is not applicable where it is admitted that a disruption of the unity of such family has already taken place ; a presumption under such circumstances cannot arise as to whether the other members of the family remained joint or became separate. RADHA CHURN DASS *v.* KRIPA SINDHU DASS **I. L. R. 5 Calc. 474 : 4 C. L. R. 428**

77. ——————— *Onus probandi—Division of property.* In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that everything in the possession of any one member of the family belongs to the common stock. The onus of establishing the contrary rests on him who alleges separate property. But this presumption does not arise where it appears that there has been a division of the family property and a separation in the family, all the members of which are living separately. BANNOO *v.* KASHEE RAM **I. L. R. 3 Calc. 315**

78. ——————— *Onus probandi.* Where plaintiff, a member of a Hindu family, suing for a division of the family estate, admitted on the face of his plaint that he had taken possession of part of the family property, and for sixteen years lived separate, the *onus probandi* lies on him to

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*b*) EVIDENCE OF JOINTNESS—*concld.*

show that the circumstances under which he became possessed of the portion of his property were consistent with his statement that the family remained undivided. SOMANGOUDA BIN DAJAMANGOUDA *v.* BHARMANGOUDA . . **1 Bom. 43**

79. ——— *Separate estate of co-parcener—Proof—Onus—Nucleus of ancestral property—Adverse possession.* When the question was whether a certain property was the joint property of a Hindu family or the separate estate of a member and it was proved that the family lived joint in one house and that there was a nucleus of joint property of substantial value, the onus was on the party setting up a case of separate estate. *Held,* on the evidence, that the property was joint. Whilst on the one hand there were certain instruments by which the grantors purported to deal with it as if it were separate estate, there were, on the other hand, a series of family books and various contracts and transactions inconsistent with anything but joint property. But over and above this, the tenor of family life proved the use of the property to have been the same after as before the execution of those instruments. A case of adverse possession by a co-parcener cannot be established by mere paper assertions not brought home to the knowledge of the other co-parceners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation. ANANDRAO GUNPUTRAO *v.* VASANTRAO MADHAWRAO (1907) **11 C. W. N. 478**

(*c*) EVIDENCE OF SEPARATION.

80. ——— **Character of proof**—*Evidence to rebut presumption of joint property.* Character of "strict proofs" which an auction-purchaser of the rights of one member of a joint Hindu family can be expected to give, in order to rebut the presumption in favour of joint estate in a joint Hindu family. LALLA SREEDHUR NARAIN *v.* LALLA MODHO PERSHAD . . **8 W. R. 294**

81. ——— **Portions of estate held in severalty**—*Evidence to rebut presumption of joint property.* So long as no partition of a joint estate is proved, the presumption is that the property is joint. The fact that certain parcels are admittedly held in severalty does not rebut the presumption as regards the rest of the joint estate. SREERAM GHOSE *v.* SREE NATH DUTT CHOWDHRY **7 W. R. 451**

82. ——— **Separate occupation of portions of dwelling-house**—*Evidence to rebut presumption of joint property.* Where there is joint occupation of some portions of a joint family dwelling-house, and the separate occupation of other portions of the same property appears to be merely permissive, such separate occupation does not necessarily imply that the properties occupied are separate properties. GOUR LALL SINGH *v.* MOESH NARAIN GHOSE . . . **14 W. R. 484**

HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*c*) EVIDENCE OF SEPARATION—*contd.*

83. ——— **Occupation of separate house**—*Presumption as to commensality.* The mere circumstance that one of several brothers of a Hindu family occupied a separate dwelling-house does not rebut the presumption of the family being joint, if it appear that they dealt with the family property as joint property. BELAS KOER *v.* BHOWANEE BUKSH . . . **Marsh. 641**

84. ——— **Separation in mess**—*Presumption of joint property.* Mere separation in mess is not sufficient to rebut the presumption of joint property arising out of nucleus of joint property. BANEE MADHUB MOOKERJEE *v.* BHAGOBUTTY CHURN BANERJEE . . **8 W. R. 270**

85. ——— **Separation in food and residence**—*Presumption of separation in estate.* Separation in dwelling and food would give rise in Hindu law to a presumption of separation in estate. The evidence of members of the family would be the best evidence as to whether the parties were joint or separate; the account books would be simply corroborative. JAGUN KOOER *v.* RUGHOONUNDUN LALL SAHOO . . . . . **10 W. R. 148**

86. ——— **Separation in food and habitation**—*Separation of joint family, evidence of.* Although a family may be separate in food and habitation, it may still be joint under Hindu law, if the family property be joint. In this case there was held to be not sufficient evidence of separation. PARBUTTY COOMAR *v.* SUDABUT PERSAD **2 Hay 315**

87. ——— **Separation in dwelling, food and business**—*Presumption of separation in estate.* Notwithstanding separation in dwelling, food, and business, members may yet be joint as to property. SHERAJOODDEEN AHMED *v.* HOREL SINGH . . . . . **25 W. R. 116**

88. ——— **Separation of shares**—*Presumption of joint family.* Proof of separation of shares is not sufficient to rebut the presumption of the joint character of a Hindu family or to shift the burden of proof. BILASH KOONWAR *v.* BHAWANEE BUKSH NARAIN . . . **W. R. 1864, 1**

89. ——— **Use of one name in documents**—*Presumption of sole proprietorship.* In a Hindu family where commensality is admitted the mere use of one brother's name in documents relating to the property affords no presumption whatever of such brother being the sole proprietor. KISHEN KOMUL SINGH *v.* JANOKEE DASSEE **1 Ind. Jur. O. S. 23 : W. R. F. B. 3**

JANOKEE DOSSEE *v.* KISTO KOMUL SINGH **Marsh. 1 : 1 Hay 20**

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(c) EVIDENCE OF SEPARATION—*contd.*

DEELA SINGH *v.* TOOFANEE SINGH **1 W. R. 307**

90. ——— Deed providing separate accommodation—*Evidence of partition.* The fact of the members of two branches of a Hindu family being separate in food and worship is quite compatible with their never having been separate in estate. A document providing separate house accommodation for the members of each of the two branches points rather to a division of enjoyment than to a division of ownership or estate. The absence of attestation by caste-men to documents by which a Hindu affects to deal with his property as though he were separate in estate is a circumstance which throws suspicion on the truth of an alleged separation, as the presence of such would be satisfactory evidence of a state of things generally believed to be true at the time. CHHABILA MANCHAND *v.* JADAVBHAI . . . **3 Bom. O. C. 87**

91. ——— Separation in residence and transaction of affairs—*Evidence of partition.* Evidence of some separation in residence, separate transaction of affairs in certain instances, and acquisition of the property in dispute by plaintiff, all occurring in recent years, are not sufficient to prove division. KRISTNAPPA CHETTY *v.* RAMASWAMY IYER . . . . . **8 Mad. 25**

92. ——— Separate appropriation of profits—*Evidence of partition.* Separate appropriation of profits would in some cases be very good evidence of a tacit agreement amongst the members of a joint Hindu family, to hold their property according to their separate shares. CHYET NARAIN SINGH *v.* BUNWAREE SINGH . **23 W. R. 395**

93. ——— Alienation of share of one member—*Proof of separation in estate.* The mere fact of one of several co-sharers alienating his share of the property is no proof of separation in estate. TREELOCHUN ROY *v.* RAJKISHEN ROY **5 W. R. 214**

94. ——— Portion of estate separately held—*Long separate possession.* The acts of different members of a family in allowing separate portions of the banks of a tank to be held severally for so long a time that no one can tell when such possession began, constitute a separation of the land which cannot be disturbed at the instance of one member without proof that he has jointly or otherwise held possession of the lands in question within twelve years. SURBESSUR METHOOR *v.* GOSSAIN DOSS METHOOR . . . **17 W. R. 210**

95. ——— Incomplete separation. *Absence of separate enjoyment through opposition of co-sharer.* Where the surviving sharer in an estate sought to be put in possession of his co-sharer's portion, as manager on behalf of the latter's widow, on the ground that, though the deceased co-sharer had made efforts to reduce his share to district possession, those efforts had not been completely successful when he died, and he could not therefore be said to have had a separate enjoyment of the said share:—*Held*, that, as the deceased co-sharer had done all that was possible to obtain separate possession, and it was only the opposition of the plaintiff that had obstructed him it would be allowing plaintiff to benefit by the wrong he had done to give him possession: that the co-sharers must be held to have separated, and that the share of the deceased co-sharer must be held to have passed to those to whom though not his immediate heirs, he had been taking steps, when he died to devise the possession of it. JOY NARAIN GIRI *v.* GOLUCK CHUNDER MYTEE . . **25 W. R. 355**

96. ——— Management by one brother—*Presumption of property being joint.* Where property is not expressly shown to be separate, the presumption of Hindu law is that it is joint, and when one brother has managed the property and made collections and acquired property out of such collection, he is accountable to his other brothers who are entitled to share in the property so acquired. PRANKISHEN PAUL CHOWDHRY *v.* MOTHOORA MOHUN PAUL CHOWDHRY **1 Ind. Jur. N. S. 73 : 5 W. R. P. C. 11 10 Moo. I. A. 403**

97. ——— Record of proprietorship in one name—*Purchase from one member of family.* The mere fact of the name of the managing member of a joint Hindu family standing as the recorded proprietor of an estate is not *per se* sufficient to give title to a purchaser for valuable consideration from him, unless at the time of the purchase the purchaser was ignorant of the real state of the family, and was really led by that circumstance to believe that the recorded proprietor was the sole owner. GOUR CHUNDER BISWAS *v.* GREESH CHUNDER BISWAS . . . . **7 W. R. 120**

98. ——— Property standing in name of one member—*Separate possession and acquisition.* The mere fact of certain property standing in the name of one member of a joint family is no index to the real owner, nor is the existence of a separate possession any evidence as to separate acquisitions, unless such separate possessor can prove consent of the other sharers to his keeping a separate account. LALLA BEHAREE LALL *v.* LALLA MODHO PROSAD . . . **6 W. R. 69**

RUNJEET SINGH *v.* MADUD ALI . **3 Agra 222**

99. ——— Entry in revenue records of one name—*Presumption as to property being joint.* *D*, claiming as a widow of *A*, brought a suit of ejectment against the sons of *A*'s brother, deceased. *D* admitted that the property had originally been the joint ancestral property of *A* and his

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(c) EVIDENCE OF SEPARATION—*contd.*

brother. *Held*, that the mere appearance on the face of the revenue records that *A* was sole owner was not sufficient to rebut the presumption of Hindu law, that the property remained joint. JUSSOONDAH *v.* AJODHIA PERSHAD **2 Ind. Jur. N. S. 261**

SHIBOSOONDERY DOSSEE *v.* RAKHAL DOSS SIRKAR **1 W. R. 38**

MUN MOHINEE DABEE *v.* SOODAMONEE DABEE **3 W. R. 31**

100. ——— Definement of shares in ancestral property. A four-anna ancestral share in a zamindari village was owned by two brothers, in which the share of *H*, son of one of the brothers, was one-half, the remaining half being the share of the plaintiffs, the descendants of the other brother. In the village records there had been a definement of shares followed by entries of separate interests in the revenue records, and since 1264 Fasli the two plaintiffs had each been recorded as the owner of a one-anna share and *H* of a two-anna share thereof. The entire four-anna share had been in the possession of mortgagees from the year 1844 excepting the sir lands of which *H* held separately his own share, *viz.*, 10 bighas. On the 7th July 1883 *H* executed a deed of gift of his two-anna share in favour of the defendants, and caused mutation of names to be made in their favour, surrendering to them at the same time possession of the sir land. *H* died on 31st January 1884, leaving neither son, widow nor daughter, and the plaintiffs were his heirs-at-law. They brought this suit to set aside the deed of gift and for possession of the sir land from the defendants. The suit was dismissed by the Court of first instance, and on appeal the District Judge affirmed the decree, holding that the four-anna share was not joint and undivided property between the co-sharers, and that *H* was in separate possession of the two-anna share of which the defendants were the donees. On second appeal it was contended that, inasmuch as since 1844 there could have been no separate enjoyment of the four-anna share which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat* v. *Sukhmani Kuar, I. L. R. 1 All. 437,* was cited in support of the contention. *Held*, that, from evidence of definement of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated. *Ambika Dat* v. *Sukhmani Kuar, I. L. R. 1 All. 437,* discussed. RAM LAL *v.* DEBI DAT . . . **I. L. R. 10 All. 490**

101. ——— Evidence of separation——*Shares separately recorded in village papers—* *Separate purchases by individual members of family out of joint family funds.* Where there has existed a joint Hindu family possessed as such of immoveable property, the presumption is that, until the contrary is shown, such family will continue to be joint. The fact that in the revenue and village papers individual members of a Hindu family, once admittedly joint, are recorded as holding each a certain specified portion of property is not, standing by itself, sufficient evidence that a separation has taken place, nor is the fact that specific purchases of immoveable property have been made from time to time in the names of individuals members of the family, and that the property as purchased was recorded in each case in the name of the nominal assignee. GAJENDAR SINGH *v.* SARDAR SINGH **I. L. R. 18 All. 176**

102. ——— Deed of sale and mutation of names—*Evidence of separation in estate.* Deeds of sale and mortgage and mutation of names in the Collector's register as amongst members of a Hindu family are evidence of separation. PEARY LALL *v.* BHAWOOT KOER . **W. R. F. B. 18** **1 Ind. Jur. O. S. 100**

103. ——— Registration of name of widow after husband's death—*Partition—Evidence of partition.* Where property is joint and ancestral, the mere registration of the widow's name after her husband's death, and sole possession by her, is not sufficient proof that the property has been divided in the absence of any evidence of regular partition. LUCHMUN PERSHAD *v.* MOONEE KOONWER . . . . . **1 Agra 220**

104. ——— Registration of name as lumberdar—*Presumption—Onus probandi.* Where an estate was originally ancestral belonging to a joint and undivided Hindu family, the presumption of law being that a family once joint retains that status can only be rebutted by evidence of partition or acts of separation ; and the *onus probandi* lies on the party who claims a share in such estate to prove that it is a divided family. The entry of the name of one member of a joint family as lumberdar (the party liable for the assessment of the revenue) on the registry being for fiscal purposes is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration. CHEETHA *v.* MIHEEN LALL . . **11 Moo. I. A. 369**

105. ——— Registration of name of one member as proprietor—*Ancestral property—Onus probandi.* Where property is proved to be ancestral, the mere registration of one brother as proprietor is of little value as supporting a case of the property not being joint, and the burden of proving that the property is not joint rests on him

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(c) EVIDENCE OF SEPARATION—*contd.*

who alleges that to be the case. AMRIT NATH CHOWDHRY *v.* GAURI NAUTH CHOWDHRY **6 B. L. R. 232**

UMRITHNATH CHOWDHRY *v.* GOUREENATH CHOWDHRY . **15 W. R. P. C. 10 . 13 Moo. I. A. 542**

106. ———— Registration in name of female member—*Property purchased in name of female members of family.* The wives and mothers of the members of a joint undivided Hindu family, so long as they continue to live in the family and are supported out of its income are just as much members of that family as their husbands and sons; and where property is purchased in the name of one such female member during the life of her minor son, the presumption of joint acquisition arising in such cases cannot be rebutted by the mere fact that her name was used in making the purchase or entered in the Collector's books as the purchaser. CHUNDER NATH MOITRO *v.* KRISTO KOMUL SINGH **15 W. R. 357**

107. ———— *Presumption—Property purchased in names of wife and daughter-in-law.* In a suit for partition of joint family property, it was found that certain property stood partly in the name of the wife of the original proprietor and partly in that of a daughter-in-law. *Held*, that a wife, a member of a joint family, is, as regards property held in her name, in the same position as her husband with respect to property acquired in his name, and subject to the same presumption in favour of the joint family. *Chunder Nath Moitro* v. *Kristo Komul Singh, 15 W. R. 357*, followed. *Chowdhrain* v. *Tarini Kant Lahiri Chowdhry, 15 C. L. R. 41*, distinguished. NOBIN CHUNDER CHOWDHRY *v.* DOKHOBALA DASI **I. L. R. 10 Calc. 686**

108. ———— *Presumption of joint property.* When property stands in the name of a female member of a joint Hindu family, there is no presumption that such property is the common property of the family. NARAYANA *v.* KRISHNA **I. L. R. 8 Mad. 214**

109. ———— Purchase and possession of portion of property by one member—*Source of purchase-money.* Where a Hindu family lives joint in food and estate the presumption of law is that all the property they are in possession of is joint property, until it is shown by evidence that one member of the family is possessed of separate property. The purchase of a portion of the property in the name of one member of the family, and the existence of receipts in his name respecting it, may be perfectly consistent with the notion of its being joint. The criterion in such cases in India is to consider from what source the purchase-money comes. DHURM DASS PANDEY *v.* SHAMA SOONDERY DEBIA . **6 W. R. P. C. 43 : 3 Moo. I. A. 229**

HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(c) EVIDENCE OF SEPARATION—*contd.*

110. ———— Purchase by one member—*Evidence of want of sufficient funds.* Where the plaintiff, a member of a joint Hindu family, claimed a share in certain property as having been purchased with the joint funds, and the defendant alleged that it was purchased by him with his own funds, and it was proved that the joint family property was not at the time of the purchase sufficient, after supporting the family, to leave any surplus funds from which the property in suit could have been purchased:—*Held*, that the presumption of joint ownership was rebutted, and it was for the plaintiff to show the acquisition of the property with joint funds. The party alleging self-acquisition is not in every case bound to show the source from which the purchase-money was derived. DHUNOOKDHAREE LALL *v.* GUNPUT LALL **11 B. L. R. 201 note : 10 W. R. 122**

111. ———— Receipt of purchase-money by one member—*Source of consideration-money for purchase.* The mere fact of the consideration money for property sold by a member of a joint Hindu family having passed through his hands does not relieve him of the onus of proving the source from which the money came or to rebut the presumption of joint ownership. KOONJ BEHAREE DUTT *v.* KHETTURNATH DUTT . **8 W. R. 270**

112. ———— Separate dealing by one of several partners—*Onus probandi.* The onus of proving separation according to Hindu law is on the party setting it up. According to Hindu law, a separate dealing is no proof of a separation of partners. KHEEROODHUR LALL *v.* SEETULRAM **2 Hay 353**

113. ———— Separate acquisition—*Presumption—Onus probandi.* The presumption of Hindu law that any property acquired during the time a Hindu family remains joint belongs to all the members of the joint family does not take away the onus which lies on the plaintiff in a suit to recover a share of the property of proving his case; it merely aids him in proving it. Such presumption is liable to be rebutted by means other than enquiring as to the source from which the purchase-money of the property was derived. That criterion, though the most satisfactory, is not indispensable. Evidence that the property claimed to be joint was purchased in the name of one member only, that after the purchase the members separated, and each member carried on business separately, and that the property was thenceforward in the exclusive possession, and used for the business, of the member in whose name it had been purchased, is evidence sufficient to rebut the presumption that the property was joint. BHOLANATH MAHTA *v.* AJOODHIA PERSAD SOOKUL **12 B. L. R. 336 : 20 W. R. 65.**

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(c) EVIDENCE OF SEPARATION—*contd.*

114. ——— **Separate acquisition**—*Onus probandi—Purchase by one member of family in his own name, but with joint funds.* In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the defendant at a sale in execution of a decree passed against the estate of *R*, one member of the family, for his separate debt, the defendants sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own ; and that, while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in disupte was the separate property of *R*, *viz.*, that during *R*'s lifetime the other members of the family allowed him to appear to the world as the sole owner thereof, and on one occasion when *R*, *B* the kurta, and a third member of the family entered into a security bond with the Collector whereby *R* pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any co-sharers." On the other hand, the plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, although the purchase was made in the name of *R* alone, filed the family account-books and the private account-books of *R* for the same purpose, as well as certain letters which passed between *B* and *R* relative to the purchase of the property. *Held*, that the evidence as to the separate trading funds and property of the several members of the joint family, and their independent dealing with such property, disclosed such a state of things as might be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon the plaintiff the onus of establishing the joint nature of the property claimed by clear and cogent evidence. *Held*, also, that the mere fact that *R*, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates did not disentitle those members to recover from the defendant, the purchaser at a sale in execution of a decree against *R*, their own share of such estates. BODH SINGH DOODHARIA *v.* GONESH CHUNDER SEN **12 B. L. R. P. C. 317 : 19 W. R. 356**

115. ——— *Joint funds—Separate trading.* Suit between a widow claiming administration to the estate and effects of her deceased husband as his only legal personal representative, and a caveator claiming the whole family property as an undivided second cousin of the deceased and sole surviving member of the family. The widow asserted a division, and that the whole property of the deceased had been self-acquired by his father. The Court of first instance found against division and against self-acquisition, laying the burthen of proof of each question entirely on the party asserting the facts. On appeal it was contended for the appellant (the plaintiff) that the onus on plaintiff was sufficiently discharged when it was shown that the two branches of the family were trading separately, and that certain items of property were acquired in the names of members of the branch of the family to which plaintiff's husband belonged ; that then it rested with the other side to show that there were joint funds from which the purchases could have been made. *Held*, in accordance with the view of the judicial committee of the Privy Council in *Dhurm Dass Pandey* v. *Shama Soondery Dibiah, 3 Moo. I. A. 229*, and the observations of COUCH, *C.J.*, in *Taruck Chunder Poddar* v. *Jodheshur Chunder Koondoo, 11 B. L. R. 193*, that such a contention could not be maintained. VEDAVALLI *v.* NARAYANA . **I. L. R. 2 Mad. 19**

116. ——— **Self-acquisition**—*Partibility of property given by father to sons—Arrangements made as to enjoyment of joint property, effect of, on members.* Whilst the members of a Hindu family are found in possession of joint ancestral estate, all property in the possession of any member of the family is to be presumed to be joint, and it is incumbent on the member who claims property in his possession as his separate property to prove his sole title to it. Separate property may be acquired by a member of an undivided family by gift, and the character of impartibility attaches to gifts made by a father to his unseparated sons. What is acquired by the father's favour will subsequently be declared exempt from partition. Separate property may be acquired by the exertions of a member of the family without detriment to the family funds. It may be acquired with money borrowed on the sole credit of the borrower, and it may be acquired by the mutual agreement of the members of the family. It is not necessary for the preservation of the joint nature of family property that the members of the family should live in commensality ; they may dwell and mess apart, and yet remain joint in property. Parties who allege that the acquisitions of the several members of a Hindu family are not to be brought into hotchpot and divided *per stirpes* must show that they were acquired in such a manner as to constitute them separate property and impartible. And it is incumbent on those parties who admit that a partition has been made of certain portions of the family estate, and seek a re-partition of the portion

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HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*contd.*

(*c*) EVIDENCE OF SEPARATION—*contd.*

so partitioned, to show that a condition attached to the partition which rendered it inoperative, or that the members of the family have consented to a re-partition of it. The several members of a family may agree to take loans from the common fund, and treat the profits on such loans as the separate property of the several members by whom the loans have been respectively taken. NURSHING DASS *v.* NARAIN DASS . . . . **3 N. W. 217**

Affirmed by Privy Council in . **26 W. R. 17**

117. ———— *Separate acquisition—Members carrying on separate dealings—Manager of joint family.* In a suit for partition and for an account from the principal defendant, who was alleged to have been the kurta of a joint Hindu family since the death of a former kurta, it appeared that the former kurta by his will directed that his wife and daughter-in-law should manage his property during the minority of the plaintiffs who were his son and grandson. These ladies applied for a certificate under Act XXVII of 1880, and thereupon as guardians for the plaintiffs granted an ammukhtarnamah to the principal defendant. In the suit the defendants variously claimed the properties alleged to be joint as their separate acquisitions, and there was evidence of the different members of the family having carried on separate dealings. The lower Court found that the principal defendant was not under the circumstances kurta of the family, but held that the burden of proving separate acquisition was upon the defendants, and declared the properties claimed to be joint. On appeal:—*Held*, (i) that the principal defendant was not the kurta, and that the plaintiffs were bound to look to the managers first, and (ii) that, although the members of the family had certain properties joint, yet the ordinary presumption applicable to a simple case of co-parcenary did not apply. UDOY CHAND BISWAS *v.* PANCHOO RAM BISWAS. HUROMONI DASI *v.* PANCHOO RAM BISWAS . **11 C. L. R. 514**

118. ———— **Long possession as proprietor**—*Proof of separation.* In a suit brought to recover a share of land alleged to be joint family property where the defendants pleaded possession as proprietors for more than thirty years:—*Held*, it was not necesssary to prove actual separation, but it was enough to show that the defendants had been in possession as they alleged. GURAVI *v.* GURAVI **3 Bom. A. C. 170**

RANE *v.* RANE . . **3 Bom. A. C. 173**

119. ———— **Settlement with one member of joint family**—*Separate acquisition, proof of.* The fact of a settlement being made with one member of a joint Hindu family does not negative the rights of other members to a participation in the property so settled ; nor is it necessary for such other members, if living in commensality with the former as joint proprietors, to prove that

HINDU LAW—JOINT FAMILY—*contd.*

1. PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY—*concld.*

(*c*) EVIDENCE OF SEPARATION—*concld.*

they actually contributed money towards the acquisition of the property. HURO SOONDUREE DEBIA *v.* DOORGA DOSS BHUTTACHARJEE **16 W. R. 215**

120. ———— **Distribution of land and tenants**—*Partition of khoti estate—Proof of partition.* Where the plaintiffs sued for the partition of a khoti estate, alleging that they and the defendants were joint proprietors thereof, and where the defendants admitted that the estate was originally joint, but set up that a partition had taken place more than a hundred and fifty years ago :—*Held*, that the burden of proving that a partition had been made lay on the defendants, and that the mere distribution of land and tenants, such as is usual in the South Konkan, while a khoti estate continues to be held in co-parcenary, in no way established a formal partition. BABASHET BIN GOBINDSHET *v.* JIRSHET BIN YESSHET **5 Bom. A. C. 71**

121. ———— **Partition**—*Mitakshara*—The disruption of a joint family cannot be effected by an order of Court against the intention of the parties, unless it is followed by an actual conversion of the joint tenancy into a tenancy in common, or by an actual partition by metes and bounds. MUDIT NARAYAN SINGH *v.* RANGLAL SINGH (1902) . . . **I. L. R. 29 Calc. 797**

2. NATURE OF, AND INTEREST IN, PROPERTY.

(*a*) ANCESTRAL PROPERTY.

1. ———— **Ancestral property, meaning of**—*Immoveable property of father.* Ancestral property is not confined to such property as the father derives from his father or any ancestor, but means at least immoveable property derived from the father, however acquired by him. RAJMOHUN GOSSAIN *v.* GOURMOHUN GOSSAIN **4 W. R. P. C. 47 : 8 Moo. I. A. 91**

2. ———— **Property purchased by father as manager for himself and sons**—*Purchase from profits of ancestral family.* Property purchased by a father in possession of ancestral property, as manager for himself and his sons, from the profits of such ancestral property is itself ancestral property. SHUDANUND MOHAPATTUR *v.* BONOMALEE DOSS . . . **6 W. R. 256**

3. ———— **Joint ancestral property after distribution**—*Character of shares of heirs.* Where the heirs of a deceased Hindu, by an arrangement with a third party who claimed to be an heir, distributed the property between them, such property after its distribution retained its character as ancestral property, and shares taken under the arrangement are not to be regarded as the self-

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

acquired property of the heirs who took them. MEWA KOONWER *v.* LALLA OUDH BEHAREE LALL **2 Agra 311**

4. ——— Ancestral property inherited from brothers—*Interest of sons in ancestral property.* *S* died, leaving three sons and ancestral property, of which *K*, one of *S*'s sons, took a third share. On the death of another of *S*'s sons without issue, *K*'s original share was increased by his deceased brother's share. *Held*, that, according to the Mitakshara law, one of *K*'s sons was entitled, during *K*'s lifetime, to bring a suit to assert his right in the share of *K*, inherited from his deceased brother, such share being ancestral property. GUNGOO MULL *v.* BUNSEEDHUR **1 N. W. Part 6, p. 79 : Ed. 1873, 170**

5. ——— Moveable converted into immoveable property—*Mitakshara law. Quære:* Whether ancestral property which was moveable when it descended, but has been converted into immoveable property, is not immoveable ancestral property for the purposes of the Mitakshara law. SHAM NARAIN SINGH *v.* RUGHOOBUR DYAL . **I. L. R. 3 Calc. 508 : 1 C. L. R. 343**

6. ——— *Interest of sons in ancestral property—Mitakshara law—Adopted sons.* Where money derived from ancestral estates is invested, before the adoption of a son, in the purchase of immoveable property which continues to exist at the time of the adoption, the adopted son has equally a vested right in that property as he has in any other similar immoveable property which the father had it in his power before the adoption to alienate, but which he did not alienate. SUDANUND MOHAPATTUR *v.* SOORJOOMONEE DAYEE **11 W. R. 436**

This case went on appeal to the Privy Council, but it was decided on a point which made the decision of this point unnecessary.

See SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER . . . . **12 B. L. R. 304**
20 W. R. 377
L. R. I. A. Sup. Vol. 212

7. ——— Property once ancestral but alienated and re-purchased with separate funds—*Recovered ancestral property.* The principle of the Mitakshara law that, if a father recover ancestral property which had been taken away by a stranger and not recovered by the grand father, he need not share it against his inclination with his sons, was held to apply *à fortiori* where the property would have been irrevocably lost to the family, but was re-purchased by a member who was at the time solely entitled, and who advanced the money out of his self-acquired property. BOLAKEE SAHOO *v.* COURT OF WARDS . **14 W. R. 34**

HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

8. ——— Interest of son in joint family property—*Co-parcenary rights—Limitation.* A son during the life of his father has, as co-parcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that he has vested in him no legal interest whatever whilst his father is alive. Except in respect of his co-parcenary rights, a son is not in a different position as to the corpus of the ancestral property from that of any other relation who is an heir-apparent of the owner of property. Though the Limitation Act may have been decided to be a bar to a suit by the son for partition, his right as co-parcener has not thereby been destroyed, and it may be that he is entitled to relief against the improper disposal by the defendant of more than his proper share of the property. RAYACHARLU *v.* VENKATARAMANIAH . . . . **4 Mad. 60**

9. ——— Property acquired by litigation—*Self-acquired property devised by a father to his son—Earnings of father as mill manager—Property left by testator to be held moveable or immoveable according to its condition at his death.* Defendant's great-grandfather (*M*) died in 1792, leaving a will, dated 1789, whereby he directed his property to be equally divided among his five sons, of whom *R* (the grandfather of defendant) was one. The property became the subject of litigation, and was not divided until 1852, long after the death of *R*, which took place in 1808. *R*'s share was received in 1852 by the executors of his son *N* (defendant's father), who had died in 1843. *Held*, that this property came to the defendant by inheritance, and was ancestral property and was not capable of being given or willed away by him. Further that, as having regard to *M*'s will there was no apparent intention on the part of the testator to convert into money such of his property as consisted of lands and houses, the general rule of law applied, *viz.*, that the property must be held to be real or personal according to the actual condition in which it existed at the testator's death. All property acquired out of the income of ancestral property is itself ancestral, whether acquired before or after the birth of a son. In order to entitle a co-parcener to hold as property self-acquired by him property which has been recovered by his exertions (*e.g.*, by litigation), such property must have been recovered from usurpers holding it adversely to the family; the co-parceners must have abandoned their rights; and where such abandonment is a matter of inference, the co-parceners, to whom it has been imputed, must have been in a position to sue. A son to whom his father leaves his self-acquired property by will takes the property under the will, and not by inheritance; and as property received by will is held by Hindu law to be received by gift, such property is self-acquired in the hands of the son, and is not subject to partition. The first defendant was sued by his son for partition.

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

Some of the property in the defendant's hands consisted of his earnings as manager of a mill and of the investments of such earnings. The mill had been established in 1860, and the defendant brought thirty-nine shares out of the ancestral funds in his hands. He was appointed chairman of the company, and managed the mill for ten years without any remuneration. His management was very successful, and good dividends were declared every year from 1863. In 1870 he declined to work any longer without remuneration and at a meeting of the shareholders he was appointed managing director, and was granted a commission on all sales effected by the company. *Held*, that the commission so received by the defendant was his self-acquired property. Under the circumstances, it might safely be inferred that he did not obtain the appointment of manager by the direct influence of the shares which he held in the company. The gratuitous services which he had for years rendered to the shareholders had influenced them in giving him the appointment, and such influence could not be said to have been created by the direct instrumentality of the ancestral property. In a suit for partition brought by a son against his father :—*Held*, that the plaintiff was entitled to partition of the ancestral property as it subsisted at the date of the suit. A custom alleged to exist among the Kapoli Bania caste, according to which a son is not entitled to the partition of ancestral property in his father's lifetime and against his father's will, *held*, not proved. JAGMOHANDAS MANGALDAS *v.* MANGALDAS NATHUBHOY . **I. L. R. 10 Bom. 528**

10. ———— Profits in business where capital is ancestral property—*Profits earned by loans and by commissions.* Four brothers of the Cutchi-Memon community carried on trade with capital inherited from their father. Large profits were made in the course of business. It was alleged that some of the profits were made by means of borrowed capital and some arose out of a commission business in which the capital of the firm was not used at all ; and it was contended that such profits could not be considered as an ancestral funds. It appeared, however, that the entire business was carried on by the same firm. There were common books, common expenses, and a common staff. The borrowed money was put into the general cash with the original capital. *Held*, that the whole property was ancestral. Augmentations, which blend, as they accrue, with the original estate, partake of the character of that estate. Moreover, the loans in question and the extension of business, to which they led, might have produced heavy losses instead of great profits, and the family property would have been liable to debts so incurred. The family property, being thus subject to liabilities arising from the loans, was entitled to participate in any benefits

HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

resulting from them. MAHOMED SIDICK *v.* AHMED ABDULA HAJI ABDSATAR *v.* AHMED **I. L. R. 10 Bom. 1**

11. ———— Wealth amassed in trade—*Proof of ancestral quality of property.* Where wealth amassed by an individual in trade is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property ; it must be shown that the property inherited contributed in a material degree to the wealth so amassed. AHMEDBHOY HUBIBBHOY *v.* CASSUMBHOY AHMEDBHOY . . . . **I. L. R. 13 Bom. 534**

12. ———— Property bonâ fide disposed of before birth of son—*Rights of sons—After-born son—Son born subsequently to adoption by father and partition.* According to Hindu law, sons acquire rights only in the property which belonged to their father at the time of their birth, and have no legal claim to property of which a *bonâ fide* disposition, effectual as against their father, had been made long before they were born. The right of an after-born son to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of a partition. The father of the plaintiffs adopted the third defendant. After the adoption, the wife of the father gave birth to a son. Thereupon the father effected a division of the property with the adopted son, and gave the latter a larger share than he was entitled to receive by law. The father married a second wife, and the plaintiffs were the issue of the marriage. *Held*, that the plaintiff's were not entitled to a partition of any portion of the property which fell to the share of the adopted son. YEKEYAMIAN *v.* AGNISWARIAN **4 Mad. 307**

13. ———— Interest of son in ancestral property—*Mitakshara law.* According to the Mitakshara law, sons have a vested interest in ancestral property, which interest is saleable at any time in satisfaction of claims against them. GOOR SURUN DOSS *v.* RAM SURUN BHUKUT **5 W. R. 54**

And also to the profits of ancestral property. SUDANUND MOHAPATTUR *v.* SOORJOO MONEE DAYEE **11 W. R. 436**

14. ——————— *Ancestral immoveable property—Rights of father and son—Suit by father to eject son.* The sons in an undivided Hindu family, although they have a proprietary right in the paternal and ancestral estate, have not independent dominion. Where therefore the plaintiff sued to eject the defendant, his son, from a portion of a house, partly self-acquired by the plaintiff and partly ancestral property, in which the defendant was living against the plaintiff's will, the Court decreed the claim. BALDEO DAS *v.* SHAM LAL . . . . . **I. L. R. 1 All. 77**

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

15. ——— Burden of proof where property alleged to be ancestral—*Property derived by a son from his mother where it originally formed part of his father's estate.* Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character. *P M*, a Hindu, died in 1831, having by his will bequeathed all his estate to his wife *P* and his three minor sons, *A*, *B*, and *C* and directed as follows: "In the event of my wife's demise previous to my sons attaining their full age of twenty-one years to entitle them to claim their respective shares of whatever may be left after marrying, etc., then I direct my surviving executors will secure my property and divide the whole among such sons or the survivors of them." Subsequently to the testator's death, his widow *P* managed his estate, and probate of his will was granted to her alone in January 1832. In 1836 she bought the *V* property for R2,801. There was no evidence to show out of what funds this property was bought, but the deed of sale stated that it was assigned to "*P*, widow and administratrix of the late *P M*, her heirs, executors, administrators, and assigns." In 1845 the eldest son *A* separated from the family, and gave a release to his mother *P*. In 1854 she purchased the *X* property for R8,452, the conveyance being to "*P*, her heirs, executors, administrators, and assigns." In this deed also she was described as "the widow and administratrix of *P M*, deceased." In the same year, *viz.*, 1854, the second son *B* separated and gave *P* a release. The third son *C* (the third defendant) continued to live with his mother *P* until 1871, in which year she died intestate. *C* then entered into possession of all the property which she had or managed in her lifetime, including the *V* and *X* properties. In 1879 he mortgaged these properties to the first two defendants for R12,500. His sons (the plaintiffs) now alleged those properties to be ancestral, and complained that he and the mortgagees were acting in collusion, that he had charged the properties unnecessarily, and that he and the mortgagees were about to sell them at an undervalue for the purpose of defeating their (the plaintiffs') rights. They therefore filed this suit, and prayed (*inter alia*) that the claims of the mortgagees, after being ascertained, might be paid off. The defendants denied that the properties in question were ancestral property in the hands of *C* (the third defendant) or that the plaintiffs, as his sons, had any interest therein. *Held*, that the interest which the third defendant *C* derived from his mother *P* in the mortgaged premises was ancestral property, in respect of which the plaintiff had no present right of interference. The Court ordered that on payment of the mortgage-debt the properties should be reconveyed to the third defendant, and, in the event of their being sold, that the whole of the surplus proceeds should be paid to him. The original property was to be regarded, as in 1831, the self-acquired property of *P M* and as having passed under his will. In the absence of any evidence with regard to it, there was no presumption as to its character, and the plaintiffs, who alleged it to be ancestral, were bound to prove that fact. On *P M*'s death, his sons, *A*, *B*, and *C*, took whatever they became entitled to under their father's will as their self-acquired property, but in co-parcenary according to Hindu law, and not as joint tenants according to English law. As to *P*, she took under the will an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they might claim their shares. On the sons claiming their shares, one share would be left with *P*, and that share, subject to her incapacity as a Hindu widow to deal with immoveable property given her by her husband, would then become hers absolutely. *A* and *B* having separated, *P* and *C* continued to treat themselves as a joint family, and when *P* died in 1871, her share in the joint property lapsed for the benefit of *C*. That share, whether he took it by inheritance or by survivorship, having originally formed part of his father's estate, became ancestral in his hands. NANABHAI GANPATRAV DHAIRYAVAN *v.* ACHRATBAI

I. L. R. 12 Bom. 122

16. ——— Legal obligation of heir to fulfil moral obligations of last proprietor. In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father was at the time of her husband's death a minor: she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with, and been maintained by, her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants. *Held* (MAHMOOD, *J.*, expressing no opinion on this point), that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendants' hands, from which she would be entitled to maintenance; inasmuch as, during the father's lifetime, it was not in any sense ancestral, and the sons had no co-parcenary interest in it, but merely the contingent interest of taking it on their father's

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

death intestate, and, in the case of the plaintiff's husband, such interest, by reason of his predeceasing his father, never became vested. *Adhibai* v. *Cursandas Nathu, I. L. R. 11 Bom. 199,* dissented from on this point. *Savitribai* v *Luximibai, I. L. R. 2 Bom. 573,* referred to. JANKI *v.* NAND RAM **I. L. R. 11 All. 194**

17. ——— **Ancestral property**—*Self-acquired property made ancestral by agreement—Effect of such agreement on accumulations and accretions of the property—Election—Estoppel—Interest of minor members of family in property made ancestral by agreement.* *M* and his three sons *T*, *P*, and *J*, lived together as an undivided Hindu family. In 1881 the youngest son, *J*, filed a suit for partition against his father and his two brothers. Being apprehensive that his other sons (the plaintiffs) might make a similar claim, *M*, on the 28th June 1881, entered into an agreement with them (the plaintiffs) which recited, *inter aliâ*, that he, *M*, alleged that the only ancestral immoveable property belonging to him was the property specified in Part I of the schedule annexed to the agreement, but that the plaintiffs (his sons) alleged that the immoveable property specified in Part II of that schedule was also ancestral property, and provided, *inter aliâ*, that, in consideration of the terms and conditions therein set forth, his sons (the plaintiffs) would not "claim a partition of the said property" during the lifetime of the said *M*. The terms of this agreement were duly observed by the plaintiffs during their father's lifetime, and they continued to reside with him until his death. In the interval, however, *viz.*, in 1886, the partition suit brought by *J* was decided, and by the decree it was declared that the immoveable property specified in Sch. I of the aforesaid agreement was not ancestral property, but was the self-acquired property of *M*. On the 9th March 1890, *M* died, leaving a will, dated 27th January 1888. By this will he directed that his executors and trustees should take possession of all his property, both ancestral and self-acquired, and, after referring to the agreement of the 28th June 1881, and the property in Part I of the schedule thereto, continued: "Whereas it has been decided by the Court of first instance, and such decision has been confirmed by the Appellate Court, that such property (*i.e.*, the property in Part I) is not ancestral property, yet I am unwilling to disturb the said deed as between my said two sons, and I therefore hereby confirm the same." Then, after making some other provisions, he devised and bequeathed to his trustees "all the residue of my self-acquired property," and he directed that such residue, when ascertained and realized, should be handed over to the Chancellor and Senate of the Bombay University to be devoted to the founding of scholarships. As directed by the will, the executors took possession of all the testator's property, including the

HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

property in Part I of the said schedule. This last-named property was subsequently, *viz.*, in December 1890, conveyed by the executors to the plaintiffs. The plaintiffs now sued the executors, contending that the properties in Part I of the schedule to the agreement being ancestral under the agreement and will, they (the plaintiffs) were entitled not only to them, but to all the accumulations and accretions thereof, which amounted in value to about ten lakhs of rupees. The University, on the other hand, contended that the accumulations and accretions formed part of the self-acquired property of the testator, and went to the University under the residuary clause of the will. *Held* (TYABJI, *J.*), (i) that the effect of the agreement was to make the property specified in Part I of the schedule thereto ancestral property as between the parties to the agreement. (ii) That the agreement was confirmed by the will and was binding on the executors. (iii) That, although the corpus of the said property became ancestral under the agreement, the accumulations and accretions thereof did not: they were the self-acquired property of the testator, and passed to the trustees under the residuary clause of the will. The plaintiffs had subsequently to the death of *M* taken possession of the properties in question and had paid probate duty on them. The plaintiffs had taken conveyances from the executors and had given releases to the executors, and in a previous suit (No. 670 of 1892) the first plaintiff had in his evidence stated that he did not wish to dispute the will, and that he had elected to take under it. *Held*, that by their conduct the plaintiffs had elected to take the properties in question under the will, and could not maintain a suit for an account of the rents and profits either under or in opposition to the will. *Held*, also, that the sons of the plaintiffs (the minor defendants) were bound by the acts of the plaintiffs. The property in question was not really ancestral. It was only such for the purpose and by virtue of the agreement of 28th July 1881, and the plaintiffs were entitled to waive it or rescind it if they pleased, and their sons could not prevent them from doing so. TRIBHOVANDAS MANGALDAS *v.* YORKE-SMITH **I. L. R. 20 Bom. 316**

Held on appeal (FARRAN, *C.J.*, and STRACHEY, *J.*) reversing the above decree, that all accumulations and accretions to the properties in question subsequent to the agreement of 28th June 1881 were ancestral property, and passed as such to the sons of *M* at his death. TRIBOVANDAS MANGALDAS *v.* YORKE-SMITH . **I. L. R. 21 Bom. 349**

18. ——— *Mitakshara family—Deed executed by a member—Self-acquired property—Right of suit.* The members of a *Mitakshara* family are all joint tenants of the undivided property in which no member has any defined share; and the property passes, on the death of any mem-

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*a*) ANCESTRAL PROPERTY—*contd.*

ber, to the survivors. Where a member of a *Mitakshara* family executed a deed of gift, treating the property as his self-acquired property, and it was found that the same was the joint property of the family: *Held*, that the whole deed should be set aside. GOPAL LAL *v.* MAHADEO PRASAD (1901)

6 C. W. N. 651

19. ——————————— *Dayabhaga—Joint family—Presumption of joint property—Father—Burden of proof.* The presumption of law that, while a Hindu family remains joint, all property including acquisitions made in the name of individual members, is joint property does not apply to the case of a joint family governed by the Dayabhaga. Certain property in dispute was acquired in the name of one of several brothers during the lifetime of their father, and was in the possession of that brother. *Held*, that the burden of proof in such a case rests upon the party, who asserts that the property in reality belonged to the father. SARODA PROSAD RAY *v.* MAHANANDA RAY (1904) . . . **I. L. R. 31 Calc. 448**

20. ——————————— *Dayabhaga—Joint property—Partition—Widow—Moveable property—Reversionary, rights of—Waste, prevention of—Bill quia timet—Injunction—Receiver.* A Hindu widow, governed by the Dayabhaga school, has, in regard to moveable property inherited by her from a male, the same powers and is subject to the same restrictions in respect of management and alienation as to immoveable property similarly inherited by her. *Cossinauth Bysack* v. *Hurrosoondery Dossee, 2 Morley's Dig. 1898; Thakoor Deyhee* v. *Raj Baluk Ram, 11 Moo. I. A. 139;* and *Bhagwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487*, referred to. A Hindu widow, governed by the Dayabhaga school, inheriting her husband's share in joint properties, is entitled to claim partition of the properties, both moveable and immoveable, as against her husband's co-parceners; but if there be a reasonable apprehension of waste by her of the moveable properties allotted to her share, sufficient provision should be made in the final decree for partition, for the prevention of such waste, to safeguard the interests of the reversioners. The remedy of the latter is not necessarily confined to a subsequent suit for injunction or a bill quia timet. *Soudaminey Dossee* v. *Jogesh Chunder Dutt, I. L. R. 2 Calc. 262; Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya, I. L. R. 9 Calc. 580; Coosinath Bysack* v. *Hurrosondery Dossee, Clarke's Rules and Orders (Appx.) 91;* and *Bepin Behary Moduck* v. *Lal Mohun Chattopadhya, I. L. R. 12 Calc. 209*, referred to. *Biswanath Chandra* v. *Khantomoni Dasi, 6 B. L. R. 747; Hurrydoss Dutt* v. *Rungunmoney Dossee, 2 Sevest 657;* and *Hurrydoss Dutt* v. *Uppoornah Dossee, 6 Moo. I. A. 433*, distinguished. DURGA NATH PRAMANIK *v.* CHINTAMONI DASSI (1904)

I. L. R. 31 Calc. 214
s.c. 8 C. W. N. 11

21. ——————————— *Action in ejectment—Issue as to alleged personation by plaintiff—Admissibility and effect of ex parte official inquiries.* In an action brought in 1894 by the presumptive collateral heir to a deceased Hindu to recover his estate from the appellant as having been substituted for the real heir, who was admittedly born in 1881, but was alleged by the plaintiff to have died in 1883, it appeared that a former suit had been brought in 1885 by the then collateral heir against the appellant and others for a similar purpose after his pleader had, in furtherance of a criminal charge of personation against the appellant's mother, instituted with the assistance of the authorities two secret and official inquiries with the object of either preventing or proving the crime charged. The first Court dismissed the suit, the alleged substitution not having been proved, but the High Court considered that the plaintiff's case was supported by overwhelming circumstantial evidence, meaning the proceedings at and the results of the said enquiries:—*Held*, allowing the appeal, that having regard to the purpose, the nature and the circumstances of the said inquiries, which were not in any sense judicial, but were made *ex parte* in order to obtain support to a foregone conclusion, the said proceedings and results were not, even if admissible, entitled to any weight. CHANDRASANGJI HIMATSANGJI *v.* MOHANSANGJ HAMIRSANGJI (1906)

L. R. 33 I. A. 198
s.c. I. L. R. 30 Bom. 523

22. ——————————— *Joint family—Presumption and onus of proof as to whether property is ancestral or self-acquired—Nucleus of ancestral property—Property purchased while living jointly—Will disposing of ancestral property, invalidity of.* A Hindu, the head of a joint family governed by the Mitakshara law, left property which on his death in 1849 passed to his three sons, who remained joint until 1866 when they came to a partition amongst themselves. There was nothing to show that any of them then had any separate property. At that time one of them had two sons and another son was born to him after the partition. The father and these three sons lived together jointly and acquired other property. The father died in 1894 leaving a will by which he gave a small allowance and a residence to each of his younger sons, and left all the rest of his property to his eldest son describing it as his self-acquired property. In a suit brought by the two younger sons against their brother to set aside the will, the validity of which depended on the question whether the property was ancestral or self-acquired, the Judicial Committee (reversing the decision of

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HINDU LAW—JOINT FAMILY—*contd.*

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(*a*) ANCESTRAL PROPERTY—*contd.*

the High Court) held that the share taken on partition by the father of the plaintiffs and defendant was ancestral property in which from their birth his sons acquired an interest; that there thus being a nucleus of ancestral property the onus was on the defendant to show that the property in suit was self-acquired and not purchased with ancestral funds; that such onus had not been discharged; that on the contrary the evidence showed that there was a common stock of the whole family into which each member voluntarily threw what he might otherwise have claimed as self-acquired, and that the property purchased by, or with the assistance of, the joint funds was joint property, and did not belong to any particular member of the family. There was therefore no self-acquired property, and the will was consequently inoperative to defeat the claim of the younger sons to a share in the family estate. LAL BAHADUR *v.* KANHAIYA LAL (1907)

I. L. R. 29 All. 244 : I. R. 34 I. A. 65

23. ——— **Mortgage**—*Joint family—Liability of sons in respect of a mortgage executed by the father—Exemption of son's interest—Subsequent suit against sons for share of debt payable by them—Limitation Act (XV of 1877), Sch. II, Arts. 147, 132, 120.* Certain joint ancestral property was mortgaged by the head of the family first in 1882 and again in 1893. Subsequently the second mortgagee redeemed the first mortgage. The second mortgagee then sued to recover the amount due on both mortgages by sale of the mortgaged property, and obtained a decree in March 1895 and an order absolute for sale on the 25th of October 1897. To this suit the sons and grandsons of the mortgagor were not made parties. The sons and grandsons of the mortgagor sued for and obtained a decree exempting their interest in the mortgaged property from the operation of the mortgagee's decree. The mortgagee then sued the sons and grandsons to recover from them a proportionate part of the amounts due on his mortgages. This suit was instituted on the 6th of April 1904. *Held*, that the mortgagee's suit against the sons and grandsons of the mortgagor was maintainable and that it was not barred by limitation, the rule applicable being either Art. 147 or Art. 132 of the second Schedule to the Indian Limitation Act, 1877. *Badri Prasad* v. *Madan Lal, I. L. R. 15 All. 75; Maharaj Singh* v. *Balwant Singh, I. L. R. 28 All. 508*, and *Muhammad Askari* v. *Radhee Ram Singh, I. L. R. 22 All. 307*, distinguished. *Dharam Singh* v. *Angan Lal, I. L. R. 21 All. 301*, and *Ariabudra* v. *Dora Sami, I. L. R. 11 Mad. 413*, followed. RAM SINGH *v.* SOBHA RAM (1907) : **I. L. R. 29 All. 544**

24. ——— *Joint family—Redemption of mortgage—Suit by father dismissed—Subsequent suit by sons.* A joint Hindu family, consisting of father and sons, were co-mortgagors by way of usufructuary mortgage of joint family property. The father sued for redemption, but was unsuccessful. *Held*, on suit by the sons claiming to redeem the whole mortgage, that the sons were not precluded by reason of the result of their father's suit from suing to redeem, but they could not obtain redemption of more than their own shares. SUNDAR LAL *v.* CHHITAR MAL (1906)

I. L. R. 29 All. 215

25. ——— **Legal representative**—*Mitakshara—Survivorship—Execution of decree—Decree against father—Execution against representative—Mitakshara son, liability of, to be brought upon the record—Civil Procedure Code (Act XIV of 1882), ss. 234, 244.* Where a decree for money passed against a member of a joint Hindu family governed by the Mitakshara was sought to be executed after his death against his son and heir who took ancestral property by survivorship, as his legal representative: *Held*, by MACLEAN, *C.J.*, BRETT and MITRA, *JJ.* (HARINGTON and GEIDT, *JJ.*, dissenting), that on a construction of ss. 234 and 244 of the Code of Civil Procedure the liability of an ancestral property or of a share of it for the debt covered by the decree might be determined in the execution proceedings, if the legal representative had been properly brought on the record under s. 234. *Held*, also, by MACLEAN, *C.J.* (BRETT, *J.*, concurring), that the son being the legal representative of the deceased judgment-debtor is, *primâ facie*, unless he can show that the judgment-debtor left no self-acquired property, liable to be brought upon the record under s. 234 of the Code. *Held*, by HARINGTON and MITRA, *JJ.*, that the son was the legal representative and might, as such, be brought upon the record. AMAR CHANDRA KUNDU *v.* SEBAK CHAND CHOWDHURY (1907)

I. L. R. 34 Calc. 642

26. ——— **Property inherited from maternal grandfather.** *Mitakshara—Joint family—Ancestral property. Held*, that a son in a joint Hindu family does not acquire by birth an interest jointly with his father in property which the latter inherits from his maternal grandfather. *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar, I. L. R. 27 Mad. 382*, dissented from. *Sudarsanam Maistri* v. *Narsimhulu Maistri, I. L. R. 25 Mad. 149*, discussed. *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu, I. L. R. 25 Mad. 678; Karuppai Nachiar* v. *Shankaranarayanan Chetty, I. L. R. 27 Mad. 300*, and *Chatturbhooj Meghji* v. *Dharamsi Naranji, I. L. R. 9 Bom. 438*, referred to. JAMNA PRASAD *v.* RAM PARTAP (1907)

I. L. R. 29 All. 667

27. ——— **Doctrine of nucleus**—*Ancestral property—Difference between joint property, joint-family property and joint-ancestral family property.* The three notions—(i) joint property, (ii) joint-family property, and (iii) joint-ancestral family property are distinguishable. In all

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HINDU LAW—JOINT FAMILY—*contd.*

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three things there is a common subject—property; but it is qualified in three different ways. The joint property of the English law is property held by any two or more persons jointly, and its characteristic is survivorship. Analogies drawn from it to joint-family property are false or likely to be false for several reasons. The essential qualification of the second class is not jointness only, but a good deal more. Two complete strangers may be joint tenants, according to English law: but in no conceivable circumstances could they constitute a joint Hindu family, or, in that capacity, hold property. In the third case, property is qualified in a two-fold manner: it must have been joint-family property and it must be ancestral. There must have been a nucleus of joint-family property before ancestral joint-family property can come into existence, because the word ancestral connotes descent and therefore pre-existence. B—because it is true that there can be no joint ancestral family property without a previous nucleus of joint-family property, it is *not* true that there cannot be joint-family property, without a pre-existing nucleus, for that would be identifying joint-family property, with ancestral joint-family property. Where there is ancestral joint-family property every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or disposition of any kind. This is equally true of joint-family property. Where it is known or admitted that some at least of the property of a joint-family has come down to them the presumption is that the whole property is ancestral, and any member alleging that it is not will have to prove his self-acquisition. Where property is admitted or proved to be joint-family property, it is subject to exactly the same legal incidents in every respect as property which is admitted or proved to be ancestral joint-family property. Further, this class of property in India differs radically in origin and essential characteristics from the joint property of the English law. The fundamental principles of the Hindu joint-family is the tie of *sapindaship*. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together it is almost impossible not to form a joint Hindu family. There is nothing either in practice or theory which excludes the possibility of members of the same family starting a family fortune holding it as members of a joint-family, and thereby clothing it with all the legal qualities and incidents of joint-family property, chief among which is that every member born into the family after the property has acquired that character, and before it has been divested by partition obtains by birth an interest in it. KARSONDAS DHARAMSEY *v.* GANGABAI (1908) . . . **I. L. R. 32 Bom. 479**

28. ——— Money received at marriage—*Dayabhaga—Joint property or self-acquisition—Money received at marriage by a member.* Money received by a member of a joint Hindu family at marriage is not joint family property. ADHAR CHANDRA CHATTERJEE *v.* NABIN CHANDRA CHATTERJEE (1907) . **12 C. W. N. 103**

29. ——— Right of co-parcener's son born after release—*Joint Hindu family—Release by a co-parcener.* *M*, a member of a joint Hindu family, being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of R5,000. At the time of this release *M* had one son living. On this son suing the co-parcenary for partition it was held (in Suit No. 423 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree *M* had another son born, who sued the first son to recover from him a moiety of the sum allotted to the first son on partition. *Held*, that the second son was not entitled to any share in the property. SHIVAJIRAO *v.* VASANTRAO (1908) **I. L. R. 33 Bom. 267**

30. ——— Right to manage charities—*Joint family, right of, to manage charities—Such right until partition vests in the senior male member of the family.* When the right to manage charities, without any beneficial interest in the charity properties, is vested in a joint Hindu family the senior male member of such a family is, until a partition is effected, entitled to exercise the right of management vested in the family on its behalf. Until partition is effected, no junior member is entitled to management by rotation, in the absence of an agreement recognising such right; nor is it competent to a Court to decree such a right on the ground of convenience. THANDAVARAYA PILLAI *v.* SHUNMUGAM PILLAI (1908) **I. L. R. 32 Mad. 167**

(*b*) SELF-ACQUIRED PROPERTY.

31. ——— Property inherited through mother—*Succession of female to impartible zamindari.* Property inherited through a mother is not "self-acquired" as between her son and grandson. MUTTAYAN CHETTI *v.* SANGILI VIRA PANDIA CHINNA TAMBIAR **I. L. R. 3 Mad. 370**

32. ——— Property acquired from father-in-law on marriage—*Liability to partition.* Property acquired from a father-in-law is self-acquired property, and therefore not liable to be shared in by a brother. BEHAREE LAL ROY *v.* LALL CHAND ROY . . . **25 W. R. 307**

33. ——— Father's interest in self-acquired property of son—*Separation.* The doctrine of Hindu law that a father takes a share in his son's self-acquired property applies only to cases of families in joint estate, but not where separation

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HINDU LAW—JOINT FAMILY—*contd.*

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in estate has taken place. ANUND MOHUN PAUL CHOWDHRY *v.* SHAMASOONDURI
W. R. 1864, 352

34. ——— Property acquired by member while drawing income from family. Property acquired by a Hindu while drawing an income from his family is liable to partition. RAMASHESHAIAYA PANDAY *v.* BHAGABAT PANDAY
4 Mad. 5

35. ——— Property acquired by one member in trading—*Education at expense of joint family. Quære:* Where a member of a joint Hindu family subject to the Mitakshara law has received a general education at the expense of the joint family funds, but is shown to have derived no material wealth from those funds, does property which he afterwards acquires by the exercise of his industry and intelligence in successful trading become joint in the contemplation of the Hindu law? Decisions of the Indian Courts bearing on this question observed on. PAULIEM VALOO CHETTI *v.* PAULIEM SOORYAH CHETTY
I. L. R. 1 Mad. 252
L. R. 4 I. A. 109

36. ——— Onus of proof. *A*, a Hindu, took up some abandoned waste land and brought it into cultivation. *Held*, that the true test as to whether the land was his self-acquired property or not is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lay upon those who allege the latter. SUBBAYYA *v.* SURAYYA . . **I. L. R. 10 Mad. 251**

37. ——— Gains of science—*Educational family expense.* Gains of science acquired at the family expense, and whilst the acquirer is receiving a family maintenance, are liable to partition, and upon the death of the acquirer form part of the family property, and do not pass to his widow. BAI MANCHA *v.* NAROTAMDAS KASHIDAS
6 Bom. A. C. 54

38. ——— ——— *Self-acquired property—Partition.* The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint funds is his self-acquired property, and is not subject to partition; but the improvement or augmentation of the family property by the exertions of one of the members is subject to division. Hindu law texts regarding gains of science establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family. When the Hindu texts speak of the gains of science, they intend the special training for a particular profession which is the immediate source

HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*b*) SELF-ACQUIRED PROPERTY—*contd.*

of the gains, and not the general elementary education which is the stepping-stone to the acquisition of all science. Consequently, the property acquired by a Subordinate Judge who had received elementary education at the family expense, but a knowledge of law and judicial practice without such aid, is impartible. The ruling of the Privy Council in *Luximon Rao Sudasev* v. *Mullar Rao Bajee, 2 Knapp 60,* interpreted to mean no more than that law as now settled, *viz.*, that when there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. *Bai Mancha* v. *Narotamdas, 6 Bom. 1,* distinguished. Dictum of MITTER, *J.*, in *Dhunookdharee* v. *Gumput Lal, 11 B. L. R. 201; 10 W. R. 122,* that the Hindu law nowhere sanctions the contention that the acquisition of a member of a Hindu family who has received education from the joint estate is liable to partition—commented on as not strictly correct. LAKSHMAN MAYARAM *v.* JAMNABAI . **I. L. R. 6 Bom. 225**

39. ——— ——— *Fruits of elementary education impartible—Earnings of different co-sharers thrown into the joint-stock—Estoppel—Alienation of joint property by manager of family.* Three brothers—*K*, *M*, and *N*—were members of a joint Hindu family living at Nagothna. *M* and *N* went to Baroda and obtained employment there as karkuns. They had not received anything more than a rudimentary education before they left their family house at Nagothna. *K* remained at home to look after the affairs of the family. *M* and *N* used to remit moneys from time to time for the support of the family at Nagothna. With money supplied by *M* and *N*, *K* redeemed the family house from mortgage and purchased lands at Nagothna, varvatni and vagni. These lands were entered in the revenue records in *K*'s name. *K* managed the whole property and applied the rents to the support of the family. In 1881 *K* mortgaged the property. In 1885 *M* and *N* brought this suit to recover possession of the house and lands, alleging that they were their self-acquired property, and that *K* had no power to alienate them. They also prayed, in the alternative, for a partition of their two-thirds share of the property. *Held*, that, the plaintiffs having received only a rudimentary education in their family, their earnings in the exercise of their profession as karkuns were self-acquired and impartible, and that the property purchased or redeemed with those earnings would also be impartible, unless it appeared that they had voluntarily thrown such property into the joint stock, with the intention of abandoning all separate claims upon it. If they did so, the property would thereupon become joint property. *Held*, also, that, the plaintiffs having held out *K* as the manager of

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*b*) SELF-ACQUIRED PROPERTY—*contd.*

the whole estate so as to induce outsiders dealing with him to believe that he had authority to mortgage the whole interest of the three brothers in the property, they (the plaintiffs) were estopped from contending that the mortgages effected by *K* were not binding on their shares, if *K* did, as a matter of fact, borrow the money for the benefit of the family. KRISHNAJI MAHADEV *v.* MORO MAHADEV **I. L. R. 15 Bom. 32**

40. ———— *General education acquired at the expense of the joint family funds. Held*, that the mere fact that a member of a joint Hindu family had acquired a certain general education of a not very advanced character at the expense of the joint family funds would not have the result of making all the subsequent earnings of that member joint family property, but they would remain his self-acquired property. *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty, I. L. R. 1 Mad. 252*, and *Krishnaji Mahadev* v. *Moro Mahadev, I. L. R. 15 Bom. 32* referred to and followed. LACHMIN KUAR *v.* DEBI PRASAD **I. L. R. 20 All. 435**

41. ———— *Prostitution.* The ordinary gains of science are divisible when such science has been imparted at the family expense and acquired while receiving a family maintenance. *Secus*, where the science has been imparted at the expense of persons not members of the learner's family. The trade of prostitution is recognized and legalized by Hindu law. CHALAKONDA ALASANI *v.* CHALAKONDA RATAN CHALAM . **2 Mad. 56**

42. ———— **Income derived from prostitution**—*Dancing girl—Education in dancing and music.* Property acquired with income derived from prostitution by a Hindu dancing girl who has received the ordinary education in music and dancing is not partible. BOOLOGAM *v.* SWORNAM **I. L. R. 4 Mad. 330**

43. ———— **Professional earnings of vakil**—*Self-acquired property—Gains of science.* Upon the question whether the professional earnings of a vakil were generally his self-acquisition and impartible:—*Held* by KINDERSLEY, *J.*, that the question must be upon the facts in each case, how far the common family means were instrumental in enabling the professional man to earn the property which is claimed as subject to partition. The fair presumption is that such attainments as are usually possessed by a vakil have been acquired with the assistance of the family means. *By* HOLLOWAY, *J.*, that the ordinary gains of science by one who has received a family maintenance are certainly partible. Moreover, within the meaning of the authorities a vakil's business is not matter of science at all. DURVASULU GANGADHARUDU *v.* DURVASULA NARASAMMAH . . . . . **7 Mad. 47**

HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*contd.*

(*b*) SELF-ACQUIRED PROPERTY—*contd.*

44. ———— **Partnership property**—*Agreement allowing members to draw separately from assets of firm—Self-acquired property.* Where the relation between the plaintiff and the defendant (two brothers) was not strictly that of members of a joint undivided Hindu family, since although they were joint as to their general concerns, and in some sense joint as members of a family, yet that relation was qualified by the provision contained in a family arrangement whereby each member of the family might take out and use assets derived from a partner-ship firm for the benefit of his sole and separate speculations:—*Held*, that the plaintiff was not entitled to throw his own and his brother's acquisitions into hotchpot and to claim an equal division of them. The arrangement being of such an extraordinary character as to leave it in the power of each member to draw to an unlimited extent upon the assets of the firm, the Privy Council declined to extend the operation of such an agreement one iota beyond its terms, and were therefore of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm. NURSINGH DOSS *v.* NARAIN DOSS **26 W. R. 17**

Affirming decision of High Court in s.c. **3 N. W. 217**

45. ———— **Self-acquired immoveables**—*Construction of words of a sanad granting an absolute estate of inheritance—Change of ancestral character of immoveables—Mortgage and foreclosure—Bonâ fide re-acquisition for value by mortgagor's descendant.* A father, being a member of an undivided family subject to the Mitakshara, can exercise full power of disposition at his own discretion over immoveables which he has himself acquired as distinguished from ancestral property. The immoveables alienated by a father's gift, disputed by his son, partly consisted of zamindari rights in villages which had been at one time ancestral in the family, but had been transferred to satisfy the debts of an ancestor, and had been acquired back by his descendant, the donor. As to one of these villages, the Courts below had differed whether it was self-acquired property in the donor's hands. It had been mortgaged by the ancestors; and the mortgage had been foreclosed under Regulation XVII of 1806, before having been re-acquired by the donor. That the foreclosure and re-acquistion were genuine were facts found upon evidence, including that of prior concurrent decrees maintaining the foreclosure, as between other parties. *Held*, that the re-acquisition was not a redemption of an estate inherited from an ancestor, and merely encumbered; but that the once ancestral character of this village had been destroyed by the foreclosure. Like the other villages alienated by the father's gift, it was self-

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HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN PROPERTY—*contd.*

(*b*) SELF-ACQUIRED PROPERTY—*contd.*

acquired by the donor. Other immoveable property comprised in the gift consisted of a malikana payable out of other villages conferred upon the donor by a Government sanad granting a muafi on seven villages to him for life, and declaring that "the zamindars who now pay the revenue will pay it to him, and after him they shall ever pay ten per cent. as malikana allowance to his heir after the deduction of Government revenue for generation after generation." *Held*, that the grant of the malikana was absolute to the one grantee: that there were not two gifts, one for life to the grantee and the other a distinct gift after his death, to the person who should then be his heir. The malikana formed part of the grantees heritable property and was self-acquired. BALWANT SINGH *v.* RANIKISHORI . . . **I. L. R. 20 All. 267**
L. R. 25 I. A. 54

RAO BALWANT SINGH *v.* RANIKISHORI
2 C. W. N. 273

46. ——— *Joint Hindu family—Ancestral property—Self-acquired property—Property inherited from collateral, acquired after litigation supported by joint family funds.* The head of a joint Hindu family owning a large amount of joint ancestral property acquired by inheritance from a collateral branch of the family property both moveable and immoveable after litigation ending in a compromise. This litigation was carried on by means of money belonging to the joint family business. *Held*, on a finding that the business of the family usually necessitated the existence of a very large floating balance, and that the money used for this litigation was in a short time re-credited by the head of the family in the family accounts, that the money should be treated as borrowed, that there was no appreciable detriment to the ancestral property, and consequently the property, which passed under the compromise above referred to, was self-acquired and not ancestral property. *Rani Mewa Kunwar* v. *Rani Hulas Kunwar, L. R. 1 I. A. 157*, and *Rai Nursing Das* v. *Rai Narain Das, 3 All. H. C. 217*, referred to. BACHCHO KUNWAR *v.* DHARAM DAS (1906)
I. L. R. 28 All. 347

47. ——— **Devise of self-acquired property to sons**—*Self-acquired property—Nature of son's interest. Semble:* That property which is the self-acquired property of a Hindu who has sons and grandsons and is devised by will to one of the owner's sons remains after devolution self-acquired property and does not become the joint property of the devisee and his sons. *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy, I. L. R. 10 Bom. 528*, followed. *Tarachand* v. *Reeb Ram, 3 Mad. H. C. 50*, and *Muddun Gopal Thakoor* v. *Ram Buksh Pandey, 6 W. R. 71*, dissented from. *Semble*, also, that where the sons of a Hindu father, apparently members with their father of a joint Hindu family, took under their father's will property acquired by him under the will of his father, devised to them separately by name; but continued to live in the manner of a joint Hindu family and treated at all events the immoveable property for a series of years in all respects as if it were joint ancestral property, the property so devised remained separate property according to Hindu law. *Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75*, and *Balkishen Das* v. *Ram Narain Sahu, L. R. 30 I. A. 139*, referred to. PARSOTAM RAO TANTIA *v.* JANKI BAI (1907) . . **I. L. R. 29 All. 354**

HINDU LAW—JOINT FAMILY—*contd.*

2. NATURE OF, AND INTEREST IN, PROPERTY—*concld.*

(*b*) SELF-ACQUIRED PROPERTY—*concld.*

48. ——— **Presumption as to the character of the property held by the father**—*Self-acquisition.* A Hindu, who had a son and that son's son living with him, made a deed of gift of his property in favour of his grandson. In that deed the property was described as his self-acquired property; and the deed was attested by his son. It was shown that the son had knowledge of the contents of the deed. *Held*, that the above facts led to the inference that the property was self-acquired. KALLIANJI *v.* BEZANJI (1908)
I. L. R. 32 Bom. 512

3. NATURE OF JOINT FAMILY AND POSITION OF MANAGER.

1. ——— **Position of manager**—*Agent.* The managing member of a Hindu joint family holds a position in relation to the other members of the family and the family property peculiar to himself and not precisely analogous to anything known to English law. He is not the agent of the other members of the family. MUHAMMAD ASKARI *v.* RADHE RAM SINGH
I. L. R. 22 All. 307

2. ——— **Rights of members of family**—*Position of manager—Agent—Trustee.* Members of a Hindu family, with vested interest in their joint property, choosing to continue in a state of commensality and joint fruition, do not possess individually any several proprietary right other than an alienable right to call for partition. The karta of a joint Hindu family in general is the mere mouthpiece of the family and not an agent with delegated authority in a fiduciary and accountable relation to the rest of the family. As long as a member of such a family is a minor, the karta is in the position of a trustee for him of the joint property to the extent of his share in it, and is liable to account for it to him when the trusteeship ceases. CHUCKUN LALL SINGH *v.* PORAN CHUNDER SINGH . **9 W. R. 483**

3. ——— **Agreement between members of a Hindu family**—*Their estate managed by one in the relation of ordinary agent to principal—Liability to account.* Three brothers of a

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HINDU LAW—JOINT FAMILY—*contd.*

3. NATURE OF JOINT FAMILY AND POSITION OF MANAGER—*contd.*

joint Hindu family agreed that their estate should remain joint, excepting the share of a separated fourth brother, which was excluded. It was in the agreement that the eldest of the three should manage the family estate, and that after twelve years, and after an account rendered by him of the profit and loss, a division among them should be made; any one of them to obtain his share on giving up his portion of the profits. In a suit for partition commenced by one of the brothers and carried on by his representatives, the term having expired:—*Held*, that the true construction was that the above was not a mere agreement to postpone partition, leaving the family status of the brothers uninterrupted, but was an agreement which put them on a new footing. Upon reference to several terms of the agreement, it appeared that the elder had become liable on the footing of an ordinary agent, accountable for receipts and expenditure, and that he was not in the position of the managing member of a joint family liable only to account as to the then existing estate of the property. SETRUCHERLA RAMABHADRA *v.* SETRUCHERLA VIRABHADRA SURYANARAYANA **I. L. R. 22 Mad. 470**
L. R. 26 I. A. 167
3 C. W. N. 533

4. ——— **Manager, liability of, to account**—*Partnership, distinction between Hindu family and.* The manager of a joint Hindu family is not, by reason of his occupying that position, bound to render an account to the other members of the family. There is no analogy in this respect between a joint Hindu family and a partnership. Where it was arranged amongst the members of a joint Hindu family that the accounts of a banking business carried on by them should be kept on the understanding that the profits, when realized, should be divided amongst the individual members in certain proportions, and that the expenses of each member should be credited and charged in the name of each member:—*Held*, that this was in the nature of a partnership, and an account was decreed. RANGANMANI DASI *v.* KASINATH DUTT
3 B. L. R. O. C. 1 : 13 W. R. 76 note

5. ——— *Suit for account during minority of members.* A managing member of joint Hindu family is bound to render an account of his management to his co-sharers, and he is liable to a suit if he refuses to do so. And such suit will lie even if the parties suing were minors during the period for which the account is asked. ABHAYCHANDRA ROY CHOWDHRY *v.* PYARIMOHUN GOOHO
5 B. L. R. 347

S.C. OBHOY CHUNDER ROY CHOWDHRY *v.* PEAREE MOHUN GOOHO . **13 W. R. F. B. 75**

6. ——— *Suit for account of portion of joint property.* One member of a joint Hindu family sued another, who was the manager, for a moiety of two items pertaining to the ancestral estate, which she alleged that the defendant had misappropriated. *Held*, that the form of the suit was wrong, and that the plaintiff should have sued for an account of the whole joint family property. NOWLASO KOOEREE *v.* LALLJEE MODI
22 W. R. 202

7. ——— *Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner.* A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property, and an award of his share in such profits when ascertained. This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm. GANPAT *v.* ANNAJI
I. L. R. 23 Bom. 144

8. ——— *Right of excluded minor to account.* Where an infant has been ejected by the manager of the joint Hindu family from the family house, and excluded from enjoyment of the family property, the manager is bound to account to the infant for mesne profits from the date of his exclusion. The rule which limits the right of members of a Hindu family seeking partition to a division of the family property existing at the date of the division not applying. KRISHNA *v.* SUBBANNA . . . **I. L. R. 7 Mad. 564**

9. ——— *Suit for share of profits—Suit for partition—Account, right to.* A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate, as he has no definite share until partition. He may sue for a partition of such estate unless by a family usage of special law it is impartible, and then is entitled to an account. PIRTHI LAL *v.* JOWAHIR SINGH . . . . **I. L. R. 14 Calc. 493**
L. R. 14 I. A. 37

See SHANKAR BAKSH *v.* HARDEO BAKSH
I. L. R 16 Calc. 397
L. R. 16 I. A. 71

10. ——— **Reference to arbitration**—*Power of father as manager of joint family to refer to arbitration the partition of the joint family property—Effect of award.* It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property, and the award made on such a reference, if in other respects valid, will be binding on the sons. JAGAN NATH *v.* MANNU LAL . **I. L. R. 16 All. 231**

11. ——— **Remuneration for management.** In a suit for partition of family property, one of the defendants claimed to be credited with a sum payable to him as the managing co-parcener under a deed of management to which the plaintiff was not party:—*Held*, that the

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claim under the deed of management was not valid against the plaintiff. In the absence of a valid special agreement, the managing co-parcener of a joint Hindu family is clearly not entitled to remuneration, he being a joint owner of the property which he manages. KRISHNASAMI AYYANGAR *v.* RAJAGOPALA AYYANGAR . **I. L. R. 18 Mad. 73**

12. ——— Power of manager to revive a time-barred debt—*Limitation Act (XV of 1877), s. 19.* The manager of a Hindu family has no power to revive by acknowledgment a debt barred by imitation, except as against himself. DINKAR *v.* APPAJI . **I. L. R. 20 Bom. 155**

13. ——— Partnership—*Mitakshara doctrine of joint family property—Limitation Act (XV of 1877), Sch. II, Art. 106—Contract Act (IX of 1872), ss. 239, 253.* *V* and his five sons constituted an undivided Hindu family. *V* and his three elder sons lived apart from the two youngest sons, and were in possession of some ancestral property. The two youngest sons were plaintiff and first defendant, respectively, in this suit. Plaintiff sued this brother for an account, and for partition of certain property which he alleged to be the property of a joint family consisting of the first defendant and himself. The property had, as plaintiff alleged, been acquired from the funds of a business which had been carried on jointly by him and first defendant until 1894, and continued by the first defendant until the institution of the suit. It was alleged that, although there had not been an express agreement of partnership, in the circumstances of the case an agreement under which plaintiff had become jointly interested in the business ought to be inferred. *Held*, that plaintiff had not a joint interest in the contract business, and was not entitled to claim a share in it. *Held*, also, that, even if such an interest had existed, plaintiff's claim was barred by limitation. *Maung Tha Hnyin* v. *Mah Thein Myah, L. R. 27 I. A. 189*, distinguished. *Per* BHASHYAM AYYANGAR, *J.*—It was impossible to regard plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body. *Sham Narain* v. *Court of Wards, 20 W. R. 197*, commented on. The origin and nature of the *Mitakshara* doctrine of joint family property discussed. *Peddayya* v. *Ramalingam, I. L. R. 11 Mad. 406*, referred to. *Radha Churn Dass* v. *Kripa Sindhu Dass, I. L. R. 5 Calc. 474*, considered. *Rampershad Tewarry* v. *Sheochurn Dass, 10 M. I. A. 490*, distinguished. SUDARSANAM MAISTRI *v.* NARASIMHULU MAISTRI (1901) **I. L. R. 25 Mad. 149**

14. ——— *Partnership with manager of joint family—Death of manager, effect of—Joint family and joint family business, nature of—Partner, right of, to sue for particular assets after suit for general account barred—Limitation Act (XV of 1877), Sch. II, Art. 106.* Where *K*, the manager of a joint Hindu family, enters into a partnership for the family benefit with *S*, a stranger to the family, the partnership is dissolved on the death of *K*, in the absence of any agreement with the survivors. How far a joint Hindu family resembles a corporation sole and how far a joint family business resembles a partnership considered. *Samalbhai Nathubhai* v. *Someshvar, Mongal, and Harkisan, I. L. R. 5 Bom. 38*, referred to. Although a suit for general account of a partnership will be barred under Sch. II, Art. 106 of the Limitation Act, if brought more than three years after the dissolution of the partnership, a suit will lie for recovering a share of any particular asset received by a partner after such dissolution, if such suit is brought within time and if such claim, having regard to previous dealings, is not inequitable. *Merwanji Hormusji* v. *Rustomji Burjorji, I. L. R. 6 Bom. 628*, and *Knox* v. *Gye, L. R. 5 H. L. 656*, followed. SOKKANDHA VANNIMUNDAR *v.* SOKKANADHA VANNIMUNDAR (1905) . . **I. L. R. 28 Mad. 344**

15. ——— Minor co-parceners—*Joint Hindu family—Guardian of the family property appointed by the Court—Guardianship ceases when one of the co-parceners attains majority—Guardianship goes to the adult co-parcener.* Where a joint Hindu family consists of co-parceners, who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property of that group as a whole. But when, subsequently, one of that group arrives at the age of majority, the guardianship of the person appointed by the Court ceases, and the Court is bound to hand over the joint family property to the adult co-parceners notwithstanding the fact that other co-parceners are minors. *Virupakshappa* v. *Nilgangava, I. L. R. 19 Bom. 301*, applied, *Bindaji* v. *Mathurabai, I. L. R. 30 Bom. 152*, followed. RAMCHANDRA *v.* KRISHNARAO (1908) . **I. L. R. 32 Bom. 259**

16. ——— Protection by Magistrate—*Possession by the manager of a joint Hindu family can be protected by a Magistrate by proceedings under s. 145 of the Code.* The managing member of a co-parcenary governed by the Mitakshara Law has a recognised position of superiority with well-defined rights of management and possession independent of the consent of the other members of the co-parcenary. A Magistrate has jurisdiction to protect a manager in such possession by proceedings under s. 14 of the Criminal Procedure Code. *Sri Mohan Thakur* v. *Narsing Mohan Thakur, I. L. R. 27 Calc. 259*, referred to and approved. BHASKARI KASAVARAYADU *v.* BHASKARAM CHALAPATIRAYUDU (1908) . . . **I. L. R. 31 Mad. 318**

17. ——— Liability of karta to account—*Settled account—Re-opening on ground of error or omission—Right to surcharge and falsify—Onus—Pleadings—Frame of plaint—Objection when to be taken—Partial partition—Suit to partition unpartitioned property.* The manager of a

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joint family administers it for the purposes of the family, and so long as he does this, he is not under the same obligation to economise or to save as would be the case with a paid agent or trustee. *Rajah Setrucherla* v. *Rajah Setrucherla, L. R. 26 I. A. 167,* referred to. When accounts have to be taken with a view to a partition of joint family properties the enquiry is mainly into assets then existing in the hands of the different members of the family. The head of the family cannot in general be called upon to defend the propriety of the past transactions of the family. *Jug Mohan Das* v. *Mangal Das, I. L. R. 10 Bom. 528 at pp. 561* and *581, Narayan* v. *Nathji, I. L. R. 28 Bom. 201; Abhoy Charan* v. *Peari, 5 B. L. R. 247: 13 W. R. 75; Surjeemonee* v. *Dinobundhoo, 6 Moo. I. A. 326,* referred to. When accounts have been settled, they are *primâ facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of settlement, but the parties will not be concluded by such presumption as to matters which were not contemplated by them or which were not in fact included in the settlement, though they existed at the time, provided there is no element of estoppel or no obligatory agreement between the parties as upon a settlement and mutual compromises. *Helan Dassi* v. *Durga Das, 4 C. L. J. 323,* referred to and explained. The onus is always on the party having liberty to surcharge and falsify on the ground of mistakes and omissions. An account which has been settled may be rectified, if mistake is established and it does not matter whether the error in the accounting occurred by accident or design, nor is it necessary that the error or mistake should be mutual. Ordinarily when the plaintiff impeaches accounts which have been settled, on the ground of errors, such errors ought to be specifically stated. Where the plaintiff did not make specific averment of errors, but asked for relief only upon the general ground that items of joint family property had been excluded from partition, but no objection was taken by the defendants to the frame of the suit, and after the preliminary question of the liability of the defendant to render account had been decided in favour of the plaintiff, the parties went into an elaborate examination of the accounts without objection and it did not appear that the defendant was in any way prejudiced by the omission in the plaint, *Held,* that the objection that the errors were not specified in the plaint could not prevail. *Mohesh Chandra* v. *Radha Kishore, 12 C. W. N. 28: s. c. 6 C. L. J. 580, 590,* distinguished. Property excluded from partition continues to be joint property and is liable to partition. BHOWANI PROSHAD SHAHU *v.* JUGERNATH SHAHU (1909) **13 C. W. N. 309**

4. DEBTS AND JOINT FAMILY BUSINESS.

1. ——— **Debt incurred by manager** —*Presumption of debt being on joint account.* Though property of a joint Hindu family is *primâ facie* joint, yet as there is nothing to prevent an individual managing member from contracting debts on his own account, there is no presumption that a debt contracted by him is joint. SUNKUR PERSHAD *v.* GOURY PERSHAD . . **I. L. R. 5 Calc. 321**

HINDU LAW—JOINT FAMILY—*contd.*

4. DEBTS AND JOINT FAMILY BUSINESS—*contd.*

2. ——— *Duty of purchaser from manager of family—Minor members.* A debt incurred by the head of a Hindu family residing together under ordinary circumstances, is presumed to be a family debt; but when one of the members is a minor, the creditor seeking to enforce his claim against the family property must show that the debt was contracted *bonâ fide* and for the benefit of the family. *Hunoomanpersaud Pandey* v. *Babooee Munraj Koonweree, 6 Moo. I. A. 393,* followed. TANDAVARYA MUDALI *v.* VALLI AMMAL **1 Mad. 398**

3. ——— **Liability of members for separate debts of deceased brother**—*Survivorship.* *P,* an undivided Hindu co-parcener, died on the 7th August 1874, leaving him surviving a brother *C* and a son *N.* *N* subsequently died on the 2nd July 1875. In a suit brought by plaintiff against *C,* on a bond executed by *P* as surety for one *R*:—*Held,* that the family property, which on *N*'s death became vested by survivorship in *C,* was not in his hands liable for the separate debts of *P* or *N.* NARSINBHAT BIN BAPUBHAT *v.* CHENAPA BIN NINGAPA . . . **I. L. R. 2 Bom. 375**

4. ——— **Debt [incurred by joint family**—*Duty of purchaser—Reasonable enquiry.* A person lending money on the security of the property of an undivided Hindu family is bound to make enquiries as to the necessity that exists for such loan. If he lends the money after reasonable enquiry, and *bonâ fide* believing it will be properly expended, he is not bound to see to the application of it. The rule is the same whether all the members of the family are adults or minors. Authorities bearing on the question of the *onus probandi* in such cases cited. GANE BHIVE PARAB *v.* KANE BHIVE **4 Bom. A. C. 169**

5. ——— **Debts incurred for] family purposes**—*Evidence of legal necessity.* *N, G,* and *H* were three brothers living together as a joint Hindu family. After the death of *N* and *G,* decrees were obtained against *N*'s widow, and satisfied by her in respect of moneys borrowed by *N* and *H* as the managing members of the family and spent for family purposes while *G*'s widow was living in the family. In a suit by *N*'s widow for contribution against *G*'s widow:—*Held,* that, though no legal necessity had been shown for borrowing, the defendant was bound to pay her share, as the money had been spent for family purposes while she was living in the family. BIMALA DEBI *v.* TARASUNDARI DEBI . **6 B. L. R. Ap. 101 : 14 W. R. 480**

6. ——— **Suit by one member for debt due to family firm**—*Partnership.* In a

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HINDU LAW—JOINT FAMILY—*contd.*

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suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated in examination that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks." *Held*, that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business and he not being the managing member or proprietor. JUGAL KISHORE *v.* HULASI RAM
I. L. R. 8 All. 264

7. ——— **Joint ancestral business, nature of**—*Partnership—Manager of joint family, power of.* An ancestral trade descends like other Hindu property upon the members of an undivided family, and the manager of such family can on behalf of the family enter into co-partnership with a stranger. In carrying on such a trade, infant members of the family will be bound by the acts of the manager which are necessarily incident to, and flowing out of, the carrying on of that trade. The manager can pledge the property and credit of the family for the ordinary purposes of that trade, and third persons dealing *bonâ fide* with such manager are not bound to investigate the status of the family, minor members being bound by the necessary acts of the manager. By necessary acts are meant such as are necessary for the material existence of the undivided family or the preservation of the family property: and a compromise between co-partners of partnership accounts, and differences by a transfer and division of partnership property, is not such a necessary act, but is one which is left to be dealt with by the ordinary rules of law, and one which must be shown clearly to be for the benefit of the infant members before the compromise will be enforced. The avoidance of a suit to take partnership accounts is not sufficient of itself to render a compromise necessary for the preservation of family property or beneficial to a minor member. A co-partner dealing with an undivided Hindu family is, with reference to its component members, in the same position that a partner according to English law is placed in with respect to his co-partners and their representatives. RAMLAL THAKURSIDAS *v.* LAKHMICHAND MUNIRAM
1 Bom. Ap. 51

8. ——— *Mitakshara law—Debts incurred by manager of joint family in trading.* A joint family property acquired and maintained by the profits of trade is subject to all the liabilities of that trade. *Ramlal Thakursidas* v. *Lakmichand, 1 Bom. Ap. 51*, followed. JOHURRA BIBEE *v.* SREEGOPAL MISSER
I. L. R. 1 Calc. 470

9. ——— *Business carried on for benefit of infants—Debts incurred by guardian—Liability of infants—Contract Act, s. 247.* Where the ancestral trade of a Hindu was carried on after his death for the benefit of his infant children by their guardian, and debts were incurred by the firm in the course of business:—*Held*, that the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor, and that, following the analogy of the rule laid down by s. 247 of the Contract Act as to the liability of a minor admitted by contract into a partnership business, the minor is not to be held personally liable for the debts incurred in such trade, but that his share therein is alone liable. JOYKISTO COWAR *v.* NITTYANUND NUNDEY
I. L. R. 3 Calc. 738 : 2 C. L. R. 440

10. ——— *Ancestral trade carried for benefit of minor by the minor's natural guardian—Minor bound by acts of the guardian—Liability of minor for debts.* Under Hindu law, where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian for the benefit of herself (she having a claim for maintenance) and the said minor, the minor will be bound by all acts of the guardian necessarily incidental to, or flowing out of, the carrying on of the trade. RAMPARTAB SAMRATHRAI *v.* FOOLIBAI . **I. L. R. 20 Bom. 767**

11. ——— *Power of managing member to bind members of partnership.* Adult members of an undivided Hindu family governed by the law of the Dayabhaga, who have an interest in a family business carried on by the managing member of the family, and who are maintained out of the profits of such business, must in the absence of evidence be taken to possess the knowledge that the business might require financing, and to have consented to such financing. Where, therefore, a managing member of such a family, in carrying on the family business, obtains an advance necessary for the purposes of the business by pledging the joint family property, the mortgage is binding on all the members of the partnership. BEMOLA DOSSEE *v.* MOHUN DOSSEE
I. L. R. 5 Calc. 792 : 6 C. L. R. 34

See SHAM SUNDAR LAL *v.* ACKHAN KUNWAR
I. L. R. 21 All. 71

12. ——— *One member as agent of others—Partnership.* As between the members of a joint family, any one or more may be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family or any members of it carry on a trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts

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of law as any other partnership. RAMSEBUK *v.* RAMLALL KOONDOO
I. L. R. 6 Calc. 815 : 8 C. L. R. 457

13. ——— *Joint family—Partnership—Infant sons—Mitakshara law—Promissory note, suit on—Non-joinder of parties—Plea in bar of suit.* In a suit on a promissory note executed by the defendant in favour of a firm whose original partners were two brothers, one of whom had previously died leaving an infant son surviving, while the other, who also had infant sons, was, at the date of the execution of the note, sole surviving partner of the firm:—*Held*, that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, does not necessarily become a member of the trading partnership carrying on the business. There must be some consentient act to that effect on the part of the infant and his partners. Even, therefore, where parties are governed by the Mitakshara law, an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. Decrees obtained in such suits by or against the managers of the business are presumed to have been obtained by or against them in their representative capacity and will be binding on the whole joint family. *Bissessur Lall Sahoo* v. *Luchmessur Sing, L. R. 6 I. A. 233 ; Petum Doss* v. *Ramdhone Doss, 1 Taylor 279 ;* and *Ramsebuk* v. *Ramlall Koondoo, I. L. R. 6 Calc. 815*, referred to. LUTCHMANEN CHETTY *v.* SIVA PROKASA MODELIAR
I. L. R. 26 Calc. 349
3 C. W. N. 190

14. ——— *Family firm—Cutchi Memons—Partnership in firm—Onus probandi—Adjudication of insolvency under s. 9 of Insolvent Act.* By an order of adjudication one *H*, together with eight other persons alleged to be his partners in the firm of *H, M, C*, was adjudged an insolvent. *H* appealed denying that he was a partner. All of the insolvents were Cutchi Memons, and were members of the same family. The firm had existed for forty years, having been established by the great-grandfather of the appellant, and had ever since been carried on under the same name by the family of the founder. The petitioning creditors alleged that the members of the insolvent's family lived together and were joint in food and estate, and that the firm was a family firm ; that the appellant's father had been principal manager of the firm in his lifetime, and that on his death two years previously the appellant had taken his place. The appellant denied that he was joint with the other members of the family, or that he had ever been a partner, or had represented himself to be a partner in the firm. *Held*, confirming the order of the Court below, (i) that, being a Cutchi Memon, the rules of Hindu law and custom applied to the appellant, and that his position with regard to the family property was to be determined by the same conditions as would apply in the case of a member of a joint and undivided Hindu family ; (ii) that the firm in question was a family firm, and was the property of a family subject to Hindu law ; that whatever might have been the appellant's position previously, it was clear that on his father's death his father's share in the firm by law descended to the appellant and his brothers, if he had any. He then became a partner in the firm, if he had not been so already. It was open to him to show that he did not become a partner ; but the facts abovementioned being established, the burden rested on him of displacing them, and of showing that he did not become a member of the family firm. *In the matter of* HAROON MAHOMED . **I. L. R. 14 Bom. 189**

15. ——— *Partnership—Joint family, Member of, starting new business—Presumption as to funds obtained from joint family, how rebutted.* The father of *A, N, M, H*, and *T* died, leaving a gold and silver business, which was, after his death, carried on jointly for the benefit of the family. The brothers remained joint in food, worship, and estate. Subsequent to the death of the father, *A* and *N* started a new business in rice in partnership with others. It was shown by the evidence that the profits of the new business were appropriated exclusively by the admitted partners, and *A* denied that the other brothers had any interest in that business. *Held*, that on those facts the presumption that the new business was started with funds belonging to the joint family was rebutted. *Semble :* That if the other members of the joint family were minors at the time the new business was started, the eldest brother had no power to start the new business so as to bind the infant members. MAKHUN DUTT *v.* RAM LALL SHAW . . . . . **3 C. W. N. 134**

16. ——— **Promissory note by member of an undivided Hindu family**—*Liability of other members—Negotiable Instruments Act (XXVI of 1881), ss. 4, 26, 27.* The maker of a promissory note (executed in plaintiff's favour), being a member of an undivided Hindu family, had borrowed from plaintiff the money represented by the note and purchased therewith land for the benefit of the family which consisted of himself (the maker of the note), an uncle, and the sons of the uncle. The uncle had always recognized the debt as a family debt, and the land purchased with the money borrowed had, in a subsequent division of property, been allotted to the uncle and his sons, who had also agreed with the maker of the note that they would discharge the debt. On a suit being brought against the maker of the note, as well as the uncle and his sons :—*Held per* SHEPHARD and SUBRAHMANIA AYYAR, *JJ.* (DAVIES, *J.*, dissenting), that all the members of the undivided family were liable. *Per* SUBRAHMANIA AYYAR, *J.* Even assuming that the maker of the note was not the manager of the family, he was the agent of his

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co-parceners when buying the land and raising the loan, and his acts as such agent bound the uncle who expressly assented to them; also that, insamuch as the uncle was liable, his sons must be also held liable for the debt to the extent to which they were interested in the family property, and that even if they were minors when the money was borrowed. *Per* DAVIES *J.*—(i) Had the suit been brought on a bond or on the debt of which the promissory note afforded evidence, other members of the family might have been held liable as well as the maker of the note, on the ground that the latter represented them. But in the case of a suit on a promissory note (as this suit was) no such representation could be alleged unless the persons said to be represented appeared by name on the face of the document. (ii) Where the name of only one person appears on a promissory note and he does not purport to make it on behalf of any one but himself, none but the maker can be held liable to discharge it. KRISHNA AYYAR *v.* KRISHNASAMI AYYAR **I. L. R. 23 Mad. 597**

17. ——— Business carried on by one member as manager—*Liability of all as joint owners—Ancestral trade and ordinary partnership, difference between—Contract Act IX of 1872.* *J*, the father of the three defendants established a trading firm in 1865 under the name of *J H*. He and his three sons lived together as a joint Hindu family. *J* died in 1872, and the business was continued under the same name by *S* as the eldest brother and manager of the family. The youngest of the three brothers was a minor at the date of his father's death. The plaintiff sued the three brothers to recover money due on an account signed by *S* in the name of the firm. The second defendant contended that he had never participated in the property of the business; that he had not resided at the family residence for six years; that he could not be considered a partner of the firm, and therefore was not liable to the plaintiff. *Held*, that he could not repudiate a liability arising out of the ordinary transactions of the firm. During his father's life he was joint owner, and after his father's death he acquiesced in the continuance of the firm under the same name, and ostensibly therefore with the same constitution. He had done no act to divest himself of his share. He had given no notice of repudiation and made no partition, and there was nothing to prevent him from demanding his share of the partnership or claiming to share in the profits. There was therefore nothing to exempt him from the ordinary rule of Hindu law, which makes every member of a united family liable for debts properly incurred by a manager for the benefit of the family. The debt due to the plaintiff for goods supplied to the shop was properly incurred in the course of the ordinary transactions of the firm, and presumably therefore for the benefit of all the joint owners of the firm. The rights and liabilities arising out of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family cannot be determined by exclusive reference to the Contract Act (IX of 1872), but must be considered also with regard to the general rules of Hindu law which regulate the transactions of united families. An ancestral trade may descend, like other inheritable property, upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses. SAMALBHAI NATHAUBHAI *v.* SOMESHVAR MANGAL . **I. L. R. 5 Bom. 38**

18. ——— Payment of debt—*Debtor of undivided family—Release—Manager of family.* The debtor of an undivided Hindu family is not justified in paying his debt to the eldest member of the family, unless such eldest member be also the manager of the undivided family. If there is no manager, the debtor should obtain a release from all the members of the undivided family. SANGAPPA BIN CHANBASAPPA *v.* SAHEBANNA BIN KENGEDAPPA **7 Bom. A. C. 141**

19. ——— *Bond in favour of one co-sharer—Joint family—Payment of such bond made to another co-sharer when a discharge—Right to sue.* Where a debt due to one member of a joint family has been paid by the debtor to another member of the family, the question whether such payment operates as a discharge depends on the circumstances under which it was made. *A* and *B* were members of a joint Hindu family. Both managed the joint property for the common benefit. Each used to recover debts due on bonds taken in the other's name. In 1890 defendant passed a bond to *A*. In 1892 he passed a mortgage bond to *B*, the consideration for which was stated to be the balance due on the former bond. Subsequently *A* sued defendant on the bond of 1890. *Held*, that under the circumstances the mortgage bond passed to *B* operated as a valid discharge of *A's* claim under the previous bond. GURUSHANTAPPA *v.* CHANMALLAPPA . . **I. L. R. 24 Bom. 123**

20. ——— Debt incurred by senior member of family—*Mortgage of family property by senior member—Decree against mortgagor—Purchase under that decree—Suit for partition of property among the co-parceners—Recognition of debt as binding on co-parceners—Suit by purchaser for possession—Evidence of award in partition insufficient as showing necessity for original mortgage.* An undivided Hindu family consisted of *A*, his three sons, and his nephew. *A* mortgaged family land while the nephew was a minor. The mortgagee filed a suit and obtained a decree on the mortgage,

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in execution of which the land was put up for sale and purchased by plaintiff. The nephew was not made a party to that suit. *A* died, whereupon the nephew instituted a suit for partition against *A's* sons: plaintiff was not a party to that suit. The matters in dispute therein were referred to arbitrators, who held that the mortgage which *A* had executed was binding on the nephew, and charged his share with a half of it. They also awarded the nephew certain land, being part of the land which had been purchased by plaintiff. Plaintiff now sued to recover the land so awarded to the nephew, but adduced no evidence to show that the mortgage executed by *A* was binding on the nephew, beyond proving the award by the arbitrators: *Held*, that, although the decree which had been passed in accordance with the award of the arbitrators in the partition suit was binding as between the nephew and the other members of the family, it could not be used in the present suit as evidence that the debt was for a family purpose binding on the nephew; and that, there being no other evidence, the suit failed. KRISHNA REDDI *v.* THAMBU REDDI (1902) **I. L. R. 26 Mad. 28**

21. ——— Document executed by eldest brother on understanding that all would join—*Proposed agreement with all members of Hindu family—Agreement not perfected—Execution of document by eldest brother upon understanding that all would join—Refusal by younger brothers to execute—Suit on document dismissed.* Plaintiff sued two brothers and the minor son of the elder of them on a hypothecation bond, which recited that it was executed by the elder on his own behalf and on behalf of his minor son, and by his two brothers (one of whom was now deceased) on their own behalf, respectively. In fact, it was signed only by the eldest, for himself and for his son, the other brothers having refused to execute it when asked to do so. The defence was that no suit could be brought on the document, inasmuch as it was not completed; and the younger of the two surviving brothers further contended that the loan had not been contracted for his benefit; that the eldest brother had not executed the bond on his behalf; and that he had never agreed to execute it himself. The document separately named each of the three brothers as parties; they were not described as being undivided, and the eldest was described as only representing his son. *Held*, that the document constituted merely a proposed agreement which had never been perfected; the plaintiff having contracted and the eldest brother having executed it, upon the understanding that the two younger brothers would join in its execution; and that neither the elder nor the younger defendant was liable. *Held*, also, that, if the parties intended that all the members of the family should execute the document, it could not take effect, by reason that the person who had alone executed it

happened to be the managing member, and that the debt was recited to have been incurred for the benefit of the family. SIVASAMI CHETTI *v.* SEVUGAN CHETTI (1901) . . **I. L. R. 25 Mad. 389**

22. ——— Liability of sons for father's debts—*Joint Hindu family—Liability of sons to pay their father's debts—Limitation—Act XV of 1877 (Indian Limitation Act), Sch. II, Art. 120.* The father of a joint Hindu family executed, on the 23rd June, 1898, a simple money bond, payable on the 18th June, 1894. The money not being paid on due date, the creditor sued the father alone, and obtained a decree against him on the 17th June, 1897. The father died in 1899, and after his death the creditor attached certain joint family property in the hands of the sons. The sons objected to the attachment, and their objection was allowed. Thereupon the creditor, on the 22nd January, 1900, filed a suit against the sons, claiming payment from them of the father's debt. *Held*, (i) that the liability of the sons to pay their father's debt accrued on the 18th June, 1894, the date when the bond became payable, and (ii) that the suit was one to which Art. 120 of the second Schedule to the Indian Limitation Act, 1877, applied, and was therefore not barred by limitation. *Badri Prasad* v. *Madan Lal, I. L. R. 15 All. 75*, followed. *Mallesam Naidu* v. *Jugala Panda, I. L. R. 23 Mad. 292*, and *Natasayyan* v. *Ponnusami, I. L. R. 16 Mad. 99*, referred to. The latter case dissented from as regards the *terminus a quo* of the period of limitation. NARSINGH MISRA *v.* LALJI MISRA (1901) . . . **I. L. R. 23 All. 206**

23. ——— Loan taken by Manager—*Whether other members liable.* The *karta* of a joint family governed by the *Dayabhaga* law executed a note of hand, and it was alleged by the plaintiff that the money was borrowed by him for the purpose of carrying on a trade in his name, but that the income was spent for the benefit of the joint family. The lower Court held that the *karta* of a joint family had presumably authority from the other members of the family to contract a debt, and that the debt contracted by him was presumably for the benefit of the other members of the family. The lower Court therefore passed a decree making the brother of the maker of the note, belonging to the joint family, liable jointly with the heirs of the maker. *Held*, that the view taken by the Judge was erroneous, and that the proposition may be true as regards the sons in a *Mitakshara* family as to debts contracted by the father, but not as regards other members. *Held*, also, that, in order to make the brother of the maker of the note liable, it was necessary to find (i) whether the trading business was a joint family business, (ii) whether the note was given for the purpose of the trading business of the family, and (iii) whether the money was appropriated for the purpose of the trading business. NAGENDRA CHANDRA DEY *v.* AMAR CHANDRA KUNDU (1903) . . . . . **7 C. W. N. 725**

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24. ——— Engagement entered into by father—*Joint Hindu family—Security—Liability of sons under an engagement by their father to be answerable for the payment of rent by a third person. Held*, that under the Hindu law the sons in a joint Hindu family are liable as such for the due fulfilment of an engagement entered into by their father as surety for the payment of rent by a lessee in accordance with the terms of his lease. *Tukarambhat* v. *Ganga Ram Mulchand Gujasr, I. L. R. 23 Bom. 454*, and *Sitaramayya* v. *Venkatramanna, I. L. R. 11 Mad. 373*, followed. MAHARAJA OF BENARES *v.* RAMKUMAR MISIR (1904) . . **I. L. R. 26 All. 61**

25. ——— Decree against karta—*Hindu Law—Dayabhaga—Debt incurred for joint family purpose—Execution when available against joint family property—Effect, when karta sued in personal capacity—Representative capacity—Parties—Agency—Difference between Dayabhaga and Mitakshara law.* When a debt is contracted by the managing member of a joint family for a joint family purpose, the joint family and not the managing member alone becomes liable for it. There is no difference between the Mitakshara and the Dayabhaga School of Law in this matter. But a decree for such a debt, obtained against the managing member alone, where the other members are adults cannot be executed against the joint family property, if the managing member was sued not in his representative, but in his personal capacity. DWARKA NATH CHOWDHURY *v.* BUNGSHI CHANDRA SAHA (1905) . . . . **9 C. W. N. 879**

26. ——— Karta as administrator, powers of—*Personal bond of karta, if binding on co-parcener—Probate and Administration Act (V of 1881), s. 90.* A *karta* of a joint Hindu family cannot cast the obligation of a personal bond on his co-parceners. The co-parceners, however, might become liable on the bond, if the *karta* was acting as their agent or if they subsequently acquiesced in it. *Chalamlya* v. *Varadayya, I. L. R. 22 Mad. 166*; and *Kirshna Ramya* v. *Vasudeb Venkatesh Pai, I. L. R. 21 Bom. 898, 816*, referred to. *Obiter:* A *karta* of a joint Hindu family, who is also the administrator of the joint estate, cannot exercise powers as *karta*, which he is directly prevented from exercising as administrator. *Shurrut Chunder* v. *Raj Kishen Mukherjee, 15 B. L. R. 350*, referred to. RANJIT SINGH *v.* AMULYA PROSAD GHOSE (1905) . **9 C. W. N. 923**

27. ——— Liability of minor member of family for trade debts—*Joint Hindu family—Family business—Separate property.* Where a member of a joint Hindu family carrying on an ancestral family business upon attaining majority separates entirely from the family and the family business, and thereafter acquires separate property, such separate property cannot be made liable for the debts incurred by the family trading firm, but the interest of the separating member in the family property will alone be liable. *Chalamayya* v. *Varadayya, I. L. R. 22 Mad. 167*, followed. *Ram Lal Thakursidas* v. *Lakhmichand Muniram, 1 Bom. H. C. App. li; Johurra Bibee* v *Srigopal Misser, I. L. R. 1 Calc. 470; Bemola Dossee* v. *Mohun Dossee, I. L. R. 5 Calc. 792*, and *Lutchmanen Chetty* v. *Siva Prokasa Modeliar, I. L. R. 26 Calc. 349*, referred to. *Samalbhai Nathubhai* v. *Someshwa I. L. R. 5 Bom. 38*, and *In the matter of Haroon Mahomed, I. L. R. 14 Bom. 189*, distinguished. BISHAMBHAR NATH *v.* FATEH LAL (1906) **I. L. R. 29 All. 176**

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28. ——— Family business—*Joint family—Suit to recover a debt due to the firm—Parties to such suit. Held*, that the managing members of a joint Hindu family carrying on a joint family business are not entitled to maintain a suit in their own names against debtors of the family without joining with them in the suit either as plaintiffs or defendants all the other members of the family. *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajipad, I. L. R. 3 Mad. 234; Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad, I. L. R. 10 Bom. 32; Ramsebuk* v. *Ramlal Koondoo, I. L. R. 6 Calc. 815; Kalidas Kevaldas* v. *Nathu Bhagvan, I. L. R. 7 Bom. 217; Imam-ud-din* v. *Liladhar, I. L. R. 14 All. 524; Alagappa Chetti* v. *Vellian Chetti, I. L. R. 18 Mad. 33*, and *Angamuthu Pillai* v. *Kolandavelu Pillai, I. L. R. 23 Mad. 190*, referred to. *Pateshri Partap Narain Singh* v. *Rudra Narain Singh, I. L. R. 26 All. 528*, distinguished. SHAMRATHI SINGH *v.* KISHAN PRASAD (1907) . **I. L. R. 29 All. 311**

29. ——— *Joint family—Ancestral family business—Liability of member of the family after severance of his connection with the family business.* A member of a joint Hindu family carrying on an ancestral family business upon attaining the age of majority completely severed his connection with the family business, nor was it shown that he ever ratified any of the transactions entered into by the family firm. *Held*, that such member could, on the failure of the family business only, be made liable for its debts to the extent of his interest in the joint family property. He could not be held personally liable. BISHAMBHAR NATH *v.* SHEO NARAIN (1906) **I. L. R. 29 All. 166**

30. ——— Promissory note by karta—*Negotiable Instruments Act (XXVI of 1881), ss. 4, 26, 27, 28—Joint Hindu family, liability of—Promissory note executed by karta—Family necessity—Liability of other members—Agency.* Where the *kurta* of a joint undivided Hindu family borrows money on promissory notes for the purpose of a joint family business or to meet a joint family necessity, the creditor can recover the money from all the members of the joint family, although they were not all

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parties to the notes. Ss. 26, 27, 28 of the Negotiable Instruments Act refer to cases of ordinary agency. *Krishna Ayyar* v. *Krishnasami Ayyar, I. L. R. 23 Mad. 597 ; Nagendra Chandra Dey* v. *Amar Chandra Kundu, 7 C. W. N. 725,* referred to. BAISNAB CHANDRA DE *v.* RAMDHON DHOR (1906)
11 C. W. N. 139

5. POWERS OF ALIENATION BY MEMBERS.

(*a*) MANAGER.

1. ———— Power of manager—*Position of manager of family—How far his acts bind other members.* A Hindu family is regarded as a corporation whose interests are necessarily centered in the manager, the presumption being that the manager is acting for the family unless the contrary is shown. Before the introduction of the Civil Procedure Code, this was so equally with regard to litigation as to other transactions, and it was not then obligatory, or even customary, for a Hindu manager to set forth that he sued in a representative character (as now required by the Code, s. 50) or to add the co-owners as parties to the suit (as required by English law). GAN SAVANT BAL SAVANT *v.* NARAYAN DHOND SAVANT . . . . **I. L. R. 7 Bom. 467**

2. ———— Ancestral family trade. The case of a widow, or of a daughter, differs from that of the manager or head of an undivided family who manages an ancestral trade, and has a certain power to pledge for the requirements of the business. The validity of his charge, however, on the family estate, where there is a minority or non-consent among the members of the family, depends on proof that the charge was necessary, or was believed to be so by the mortgagee after due inquiry. The manager, appointed by the daughter, on whom the family estate has devolved, has no larger power to pledge the ancestral assets than his principal. SHAM SUNDAR LAL *v.* ACHHAN KUNWAR
I. L. R. 21 All. 71
L. R. 25 I. A. 183
2 C. W. N. 729

Upholding decision of High Court in ACHHAN KUAR *v.* THAKUR DAS . **I. L. R. 17 All. 125**

3. ———— Debt incurred by managing members of a joint family—*Personal liability of other members.* Three brothers, being the managing members of their joint Hindu family, borrowed money from the plaintiff for a family purpose. The plaintiff now sued the survivor of the brothers and the sons of all three to recover the amount of the debt, and he obtained a decree that the debt was recoverable from the family estate and also personally from the survivor of the three borrowers. *Held,* on appeal, that the plaintiff was not entitled to a personal decree against the other defendants. CHALAMAYYA *v.* VARADAYYA
I. L. R. 22 Mad. 166

HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS—*contd.*

(*a*) MANAGER—*contd.*

4. ———— *Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale.* Where a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt, and, if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale. SAKHARAM *v.* DEVJI
I. L. R. 23 Bom. 372

5. ———— Transactions of manager, liable to be questioned—*Fraudulent contract.* Every member of a family of proprietors who has an interest in the estate has a right to question any transactions entered into by the elder member as manager whereby the former would be defrauded. The right of a person defrauded by a contract between a manager and a third party is to have the contract altogether rescinded. RAVJI J. SHARANGPANI *v.* GANGADHARBHAT . **I. L. R. 4 Bom. 29**

6. ———— Money expended in improvement or repair—*Agreement by one co-parcener in respect of expenditure of family property.* While the members of a Hindu family enjoy in common undivided property, money expended in its improvement or repair is considered as spent on behalf of all the members alike, and all have the benefit of the outlay when a division takes place. There is no rule of law precluding one member of an undivided Hindu family, though living together, from entering into an agreement with his co-parceners in respect of the expenditure on family property and repayment of self-acquired funds ; and such an agreement is rendered more reasonable and probable where portions of the family property are occupied and enjoyed by each of the members living separately. MUTTASVAMI GAUNDAN *v.* SUBBIRAMANYYA GAUNDAN . . . . . **1 Mad. 309**

7. ———— Discretion of managing member to expend moneys for improvements—*Mortgage for improvements to family property.* Where a mortgagee of a house, the ancestral property of a Hindu family, advanced money on the representation that it was required to complete improvements in the family house and to pay a mortgage-debt carrying a higher rate of interest which had been contracted to make those improvements:—*Held,* that the sons of the mortgagor were bound by the mortgage. In the case of improvements of the family property made by the managing member of a Hindu family where the sum spent was large, but the discretion of the managing member was exercised *bonâ fide* and for the benefit of the estate and the family had this benefit, such discretion should not be narrowly scrutinised. *Saravana Tevan* v. *Muttayi Ammal, 6 Mad. 371,* and *Hunooman*

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*a*) MANAGER—*contd.*

persaud Panday v. *Munraj Koonweree, 6 Moo. I. A. 393,* discussed and followed. RATNAM *v.* GOVINDARAJULU . . **I. L. R. 2 Mad. 339**

8. ——— Costs incurred by manager in protecting property of joint family —*Liability of shares of members of joint family for.* Pending an appeal, the plaintiff, who was the appellant, died, leaving one adult and four minor sons. The adult son prosecuted the appeal, which was dismissed, as was the suit in the Court below, with cost. The decrees for costs were sold by the defendant to a third person, who caused certain property which belonged to the estate of the plaintiff to be sold in execution. *Held,* in a suit by the minor sons to recover possession of the shares in the property sold, that, as all the sons were interested in the litigation, all their shares were liable for the costs, and the suit was dismissed. JUTADHARI LAL *v.* RUGHOBEER PERSAD **I. L. R. 9 Calc. 508 : 12 C. L. R. 255**

9. ——— Alienation by manager—*Sale by manager of joint family.* The manager of an undivided Hindu family can sell his own share of the family property only. DAMODHAR VITHAL KHARE *v.* DAMODHAR HARI SOMANA **1 Bom. 183**

KOYLASHESSUR BOSE *v.* NARAINEE DOSSEE **10 W. R. 303**

10. ——— *Acquiescence.* An alienation made by the managing member of the joint Hindu family cannot be questioned by another member if he stands by and sees to the application of the purchase-money for the benefit of the whole family, without refusing to participate in it. WHITE *v.* BISTO CHUNDER BOSE . . **2 Hay 567**

11. ——— *Sale of family property by manager when binding on an adult member of family absent at time of sale—Consent to such sale.* *B* and *C* were half-brothers and members of an undivided family. *C* left his native place, and in his absence *B* carried on the family business and managed the family affairs. In order to raise money for the business and to provide for the marriage expenses of *C's* sisters, *B* sold to the plaintiff a house, which was part of the family property. On *B's* death, *C* returned to his village and refused to give up possession of the house to the plaintiff, who accordingly filed this suit. It was contended that *B* could not sell the house so as to bind *C* without his expressed assent. *Held,* confirming the decree of the lower Appellate Court, that the sale was binding on *C,* who, under the circumstances, must be presumed to have intended that *B* should continue as *de jure* and *de facto* manager to exercise such powers as the family necessities required. CHHOTIRAM *v.* NARAYANDAS **I. L. R. 11 Bom. 605**

HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*a*) MANAGER—*contd.*

12. ——— *Mortgage by member of Hindu family.* A member of an undivided Hindu family has a right to mortgage his own share of the family estate, and, if he be acting as representative and manager of the undivided family to mortgage the interests of the other members of the family therein on any common family necessity, or for the common benefit and use of the undivided family. GUNDO MAHADEV *v.* RAMBHAT BIN BHAUBHAT . . . . **1 Bom. 39**

13. ——— *Power of manager to alienate joint family property.* The holder of an impartible zamindari governed by the law of primogeniture having a son executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend (authorized in that behalf by the Court of Wards) now sued the assignee of the lessee to have the lease set aside. *Held, per* MUTTUSAMI AYYAR and WILKINSON, *JJ.* (affirming the judgment of PARKER, *J.*), that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into. BERESFORD *v.* RAMASUBBA **I. L. R. 13 Mad. 197**

14. ——— *Sale by widow, as manager of the joint family, of immoveable property left by husband—Family necessity—Effect of sale as against minor sons—Deed of sale—Intention of parties.* A Hindu died in debt, leaving two minor sons. His widow, who after his death was the manager of the family, borrowed money for family purposes, and as security mortgaged some of the immoveable property left by her husband. She subsequently sold it, and the Court held that the evidence showed that it was sold to pay off the family debts. *Held,* that the minor sons were bound by the sale. *Held,* also, that the effect of a conveyance of property sold by the manager of a family depends on the intention of the parties as gathered from the terms of the instrument and from the surrounding circumstances. SUCCARAM MORARJI SHETAY *v.* KALIDAS KALIANJI **I. L. R. 18 Bom. 631**

15. ——— *Gift by manager of part of family property—Illegitimate daughters —Maintenance, right to.* *R,* the manager of an undivided Hindu family, gave certain shares in a spinning and weaving company, which had been purchased out of family funds, to *G* for and on behalf of the plaintiffs, who were *R's* illegitimate daughters. After the death of *R* and *G, R's* illegitimate daughter sued the surviving members of

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS—*contd.*

(*a*) MANAGER—*contd.*

the family for a declaration that the shares belonged to them, and that they had a right to have them transferred to their names in the company's books. *Held*, without deciding whether illegitimate daughters were entitled to simple maintenance from the family property, that in any case *R* as manager could not allienate the shares for that purpose, as there were no emergent circumstances requiring it. PARVATI *v.* GANPATRAO BALAL . . **I. L. R. 18 Bom. 177**

16. ——— *Gift of undivided share by adults of family—Minor co-sharer not a party to gift.* According to Hindu law, under ordinary circumstances, a gift by a co-parcener of his undivided share in immoveable property is invalid, and a minor's share cannot be given away by a manager except in case of necessity or for certain specified purposes. Certain land which was joint family property was given by the adult members of the family to the plaintiff as the worshipper of a deity. A minor co-parcener did not join in the gift. The plaintiff sued the occupier for possession. *Held*, that the plaintiff could not recover. The gift, not being made from necessity, nor for the performance of any pious duties obligatory on the minor or the family, was invalid, and could not be given effect to even with respect to the shares of the donors. KALU *v.* BARSU . . **I. L. R. 19 Bom. 803**

17. ——— *Manager of lunatic appointed under Act XXXV of 1858—Mortgage of interest of minors.* Where a person is appointed manager of a lunatic's estate under Act XXXV of 1858, he can only make a valid alienation in accordance with the provisions of that Act, although he may also be *de facto* manager of the family property. A Hindu married woman having a lunatic husband and minor sons was appointed guardian of the lunatic's estate under Act XXXV of 1858. She was also *de facto* manager of the family. She mortgaged the family property without the sanction of the Court, as required by s. 14 of the Act. *Held*, that the mortgages were invalid as regards the lunatic's interest in the property, but as regards the interest of the minors, which was vested in them at the time of the mortgages, the property being ancestral, the mortgages were binding if made for family purposes. ANPURNABAI *v.* DARGAPA MAHALAPA NAIK . . **I. L. R. 20 Bom. 150**

18. ——— *Debts contracted by manager for family purposes—Evidence required where there has been a series of transactions—Onus of proof and presumption as to loans being for family purposes.* Although there is no presumption that moneys borrowed by the manager of a Hindu family are borrowed for family purposes, and a plaintiff seeking to make the family property liable must prove that the loans were contracted for the family, it is not incumbent on the plaintiff to show, in

HINDU LAW—JOINT FAMILY—*contd.*

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(*a*) MANAGER—*contd.*

respect of each item in a long series of borrowings, the particular purpose for which it was borrowed. It will be sufficient for him to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed, although he is not able to indicate the particular purpose for which such sum has been borrowed. KRISHNA RAMAYA NAIK *v.* VASUDEV VENKATESH PAI. VASUDEV VENKATESH PAI *v.* MHASTI **I. L. R. 21 Bom. 808**

19. ——— *Purchaser from member of joint family.* If a person dealing with a Hindu representing himself to be the representative and manager of an undivided family, comprising infant members, can show that, after reasonable enquiry, he believed in good faith that the person so representing himself was entitled to act, and was acting, for the family, and that the transaction entered into with him by such manager was entered into for some common family necessity or for the benefit of the infants, such act of the manager is valid and binding on the minor members of the family. TRIMBAK ANANT *v.* GOPALSHET BIN MAHADSHET MAHADU . . . **1 Bom. 27**

20. ——— *Power of manager to alienate or charge shares of other members of family—Necessity—Onus probandi.* It is a firmly settled rule of Hindu law, resting upon the authority of the Mitakshara and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immoveable ancestral property except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate; and in every case to which the rule is applicable, the onus of showing either by direct or presumptive proof a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question of what is the amount of proof which the law renders necessary to discharge that burden of proof:—*Held*, that where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it has not been advanced for the purpose of discharging an antecedent charge on the property or an old debt incurred by an ancestor; the case of the vendee or mortgagee, as regards the existence of a family

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5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*a*) MANAGER—*contd.*

need or sufficient beneficial purpose requiring the advance of the consideration-money, must be established by positive proof. But that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there was this distinction to be observed, that the burden of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof not only of the consideration-money for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation, and the sale or mortgage a prudent arrangement for its discharge. SARAVANA TEVAN *v.* MUTTAYI AMMAL . **6 Mad. 371**

21. ——————— *Mortgage of joint family property—Powers of karta—Acknowledgment by karta or by executor under Hindu will —Acquiescence.* *H*, a Hindu, died leaving two adult and two minor sons, and having made a will or anumatipatra, addressed to his two eldest sons, *L* and *G*, whom he thereby appointed malik mukhtars of the whole of his estate with full powers of management. He directed them to maintain his widow and minor sons and to pay the marriage expenses of the latter out of the joint estate, and further directed them to pay his liabilities and, if necessary, to raise money for that purpose by sale or mortgage; the necessary documents to be signed by *L* and *G*, "the names of the infants being signed by you as guardians and executors." In case of the death of either *L* or *G*, the will provided that all the powers of the executors should be vested in the survivor; the minors to have same powers upon attaining majority. The will further provided that the executors should, when the minors came of age, "make over to them with explanation the share of each;" and that the four sons should take the property in equal shares. *L* died after his father leaving a widow and having made a will, whereof he appointed *G* executor, and *G* subsequently obtained a certificate under s. 7, Act XL of 1858, in respect of the property of his minor brothers. Thereafter *G*, by a deed in the English form, which was executed by him alone "as executor of *H*" and also "as executor of *L*," mortgaged a portion of the property to the plaintiff to secure R6,847-3-3. Of this sum R947-3-3 were advanced to *G* at the time of the mortgage, and were applied by him for the benefit of *H's* estate, R1,000 were advanced to pay a debt due from *L* to third persons, the remainder being in respect of debts of *H*, all of which, however, with the exception of one debt of R100, were barred by the law of limitation. In a suit by the mortgagee for an account and sale, or foreclosure of the mortgaged property, it appeared that one of the minors had attained his majority when the mortgage was executed, and the other some years thereafter, and that both had been informed of the mortgage several years before the suit, and had then raised no objections. No question as to the effect of the limitation law on the mortgage was raised on the pleadings or at the trial. *Held*, by MARKBY, *J.*, that, although the mortgage was not executed in accordance with the will of *H*, the younger sons had stood by and had taken the benefit of the transaction, and could not therefore question it. A member of a joint Hindu family is bound, when he comes of age, to make himself acquainted with the acts during his minority of the manager, and to express his dissent at once if he disapprove of such acts. No evidence having been offered as to *L's* estate when the mortgage was executed or that *L's* widow knew of the mortgage, the suit must be dismissed as against her. *Held*, on appeal, by COUCH, *C.J.*, and PONTIFEX, *J.*, that debts by Hindu law being a charge upon the estate of the debtor, and the intention of *H*, as shown by the provision in his will for the maintenance of his widow and minor sons, being that the family should for a time continue to be joint, no charge or trust was created by the clause in *H's* will for payment of his debts, and therefore the fact that in executing the mortgage *G* professed to act under the will and not as karta did not invalidate the mortgage. For the same reason, the clause for payment of debts could not prevent the operation of the law of limitation. The manager of a joint Hindu family, or the executor of a Hindu will, has no power by acknowledgment to revive a debt barred by the law of limitation except as against himself. *G* as karta of the joint family could not make a valid mortgage of *L's* share separately from the shares of the other members of the family; his estate therefore was liable to pay the plaintiff the R1,000 borrowed to pay *L's* debt, and his representatives could claim to be repaid from *L's* estate. GOPALNARAIN MOZOOMDAR *v.* MUDDOMUTTY GUPTEE. SHOSHEE-BHOOSUN MOZOOMDAR *v.* MUDDOMUTTY GUPTEE. MUDDOMUTTY GUPTEE *v.* BAMASOONDERY DOSSEE **14 B. L. R. 21**

22. ——————— *Mortgage of joint family property.* An alienation made by a managing member of a joint Hindu family is not binding upon his adult co-sharers unless it is shown that it was made with their consent, either express or implied. In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family; and the latter

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entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power of pledging the family credit or estate when it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them and obtain their consent before pledging such credit or estate. MILLER *v.* RUNGA NATH MOULICK . **I. L. R. 12 Calc. 389**

23. ——————— *Mitakshara law —Loan by Karta—Ancestral property.* *A*, the karta of a Hindu family governed by the Mitakshara law, living with his two sons, *B* and *C*, in joint enjoyment of the family property, took a loan from certain persons, and executed to them a mortgage bond on the joint family property. The bond-holders obtained a decree on their bond, in execution of which they caused the property to be sold, and themselves became the purchasers. *C* was a minor at the time of the alienation. In a suit by *B* on behalf of himself and *C* to set aside the alienation, on the ground that it had been made without their consent and without legal necessity, the Court found that *B* had taken such a part in the transactions leading to the alienation as made him a consenting party to it; that there was no legal necessity for the alienation; and that, *C* being a minor, the alienation was not the joint act of all the members of the family. *Held*, that, under these circumstances, the alienation failed to convey to the purchasers either the entirety of the property or any share or interest in it, and *C* was entitled to have it set aside. In ordering the alienation to set aside, the Court, in the interest of the minor son, and favouring the equity the purchasers clearly had against *A* and *B*, directed that, on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of *A* and *B* should be jointly and severally subject to the lien thereon of the purchasers for the repayment of the loan to *A*. So long as the members of a Hindu family under the Mitakshara law are living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, no member of the family has any separate proprietary right therein which he can alienc or encumber. The property can only be aliened by the joint act of all the members, express or implied; or, in case of justifiable family necessity, by the karta alone. MAHABEER PERSHAD *v.* RAMYAD SINGH . . **12 B. L. R. 90 : 20 W. R. 192**

24. ——————— *Attachment and sale of the interest of manager where manager is not the father of other co-sharers—Tenants-in-common.* *N* and *H* (uncle and nephew) were members of an undivided Hindu family. On the 22nd April 1872, *N* mortgaged the land in dispute (part of the family property) to *J*, who, on the 10th June 1876, obtained a decree against *N* on the mortgage, and put up the land for sale in execution. It was purchased by the defendant on the 26th October 1876. *N* and *H* had previously sold the land to the plaintiff by a registered deed, dated the 30th June 1876. On the 28th September 1877, the plaintiff sued the defendant for possession of a half share of *H* in the land. The Subordinate Judge awarded the plaintiff's claim, holding that his purchase was *bonâ fide*, and that the share of *H* was not bound by the mortgage executed by *N* to *J*. In appeal the District Judge thought in unnecessary to consider whether the plaintiff's purchase was *bonâ fide*, and whether *H* was liable for the mortgage-debt, inasmuch as the interest of *N* alone had been sold under the mortgage decree, and the interest of *H* therefore was not affected by the sale. He affirmed the decree of the first Court, with the variation that the plaintiff and defendant were jointly entitled to the possession of the land. In second appeal it was contended for the defendant that the District Judge ought to have found whether the mortgage-debt contracted by *N* was for a family necessity and therefore binding on *N*, and whether the sale to the plaintiff was *bonâ fide*. *Held*, that the plaintiff was entitled to recover. The defendant had only purchased that which was seized and sold in execution of the decree, *viz.*, the right, title and interest of *N* in the land, and *H's* share was not affected by the sale. *Held*, also, following *Maruti Narayan* v. *Lilachand*, *I. L. R. 6 Bom. 564*, that it was not competent for the Court in this suit to consider the question whether the loan contracted by *N* in 1872 was contracted by him as manager for a necessary family purpose so as to bind the share of *H* in the property. *Held*, also, that, if the share of *N* had already been sold to the defendant under the mortgage-decree, the defendant and *H* were simply tenants-in-common, and there could be no objection to *H* doing what he liked with his remaining share. KISANSING JIVANSING *v.* MORESHWAR VISHNU . . **I. L. R. 7 Bom. 91**

See, also, PANDURANG KAMTI *v.* VENKATESH PAI **I. L. R. 7 Bom. 95 note**

25. ——————— *Mortgage of family property, effect of, on minor members.*—Sadoba, Raghoba, and Sambhapa were members of an undivided Hindu family. Sambhapa died, leaving him surviving several sons. Subsequently Sadoba, Raghoba, and Rajaram, the eldest son of Sambhapa, mortgaged the family house to the plaintiff. In 1877 the plaintiff brought a suit upon the mortgage against Sadoba, Raghoba, and Rajaram. The Court of first instance awarded him possession of the house until he should receive payment of the mortgage-debt. In execution of the decree, the plaintiff was obstructed by the widow and sons of Sambhapa, but after enquiry the Court, on 14th January 1879, overruled the objection and directed

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possession of the house to be given to the plaintiff. On 28th January 1879, the plaintiff complained that he was prevented from obtaining possession of one of the rooms in the said house; the defendant Babaji appeared, and admitted that he had locked up the room, and he refused to give up possession, contending that he was not bound by the mortgage, that at the date of the mortgage Rajaram was not joint with him and the other sons of Sambhapa, and that the loan was not required for family necessity. The Subordinate Judge dismissed the plaintiff's application. In 1882 the plaintiff brought the present suit against the defendant, in which he prayed for a decree giving him possession of the said room on the terms of the decree passed in 1877. The defendant alleged that the house in question was not the joint property of his uncles Sadoba and Raghoba, but that his father Sambhapa was the sole owner; that his uncles Sadoba and Raghoba and his brother Rajaram had no right to mortgage it, and that the money was not required for family necessity. He contended that the decree of 1877 was not binding on him, and, further, that the present suit was barred. *Held*, that the plaintiff was entitled to a decree against the defendant. There was nothing to show that at the date of the mortgage in 1875 the defendant was not still a member of the same joint family with Rajaram into which he had been born. In the mortgage transaction all the branches of the family were represented by their eldest members, and the mortgagee (the plaintiff) might reasonably suppose that a transaction entered into by them and apparently necessary for the common interest was really necessary. BALVANT SANATARAM *v.* BABAJI BIN SAMBHAPA . . **I. L. R. 8 Bom. 602**

26. ——————— *Mortgage for family purposes—Decree against manager for mesne profits—Execution against family property.* *D*, the manager of an Alyasantana family, having executed a usufructuary mortgage of certain land belonging to the family to *V*, to secure the repayment of a debt contracted for purposes binding on the family, *V* was compelled to sue for possession of the land mortgaged, and obtained a decree for possession against *D* and two other members of the family and for payment of mesne profits from the date of the mortgage against *D* only. After the death of *D*, *V* sought in execution proceedings against the surviving members of the family to obtain payment of the mesne profits decreed, by sale of the equity of redemption of the land mortgaged to him by *D*. *Held*, that *V* was not entitled to execute the decree for mesne profits against the family. VENKATA KRISHNAYYAR *v.* KAVERI SHETTATI : . . . **I. L. R. 7 Mad. 201**

27. ——————— *Polygar, position and liabilities of—Debts incurred by—Acquisition of moveable property by—Assets in hands of successor—Duty of lender dealing with polygar.*

HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*a*) MANAGER—*contd.*

Per KERNAN, *J.*—A simple loan and an express charge require the same foundation to bind the family estate of a polygar. The position of a polygar differs from that of a manager of a Hindu family in this incident amongst others, *viz.*, that *primâ facie* he borrows on his own personal credit (where there is no mortgage) and not on the credit of the family estate, and the rule requiring a lender to satisfy himself of the existence of family necessity or of the family benefit which justifies the manager in borrowing would not be sufficiently complied with by similar enquiries in the case of a polygar borrowing money. To entitle a creditor, obtaining a charge from a polygar on the corpus of the estate, to the security of the estate, proof of imminent pressure or danger of loss, or of such close enquiries as to the position of the estate and the immediate circumstances of the pressure or apprehended danger as to satisfy a prudent and reasonable mind of the truth of an alleged pressure and impending danger, should be given. *Per Curiam*—Although moneys lent by a creditor to a polygar have been actually expended in payment of paramount charges on the estate, the mere fact of such payments is no evidence of family necessity, nor can the estate be said to derive any benefit thereby, when the annual rents of the estate are more than sufficient to pay for all proper charges on the estate, so as to entitle the creditor to recover from the family estate. When a creditor has made no enquiry as to the necessity for a polygar borrowing money, he cannot remedy the omission by showing that if he had enquired he would have been informed that the money was wanted to pay for Government kist due by the polygar. *Per* KERNAN, *J.*—When the rightful owner of a polliam has stood by and allowed another to take and remain in possession of the polliam, and loans have been made to the *de facto* polygar, the moveable property, purchased by the *de facto* polygar out of the income or with borrowed moneys in his possession at his death, is assets available for payment of his creditors. *Per* MUTTUSAMI AYYAR, *J.*—The moveable property acquired by means of the income of the polliam by a *de facto* polygar is not available as assets for his creditors in the hands of *de jure* polygar who succeeded him and who has not admitted his predecessor's title, nor accepted maintenance from him, but moveable property acquired by means of borrowed money may be pursued by the creditor as assets. KOTTU RAMASAMI CHETTI *v.* BANGARI SESHAMA NAYANIVARU . **I. L. R. 3 Mad. 145**

28. ——————— *Agreement made by manager of family.* Every member of a joint family is not bound by an agreement made by the head of that family. The rent of a joint undivided tenure cannot be enhanced on the strength of an ikrar executed by one of the co-parceners. HEMUYETOOLAH CHOWDRY *v.* NIL KANTH MULLICK **17 W. R. 139**

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*a*) MANAGER—*contd.*

29. ——— *Authority of elder brother to sell.* In the absence of authority in the eldest brother from his brothers to sell their rights, the sale by the eldest brother is not the act of all the brothers. OAHAD BUKSH *v.* BINDOO BASHINEE DOSSEE . . . **7 W. R. 298**

See BHUJONANUND MYTEE *v.* RADHA CHURN MYTEE . . . . . **7 W. R. 335**

30. ——— *Permanent lease by elder brother—Necessity.* The elder brother in a joint Hindu family cannot grant a valid permanent lease of land without some consideration being proved to have been paid or applied towards meeting any necessary expenses of the joint family. BROJO MOHUN GHOSE *v.* LUCHMUN SINGH **W. R. 1864, 83**

31. ——— *Agreements made by adult members of family.* Arrangements relating to the enjoyment of joint family property and acknowledgments of the right of the several members of the family to acquire separate property made by the adult members of the family are to be held binding on the minor members of the family if they are not detrimental to their interest, and such arrangements consented to by a father should be held binding on his minor child. NURSINGH DASS *v.* NARAIN DASS . . . **3 N. W. 217**

Upheld by Privy Council . **26 W. R. 17**

32. ——— **Allegation of managership** —*Contract for sale of land by one of three brothers—Allegation in plaint that vendor was managing member—No allegation of authority or ratification by others—Suit for specific performance against all—Cause of action.* A plaint alleged that first defendant, as managing member of an undivided family consisting of the three defendants, had entered into a contract to convey certain land to plaintiff, and had placed him in possession thereof, after receiving a sum of money in part payment. There was no allegation that the other defendants were parties to the contract, or that they had authorized the first defendant to enter into it, or that they had ratified it. The plaint claimed specific performance of the contract as against all the defendants. *Held*, that it disclosed no cause of action as against the second and third defendants, and that (the allegations in the plaint having been proved as against first defendant) plaintiff was entitled to a decree for specific performance against first defendant, without determining whether the sale by him would or would not bind the interests of the other defendants in the property. KOSURI RAMARAJU *v.* IVALURY RAMALINGAM (1902) . **I. L. R. 26 Mad. 74**

33. ——— **Minority**—*Joint Hindu family —Mitakshara—Appointment of guardian of member of family—Liability of members on mortgages executed by karta.* A guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided *Mitakshara* family, such interest not being individual property, and therefore not property with which a guardian, if appointed, would have anything to do. In a suit to enforce mortgage-deeds against the members of a joint Hindu family governed by the *Mitakshara* law, it appeared that one of the three brothers constituting the family was a minor; that the mother had obtained a certificate of guardianship; that one at least of the mortgage-deeds was executed in her name with others; and that she, as guardian, could not (by reason of s. 18 of Act XL of 1858 and ss. 29 and 30 of Act VIII of 1890) make a mortgage of the minor's property without the sanction of the Court, which admittedly was not obtained. *Held*, by the Judicial Committee, that the mortgages must be considered to be mortgages by the family, entered into by the *karta* of the family, with the concurrence of the other adult members of the family, and could, so far as they were found to have been made for the benefit of the family and for legal necessity, be enforced against all the members. As to the second of the brothers, it was uncertain whether he was not also under the mother's guardianship, which would have prolonged his minority until he attained 21 years. It appeared, however, that he was at the time of the suit of full age and able to bring his case before the Court; that at the time of the mortgages in suit he was of full age according to Hindu law; that he executed the mortgages himself as a person of full age; and that, if there were any grounds for exempting him from liability, it was for him to show them, which he had failed to do: and on these grounds he was made equally liable with the *karta* of the family to a money decree for advances as to which necessity had not been established. GHARIB-ULLAH *v.* KHALAK SINGH (1903) . **I. L. R. 25 All. 407 : s.c. L. R. 30 I. A. 165 7 C. W. N. 681**

34. ——— **Power of manager**—*Karta, power of, to pledge family credit—Ancestral business. A karta* of a Hindu joint family possessing an ancestral business has an implied power to pledge the credit and property of the family, but only for the ordinary purposes of that business; he cannot do so for the purpose of embarking in a business which was not the ancestral business. *Ramlal Thakursidas* v. *Lakhmi Chand Muniram (1861), 1 Bom. H. C. Civ. App. 51,* referred to. MORRISON *v.* VERSCHOYLE (1901) . . **6 C. W. N. 429**

35. ——— **Younger member as manager**—*Mitakshara law—Junior or dependent member of family—Karta—Mortgage of family property—Necessity—Zarpeshgi lease.* Hindu law authorizes a younger member of a *Mitakshara*

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*a*) MANAGER—*concld.*

joint Hindu family to alienate or otherwise deal with immoveable property belonging to the family, for family necessity, whenever he is put forward to the outside world by the elder members of the family, as the managing member. MUDIT NARAYAN SINGH *v.* RANGLAL SINGH (1902) **I. L. R. 29 Calc. 797**

(*b*) FATHER.

See HINDU LAW—ALIENATION—ALIENATION BY FATHER.

36. ——— **Alienation by father**—*Mitakshara law—Interest of father in ancestral property.* Before partition, a Hindu father has, under Mitakshara law, no definite share in joint ancestral property which he can aliene. NOWBUT RAM *v.* DURBAREE SINGH . . . **2 Agra 145**

37. ——— *Sale by father of joint family of his own share.* A sale by a father is valid by Hindu law to the extent of his own share of the undivided estate. There is no distinction according to the Madras school between a father and other co-parceners. PALANIVELLAPPA KAUNDAN *v.* MANNARU NAIKAN . . . **2 Mad. 416**

38. ——— *Mitakshara law—Sale of ancestral property.* According to *Sadabart Prasad Sahu* v. *Foolbash Koer, 3 B. L. R. F. B. 31,* a sale of undivided ancestral property by a father without any legal necessity and without the consent of all the co-sharers is, under the Mitakshara law, invalid. It is not valid even as regards the father's share. A son suing to set aside such an alienation is, according to that case, entitled to a declaration that the alienation is void altogether. The son suing in the father's lifetime on behalf of the family may be entitled to a decree for possession. Upon what terms that decree should be made will, according to the decision in *Modhoo Dyal Singh* v. *Kolbur Singh, B. L. R. Sup. Vol. 1018,* depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an encumbrancer as against the joint family in the particular case. HANUMAN DUTT ROY KISHEN KISHOR NARAYAN SINGH . **8 B. L. R. 358**

S.C. HONOOMAN DUTT ROY *v.* BHAGBUT KISHEN **15 W. R. F. B. 6**

39. ——— *Mitakshara law—Power of father to aliene.* A Hindu father in a Mitakshara joint family has no power to settle ancestral property by conveyance in his lifetime, or by a will to take effect after his death, without the consent of all his sons living at the time. Where such a settlement is not assented to by the sons living at the time, and another son is afterwards born, no subsequent assent would be binding on the latter. HURODOOT NARAIN SINGH *v.* BEER NARAIN SINGH . . . . . **11 W. R. 480**

40. ——— *Mitakshara law—Alienability by a co-parcener of his undivided share of ancestral estate—Will.* A Hindu of the Southern Mahratta country, having two sons undivided from him, died in 1871, leaving a will disposing of ancestral estate substantially in favour of his second son, excluding the elder, who claimed his share in this suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that, as to the immoveables, the claim failed, because they were situate beyond the jurisdiction of the Court. It having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one-third share. *Held,* that, under the Mitakshara law as received in Bombay, the father could not dispose of his one-third share by will. The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended in the above manner beyond the decided cases. The Bombay Court had ruled that a co-parcener could not without his co-sharer's consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that, although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will were held to be sound and sufficient to support that decision. LAKSHMAN DADA NAIK *v.* RAMCHANDRA DADA NAIK . . . **I. L. R. 5 Bom. 48**
L. R. 7 I. A. 181

41. ——— *Ancestral property—Joint property earned by a father and his sons—Effect of contribution by the father of a nucleus of property earned by himself exclusively Power of disposition by will over.* *D* (defendant No. 1) lived at Jamnagar jointly with his father and brother until the year 1850. In that year his father died and *D* separated from his brother. At the time of separation *D* took nothing out of the family estate, which was very small. He subsequently supported himself by practising medicine, which he taught himself from some medical books

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*b*) FATHER—*contd.*

which his father had bought for him before his death. *D* had two sons, *viz.*, *M*, born in 1846, and *H*, born in 1849. At the end of the year 1850, *D* and his two sons came to Bombay, where *D* continued to practice medicine and established a dispensary. In 1862, having saved R5,000 by his medical practice, he set up business as a merchant, and acquired a considerable fortune. His two sons, *M* and *H*, who were joint with him, assisted him in his business. On the 7th October 1882, *M* separated from his father and brother and received as his share of the property a sum of R6,000 and jewels and clothes worth about R5,000. On the same day *M* made his will, whereby he appointed his father *D* executor, and disposed of the whole of the portion of the property so allotted to him, directing that it should be invested and paid over to his son (the plaintiff) on his attaining majority; and, in the event of his dying without issue, that it should go to his (*M's*) brother, *H* (defendant No. 2). On the 16th October 1882, *M* died leaving the plaintiff, his son, him surviving. The plaintiff in this suit contended that the whole of the said property was ancestral property in the hands of *M* and as such came to him (the plaintiff) unaffected by the will. The defendants contended that the property previously to the division was the joint, but not the ancestral, property of *M*, his father, and brother; that it was property earned by the joint exertions of *D* and his sons; that at the division in October 1882, the portion taken by *M* was his self-acquired property; and that he was entitled to dispose of it by will. *Held*, that whether, previously to the division in October 1882, the joint property of *D* and his two sons was ancestral or not, as soon as a portion of such joint property was divided off by the father (*D*) and given to his son *M*, it became ancestral in *M's* hands. For, assuming the truth of the defendants' story as to the mode in which the whole property was acquired, it could not be held that it was acquired by the equal exertions of the father and his two sons. The father contributed the nucleus of R5,000, and on that nucleus the property was formed by the joint exertions of himself and his sons. The portion, therefore, that came to *M* did not represent the equivalent of his own exertions only. It represented also a portion of the father's original capital. The property thus being ancestral in the hands of *M*, he could not, in the town of Bombay, dispose of it by will, even though it consisted of moveables, to the prejudice of the plaintiff's rights. CHATTURBHOOJ MEGHJI *v.* DHARAMSI NARANJI . . **I. R. L. 9 Bom. 438**

42. ——————— *Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs.* The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father. In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question. Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father on the ground that the debts contracted by the father were for immoral purposes, and that therefore the estate could not be bound by the decree at all. The Court of first instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the High Court:—*Held*, that, under the decree passed against the father, the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality, though the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable. Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicity or impliedly binds only his own portion. NARAYANRAV DAMODAR *v.* JAVHERVAHU **I. L. R. 12 Bom. 431**

43. ——————— *Mortgage by father and one of the sons—Agreement by father alone that mortgagee should enjoy the property for a term of years in satisfaction of debt—Agreement not binding on sons—Alienation—Decree against father—When binding on his sons—Dekkan Agriculturists' Relief Act (XVII of 1897), s. 44.* In 1888, one *D* and his eldest son *B* mortgaged certain ancestral property for R1,500. In 1890 *D* alone came to an arrangement with the mortgagee by which it was agreed that the mortgagee should enjoy the income of the mortgaged property till 1900 A.D. in full satisfaction of the mortgage-debt. This agreement was filed in Court under s. 44 of the Dekkan Agriculturists' Relief Act on 4th April 1891, when it took effect as a decree. In execution of this decree, the mortgagee sought to attach the property mortgaged. *D* having died in the meantime his sons objected to the attachment on the ground that the

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5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*b*) FATHER—*concld.*

decree was fraudulent and collusive. But this objection was disallowed by the Court, and the property was attached. Thereupon *D's* sons filed a suit for redemption of the mortgage of 1888. Defendant pleaded that the mortgage was merged in the agreement of 1890, and that the plaintiffs had no right to redeem. *Held*, that the agreement was not binding upon the plaintiffs. By the agreement the right to redeem the mortgage before its fixed period under the provisions of s. 15A of the Dekkan Agriculturists' Relief Act ceased, and the right to the surplus profits in the hands of the mortgagee over and above the mortgage-debt was also lost, without any countervailing advantage or benefit. Such an agreement by a Hindu father is not binding on his sons in respect of ancestral property. It amounts *pro tanto* to an alienation by him of the ancestral estate without consideration. *Held*, also, that, as the agreement was not binding upon the plaintiffs, the decree against their father based upon the agreement was also not binding upon them. BALA *v.* BALAJI MARTAND . . . **I. L. R. 22 Bom. 825**

44. ——————— *Joint Hindu family—Sale of ancestral property by the father with no antecedent debt or valid necessity to support it—Suit by sons to set aside sale so far as affecting their interests.*—A sale of ancestral property by the father in a joint Hindu family may be set aside on suit by the son so far as it affects their interests in the property, if there is no antecedent debt or valid necessity to support it, although the transaction may not be shown to be tainted with immorality. *Manbahal Rai* v. *Gopal Misra, Weeklk Notes, 1901, p. 57,* followed. *Debi Prasad* v. *Jai Karan Singh, I. L. R. 24 All. 479,* referred to. *Debi Singh* v. *Jai Ram, I. L. R. 25 All. 814,* distinguished. While an appeal on behalf of two minor appellants was pending in the High Court, the guardian *ad litem* and also one of the appellants themselves died. The appeal was decreed without these matters having been brought to the notice of the Court. *Held*, that this was no more than an irregularity, which was cured by the subsequent appointment of a guardian *ad litem* pending an appeal under s. 10 of the Letters Patent. RAM DAYAL *v.* AJUDHIA PRASAD (1906) . . . . **I. L. R. 28 All. 328**

(*c*) OTHER MEMBERS.

45. ——————— **Alienation by one member** —*Alienation without consent of others—Mitakshara law. Quære:* Whether, under the law of the Mitakshara in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid. DEENDYAL LAL *v.* JUGDEEP NARAIN SINGH **I. L. R. 3 Calc. 198: 1 C. L. R. 49 L. R. 4 I. A. 247**

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*c*) OTHER MEMBERS—*contd.*

46. ——————— *Transfer by one member of his share in the joint family property to another member.—Consent of co-sharers.*— One member of a joint Hindu family cannot transfer his undivided share in the joint family property to another member of the family without the consent of the rest of the co-sharers. CHANDAR KISHORE v. DAMPAT KISHORE . . **I. L. R. 16 All. 369**

47. ——————— *Investment of proceeds of estate by one member.* If a member of an undivided Hindu family invests the proceeds of the joint ancestral estate in the purchase of other estates, he does so for the benefit of the joint family. Without the consent of all the members, or a legal necessity, or a declaration and acts amounting to a division, he cannot alienate so as to bind even his own share. BONA KOEREE *v.* BOOLEE SINGH **8 W. R. 182**

48. ——————— *Mitakshara law.* Under the Mitakshara law, a single member of a family was empowered to sell immoveable property for the purpose of paying off family debts only where the sons and grandsons are minors or otherwise incapable of giving their consent. Where the sale of landed estate by a single member for the payment of family debts is set aside because made without the son's consent, the son can only get possession on repayment of the purchase-money which was applied to the liquidation of the debts. MUTHOORA KOONWAREE *v.* BOOTUN SINGH . . **13 W. R. 31**

49. ——————— *Power to alienate share of joint family property.* Where the validity of a sale of ancestral property is objected to on the ground that it was effected without the consent of all the members of the joint Hindu family, the objection can only be made by the member who did not consent. A member of a Hindu family may mortgage his undivided share of the joint property without the consent of his co-sharers, in order to raise money for the benefit of the family, *e.g.*, to pay debts or liquidate demands under legal necessity. JUGGERNATH KHOOTIA *v.* DOOBO MISSER **14 W. R. 80**

50. ——————— *Alienation of joint property—Mitakshara law.* As long as a Hindu family under the Mitakshara is living in the joint enjoyment of family property, such property can only be alienated by the joint consent of all the members, or in the event of such necessity as will, in the eye of the law, give the karta power to alienate as the agent of all, then by the karta alone. BUNSEE LALL *v.* AOLADH ABSAN . . **22 W. R. 552**

51. ——————— *Sale by co-parceners, effect of—Mitakshara law.* A sale by one member of a joint family held to be bad under the Mitakshara law, as being an appropriation by him, without any partition, or joint family property. CHUNDER COOMAR *v* HURBUNS SAHAI **I. L. R. 16 Calc. 137**

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(c) OTHER MEMBERS—*contd.*

52. ——— *Mitakshara law —Survivorship—Mortgage of share in joint family property.* A member of a Hindu family living under the Mitakshara law and having joint family property died entitled to an undivided share in such property, leaving two widows him surviving. The widows were sued in their representative capacity in respect of debts incurred by him during his lifetime on his own account, and decrees were obtained against them. In execution, an interest in certain portions of the joint family property, to the extent of the share to which the deceased was entitled in his lifetime, was sold, and the auction-purchasers obtained possession of it. *Held*, that the share of the deceased did not at his death pass to his widows, but that there being no male issue it passed to the remaining members of the family by survivorship, and could not be rendered liable to the debts of the deceased in a suit against his widows. *Quære:* Whether those who take the share by survivorship are liable for the debts of the deceased to the extent of his share ? A member of a joint Hindu family has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. SADABART PRASAD SAHU *v.* FOOLBASH KOER **3 B. L. R. F. B. 31 : 12 W. R. F. B. 1**

COSSERAT *v.* SUDABURT PERSHAD SAHOO **3 W. R. 210**

PHOOLBAS KOER *v.* LALLA JOGESHUR SAHOY **18 W. R. 48**

Affirming on review SADABURT PERSHAD SAHOO *v.* LOTFALI KHAN . . . **14 W. R. 339**

53. ——— *Suit by one member to set aside alienation by another.* There is nothing in *Rajaram Tewari* v. *Luchman Prasad, B. L. R. Sup. Vol. 731 : 8 W. R. 15,* or in *Sadabart Prasad Sahu,* v. *Foolbash Koer, 3 B. L. R. F. B. 31,* to justify the contention that, where there is an alienation made by one shareholder and another sharer sues to set aside that alienation it follows as a consequence that a party who sues to set aside the alienation must obtain a decree. SRI PRASAD *v.* RAJGURU TRIAMBUKNATH DEO **6 B. L. R. 555 : 14 W. R. 386**

54. ——— *Mitakshara law —Mortgage of undivided share in joint family property—Succession—Survivorship—Decree in suit against widow—Misjoinder —Parties.* On the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives. *Quære:* Where a member of a joint Hindu family governed by the Mitakshara law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his lifetime his undivided share in portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming ? A suit by a surviving member of a joint Hindu family subject to the Mitakshara law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family as already sued for and recover his moiety of the property, and disclaims all further interest, and is joined as a co-defendant in the suit. PHOOLBAS KOONWAR *v.* LALLA JOGESHUR SAHOY . . **I. L. R. 1 Calc. 226 25 W. R. 285 : L. R. 3 I. A. 7**

55. ——— *Power of one member to alienate his right to rent.* Where members of a Hindu family are so far separate in estate that each collects his quota of rent separately, there is no reason why one of should not make over either in exchange or sale, his right of receiving a part of the rents. KALIKA SAHOY *v.* GOUREE SUNKUR . . . . **12 W. R. 287**

56. ——— *Mitakshara law —Alienation by a member of his own share* One member of a joint and undivided Hindu family governed by the law of the Mitakshara, cannot mortgage or sell his share of the family property without the consent express or implied, of the other members. *Chamaili Kuar* v. *Ram Prasad, I. L. R. 2 All. 267,* followed. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* and *Suraj Bunsi Koer* v. *Sheo Parsad Singh, I. L. R. 5 Calc. 148,* referred to. RAMANAND SINGH *v.* GOBIND SINGH . . . . **I. L. R. 5 All. 384**

SHEO PERSAD JHA *v.* GUNGA RAM JHA **5 W. R. 221**

57. ——— *Mitakshara law— Alienation by one member of his own share.* According to the law of the Mitakshara, joint family property cannot be alienated by any member of the family, save for urgent and necessary expenses of the family, without the consent of all the members. *Held*, therefore, where the holder of an impartible raj made an absolute gift of a portion of the estate appertaining to the raj to one of his wives, "in token of his love for her," and his eldest son sued to set aside the alienation that the parties, being members of a joint Hindu family, and governed by the law of the Mitakshara, the son was entitled to bring the suit, and that the alienation not being made for

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HINDU LAW—JOINT FAMILY—*contd.*

5. POWERS OF ALIENATION BY MEMBERS —*contd.*

(*c*) OTHER MEMBERS—*contd.*

necessary purposes was void. BHAWANI GHULAM *v.* DEO RAJ KUARI . . **I. L. R. 5 All. 542**

58. ——— *Power of member to give stranger interest in property.* Until a division of ancestral property is effected, no member of a joint family governed by the Mitakshara law can give a stranger any interest in the property. MUDDUN GOPAL LALL *v.* GOWURBUTTY **21 W. R. 190**

59. ——— **Introduction of stranger**—*Effect of introduction of stranger into family—Auction-purchaser—Gift by member of family—Co-sharers, Assent of.* The introduction of a stranger in blood as auction-purchaser of a portion of the rights and interests of an undivided Hindu family breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property, and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the auction-purchaser is not invalid by reason of the principle of Hindu law which requires the assent of co-parceners in an undivided Hindu family to give validity to such a gift. BALLABH DAS *v.* SUNDER DAS . **I. L. R. 1 All. 429**

60. ——— *Joint undivided family property—Assent of co-parceners—Stranger.* The member of a joint Hindu family who alienates his rights and interests in the family property to a stranger in blood thereby incapacitates himself from objecting to similar alienation by another member of such family of his rights and interests in such property, on the ground that such alienation was made without his consent, and such stranger is not competent to make such objection. *Ballabh Das* v. *Sunder Das, I. L. R. 1 All. 429,* followed. GANRAJ DUBEY *v.* SHEOZORE SINGH **I. L. R. 2 All. 898**

61. ——— **Sale of share in execution of decree.** According to the Hindu law current in Madras, the member of an undivided family may aliene the share of the family property to which, if a partition took place, he would be individually entitled, and there may be a valid sale of such share on an execution in an action of damages for a tort. VIRASVAMI GRAMINI *v.* AYYASVAMI GRAMINI . . . . . **1 Mad. 471**

62. ——— **Suit to enforce purchase.** The right of a co-parcener to alienate his vested interest in the property held in co-parcenary is limited to the extent of the co-parcener's share in the particular property which is the subject of the alienation. In a suit to recover a moiety of a village which was a portion of the joint family property, and which had been sold by the managing member without the assent of the plaintiff's father and not for family purposes, the entire village being less in quantity and value than the share of the managing member: *Held,* that the plaintiff was entitled to the relief prayed. VENKATA CHELLA PILLAY *v.* CHINNAYA MUDALIAR . **5 Mad. 166**

63. ——— **Power to dispose of portion of property by will.** A long course of decisions in this presidency recognize the right of a co-parcener to dispose of his interest in the joint family property before partition; a co-parcener cannot, however, before partition, convey away as his interest any specific portion of the joint property. In a suit by an adopted son to set aside a will made by his adoptive father disposing of immoveable property: *Held,* that the will was of no effect as a valid devise of property. At the moment of death the right of survivorship was in conflict with the right by devise. Then the title by survivorship, being the prior title, took precedence to the exclusion of that by devise. VITLA BUTTEN *v.* YAMENAMMA . . . . . **8 Mad. 6**

64. ——— **Alienation of impartible polliaput**—*Impartible polliaput held by single member, rights of disposition or alienation over.* The words "we and our offspring shall have no interest in the said polliaput (an impartible one), but you alone shall be zamindar and rule and enjoy the same," must be construed with due regard to the person using them and the occasion when they were used. *Held* by the High Court, that in the present case they were not a release, by the person using them for himself and his heirs, of all future rights of succession which might accrue to them as members of an undivided family. Possession under such a relinquishment was not a new and separate acquisition. No question upon the law of limitation can arise between the different members of the joint family in respect of the property thus held by a single member. An estate so possessed, free from present co-parcenary rights in others, is not entirely at the disposal of the holder for his own purposes. The possessor has only the qualified powers of disposition of a member of a joint family, with such further powers, or it may be with such restrictions, as spring from the peculiar character of his ownership. These powers fall short of a right of absolute alienation of the estate. PAREYASAMI *alias* KOTTAI TEVAR *v.* SALUCKAI TEVAR *alias* OYYA TEVAR . . . . . **8 Mad. 157**

In the same case an appeal to the Privy Council this decision, however, was reversed, and it was *held* that the construction to be put on the words was that they were a renunciation by the person using them for himself and his descendants of all interest in the polliaput either as the head or as a junior member of the joint family, and that their effect was to make the polliaput, with its incidents of impartibility and peculiar course of succession, the

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property of the other members of the family as effectually as if it had been assigned on partition. SIVAGNANA TEVAR *v.* PERIASAMI **I. L. R. 1 Mad. 312**

s. c. PERIASAMI *v.* PERIASAMI **L. R. 5 I. A. 61**

65. ———— Law in Bombay Presidency. On the western side of India a member of an undivided Hindu family can, without the consent of his co-parceners, sell his share in the undivided property. TUKARAM AMBAIDAS *v.* RAMCHANDRA VALAD BHIMANNA DHUGI **6 Bom. A. C. 247**

66. ———— *Right to alienate share—Liability to attachment.* It is settled law in the Presidency of Bombay that one of several parceners in a Hindu undivided family may, without the assent of his co-parceners, sell, mortgage, or otherwise alienate, for valuable consideration, his share in the undivided family estate, moveable or immoveable. It is also settled law in the same Presidency that a share in the undivided estate of a Hindu family may be taken in execution, under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor. VASUDEV BHAT *v.* VENKATESH SANBHAV **10 Bom. 139**

67. ———— *Right to alienate share—Consent.* *Held*, by a Full Bench, following the doctrine laid down in the preceding case, *Vasudev Bhat* v. *Venkatesh Sanbhav, 10 Bom. 139*, that a Hindu parcener may, without the consent of his co-parceners, alienate his share in undivided family property. *Tukaram* v. *Ramchandra, 6 Bom. A. C. 247*, approved and adopted. *Bajee* v. *Pandurang, Morris, Part II, 93*, disapproved. FAKIRAPA BIN SATYAPA *v.* CHANAPA BIN CHANMALAPA **10 Bom. 162**

68. ———— Mortgage by one co-parcener in undivided estate—*Sale of interest of one co-parcener—Rights of purchaser. Partition.* In 1848 two members of an undivided Hindu family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 gundas of the mortgaged land to be attached and sold, on account of the right and interest of one of the mortgagors only. on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 gundas then were, to recover the same from him, as being the property of the mortgagor, whose right and interest therein had been attached and sold : *Held*, that the share of a co-parcener, being in the estate as a whole and not in any particular part of it, can be ascertained only by taking a general account of the whole estate, making a distribution in accordance with the results of such account. In taking such account, however, and in making the consequent distribution, it would be only equitable that the share of the co-parcener who affected to deal with a portion of the land as if empowered to mortgage it should, *cæteris paribus*, if the purchaser takes his place, be so made up as to embrace wholly, or so far as possible, the land which the purchaser bought as belonging to such co-parcener. *Held*, also, that to obtain possession of the land purchased by himself the purchaser must file against the other members of the family a partition suit for the ascertainment of the share of the co-parcener, whose interest he has purchased, as it stood in 1848, and for the allotment to himself of that share so far as it can legally and equitably be identified with the land purchased by himself, and that consequently the suit in its present form will not lie. PANDURANG ANANDRAV *v.* BHASKAR SHADASHIV . . **11 Bom. 72**

69. ———— Alienation by one holder of inam—*Right of alienee.* *Held*, that it was competent for an inamdar to alienate a third share of whatever interest he himself had in a family inam, in consideration of services rendered in recovering the inam itself ; and that the grantee had a right to have the award made by the decree in the terms of the grant, which purported to bestow the third share in perpetuity. SULTANJI T. PATIL SIRVALE *v.* RAGHUNATH R. MARATHE **2 Bom. 48 : 2nd Ed. 45**

70. ———— Mortgage by a co-parcener —*Liability of his share after his death to satisfy the mortgage.* Where a member of a joint Hindu family makes a mortgage, such mortgage, being good when made, creates a valid charge on the property to the extent of his share, which cannot be defeated by his death. RANGAYANA SHRINIVASAPPA *v.* GANAPABHATTA . . **I. L. R. 15 Bom. 673**

71. ———— *Mortgage—Attempt by one co-sharer to mortgage his undivided share on his own account— Effective sale of part of such a share in execution of a decree against the co-sharer.* Under the Mitakshara, as administered by the High Courts of the North-West Provinces and Bengal, an undivided share in ancestral estate, held by a member of a joint family in co-parcenary, cannot be mortgaged by him on his own private account without the consent of those who share the joint estate. An attempted mortgage by one of them does not create a charge which can have priority over purchases at execution-sales made *bonâ fide* and without notice of it ; such purchasers having acquired the right of compelling the partition which the debtor might have compelled, had he been so minded, before the alienation by the sale of his share. As to the invalidity of the attempted mortgage, *Sadabart Prasad Sahu* v. *Foolbash Koer, 3 B. L. R. F. B. 31*, referred to and approved. As to the right of the purchaser of the share at a judicial sale, *Deen Dayal Lal.* v. *Jugdeep Narain Singh, I.*

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L. R. 3 Calc. 198 : L. R. 4 I. A. 247, followed, and reference made to the distinction mentioned in the latter case, between a voluntary alienation without such consent and an involuntary one as the result of the execution of a decree against the co-partner and a judicial sale thereunder. A father and son composed a joint family, holding a share of ancestral lands. The son mortgaged to a banker, to secure a loan, his interest in the undivided share. His father, without having notice of the mortgage, purchased in good faith portions of the estate forming part of the son's joint share at sales in execution of decrees against the latter obtained by his creditors. *Held*, that the son's interest in the portions so sold passed to the father, whose rights therein as purchaser at the judicial sales were not affected by the mortgage. The mortgagee could, in execution of a money-decree which he might obtain against the mortgagor, personally attach and bring to a judicial sale such parts of the mortgaged property as had not already been sold, but not in virtue of the mortgage. BALGOBIND DAS *v.* NARAIN LAL . . **I. L. R. 15 All. 339**
L. R. 20 I. A. 116

72. ——— Sale by one member of his share—*Ancestral estate held jointly by family under the Mitakshara—Effect of partition—On death of vendor, right by survivorship of other members—Equity of purchaser to have a lien against survivor.* As to ancestral estate under the Mitakshara, so long as the estate is undivided and the share of a member of the family is indefinite, he cannot dispose of it without the consent of his co-parceners. *Held*, that in a joint family a nephew, having taken by survivorship the undivided share of an uncle, deceased, was entitled to recover that share from a purchaser, to whom the uncle in his lifetime had sold it without the consent of his co-parceners and without necessity. *Held*, also, that the purchaser could have no lien on the share for return of the purchase-money. As soon as partition is made —actual partition not being in all cases essential, as, for instance, where the family has agreed to hold their estate in definite shares, or a member's undivided share, in execution of his creditor's decree, has been attached—that will be regarded as sufficient to support the alienation of a member's interest, as if it had been his acquired property. As regards members of a family living at the time when their alienation was set aside at the instance of another member, the Court, in *Mahabeer Persad* v. *Ramyad Singh, 12 B. L. R. 90*, justly ordered that the property should be thenceforth posesssed in defined shares, and that the shares of the members who had joined in the sale should be subject to a lien for the return of the purchase money. But that case must be distinguished from the present. Here the accrued right of survivorship precluded any such course. The nephew not

being responsible for the personal debts and obligations of his uncle, what might have been an enforcible equity against the interest of the latter, while it existed, could not affect the interest which had passed to a surviving co-parcener. MADHO PARSHAD *v.* MEHRBAN SINGH . **I. L. R. 18 Calc. 157**
L. R. 17 I. A. 194

73. ——— Right of son to alienate joint ancestral property—*Mortgage.* A member of a joint Hindu family has no power in his father's lifetime to make a mortgage of any part of the ancestral family property. *Balgobind Das* v. *Narain Lal, I. L. R. 15 All. 339 : L. R. 20 I. A. 116*, and *Madho Parshad* v. *Mehrban Singh, I. L. R. 18 Calc. 157 : L. R. 17 I. A. 194*, referred to. BHAGIRATHI MISR *v.* SHEOBHIK
I. L. R. 20 All. 325

74. ——— Mortgage—*Mitakshara law—Mortgage of undivided shares in joint family property—Consent of co-sharer.* *A*, *B*, and *C* together formed a joint Mitakshara family. On the 27th June 1872, *A* and *B* without the consent of *C* for their own benefit and without legal necessity, executed a bond in favour of *J* and *I* (defendants, 2nd party), mortgaging to them certain joint properties. On the 14th August 1882, *J* and *I* obtained an *ex parte* decree on their bond against *A*, *B*, and *C*, and in execution mouzahs Pipra and Bangra were put up to sale on the 16th March 1888 and purchased by *H* (defendant, 1st party). Prior to the institution by *J* and *I* of their suit, *A*, *B*, and *C*, on the 24th August 1881, together mortgaged mouzahs Pipra and Bangra to *N*. On the 13th March 1884, *N* obtained an *ex parte* decree on his mortgage, and in execution thereof, mouzah Pipra was sold on the 21st November 1884. The plaintiffs purchased the property and duly obtained possession from the Court. In a suit by the plaintiffs, for a declaration that the mortgage of the 27th June 1872, was invalid and the decree and execution-sale upon the basis thereof ineffectual as against them, and for confirmation of possession, and in the alternative that if the mortgage-bond was valid the amount due thereunder and chargeable on mouzah Pipra might be determined, and the plaintiffs declared entitled to redeem upon payment of such amount :—*Held*, that, although *A* and *B* had no authority, without the consent of their co-sharer C, to mortgage their undivided shares to *J* and *I*, yet as the plaintiffs derived their title from those mortgagors, they were not entitled to recover such shares without paying to *H*, who by his auction-purchase had acquired the rights of the mortgagees, the money advanced on the mortgage-bond of 1872 with interest, and that the same was a charge on such shares. *Mahabeer Persad* v. *Ramyad Singh, 12 B. L. R. 90*, applied in principle. *Sadabart Prasad Sahu* v. *Foolbash Koer, 3 B. L. R. F. B 31*, and *Madho Prashad*

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v. *Mehrban Singh, I. L. R. 18 Calc. 157 : L. R. 17 I. A. 194,* distinguished. *Nilakant Banerji* v. *Suresh Chandra Mullick, I. L. R. 12 Calc. 414,* referred to. JAMUNA PARSHAD *v* GANGA PARSHAD SINGH. HARDHANI LALL *v.* GANGA PARSHAD SINGH . . . . **I. L. R 19 Calc. 401**

75. ——— Alienation to pay off mortgage executed by widow to pay debt of husband—*Revival of a barred debt by the widow of a deceased Hindu.* Although a managing member of a joint Hindu family cannot as such revive a barred debt as against his co-parceners, it is competent to the widow of a deceased member of the family, who represents the inheritance for the time being and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts though they were barred at the time of its execution. Where therefore the managing members of an undivided Hindu family, after the death of the widow, sold family property for the purpose of discharging such a mortgage: *Held,* that the sale was binding on the co-parcenary. KONDAPPA *v.* SUBBA **I. L. R. 13 Mad. 189**

76. ——— Sale by co-parcener—*Alienation of his share by a co-parcener—His position and rights after such alienation—Position and rights of purchaser—Subsequent death or birth of other co-parceners—Effect on position of purchaser and on right of survivorship.* (i) The alienation by a Hindu co-parcener of his rights in part or the whole of the joint family property does not place the purchaser of such rights in his own position. The purchaser becomes a sort of tenant in common with the co-parceners, admissible as such to his distributive share upon a partition taking place. (ii) Such an alienation before partition does not deprive the alienating co-parcener of his rights in the joint family. (iii) As the purchaser does not by the death of the vendor lose his right to a partition, so his position is not improved by the death of the other co-parceners before partition. (iv) The purchaser like his alienor is liable to have his share diminished upon partition by the birth of other co-parceners if he stands by and does not insist on an immediate partition. Three undivided brothers, *viz.*, *S N*, and *M*, were the owners of a certain house which, on the 1st August 1845, *N* mortgaged with possession to one *A*. In 1878, the house was vested in the respective sons of the said three brothers, *viz.*, *B* (son of *S*), *R* (son of *N*), and *K* (son of *M*). In September 1878, in execution of a decree against *B* alone, the house was sold *co nomine* (not merely *B's* interest) to one *G*. Formal possession was given to the purchaser, but the actual possession remained with the mortgagee (*A*). After this sale took place, no other family property remained in which *B* had an interest. *K* died in 1880, and *R* died in 1883, no partition having been made between them and *B*. In March 1891, *B* sold his interest in the house to the plaintiff, who in 1892 field this suit to redeem the mortgage of 1845. The lower Appellate Court dismissed the suit, holding that when in 1878 *G* purchased *B's* right and interest in the last remaining portion of the family property, *B* ceased to be a co-parcener with *K* and *R*, and consequently took nothing by survivorship on their death, their shares going to *G*. On appeal to the High Court: *Held,* that *B's* rights to succeed to his brothers shares were not affected by the sale of his interest in the last item of joint family property to *G* so long as the latter did not proceed to work out his rights by partition. *B* became entitled, on the death of *K* and *R* to their respective shares. GURLINGAPA SATWIRAPA GIDWIR *v.* NANDAPA CHANBASAPA SOLAPURI . . . . **I. L. R. 21 Bom. 797**

77. ——— *Sale of land not joined in by all co-parceners—Partial application of consideration towards debt bindng on all —Suit for ejectment—Rights of purchaser.* In a sale of land the consideration was expressed to be the discharge by the purchaser of a debt owing by the vendor and secured by mortgage on the land, and of sundry other debts which had been incurred by the vendor for family necessity. In a suit for ejectment by the vendor's co-parceners, who were minors at the time and had not joined in the sale, it was held that there had been no legal necessity for the sale, which was accordingly declared to be not binding on the plaintiffs. It was, however, found that a portion of the consideration had been applied to the discharge of a mortgage debt, which would have been also binding on the plaintiffs. On its being contended that plaintiffs' interest in the property comprised in the sale should be held liable to the extent of their share of the mortgage debt. *Held,* that in making the purchase defendant was, with reference to plaintiffs, a mere volunteer, and could not as against them claim by way of equity a charge on their shares, even though part of the consideration had been applied towards the discharge of their joint debt; also that, if a purchaser wishes to stand by a sale which is only partially valid, he must be content with the vendor's share; and that, if he wishes to repudiate the transaction altogether, his only remedy is by suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed. MARAPPA GAUNDAN *v.* RANGASAMI GAUNDAN **I. L. R. 23 Mad. 89**

78. ——— *Alienation by co-parcener—Suit for possession—Limitation.* When immoveable property is alienated by a co-parcener in a Mitakshara joint family, the co-parceners who were not parties to the deed may institute a suit for recovery of possession within 12 years

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from the time when the alienee took possession of the property, Art. 91 of Sch. II of the Limitation Act not applying to the case. *Rajaram Tewary* v. *Luchmun Pershad, 8 W. R. 15*; *Girdhareelal* v. *Kantoolal, L. R. 1 I. A. 22*: *14 R. L. R. 187, Bhola Nath* v. *Kartick Kissen, I. L. R. 34 Calc. 372*, relied on. *Janki Kunwar* v. *Ajit Singh, L. R. 14 I. A. 148*; *I. L. R. 15 Calc. 58*, distinguished. A Court will grant relief in the case of an alienation of joint family property by one co-parcener without the assent of the others subject to the equities of the purchaser. *Mahabir Pershad* v. *Ramyad Singh, 12 B. L. R. 90*: *20 W. R. 192, Jamuna Parshad* v. *Ganga Parshad, I. L. R. 19 Calc. 401*, followed. In setting aside such an alienation the Court will order that the property should be possessed in defined shares and the share of the transferor should be subject to the lien of the transferee for the return of the purchase-money. *Held*, accordingly, that the plaintiffs would be entitled to recover three-fourths of the property unconditionally and the remaining one-fourth share belonging to the transferor on payment of the purchase-money within a specified date, failing which the claim for this one-fourth share will stand dismissed. The death of the transferor after the decree of District Judge was passed in favour of the plaintiffs, did not bring into operation the rule of survivorship so as to deprive the purchaser of his equitable claim. *Madho Parshad* v. *Mehrban Singh, L. R. 17 I. A. 194*: *s.c. I. L R. 18 Calc. 197*, distinguished. In the case of a joint Mitakshara family where a right is vested in all the members jointly the managing member may within the meaning of s. 8 of the Limitation Act give a discharge without the concurrence of the minor members of the family and time may consequently run against all the members of the undivided family including the minor members thereof. *Surju Prasad Sing* v. *Khwahish Ali, I. L. R. 4 All. 512*: *s.c. 2 All. W. N. 114, Vigneswara* v. *Bapayya, I. L. R. 16 Mad. 436, Hari Har Pershad* v. *Bholi Pershad, 6 C. L. J. 383, 393*, relied on. *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose, I. L. R. 14 Calc. 50*, distinguished. *Annamalai* v. *Murugasa, L. R. 30 I. A. 220*, referred to. BUNWARI LAL *v.* DAYA SUNKER MISSER (1909) . . **13 C. W. N. 815**

79. ——— Release by co-parcener —*Release by a co-parcener of his rights in favour of another co-parcener.* In a joint Hindu family, consisting of four brothers, *A*, *B*, *C*, and *D*. *A* and *B* obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the moveable property in favour of *C*. In a suit by *C* against *D* to recover his share *C* claimed three-fourths of the moveable property. *D* contended that the release by

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A and *B* in favour of *C* could not, according to Hindu law, add to the share of *C* as a co-parcener *Held*, that *C* was entitled to the share claimed PEDDAYYA *v.* RAMALINGAM

I. L. R. 11 Mad. 406

6. SALE OF JOINT FAMILY PROPERTY IN EXECUTION, AND RIGHTS OF PURCHASERS.

See SALE IN EXECUTION OF DECREE—JOINT PROPERTY.

1. ——— Sale of interest of one member. The right, title, and interest of one co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally, under the law of the Mitakshara, as well in Bengal as in Bombay and Madras. The purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed. DEENDYAL LAL *v.* JUGDEEP NARAIN SINGH

I. L. R. 3 Calc. 198 : 1 C. L. R. 49
L. R. 4 I. A. 247

SOOMRUN THAKOOR *v.* CHUNDER MUN MISSER

3 C. L. R. 282 : 5 C. L. R. 26

2. ——— *Mitakshara law* —*Right of purchaser.* The principle laid down in the case of *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198*, that the right, title, and interest of a Hindu father in a joint family estate under the Mitakshara law can be attached and sold in execution of a decree obtained against him personally is applicable to the right, title, and interest of any member of the joint family, and is not confined to the interest of the father alone. RAI NARAIN DASS *v.* NOWNIT LAL

I. L. R. 3 Calc. 809 : 4 C. L. R. 67

3. ——— Alienation by father, and decree against son—*Mitakshara law—Purchaser of son's interest at sale in execution of decree—Partition.* Where property belongs to a father and son governed by the Mitakshara law, the son's interest vests at birth and is saleable. The son may obtain a partition and separate possession of his share of ancestral property, and his share, once partitioned, will be liable to sale. There is, therefore, no reason why the interest of the son in the property while undivided should not be sold in satisfaction of his debts, but in such case the purchaser should bring a suit to obtain partition of the property. JALLIDAR SINGH *v.* RAM LAL . . . . **I. L. R. 4 Calc. 723**

4. ——— Sale under decree against one member—*Purchaser, right of.* The purchaser of the rights and interests of a judgment-debtor who is a member of a joint family, at a

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sale in execution of a decree, does not aquire any title to the rights and interests of the other members of the family unless it is clear that the judgment-debtor was sued in a representative capacity. LOKI MAHTO *v.* AGHOREE AJAIL LALL
I. L. R. 5 Calc. 144 : 4 C. L. R. 465

5. ——— **Right of purchaser at sale in execution of decree**—*Bonâ fide purchaser.* Although a purchaser at an execution-sale can ordinarily get no greater rights than the rights of the person named as the debtor in the decree under which the sale is held, the effect of a sale in execution of a decree against a member of a joint Hindu family under Mitakshara law has been extended on the ground that members of such a family, other than the judgment-debtor, contesting a sale under a decree, when shown to be bound to pay the debt, for the realization of which the sale has been brought about, are in equity not entitled to relief against a *bonâ fide* purchaser without notice. Where the property of a joint family is sold in execution of a decree against one of the members, a judgment-creditor who was plaintiff, and at whose instance the sale in execution was held, cannot claim to be in the position of a third person purchasing *bonâ fide* without notice. *Gridharee Lall* v. *Kanto Lall* and *Muddun Thakoor* v. *Kanto Lall, L. R. 1 I. A. 321; Deendyal Lall* v. *Jugdeep Narain, I. L. R. 3 Calc. 198 : 1 C. L. R. 49; L. R. 4 I. A. 247;* and *Ram Sahai* v. *Sheo Proshad Singh, 4 C. L. R. 266,* discussed. GONESH PANDEY *v.* DABEE DOYAL SINGH . . . . **5 C. L. R. 36**

6. ——— **Mortgage**—*Mitakshara law—Mortgage of family property by one of several co-sharers in a joint estate.* In a suit on a mortgage against a member of a joint Hindu family governed by the Mitakshara law, the whole of the interest of the joint family in the estate was decreed to the mortgagees, who subsequently obtained possession of it. Afterwards a suit was brought by another member of the family, who had attained majority prior to the mortgage, to set it and the decree aside so far as he was concerned, and to recover possession of his share of the joint family property. *Held,* that the mere circumstance of an antecedent debt was not in itself sufficient to bind him, and that the alienation was not good as against him, unless it could be shown that he had either expressly or impliedly given his consent to the mortgage. UPOROOP TEWARI *v.* LALLA BANDHJEE SUHAY
I. L. R. 6 Calc. 749 : 8 C. L. R. 192

7. ——— *Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution-proceedings—Sale-certificate.* The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right. *Held,* that, as the mortgage and decree, as well as the sale-certificate, expressed only the father's right, the *primâ facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract, but supported. The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.,* what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution the purchaser had reason to think he was buying. Each case must depend on its own circumstances. *Upooroop Tewary* v. *Lalla Bandhjee Suhay, I. L. R. 6 Calc. 749,* distinguished. SIMBHUNATH PANDE *v.* GOLAP SINGH
I. L. R. 14 Calc. 572
L. R. 14 I. A. 77

8. ——— *Mortgage by sons of an insane person—Sale in execution of decree—Suit by Committee to recover possession—Purchaser, Rights of.* Although a co-parcener in a Mitakshara family has a right (in a suit properly framed for that purpose) to recover the whole property from an execution-purchaser, subject to the right of the latter to have the share and interest of the debtor ascertained by partition, yet this rule will not be applicable where the suit is brought by a person who has become insane subsequent to his birth, inasmuch as no decree could be passed in his favour which could contemplate a partition between himself and the purchaser of the interest of his co-parceners. RAM SAHYE BHUKKUT *v.* LALLA LALJEE SAHYE
I. L. R. 8 Calc. 149 : 9 C. L. R. 457

9. ——— **Sale under decree against adult members**—*Sale of right, title, and interest of member of joint Hindu family—Suit to set aside alienation.* A suit having been brought against the ostensible heads of a family governed by Mitakshara law upon a mortgage, a decree was obtained for the sale of the mortgaged property, and under that decree the right, title, and interest of the judgment-debtors were sold. The plaintiffs, who were minors at the date of the decree and had not been made parties to the suit, instituted a suit to recover their shares in the property sold. The debt for which the property had been mortgaged was one which the plaintiffs and their predecessors were morally bound to pay. *Held,* on review, reversing the decision of *Hunooman Sahai* v. *Parsidh Narain, 7 C. L. R. 465,* that the entire property of the family passed to the purchaser, and that the plaintiff's suit must be dismissed. PARSIDH NARAIN SINGH *v.* HONOMAN SAHAI . . . . . **11 C. L. R. 263**

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HINDU LAW—JOINT FAMILY—*contd.*

6. SALE OF JOINT FAMILY PROPERTY IN EXECUTION, AND RIGHTS OF PURCHASERS—*contd.*

10. ——————— *Mitakshara law —Family trade—Alienation of ancestral property by some members of family—Interest of son affected by a sale in execution of a decree against his father—Parties to suit.* A family, governed by Mitakshara law, carrying on a trade in the names of some of its members, having become indebted to the defendants in a large amount in respect of advances made for the purposes of the trade, some of the head members of the family executed a bond in favour of the defendants for the amount due, and hypothecated certain family properties which stood in their names as collateral security therefor. The amount not having been paid on the due date, the defendants brought a suit on the bond against the persons who had executed it, and obtained a decree which, however, did not direct that the properties hypothecated should be sold. In execution of that decree, the interest of the judgment-debtors in the hypothecated properties, and in other family properties, were sold, and were purchased by the defendants, who subsequently, under their purchase, obtained possession of the shares of the judgment-debtors and of those of their sons. The decree not having been satisfied by those sales, the defendants brought a suit against the remaining head members of the family to have it declared that their interests in the family properties were liable to satisfy the decree, and that suit also was decreed. Under the last decree, the interests in the family properties of the judgment-debtors under that decree were sold and were purchased by the defendants who subsequently obtained possession of the shares of those judgment-debtors and of the shares of their sons. Some of the sons of the judgment-debtors in both decrees were adult at the time when the suits were instituted. In suits brought, many years after the sales, by members of the family who had not been parties to the previous suits, to recover their shares in the family properties :—*Held*, that the interests of all the members of the family had passed on the sales. *Per* MITTER, *J.*—There is no distinction in principle between the case of an adult son and that of a minor son as regards a son's interest in ancestral property being liable to pass on a sale of such property in execution of a decree against his father only ; but if an adult son proves that he would have been able to save the property by paying off the debt out of his private funds, if he had been a party to the suit, *quære*, whether he should not be allowed to have the sale set aside on payment of the debt due under the decree. BASO KOER *v.* HURRY DASS

I. L. R. 9 Calc. 495 : 12 C. L. R. 292

11. ——————— **Sale under decree against joint family property**— *Liability of family for debts contracted by co-sharer—Debts binding on joint family.* When one member of a Mitakshara family contracts a debt which is binding not only on the persons executing the contract, but on the other members of the joint family to which he belongs, the creditor has two courses open to him- (*a*) he may elect to treat the debt as a personal debt: and confine his suit to the person who actually contracted it. In such a suit he obtains a mere personal decree not binding on the family, and in execution thereof he merely sells the right, title, and interest of the person who actually contracted the debt ; that was the case of *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198 ; L. R. 4 I. A. 24 ;* or (*b*) he may treat the borrower as acting for the family, sue him as representing the joint family, and, when he has obtained a decree against the borrower in that capacity, proceed to sell the right, title, and interest of his judgment-debtors (*i.e.*, all the members of the joint family) or any of them. That was the case of *Bissessur Lal Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233.* JUMOONA PERSAD SINGH *v.* DIG NARAIN SINGH

I. L. R. 10 Calc. 1 : 13 C. L. R. 74

12. ——————— *Rights of purchaser of co-sharer's interest in joint family property.* When the right, title, and interest of a co-sharer in a joint family estate are sold in execution to satisfy a decree against him personally, the purchaser acquires merely the right of the judgment-debtor to compel a partition against the other co-sharers. *Deendyal Lal* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247 : I. L. R. 3 Calc. 198*, referred to and followed. A money-decree having been made against the father of a family, and the decree-holder having caused to be attached the family estate, and brought to sale the father's right, title, and interest therein :—*Held*, that, by the sale not the father's share, but that interest which he had—*viz.*, the right which he would have had to a partition, and to what would have come to him under it—passed to the purchaser. The family governed by the Mitakshara consisted of father, mother, and minor son at the time of the decree, and the Court below had decreed to mother and son one-third each, leaving one-third to the purchaser. A second son was born, and the mother died pending this appeal, the two sons becoming parties in respect of her share : *Held*, that on this appeal preferred by the purchaser, the decree should stand, the appellant having got quite as much as he would have got if the decree had been more correct in form, as he had obtained all that he would have been entitled to on a partition without being left to demand it. HARDI NARAIN SAHU *v.* RUDER PERKASH MISSER

I. L. R. 10 Calc. 626 : L. R. 11 I. A. 26

13. ——————— *Alienation—Liability of the joint undivided family property for family debts—Sale in execution of decree against one member of family property—Rights of other members.* During the minority of *S*, a member of a joint Hindu family, consisting of himself, his father *J*,

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6. SALE OF JOINT FAMILY PROPERTY IN EXECUTION, AND RIGHTS OF PURCHASERS—*contd.*

and his uncle *H*, and while he was living under the natural guardianship of his father, *R* sued *J* and *H*, but not *S*, as the heirs of *P*, *S's* grandfather, and as the heads and representatives of the joint family, to recover a joint family debt incurred to *R* by *P* before *S's* birth, by the sale of the joint family estate which had been hypothecated by *P* as security for the payment of such debt. *R* obtained a decree in this suit against *J* and *H* for such debt, such decree directing the sale of the joint family estate for the satisfaction of the debt. In the execution of such decree the rights and interests of *J* and *H* in such estate were put up for sale and were purchased by *R*, who took possession of such estate. *Held*, in a suit by *S* to recover his share of the joint family estate, that, under the circumstances, it must be held that the decree against *J* and *H* was made against them as representing the joint family, and therefore such decree was properly executable against such estate, notwithstanding that *S* was not formally brought on the record of the suit in which such decree was made, and *S* could not recover his share of such estate. *Bissessur Lall Sahoo* v. *Luchemessur Singh, L. R. 6 I. A. 233*, followed. *Deendyal Lall* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198*, distinguished. RAM SEVA DAS *v.* RAGHUBAR RAI

I. L. R. 3 All. 72

14. ——————————— *"Ancestral property"—Right of occupancy at fixed rates—Liability of son for father's debts—Purchaser at execution sale—Notice.* A decree was made against a Hindu governed by the law of the Mitakshara, for money which he had criminally misappropriated. The transferee by sale of the decree brought to sale in execution thereof the judgment-debtor's right of occupancy in certain land as a tenant at fixed rates. The judgment-debtor's two sons brought a suit against the purchaser to recover two-thirds of the holding. *Held*, that the right of occupancy at fixed rates in such land was ancestral property,—that is, property in which under Hindu law the sons took a vested interest by birth. *Held*, also, that, as the decree was not one to satisfy which the family property could be sold, being a mere money-decree against the father personally, and for a debt which it was not the duty of the sons to pay, and as the purchaser was bound to have satisfied himself as to whether the family property was liable to be sold in satisfaction of the decree, the purchaser could not, on the principles laid down in *Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187*, and *Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148*, be protected as a *bonâ fide* purchaser for value, without notice that the family property was not liable to be sold in satisfaction of the decree, but must be taken to have had constructive notice of that fact. MAHABIR PRASAD *v.* BASDEO SINGH

I. L. R. 6 All. 234

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15. ——————————— *Joint ancestral property—Execution against deceased son's interest in hands of the father—Death of Judgment-debtor after attachment and before sale—Civil Procedure Code, s. 274.* In execution of a money-decree, an order was issued under s. 274 of the Civil Procedure Code for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. The sale was ordered and a day fixed for sale, but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died, and the decree-holder applied for execution against the father as representative of the judgment-debtor, whose interest had survived to him. *Held*, that the decree-holder had, by the proceedings taken in execution during the son's lifetime, obtained rights over his interest which could not be defeated by his death before sale. *Suraj Bansi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148*, followed. RAI BALKISHEN *v.* RAI SITARAM . **I. L. R. 7 All. 731**

16. ——————————— *Alienation by father—Co-sharers—Sale of minor's share—Right of purchaser.* Plaintiff's father (first defendant) borrowed money to enable him to sue for the recovery of certain lands, and being unable to repay it, judgment was obtained against him, and the lands in suit were sold and purchased at the Court sale, by the fourteenth defendant. Plaintiff brought the present suit to set aside the sale of one-half of those lands on the ground that they formed his share, that he was a minor when his father incurred the debt, and that his share was not liable for debts incurred by his father. The Munsif gave a decree in favour of plaintiff. The fourteenth defendant appealed. The District Judge reversed the Munsif's decree. On special appeal by the plaintiff: *Held*, that, as the debt was the first defendant's personal debt, and the decree was against him personally only his rights and interest in the property could be sold, and nothing beyond his rights would pass to the purchaser. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198*, followed. VENKATASAMI NAIK *v.* KUPPAIYAN . . **I. L. R. 1 Mad. 354**

17. ——————————— *Mortgage by father—Minor's interests.* The plaintiffs, minors, by their mother, as next friend and guardian, sued defendants, sons of one *S D*, under s. 230 of Act VIII of 1859, to recover a four-fifths share of a house and lands of which plaintiffs were dispossessed by the defendants in the execution of the decree in a suit, No. 33 of 1872. The facts were that in a suit, No. 28 of 1871, a decree for money due under a mortgage-bond was passed against *S D*, the father of the present defendants, and in execution of the decree certain immoveable property was attached. The sons of *S D* came forward and put in a claim to the property and applied for the release of the

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attachment. The claim was disallowed. The sons, being dissatisfied with the order disallowing their claim, brought suit No. 33 of 1872, in which they prayed for a partition, and that their four-fifths share might be released from attachment. Prior to that suit, the attached property had been sold, but the sale was limited to the right, title, and interest of the father in the joint property; however, in suit No. 33 of 1872, the Court, having decreed a partition, further entertained the question as between the sons and the creditor of the father "whether the attachment of the rest of the family property specified in the plaint ought not, in respect of plaintiff's shares, to be cancelled," and decided it in favour of the creditor on the ground that the debt had been contracted for purposes binding on the family, and further decided that the property so under attachment ought to be sold to discharge the debt, and it was sold accordingly. Subsequently to the decree for partition, and when the defendants were divided from their father, *S D* (who was the sole judgment-debtor in suit No. 28 of 1871), the house and lands now in issue, which formed no part of the property mortgaged for the debt, the subject of suit No. 28 of 1871, were attached and sold and bought by the father of the present plaintiffs. The question in the present suits was whether the properties last mentioned, not having been attached in execution of the decree in suit No. 28 of 1871, and not therefore being any of those specifically affected in favour of the creditor by the decree in suit No. 33 of 1872, were liable as part of the joint family property, under the declarations of the judgment in that suit, to discharge the debt due to the creditor of the father by the decree in suit No. 28 of 1871. *Held*, on this question by the High Court (MORGAN, *C.J.*, INNES and KINDERSLEY, *JJ.*), affirming the decree of the Court of first instance, that these properties were not so liable; that under the decree and execution-proceedings in suit No. 28 of 1871 merely the rights of *S D* were sold; that nothing in that litigation indicated that it was intended to enforce the debt against the whole property as a debt due from the family, and that the decision in the partition suit (No. 33 of 1872) covered only what was then in question, and could not be viewed as authorizing the attachment of the items of property now in question in execution of that decree. That the present suits were therefore rightly dismissed. *By* INNES, *J.*—That the prayer of the plaintiffs (the sons) in suit No. 33 of 1872, so far as it related to the removal of the attachment in execution of the decree in suit No. 28 of 1871, should have been at once granted. That the creditor in suit No. 28 of 1871 had elected to sue the father alone, and that, though it might have been open to him (the creditor) to have so framed his suit as to have obtained a decree making the joint family liable in persons and property having failed to do so, he could not afterwards seek

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to extend the operation of the decree beyond the proper and limited scope of it; and that the Court in trying the question of the liability of the sons to discharge the debt due to the first defendant's creditor, in effect instituted against them a new suit. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198*, followed. The authorities reviewed on the question whether in execution of a decree the interests of any but those who were actual parties to it, or those who, on the death of such parties, became their representatives in interest, could be affected. VENKATARAMAYYAN *v.* DIKSHATAR **I. L. R. 1 Mad. 358**

18. ——————————— *Rights of creditors and purchasers—Partition. Per* INNES, *J.* A creditor of an undivided Hindu family as such has no right to intervene in a partition suit among co-parceners, and to claim that the debt owing to him be distributed over the several parcels of the family property so as to charge all the co-parceners. *Per* MUTTUSAMI AYYAR, *J.*—Although an account is taken between co-parceners as a convenient matter of procedure for resolving their joint rights and liabilities into several rights and liabilities, this does not create an additional right in the creditors of the family to forbid partition until their debts are paid, or in purchasers at a Court sale to add to the determinate interest that has been sold to them by a fresh enquiry into the real character of the decree debt. VELLIYAMMAL *v.* KATHA CETTI **I. L. R. 5 Mad. 61**

19. ——————————— *Mortgage by one co-parcener—Suit to declare shares of other co-parceners liable.* *C*, one of two undivided Hindu brothers, hypothecated family property as security for money lent. The creditor having obtained a decree, in a suit brought against *C*, against the property hypothecated only, the personal remedy being barred by limitation, attached the property hypothecated. *S*, the brother, and the minor sons of *C* intervened, and their shares in the property were released from attachment, and the one-sixth share of *C* alone was sold in execution and bought by the creditor. The creditor having brought a suit to have it declared that the shares released from attachment were liable to be sold for the amount due under the decree against *C* and having proved that the debt was incurred by the managing member for purposes which would render it binding on the defendants: *Held*, that the suit must nevertheless be dismissed. CHOCKALINGA MUDALI *v.* SUBBARAYA MUDALI . . . **I. L. R. 5 Mad. 133**

20. ——————————— *Mortgage made by managing brother—Rights of purchaser at Court sale.* If one of several undivided Hindu brothers mortgages the family lands, and the creditor sues upon the mortgage-bond without making the brothers of the debtor parties to the suit, and a decree is passed against the mortgagor personally,

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directing payment of the debt and costs, and declaring the property mortgaged liable for the amount decreed, and the property is subsequently attached by the judgment-creditor in execution of the decree, and the right, title, and interest of the judgment-debtor in the land mortgaged is sold by the Court and purchased by a third party, the brothers of the judgment-debtor are entitled, in a suit for partition of the family property, to recover their shares in the lands made over by the Court to the auction-purchaser, although such purchaser proves that the mortgage-debt was contracted by the judgment-debtor as manager of the family and for the purposes binding on the family. DASARADHI *v.* JODDUMONI . **I. L. R. 5 Mad. 193**

21. ——————— *Suit by co-parcener for share of house sold in execution of decree against another co-parcener.* Although a suit by a Hindu co-parcener for a partial partition of undivided family property will not lie, yet where one of two co-parceners sells to a stranger his interest in a parcel of the family land, the other co-parcener may either repudiate the sale or affirm it and claim by partition to recover from the stranger his share of the parcel sold to which the alienation could not extend and which has now become his separate property. CHINNA SANYASI *v.* SURIYA **I. L. R. 5 Mad. 196**

22. ——————— *Decree on mortgage-bond—Rights of purchaser.* Where the property of an undivided Hindu family consisting of father and sons has been sold in execution of a decree against the father only in suit upon a mortgage-bond executed by the father to raise money for no improper purposes, and it does not appear whether the sale was carried out in execution of so much of the decree as was personal or in execution of the order for enforcement of the mortgage, the sons in a suit for partition of the family property are not entitled to recover their share of the property sold from the purchaser. SRINIVASA NAYUDU *v.* YELAYA NAYUDU **I. L. R. 5 Mad. 251**

23. ——————— *Undivided family—Uncle and nephew—Decree against uncle—Sale of ancestral land—Interest of purchaser—Nature of debt immaterial.* *K*, a Hindu, the undivided uncle of *D*, a minor, executed a bond whereby certain ancestral property was hypothecated to secure the repayment of a sum borrowed by *K*. In execution of a decree against *K*, obtained upon this bond, *A* brought to sale and purchased the right, title, and interest of *K* in the land hypothecated and obtained possession of the said land. *Held*, in suit by *D* to recover one moiety of the land in *A's* possession, that whether or not the decree against *K* was founded upon a debt incurred for paying a debt of *D's* grandfather, *D* was entitled to recover a moiety of the land purchased by *A*. DORASAMI VAJAPPAVAR *v.* ATIRATRA DIKSHATAR **I. L. R. 7 Mad. 136**

24. ——————— *Debt binding on family—Suit against one of two undivided brothers—Personal decree—Attachment of family property—Effect of decree.* The creditor of a joint Hindu family, consisting of two brothers, sued the elder brother only (the younger being a minor) to recover a debt binding on both brothers, and having obtained a decree for the payment of the debt attached the family property. In a suit by the younger brother to set aside the attachment *quoad* his share in the property attached:—*Held*, that, inasmuch as the decree was not passed against the elder brother as manager of the family, the younger brother's suit must prevail. *Bissessur Lall Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233*, distinguished. VIRARAGAVAMMA *v.* SAMUDRAIA **I. L. R. 8 Mad. 208**

25. ——————— *Mortgage by father—Suit to enforce against manager of family—Decree for sale—Attachment—Order for sale of property—Sale of right, title, and interest—Rights of purchaser.* *V*, a Hindu, and his son *P*, executed a mortgage of a house, the self-acquired property of *V*. *V* having died, *P*, the manager of the family, was sued by the mortgagee on his own promise in the mortgage-deed and as representative of *V*, and a decree was passed for the sale of the house in default of payment by *P* within three months of the debt then due. This period having elapsed, the mortgagee applied to the Court to enforce the decree by attachment of the mortgaged property, and the property having been attached, application was made for sale. By a warrant, dated 3rd December 1874, the Sheriff of Madras was ordered to sell the property, and on the 12th July 1875 the Sheriff sold the right, title, and interest of the judgment-debtor in the said house to *K*. In a suit brought by *K* against *P* and the other members of the family to recover possession of the house:—*Held*, that as the mortgagee intended to enforce his rights under the mortgage by sale, and the Court intended to sell the house as mortgaged property, *K* was entitled, by virtue of his purchase, to recover possession of the house. *Bissessur Lall Sahoo* v. *Luchmessur Singh, L R. 6 I. A. 238*, referred to and followed. KRISHNAMA *v.* PERUMAL **I. L. R. 8 Mad. 388**

26. ——————— *Mortgage of family property by son during father's temporary absence how far binding on the family—Subsequent sale of such mortgaged property in execution of money-decree against father—Rights of purchaser at such a sale.* The land in dispute was the ancestral property of *H* and his son, *J*, who were members of an undivided Hindu family. This land had been mortgaged to one *B*, to whom the father and

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son were also liable on a separate money-bond. *H*, being pressed by his creditors, left his village and remained away for some years. During his father's absence, *J*, being pressed for payment of his debts, compromised *B's* entire claim for R200, which he obtained on loan from the plaintiff, to whom he gave as security a mortgage with possession of the land in question. The plaintiff continued in possession until he was dispossessed by defendant No. 2, who claimed to be purchaser of the land at a sale held in execution of a money-decree obtained by defendant No. 1 against *H*. The plaintiff now brought the present suit against the defendants, praying that either he should be restored to the possession of the lands or that the sum of R200, which he had advanced to *J*, should be decreed to be paid by the defendants. Both the lower Courts rejected the plaintiff's claim. On appeal by the plaintiff to the High Court :—*Held*, that the plaintiff's claim to be regarded as a mortgagee of the entire property could not be allowed. The temporary absence of his father, *H*, owing to the pressure of his creditors, could confer no legal authority on *J* to take upon himself to mortgage the family property. He had not been authorized by his father, nor did he assume to act for him when he mortgaged the property. The mortgage to the plaintiff was therefore to be regarded as the act of *J* in his individual capacity, and as such could receive no ratification by the mere reticence of his father. The plaintiff, however, having been in possession, was entitled, if he could establish his title to a lien on *J's* share, to be put into possession jointly with the defendant if the latter's title was proved. PATIL HARI PREMJI *v.* HAKAMCHAND

I. L. R. 10 Bom. 363

27. ——— *Joint and undivided property—Debts of deceased member—Liability of his interest.* *J*, a member of a joint Hindu family, felt two sons, *R* and *S*. *S* borrowed money upon a simple bond, and, after his death, the obligee sued his widow and daughter-in-law upon the bond, obtained a decree against them, and in execution thereof brought to sale *S's* interest in the property. *B*, the grandson of *R*, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of *S* and himself, and could not be attached and sold in satisfaction of *S's* debt. *Held*, that, on the death of *S*, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property and the creditor could not recover his money from the joint property after the death of *S* when he had not obtained judgment against *S*, and taken out execution by attachment against him. *Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148*, and *Rai Bal Kishen* v. *Rai Sita Ram, I. L. R. 7 All. 731*, referred to. BALBHADAR *v.* BISHESHAR

I. L. R. 8 All. 495

28. ——— *Liability of ancestral estate for separate debt of deceased co-parcener.* Undivided family property is not, in the hands of surviving co-parceners, generally speaking, liable to separate debts of a deceased co-parcener. Where therefore a Hindu, undivided in estate from his father, died separately indebted to the plaintiffs, who obtained a decree against the father and wife of the deceased, as his legal heirs and representatives to recover, from the estate and effects of the deceased, the amount of their debt and costs, and sought, in satisfaction of the decree, to attach a shop which during the lieftime of the deceased and subsequently to his death had been in the possession of his father, there being no proof of any separate estate of the deceased having devolved upon his father :—*Held*, that, though the son was, during his life, jointly interested with his father in the shop as being ancestral property, his right had come into existence at his birth and died with him, and therefore the plaintiffs could not render the shop available for their claim. In the Bombay Presidency the share of one of the co-parceners in a Hindu undivided family in the ancestral estate may, before partition, be seized and sold in execution for his separate debt in his lifetime. Such a co-parcener cannot, however, by simple voluntary gift or by devise, alienate his share to a stranger, so as to bind his surviving co-parceners after his decease. The purchaser, mortgagee, or other alienee, for valuable consideration, of such an unascertained share, cannot, before partition, insist upon the possession of any particular portion of the undivided family estate. The mortgagee or purchaser of a share in the undivided ancestral estate of a Hindu family takes such share subject to the prior charges or encumbrances affecting the family estate or that particular share. If the mortgage or sale be of a special portion of the family property, and possession of such portion can, on partition be given to the mortgagee or purchaser, without injustice to prior encumbrancers or to co-parceners, it is the duty of the Court making the partition to give effect to the mortgage or sale, and so to marshall the family property among the co-parceners as to allot that portion, or so much of it as may be just, to the mortgagee or purchaser. *Quære :* Whether, in the event of it being impossible, consistently with the rights of others, to give possession of the portion mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold. The attachment of a parcener's share in the family property under an ordinary money-decree should go against the share, right, title, and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family pro-

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perty. *Kalyanbhai* v. *Motiram Jamnadas, 10 Bom. 378 : Vasudev Bhat* v. *Venkatesh Sanbhav, 10 Bom. 139 ;* and *Fakirappa* v. *Chanappa, 10 Bom. 162,* commented on and distinguished. *Goor Pershad* v. *Sheodin, 4 N. W. 137,* approved. UDARAM SITARAM *v.* RANU PANDUJI . . **11 Bom. 76**

29. ——————— *Mortgage made by one co-parcener without consent of the others—Onus probandi.* Where joint family property is mortgaged by one parcener, in order that it may bind the co-parceners, the mortgagee must prove affirmatively that the mortgage was assented to by the other co-parceners, or was necessary for family purposes. LILA MORJI v. VASUDEV MORESHVAR GANPULE . . . **11 Bom. 283**

OODHUN MISSER *v.* HOOBDAR SINGH. **1 N. W. Ed. 1873, 271**

30. ——————— *Sale in execution of decree of one of several co-paceners' share in joint family property—Right of purchaser—Right of parceners to partition.* The purchaser at a Court's sale of the right, title, and interest of one of the co-parceners in the undivided estate, by his certificate, under s. 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of, as a member of the united family. Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property forming only a part of the common estate. Where, however, the purchaser got into possession and held it with such an accompanying right as the judgment-debtor could transfer to him :—*Held,* that the purchaser was in as a tenant-in-common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a definition of the portions in which each party in future was to have a sole interest. Such co-parceners, however, are not, entitled to eject the purchaser wholly from a defined moiety of any particular portion of the joint property. MAHABALAYA BIN PARMAYA *v.* TIMAYA BIN APPAYA . . . . . **12 Bom. 138**

31. ——————— *Alienation of joint family property—Mortgage by manager—Decree against manager—Sale in execution of decree. G,* the brother of the plaintiff, executed a mortgage to the defendant during the plaintiff's minority. The deed recited that the money was borrowed to pay off a family debt, and to defray family expenses. The defendent sued *G* on the mortgage, and obtained a decree. A house, which was part of the family property, was sold in execution, and was purchased by the defendant himself. The plaintiff sued to have the sale set aside, and to recover his half share in the house. *Held,* that the defendant was not entitled to hold the plaintiff's share in the property by virtue of the sale to him under the decree obtained against *G* alone. *Held,* also, that the plaintiff was entitled to be put into possession of the whole house, the defendant being left to his remedy by a suit for partition. The plaintiff, however, having claimed only the restoration of his half share, the decree was limited accordingly. *Held,* also, that it was not competent for the Court in this suit to go into the question whether the mortgage by *G* was binding on the minor plaintiff. MARUTI NARAYAN v. LILACHAND **I. L. R. 6 Bom. 564**

32. ——————— *Son's liability for father's Debts—Execution sale of ancestral property for decree against father.* By the sale of ancestral property in execution of a mere money-decree against the father for his separate debt, only the right, title, and interest of the father pass to the purchaser, and nothing more ; and this holds good whether the purchaser is a stranger or the decree-holder himself. *Deendyal* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247 ; Hurdey Narain* v. *Ruder Perkash, L. R. 11 I. A. 26 ;* and *Muddun Thakoor* v. *Kantoo Lall, L. R. 1 I. A. 321,* referred to. *Lakhmichand* v. *Kastur, 9 Bom. 60,* and *Sohagchand Gulabchand* v. *Bhaichand, I. L. R. 6 Bom. 295,* followed. BHIKAJI RAMCHANDRA OKE *v.* YASHVANTRAV SHRIPAT KHOPKAR **I. L. R. 8 Bom. 489**

33. ——————— *Decree against father alone for unsecured debts—Purchaser at a sale in execution of such decree—Liability of family property—Sons, How far such decree and sale binding on.* Where father alone is sued, not expressly in his representative capacity, and without his sons being joined as co-defendants, for unsecured debt contracted by him, whatever be the nature of such debts, the decree does not bind the interest of the sons in the family estate. Nor when the judgment-creditor proceeds to sale in execution of such decree against the family property does the sale of the father's "right, title, and interest" pass any more than the father's interest to be ascertained generally by a partition with his sons. BABAJI *v.* DHURI . . . . **I. L. R. 9 Bom. 305**

34. ——————— *Decree against the father alone—Attachment of family property in execution of such decree—Son's interest in the family property when bound by decree against the father or by sale effected by the father.* Where in a joint Hindu family the father disposes of family property, the son's interest is bound unless the son can show, in proceedings taken for that purpose, that the disposal of the property by his father was made under circumstances which deprived his father of his disposing power. So also, where family property is sold under proceedings taken against the father alone, the son's interest is bound, unless the son can show that the sale was on account of an obliga-

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tion to which he was not subject. The father is, in fact, the representative of the family both in transactions and in suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part. JAGABHAI LADUBHAI *v.* VIJBHUKANDAS JAGJIVANDAS . **I. L. R. 11 Bom. 37**

35. ——————— *Civil Procedure Code, Act VIII of 1859, s. 264—Execution of decree against a member of an undivided family by sale of his personal interest in the family estate which was an impartible zamindari ; such interest, by reason of the death before the sale, consisting only of the rents and profits then uncollected.* On a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the zamindar, the head of an undivided family, the question was whether (*a*) only his own personal interest or (*b*) the whole title to the zamindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale, purported to relate to (*a*) only ; and between the debts of proclamation and the auction-sale the zamindar died. Or the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell ; (*b*) because the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son. *Held*, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. PETTACHI CHETTIR *v.* SANGILI VIRA PANDIA CHINNATAMBIAR . . . **I. L. R. 10. Mad. 241**
L. R. 14 I. A. 84

36. ——————— *Decree against an undivided brother—Mortgage of joint property.* *A*, an undivided member of a Hindu family, mortgaged part of the family property by way of conditional sale to *B*, to secure a loan. *B* having sued *A* personally for the amount due, *A* admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. *A's* undivided brothers intervened in execution. *Held*, that the decree, not being passed against the joint family or its representative, and not describing the property, which it directed to be delivered to the plaintiff by way of absolute sale to be family property, could not be executed against the family property. GURUBAPPA *v.* THIMMA . . . **I. L. R. 10 Mad. 316**

37. ——————— *Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather—Assignment by grandsons of the same property subsequently to such sale, Effect of.* In 1858, *S* mortgaged certain ancestral property to the first defendant for a term of nine years. In 1864, *S* being then dead, the defendant sued *R*, the son of *S*, to recover the money-debt, and obtained a decree against the estate of the deceased. The land in question was thereupon attached and sold on the 13th August 1873 subject to defendant's mortgage lien, and was purchased for the defendant by his cousin. The certificate of sale was drawn up in accordance with the decree, and recited that the purchaser bought the whole right, title, and interest of *S*. On the 3rd August 1882, the plaintiff purchased from *R's* sons the share of *R* in *S's* estate. The plaintiff sued the defendant to redeem the property. The Court of first instance rejected his claim. On appeal, the lower Appellate Court reversed that decree, and remanded the case for re-trial. Against this order of remand, the defendant appealed to the High Court. *Held*, restoring the decree of the Court of first instance, that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely *S's* interest. By his purchase the defendant was to be regarded as having bargained for and purchased the entire interest in the land. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21*, followed. SAKARAM SHET *v.* SITARAM SHET . **I. L. R. 11 Bom. 42**

38. ——————— *Mortgage by father—Decree subsequently to father's death against eldest son as heir of father—Minor sons not parties—Sale in execution of family property other than that comprised in mortgage—Subsequent suit by minor sons to recover their shares—Minor sons when bound by decree against eldest son as heir of father.* One *K* mortgaged certain land to *B*, and died leaving four sons, *viz.*, *R* and three minor plaintiffs. Subsequently *B* brought a suit on the mortgage against *K* by his heir, *R*, for the amount due, and obtained a decree whereby it was ordered that the amount should be recovered from the mortgaged property, and if that proved insufficient, from the other estate of the deceased. The minor sons were not made parties to that suit, nor was *R* sued as representing the joint family. In execution of the decree, *B* attached and sold the whole of the joint family property, the certificate of sale showing that the right, title, and interest of *K*, deceased, by his heir *R*, was attached and sold and conveyed to the purchaser. The three minor sons subsequently brought this suit to recover some of the property, contending that their shares were not bound by the sale. *Held*, on the authority of *Bissessur Lall Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233*, and reversing the decree of the lower Court, that the property in question having been declared liable for the debt incurred by the father, the intention was that the estate in its entirety should be sold. The minor

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sons were therefore bound by the sale, unless they could prove that the father's debt had been incurred for an immoral and improper purpose. The case was accordingly sent back for trial of an issue upon that point, with a direction that the burden of proof should lie upon the plaintiffs. JAIRAM BAJABASHET *v.* JOMA KONDIA

I. L. R. 11 Bom. 361

39. ——————————— *Manager, decree against—Sale in execution of such decree passing his interest only—Effect of sale on shares of co-parceners not parties to the suit.* A sale under a decree obtained against the manager of a Hindu family only passes the right, title, and interest of those who are parties to the suit. Accordingly, where, in execution of a decree obtained against two of the brothers of the plaintiff as managers in a suit to which the plaintiff was not a party, the house, which was the family property, was sold:—*Held*, that the sale was void as against the plaintiff's share in the house. *Maruti Narayan* v. *Lilachand, I. L. R. 6 Bom. 564*, followed. LAKSHMAN VENKATESH *v.* KASHINATH . . . **I. L. R. 11 Bom. 700**

40. ——————————— *Mortgage of family property by father—Decree against father enforcing mortgage—Decree for money against father—Sale in execution of decree—Rights of sons.* The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from such sale. One of these decrees was for enforcement of a hypothecation by the plaintiff's father of the property in suit. It was admitted on behalf of the plaintiffs in connection with this decree that, although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the moneys advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest. *Held*, that the plaintiffs were not entitled to any declaration in respect of the execution-proceedings under the decree for enforcement of hypothecation. The second of the decrees above referred to was a simple money-decree for the principal and interest due upon a hundi executed by the father in favour of the decree-holder. The suit terminating in that decree was brought against the father alone, and the debt was treated as his separate debt. *Held*, that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which could execute against the family property and not against the father's interest only, and if he could maintain such suit, either against those members of the family against

whom he desired to execute his decree, or against the father as head of the family, expressly or impliedly, suing him in that capacity; but that, not having taken this course, his decree was not inforcible against the plaintiff's rights and interests in the attached property. *Muttayan Chettiar* v. *Sangili Virapandia Chinnatambiar, I. L. R. 6 Mad. 1*, distinguished. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21*, and *Basa Mal* v. *Maharaj Singh, I. L. R. 8 All. 205*, referred to. BALBIR SINGH *v.* AJUDHIA PRASAD

I. L. R. 9 All. 142

41. ——————————— *Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, Sale in execution of—Sale-certificate referring to right and interests of father only in joint family property—Suit by sons for declaration of right to their shares—Form of decree.* If a person in possession of property which originally belonged to the members of a joint Hindu family of whom the father was one can produce as his document of title only a sale-certificate showing him to have bought, in execution of a money-decree against the father only, the right, title, and interest of the father, then he has bought nothing more than such interest and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale. The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zamindari property, covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation and obtained a money-decree, in execution whereof the right, title, and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale-certificate, only that right, title, and interest was sold. The auction-purchasers, having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as karta, and that the other members of the family, were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares. *Held*, that, inasmuch as upon the terms of the sale-certificate nothing more passed to the defendants at the sale than the right, title, and interest of the father, the plaintiffs were entitled to maintain the suit and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants as auction-purchasers of the father's share might come in and claim a partition of that share

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out of the joint estate. *Per* MAHMOOD, *J.*, that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law. *Simbhunath Pande* v. *Golap Singh, I. L. R. 14 Calc. 572 : L. R. 14 14 I. A. 77 ; Deendyal* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247 : I. L. R. 3 Calc. 198 ;* and *Hurdey Narain Sahu* v. *Ruder Perkash Misser, L. R. 11 I. A. 26 : I. L. R. 10 Calc. 626*, referred to. RAM SAHAI *v.* KEWAL SINGH **I. L. R. 9 All. 672**

42. ——————————— *Mitakshara law —Sale of joint family property in execution of decree, as the result of a mortgage by managing member—Liability of shares of members of family not parties to the decree.* Although some of the members of a joint family had not been made parties to a suit upon a mortgage effected by the managing members, the entire family estate was bound by the act of the latter, and passed at the sale in execution of a decree upon the mortgage. Whether the shares of all were bound depended on the authority of those who executed the mortgage. By this authority they had to raise money to pay a debt owed by the family as joint members of an ancestral trading firm. The managing members of a joint trading family, having purported to mortgage the family estate, to pay a debt due by the firm were sued upon it by the mortgagee, who afterwards purchased the property at the execution-sale. In a suit brought by the latter against the other members of the family to obtain a declaration that he had purchased the entire family estate, the defendants, without showing that the mortgage did not validly bind the family estate, contended that, not having been made parties to the suit, they were not affected by the decree, and their shares had not passed at the sale in execution. *Held*, that, as the defence was substantially on the latter ground only though there was every opportunity given to the defendants to raise the former ground also, the suit need not be remanded ; and that the whole estate had passed to the purchaser. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21 : L. R. 12 I. A. 1*, referred to and followed. *Pursid Narain Singh* v. *Honooman Sahay, I. L. R. 5 Calc. 845*, referred to and approved. DAULAT RAM *v.* MEHR CHAND **I. L. R. 15 Calc. 70 L. R. 14 I. A. 187**

43. ——————————— *Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose—Burden of proving the nature of the debt.* The sons in a joint family, under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt, although the sons may not have

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been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose. The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay, out of the family estate, his father's debt. A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title, and interest of the debtors, but of the property being such interest. On the other hand, before the sale notice was given on behalf of the sons that the property was ancestral and joint. *Held*, in a suit on behalf of the sons against the purchaser at the sale to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan or to prove that the money was borrowed for family necessities. BHAGBUT PERSHAD SINGH *v.* GIRJA KOER . . . **I. L. R. 15 Calc. 717 L. R. 15 I. A. 99**

44. ——————————— *Decree against father—Sale of ancestral estate in execution of money-decree—Son's rights and liabilities.* A purchased the half-share of the judgment-debtors in certain immoveable family property, at a Court-sale held in execution of money-decrees against *B* and his brother, who were members of an undivided Hindu family. *B's* undivided son sued *A—B* and the remaining members of his family being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale, but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that *A* had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and *B* was not the managing member of the family. *Held*, that the Court-sale was binding on the plaintiff's share. *Nanomi Babuasin* v. *Modhun Mohun L. R. 13 I. A. 1 : I. L. R. 13 Calc. 21*, discussed and followed. KUNHALI BEARI *v.* KESHAVA SHANBAGA. . . . **I. L. R. 11 Mad. 64**

45. ——————————— *Decree on mortgage for ancestral debt of family—Minor.* In a suit by a minor to set aside a sale in execution of a decree on a mortgage for a debt of his father's—*Held*, on the merits, that the debt for which the decree was passed, being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was therefore not entitled to disturb the execution-purchaser. DAJI HIMAT *v.* DHIRAJRAM SADARAM . . . **I. L. R. 12 Bom. 18**

46. ——————————— *Ancestral property—Alienations by father—Son's liability for father's debts—Purchaser—Notice.* Where a Hindu

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governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at Court-sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes, it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such case are—(i) What was the interest that was bargained for and paid for by the purchaser ? Was it the father's interest only, or was it the interest of the entire family ? (ii) Were the debts for which the decrees were obtained, under which the property was sold, contracted for immoral purposes ? and (iii) Had the purchaser notice that the debts were so contracted ? *Suroj Bunsi Koer* v. *Sheo Proshad Singh, L. R. 6 I. A. 88 : I. L. R. 5 Calc. 148*, and *Nanomi Babuasin* v. *Modhun Mohun, L. R. 13 I. A. 1 ; I. L. R. 13 Calc. 21*, followed. The plaintiff sued in 1883 for partition of ancestral property, consisting (*inter alia*) of certain thikans which had been sold in execution of decrees passed against his father. The plaintiff though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution-proceedings. In the certificates of sale granted to the different purchasers, the property sold was described as being a four-annas share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that " the right, title, and interest in the above-mentioned property of the said *R* (*i.e.*, the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover the plaintiff's possession and enjoyment of the thikans in question was never disturbed, though the shares had each a separate possession of distinct portions of the ancestral property. *Held*, that, under the circumstances, the father's interest alone passed to the auction-purchasers. KRISHNAJI LAKSHMAN *v.* VITHAL RAVJI RENGE . **I. L. R. 12 Bom. 625**

47. ——————— *Ancestral zamindari sold in execution of decree for money against the father, including the son's right of succession —Debt not immoral.* A sale in execution of a decree against a zamindar for his debt purported to compromise the whole estate in his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose. *Held*, that, the impeachment of the debt failing, the suit failed, and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay. *Hardi Narain Sahu* v. *Ruder Perkash Misser, I. L. R. 10 Calc. 626* (where the sale was only of whatever right, title, and interest the father had in property), distinguished. MINAKSHI NAYUDU *v.* IMMUDI KANAKA RAMAYA GOUNDAN **I. L. R. 12 Mad. 142 : L. R. 16 I. A. 1**

48. ——————— **Money-decree**—*Decree against father alone—Purchaser at execution-sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution-proceedings.* In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale, is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money-decree. In the case of an execution-sale the mere fact that the decree was a mere money-decree against the father as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person who had purchased it at an auction-sale held in execution of a money-decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale, and the lower Courts decided in their favour. On appeal, the High Court reversed the decree, and sent back the case for a fresh decision on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution-proceedings. KAGAL GAMPAYA *v.* MANJAPPA **I. L. R. 12 Bom. 691**

49. ——————— *Money - decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed.* The mere obtaining of a simple money-decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment-debtor had in the joint family property. *Suraj Bunsi Koer* v. *Sheo Pershad Singh., I. L. R. 5 Calc. 148 : Rai Balkishen* v. *Rai Sita Ram, I. L. R. 7 All. 731 ;* and *Balbhadar* v. *Bisheshar, I. L. R. 8 All. 195*, referred to. JAGANNATH PRASAD *v.* SITA RAM . **I. L. R. 11 All. 302**

50. ——————— *Money - decree against father—Attachment of ancestral estate.*

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HINDU LAW—JOINT FAMILY—*contd.*

6. SALE OF JOINT FAMILY PROPERTY IN EXECUTION, AND RIGHTS OF PURCHASERS—*contd.*

In execution of a money-decree, ancestral property of the joint family of the judgment-debtor was attached. His son sued to release their interest from attachment, alleging that the judgment-debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree. *Held*, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. *Nanomi Babuasin* v. *Modhun Mohun L. R. 13 I. A. 1 : I. L. R. 13 Calc. 21*, discussed, and followed. RAMANADAN *v.* RAJAGOPALA **I. L. R. 12 Mad. 309**

51. ——— *Money - decree against father—Auction-purchaser at such sale.* In the absence of special circumstances showing an intention to put up the entire interest of the family in the property sold in execution of a money-decree against the father, only the interest of the father passes to the auction-purchaser, regard being had to *Hurdey Narain Sahu* v. *Ruder Perkash Misser, L. R. 11 I. A. 26 : I. L. R. 10 Calc. 626*, and *Simbhunath* v. *Golab Sing, L. R. 14 I. A. 77 ; I. L. R. 14 Calc. 572.* MARUTI SAKHARAM *v.* BABAJI **I. L. R. 15 Bom. 87**

52. ——— *Money - decree against father—Execution against son after the death of the father—Ancestral property in the hands of the son—Civil Procedure Code, 1882, s. 234.* A money-decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands, even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality. UMED HATHISING *v.* GOMAN BHAIJI . . **I. L. R. 20 Bom. 385**

53. ——— **Son's liability for father's debt**—*Decree against father—Son's interests when not affected by sale.* When ancestral property is sold in execution of a decree against a Hindu father, there are only two cases in which the son's interests do not pass under the sale: *first*, when they are not sold; *second*, when the debt is not binding upon the sons by reason of its having been contracted for an illegal or immoral purpose. JOHARMAL *v.* EKNATH . **I. L. R. 24 Bom. 343**

54. ——— *Sale of joint family estate in execution of a decree against the father upon debts contracted by him—Liability of son's share—Alienation by father.* It is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara law. In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution or not, is a question of fact in each case dependent on what was understood to be brought, and has been brought to sale. *Nanomi Babuasin* v. *Modhun Mohun, L. R. 13 I. A. 1 : I. L. R. 13 Calc. 21*, and *Bhagabut Pershad Singh* v. *Girja Koer, L. R. 15 I. A. 99 : I L. R. 15 Calc. 717*, referred to and followed. The description of the property in a certificate of sale as the right, title, and interest of the judgment-debtor is consisted with every interest which he might have caused to be sold passing at the sale, and does not necessarily import that, when the father of a joint family is the judgment-debtor, nothing is sold but his interest as a co-sharer. MAHABIR PERSHAD *v.* MOHESWAR NATH SAHAI . . . **I. L. R. 17 Calc. 584**

S. C. MAHABIR PERSHAD *v.* MARKUNDA NATH SAHAI . . . . **L. R. 17 I. A. 11**

55. ——— *Decree against Hindu father—Interest of undivided son—Certificate of sale.* In execution of a decree for sale passed on a hypothecation-bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title, and interest of the judgment-debtor be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land part of which he leased to the son. Subsequently, the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment-debt had been incurred for purposes not binding on him:—*Held*, that the entire estate less the interest of the nephew was sold to the decree-holder, and consequently the son's interest had passed to him. GNANAMAL *v.* MUTHUSAMI . . . . **I. L. R. 13 Mad. 47**

56. ——— **Decree against manager for debt due by the family**—*Sale in execution of such decree, effect of, on the other co-sharers, though not parties to the decree.* The plaintiffs and their brother *E* were in joint occupation of certain thikans in a khoti village. *E*, being the eldest brother, was in management of the family estate. In 1877 the khot sued *E* alone for arrears of assessment due on the thikans in question, obtained a decree, and in execution put up the thikans to sale. Defendants 2 to 5 became the auction-purchasers, and were put into possession by the Court. Thereupon the plaintiffs sued for a partition of their five sixths share of the thikans sold, alleging that they were not bound by the Court-sale, as they were not

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parties to the khot's suit against their brother or to the execution-proceedings. *Held*, that, the assessment for which the khot obtained a decree against *E* being due by the whole family, the sale in execution passed the shares of the plaintiffs, as well as that of their brother, to the auction-purchasers. *Daulat Ram* v. *Mehr Chand, I. L. R. 15 Calc. 70 : I. R. 14 I. A. 187*, followed, by which *Lakshman Venkatesh* v. *Kashinath, I. L. R. 11 Bom. 700*, and *Maruti Narayan* v. *Lilachand, I. L. R. 6 Bom. 564*, are overruled. HARI VITHAL *v.* JAIRAM VITHAL **I. L. R. 14 Bom. 597**

57. ——— **Mortgage decree**— *Mortgage for debt due by father of joint family—Sale in execution of decree—Effect of sale on members of family not made parties.* When in a mortgage suit the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale, simply because they are not parties on the record. This principle of law applies as much to a Hindu family governed by the Mitakshara law as to a Mahomedan family. *Hari* v. *Jairam, I. L. R. 14 Bom. 597*, and *Khurshetbibi* v. *Keso, I. L. R. 12 Bom. 101*, referred to and followed. DAVALAVA *v.* BHIMAJI DHONDO . **I. L. R. 20 Bom. 338**

58. ——— *Mortgage of ancestral property by father of joint family—Decree on mortgage—Sale in execution of decree—Extent of the right, title, and interest sold.* *A* mortgaged his family property to *C*. Subsequently *C* got a decree upon his mortgage and purchased the property at an auction-sale held in execution of the decree. In a suit brought by *C's* son against the heirs of *A* to recover possession of the property :— *Held*, that, having regard to the language of the mortgage-deed, there could be no doubt that the entire family property was intended to be mortgaged. The auction-purchaser, therefore, took the whole interest in the property, and not merely the interest of *A* alone. *Simbhunath Pande* v. *Golap Sing, I. L. R. 14 Calc. 572 : L. R. 14 I. A. 77*, distinguished. *Bhagbut Pershad Singh* v. *Girja Koer, I. L. R. 15 Calc. 717 : L. R. 15 I. A. 101*, followed. PEMRAJ CHANDRABHAU *v.* SAVALYA GAJABA **I. L. R. 15 Bom. 293**

59. ——— *Ancestral property—Father's debt—Decree against father—Liability of family property—Purchaser, rights of—Civil Procedure Code (Act XIV of 1882), ss. 318, 332, 333.* In a suit for specific performance of a certain contract for the sale of land which the defendant had failed to complete, the plaintiff obtained a decree against the defendant for the repayment of the earnest-money and his costs of suit. In execution of this decree, the plaintiff attached the whole of the property, which the defendant had agreed to sell. A warrant for sale was duly issued and claims were advertised for. The sons of the defendant thereupon appeared before the Commissioner and claimed to be entitled to three-fourths of the property, which they alleged was ancestral. Their claim was not investigated, but to save time it was agreed that a note should be made in the proclamation of sale, that the sons claimed to be interested in the said lands and premises on the ground that they were ancestral, and that the one-fourth share of the defendant only could be sold by the attaching creditor. Under this proclamation, the right, title, and interest of the defendant in the property were sold. At the sale the sons gave notice of their claim, the property was duly sold, and the purchaser was put into possession, the claimants being dispossessed. The claimants then took out a summons under s. 332 of the Civil Procedure Code calling upon the purchaser to show cause why they should not be restored to possession. *Held*, (i) that the judgment-debt due by the defendant was one which the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant to the extent of the whole interest therein of the defendant and his sons, as it was not an immoral or illegal debt ; (ii) that, assuming that the property in question was ancestral, what the purchaser bought was the whole property, and not merely the right which the defendant might have as the father of the family to a share of it on partition. The plaintiff evidently did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, which, as the judgment-debt was one for which the family property was liable, was the whole estate of the joint family ; (iii) that the purchaser, who had bought the whole of the rights of the family in the property, was entitled to the possession of what he bought, and was not required to file a suit for partition, because the shares of all the co-parceners had passed to him ; (iv) assuming that the property was ancestral, the claimants were not in possession on their own account, and were therefore not entitled to be restored under s. 332 of the Civil Procedure Code. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family ; (v) what all the sons were entitled to was to try the fact or nature of the debt due to the plaintiff, in a suit of their own. In such suit they would have to prove that the debt was not such as to justify the sale. COOVERJI HIRJI *v.* DEWSEY BHOJA **I. L. R. 17 Bom. 718**

60. ——— *Execution of mortgage-decree against the estate of a deceased judgment-debtor, member of a joint family under Mitakshara law—Survivorship—Hindu law.* On an

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application for the execution of a mortgage-decree the following order was made: "In this case the sale was stayed awaiting the disposal of the regular suit. It being not necessary to keep the case pending, it is ordered that, attachment being allowed to stand, the case be struck off for the present." The judgment-debtor, the father of a joint Hindu family subject to the Mitakshara law, having died, a fresh application for execution was subsequently made against his estate. The heirs of the judgment-debtor objected to the application on the ground that, the decree having been passed against their father alone it could not be executed against the joint family estate, now theirs by operation of Mitakshara law. *Held*, that, inasmuch as there was an attachment subsisting at the time of the application, the estate of the judgment-debtor under attachment at the time of his death was liable after his death, even though it had passed to the surviving members of the joint Mitakshara family. *Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88*, relied on. *Karnataka Hanumantha* v. *Andukuri Hanumayya, I. L. R. 5 Mad. 232*, distinguished. BENI PERSHAD *v.* PARBATI KOER . . **I. L. R. 20 Calc. 895**

61. ———— Debts incurred by agent of joint family—*Mitakshara law—Suit and decree against managing members of a joint family business—Effect of sale against other members, though not parties to decree—Execution-proceedings, setting aside of.* The plaintiffs, who were the members of a joint Hindu family, sought to recover a share in certain properties on the allegation that they were joint family properties, but wrongfully sold in execution of a decree upon a bond executed by their paternal uncles, *L* and *S*, and one *B S*. The family was a trading family, and carried on a money-lending business under the supervision of *L* and *S*. One *Z M* had dealings with *L* and *S*, and in the course of such dealings, he deposited a certain sum of money with them, for which the above bond was executed, in which certain properties belonging to the family were pledged as security. Subsequently, *Z M* sued on this bond, obtained a decree, and put up the properties for sale, which were purchased by some of the defendants, who dispossessed the plaintiffs. The share of the properties advertised for sale, certified in the sale-certificates granted to the defendants to have passed to them, was the share of the whole family in the properties sold, but it was described as the right, title, and interest of *L* and *S*, the persons sued. *Held*, that *L* and *S*, though not the managers of the family, were yet its accredited agents in the management of the money-lending business, and as such had the authority of the other members to pledge the family properties for a joint debt contracted in the ordinary course of that business. *Johurra Bibee* v. *Sreegopal Misser, I. L. R. 1 Calc. 470*, referred to. *Held*, also, that, the sale having been

under a decree in respect of a joint-debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although *L* and *S* only out of the members of the family were sued. *Pursid Narain Sing* v. *Honooman Sahai, I. L. R. 5 Calc. 845 ; Bissessur Lall Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233 : 5 C. L. R. 477 : Nanomi Babuasin* v. *Modhun Mohan, I. L. R. 13 Calc. 21 ; Daulat Ram* v. *Mehr Chand, L. R. 14 I. A. 187 : I. L. R. 15 Calc. 70 ; Gaya Din* v. *Raj Bansi Kuar, I. L. R. 3 All. 191 ; Ram Narain Lal* v. *Bhowani Prasad, I. L. R. 3 All. 443 ; Phul Chand* v. *Lachmi Chand, I. L. R. 4 All. 486 ; Bemola Dossee* v. *Mohun Dossee, I. L. R. 5 Calc. 792 ; Baso Kooer* v. *Hurry Dass, I. L. R. 9 Calc. 495 ; Samalbhai Nathubhai* v. *Someshvar, I. L. R. 5 Bom. 38 ;* and *Hari Vithal* v. *Jairam Vithal, I. L. R. 14 Bom. 597*, referred to. *Held*, further, that in execution-proceedings the Courts will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right. *Bissessur Lall Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233 : 5 C. L. R. 477*, followed. SHEO PERSHAD SINGH *v.* SAHEB LAL. RAJKUMAR LAL *v.* SAHEB LAL . . . **I. L. R. 20 Calc. 453**

62. ———— Decree against manager—*Family debt—Liability of family property—Sale in execution of decree—Rights of auction-purchaser.* Where the manager of a joint Hindu family is sued for the recovery of a debt, and his right, title, and interest in the family property are sold in execution, the questions which the Court has to decide in determining the quantum of interest which has passed to the auction-purchaser are (i) whether the debt was one for which the entirety might, by proper procedure, have been brought to sale, and (ii) whether, as a matter of fact, the purchaser bargained and paid for the entirety. *A* and his three younger brothers, *B*, *C*, and *D*, were members of a joint Hindu family. *A* was the manager of the family. After *A's* death, *B*, *C*, and *D* were sued as his legal representatives in respect of a debt which *A* had contracted for the benefit of the family. A decree was passed against them as *A's* representatives, directing the recovery of the debt by sale of *A's* estate. In execution of this decree, *A's* right, title, and interest in certain family property was put up to sale. *Held*, that the sale affected the rights of all the members of the joint family. Under the circumstance, what was meant to be brought to sale was the right, title, and interest of the family of which *A* had been the manager, and for the benefit of which the debt had been incurred. JANKIBAI *v.* MAHADEV **I. L. R. 18 Bom. 147**

63. ——————— *Mitakshara law—Sale of joint property in execution of decree against father—Decree for damages for theft or*

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6. SALE OF JOINT FAMILY PROPERTY IN EXECUTION, AND RIGHTS OF PURCHASERS—*contd.*

misappropriation—Antecedent debt—Pious duty of sons to pay father's debt—Bonâ-fide purchaser, Equities of. In execution of a decree for damages for theft or misappropriation against *M* and *S*, two of the members of a joint Hindu family under the Mitakshara law, ancestral property of the family was sold, and the purchasers took possession. In a suit by the sons of *M* and *S* and several other members of the family for recovery of their interests in the property:—*Held*, that there was no debt "antecedent" to the decree in this case; that even if the right to obtain damages for the theft or misappropriation could be said to have created a "debt," the debt was tainted with illegality or immorality, the sons were not under a pious duty to pay the debt, and the interests of the sons did not pass by the sale. *Held*, also, that the purchasers in this case were not entitled to the equities of a *bonâ fide* purchaser, as the decree, if examined, would have put them upon inquiry. PAREMAN DASS *v.* BHATTU MAHTON . . **I. L. R. 24 Calc. 672**

64. ——————— *Family-debt, liability of family property in execution of—Decree against a manager—Parties, non-joinder of.* Where family property is sold in execution of a decree, obtained against a brother as manager of a joint Hindu family, for a family debt contracted by his father and himself and a brother, the interest of all the members of the family passes to the auction-purchaser, though they have not been joined as parties to the suit or to the execution-proceedings. BHANA *v.* CHINDHU **I. L. R. 21 Bom. 616**

65. ——————— *Benares school of law—Joint family property—Ancestral property assigned to wife in lieu of maintenance, Devolution of—Collateral succession—Decree passed by mistake against father, Effect of, on sons—Sale in execution of decree against father—Parchase by decree-holder—Interest passed by sale—Nature and extent of mother's share in joint family property, Nature and devolution of.* A Hindu, governed by the Benares school of law, died leaving a joint family consisting of four sons, *A*, *B*, *C*, and *D*, and a widow, *R*, to whom he assigned an ancestral mouzah in lieu of her maintenance. All the sons predeceased the widow, *C* and *D* dying childless. After the widow's death, a separation took place in 1862 among all her grandsons, *viz.*, *E* and *F*, sons of *A*, and *G* and *H*, sons of *B*. At the separation, *E* withheld possession, among other properties, of the mouzah assigned to *R* on alleged transfers from *R* and the widows of *C* and *D*. *H* sued *E*, making *G* a *pro formâ* defendant, and recovered a decree for 4 annas of the mouzah in 1864, and *G* also recovered a similar decree for 4 annas in 1866. Some time after *H* brought an action for mesne profits and recovered a decree in 1875 against *M*, heir of *E*, and also against *G*, although there

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was no allegation of wrong against the latter and no finding in the Court's judgment to that effect. In execution of this decree, *H* caused the interest of *G* in the mouzah to be sold, purchased it himself, and took delivery of possession on the 19th December 1878. In 1881, the wife of *G*, together with her two sons (plaintiffs 1 and 2), executed a kobala in respect of one anna six pies of the mouzah to *S* (defendant 4); the wife of *G* died in 1885. The present suit was brought by the three sons of *G* to recover a four-fifths of the four annas of the said mouzah—a three-fifths in their own right and a one-fifth in right of their mother. Among the objections raised by the defendants and pressed by them on appeal to the High Court it was urged (i) that out of the four-anna share, two annas were acquired by *G* collaterally from his uncles *C* and *D*, and therefore were not "ancestral property" of the plaintiffs. *Held*, that the mouzah in question retained the character of ancestral property during the lifetime of the widow *R*, and that, upon her death, it devolved upon her grandsons *E*, *F*, *G*, and *H* as ancestral property, and not as property derived by collateral succession from either *C* or *D*. (ii) It was also urged that the decree of 1875 was conclusive as to the liability of *G*, and the plaintiff could not raise any question on the existence of a debt binding on them. *Held*, that the plaintiffs were not precluded from showing that there was no real debt, and that the sale held in execution did not pass the entire interest of the family of the plaintiffs. *Suraj Bunsi Koer* v. *Sheo Proshad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88; Luchmon Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855; Nanomi Babuasin* v. *Modun Mohun, I. L. R. 13 Calc. 21 : L. R. 13 I. A. 1; Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198; L. R. 4 I. A. 247; Hurdey Narain Sahu* v. *Rooderperkash Misser, I. L. R. 10 Calc. 626 : L. R. 11 I. A. 26;* and *Simbhunath Panday* v. *Golab Sing, I. L. R. 14 Calc. 572 : L. R. 14 I. A. 77*, referred to. (iii) It was further urged that the claim being for a four-fifths share, the present suit should be treated as one for partition, and shares distributed according to the state of the family on the date of the suit, and in that case plaintiff's claim to the share of their mother would not stand. *Held*, that this contention could not be sustained, and the defendants could claim only that share which, if a partition had taken place on or before the date of sale, would be allotted to the father, *i.e.*, a one-fifth share. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198 : L. R. 4 I. A. 247; Hurdey Narain Sahu* v. *Rooderperkash Misser, I. L. R. 10 Calc. 626 : L. R. 11 I. A. 26;* and *Suraj Bunsi Koer* v. *Sheoproshad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88*, referred to. (iv) As to the kobala executed by the plaintiffs 1 and 2 and their mother in 1881, it was contended that six pies out of a one anna six pies share, the pro-

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portionate share of the mother, passed absolutely to the purchaser, and plaintiffs could not recover that portion of the share. *Held*, that the mother was entitled to a one-fifth share in lieu of maintenance only, and had no absolute power of disposal in respect of that share. *Judoonath Tewaree* v. *Bishonath Tewaree, 9 W. R. 61*; and *Lalljeet Singh* v. *Rajcoomar Singh, 12 B. L. R. 374 : 20 W. R. 336*, referred to. BENI PARSHAD *v.* PURAN CHAND **I. L. R. 23 Calc. 262**

66. ——— **Suit for redemption**—*Joint Hindu family—Mortgage of ancestral property by father—Sale under degree on mortgage—Suit by sons to redeem their interests.* Where ancestral property of a joint Hindu family has been sold in execution of a decree upon a mortgage executed by the father, no suit for redemption of their interests is maintainable by the sons upon the ground solely that they were not made parties to the suit under the decree in which the ancestral property was sold. *Debi Singh* v. *Jai Ram, I. L. R. 25 All. 214*; *Banke Rai* v. *Raghubir, S. A. No. 641 of 1903, decided 6th August 1904*, followed. *Girdharee Lall* v. *Kantoo Lall, L. R. 1 I. A. 321*, referred to. LAL SINGH *v.* PULANDAR SINGH (1905) . . . **I. L. R. 28 All. 182**

67. ——— **Suit on promissory note**—*Suit against father and son on promissory note given by father—Son exempted from liability on the note—Liability of son as member of a joint family.* In a suit brought against father and son in a joint Hindu family upon a promissory note executed by the father alone, the son was exempted from liability on the note on the ground that he was no party to it: in other words the suit as against the son was dismissed. A decree, however, was passed against the father, and in execution thereof the decree-holder's assignee caused a portion of the joint family property to be sold. *Held*, on a suit by the son for a declaration exempting his interest in the joint family property, that the dismissal as against him for the suit on his father's promissory note left him still liable as a Hindu son to pay his father's debt, unless—which was not suggested here—the debt was tainted with immorality. SHIAM LAL *v.* GANESHI LAL (1905) **I. L. R. 28 All. 288**

7. SUITS FOR POSSESSION.

1. ——— **Co-parcener, right of**—*Possession—Suit by co-parcener for exclusive possession—Failure to prove right to exclusive possession, but right to joint possession proved—Decree for joint possession.* The plaintiff sued for exclusive possession of certain land, alleging it to be his property, and complaining that defendants Nos. 1 and 2 had taken possession of it alleging that they had purchased it from defendants Nos. 3 to 8. On appeal, the Judge concurred with

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7. SUITS FOR POSSESSION—*contd.*

the lower Court in holding that the plaintiff had failed to prove his right to exclusive possession, but, without going into the question of the plaintiff's right as co-parcener, reversed the decree and dismissed the suit, holding that the plaintiff's remedy was a suit for partition. *Held*, that the lower Court ought to have considered the plaintiff's right as co-parcener in this suit, and, if it found that right proved, ought to have confirmed the decree for joint possession, notwithstanding that the plaintiff's claim in the plaint was only for exclusive possession. NARANBHAI VAGHJIBHAI *v.* RANCHOD PREMCHAND (1901) . . . . **I. L. R. 26 Bom. 141**

2. ——— *Right to sue on behalf of co-parceners—Limitation Act (XV of 1877), s. 22—Civil Procedure Code (Act XIV of 1882), s. 32—Suit to recover possession—Suit by one of the plaintiffs as manager of the family—Right of manager to sue—Objection as to non-joinder at a late stage—Joinder of co-plaintiffs after the period of limitation—Limitation.* A suit to recover possession of a house was originally brought by two plaintiffs, the second plaintiff being described as the manager of the family. Subsequently at a late stage of the suit, the defendants having raised an objection of non-joinder of parties, the other members of the family who, however, stated that they were satisfied to be represented by the plaintiff No. 2 as the manager of the joint family, were joined as co-plaintiffs, but after the expiry of the period of limitation prescribed for the suit. The first Court allowed the claim. The Judge in appeal reversed the decree and dismissed the suit as time-barred under s. 22 of the Limitation Act (XV of 1877). *Held*, reversing the decree of the Judge and restoring that of the first Court, that s. 22 of the Limitation Act (XV of 1877) does not in itself purport to determine directly whether the joinder of the parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon a consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of s. 22 of the Limitation Act) of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act (XV of 1877). The question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and the right to insist on the other co-parceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependent on the objection being taken

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at an early stage, the objection on the score of want of authorization being one of a character, which it would clearly be open to the defendant to waive. GURUVAYYA *v.* DATTATRAYA (1904)
I. L. R. 28 Bom. 11

8. PARTITION.

1. ——— Purchaser of portion of property belonging to a joint Hindu family— *Partition—Such purchaser competent to obtain partition of a part only of the property purchased by him.* It is competent to the purchaser of property belonging to a joint Hindu family to have, if he is so desirous, a portion only of the property, which he has purchased, partitioned: he is not bound to include in his suit for partition the whole of the property which he has purchased. *Sreemati Padmamani Dasi* v. *Srimati Jagadamba Dasi, 6 B. L. R. 134* followed. RAM MOHAN LAL *v.* MUL CHAND (1905). . **I. L. R. 28 All. 39**

2. ——— *Right to sue for partition of a portion of the joint family property.* One of two brothers, who formed a joint Hindu family, sold his own interest in a portion of the joint family property. *Held,* that it was competent to the other brother to sue for partition of his share in the property so dealt with without asking also for partition of the remainder of the joint family property. *Lachmi Narain* v. *Janki Das, I. L. R. 23 All. 216,* and *Subramanya Chettyar* v. *Padmanabha Chettyar, I. L. R. 19 Mad. 267,* followed. RAM CHARAN *v.* AJUDHIA PRASAD (1905) . . . **I. L. R. 28 All. 50**

3. ——— Right of minor member of a joint family to sue for partition—*Joint family—Minor. Held,* that a minor member of a joint Hindu family may institute a suit for and obtain partition of his share in the joint family property if there exist circumstances such as, in the interest of the minor, render it advisable that his share should be set aside and secured for him. BHOLA NATH *v.* GHASI RAM (1907)
I. L. R. 29 All. 373

4. ——— Family arrangement— *Amongst co-parceners not to partition, to what extent binding.* Persons jointly entitled to lands may, as amongst themselves, come to an agreement as to the manner in which they will mutually enjoy the property, and an agreement between the members of a Hindu family not to come to partition may be binding on the immediate parties thereto. *Ram Dhone Ghose* v. *Anund Chunder Ghose, 2 Hyde, 97,* followed. *Sri Mohan Thakur* v. *W. O. MacGregor, I. L. R. 28 Calc. 769,* distinguished. A family arrangement may be such as the Court will uphold, although there are no rights in dispute, and, if sufficient motive for the arrangement is proved, the Court will not consider the *quantum* of the consideration too nicely. *Williams* v. *Williams, L. R. 2 Ch. App. 294.* Where in return for binding themselves not

to sue for partition, the parties obtained a right to take advances from family funds in excess of what might be due to them at the time, and also obtained a right to pre-empt any share, which the other members of the family might wish to sell: *Held,* that the arrangement was for consideration. KRISHNENDRA NATH SARKAR *v.* DEBENDRA NATH SARKAR (1908)
12 C. W. N. 793

5. ——— Partial partition—Limitation Act, Act XV of 1877, Sch. II, Arts. 32, 127—*When debts recovered by one member after division in status, right of other members to recover their shares, falls under Art. 62 and not 127—Funeral expenses, liability for.* Where a partial partition is proved or admitted to have taken place between members of a Hindu family, the presumption is that there has been an entire partition both with reference to rights and properties. Where the greatest portion of the properties have been divided, and where the parties subsequently continue to live separately and have separate accounts, and there is no managing member of the family and no reason is shown why they should have been continued joint in respect of the other properties, the parties must be considered as having become divided in status. Where the members of a joint family become divided in status, no member has a right, on behalf of the others, to recover any debt due to the family; and where it is so recovered, it is not joint family property, so as to entitle another member to recover his share by partition within the period provided by article 127 of Schedule II of the Limitation Act. The article applicable in such a case is article 62, and a suit, brought more than three years after the recovery of the debt, by another member for his share will be barred by limitation. *Arunachalam* v. *Ramasamya, I. L. R. 6 Mad. 402,* followed. The principle that the possession of one tenant-in-common is to be deemed possession on behalf of all, and limitation begins to run only after the exclusion of any tenant-in-common or after adverse possession is set up, will not apply in the case of joint families after a complete separation in status, as no member can then legally represent the others. Where, however, at the time of such division, one of the members is a minor and continues undivided from and under the guardianship of another, who afterwards collects certain debts due to the family, it will not be open to the guardian to say that he did not realise the minor's share of the debt on his behalf, as it was his duty to protect the minor's interest and he would have been guilty of dereliction of duty if he had omitted to do so. Where therefore he collects any such debts, he will be considered to have recovered the minor's share on behalf of such minor and the minor can recover his share within the period provided by article 127 of the Limitation Act. The funeral expenses of the mother are defrayable out of the family funds; but where, at the partition,

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HINDU LAW—JOINT FAMILY—*concld.*

8. PARTITION—*concld.*

an agreement is made regarding such expenses, the divided member who, at his expense, performs such funerals, cannot recover contributions from the others except under the terms of such agreement. VAIDYANATHA AIYAR *v.* AIYASAWMY AIYAR (1908) **I. L. R. 32 Mad. 191**

6. ——— Right to account—*Partition, suit for—Claim for share of specific items bar to claim for a general account.* Under the Mitakshara law, a member of an undivided family who sues for partition, and who has not been excluded from the family, is not, unless he establishes fraud or misappropriation, entitled to call upon the managing member to account for his past dealings with the family property. *Abhaychandar Roy Chowdhry* v. *Pyari Mohan Guho, 5 B. L. R. 347*, not followed. *Narayan bin Babaji* v. *Nathaji Durgaji, I. L. R. 28 Bom. 201*, followed. Where a plaintiff, suing for partition, prays for general account and claims a share in specific items alleged to have been received by the manager of the family, and attempts to prove the receipt of such items, he will not, on failing to prove such receipt, be allowed to claim a general account. BALAKRISHNA IYER *v.* MUTHUSAMI IYER (1908) **I. L. R. 32 Mad. 271**

HINDU LAW—MAINTENANCE.

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I. L. R. 2 Bom. 140
I. L. R. 7 Mad. 428

1. NATURE OF RIGHT.

1. ——— Nature of right to maintenance—*Right not based on contract.* Ordinarily, the right to maintenance does not rest upon contract. It is a liability created by the Hindu law, and arises out of the jural relation of the Hindu family. It is enforceable in numerous instances in which there is no connection with contract. SIDLINGAPA *v.* SIDAVA . **I. L. R. 2 Bom. 624**

2. ——— Charge on immoveable property—A claim for maintenance held not to be a charge upon immoveable property. BEER CHUNDER MANIKHYA *v.* RAJ COOMAR NOBODEEP CHUNDER DEB BURMONO **I. L. R. 9 Calc. 535 : 12 C. L. R. 465**

3. ——— Danpatra in favour of sister—*Maintenance, grant for—Construction—Absolute estate, though donee's heirs wrongly enumerated—Ayautuka stridhan—Succession—Dispossession by natural guardian by untrue representation—Decree for possession—Mesne profits.* C executed in favour of his younger sister a *danpatra*, which declared that the donor did of his own free will make a gift to the donee of an eight annas share of a certain mouzah for her maintenance. The document further provided that "you (the donee) shall pay the annual Government revenue of the said share to the Collectorate and get your name registered" to that extent "and enjoy possession during your lifetime. On your death, your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale will successively vest in your husband, sons, grandsons and others." *Held*, on the construction of the *danpatra*, that the donee took an heritable estate, it being apparent that her heirs, though wrongly enumerated, were intended to succeed as such. *Held*, further, that the property having been given to the donee, when married, became her "*ayautuka stridhan*," so that on her death her only unmarried daughter became entitled to succeed to it in preference to her husband. The donee died on 31st May 1879 and thereupon her husband applied to have his name registered in lieu of the donee's, falsely stating that she had died childless and had his name registered on the 27th May 1880. The present suit was instituted by the donee's only daughter on the 22nd January 1897 to recover possession of the properties from the widow of the husband, who had died on the 23rd February 1893. The plaintiff having obtained a decree for possession it was held, that having regard to the fact that the plaintiff was dispossessed by her natural guardian and that by means of an untrue representation she was entitled to get mesne profits from the date of her mother's death and not merely for three years before suit.

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HINDU LAW—MAINTENANCE—*contd.*

1. NATURE OF RIGHT—*concld.*

BASANTA KUMARI DEBI *v.* KAMIKSHYA KUMARI DEBI (1905) . . . I. L. R. 33 Calc. 23 s.c. 10 C. W.N. 1

2. FORM OF ALLOWANCE AND CALCULATION OF AMOUNT.

1. ——— **Impartible raj**—*Allowance to younger sons—Matters which may be considered in assessing such allowance. Held,* that in calculating what allowance might properly be made to the younger brother of the holder of an impartible raj regard might properly be had, not merely to the extent of the property constituting the raj, but to the other sources of income, whencesoever derived, possessed by the incumbent of the raj. MAHESH PARTAB *v.* DIRGPAL SINGH . . I. L. R. 21 All. 232

2. ——— **Power of Court to fix maintenance**—*Husband and wife—Wife residing apart from husband.* A Civil Court has power to fix the rate of maintenance payable by a husband to his wife, where she, for lawful cause, is residing apart from him and to make an order that maintenance at that rate shall be paid in future, subject to be set aside or modified according to circumstances. NOBO GOPAL ROY *v.* AMRIT MOYEE DOSSEE 24 W. R. 428

3. ——— **Form of allowance**—*Fixed annual sum—Share of income—Widow.* In a case where a Hindu widow is entitled to maintenance, it is better to award a fixed annual sum and not a share of the income of the estate. JHUNNA *v.* RAMSARUN I. L. R. 2 All. 777

4. ——— *Assignment of mortgaged property as maintenance of a widow—Subsequent redemption of the mortgage—Widow's right to the redemption money—Form of decree.* A field held in mortgage by the family of the parties was assigned to a widow in the family for her maintenance when the family divided. The mortgage money was subsequently paid into Court in pursuance of a decree for redemption. *Held,* that it was clear on the assignment that the widow was entitled to the money just as she was entitled to the field, *i.e.,* to the usufruct of it for her life. GAMBHIRMAL *v.* HAMIRMAL I. L. R. 21 Bom. 747

5. ——— **Calculation of amount**—*Maintenance of widows and daughters.* The question of the adequacy of the maintenance granted to widows and daughters must depend in each case on its own peculiar circumstances. DINOBUNDHOO CHOWDRY *v.* RAJMOHINEE CHOWDRY 15 W. R. 73

6. ——— *Maintenance, widow's right to—Arrears of maintenance.* A widow has by Hindu law a right to maintenance, and the amount is to be determined on a consideration not merely of her absolute necessities, but also of the circumstances of her family. SAKVARBHAI *v.* BHAVANJI RAJE GHATJI ZANJARRA DESHMUKH 1 Bom. 194

7. ——— *Widow's maintenance—Separate savings.* In a suit by a widow against her step-son for separate maintenance on the ground of ill-treatment, the Court held that, the ill-treatment being proved, a reasonable maintenance ought to be provided. Taking the income tax return as evidence of the amount of defendant's income, R25 a month out of an annual income of R7,000 was held to be sufficient. In an enquiry of this kind any savings which a woman might make by living with her own family should not be taken into consideration; and the degradation which a Hindu widow is expected to live in is a matter of ceremonial observance rather than of law. HURRY MOHUN ROY *v.* NYANTARA 25 W. R. 474

8. ——— *Stridhan—Hindu widow. Semble:* The stridhan of a Hindu widow should be taken into account in determining whether and to what extent she should have maintenance assigned to her. SAVITRIBAI *v.* LUXIMIBAI I. L. R. 2 Bom. 573

9. ——— *Valuable moveable property—Jewels.* The fact that a widow has in her possession jewels and other property unproductive of income does not deprive her of, or diminish her right to, maintenance; but if the property she possesses be productive, the amount should be taken into consideration in determining the allowance for maintenance. SHIB DAYEE *v.* DOORGA PERSHAD 4 N. W. 63

10. ——— *Discretion of Court.* The *quantum* of maintenance to be awarded is a question in the discretion of the Court, and the Privy Council will not interfere with such discretion unless strong grounds are shown for their so doing. COLLECTOR OF MADURA *v.* MUTU RAMALINGA SATHUPATHY 1 B. L. R. P. C. 1: 12 Moo. I. A. 397 10 W. R. P. C. 17

11. ——— *Widow—Style of living in husband's lifetime.* It is not necessary that a Hindu widow should be maintained in the same estate in which her husband would maintain her. KALLEEPERSAUD SINGH *v.* KUPOOR KOOWAREE 4 W. R. 65

12. ——— *Annual proceeds of husband's share of family property.* A Hindu widow is not entitled to a larger portion of the annual produce of the family property as maintenance than the annual proceeds of the share to which her husband would have been entitled on partition if he were living. MADHAVRAO KESHAV TILAK *v.* GUNGABAI . . I. L. R. 2 Bom. 639

13. ——— *Penalty for vexatious defence—Reduction of maintenance.* Case in

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HINDU LAW—MAINTENANCE—*contd.*

2. FORM OF ALLOWANCE AND CALCULATION OF AMOUNT—*contd.*

which some of the elements in determining what is a suitable amount of maintenance for a Hindu widow out of her deceased husband's estate were considered. A Court is not justified in reducing, as a kind of punishment for vexatious defence to a suit, the amount of maintenance which it would otherwise have awarded. NITTO KISSOREE DOSSEE *v.* JOGENDRO NAUTH MULLICK . **L. R. 5 I. A. 55**

14. ——— *Increase or decrease for sufficient cause.* There is nothing in the law to prevent an increase or a decrease of the amount of maintenance allowed to a Hindu widow, should sufficient cause be shown for either. The increase, if allowed, should be made from date of suit. SREERAM BHUTTACHARJEE *v.* PUDDOMOOKHEE DEBIA . . . . . **9 W. R. 152**

15. ——— *Widow's second suit for maintenance—Enhancement of rate of maintenance—Res judicata.* A Hindu widow in 1867 obtained a decree for maintenance against her husband's co-parceners, but the decree created no charge on the land. The family estate having passed to a collateral relative, the widow now sued him for maintenance at an increased rate with arrears, and asked for a charge on the estate, alleging that prices had risen and that in other respects also circumstances had changed. *Held*, that the decree in the suit of 1867 was not a bar to the present suit. BANGARU AMMAL *v.* VIJAYAMACHI REDDIAR **I. L. R. 22 Mad. 175**

16. ——— *Widow—Reduction of amount, ground for. Held*, in a suit by a Hindu widow for maintenance, that the circumstance that she was not a childless widow, but had had a son who had died a minor subsequently to his father, was not a ground for reducing the allowance she would have been reasonably entitled to had she been a childless widow. NARHAR SINGH *v.* DIRGNATH KUAR **I. L. R. 2 All. 407**

17. ——— In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and status of the widow, and the expenses involved by the religious and other duties which she has to discharge. *Nitto Kissoree Dossee* v. *Jogendro Nath Mullick, L. R. 5 I. A. 55*, and *Narhar Singh* v. *Dirgnath Kuar, I. L. R. 2 All. 407*, referred to. *Per* MAHMOOD, *J.*—The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only a "starving allowance." The austerities enjoined upon Hindu widows are matters not of legal obligation, but only of moral injunction, and cannot be enforced by Courts of justice. The Courts should bear in mind that Hindu widows are by ancient custom debarred

HINDU LAW—MAINTENANCE—*contd.*

2. FORM OF ALLOWANCE AND CALCULATION OF AMOUNT—*contd.*

from re-marriage, and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality. BAISNI *v.* RUP SINGH **I. L. R. 12 All. 558**

18. ——— *Maintenance of widow by her husband's brothers and nephew—Death of the plaintiff's husband prior to his father's death.* In a joint Hindu family governed by the Mitakshara law, the property of *S*, the father, consisted at any rate partly of ancestral property. He died leaving three sons and one grandson (son of a predeceased son). *A*, another son of *S*, died childless before his father leaving his widow, the plaintiff. In a suit by her against the brothers and the nephew of her husband for maintenance, in which she claimed R100 a month: *Held*, that in determining the amount of maintenance the Court should take into consideration not only the reasonable wants of a person in her position of life, but also the means of the family of her husband. *Nittokissoree Dassee* v. *Jogendro Nath Mullick, L. R. 5 I. A. 55*; *Baisni* v. *Rup Singh, I. L. R. 12 All. 558*, referred to. DEVI PERSAD *v.* GUNWANTI KOER **I. L. R. 22 Calc. 410**

19. ——— *Suit for reduction of maintenance where fund from which it is paid has decreased—Right of suit.* A Hindu lady obtained a decree awarding her maintenance at a certain fixed rate and charging the assets of a certain firm with the payment of such maintenance. There was no provision in this decree that such rate was subject to any modification which future circumstances might render necessary. The assets of such firm having diminished, the proprietor of the same brought a suit for the reduction of such rate of maintenance. *Held*, that such suit was maintainable. RUKA BAI *v.* GANDA BAI **I. L. R. 1 All. 594**

20. ——— *Decrease of estate in value on which maintenance is charged.* A suit brought by a widow against the adopted son of her husband, for possession of her husband's estates, was compromised on the terms of a solenamah under which the defendant agreed to pay to the plaintiff a certain sum for maintenance, the same to be secured by assignment of the rents payable by certain raiyats. Subsequently the holding the rents of which were assigned having become unfit for cultivation by reason of an inundation of salt water, and the defendant himself having become greatly impoverished by his estate having been injured by the same cause, the amount due for maintenance was not paid, and the widow brought a suit to recover that amount. *Held*, that, inasmuch as the amount of maintenance must be taken to have been fixed with reference to the extent and value of the property, the Court had power to reconsider the allowance and to re-adjust it to the altered circumstances. RAJENDRO NATH ROY *v.* PUTTOO SOONDERY DASSEE . **5 C. L. R. 18**

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HINDU LAW—MAINTENANCE—*contd.*

2. FORM OF ALLOWANCE AND CALCULATION OF AMOUNT—*contd.*

21. ——— *Reduction in value of property on which maintenance is charged—Natural equity.* A zamindar bequeathed the whole of his zamindari to his eldest son, leaving certain fixed stipends to his other children. In consequence of subsequent events, the Court considered these stipends ought to be reduced. It was alleged that the value of the zamindari had been reduced by sale of a part of it; but as it was nowhere alleged that the sale had been occasioned by bad seasons or acts of God, and not by the neglect of the person through whom the appellant claimed, the question of natural equity was held not to have arisen. GREES CHUNDER ROY *v.* SUMBHOO CHUNDER ROY **5 W. R. P. C. 98**

22. ——— *Suit to reduce rate awarded by decree.* *S*, a Hindu, obtained a decree for maintenance at a certain rate against *R*, her father-in-law. After the death of *R*, *V*, who was adopted by *R* subsequent to the decree, sued *S* to have the rate reduced on the ground that the estate of *R*, which came to his hands, was considerably diminished in value. *Held*, that, as the estate had been diminished by the voluntary acts of *R* and *V*, the claim could not be allowed. VIJAYA *v.* SRIPATHI . . . . **I. L. R. 8 Mad. 94**

23. ——— *Widow's maintenance—Withholding of maintenance—Demand and refusal—Arrears of maintenance—Limitation—Decree providing for reduction of maintenance in event of altered circumstances of persons paying it—Decree, form of.* *K*, a Hindu widow, sued the undivided brothers of her deceased husband for maintenance. She also claimed arrears of maintenance for six years prior to the institution of the suit. The Court of first instance passed a decree in her favour awarding her maintenance at the rate of R52 a year during her lifetime, but "subject to variation according to the change in defendants' circumstances for the worse." The Court also awarded her arrears of maintenance for three years only (not six as claimed) on the ground that she was only twenty years old, and had always lived with her father and been maintained by him, and that a formal demand had only been made on the defendants three years previously. On appeal, the District Court increased the rate of maintenance to R65 per annum, and awarded the plaintiff arrears of six years, holding that the fact of the demand having been made only three years before suit did not prevent her from recovering arrears for six years. *Held*, by the High Court, that, although the withholding of maintenance, which constituted the cause of action, might be proved otherwise than by a demand and refusal, yet in this case it had not been shown that there were any circumstances which would amount to a refusal of maintenance. The decree of the lower Appeal Court was, therefore, confirmed, except so far as it gave the plaintiff arrears of maintenance for six years, which period was altered to three years. The clause as to the reduction of maintenance in the event of altered circumstances was also struck out. MOTILAL PRANNATH *v.* BAI KASHI . **I. L. R. 17 Bom. 45**

HINDU LAW—MAINTENANCE—*contd.*

2. FORM OF ALLOWANCE AND CALCULATION OF AMOUNT—*concld.*

24. ——— *Decree for maintenance—Suit for altering the rate of maintenance fixed by a decree.* A suit will lie to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances, such as a permanent deterioration in the value of the family property. But where such deterioration is due to the plaintiff's own default in not keeping the property in a proper state of repair, he has no right to ask for a reduction. *Per* PARSONS, *J.*—Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved. GOPIKABAI *v.* DATTATRAYA . . **I. L. R. 24 Bom. 386**

3. ARREARS OF MAINTENANCE.

1. ——— **Power to award arrears.** Arrears of maintenance may be awarded. PIRTHEE SINGH *v.* RAJ KOER **12 R. L. R. 238 : 20 W. R. 21 L. R. I. A. Sup. Vol. 203**

Affirming decision of Court below in **12 N. W. 170**

2. ——— **Right to recover arrears—** *Limitation.* No rule of Hindu law precludes the recovery of arrears of maintenance. The only bar to the enforcement of a purely legal right is the lapse of the time required by the law of limitations to bar the remedy. VENKOPADHYAYA *v.* KAVARI HENGUSU . . . . . **2 Mad. 36**

SINTHAYEE *v.* THANAKAPUDAYEN *alias* PONDILY UDAYAN . . . . . **4 Mad. 183**

3. ——— *Limitation—Hindu widow—Demand and refusal—Arrears of maintenance.* A Hindu widow has a legal right, irrespective of demand and refusal, to maintenance, and may recover arrears for any period not excluded by the law of limitation applicable to her suit. JIVI *v.* RAMJI . . . **I. L. R. 3 Bom. 207**

4. ——— **Award of arrears—***Form of decree—Charge on property of husband.* Arrears of maintenance as well as prospective allowance during the widow's life awarded in the same decree, and held to be a charge on the property in the possession of the donees of her deceased husband. NARBADABAI *v.* MAHADEO NARAYAN **I. L. R. 5 Bom. 99**

5. ——— **Suit for arrears of maintenance—***Proof of wrongful withholding of maintenance.* In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has

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HINDU LAW—MAINTENANCE—*contd.*

3. ARREARS OF MAINTENANCE—*contd.*

been a wrongful withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji, I. L. R. 3 Bom. 207,* and *Mahalakshmamma* v. *Venkataratnamma, I. L. R. 6 Mad. 83,* followed. MALLIKARJUNA PRASADA NAIDU *v.* DURGA PRASADA NAIDU . . . **I. L. R. 17 Mad. 362**

6. ———— *Suit to recover arrears of maintenance due under a personal decree and to establish a charge for future maintenance on the family property.* A Hindu widow obtained a personal decree against her father-in-law for maintenance. Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made a charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due and the widow instituted the present suit, in which she asked for a decree establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property. *Held,* (i) that, the maintenance not having been declared a charge upon the portion of the property which had been alienated, this property was free from any charge for her maintenance ; (ii) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandson (the defendants) incurred his liability on his decease, and were bound to discharge the same out of the family property ; (iii) that the right to maintenance being enforceable against the defendants, the right to have it made a charge on the family property was enforceable along with it. BHAGIRATHI *v.* ANANTHA CHARIA **I. L. R. 17 Mad. 268**

7. ———— *Previous demand—Right to arrears of maintenance.* A Hindu widow brought a suit against her husband's brother to establish her right to maintenance, and to recover arrears for six years ; she had made no demand before suit. *Held,* that she was not entitled to a decree for the arrears. SESHAMMA *v.* SUBBARAYADU **I. L. R. 18 Mad. 403**

8. ———— *Discretion of Court in allowing arrears.* Where a Hindu widow sues for maintenance from the family and estate of her deceased husband, with arrears of such maintenance, the allowance of arrears of maintenance is a question for the discretion of the Court, and the Court, if it allows arrears of maintenance at all, will not necessarily allow arrears at the same rate as it may allow future maintenance, especially where the plaintiff has made a serious delay in bringing her suit for maintenance. RAGHUBANS KUNWAR *v.* BHAGWANT KUNWAR . . . **I. L. R. 21 All. 183**

9. ———— **Past non-payment of arrears**—*Right of suit—Proof of wrongful withholding—Unwillingness of holder of estate to pay, and denial of right.* With regard to arrears of maintenance, past non-payment does not necessarily give a right of action : it is a *primâ facie* proof of wrongful withholding. Where the evidence shows that the holder of the estate was unwilling to pay and denied the right, that *primâ facie* proof is not rebutted. YARLAGADDA MALLIKARJUNA PRASADA NAYUDU *v.* YARLAGADDA DURGA PRASADA NAYUDU **L. R. 27 I. A. 151**
I. L. R. 24 Mad. 147

10. ———— **Maintenance, decree for**—*When such decree can be executed after death of person against whom it is passed against other members of joint family.* A decree for maintenance obtained against a member of an undivided family, can, after his death, be executed against joint property in the hands of other members, if the member against whom the decree was passed, was sued as representing the family or if the decree created a charge on the joint family property. *Muttia* v. *Virammal, I. L. R. 10 Mad. 283,* referred to. SUBBANNA BHATTA *v.* SUBBANNA (1907) . . **I. L. R. 30 Mad. 324**

4. EFFECT OF DEATH OF RECIPIENT.

1. ———— **Death of person maintained where sum has been awarded for maintenance**—*Reversion to donor.* There seems no authority for the proposition that, on the death of junior members of a family to whom certain properties were awarded for maintenance, not only the property so awarded, but the profits made upon it, by the donee, revert to the donor. HUREEHUR PERSHAD DOSS PUHRAJ *v.* GOCOOLANUND DOSS MOHAPATTUR . . . . **17 W. R. 129**

5. RIGHT TO MAINTENANCE.

(*a*) GENERAL CASES.

1. ———— **Agreement by zamindar to maintain collateral relations**—*Construction of agreement—Charge on estate—Impartible zamindari.* The holder of an impartible zamindari estate in an agreement with the eldest son of his younger brother, settling family disputes, used words to this effect : "I have agreed to give you, through the Collector, every month R300 on account of the maintenance of yourself, your younger brothers, three in all, and the rest of your family." The son of the youngest brother now sued the son and successor of that zamindar for maintenance according to the agreement. *Held,* that the payment was not limited to the life of one, or all, of the brothers, but that the issue of each of the three were included, and that maintenance at a proportionate rate had been rightly decreed to the plaintiff as a charge on the estate. LAKSHMI NARAYANA ANANGA GARU *v.* DURGA MADHAWA DEO GARU **I. L. R. 16 Mad. 268**
L. R. 20 I. A. 9

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*a*) GENERAL CASES—*concld.*

2. ———— **Junior members of raj family**—*Impartible property, maintenance out of, Suit for—Limitation.* The plaintiff was the second son of the defendant, who was the Thakor of Amod, a talukhdari estate of the nature of an impartible raj or principality. The plaintiff's family belonged to the community of Molesalam Girasias. Plaintiff alleged that, according to a family usage, he, as a junior member of the family, was entitled to receive maintenance from his father, who was the holder of the gadi. The estate was under the management of the talukhdari settlement officer from 1878 to 1888, during which period that officer granted the plaintiff an allowance in lieu of maintenance without any objection on the defendant's part. On the 1st August 1888, the estate was restored to the defendant, who stopped the allowance. The plaintiff thereupon sued in 1891 to recover from the defendant arrears of maintenance for two years and eleven months at R200 a month. *Held*, that the plaintiff was entitled to recover, and that the claim was not time-barred. FATESANGJI JASVATSANGJI *v.* KUVAR HARISANGJI FATESANGJI **I. L. R. 20 Bom. 181**

3. ———— **Suit for partition in part unsuccessful**—*Partible and impartible property—Right of junior member of family to maintenance.* In a suit for general partition of Hindu family estate the plaintiff succeeded only with regard to a small portion thereof, the bulk being found to be impartible. *Held*, that the family did not, in consequence of these proceedings, become a divided one, and that, as regarded the impartible estate, the younger members retained their rights of maintenance. YARLAGARDA MALLIKARJUNA PRASADA NAYUDU *v.* YARLAGARDA DURGA PRASADA NAYUDU . . . **I. L. R. 24 Mad. 147 L. R. 27 I. A. 151**

(*b*) CONCUBINE.

4. ———— **Incontinence of a co-parcener's concubine disentitling her to maintenance.** Continued continence is, under the Hindu law, a condition precedent to a deceased coparcener's concubine claiming maintenance. YASHVANTRAV *v.* KASHIBAI . **I. L. R. 12 Bom. 26**

5. ———— **Right of discarded concubine to maintenance.** A woman who has been kept by a man as his concubine for a number of years continuously, and then discarded, is not entitled under the Hindu law to claim maintenance from him. RAMANARASU *v.* BUCHAMMA **I. L. R. 23 Mad. 282**

6. ———— **Gift to concubine by way of maintenance**—*Permanent connection—Gift of joint family property—Father—Son's liability.* Where, in a joint Hindu family, a father makes a gift of a portion of the family property, during his lifetime, by way of maintenance, to his concubine, in consideration of past cohabitation, the gift is not binding on his son; though the son is bound to provide maintenance for a concubine who lived with his father till his death. Under Hindu law, a concubine gets no right of maintenance against her paramour, unless, having been kept continuously till his death, it can be said that the connection had become permanent. It is only on his death that his estate, in the hands of those who take it, becomes liable for her maintenance. NINGAREDDI *v.* LAKSHMAWA (1901) **I. L. R. 26 Bom. 163**

(*c*) DAUGHTER.

7. ———— **Daughter living separate from father.** A daughter living apart from her father for no sufficient cause cannot sue him for maintenance. ILATA SHAVATRI *v.* ILATA NARAYANNA NAMBUDRI . . . . **1 Mad. 372**

8. ———— **Widowed daughters**—*Their right of maintenance out of their father's estate.* According to Hindu law, it is only the unmarried daughters who have a legal claim for maintenance out of their father's estate. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs. BAI MANGAL *v.* BAI RUKHMINI . . . **I. L. R. 23 Bom. 291**

9. ———— **Right of maintenance of a sonless widowed daughter in indigent circumstances out of properties inherited by the father's heirs.** A sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs. The right would depend upon the fact whether the widowed sonless daughter was at the time of her father's death maintained by him as a dependent member of his family with others whom he was legally or morally bound to maintain. The position of a sonless widowed daughter is not the same as that of a disqualified owner or disqualified heir. *Bal Mangal* v. *Bai Rukhmini, I.L.R. 23 Bom. 291,* referred to. MOKHODA DASSEE *v.* NAND LALL HALDAR . **I. L. R. 27 Calc. 555 4 C. W. N. 669**

10. ———— *Sonless widowed daughter—Right of such daughter to claim separate maintenance—Obligations of the husband's family—Costs.* A sonless widowed daughter in indigent circumstances is not entitled, under the Bengal school of Hindu law, to separate maintenance out of her father's estate which has descended to his heirs. A Hindu widow

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*c*) DAUGHTER—*concld.*

must, in the first instance, look for her maintenance to her husband's family. *Bai Mangal* v. *Bai Rukhmini (1898), I. L. R. 23 Bom. 291,* referred to. *Quære* whether, having regard to the dicta of PEACOCK, *C.J.*, in the case of *Khetramani Dasi* v. *Kashinath Das (1868), 2 B. L. R. (A. C.), 15,* there is not a legally enforceable right by which a widowed daughter's maintenance can be claimed as a charge on her father's estate in the hands of his heirs, when she is unable to obtain maintenance from her husband's family. MOKHADA DASSEE *v.* NUNDO LALL HALDAR (1901)

I. L. R. 28 Calc. 278
s.c. 5 C. W. N. 297

(*d*) GRANDMOTHER.

11. ——— Right of grandmother to maintenance —*Division of estate.* On a division of an estate, the Hindu law recognizes the right of a grandmother to maintenance but not her title to any share of the estate. PUDUMMOOKEE DASSE *v.* RAYEEMONEE DOSSEE . **12 W. R. 409**

12. ——— *Mortgagee selling the estate—Right of residence secured on sale of house by mortgagee.* Although according to the Mitakshara a mother may, on partition, or if the estate is being wasted or her maintenance is not duly provided for, claim an assignment of a portion of the estate, yet she cannot call for partition, and her right to maintenance cannot affect a mortgage of the estate created before any portion has been assigned to her, except that, if the house she resides in is subject to the mortgage and is sold in execution of a decree upon the mortgage, the house must be sold subject to her right. VENKATAMMAL *v.* ANDYAPPA CHETTI . . **I. L. R. 6 Mad. 130**

(*e*) GRANDSON.

13. ——— Grandson or other more remote descendant of a Raja—*Impartible raj—Pachete raj.* In the case of the impartible raj of Pachete there is no law or custom under which any one, not being a son or daughter of a deceased Raja, can claim of right either maintenance or a grant in lieu of maintenance, from the person in possession for the time being of the raj. NILMONEY SINGH DEO *v.* HINGU LALL SINGH DEO

I. L. R. 5 Calc. 256

(*f*) ILLEGITIMATE CHILDREN.

14. ——— Children of Sudra caste. According to Hindu law, illegitimate children of the Sudra caste can inherit, and are entitled to maintenance. INDERAN VALUNGYPULY TAVER *v.* RAMASWAMY PANDIA TAVER

3 B. L. R. P. C. 1 : 12 W. R. P. C. 41
13 Moo. I. A. 141

HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*f*) ILLEGITIMATE CHILDREN—*contd.*

Affirming s. c. in Court below, PANDAYA TELAVER *v.* PALI TELAVER . . . . **1 Mad. 478**

15. ——— Adult illegitimate son—*Bengal law.* An adult illegitimate son has not, by Hindu law as prevalent in Bengal, any right to maintenance. NILMONEY SINGH DEO *v.* BANESHUR

I. L. R. 4 Calc. 91

16. ——— Illegitimate son. By Hindu law an illegitimate son has a claim only to maintenance, and an agreement, not appearing to be made on valuable consideration between a nephew who was the legitimate heir of his uncle and that uncle giving up the nephew's right to about 70 acres of land in favour of the illegitimate son of the uncle, was declared void as against the nephew. SAKHARAM TRIMBAK *v.* RAM VALAD VITAL APAJI

1 Bom. 191

17. ——— Under the Mitakshara law, an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The maintenance decreed to an illegitimate son may be secured on the family property. ANANTHAYA *v.* VISHNU

I. L. R. 17 Mad. 160

18. ——— *Concubine—Daughter-in-law.* Where the claimants to maintenance were the daughter-in-law, concubine, and illegitimate sons: *Held,* that the heirs were entitled to possession of the property, paying a sum equal to the whole of the profits to the persons entitled to maintenance if the profits are found to be insufficient to provide for their maintenance. OMRAO SINGH *v.* MAN KOONWER . . . . **2 Agra 136**

19. ——— *Charge on impartible zamindari.* In a suit for maintenance brought by an illegitimate son of a Hindu zamindar, deceased: *Held,* that it was established that the plaintiff was the natural son of such zamindar and recognized by him as such, it not having been essential to the plaintiff's title to maintenance that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar status therein. Case remanded for the Courts in India to try whether such maintenance can be a charge upon an impartible zamindari, or, if not, out of what property or fund, if any, the son was entitled to be paid. MUTUSWAMY JAGAVERA YETTAPPA NAIKEN *v.* VENCATASWARA YETTAPPA

2 B. L. R. P. C. 15 : 11 W. R. P. C. 6
12 Moo. I. A. 203

Upholding on this point the decision of the High Court where it was held that the illegitimate son of a Sudra by a concubine, not being a female slave, is entitled to maintenance according to Hindu law. MUTTUSAMY JAGAVIRA YETTAPA NAIKAR *v.* VENKATASUBHA YETTIA . . . **2 Mad. 293**

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*f*) ILLEGITIMATE CHILDREN—*contd.*

20. ——— *Charge on estate.* According to Hindu law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for the payment of it. *Chuoturya Run Murdan Syn* v. *Purhlad Syn, 7 Moo. I. A. 18,* followed. *Nurbibi* v. *Husein Lall, I. L. R. 7 Bom. 538,* referred to. PARICHAT *v.* ZALIM SINGH . . . . . **L. R. 4 I. A. 165**

21. ——— *Son of Sudra—Charge on estate.* The legitimate son of a zamindar of the Sudra caste is entitled to maintenance, and the maintenance is a charge upon the revenues of the zamindari. COOMARA YETTAPA NAIKAR *v.* VENKATISMARA YETTIA . . . **5 Mad. 405**

22. ——— *Son of Sudra.* The illegitimate son of a Sudra, his mother having been a married woman at the time of her forming an adulterous connection with his father, is entitled to maintenance out of his father's estate. VIRARAMUTHI UDAYAN *v.* SINGARAVELU **I. L. R. 1 Mad. 306**

23. ——— *Sons of female slave or concubine—Obedience to head of family.* It is immaterial whether the illegitimate sons have been begotten on a female slave or on a concubine. *Sarasuti* v. *Mannu, I. L. R. 2 All. 134,* followed. The test by which the continuance of the right to receive maintenance must be decided is not the age of the illegitimate descendant or his capacity to earn his own livelihood, but obedience to the head of the family. This test cannot be applied till he has reached full age. By docility or obedience in the sense of the texts is meant the rendering to the head of the family such reasonable service as is ordinarily rendered by the cadets of a family in that station of life to which the parties belong. HORGOBIND KUARI *v.* DHARAM SINGH . **I. L. R. 6 All. 329**

24. ——— *Issue of adulterous intercourse—Son of Sudra.* A Sudra, having kept the wife of another man in his house for many years as a concubine, had a son by her, whom he recognized as his own. In a suit brought by the son, who was of age, to recover maintenance from his putative father: *Held,* that he was entitled to recover. KUPPA *v.* SINGARAVELU . **I. L. R. 8 Mad. 325**

25. ——— *Suit for partition by illegitimate son of undivided brother against sons of other brothers—Sudra caste.* In a joint Hindu family of the Sudra caste, consisting of three brothers, two left legitimate sons and the third an illegitimate son. In a suit brought by the latter for partition of the family estate against his father's brother's sons: *Held,* that he was not entitled to a share, but only to maintenance. RANOJI *v.* KANDOJI . . . . . **I. L. R. 8 Mad. 557**

26. ——— *Right to maintenance of illegitimate member of joint family—Suit by legitimate son of illegitimate member of family to redeem mortgage made by legitimate member—Right of redemption.* An allowance for maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent. The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the above-mentioned head of the family. His ground of claim was that he had inherited the right to maintenance and had thus an interest of charge within the meaning of s. 91 of the Transfer of Property Act, 1884, to entitle him to redeem. *Held,* by the High Court, that the right of an illegitimate son in a Hindu family to receive maintenance from the family property is a purely personal right, and does not descend to his son. The legitimate son of an illegitimate member of a Hindu family who as such illegitimate son might have had a right to maintenance from the property of his father, had no such interest in the estate belonging to the family as would entitle him to redeem a mortgage made by a previous rightful and legitimate owner of the estate. *Held,* by the Privy Council on appeal, that in the regenerate classes of Hindus a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of his father's estate—a right personal to him and not inherited by his offspring. *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn, 7 Moo. I. A. 18,* referred to and followed. *Held,* also, that the High Court had rightly concluded that the plaintiff had not inherited that right. The authority of the Mitakshara in Ch. I, ss. 11 and 12, was more consistent with a personal right of the illegitimate son. ROSHAN SINGH *v.* BALWANT SINGH **I. L. R. 22 All. 191**
L. R. 27 I. A. 51
4 C. W. N. 353

Upholding the decision of the High Court in BALWANT SINGH *v.* ROSHAN SINGH **I. L. R. 18 All. 253**

27. ——— *Claim by illegitimate son of a Hindu by a woman not a Hindu to maintenance.* There is no text of Hindu law under which an illegitimate son of a Hindu by a woman, who is not a Hindu, can claim maintenance. Plaintiff (who sued for maintenance out of the assets of his deceased father, a Sudra) was an illegitimate son, his mother being a Christian. *Held,* that plaintiff could not be regarded as a Hindu by birth, and he was in consequence not governed by Hindu law, and was not entitled to maintenance. Under the rules laid down by Hindu law for determining the caste of the offspring of unions between parents belonging to different castes (amongst the four recognised main castes)

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*f*) ILLEGITIMATE CHILDREN—*contd.*

the dharma or religious rites applicable to the offspring are those prescribed for the mother's caste. Though an illegitimate child is entitled to claim maintenance from his father under s. 488 of the Criminal Procedure Code, such claim can only be enforced during the lifetime of the father and the right terminates with his death. Such a statutory right is cumulative and does not deprive persons otherwise entitled to maintenance, by the common law, of their right to enforce payment of maintenance by action brought against the father during his lifetime or against his estate after his death. But where persons are not entitled under the common law to claim maintenance from the father, the right conferred by statute can only be enforced by the particular remedy provided by the statute and to the extent provided therein. Plaintiff therefore, who could only rely on the statutory right, could not seek to enforce it by suit; nor did the right exist after the father's death. LINGAPPA GOUNDAN *v.* ESUDASAN (1904) . . **I. L. R. 27 Mad. 13**

28. ———— *Illegitimate son—Right to maintenance—Evidence Act (I of 1872), s. 112—Presumption as to paternity applicable only to offspring of married couple.* In a suit by an illegitimate son of a deceased Chetti against the adopted son and brother of his late father for a share in his father's estate, or, in the alternative, for maintenance: *Held*, that the claim for a share must fail, as it was not shown that the deceased had left any separate or self-acquired property. The family of the deceased (consisting of his father and two sons, of whom one was the deceased) was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle, and, as he was illegitimate, he could not "represent" his father in the undivided family. *Ramalinga Muppan* v. *Pavadai Goundan, I. L. R. 25 Mad. 519*, referred to. The fact that in the present case there was a son in existence besides the illegitimate son made no difference in principle between this case and the cases already decided. *Held*, also, that plaintiff was entitled to maintenance. An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females, who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. Arrears of maintenance awarded for a period of nine years prior to the suit. The presumption as to the paternity in s. 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established. GOPALASAMI CHETTI *v.* ARUNACHELLAM CHETTI (1904) . . **I. L. R. 27 Mad. 32**

HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*f*) ILLEGITIMATE CHILDREN—*concld.*

29. ———— **Illegitimate child**—*Maintenance, suit for—Criminal Procedure Code (Act V of 1898), s. 488, refusal of application under, if bars suit—Right to maintenance—Hindu law.* An order by a Magistrate refusing an application for maintenance under s. 488 of the Criminal Procedure Code does not preclude a civil suit for the recovery of maintenance. *Subad Domni* v. *Katiram Dome, 20 W. R., Cr. 58* and *Subhudra* v. *Basdeo, I. L. R. 18 All. 29*, distinguished. Both under Hindu law, as also on general principles, an illegitimate child has a right to claim maintenance against the father. *Chuoturya Run Murdun Syn* v. *Sahul Purhulad Syn, 7 Moo. I. A. 18*, referred to. GHANA KANTA MAHANTA *v.* GEREIA (1904) **13 C. W. N. 150**

(*g*) MOTHER.

30 ———— **Parent and child**—*Duty of son to maintain aged mother.* According to Hindu law, a son is bound to support his aged mother, whether or not he has inherited property from his father. SUBBARAYANA *v.* SUBBAKKA **I. L. R. 8 Mad. 236**

31. ———— **Maintenance of mother on partition between her son and step-sons.** A widowed mother, on a partition taking place between her son and her step-sons of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition. A separation in food and worship took place between a Hindu widow, her son, and her two step-sons, after which the widow lived as a member of her son's family and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and step sons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held*, that, from the separation to the decree in the partition suit, the widow was entitled to maintenance charged on the whole estate, and subsequently to the decree to a charge on her son's share only.

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*g*) MOTHER—*concld.*

But, inasmuch as she had during the former period been maintained by her son, and could not claim maintenance over again from her step-sons, whatever claim her son might have against them for contribution for her maintenance during that time, the suit as against them must be dismissed. Where the annual value of the whole estate was found to be R70,000 and the proportionate annual value of her son's portion was R23,333, R150 a month was held under the circumstances to be a suitable maintenance. KEDAR NATH COONDOO CHOWDHRY *v.* HEMANGINI DASSI . . **I. L. R. 13 Calc. 336**

32. ———— Widow's right to a share in lieu of maintenance on a partition. A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence. AMRITA LAL MITTER *v.* MANICK LALL MULLICK **I. L. R. 27 Calc. 551**

(*h*) MOTHER-IN-LAW.

33. ———— Liability of son's widow for maintenance of her mother-in-law— *Family house—Proceeds of stridhan.* Where a Hindu widow sued the widow of her predeceased son for maintenance, and it was found that the only property in the possession of the defendant were the proceeds of her own stridhan and family house, which yielded no rent and was jointly occupied by the plaintiff and defendant: *Held*, that the defendant was not liable for the maintenance claimed. *Savitribai* v. *Lakshmibai, I. L. R. 2 Bom. 573,* followed. BAI KANKU *v.* BAI JADAV **I. L. R. 8 Bom. 15**

(*i*) SISTER-IN-LAW.

34. ———— Suit by sister-in-law against brother-in-law—*Joint family—Death of plaintiff's husband prior to his father's death and therefore before devolution of estate, which was self-acquired by his father—Amount of maintenance claimable by a sister-in-law—Separate maintenance.* The plaintiff was the widow of one *P*, who was the son of one *N*. *N* had three sons, *viz.*, *M*, *P*, and the defendant *C*, and all lived together as a joint family. The plaintiff was married to *P* about thirty years previously to this suit, she being then eleven years of age. *P* died when he was fourteen years old, before the plaintiff had attained puberty, and while she was still living with her parents. After her husband's death she went to the house of her father-in-law *N*, and was residing there at the time of his death. He died intestate in 1881, leaving moveable and immoveable property of the value of R1,50,000, all of which was admittedly self-acquired property. His widow (*L*) and two sons, *viz.*, *M* and the defendant *C*, survived him. *M* died in 1883. After *N's* death, the plaintiff continued for a time to reside in the family house with *C*. Disputes, however, arose, and she left the house, and went to reside with her brother. She now sued her brother-in-law, *C*, for maintenance, alleging that she had been obliged to leave his house in consequence of ill-treatment. She claimed R1,000 per month by way of maintenance, and also prayed for the delivery of certain ornaments belonging to her, which she said were in the defendant's possession. The defendant denied possession of the plaintiff's ornaments; and, as to her claim for maintenance, he contended that all the property of his father, *N*, was self-acquired, and that as such the plaintiff's husband, *P*, had never any interest in it, having predeceased *N*, and that she was therefore not entitled to maintenance out of it. He stated, however, that he was willing to maintain her if she would return to his house and live with his family. *Held*, that the plaintiff, being as *P's* widow a member of her husband's undivided family, was entitled to maintenance from the defendant. Upon *N's* death, intestate, his property devolved upon his sons (*M* and *C*) as ancestral property for the benefit of the undivided family, of which he (*N*) was in his lifetime the head; or, in other words, subject to the incidents to which ancestral property is liable. If one of such sons had been disqualified from inheriting by reason of idiotcy, etc., he, though a member of the undivided family, would only be entitled to maintenance. The plaintiff, by reason of her sex, was disqualified from inheriting in competition with males, but none the less was she entitled to maintenance out of the ancestral estate which had devolved upon the males, with whom she constituted an undivided family. Where a widowed sister-in-law claims maintenance from a brother-in-law, the only question for the Court to consider is, whether the brother-in-law has ancestral property in his hands. *Held*, also, that the plaintiff being legally entitled to claim maintenance from the defendant, she was entitled to separate maintenance, and that the defendant could not insist upon her living in his house. The property left by *N* at his death was of the value of R1,50,000. *Held*, that an allowance of R40 per month should be paid to the plaintiff by the defendant as maintenance. If *P* (the plaintiff's husband) had survived his father, *N*, the share of *N's* property (deducting one-fourth for *L*, the widow of *N*), which would have devolved on him, would have been a little less than R40,000, or R1,600 per annum at 4 per cent.,—that is, R133 per month. The plaintiff could not be allowed more than the interest on that sum. By analogy to the case of a deserted wife's claim for maintenance against her husband, the plaintiff ought not to be allowed less than one-third of such interest, her husband having left no sons. ADHIBAI *v.* CURSANDAS NATHU . . . **I. L. R. 11 Bom. 199**

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*j*) SLAVE.

35. ——— Slave or chela—*Proof of deprivation of ordinary means of livelihood.* The fact of *A* having been long supported by *B*, or of his having been purchased either as a slave or as a chela, will not entitle him to claim perpetual maintenance for himself and his heirs, especially where *A* does not show that he has been deprived of ordinary means of livelihood which he might otherwise have commanded. NARAIN DASS *v.* MAHATAB CHUND BAHADOOR . . . **7 W. R. 137**

(*k*) SON.

36. ——— Adult son. According to the Hindu or Jain law, a father is not bound to maintain a grown-up son. PREMCHAND PEPARAH *v.* HULAS CHAND PEPARAH **4 B. L. R. Ap. 23 : 12 W. R. 494**

37. ——— *Right of son to maintenance out of impartible property—Right to partition.* A suit for maintenance out of ancestral estate by Hindu son lies against his father where the property in the hands of the latter is impartible. *Quære*: Whether a like suit lies where the son might sue for partition. HIMMATSINGH BECHARSING *v.* GANPATSING . . . **12 Bom. 94**

38. ——— *Maintenance, right of adult son to—Father with no partible property.* If a Hindu father possesses practically no partible property, his legitimate son, though adult, suffering from no disability to inherit, is entitled to maintenance from him. RAMCHANDRA SAKHARAM *v.* SAKHARAM GOPAL **I. L. R. 2 Bom. 346**

39. ——— *Self-acquired property.* A Hindu is under no obligation to maintain his adult son out of his self-acquired property. AMMAKANNU *v.* APPU . **I. L. R. 11 Mad. 91**

40. ——— Adopted son when adoption is invalid—*Period between adoption and possession of estate.* A Hindu whose adoption is invalid is entitled to maintenance in his adopter's family. A son, whether adopted or begotten, can claim maintenance of his father until put into possession of his share of the ancestral property. AYAVU MUPPANAR *v.* NILADATCHI AMMAL **1 Mad. 45**

41. ——— *Right to maintenance, nature of.* The adopted son of one whose alleged adoption has been held invalid can make no claim through his adoptive father to be maintained by the alleged adopter. The natural rights of a person adopted remain unaffected when the adoption is invalid. *Quære*: Whether a right to maintenance can descend as an estate. BAWANI SANKARA PANDIT *v.* AMBABAY AMMAL . **1 Mad. 363**

HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*l*) SON'S WIDOW.

42. ——— Claim on father-in-law—*Father and son living jointly.* A Hindu father and son lived joint in food and worship, but separate in estate. *Held*, that the widow of the son had no legal claim upon the father for maintenance. RUJJOMONEY *v.* SIBCHUNDER MULLICK . **2 Hide 103**

43. ——— Son's widow remaining chaste—*Right to choose residence.* According to Hindu law, a son's widow is entitled to maintenance so long as she leads a chaste life, whether she elects to live with her father-in-law or with her own relations. KOODEE MONEE DABEA *v.* TARA CHAND CHUCKERBUTTY . . . **2 W. R. 134**

RUTTAN CHAND SHOOREE *v.* HUREE MONEE **5 W. R. 225**

44. ——— Son's widow residing with her father—*Liability of father-in-law for maintenance.* A Hindu died possessed of no property, but leaving a widow. On his death she left the house of her father-in-law, and went to reside at her father's house. Her father-in-law was not possessed of any ancestral property. *Held*, that she could not sue her father-in-law for a sum of money on account of maintenance. KHETRAMANI DASI *v.* KASINATH DAS . . **2 B. L. R. A. C. 15 9 W. R. 413 : 10 W. R. F. B. 89**

UMACHARAN CHOWDHRY *v.* NITAMBINI DEBI **2 B. L. R. S. N. 11 10 W. R. 359**

45. ——— Son's widow refusing to live with father-in-law—*Bengal and Mitakshara laws.* Under the Bengal law, the widow of a son who left no property cannot compel her father-in-law to make her a pecuniary allowance in lieu of maintenance if she refuses to reside in his house as a member of his family. But under the Mitakshara, the question is whether the father and son were joint in estate, and whether any joint estate was left by the son burdened with the payment of such maintenance. HEMA KOOEREE *v.* AJOODHYA PERSHAD **24 W. R. 474**

46. ——— *Grandson—Misconduct of mother.* A widowed Hindu mother, who refuses to dwell with her minor son in her father-in-law's house, and sells her infant daughter in marriage to a low-caste person, thereby injuring the social position of her father-in-law's family, is not entitled to recover maintenance on account of her son from her father-in-law. MANMAHINI DASI *v.* BALAK CHANDRA PANDIT **8 B. L. R. 22 : 15 W. R. 498**

47. ——— The refusal of a widow to live in her father-in-law's house as one of his family does not disentitle her to maintenance. VISALATCHI AMMAL *v.* ANNASSAMMY SASTRY **5 Mad. 150**

48. ——— Obligation of father-in-law to maintain son's widow. A Hindu father-in-

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*l*) SON'S WIDOW—*contd.*

law is legally bound to maintain his deceased son's widow, notwithstanding that no property left by the son may have come into his hands. Where a father-in-law performs this duty in an imperfect manner as by ill-treating the widow and turning her out of his house, the Civil Courts will award her separate maintenance. UDARAM SITARAM *v.* SONKABAI **10 Bom. 483**

49. ——— **Right to maintenance as against a father-in-law where there is no family property.** A Hindu widow sued her father-in-law for maintenance for herself and her infant children. It was found that the defendant held no ancestral property, and that the property which he possessed was exclusively his own self-acquired property. *Held*, that they had no legal right to be supported by the defendant, notwithstanding that they were in indigent circumstances. KALU *v.* KASHIBAI *alias* LAKSHMIBAI **I. L. R. 7 Bom. 127**

50. ——— **Maintenance of son's widow**—*Self-acquired property.* A Hindu is under no obligation to maintain his adult son or son's widow out of his self-acquired property. Thus a daughter-in-law can enforce no claim for maintenance against the self-acquired property of her father-in-law which has passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for his support. AMMAKANNU *v.* APPU **I. L. R. 11 Mad. 91**

51. ——— **Suit by sister-in-law against brother-in-law**—*Death of paintiff's husband prior to his father's death and therefore before devolution of father's self-acquired estate—"Ancestral property"—Legal obligation of heir to fulfil moral obligations of last proprietor.* In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father was, at the time of her husband's death, a minor; she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with, and been maintained by, her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants. *Held* (MAHMOOD, *J.*, expressing no opinion on this point), that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendants' hands from which she would be entitled to maintenance; inasmuch as during the father's lifetime, it was not in any sense ancestral, and the sons had no co-parcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and in the case of the plaintiff's husband, such interest, by reason of his predeceasing his father, never became vested. *Adhibhai* v. *Cursandas Nathu, I. L. R. 11 Bom. 199*, dissented from on this point. *Savitribai* v. *Luximibai, I. L. R. 2 Bom. 573*, referred to. *Held*, however, that the father was under a moral, though not a legal, obligation not only to maintain his widowed daughter-in-law during his lifetime, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became, by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son (who took the estate not for his own benefit, but for the spiritual benefit of the last proprietor) and against the property in question. *Adhibai* v. *Cursandas Nathu, I. L. R. 11 Bom. 199; Ganga Bai* v. *Sita Ram, I. L. R. 1 All. 170; Kalu* v. *Kashibai, I. L. R. 7 Bom. 127; Khetramani Dasi* v. *Kashi Nath Das, 2 B. L. R. A. C. 15; Rajjomoney Dossee* v. *Shibchunder Mullick, 2 Hyde, 103*; and *Tulsha* v. *Gopal Rai, I. L. R. 6 All. 632*, referred to. JANKI *v.* NAND RAM . . . **I. L. R. 11 All. 194**

52. ——— **Son's widow**—*Self-acquired property—Property inherited from maternal grandfather.* A Hindu died, leaving property with his widow, of which a portion was self-acquired and the remainder had been inherited by him from his maternal grandfather. He had also by will devised certain items to his wife. His son, who had predeceased him, had also left a widow, who now claimed maintenance from her mother-in-law. *Held*, that, inasmuch as property inherited from a maternal grandfather is not self-acquired, the rule of non-liability for maintenance relating to self-acquired property ought not to be extended to property of this description, which was therefore liable to the maintenance claimed. *Semble*: That the moral obligation to support a son's widow, to which her father-in-law is subject, acquires on his death the force of a legal obligation as against his self-acquired assets in the hands of his heir; and that a testamentary deposition of such self-acquired assets, made in favour of volunteers by a person morally bound to provide maintenance, cannot affect the position of a party whose moral claim has become a legal right. *Ammakannu* v. *Appu, I. L. R. 11 Mad. 91*. considered. RANGAMMAL *v.* ECHAMMAL **I. L. R. 22 Mad. 305**

53. ——— *Claim of daughter-in-law against self-acquired property of*

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HINDU LAW—MAINTENANCE—*contd.*

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(*l*) SON'S WIDOW—*contd.*

her father-in-law in hands of his heirs. The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father. YAMUNABAI *v.* MANUBAI **I. L. R. 23 Bom. 608**

54. ——— *Daughter-in-law—Her claim to maintenance against self-acquired property devised by her father-in-law.* The widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property. *Yamunabai* v. *Manubai, I. L. R. 23 Bom. 608,* referred to and distinguished. BAI PARVATI *v.* TARWADI DOLATRAM (1900) **I. L. R. 25 Bom. 263**

55. ——— *Bengal school—Mitakshara—Widowed daughter-in-law, maintenance of—Moral obligation—Heir of father-in-law—Legal obligation—Moral right, forfeiture of—Severance from father-in-law's family.* It is the duty of the father-in-law to maintain his widowed daughter-in-law. This obligation is legally enforceable where the father-in-law has by survivorship obtained property in which his son had a vested interest, as in a *Mitakshara* family. Where the father, on the death of his son, does not become entitled to any interest or property which the son had, the obligation to maintain the son's widow is only moral, and cannot be enforced in a Court of law. *Khetromoni* v. *Kashinath, 2 B. L. R. (A. C.) 15,* followed. The moral obligation in the father to maintain his widowed daughter-in-law becomes a legal obligation in the inheritor of his property. *Janki* v. *Nandram, I. L. R. 11 All. 194,* and *Kamini Dassee* v. *Chandra Pode Mondle, I. L. R. 17 Calc. 393,* followed. The right to be maintained, where it exists, is not necessarily forfeited by a widow who resides away from her father-in-law's house, as long as she remains chaste. *Raja Pirthee Sing* v. *Rani Raj Kower, 20 W. R. 21; Kasturbai* v. *Shivajiram, I. L. R. 3 Bom. 372;* and *Gokibai* v. *Lakhmidas Khimji, I. L. R. 14 Bom. 490,* followed. If, therefore, the daughter-in-law remains a dependent member of her husband's family, the mere fact of her residence elsewhere will not disentitle her to maintenance. Where a daughter-in-law leaves her father-in-law's house during his lifetime, with the intention of residing permanently in her father's house as a member of his household, and demands and obtains from her father-in-law a Government Promissory Note belonging to her husband, which was all the money

HINDU LAW—MAINTENANCE—*contd.*

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(*l*) SON'S WIDOW—*concld.*

she considered herself entitled to, and intends to and does sever herself from her deceased husband's family, though she leaves the house without any quarrel with her father-in-law, she ceases to be a dependent member of her father-in-law's family, and there is no longer any moral liability on the father-in-law to support her. There being no moral liability on the father-in-law, there is no legal liability on the person, who takes his property, to maintain the widowed daughter-in-law. SIDDESURY DASSEE *v.* JONARDAN SARKAR (1901) . **5 C. W. N. 549**

56. ——— *Separate maintenance of widowed daughter-in-law—Dependent member—Non-residence with the husband's family—Moral obligation of the father-in-law—Legal obligation of his heir—No distinction between Dayabhaga and Mitakshara law.* A Hindu widow does not forfeit her right to separate maintenance out of the property inherited from her father-in-law by reason of non-residence with the family of her deceased husband, unless such non-residence be for unchaste or immoral purposes. The fact that a widowed daughter-in-law has taken up her residence apart from her father-in-law with her own parents or relations does not annul his moral obligation to maintain her. It may remain dormant or in abeyance, but it subsists continuously; and, whether it be dormant or active at the death of the father-in-law, it devolves as a subsisting obligation upon his heirs, and is transformed into a legal obligation. The term "dependent member" of a family does not necessarily mean "resident member." There is no valid ground for making any distinction between the rights of maintenance of a Hindu widow under the Bengal and under the *Mitakshara* law. *Raja Pirthee Sing* v. *Rani Raj Kooer, 12 B. L. R. (P. C.) 238; Kasturbai* v. *Shivajiram, I. L. R. 3 Bom. 372; Narayanrao Ram Chandra Pant* v. *Ramabai, I. L. R. 3 Bom. 415; Janki* v. *Nand Ram, I. L. R. 11 All. 194; Mokhoda Dasi* v. *Nundo Lall Haldar, I. L. R. 28 Calc. 278; Khetramani Dasi* v. *Kashinath Das, 2 B. L. R. (A. C.) 15; Rangammal* v. *Echammal, I. L. R. 22 Mad. 304; Yamunbai* v. *Manubai, I. L. R. 23 Bom. 609; Kamini Dassee* v. *Chandra Pode Mondle, I. L. R. 17 Calc. 373,* referred to and discussed. SIDDESURY DASSEE *v.* JONARDAN SARKAR (1902) **I. L. R. 29 Calc. 557 : s.c. 6 C. W. N. 530**

(*m*) STEP-MOTHER.

57. ——— **Obligation of step-son to support step-mother**—*Family property.* Under the Hindu law, there is no legal obligation upon a step-son to support a step-mother independently of the existence in his hands of family property. BAI DAYA *v.* NATHA GOBINDLAL **I. L. R. 9 Bom. 279**

58. ——— **Step-mother and step-sister**—*Liability of zamindari property for, after parti-*

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*m*) STEP-MOTHER—*concld.*

tion. A suit was brought for maintenance by the step-mother and step-sister of a zamindar to be paid out of the income of the zamindari. The defendant contended that a partition having taken place of all the partible property of the family, and shares having been allotted to the defendant's step-brothers, the sons and brothers of the plaintiffs, the plaintiff's claim to maintenance was limited to the property of the defendant's brother, and the plaintiffs had no claim to maintenance against the defendant. *Held*, that the defendant was liable to pay and contribute to the maintenance of the plaintiffs, not only out of the partible property which he had obtained upon the partition, but also out of the income of the zamindari. SIVANANANJA PERUMAL SETHURAYER *v.* MEENAKSHI AMMAL . . **5 Mad. 377**

(*n*) WIDOW.

59. ——— **Nature of widow's right—** *Maintenance to widow not expressed nor denied by will—Gift of stridhan.* The right to maintenance being one given to a widow by the Hindu law, that right cannot be taken away except by express language to that effect. A gift of stridhan is not equivalent to a provision for maintenance. JOYTARA *v.* RAMHARI SIRDAR **I. L. R. 10 Calc. 638**

60. ——— **Widow, right of, to be maintained.** A Hindu widow has a right to be treated with kindness and suitably maintained. RAMNATH ROY CHOWDHRY *v.* ARNEE KALLY DEBIA **W. R. 1864, 177**

61. ——— *Mitakshara law—Widow with sons.* A Hindu widow has simply a right to be maintained out of her husband's property by Mitakshara law, where there are sons. MEHERBAN SINGH *v.* SHEO KOONWER **1 Agra, 106**

62. ——— *Destitute widow.* A Hindu widow, if destitute of the means of living, is entitled to maintenance from her husband's relatives, although she may have shared her husband's estate, and supported herself for a long period by trading. BAI LAKSHMI *v.* LAKHMIDAS GOPAL DAS . . . **1 Bom. 13**

63. ——— *Joint ancestral property.* It was held that a Hindu widow was entitled to be supported out of the joint ancestral estate of the family of which her husband was a member. LALTI KUAR *v.* GANGA BISHAN **7 N. W. 261**

64. ——— *Right of widow to maintenance from relations with assets of husband.* Although the relations of the husband of a Hindu woman, deserted by him, may not be under a personal liability to support her, yet, if they have property of the husband in their hands, his wife is entitled to be maintained out of the husband's estate to the extent of the proceeds of one-third thereof. RAMABAI *v.* TRIMBAK GANESH DESAI **9 Bom. 283**

65. ——— *Relatives of husband—Ancestral property—Mitakshara law. Held*, by the Full Bench, that a Hindu widow is not entitled under the Mitakshara to be mantained by her husband's relatives, merely because of the relationship between them and her husband. Her right depends upon the existence in their hands of ancestral property. *Held*, on the case being returned to the Division Bench, that the fact that the defendant in this case was in possession of ancestral immoveable property at the death of his son and had subsequently sold such property to pay his own debts, did not give the son's widow any claim to be maintained by him. GANGA BAI *v.* SITA RAM **I. L. R. 1 All. 170**

66. ——— *Relatives of husband—Ancestral property—Widow voluntarily living apart from husband's relatives.* In the Island or Presidency of Bombay, a Hindu widow, voluntarily living apart from her husband's relatives, is not entitled to a money allowance as maintenance from them if they were separated in estate from him at the time of his death, nor is she entitled to such maintenance from them whether they were separated or unseparated from him at the time of his death, if they have not any ancestral estate or estate belonging to him in their hands. The doctrine, that in certain relationships and independently of the possession of ancestral estate, maintenance is a legal and imperative duty, while in other relationships it is only a moral and optional duty, discussed. *Semble :* A Hindu widow, who has received a full share as and for her maintenance, cannot, when she had exhausted it, enforce from the relatives of her husband, or from the family estate, a further allotment, or a money allowance for maintenance. *S*, a Hindu widow, voluntarily living apart from her husband's family, sued his paternal uncle, the nearest surviving male relative of her husband, for a money allowance as maintenance. *Held*, that such suit was unsustainable for either of the two following reasons, *viz.*, (i) that the defendant was separated in estate from the plaintiff's husband at the time of his death ; (ii) that at the institution of the suit the defendant had not in his hands any ancestral estate, or any estate which had belonged to the plaintiff's husband. Decisions of the Bombay Sudder Adawlat on the right to maintenance reviewed. *Bai Lakshmi* v. *Lakhmidas Gopaldas, 1 Bom. 13 ; Chandrabhagabai* v. *Kashinath, 2 Bom. 323 ;* and *Timmappa* v. *Parmeshriamma, 5 Bom. A. C. 130,* disapproved. *Udaram Sitaram* v. *Sonkabai, 10 Bom. 483,* considered. *Rujjomoney Dossee* v. *Shibchunder Mullick, 2 Hyde, 103 ; Khetramani Dasi* v. *Kashinath Das, 2 B. L. R. A. C. 15 ;* and *Gangabai* v. *Sitaram,*

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HINDU LAW—MAINTENANCE—*contd.*

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(*n*) WIDOW—*contd.*

I. L. R. 1 All. 170, approved and followed. SAVITRIBAI *v.* LUXIMIBAI . **I. L. R. 2 Bom. 573**

67. ——— *Relatives of husband—Ancestral property.* In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage: *Held* (following the case of *Savitribai* v. *Luximibai, I. L. R. 2 Bom. 573*), that the defendant was not liable, inasmuch as he was not in possession of any ancestral property and had not received any property from the plaintiff's husband. APAJI CHINTAMAN *v.* GUNGABAI **I. L. R. 2 Bom. 632**

68. ——— *Obligation of brothers to maintain widow of a brother who predeceased their father whose property they have inherited.* The principle that an heir succeeding to property takes it for the spiritual benefit of the late proprietor, and is therefore under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal school. It is immaterial whether the property so inherited is moveable or immoveable. In each case it must be determined whether, having regard to the relationship, the means, and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principles of the Hindu law and to the usages and practice of the Hindu people, morally bound to maintain that party. The above principle is applicable to the case of a widow claiming maintenance from her husband's brothers who had inherited her father-in-law's property, her own husband having predeceased his father. *Janki* v. *Nandram, I. L. R. 11 All. 194*, followed. Provided, therefore, that there is nothing to show that she was not a dependent member of her father-in-law's family within the meaning of the rule of Hindu law enjoining a moral obligation on a person to maintain such members of his family, such a widow was entitled to maintenance. KAMINI DASSEE *v.* CHANDRA PODE MONDLE . **I. L. R. 17 Calc. 373**

69. ——— *Right of a widow to receive maintenance from her husband's brothers and nephew—Death of the plaintiff's husband prior to his father's death.* In a joint Hindu family governed by the Mitakshara law, the property of *S*, the father, consisted, at any rate partly, of ancestral property. He died leaving three sons and one grandson (son of a predeceased son). *A*, another son of *S*, died childless before his father, leaving his widow, the plaintiff. In a suit by her against the brothers and the nephew of her husband for maintenance, in which she claimed R100 a month: *Held*, that, as the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's lifetime, enforced partition of that property, and as the Hindu law provides that the surviving co-parceners should maintain the widow of a deceased co-parcener, the plaintiff was entitled to maintenance. *Khetramani Dasi* v. *Kashinath Das, 2 B. L. R. A. C. 15; 10 W. R. F. B. 89; Laljeet Singh* v. *Raj Coomar Singh, 12 B. L. R. 373: 20 W. R. 337; Suraj Bansi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148; Janki* v. *Nand Ram, I. L. R. 11 All. 194; Kamini Dassie* v. *Chandra Pode Mondle, I. L. R. 17 Calc. 373*; and *Adhibai* v. *Cursandas Nathu, I. L. R. 11 Bom. 199*, referred to. DEVI PERSAD *v.* GUNWANTI KOER . . **I. L. R. 22 Calc. 410**

70. ——— *Execution of decree for maintenance of widow—Liability of ancestral estate.* Maintenance decreed to a co-parcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate, or the decree treated as a decree against the managing member of the family for the time being. MUTTIA *v.* VIRAMMAL **I. L. R. 10 Mad. 283**

71. ——— *Right of maintenance out of property fraudulently alienated by husband without consideration—Right of suit. Quære:* (*Per* COLLINS, *C. J.*, and BENSON, *J.*)—Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud. RANGAMMAL *v.* VENKATACHARI . **I. L. R. 20 Mad. 323**

72. ——— *Private agreement, effect of, on right—Widow residing in family house—Waiver of right to maintenance.* A right to maintenance bequeathed to a person is not affected by any private arrangement entered into by the members of the testator's family who are liable to pay the maintenance as a charge on the testator's estate. A plaintiff, however, who has resided in and been supported by the family for twelve years after the testator's death without claiming the maintenance bequeathed to her is presumed to have waived her right. RAM LALL MOOKERJEE *v.* TARA SOONDERY DEBIA . . . . **W. R. 1864, 3**

73. ——— *Obligation of husband's brother—Separation of widow. Held*, that a Hindu widow is entitled to maintenance from her husband's brother, whether separated or not, notwithstanding the non-receipt by the latter of her husband's assets. There is nothing in the Hindu law to prevent the Court in its discretion awarding a widow separate maintenance. Former decision commented on. TIMMAPPA BHAT *v.* PARMESHRIAMMA . . . . **5 Bom. A. C. 130**

74. ——— *Widow leaving husband's house.* A widow's right to maintenance does not cease on her leaving her husband's house. SREERAM BHUTTACHARJEE *v.* PUDDOMOOKHEE DEBIA . . . . **9 W. R. 152**

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*contd.*

(*n*) WIDOW—*contd.*

75. ——— Widow leaving husband's house. A Hindu widow who, for no improper purpose, leaves her husband's family does not thereby forfeit her right to maintenance. AHOLLYA BHAI DEBIA *v.* LUHKEE MONEE DEBIA **6 W. R. 37**

76. ——— *Widow leaving husband's house.* Where the maintenance of a Hindu widow was not made by her deceased husband dependent upon her living with his family, she is entitled to it, notwithstanding she leaves the house of his family and go to that of her father. SURNOMOYEE DASSEE *v.* GOPAUL LALL DOSS **Marsh. 497**

77. ——— *Widow leaving husband's house—Widow in needy circumstances. Semble:* Separation from her husband's family does not deprive a Hindu widow of her right to claim maintenance from them, if she happens to be in needy circumstances. CHANDRABHAGABHAI *v.* KASHINATH VITHAL **2 Bom. 341 : 2nd Ed. 323**

78. ——— *Widow leaving husband's house and family.* Although the Shastras impose on a Hindu widow the duty of living with her deceased husband's relatives, the duty has been regarded by the British Courts as a moral duty which they will not lend their aid to enforce, and of which the non-performance does not deprive the widow of her right to inherit. By consent of the parties, and for the protection of the estate, which consisted of cash, the Court ordered the amount to be invested in Government promissory notes in the joint names of the widow and brothers of the deceased, and directed that the interest should be paid to the sole receipt of the widow, with liberty for her to apply to the Court to order a sale if any necessity arose which would justify a sale under the Hindu law. UMRIT KOWEREE *v.* KIDERNATH GHOSE **3 Agra 182**

79. ——— *Widow leaving husband's house and family—Separate residence.* The widow of a co-parcener in a Hindu family is not entitled to separate maintenance in the absence of special circumstances necessitating her withdrawal from the family and separate residence. Authorities on the subject reviewed. The widow of a co-parcener is not in Bombay entitled, as in Bengal, to her husband's share to use at her discretion for life. All she can strictly demand is a suitable maintenance when necessary, and whatever is required to make such a demand effectual. RANGO VINAYAK DEV *v.* YAMUNABAI . . . **I. L. R. 3 Bom. 44**

80. ——— *Right to select residence.* By the Hindu common law the right of a widow to maintenance is one accruing from time to time according to her want and exigencies. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable. In a suit brought by the widow against the eldest son for maintenance, it was pleaded that under the will of the husband it was a condition precedent to the plaintiff's right to maintenance that she should live under the same roof and in joint family with the defendant. It was further pleaded that there having been no demand and refusal of maintenance the plaintiff had no cause of action. *Held*, that there was no condition in the will making the plaintiff's right to maintenance dependent upon her living under the same roof with the defendant, and that she was therefore left in the ordinary position of a Hindu widow, in whose case separation from the ancestral home would not generally disentitle her to maintenance suitable to her rank and position. NARAYANRAO RAMCHANDRA PANT *v.* RAMABAI . . . **I. L. R. 3 Bom. 415 L. R. 6 I. A. 114**

81. ——— Separate maintenance— *Right to select residence.* A Hindu widow is not bound to reside with the family of her husband, and, if he were in union with them at the time of his death, she is entitled to a separate maintenance where the family property is sufficiently large to admit of an allotment of separate maintenance to her. Where, however, the plaintiff, a Hindu widow, was satisfied for several years with the maintenance, *viz.*, R16 per annum, fixed in an agreement executed by her and the defendant, and where the family of the husband was large and the family property small, the defendant being willing to maintain her in his house like the other members, the High Court declined to increase the amount, but gave the widow the right to elect between taking that sum and living separately, or accepting the defendant's offer to receive and maintain her in his own house in the same manner as the other members of his family. RAMCHANDRA VISHNU BAPAT *v.* SAGUNABAI . **I. L. R. 4 Bom. 261**

82. ——— *Right of a widow to maintenance, although living apart from her husband's family.* A Hindu widow does not forfeit her right to maintenance out of family property chargeable therewith by reason of non-residence with the family of her husband, except such non-residence be for unchaste or immoral purposes. Where there is family property available for maintenance, it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto, *e.g.*, that she resides separately from her husband's family for immoral purposes, or that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance. KASTURBAI *v.* SHIVAJIRAM DEVKURNA **I. L. R. 3 Bom. 372.**

83. ——— *Separate maintenance and residence—Family property too small to admit of allotment of separate maintenance.*

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HINDU LAW—MAINTENANCE—*contd.*

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(*n*) WIDOW—*contd.*

Where the family income was too small to admit of an allotment to a widow of a separate maintenance, and there was no family house, but a small portion of land which was the site of a house:—*Held*, that the widow was not entitled to a separate maintenance, but might be allowed, if she so desired, to occupy during her lifetime a portion of the land, not exceeding one-third. GODAVARIBAI *v.* SAGUNABAI
I. L. R. 22 Bom. 52

84. ——— *Suit against father-in-law—Defence that plaintiff was provided for by her husband's will—Effect of direction in husband's will that widow should reside in family house.* The plaintiff, after the death of her husband *A*, sued her father-in-law for maintenance. *A*, although not adopted, had always been treated by his maternal grandfather *N* as his son. They lived together, and after *N's* death, in 1873, *A* and his wife (the plaintiff) continued to live occasionally with *N's* widow *M*. *A* died in 1876 without issue, leaving the plaintiff, his widow, who was then a minor of the age of fourteen. *A* left a will and appointed *M* his executrix. In his will he spoke of himself as the adopted son of *N* (which he was not), and he purported by it to dispose of *N's* property. He bequeathed ornaments of the value of R2,000 to his wife, and he directed that, if she resided in the house of his father (the defendant) or in the house of *M*, she should be paid R10 a month as maintenance by *M*; but if she went to live elsewhere, that only R7 a month should be paid to her. *M* proved the will. In 1879 the plaintiff left *M's* house and went to live with her mother; and in 1889 she filed this suit against her father-in-law, the defendant, for maintenance. The defendant pleaded that the plaintiff was provided for by her husband's will, and further that the plaintiff had failed to obey her husband's direction to reside either in *M's* house or the defendant's house, and that therefore she was not entitled to a separate maintenance. *Held*, that the plaintiff was not bound to enforce her claim under her husband's will in lieu of claiming maintenance from her father-in-law. In answer to plaintiff's claim, the defendant was bound to show that she was possessed of property out of which she could maintain herself, and he did not discharge that onus by showing that by suing *M* she might possibly recover the maintenance provided for her by the will. *Held*, also, that the plaintiff was entitled to separate maintenance from the defendant. The general rule of law is that a Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she goes elsewhere for an improper purpose. *Quære:* Whether that rule applies if she goes to reside elsewhere notwithstanding a direction in her husband's will that she should reside in the family house. GOKIBAI *v.* LAKHMIDAS KHIMJI
I. L. R. 14 Bom. 490

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5. RIGHT TO MAINTENANCE—*contd.*

(*n*) WIDOW—*contd.*

85. ——— *Residence in family house directed by husband.* A Hindu widow, whose husband has directed that she shall be maintained in the family house, is not entitled to maintenance if she reside elsewhere without cause. GIRIANNA MURKUNDI NAIK *v.* HONAMA
I. L. R. 15 Bom. 236

86. ——— *Widow directed by the husband to be maintained in the family house—Just cause for not living in family house—Imputation of unchastity.* A Hindu widow, who is directed by her husband to be maintained in the family house, is not entitled to maintenance if she resides elsewhere without a just cause. *P*, a Brahmin, resided at Kava and died there in 1874, while his wife (the plaintiff) was living with her parents at Dabhoi. By his will he devised the greater part of his property to his nephew *M*, and bequeathed a house and certain other property to his wife "if she came to live at Kava." In 1883 the plaintiff sued *M* and his brother for arrears of maintenance, alleging that they were in possession of her deceased husband's property and therefore were liable for her maintenance. The defendants pleaded that the plaintiff led an immoral life, and had therefore forfeited her right to maintenance. They further contended that she was not entitled to maintenance unless and until she came to reside at Kava, as directed by her husband's will. The Assistant Judge found that there was no evidence of plaintiff's unchastity, and that, under the circumstances, she could not live happily at Kava, where she had no relation except the defendants, who had endeavoured to blacken her character. He awarded the plaintiff's claim. *Held*, by the High Court, confirming the decree, that the plaintiff had "a just cause" for not living with the defendants. MULJI BHAISHANKAR *v.* BAI UJAM
I. L. R. 13 Bom. 218

87. ——— **Unchastity.**—*Residence in husband's family house.* A Hindu widow is not bound to reside in her deceased husband's family house; and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity or for any other improper purpose. PIRTHEE SINGH *v.* RAJ KOOER . . . . . **12 B. L. R. 238**
20 W. R. 21
L. R. I. A. Sup. Vol. 203

Affirming decision of Court below in
2 N. W. 170

88. ——— *Act XXI of 1850—Unchastity—Loss of caste—Forfeiture of rights of property.* Since Act XXI of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights of property. A Hindu widow entitled to a bare or starving maintenance under a decree made in a suit, brought by her for maintenance against the representatives of her deceased husband,

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(*n*) WIDOW—*contd.*

is not to be deprived of the benefit of that decree by the fact that she has since its date been leading an incontinent life. *Pirthee Singh* v. *Raj Kower, 12 B. L. R. 238: 20 W. R. 21,* distinguished. HONAMA *v.* TIMANNABHAT . . **I. L. R. 1 Bom. 559**

89. ——— *Unchastity.* An unchaste widow is not entitled to a bare maintenance. *Honama* v. *Timannabhat, I. L. R. 1 Bom. 559,* followed. VALU *v.* GANGA **I. L. R. 7 Bom. 84**

90. ——— *Decree liable to be set aside or suspended for unchastity.* A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by her husband's relatives, either in a suit brought by them expressly for the purpose of setting aside the decree or in answer to the widow's suit to enforce her right. VISHNU SHAMBHOG *v.* MANJAMMA **I. L. R. 9 Bom. 108**

91. ——— *Suit on a consent decree to recover arrears of maintenance—Unchastity of widow—Starving maintenance.* A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by the husband's relatives, either in a suit brought by them expressly for the purpose of setting aside the decree or in answer to the widow's suit to enforce her right. Upon proof of such subsequent unchastity, the widow is entitled to no maintenance whatever. *Bishnu Shambhog* v. *Manjamma, I. L. R. 9 Bom. 108,* and *Rama Nath* v. *Rajonimoni Dasi, I. L. R. 17 Calc. 674,* approved. DAULTA KUARI *v.* MEGHU TIWARI . **I. L. R. 15 All. 382**

92. ——— *Forfeiture of widow's right to maintenance by reason of unchastity.* The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference. *Valu* v. *Ganga, I. L. R. 7 Bom. 84,* and *Vishnu Shambhog* v. *Manjamma, I. L. R. 9 Bom. 108,* followed. NAGAMMA *v.* VIRABHADRA **I. L. R. 17 Mad. 392**

93. ——— **Charge on property for maintenance**—*Sale of estate.* A Hindu widow's claim to maintenance upon an estate does not necessarily render the sale of the property subversive of her right; for even if there be no other property out of which that maintenance can be derived, there is nothing to prevent her from suing to establish her right to make her maintenance a charge upon the property sold. ANUND MOYEE GOOPTO *v.* GOPAL CHUNDER BANERJEE . . **W. R. 1864, 310**

94. ——— *Husband's property.* A wife is under the Hindu law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property, or dispose of it by will in such a wholesale manner as to deprive her of maintenance. *Held,* therefore, where a husband in his lifetime made a gift of his entire estate leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance. JAMNA *v.* MACHUL SAHU . **I. L. R. 2 All. 315**

95. ——— *Husband's property—Gift of his property by a husband in fraud of his widow's right to maintenance—Nature of wife's interest in her husband's property—Right to partition—Transfer by her of her interest—Release to her husband—Arrears and future maintenance a charge on property of deceased husband.* A Hindu husband cannot alienate, by a deed of gift to his undivided sons by his first and second wives, the whole of his immoveable property, though self-acquired, without making for his third wife, who is destitute and has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death, she is entitled to follow such property in the hands of her step-sons to recover her maintenance her right to which is not affected by any agreement made by her with her husband in his lifetime. A Hindu wife has no property or co-ownership in her husband's estate, in the ordinary sense, which involves independent and co-equal powers of disposition and exclusive enjoyment. Her right is merely an inchoate right to partition which she cannot transfer or assign away by her own individual act; and, unless such right has been defined by partition or otherwise, it cannot be released by her to her husband. NARBADABAI *v.* MAHADEO NARAYAN **I. L. R. 5 Bom. 99**

96. ——— *Husband's property—Charge on property alienated by heirs. Held,* that the widow's right to maintenance being a charge on the property forming her deceased husband's estate remains claimable out of the property, notwithstanding its alienation by the heirs unless she bargains to forego it. HEERA LALL *v.* KOUSILLAH . . . . **2 Agra, 42**

TARUNGINEE DASSEE *v.* CHOWDRY DWARKANATH MUSSANT . . . . **20 W. R. 196**

97. ——— *Liability of heir* The heir who takes and becomes possessed of the estate of the deceased must be held to continue to be primarily responsible, both in person and property, for the maintenance of the widow, even though he should have fraudulently transferred that estate, or otherwise have improperly vested it, and the widow is bound to look to the heir for her maintenance and to claim if from him primarily rather than from the estate transferred or wasted, which may nevertheless be in the last resort answerable to her claim. RAMCHURN TEWAREE *v.* JUSSODA KOONWER . . **2 Agra 134**

98. ——— *Nature of charge.* The maintenance of a widow is by Hindu law

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(*n*) WIDOW—*contd.*

a charge upon the whole estate, and therefore upon every part thereof. RAMCHANDRA DIKSHIT *v.* SAVITRIBAI . . . **4 Bom. A. C. 73**

99. ——— *Family property.* A Hindu widow's maintenance is a charge upon the family estate in whosoever hands the estate may fall. KHUKROO MISRAIN *v.* JHOOMUCK LALL DASS . . . . **15 W. R. 263**

100. ——— *Family property —Mitakshara law—Moveable ancestral property—Property liable for maintenance—Immoveable property purchased with profits.* Under the Mitakshara law, moveable ancestral property which remains in the hands of a father, and has not been partitioned among his sons, is to be regarded as a fund chargeable with the maintenance of those members of the family who under Hindu law have claims for maintenance on the undivided estate of the family. All ancestral property is, while it remains undisposed of and unpartitioned, charged with the manintenance of all persons who are entitled to maintenance from the estate. Immoveable property purchased with the capital or profits of ancestral moveable property does not retain the character of ancestral moveable property, but those incidents attach to it which ordinarily attach to immoveable property acquired by and inherited from an ancestor. Hindu widow with a minor son is as much entitled as a childless widow to maintenance. Where a husband dies leaving separate estates and also an undivided share in joint family property, the widow's maintenance should be met first out of the profits of the separate estates ; but if these are insufficient, there is nothing in the circumstance that the husband left separate estates which would debar the widow from having recourse to the joint estate to meet the deficiency. SHIB DAYEE *v.* DOORGA PERSHAD **4 N. W. 63**

101. ——— *Right of widow to follow property into hands of purchaser—Liability of heir.* Under the Hindu law property purchased from the heir with notice that a widow is entitled to be maintained out of it continues, while in the hands of the purchaser, to be charged with that maintenance. Before following properties from which she is entitled to obtain her maintenance in the hands of the purchaser a Hindu widow is not bound in all cases to attempt recovering her maintenance from the heir-at-law. GOLUCK CHUNDER BOSE *v.* OHILLA DAYEE . **25 W. R. 100**

102. ——— *Suit for arrears of maintenance—Charge on estate of husband in hands of co-parcener.* In a suit by the widow of one undivided brother against the survivor for maintenance on the question of past maintenance : —*Held,* that the husband's estate in the hands of the survivor was that to which the charge attached, and that the husband's death was the period from which the Act of Limitation began to run against

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(*n*) WIDOW—*contd.*

the claim. SUBBRAMANIA MUDALIAR *v.* KALIAN AMMAL . . . . . **7 Mad. 226**

103. ——— *Widow's right to have maintenance charged on inheritance.* A Hindu widow entitled to maintenance may have the payment thereof secured by a charge on part of the inheritance in the hands of the heir. MAHALAKSHMAMMA *v.* VENKATARATNAMMA **I. L. R. 6 Mad. 83**

104. ——— *Charge of ancestral land encumbered with debt of family and redeemed with self-acquired funds by one member.* A Hindu widow is entitled to charge on account of her maintenance a piece of land in the possession of her father-in-law (the defendant), which formed a portion of the ancestral property of the family, and had been allotted on partition to defendant, encumbered with a mortgage-debt of the family to the full value, and which had, subsequently to the partition in the lifetime of the plaintiff's husband, been redeemed by the defendant with self and separately acquired funds. VISALATCHI AMMAL *v.* ANNASAMY SASTRY **5 Mad. 150**

105. ——— *Purchaser for value, and bonâ fide right of widow against.* The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a *bonâ fide* purchaser from her late husband's successors any more that the payment of unsecured debts due by the family. The proposition in *Ramchurn Tewaree* v. *Jasooda Koonwer, 2 Agra 134,* that the liability of family property in the hands of a purchaser for the maintenance of a widow depends on the ability of her husband's heir to support her, dissented from. LAKSHMAN RAMCHANDRA *v.* SARASVATIBAI **12 Bom. 69**

106. ——— *How far maintenance is a charge on husband's estate—Notice.* As against one who takes as heir, a Hindu widow has a right to maintenance out of the property in his hands. She also has a right to maintenance out of such property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir. By the law of Bengal she has no lien on the property for her maintenance against all the world irrespective of such notice. BHAGABATI DASI *v.* KANAI LALL MITTER **8 B. L. R. 225 : 17 W. R. 433 note**

JUGGERNATH SAWUNT *v.* ODHIRANEE NARAIN KOOMAREE . . . **20 W. R. 126**

See NISTARNI DASI *v.* MAKHUNLALL DUTT **9 B. L. R. 11 17 W. R. 432**

107. ——— *Lien on estate of husband—Notice of lien—Bonâ fide purchaser,* The lien of a Hindu widow or maintenance out of the estate of her deceased husband s not a charge on that estate in the hands of a *bonâ fide* purchaser

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HINDU LAW—MAINTENANCE—*contd.*

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(*n*) WIDOW—*contd.*

irrespective of notice of such lien. A Hindu widow, before she can enforce her charge for maintenance against property of her deceased husband in the hands of a purchaser from his heir, must show that there is no property of the deceased in the hands of the heir. Debts contracted by a Hindu take precedence of his widow's claim for maintenance, and *semble*, that, if a portion of his property is sold after his death to pay such debts, the widow cannot enforce her charge for maintenance against such property in the hands of the purchaser. *Quære:* Whether a Hindu widow, by obtaining against her husband's heir a personal decree for maintenance unaccompanied by any declaration of a charge on the estate, does not lose her charge upon the estate. ADHIRANEE NARAIN COOMARY *v.* SHONA MALEE PAT MAHADAI . . **I. L. R. 1 Calc. 365**

108. ——— *Charge on estate in the hands of purchaser with notice—Notice.* In a suit for maintenance brought by a Hindu widow against her husband's brother who was the sole surviving member of that husband's family, and against *bonâ fide* purchasers for value from him (the defendant) of certain immoveable ancestral property of the family. *Held*, that the mere circumstance that such purchasers had notice of her claim is not conclusive of the widow's rights against the property in their hands. If the property were sold in order to pay debts (not incurred for immoral purposes) of her husband, or his father, or grandfather, or for the benefit of the undivided family, or to satisfy a former decree obtained by the plaintiff herself against the same defendant for maintenance, such sale would be valid against her, whether or not the purchasers had notice of her claim. *Per* WEST, *J.*—According to the Mitakshara, sons must, from the moment of their father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of their father's widow, and with a competence on the widow's part to have the estate made answerable. If the sons make a division of the estate, they must allot to their mother an equal share, and the same to any sonless widow of their father. The widow has no proprietorship in the estate before its partition, but she has an equity to a provision which the Court will enforce to guard her against attempted fraud. The debts of the deceased owners take precedence of the maintenance of the widow. The estate is properly applied, in the first instance, by the sons as managers in payment of such debts. By a sale of the property the sons cannot evade a personal liability to provide for the widow. If a mother foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims will not be supported, but the particular assignee for value

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(*n*) WIDOW—*contd.*

acquires a complete title. In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family, her claim being strictly to maintenance only regulated by the circumstances of the joint family, it appears that, athough she may have her maintenance made a charge on the property yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith. If there is an ample estate left, out of which to provide for the widow, or, if knowing of a proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting its can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parcener, if she lives apart, and if the estate is small and insufficient, it is the vendee's duty, before purchasing to enquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connection that the doctrine of notice becomes of importance. The knowledge of collateral rights created by agreements in equity frequently qualifies those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied, it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists, though equity as between the vendee and the vendor will make the property retained by the latter primarily answerable. Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser is enforceable or not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted. What was honestly purchased is free from her claim for ever. What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale. There is no authority for the doctrine which makes the claim of widows not entitled to a share of property, in case of partition, a real charge on the inheritance, and ranks the claim of widows who are so entitled as a mere moral obligation. In all cases it is a claim to maintenance merely, not interfering (so long as it has not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit. The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal position. The rights and obligations of the original co-parceners fall at last to

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the sole survivor. The widows must be maintained by him out of the property, but he may still deal with the estate at his discretion in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The purchaser from him takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family. Authorities on the subject of Hindu widow's maintenance reviewed. LAKSHMAN RAMCHANDRA *v.* SATYABHAMABAI **I. L. R. 2 Bom. 494**

See DALSUKHRAM MAHASUKHRAM *v.* LALLUBHAI MOTICHAND **I. L. R. 7 Bom. 282**

109. ——— *Widow's maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act (IV of 1882), s. 39—Notice.* A testator, by his will gave his widow's maintenance out of the income of his immoveable estate, subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud. *Held*, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property is his hands remained unaffected, whether under s. 39 of the Transfer of Property Act or the law previously in force and irrespective of the possibility of her claim being satisfied from other property. BEHARILALJI BHAGWATPRASADJI *v.* BAI RAJBAI **I. L. R. 23 Bom. 342**

110. ——— *Transfer of Property Act (IV of 1882), s. 39—Transferee for consideration and without notice—Mortgagee—Decree declaring charge on immoveable property for maintenance—Notice of charge—Constructive notice—Vendor and purchaser.* S. 39 of the Transfer of Property Act does not protect a transferee for consideration, when the immoveable property transferred has already been declared by a decree of Court, subject to a charge in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued due subsequent to the transfer does not affect the liability of the property transferred to be sold in execution of a decree for the maintenance so claimed. KULODA PROSAD CHATTERJEE *v.* JOGESHAR KOER **I. L. R. 27 Calc. 194**

111. ——— *Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—Transfer of Property Act (IV of 1882), s. 39.* The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to by defeated by a transfer of the husband's property to a *bonâ fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has further been made with the intention of defeating the widow's claim. *Sham Lal* v. *Banna, I. L. R. 4 All. 296*, and *Lakshman Ramchandra Joshi* v. *Satyabhamabai, I. L. R. 2 Bom. 494*, referred to. RAM KUNWAR *v.* RAM DAI . **I. L. R. 22 All. 326**

112. ——— *Notice by possession of widow of her right to maintenance—Sale of family property to discharge previous mortgage.* Immoveable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff and the purchase-money was expended in redeeming a mortgage. The character of the mortgage-debt was not shown. In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years; and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on account of maintenance. *Held*, that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it. IMAM *v.* BALAMMA . . **I. L. R. 12 Mad. 334**

113. ——— *Charge on husband's estate—Bonâ fide purchaser for value without notice.* The maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by a decree or by agreement, a charge on such estate which can be enforced against a *bonâ fide* purchaser of such estate for value without notice. When the maintenance of a Hindu widow has been expressly charged on her husband's estate, a portion of such estate will be liable to such charge in the hands of a purchaser, even if it be shown that the heirs to such estate have retained enough of it to meet such charge; but such estate will not be liable if its transfer has taken place to satisfy a claim for which it is liable under Hindu law, and which under that law takes precedence of a claim of maintenance. SHAM LAL *v.* BANNA **I. L. R. 4 All. 296**

114. ——— *Charge for, on ancestral property—Liability of purchaser for arrears of maintenance.* A decree obtained by a Hindu widow for maintenance directed that certain ancestral property, which *D* and *S* had purchased, should be liable in their hands for the payment of the maintenance allowance. *Held*, that the widow was not entitled, by virtue of such decree, to recover

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arrears of the allowance from *D* and *S* personally, after such property had left their hands. DHARAM CHAND *v.* JANKI . . **I. L. R. 5 All. 389**

115. ——— *Maintenance, right to, out of confiscated property.* A Hindu widow held not entitled to maintenance out of property belonging to her husband which had become forfeited to Government on his conviction for rebellion. GUNGA BAEE *v.* HOGG **2 Ind. Jur. N. S. 124**

116. ——— *Property sold in execution of decree for maintenance—Subsequent suit to recover maintenance. and to follow property in hands of auction-purchaser.* A Hindu widow's right to recover maintenance is subject to the right of a purchaser of a portion of the family estate for valid consideration. *A* obtained a personal decree against *B* for maintenance ; at the sale in execution of this decree a portion of the family property was sold and purchased by *C*. At this sale the widow gave notice that she claimed a right to recover maintenance from the family property. In a subsequent suit by *A* against *B* and *C* to recover arrears of maintenance, *A* sought to follow the property in the hands of *C*. *Held*, that the fact of such notice being given at the time of the auction-sale would not affect the rights of the auction-purchaser *C*, he having purchased at an auction-sale held under a decree obtained in satisfaction of a valid family debt. SOORJA KOER *v.* NATH BUKSH SINGH **I. L. R. 11 Calc. 102**

117. ——— *Hindu widow—Maintenance—Ancestral property not alienable in defeasance of widow's right of maintenance.* The holder of ancestral property cannot, where there exists a widow having a right to be maintained out of that property, alienate such property so as to defeat the widow's right to maintenance. *Mussammat Lalti Kuar* v. *Ganga Bishen, N. W. P. H. C. (1875) 261 ; Jamna* v. *Machul Sahu, I. L. R. 2 All. 315 ;* and *Devi Persad* v. *Gunwanti Koer, I. L. R. 22 Calc. 410*, followed. BECHA *v.* MOTHINA (1900) **I. L. R. 23 All. 86**

118. ——— *Widow's right to maintenance—Maintenance not a charge on the joint-family property, unless made so by a decree or by agreement.* The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband unless and until it is fixed, and charged upon the estate by a decree or by agreement ; and, if such estate has been alienated and is in the hand of a *bonâ fide* transferee, the widow cannot follow the property, even though it be the case that the transferee had notice of her claim for maintenance. *Sheo Buksh Singh* v. *Mussumat Gunneshee Koonwur, S. D. A. N. W. P. 1864, I. 228) ; Lakshman Ramchandra Joshi* v. *Satyabhamabai (1877), I .L. R. 2 Bom. 494 ;* and *Ram Kunwar* v. *Ram Das (1900), I. L. R. 22 All. 326*, referred to. BHARTPUR STATE *v.* GOPAL DEI (1901) **I. L. R. 24 All. 160**

119. ——— *Decree against representative of family creating charge on family property—Right to execute against sons of defendants, though not actually made parties—Civil Procedure Code (Act XIV of 1882), s. 244.* Where it is clear from the terms of a decree for maintenance that it was intended to create a charge on property, and the property to be charged can be otherwise identified, it is immaterial that the decree does not specify the property by mates and bounds. A widow sued three undivided brothers for maintenance, and obtained a decree which created a charge on certain family property in respect of the maintenance sued for. The son of the first defendant was a minor at the date of the decree, and was not a party to it. The widow attached the property. Upon the death of the first defendant, subsequent to the decree, his son was added as legal representative, and claimed the property by right of survivorship, and sought to have it released from attachment on the ground that it was not liable for the widow's maintanance. *Held*, that, as the property was charged by the decree with maintenance, it could be sold in execution of the decree, even though the son had not been made a party to the decree, there being no contention that the debt was either illegal or immoral, and the decree being not merely a personal one against the father alone, but against the representatives of the family. *Muttia* v. *Virammal, I. L. R. 10 Mad. 283*, followed. MINAKSHI ACHI *v.* CHINNAPPA UDAYAN (1901) . **I. L. R. 24 Mad. 689**

120. ——— *Unchastity of widow, as disentitling her to maintenance—Charge not specifically raised in pleadings or issues.* A charge of unchastity, as disentitling a widow to maintenance, must be specifically raised in the pleadings or issues. Where there was no averment of, nor issue as to, such unchastity : *Held*, that the defendants could not found any such allegation on their general denial in the pleadings that the plaintiffs (the widow and her daughter) were entitled to maintenance, and on an issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses." HAJI SABOO SIDICK *v.* AYESHABAI (1903) **I. L. R. 27 Bom. 485 : s.c. L. R. 30 I. A. 127 ; 7 C. W. N. 665**

121. ——— *Hindu widow—Widow in possession of deceased husband's property ousted by adopted son—Mesne profits—Maintenance—Set-off—Sums expended on funeral ceremonies of late owner.* A Hindu widow, who had been for some years in possession of the immoveable property of her deceased husband, was ousted by a claimant who proved his title as adopted son of the said deceased

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husband, and a decree for mesne profits was given against the widow. *Held*, on appeal in execution of the decree for mesne profits, (i) that, in absence of evidence of negligence, the decree-holder was entitled only to the rents actually collected ; (ii) that the widow was entitled to set off her claim for maintenance, which was to be fixed with due regard to the extent of the property and the social position of the widow ; and (iii) that the widow was entitled to set off such reasonable amounts as might have been expended by her on the funeral ceremonies of her late husband, which the adopted son would otherwise have been bound to perform. What was a reasonable maintenance, and what sum should be allowed in respect of the funeral ceremonies under the circumstances, considered. *Sreemutty Nittokissoree Dossee* v. *Jogendro Noth Mullick, L. R. 5 I. A. 55*, referred to. DALEL KUNWAR *v.* AMBIKA PARTAP SINGH : (1903) . **I. L. R. 25 All. 266**

122. ——— *Hindu widow—Maintenance—Forfeiture for unchastity—Suit by Hindu widow to recover income of property assigned by way of maintenance—Provincial Small Cause Court Act (IX of 1887), Sch. II, Arts. 31 and 38.* In pursuance of a compromise between a Hindu widow and the brothers of her deceased husband, to whose estate the widow had laid claim, the brother assigned to the widow certain property by way of maintenance, but themselves remained in possession as managers on behalf of the widow. It was not made a term of the agreement that the income of the property so assigned should be payable to the widow only so long as she remained chaste. *Held*, that a suit by the widow for recovery of the income of the property so assigned was not a suit cognizable by a Court of Small Causes. *Held*, also, that the widow would not, even if unchastity were proved against her, forfeit her right to the income of the assigned property in the absence of an express stipulation to that effect. BHUP SINGH *v.* LACHMAN KUNWAR (1904) . . **I. L. R. 26 All. 321**

123. ——— *Hindu widow's right of maintenance out of husband's estate—Principles on which Court should ascertain amount of such maintenance.* Case in which the principles to be followed in ascertaining the amount of separate maintenance payable to a Hindu widow out of her husband's estate are discussed and defined. KAROONAMOYEE DABEE *v.* ADMINISTRATOR-GENERAL OF BENGAL (1905) . . **9 C. W. N. 651**

124. ——— *Transfer of Property Act (IV of 1882), s. 39—Maintenance of Hindu widow—Whether charge upon the estate—Hindu Law—Mitakshara School—Transfer of estate with intention to defeat right—Fraudulent intention—Purchaser with notice, position of.* When immoveable property, from the profits of which a Hindu widow was entitled to receive her maintenance was sold and the sale-deed recited that the amount

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of maintenance would continue to be paid to the widow by the vendor and that the property sold would not be subject to any charge for it. *Held*, that this mere recital was not enough for holding that the conveyance was executed with the intention of defeating the right of the maintenance-holder, within the meaning of s. 39 of the Transfer of Property Act. It was necessary to enquire whether at the time of the sale, there was sufficient property left in the hands of the vendor out of which the amount of maintenance could be realised, and, if there was not, whether the vendee was aware of the fact. The intention to defeat the right of the maintenance-holder against which provision is made in s. 39 of the Transfer of Property Act, involves the idea of a fraudulent intention. *Ram Kunwar* v. *Ram Dai, I. L. R. 22 All. 326*, approved. Under the Mitakshara the maintenance of a widow is not a charge upon the estate of her deceased husband. *Lakshman Ram Chandra Joshi* v. *Sattya Bhama Bai, I. L. R. 2 Bom. 494 ; Adhirani Narain Coomari* v. *Shonamali Pat Mahadai, I. L. R. 1 Calc. 365 ; Ram Kunwar* v. *Ram Dai, I. L. R. 29 All. 326 ; Bhartpore State* v. *Gopal Dai, I. L. R. 24 All. 160 ; Lakehman Ram Chandra* v. *Saraswati Bai, 12 Bom. H. C. 69*, relied on. *Musst. Khukroo Misrain* v. *Jhoomuk Lal Dass, 15 W. R. 263 ; Goluk Chandra Bose* v. *Rani Ohilla Dayee, 25 W. R. 100*, not followed. DIGAMBARI DEBI *v.* DHAN KUMARI BIBI (1906) **10 C. W. N. 1074**

125. ——— **Re-marriage of widow**—*Hindu Widow—Maintenance—Act No. XV of 1856.* During the lifetime of her husband the wife of a Hindu obtained a decree for maintenance against him, and the payment of this maintenance was by the decree made a charge on certain property which had been of the husband, but was then in the hands of certain donees from him. The husband died, and the widow, being permitted to do so by the rules of her caste (*Halwai*), married again. *Held*, that the fact of the widow having married again did not disentitle her from recovering maintenance from the property of her first husband. *Matungini Gupta* v. *Ram Rutton Roy, I. L. R. 19 Calc. 289, Rasul Jahan Begum* v. *Ramsuran Singh, I. L. R. 22 Calc. 589, Vithu* v. *Govinda, I. L. R. 22 Bom. 321, Panchappa* v. *Sanganbasawa, I. L. R. 24 Bom. 89, Murugayi* v. *Viramakali, I. L. R. 1 Mad. 226, Har Saran Das* v. *Nandi, All. Weekly Notes(1889) 76, Dharam Das* v. *Nand Lal, I. L. R. 20 All. 476 and Ranjit* v. *Radha Rani, I. L. R. 11 All. 330*, referred to. GAJADHAR *v.* KAUNSILLA (1908) . . . . **I. L. R. 31 All. 161**

(*o*) WIFE.

126. ——— **Wife's right to maintenance—Separate maintenance**—*Ground for living apart from husband.* Although by Hindu law a husband is bound to maintain his wife, she is not

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entitled to a separate maintenance from him unless she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence or other justifying cause, she is compelled to live apart from him. SIDLINRAPA *v.* SIDAVA **I. L. R. 2 Bom. 634**

127. ——— *Wife leaving husband's house without sanction.* Under the Hindu law, a wife who, without her husband's sanction, leaves him to live with her own family has no right to ask maintenance from her husband. KULLYANESSUREE DEBEE *v.* DWARKANATH SURMA **6 W. R. 116**

128. ——— *Wife leaving husband's house without objection.* Where a Hindu wife had left her husband's house and carried on an independent calling, and the husband did not object to the calling or give her notice to return :—*Held*, that, as she was desirous of returning and the husband declined to maintain her, she was entitled to maintenance. NITYE LAHA *v.* SOONDAREE DASSEE . . . . **9 W. R. 475**

129. ——— *Deed of separation—Agreement for separate residence and maintenance—Consideration—Right to enforce such agreement.* Where, by a registered deed executed by the defendant in favour of the plaintiff, his wife, after reciting certain quarrels and disagreements, none of which indicated such a condition of affairs as would warrant the wife under the Hindu law in claiming a separate residence and maintenance from her husband, he promised to pay her for a separate residence and maintenance. *Held*, in a suit for arrears of maintenance, that there was no consideration moving from the wife ; it was a mere voluntary arrangement on the part of the husband, and not enforceable by suit. RAJLUKHY DABEE *v.* BHOOTNATH MOOKERJEE . . **4 C. W. N. 488**

130. ——— *Husband's second marriage.* A Hindu wife is not entitled to maintenance if she leaves her husband without a justifying cause. The husband's marrying a second wife is not such justifying cause. Where, therefore, a Hindu husband married a second wife and his first wife thereupon left him :—*Held*, that the first wife had no implied authority to borrow money for her support. VIRASVAMI CHETTI *v.* APPASVAMI CHETTI . . . . . **1 Mad. 375**

131. ——— **Misconduct of husband**—*Wife compelled to leave husband's house on account of misconduct of husband.* A Hindu kept a Mahomedan mistress, and by such conduct compelled his wife under her religious feelings to leave her house. She went and resided with her mother and continued to live in chastity. *Held*, the husband was bound to give maintenance to his wife. LALA GOBIND PARSAD *v.* DOULAT BATTI **6 B. L. R. Ap. 85 : 14 W. R. 451**

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132. ——— **Cruelty of husband**—*Justification for wife leaving husband—Unkindness or neglect—Cruelty—Criminal Procedure Code, 1872, s. 536*—Under Hindu law, mere unkindess or neglect short of cruelty would not be a sufficient justification for a wife in leaving her husband's house. Reference being had to the first Code of Criminal Procedure (XXV of 1861) and to the existing Code (X of 1872), s. 536, unless a husband refuses to maintain his wife in his house, or has been guilty of acts of cruelty which would justify her in leaving his protection, she is not entitled to maintenance while living apart from her husband. SITANATH MOOKERJEE *v.* HAIMABUTTY DABEE. . . . . **24 W. R. 377**

133. ——— *Wife leaving her husband's protection—Cruelty of husband.* A Hindu wife is justified in leaving her husband's protection, and is entitled to separate maintenance from his income, when he habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety. *Sitanath Mookerjee* v. *Haimabutty Dabee, 24 W. R. 377*, referred to. MATANGINI DASI *v.* JOGENDRA CHUNDER MULLICK . . **I. L. R. 19 Calc. 84**

134. ——— **Unchastity**—*Adulteress living apart from her husband.* A Hindu adulteress living apart from her husband cannot recover maintenance from him so long as the adultery is uncondoned. ILLATA SAVATRI *v.* ILLATA NARAYAN NAMBUDRI . . . . . **1 Mad. 372**

135. ——— A woman divorced for adultery who had continued in adultery during her husband's life, and in unchastity after his death, is not entitled to maintenance out of the property of her deceased husband according to Hindu law. MUTTAMMAL *v.* MAMAKSHY AMMAL . . . . . **2 Mad. 337**

136. ——— *Wife's right of maintenance among Sudras—Continued unchastity and misconduct.* In 1887, a suit was instituted against a Sudra by his wife, and a decree was passed for her maintenance. The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child. The wife denied the adultery and stated that her husband had become reconciled to her, and that her child was legitimate. It was found that the plaintiff's case was established, and that the defendant's misconduct had been recent, open, and continuous. *Held*, that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance. *Quære :* Whether apart from the other circumstances in the case, the fact of having given birth to an illegitimate child would have constituted a bar to the wife's claim to bare maintenance. KANDASAMI PILLAI *v.* MURUGAMMAL . **I L. R. 19 Mad. 6**

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137. ——— **Aliyasantana law**—*Liability of husband to maintain wife.* A female, who is a member of a family governed by the Aliyasantana system of law, living apart from the family with her husband, is not entitled to a separate allowance for maintenance out of the income of the family property. *Semble*:—The husband is bound to maintain his wife out of his self-acquired means so long as she continues to live with him. SUBBU HEGADI *v.* TANGU . . . **4 Mad. 196**

138. ——— **Sagai wife**—*Marriage, validity of. Quære:* Whether a Sagai wife is entitled to maintenance. JHUBHOO SAHOO *v.* JUPODA KOOER . . . . **17 W. R. 230**

139. ——— **Hindu embracing Mahomedanism**—*Daughter's right—Residence—Marriage expenses—J.*, a Hindu, embraced the Mahomedan religion and married a Mahomedan woman whom he took to live with him. At the time of his conversion he had a Hindu wife, who, together with her minor daughter, now instituted a suit against him, praying (i) for an allowance by way of maintenance ; (ii) that the allownce might be fixed as a charge on specific property belonging to the defendant ; (iii) for an order compelling the defendant to provide the plaintiffs with a separate house for their residence ; and (iv) that a sum of R4,000 might be awarded to them to defray the marriage expenses of the minor plaintiff. *Held*, that the defendant ought not to be compelled to provide residence for the plaintiffs inasmuch as the allowance awarded to them should cover all such expenses as maintenance and house-rent, and that the claim of R4,000 for the minor plaintiff's marriage expenses should be rejected ; since it was not shown that any marriage expenses had been incurred or were at present required for her, and since if she lived to reach a marriageable age, the matter would then be in the hands of her guardian. *Held*, further, that the right of the wife and daughter to be maintained out of the husband's and father's property was undoubted, and that, when the Court has made an order directing a sum to be paid by way of maintenance, it has undoubtedly the power to ensure the enforcement of its order, and this could best be done by fixing the allowance to be a charge on specific property. *Jama* v. *Machul Sahu, I. L. R. 2 All. 315 ; Ramabai* v. *Trimbak Ganesh Desai, 9 Bom. 283 ; Sham Lal* v. *Banna, I. L. R. 4 All. 296 ;* and *Mahalakshamma Garu* v. *Venkatacatnamma Garu I. L. R. 6 Mad. 83,* referred to. MANSHA DEBI *v.* JIWAN MAL . . **I. L. R. 6 All. 617**

140. ——— **Right to maintenance from paramour**—*Woman living in adultery*—A woman living in adultery formed a temporary connexion with a man by whom she had a son. *Held*, that she could not maintain a suit for maintenance against her paramour. SIKKI *v.* VENKATASAMY GOUNDEN . . . **8 Mad. 144**

HINDU LAW—MAINTENANCE—*contd.*

RIGHT TO MAINTENANCE.—*contd.*

(o) WIFE—*contd.*

141. ——— **Woman marrying again in lifetime of husband**—*Right to maintenance.* Among the Sompara Brahmins a widow who has re-married in the lifetime of her first husband without his consent cannot be regarded as the lawful wife of her second husband, but she is entitled to maintenance as his concubine. KHEMKOR *v.* UMIA SHANKAR RANCHHOR . **10 Bom. 381**

142. ——— **Charge on husband's estate**—*Transfer of estate for payment of debts.* The *bonâ fide* purchaser for value of the estate of a Hindu husband, sold in order to satisfy the husband's debts, does not take such estate subject to the wife's maintenance, even if such maintenance is fixed and charged on the estate. *Jamna* v. *Machul Sahu, I. L. R. 2 All. 315,* and *Sham Lal* v. *Bamna, I. L. R. 4 All. 296,* referred to. GUR DAYAL *v.* KAUNSILA . . . **I. L. R. 5 A. 367**

143. ——— *Right of maintenance against purchaser at sale for payment of family debt.* Though the maintenance of a wife and children may in certain circumstances be a charge on the husband's property as against a purchaser, it is not so in a case in which the sale took place in payment of a family debt which it was the primary duty of the head of the family to pay. NATCHIARAMMAL *v.* GOPALA KRISHNA **I. L. R. 2 Mad. 126**

144. ——— **Partition**—*Mitakshara—Maintenance, wife's right to.* A suit by a Hindu wife against her husband to establish her right to a share in his property, and for partition, in the absence of any allegation that he refuses or has ceased to maintain her, is not maintainable. *Jamna* v. *Machul Sahu, I. L. R. 2 All. 315,* and *Becha* v. *Mothina, I. L. R. 22 All. 86,* distinguished. PUNNA BIBEE *v.* RADHA KISSEN DAS (1904) **I. L. R. 31 Calc. 476**

145. ——— **Right of wife, who had lived apart from her husband during his life time, to claim maintenance after his death**—*Father-in-law having ancestral property bound to maintain under such circumstances.* A wife living apart from her husband without any justifying cause is not entitled to claim maintenance from him, as in so doing she commits a breach of duty to him. After his death, however, she is entitled, though she lives apart, to claim maintenance from her father-in-law, who has taken her husband's estate, as there is no duty on her part to live with him, provided she does not live apart for corrupt purposes. *Per* WALLIS, *J.*—A wife living apart from her husband for no improper purpose may at any time, return and claim to be maintained. Her right is not forfeited but only suspended during the time she commits a breach of duty by living apart and is revived when at his death such duty ceases to exist. The Court may, under the circumstances, be justified in awarding her maintenance on a less

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HINDU LAW—MAINTENANCE—*contd.*

5. RIGHT TO MAINTENANCE—*concld.*

(*o*) WIFE—*concld.*

liberal scale than it otherwise would. *Per* SANKARAN-NAIR, *J.*—The father-in-law is under a moral obligation to maintain his daughter-in-law, which ripens into legal obligations against the assets in the hands of his heirs. *Rangammal* v. *Echammal, I. L. R. 22 Mad. 305, 307,* referred to. The husband is under a moral obligation to support a wife, when she is living apart from no corrupt motive; and this moral obligation ripens into a legal obligation on the father-in-law when, on the death of the son, he takes ancestral property. The rights of a wife and widow respectively to maintenance, rest entirely on different grounds. The former is a personal obligation on the husband based on the identity arising from marriage relations and is not dependent on the possession of property. The right of a widowed daughter-in-law to claim maintenance from her father-in-law is based on the possession of ancestral property by the latter and cannot be defeated by any breach of duty on her part towards her husband, which might disentitle her to enforce a distinct claim in respect of a different relation and on account of considerations peculiar to that relation. SURAMPALLI BANGARAMMA *v.* SURAMPALLI BRAMBAZE (1908)

I. L. R. 31 Mad. 338

6. BABUANA PROPERTY.

1. ——— **Babuana property, nature of**—*Grant to junior members of family for maintenance—Power of Grantees to alienate—Custom of Darbhanga Raj—Property not inalienable merely because it is impartible—Liability of "Babuana" to sale in execution of decree—Evidence of Custom.* Property granted as "*babuana*" to a junior male member of the Darbhanga Raj family in lieu of money maintenance was admittedly impartible, descending to the eldest male heirs of the grantee and being held and managed by the person to whom it descended for the maintenance of himself and his family. The Government revenue was conditioned to be paid by the grantee, or the person to whom the property descended, not directly to Government but through the Maharaja:—*Held,* that such property, though impartible, was not by reason of that fact inalienable. Property so granted may be alienable. *Udaya Aditya Deb* v. *Jadablal Aditya Deb, I. L. R. 8 Calc. 199 : L. R. 81. A. 248, Sartaj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272 : L. R. 15 I. A. 51,* and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards, I. L. R. 22 Mad. 383 : L. R. 26 I.A. 83,* followed. Notwithstanding its impartibility the subject of such a grant came, in the absence of any special custom regulating its enjoyment within the principle laid down in Manye's Hindu Law, 7th edition, page 415, paragraph 321, that "in cases governed by the Mitakshara Law a father may sell or mortgage, not only his own property in order to satisfy an antecedent debt of his own,

HINDU LAW—MAINTENANCE—*concld.*

6. BABUANA PROPERTY—*concld.*

not being of an illegal or immoral character . . and such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties." *Semble:* If the male descendant in whom property so granted was for the time being vested failed to pay the Governmnet revenue as stipulated, and the Maharaja was himself obliged to discharge the claim of the Government, he might sue the defaulter for the amount so paid, and execute his decree by sale of the "*babuana*" property. A family custom to the effect that property granted for maintenance by a "*babuana*" grant was inalienable, was held to be not established. Absence of evidence of alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of alienability. *Sartaj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272 : L. R. 15 I. A. 51,* followed. DURGADUT SINGH v. RAMESHWAR SINGH (1909)

I. L. R. 36 Calc. 943

HINDU LAW—MARMAKATAYAM.

——— *Marmakatayam Law—Division amongst joint owners, when binding on minors—Arrangement not binding to which all members are not parties.* Joint owners governed by the Marmakatayam Law can allow one or more of themselves to take any portion of the joint property as his or their separate property. Such transaction requires the consent of every one interested in the property, and where there are minors incapable of consenting the transaction to be binding on the Tavazhi must be for consideration and beneficial to the family as a whole. ARAYALPRATH KUNHI POCKER *v.* KANTHILATH AHMAD KUTI HAJI (1905) **I. L. R. 29 Mad. 62**

HINDU LAW—MARRIAGE.

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1. INFANT MARRIAGE, THEORY OF.

1. ———— **Infant marriages**—*Presumption of age—Age of discretion.* The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that, when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence, and also the age which the law fixes as that of discretion. JUMOONA DASSYA *v.* BAMASUNDARI DASSYA . **I. L. R. 1 Calc. 289 : 25 W. R. 235**
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2. RIGHT TO GIVE IN MARRIAGE, AND CONSENT.

1. ———— **Right of giving away daughter in marriage**—*Delegation of authority.* Though by the Hindu law no one but the father, while he is alive, can give his daughter in marriage, yet the father can delegate his authority to another. GOLAMEE GOPEE GHOSE *v.* JUGGESSUR GHOSE **3 W. R. 193**

2. ———————— *Guardian of daughters.* The plaintiff, the divided brother of the defendant's deceased husband, sued to obtain a declaration of his independent legal right to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant, and of her obligation to accept any persons whom he might select and provide for the celebration of their marriages. *Held*, that the exclusive right sought to be enforced by the plaintiff was not warranted by Hindu law, apart from the legal position and rights of the defendant as the guardian of her daughters and possessor of her husband's property which, however, presented still stronger grounds of objection to the plaintiff's claim. NAMASEVAYAM PILLAY *v.* ANNAMMI UMMAL . . **4 Mad. 339**

HINDU LAW—MARRIAGE—*contd.*

2. RIGHT TO GIVE IN MARRIAGE, AND CONSENT—*contd.*

3. ———— **Consent of guardian to marriage**—*Effect of want of consent.* The want of a guardian's consent will not invalidate a marriage otherwise legally contracted and performed with all the necessary ceremonies. MUDOOSOODUN MOOKERJEE *v.* JADUB CHUNDER BANERJEA **3 W. R. 194**

4. ———————— *Marriage of a girl without her father's consent—Husband and wife—Suit by the father to declare such marriage void—Factum valet.* The plaintiff, a Hindu father, sued for a declaration that the marriage of his daughter, which had been celebrated by his wife without his consent, was null and void. It appeared that the plaintiff had for about eight years voluntarily given up residence with his wife and daughters, and that he had several times been requested by his wife to get their daughter, aged eleven years, married, but had neglected to do so. The plaintiff's wife accordingly, having procured a suitable husband for their daughter, informed the plaintiff of the intended marriage; but the plaintiff, instead of approving the course taken by his wife, filed a suit, and obtained an injunction restraining his wife from celebrating the marriage. The marriage nevertheless was solemnized with due ceremonies. The Court of first instance declared the marriage void. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree. On appeal by the plaintiff to the High Court :—*Held*, confirming the decree of the lower Appellate Court, that the marriage should be supported, under the circumstances of the case, on the principle of *factum valet*, there being no express authority in the Hindu law-texts, making the consent of the parents and guardians of a girl a condition precedent to the validity of a marriage. The plaintiff, having been informed of his wife's intention to marry their daughter, made no *bonâ fide* attempt to marry her, and, after entirely foregoing his claim to all control over his daughter for many years, merely attempted to assert his right without any regard to her interests, and with the sole object of annoying the mother, from whom he had been long separated with his own consent. *Quære:* Whether Civil Courts would set aside a marriage if a clear case was established of fraud, by both the parties intermarrying, on the rights of the father as guardian of his daughter for the purposes of marriage. KHUSHALCHAND LALCHAND *v.* BAI MANI . . . **I. L. R. 11 Bom. 247**

5. ———————— *Custody—Guardianship—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.* The plaintiff and *R*, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was *R's* father, until the year 1880. In 1877 a daughter *S* had been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to

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HINDU LAW—MARRIAGE—*contd.*

2. RIGHT TO GIVE IN MARRIAGE, AND CONSENT—*contd.*

two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1884 he requested his wife *R* to join him with their daughter *S*. *R* refused, and she and *S* continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November 1885, *S* having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter *S* from the defendants, who, however, refused to deliver the girl to the plaintiff. In May 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter *S* married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit, he obtained a rule *nisi* for an injunction against the defendants. *Held*, that, pending the hearing of this suit, he was entitled to the injunction asked for. NANABHAI GANPATRAV DHAIRYAVAN *v.* JANARDHAN VASUDEV

I. L. R. 12 Bom. 110

6. ——————— *Alleged improper marriage of minor threatened pending application for guardianship—Injunction against person not party to application and out of jurisdiction—Guardian and Wards Act (VIII of 1890), ss. 11, 12—Civil Procedure Code (Act XI of 1882), s. 622.* During the pendency of an application for guardianship of a minor girl, it was alleged on behalf of the applicant, the mother, that an improper marriage of the girl was going to be performed by the father, and an injunction was prayed for to restrain various persons (including the present petitioner, who was not a party to the proceeding) from marrying or allowing the marriage of the minor. The lower Court had granted the injunction. *Held*, that s. 12 of the Guardian and Wards Act authorizes the Court to make such order for the temporary protection of the person of the minor as it thinks proper, and this power is not exercisable only after the production of the minor. *Held*, further, that the mere fact that a person resides outside the jurisdiction of the Court is not *per se* sufficient to prevent the Court from granting an injunction to restrain him from committing an act in a case such as the present. *Held*, also, that this was not a case in which the High Court ought to interfere under s. 622, Civil Procedure Code. HARENDRA NATH CHOWDHURY *v.* BRINDA RANI DASSI

2 C. W. N. 521

7. ——————— *Marriage of a girl without her father's consent—Suit by father to have marriage declared void—Factum valet—Applicability of the doctrine to marriage.* Under the Hindu law, a duly solemnized marriage cannot be set aside in the absence of fraud or force on the ground that the father did not give his consent to the marriage. The texts relating to the eligibility of persons who can claim the right of giving a girl in marriage are directory, and not mandatory. MULCHAND KUBER *v.* BHUDHIA

I. L. R. 22 Bom. 812

8. ——————— *Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with this authority.* The general authority, failing the father, of the paternal relatives to dispose of a girl in marriage is recognised by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not improperly be put upon terms which may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can seldom be necessary or desirable. In the case of very gross misconduct and disregard of paternal duty, the Court may interfere even in the case of a father. A Hindu died, leaving a widow and an infant daughter named *B*. After his death, his widow was forced, through the unkindness of her mother-in-law, to seek refuge at her parents' house. There she died about eighteen months after her husband's death. The orphan *B* was then brought up by her maternal uncles, *S* and *G*. When *B* became ten or eleven years old, her paternal uncle and paternal grandmother sought under Act IX of 1861, to take possession of the minor *B* from the custody of her maternal uncles. This application was resisted by *S* and *G*, on the ground that the petitioners had no right to give the girl in marriage, and that their object was to marry the girl to an old Bhatia in Bombay for a large sum of money. The Court found that several Bhatia girls of Dharangaon, where the parties resided, had of late been married to old Bhatias in Bombay, the girls' relatives receiving large sums of money. And as the girl had never lived with the petitioners, the Court ordered that she should, for the present, continue to live with her maternal uncles until the petitioners found a suitable husband for her, to be approved by the Court. Of the persons selected by the petitioners, one was approved by the Court. He was a resident of Vaizapur, a town in the Nizam's dominions. The Court passed an order authorizing the petitioners to give the girl in marriage to this person, and directing the girl to be made over into the petitioner's custody a month before the day fixed for the marriage. Against this order *S* and *G* appealed to the High Court. *Held*, that the petitioners, as paternal relatives of the girl, had, under the Hindu law, a preferential right to dispose of the girl in marriage; but as they had never taken care of the girl, it was necessary, in the interests of the minor, to put them upon terms to prevent the possi-

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HINDU LAW—MARRIAGE—*contd.*

2. RIGHT TO GIVE IN MARRIAGE, AND CONSENT—*concl'd.*

bility of their abusing their authority to the minor's prejudice. *Held*, also, that the girl should not be married to a person living in foreign territory, as the effect of marriage with such a person would be to place the minor beyond the protection of the Court in British India. *Held*, also, that the girl ought not to be forced into marrying a person whom she did not like. SHRIDHAR *v.* HIRALAL VITHAL . . . **I. L. R. 12 Bom. 480**

3. BETROTHAL.

1. ——— Betrothal how far treated as marriage. *Semble :* That according to Hindu law, a betrothal is not to be treated as an actual and complete marriage. UMED KIKA *v.* NAGINDAS NAROTUMDAS . . . . **7 Bom. O. C. 122**

2. ——— Nor does it by Hindu law amount to a binding irrevocable contract of which a Court would give specific performance. *In the matter of* GUNPUT NARAIN SINGH **I. L. R. 1 Calc. 74**

GUNPUT NARAIN SINGH *v.* RAJANI KOER **24 W. R. 207**

3. ——— Betrothal, suit to enforce— *Ceremonies of betrothal.* The plaintiff, on behalf of her infant son, sued the father and guardian of *M B* to recover possession of *M B*, alleging that *M B* had been betrothed to her son, and that, under the Hindu law, betrothment was the same as marriage and could not be repudiated, and that the defendant had, on demand, refused to give up *M B*. The defendant pleaded, *inter alia*, that the betrothment had been repudiated, as the family to which the plaintiff belonged were guilty of female infanticide, and that it would be illegal, under the Hindu law, to enter into relationship with it. *Held*, that, as according to Hindu law a betrothment is effected by the bride and bridegroom walking seven steps hand in hand during a particular recital, and the contract is perfected upon their arriving at the seventh step, and may be enforced by the husband on completion of the time, and as the evidence adduced did not show, nor was it alleged or pretended, that any betrothment had been effected or perfected in the way above described, the suit was unmaintainable. NOWBUT SINGH *v.* LAD KOOER **5 N. W. 102**

4. ——— Breach of promise of marriage—*Reciprocal contingent contract—Damages—Upariyaman—Halai Bhatia caste.* The plaintiffs alleged that by a written agreement, dated the 18th March 1882, the first defendant and her deceased son *L* agreed that the second defendant *K*, who was the daughter of the first defendant, should be given in marriage to the second plaintiff, who was the son of plaintiff No. 1 ; and that the betrothal of these two persons took place accordingly. The agreement was executed by the said *L*, as eldest male member of his family, in the name of his deceased father. In pursuance of this agreement, the plaintiffs paid to the first defendant R700 as upariyaman, and they presented *K* with ornaments and clothes of considerable value. The plaintiffs complained that the first defendant subsequently refused to carry out the contract of marriage, and had married her daughter *K* (defendant No. 2) to another person. They claimed in this suit to recover the ornaments and clothes, together with the R700 paid to the first defendant as upariyaman and R10,000 as damages. The first defendant was sued both in her personal capacity and as heir and legal representative of her son *L*. The first defendant pleaded that neither she nor the second defendant were bound by the betrothal agreement, as they were not parties to it, that the contract had been a contingent contract, inasmuch as her son *L* had agreed to give *K* (defendant No. 2) in marriage to the second plaintiff only on condition that he (*L*) should obtain in marriage *U*, the daughter of the third plaintiff, and that *L* and *U* were accordingly betrothed, that *L* had died in 1884, and that the contract had been thereby determined ; that she had been willing to renew it, and had proposed that a younger son of hers (*J*) should be accepted as the husband of *U*, but that the plaintiff had declined this offer. In proof of her allegation that the contract was a reciprocal contingent contract, the first defendant relied upon the following clause in the agreement : "At the time when the marriages are to take place the marriages of the two girls are to be performed together. When you shall give your daughter in marriage, I also am at the same time to give my daughter in marriage." *Held*, that the agreement of betrothal was not a reciprocal contingent contract ; and that the first defendant had committed a breach of the agreement by not giving her daughter *K* in marriage to the second plaintiff ; and that the plaintiffs were entitled to recover from the first defendant the value of the ornaments and the R700 paid by the plaintiffs as upariyaman together with R600 damages for the breach of contract. The second defendants being a minor, was held not liable, and the suit as against her was dismissed. MULJI THAKERSEY *v.* GOMTI . . . **I. L. R. 11 Bom. 412**

5. ——— Suit against fatherof betrothed girl to have betrothal declared void and for damages for breach of contract—*Contract of marriage—Kapole Bania caste.* The plaintiff, who had been betrothed to the defendant's daughter *K*, sued for a declaration that, unless the defendant was willing that the marriage should be performed before the expiration of the month of Baisakh 1952 (May-June 1896), the contract for the marriage should no longer be binding on the plaintiff, and that the betrothal was void, and for R25,000 damages for breach of the contract of betrothal and marriage. The defendant pleaded that his daughter *K* was not willing to marry the plaintiff within the period mentioned and that he had no right to force his daughter against

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HINDU LAW—MARRIAGE—*contd.*

3. BETROTHAL—*concld.*

her will. At the trial *K* stated that she was unwilling to be married for three or four years. The Court found that in the Kapole Bania caste, to which the parties belonged, marriages ordinarily took place when the bride was between twelve and fifteen years of age. *K* was born on the 2nd May 1881, so that she was nearly fifteen at the date of suit (16th January 1896). Before filing the suit, the plaintiff had called upon her and the defendant (her father) to fix a date for the marriage, but the defendant had declined to do so on the ground that his daughter did not wish to marry at that time, and that he would not force her to marry against her will. *Held*, that the plaintiff was entitled to the declaration prayed for. The marriage of Hindu children is a contract made by the parents, and the children themselves exercise no volition. This is equally true of betrothal, and there is no implied condition that fulfilment of the contract depends on the willingness of the girl at the time of marriage. It was contended that plaintiff could not obtain damages; that defendant had not broken the contract, the plaint assuming that the contract of betrothal was still in force, and the defendant having a *locsus pœnitentiæ* until Baisakh 1952. *Held*, that the plaintiff was entitled to damages. There was practically a repudiation of the betrothal. The plaintiff's willingness to marry *K* at any time before the end of Baisakh did not disentitle him to damages, seeing that *K* had declared her unwillingness to be married to plaintiff then, and the defendant had declared that he could not compel her to change her mind. PURSHOTAMDAS TRIBHAVANDAS *v.* PURSHOTAMDAS MANGALDAS **I. L. R. 21 Bom. 23**

4. CEREMONIES.

1. ——— **Boring of the ears**—*Necessary ceremonies—Sudras.* The boring of the ears is not one of the ten initiatory ceremonies of marriage; it is unnecessary even for a twice-born Hindu: and all ceremonies except that of marriage are dispensed with in the case of Sudras. MONEEMOTHONATH *v.* AUSHOOTOSH DEY **1 Ind. Jur. O. S. 24**

2. ——— **Ceremony of rasee bibaha**—*Custom.* The question whether the ceremony of rasee bibaha was a part of the marriage ceremony during the continuance of which gifts to the bride came under the denomination of yautuka, was held in this case to depend on the custom of the district in the caste to which the parties belonged. BISTOO PERSHAD BURRAL *v.* RADHA SOONDUR NATH **16 W. R. 304**

3. ——— **Ceremony of nandimukh or bridhi-shradh**—*Restitution of conjugal rights—Consent of lawful guardian—Presumption of validity of marriage—Non-performance of ceremonies.* The ceremony of *nandimukh* or *bridhi-shradh* is not an essential of Hindu marriage, nor would the want of consent by the lawful guardian

HINDU LAW—MARRIAGE—*contd.*

4. CEREMONIES—*concld.*

necessarily invalidate such marriage. In a suit for restitution of conjugal rights the fact of the celebration of marriage having been established, the presumption, in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with. BRINDBAUN CHUNDRA KURMOKAR *v.* CHUNDRA KURMOKER . **I. L. R. 12 Calc. 140**

4. ——— **Consummation ceremony**—*Marriage—Consummation.* According to Hindu law, a marriage between Brahmans is binding although the consummation ceremony or consummation never takes place. ADMINISTRATOR-GENERAL, MADRAS *v.* ANANDACHARI **I. L. R. 9 Mad. 466**

5. ——— **Ganadharva marriage, necessary ceremonies for.** In order to constitute a valid marriage in Gandharva form, nuptial rites are essential. BRINDAVANA *v.* RADHAMANI **I. L. R. 12 Mad. 72**

6. ——— **Presumption as to completion of marriage ceremonies.** If there is sufficient evidence to prove the performance of some of the ceremonies usually observed on the occasion of a marriage, a presumption is always to be drawn that they were duly completed until the contrary is shown. BAI DIWALI *v.* MOTI KARSON **I. L. R. 22 Bom. 509**

7. ——— **Ceremonies of Griha Pravesam and Ruthusanti**—*Legitimate marriage expenses—Contract Act (IX of 1872), s. 69—Person interested in making payment—Daughter's marriage expenses defrayed by widowed mother—Claim against brother of the widow's late husband.* The ceremonies of "*Griha Pravesam*" and "*Ruthusanti*" are essentially connected with the disposal in marriage of a girl of the Brahmin caste, and form a part of the marriage ceremonies. A Hindu widow performed these ceremonies for her daughter, and sued to recover their cost from her late husband's undivided brother. In a previous case between the same parties it had been decided that the defendant was liable to be charged with the expenses of the marriage of the plaintiff's daughter. *Held*, that plaintiff was entitled to recover the cost of these two ceremonies. The expenses were legitimate marriage expenses, and plaintiff had the right to sue, as she was the person who was interested in making the payment which the defendant (under the decision referred to) was bound to make. VAIKUNTAM AMMANGAR *v.* KALLIPIRAM AYYANGAR (1902) . . . **I. L. R. 26 Mad. 497**

5. VALIDITY OR OTHERWISE OF MARRIAGE.

1. ——— **Marriage between persons of different castes**—*Custom.* The general Hindu law being against a marriage between persons of distinct castes (*e.g.*, Domes and Hareos), local custom can alone sanction it. MELARAM NUDIAL *v.* THANOORAM BAMUN . **9 W. R. 552**

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HINDU LAW—MARRIAGE—*contd.*

5. VALIDITY OR OTHERWISE OF MARRIAGE—*contd.*

2. ——— *Sudras—Custom.* *Per* MITTER, *J.*—Marriage between parties in different sub-divisions of the Sudra caste is prohibited unless sanctioned by any special custom, and no presumption in favour of the validity of such a marriage can be made, although long cohabitation has existed between the parties. *Per* MARKBY, *J.* —*Quære :* Whether there is any legal restriction upon such a marriage. NARAIN DHARA *v.* RAKHAL GAIN . **I. L. R. 1 Calc. 1 : 23 W. R. 334**

3. ——— **Marriage of widow with husband's brother**—*Jats in North-Western Provinces.* Among the Jats of the North-Western Provinces kurao dureecha, or the marriage of a widow with the brother of a deceased husband, is common and is recognised as lawful, and the children of such marriage are legitimate and entitled to inherit an equal share of the estate of their father as his other sons. POORUNMULL *v.* TOOLSEE RAM **3 Agra 350**

4. ——— **Marriage with daughter of wife's sister.** A marriage between a Hindu and the daughter of his wife's sister is valid. RAGAVENDRA RAU *v.* JAYARAM RAU **I. L. R. 20 Mad. 283**

5. ——— **Inter-marriage between persons of different sections of the Sudra caste, validity of.** There is nothing in Hindu law prohibiting marriages between persons belonging to different sections or sub-divisions of the Sudra caste. *Narain Dhara* v. *Rakhal Gain, I. L. R. 1 Calc. 1 ; Inderun Nalungypooly Taver* v. *Ramasammy Talaver, 13 Moo. I. A. 141 ; and Ramamani Ammal* v. *Kulanthai Natchiar, 14 Moo. I. A. 346,* referred to. UPOMA KUCHAIN *v.* BHOLARAM DHUBI . . **I. L. R. 15 Calc. 708**

6. ——— **Marriage between members of different sects of Lingayets**—*Burden of proof of invalidity of marriage.* According to the Lingayet religion, as well as according to Hindu law, marriages between members of different sects of the Lingayets are not illegal, and where it is alleged that such a marriage is invalid, the onus lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom. FAKIRGAUDA *v.* GANGI **I. L. R. 22 Bom. 277**

7. ——— **Brahmin bride given in marriage by her mother without her father's consent**—*Injunction.* A Vaishnava Brahmin girl was given to the plaintiff in marriage by her mother without the consent of her father, who subsequently repudiated the marriage. It appeared that the mother falsely informed the Brahmin, who solemnized the marriage, that the father had consented to it. *Held,* that the plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from marrying the bride to any one else. VENKATACHARYULU *v.* RANGACHARYULU **I. L. R. 14 Mad. 316**

8. ——— **Marriage without consent of the father of the girl.** Under the Hindu law, if a girl is given in marriage by her mother and all the necessary rites are duly performed, and there is no question of force or fraud and no other legal impediment to the marriage, the marriage will not be invalid, merely because the consent of the girl's father has not been obtained. *Bace Rulyat* v. *Jey Chund Kewul, 1 Morley's Dig. 181,* and *Venkatacharyulu* v. *Rangacharyulu, I. L. R. 14 Mad. 316,* referred to. GHAZI *v.* SUKRU **I. L. R. 19 All. 515**

9. ——— **Conditional marriage**—*Restitution of conjugal rights—Husband and wife —Kudwa Kunbi caste—Custom—Public policy.* The plaintiff, a member of the Kudwa Kunbi caste, sued in 1890 for restitution of conjugal rights, alleging that he had been married to the first defendant in 1927 (1870). The defendants alleged that at the date of the marriage the parties were only a month old ; that the marriage was a sata (exchange) marriage, and that by the contract the plaintiff's father was bound, as a condition of his obtaining the second defendant's daughter for his son, to provide a girl to be married to the second defendant's son. They alleged that such conditional marriages were a custom of the caste, and they denied that the condition had been performed by the plaintiff's father. They further alleged that in 1936 (1879) the plaintiff's father, finding that he could not perform the condition, had passed a release (the plaintiff himself then being a minor) to defendant No. 2 (the father of defendant No. 1) giving up all claims to defendant No. 1 ; that a dispute having subsequently arisen after the plaintiff had attained his majority, the matter was referred to the members of the caste, who decided that within a certain fixed time the plaintiff should provide a girl, for the son of defendant No. 2, and that, on the plaintiff failing to do so, the marriage was dissolved. The Court found that by the custom of the caste the marriage in 1927 (1870) between the plaintiff and defendant No. 1 was only a conditional marriage ; that the release of 1936 (1879) operated to cancel the marriage, and that in any case the plaintiff's failure to find a girl for the second defendant's son, in accordance with the decision of the caste, dissolved the marriage. *Held,* that the plaintiff had not established his right to the restitution of defendant No. 1 as his wife. The alleged custom was not contrary to public policy. According to the custom relied on, there was no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies were performed. Such a transaction could not be regarded as immoral from any point of view. The Hindu law leaves it entirely to the

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HINDU LAW—MARRIAGE—*contd.*

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parents to marry their daughters, and although, according to the strict Brahminical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognize a custom, at any rate among the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as imcomplete and conditional marriages. BAI UGRI *v.* PATEL PURSHOTTAM BHUDAR **I. L. R. 17 Bom. 400**

10. ——— **Marriage of a minor in disobedience of Court's order**—*Doctrine of factum valet—Guardian and Wards Act (VIII of 1890), s. 24—Court's power to make order as to marriage of minor.* A Hindu widow, who was appointed guardian of the person of her minor daughter eight or nine years old, married the minor in disobedience of the order of a Civil Court directing her to make over the minor to her paternal uncle for the purpose of getting her married. *Held*, that the principle of *factum valet* applied. Neither the disobedience of the Court's order, nor the disregard of the preferable claims of the male relations, would invalidate the marriage. *Quære:* Whether the marriage of a minor eight or nine years old can be regarded as falling within the scope of s. 24 of Act VIII of 1890, especially when the marriage of a minor female terminates the power of the guardian of the person? BAI DIWALI *v.* MOTI KARSON **I. L. R. 22 Bom. 509**

11. ——— **Asura form of marriage**—*Nagar Vissa Vania caste—Palu, giving of.* The Hindu law, at least as evidenced by usage, though it permits the Asura form of marriage among the mercantile and servile classes, does not prohibit to those classes the more approved forms of marriage. The form of marriage in use among the Nagar Vissa section of the Vania caste corresponds to one or other of the approved forms, and not to the Asura and the giving of palu does not constitute a purchasing of the bride. *In the goods of* NATHIBAI. JAIKISONDAS GOPAL DAS *v.* HARKISONDAS HULLOCHANDAS . . . **I. L. R. 2 Bom. 9**

12. ——— *Hindus of Bhandari and other inferior castes.* Amongst Hindus of the Bhandari and other inferior castes, the Asura form of marriage (probably derived from a form in use amongst the inhabitants of Hindustan before the introduction of the Brahminical religion) is more customary than the four approved forms of marriage. The principal characteristic of the Asura form is the giving by the bridegroom of dez, or a money payment to the father of the bride. VIJIARANGAM *v.* LAKSHUMAN . **8 Bom. O. C. 244**

13. ——— **Marriage by "gandharp" form**—*Legitimacy of children. Held*, that a marriage by the "gandharp" form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the status of wife and making the offspring legitimate. BHAONI *v.* MAHARAJ SINGH . . **I. L. R. 3 All. 738**

14. ——— **Custom of Tipperah.** According to the law and custom of marriage prevailing at Tipperah, the Rajah can legitimatize his children born of a kachooa by going through a marriage ceremony with the mother. Assuming that no marriage ceremony is necessary to institute a gandharp marriage, mere cohabitation, without any intent and mutual agreement to enter into a binding contract of marriage, is not sufficient. CHUCKRODHUJ THAKUR *v.* BEER CHUNDER JOOBRAJ **1 W. R. 194**

15. ——— **Marriage between legitimate children of illegitimate parents**—*Illegitimate children—Sudras.* According to the Hindu law prevalent in Madras, legitimate children of illegitimate parents of the Sudra caste can contract legal and valid marriages. The marriage between persons of different sections of the Sudra caste is valid and legal. INDERAN VALUNGYPULY TAVER *v.* RAMASWAMY PANDIA TAVER **3 B. L. R. P. C. 1 : 12 W. R. P. C. 41 : 13 Moo. I. A. 141**

Affirming s.c. in PANDAYA TELAVER *v.* PULI TELAVER . . . . **1 Mad. 478**

16. ——— **Pat marriage**—*Marriage among Mahrattas—Inheritance—Sons of twice-married woman.* The custom of Pat marriage among the Mahrattas, and Natra amongst the inhabitants of Gujarat, referred to, and the authorities bearing on the subject to consider and discussed. The sons of a Punarbhu (twice-married woman) by a duly-contracted Pat marriage,—*i.e.*, in accordance with the custom of the caste,—are legitimate, and, as to the right of inheritance and extent of shares, rank on a par with the sons by lagna marriage. RAHI *v.* GOVINDA WALAD TEJA **I. L. R. 1 Bom. 97**

17. ——— **Polygamy**—*Prohibition against plurality of wives. Semble:* The prohibition against a plurality of wives, save under certain circumstances, is merely directory, and not imperative. VIRASVAMI CHETTI *v.* APPASVAMI CHETTI **1 Mad. 375**

18. ——— **Sagai marriage**—*Custom.* A man who is a member of the Hulwace caste may contract a marriage in the sagai form with a widow, even if he has a wife living, provided, in the latter case, that he is a childless man. *Quære:* Whether a married woman may not contract a sagai marriage, notwithstanding that her husband is living, if the punchayet has examined the case, and reported that her husband is unable to support her. KALLY CHURN SHAW *v.* DUKHEE BIBEE **I. L. R. 5 Calc. 692 : 5 C. L. R. 505**

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HINDU LAW—MARRIAGE—*contd.*

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19. ——— Sagai and Shunga marriages—*Widow re-marriage—Custom. A* became a childless widow in the lifetime of her father. She afterwards contracted a Shungo marriage, and by this marriage she had two sons. On the death of her father, *A's* claim to succeed to his property as his heir was disputed. It having been proved that the re-marriage of widows was customary amongst the Nomosudras, the caste to which the parties belonged :—*Held*, that such a custom was valid, and that *A* was entitled to succeed as heir to her father, under the Hindu law. HURRY CHURN DASS *v.* NIMAI CHAND KEYAL **I. L. R. 10 Calc. 138 : 13 C. L. R. 207**

20. ——— Re-marriage—*Presumption of legality of marriage—Act XV of 1856. L* sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower Appellate Court on the grounds that the plaintiff, at the time when her connection with the deceased began, was the widow of one of his cousins ; that, according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid ; and that consequently the plaintiff could not be considered the lawfully-married wife of the deceased, and entitled as such to the inheritance of his estate. *Held*, that the plaintiff having in the first Court given evidence to show that she was married to the diceased and that her two infant daughters were the offspring of that marriage, and looking to the provisions of Act XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown,—*i.e.*, until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited. LACHMAN KUAR *v.* MURDAN SINGH . . **I. L. R. 8 All. 143**

21. ——— *Re-marriage in husband's lifetime without his consent—Sompura Brahmins.* Among the Sompura Brahmins a widow, who has re-married in the lifetime of her first husband without his consent, cannot be regarded as the lawful wife of her second husband, but is entitled to maintenance, as his concubine, from his property. *Quære :* Whether consent of her first husband would have rendered the second marriage valid. KHEMKOR *v.* UMIASHANKAR RANCHHOR . **10 Bom. 381**

22. ——— *Lingaits—Desertion of wife.* According to custom obtaining among the Lingaits of South Canara, the re-marriage of a wife deserted by her husband is valid. VIRASANGAPPA *v.* RUDRAPPA . **I. L. R. 8 Mad. 440**

23. ——— Karao marriage—*Jats—Right of children.* A " Karao " marriage among the Jats is valid, and the offspring of such a union are entitled to inherit. QUEEN *v.* BAHADUR SINGH **4 N. W. 128**

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24. ——— *Lodh caste—Consent of brotherhood.* The custom of " Karao " marriage is prevalent among the Lodh caste, but in the lifetime of a wife by a regular marriage it can only take place with the consent of the brotherhood. KESHAREE *v.* JANARDHAN **5 N. W. 94**

25. ——— Marriage between Vaidya and Kayastha—*Marriage between persons of different castes—Validity of such marriages in Tippera—Custom—Vaisya Sudra.* Where plaintiff's father was a *Vaidya* and his mother a *Kayastha*, and the defendant took an objection that plaintiff was therefore an illegitimate son : *Held*, that it could not be disputed that plaintiff's mother, a *Kayastha* and therefore a *Sudra*, married his father, a *Vaisya*. Also, that the ancient Hindu law did not regard such marriages with the condemnation expressed by later authorites, which have been accepted by our Courts so as to make children from unequal marriages illegitimate. Also, that such marriages are recognised by local custom in the district of Tippera, and are therefore valid. RAM LAL SOOKOOL *v.* AKHOY CHARAN MITTER (1903) . . . . **7 C. W. N. 619**

26. ——— Marriage between a Brahman and Chhattri—*Succession. Held*, that whatever may have been the case in ancient times, and whatever may be the law in other parts of India, at the present day a marriage between a Brahman and a Chhattri is not a lawful marriage in these Provinces, and the issue of such a marriage is not legitimate. The defendant pleaded that the parties were governed by a Nepalese custom by which a Brahman could lawfully marry the daughter of a Chhattri. *Semble :* That the custom set up, not being an ancient family custom but merely a territorial custom, would, if in fact it existed, be applicable only to indigenous Nepalese subjects and perhaps to others permanently domiciled in Nepal. *Soorendro Nath Roy* v. *Mussamut Heeramonee Burmoneah, 1 Moo. I. A. 814*, referred to. PADAM KUMARI *v.* SURAJ KUMARI (1906) . . . **I. L. R. 28 All. 458**

27. ——— Asura form—Brahma form—*Construction of texts.* Under Hindu law, where the paternal or maternal relation of a girl, who is given in marriage, receive money consideration for it, the substance of the transaction makes it not a gift but a sale of the girl. The money received is what is called the " bride-price " : that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her. It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between

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two or more writers, the Court is free to choose any it likes. CHUNILAL *v.* SURAJRAM (1909) **I. L. R. 33 Bom. 433**

28. ——— Marriage between Panchal and Kurbar castes—*Sub-divisions of Shudra tribe —Inter-marriage valid—Custom as to illegality—Burden of proof.* A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe. The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom. *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver, 13 Moo. I. A. 141,* and *Fakirgauda* v. *Gangi, I. L. R., 22 Bom. 277,* followed. MAHANTAWA *v.* GANGAWA (1909) . **I. L. R. 33 Bom. 693**

6. EVIDENCE AS TO, AND PROOF OF, MARRIAGE.

1. ——— Evidence of marriage—*Inference and probabilities weighed against direct testimony.* Upon a widow's claim for maintenance the question was whether the relation between her and a person, deceased many years before her suit, whom she alleged to have been her husband, had been the relation of marriage or of concubinage. The decision of this question, one way or the other, rested on considerations whether the substantial testimony of witnesses, who gave their testimony to the fact of the marriage in their presence, was, or was not, outweighed and negatived in judicial estimation by the antecedent and inherent improbability that such marriage, under the circumstances of the parties alleged to have entered into it, would have taken place. The oral evidence was, however, corroborated by inferences drawn from several facts well established. The present suit was defended by the successor in estate of the deceased, and it was common ground between this defendant and the plaintiff that there had been cohab tation between the deceased and the latter. This narrowed the effect of the condition and circumstances of the deceased at the time of the alleged marriage upon the question whether it was a fact. The ordinary criteria afforded by conduct contributed but little aid to remove doubt. In the result, the conclusion of the Judicial Committee was that the direct oral testimony had not been overborne, but should prevail against the improbability presented by the case that such a marriage should have taken place. The affirmative of it was maintained, and the widow's claim allowed. LUCHMI KOER *v.* ROGHU NATH DAS . . . **I. L. R. 27 Calc. 971 L. R. 27 I. A. 142 4 C. W. N. 685**

2. ——— *Cutchi Memons —Marriage, evidence of, where disputed—Omission to mention nika wife in will made after marriage.* The omission in a will made after an alleged *nika* marriage, of all mention of the *nika* wife, is, so far as it goes, an item of evidence against the marriage having taken place; but its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In this case it was *held,* that the circumstances of the marriage made it not unlikely that the testator would have taken the latter course. A draft of the will, written by a person other than the testator, tendered as furnishing evidence similar to that afforded by the will, was held to be rightly rejected as evidence, not being a written statement by the testator. HAJI SABOO SIDICK *v.* AYESHABAI (1903) . . . **I. L. R. 27 Bom. 485 s.c. L. R. 30 I. A. 127 . 7 C. W. N. 665**

7. LEGITIMACY OF CHILDREN.

1. ——— Procreation before marriage—*Legitimacy of children.* Under Hindu law, it is not necessary, in order to render a child legitimate, that the procreation as well as the birth should take place after marriage. OOLAGAPPA CHETTY *v.* ARBUTHNOT. COLLECTOR OF TRICHINOPOLY *v.* LEKAMANI. PEDDA AMANI *v.* ZAMINDAR OF MARUNGAPULI **14 B. L. R. 115 : 21 W. R. 358 L. R. 1 I. A. 268, 282**

2. ——— Presumption of legitimacy—*Treatment of child by father as legitimate.* A marriage *de facto* being established and supported by recognition by the deceased zamindar of the children of the marriage as legitimate, the very strongest evidence will be required to show that the law denied to such children their presumable legal status on the ground of their mother's incapacity to contract a marriage. The legal presumption in favour of a child who was born in his father's house of a mother lodged and apparently treated as a wife, who was treated as a legitimate child by his father, and whose legitimacy was disputed after the father's death, was a safe and proper one to be made, and the opposing case had not, as it ought to have been, strictly proved. RAMAMANI AMMAL *v.* KULANTHAI NAUCHEAR **17 W. R. 1 : 14 Moo. I. A. 346**

8. RESTRAINT ON, OR DISSOLUTION OF, MARRIAGE.

1. ——— Injunction to restrain marriage pending suit—*Medical examination—Impotency.* In a suit against a Hindu who had been outcasted for offering his daughter in marriage to an old and impotent man, the Court granted an injunction to restrain the marriage pending the suit, and held that the lower Courts properly refused to cause the intended husband in this case to be medically

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examined as to his alleged impotency, he not being a party to the suit, and there being no provision of law authorising such a procedure. KANAHI RAM *v.* BIDDYA RAM . . . **I. L. R. 1 All. 549**

2. ———— **Loss of caste, effect of, on marriage tie**—*Caste, question of.* While the Courts have generally accepted the decisions of properly-constituted punchayets on questions of caste, they have accepted them, subject to the qualification that the decision of the punchayet does not estop the Courts from enquiring into the Civil rights of any member of the caste, and securing to him the enjoyment of such rights if he be found not to be precluded from the enjoyment of them by the shastras or the particular usages of his caste. It would be extremely inconvenient to hold that by a deprivation of caste, which may be temporary, a member of a caste loses his marital rights, so as to confer on his wife the power of contracting a second marriage. It is a general principle of Hindu law that the degradation of the husband from caste does not dissolve the marriage tie. BISHESHUR *v.* MATAGHOLAM . . . . **2 N. W. 300**

See, however, SINAMMAL *v.* ADMINISTRATOR GENERAL OF MADRAS . **I. L. R. 8 Mad. 169**

3. ———— **Change of religion**—*Divorce—Degradation—Death of husband while outcast—Dissolution of marriage—Suit by widow to recover husband's estate.* In 1850 *K* married *S*, both being Brahmins. *K* subsequently became a convert to Christianity. In 1881 *K* died and *S* claimed his estate. *Held*, that, according to Hindu law, *K* died an outcast and degraded, and that, as his degradation was unatoned for, the marriage became absolutely dissolved, and no right of inheritance remained to *S*. SINAMMAL *v.* ADMINISTRATOR-GENERAL OF MADRAS . **I. L. R. 8 Mad. 169**

4. ———— **Divorce**—*Restitution of conjugal rights, suit for—Custom.* Where a Hindu husband sued his wife for restitution of conjugal rights, and the defendant pleaded divorce, it was held that, though the Hindu law does not contemplate divorce, still in those districts where it is recognized as an established custom, it would have the force of law. KUDOMEE DOSSEE *v.* JOTEERAM KOLITA . . . **I. L. R. 3 Calc. 305**

5. ———— **Illegitimacy of parties to marriage**—*Convert to Mahomedanism—Apostate.* *R*, originally a Hindu woman and the illegitimate offspring of Chattri parents, was duly married according to the Hindu rites to *D*, who was also by caste a Chattri. After the marriage *R* became a convert to Mahomedanism. *Held*, that illegitimacy is under the Hindu law no absolute disqualification for marriage, and that, when one or both the contracting parties to a marriage are illegitimate, the marriage must be regarded as valid, if they are recognized by their caste people as belonging to the same caste. *Held*, also, that there is no authority

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in Hindu law for the proposition that an apostate is absolved from all civil obligations, and that so far as the matrimonial bond is concerned such a view would be contrary to the spirit of that law which regards it as indissoluble, and that accordingly the marriage between *R* and *D* was not under the Hindu law dissolved by her conversion to Mahomedanism. *Rahmed Beebee* v. *Roheya Bebee, 1 Norton's L. C. on Hindu Law, 12*, dissented from. *In the matter of* RAM KUMARI **I. L. R. 18 Calc. 264**

9. NO OBLIGATION TO GET SON OR DAUGHTER MARRIED.

1. ———— *Liability of father to get his daughter married.* Under the Hindu law, a father is under no legal obligation to get his daughter married. *Vaikuntam Ammangar* v. *Kallipiram Ayyangar, I. L. R. 23 Mad. 512*, explained. Where a wife expended money on her daughter's marriage and then sued her husband for the amount so expended: *Held*, that she was not entitled to recover. SUNDARI AMMAL *v.* SUBRAMANIA AYYAR (1902) . **I. L. R. 26 Mad. 505**

2. ———— *Obligation on father to get his son married—Sale by father of family lands for expenses of one son's marriage—No assent by other sons—Effect of sale on interest of the other sons.* A Hindu father sold certain ancestral lands to defray the marriage expenses of one of his four sons. That son and another assented to the sale. On its being contended that the sale was invalid in so far as the shares of the other two sons were concerned there being no family necessity, and there being no moral or religious obligation on a Hindu father to get his son married, so as to make the sale valid as against the other sons. *Held*, that there is no authority for the proposition that the omission to perform the ceremony of marriage in the case of a male Brahman entails a forfeiture of his caste or status, and in consequence there is no moral or religious obligation on a father to bring about the marriage of his son. The sale of land was therefore invalid in so far as the shares of the other brothers were concerned. GOVINDARAZULU NARASIMHAM *v.* DEVARABHOTLA VENKATANARASAYYA (1904) . **I. L. R. 27 Mad. 208**

10. RE-MARRIAGE.

1. ———— **Re-marriage of widow**—*Death of the son by first husband—Succession to the son.* A re-married Hindu widow is entitled to succeed to the property left by her son by her first husband, the son having died after the re-marriage. *Akora Suth* v. *Boreani, 2 B. L. R. 199*, followed. BASAPPA *v.* RAYAVA (1905) **I. L. R. 29 Bom. 91**

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HINDU LAW—MITAKSHARA.

1. _____ **Survivorship**—*Mitakshara family —Civil Procedure Code (Act XIV of 1882), ss. 234, 244—Decree—Mortgage decree against father —Execution against representative—Right to raise question as to validity of decree—Immoral debt.* A mortgage decree made against a person governed by the Mitakshara law may after his death be executed against his son, who claimed the mortgaged properties by survivorship, although the latter was no party to the suit upon the mortgage. The son would be permitted to have the question tried under s. 244 of the Civil Procedure Code as to whether the debt had been contracted for immoral purposes. CHANDER PERSHAD *v.* SHAM KOER (1905) . **I. L. R. 33 Calc. 676**

2. _____ **Re-union**—*Mitakshara—Re-union between two first cousins, if valid.* Under the Hindu law as laid down in the Mitakshara, there cannot be a valid re-union between two first cousins who were originally joint, but had subsequently separated. BASANTA KUMAR SINGHA *v.* JOGENDRANATH SINGHA (1905) . **I. L. R. 33 Calc. 371**
s.c. 10 C. W. N. 236

3. _____ *Mitakshara—Hindu joint family—Separation—Partition—Re-union—Jointness without re-union—Tenants in common—Act of father binding on sons.* The fact of living together and eating together on the same floor with food taken from the same cook-room or even the superintendence and control by the eldest and the most intelligent of the members cannot alone suffice to constitute either a joint or a re-united family as contemplated by Vijnaneswara and his followers, if there be satisfactory proof of previous ascertainment of the shares of individual members. The constitution of a joint Hindu family consisting of the father and his sons is such that the father represents the sons without express written authority and is considered to be the accredited agent of the joint family. He may sue and be sued and may bind the family by the result of the litigation. In a family arrangement settling disputed rights and liabilities his action as representative of the family is binding on the dependent members. *Stapilton* v. *Stapilton, 2 W. & T. 839,* applied. *Pitam Singh* v. *Ujager Singh, I. L. R. 1 All. 651,* and *Ujager Singh* v. *Pitam Singh L. R. 8 I. A. 190 : s. c. I. L. R. 4 All. 120,* relied on. GAJINDAR NARAIN *v.* HARIHAR NARAIN (1908)
12 C. W. N. 687

4. _____ **Succession**—*Competition between full sister and half-brother's son— Mitakshara—Sister's place in the line of heirs—Vyavahara Mayukha, views of, on the point—Value of the commentaries of Balambhatta and Nanda Pandita—Conflict between Mitakshara and Vyavahara Mayukha—Rule as to harmonising the difference.* In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is between her and a half-brother's son, the latter, being higher in the line, among heirs specifically mentioned in the Mitakshara is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha. The interpretation put by WESTROPP, *C.J.*, upon Balambhatta's texts in *Sakharam Sadashiv Adhikari* v. *Sitabai, I. L. R. 3 Bom. 353,* commented upon and dissented from except in cases where the Vyavahara Mayukha alone is applicable. *Rudrapa* v. *Irava, I. L. R. 28 Bom. 82,* explained. *Per* CHANDAVARKAR, *J.*— The commentary of Balambhatta on the Mitakshara is not regarded in this Presidency as an authority to be accepted in the interpretation of the former work without question. These observations apply more or less to Nanda Pandita also. It is a well established rule of the Bombay High Court that where the Mitakshara is silent or obscure, the Court must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible. BHAGWAN *v.* WARUBAI (1908)
I. L. R. 32 Bom. 300

5. _____ *Succession—Shudras—Illegitimate daughters.* Under Hindu law among Shudras an illegitimate daughter cannot succeed to her father's property in preference to the son of a divided brother. BHIKYA *v.* BABU (1908) . . . **I. L. R. 32 Bom. 562**

6. _____ *Mitakshara—Adopted son—Succession to the adopted son—Adoptive mother entitled to succeed in preference to adoptive father.* Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption. ANANDI *v.* HARI SUBA (1909) . . . **I. L. R. 33 Bom. 404**

7. _____ *Succession—Undivided son succeeds to father's self-acquired property, to the exclusion of divided son.* Under the law of the Mitakshara on the death of a father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division took place after the acquisition of such property as the father. *Fakirappa* v. *Yellappa, I. L. R. 22 Bom. 101,* referred to. Although the sons have by birth theoretically an interest in their father's self-acquisition, still as the father can dispose of those acquisitions at pleasure, they are not co-parcenary property in the ordinary sense and it is only the latter property that can form the subject of partition. After obtaining on partition his share of all the divisible property, the separating son loses all the rights which he had as a member of the co-parcenary and it was only as a member of the co-parcenary that he had by birth an interest in his father's self-acquisitions. All the right that remains to him with regard to his father's property is the right to inherit in the absence of undivided sons. An undivided son takes his father's separate property by survivorship and it becomes an addition to the joint property. NANA TAWKER *v.* RAMACHANDRA TAWKER (1908)
I. L. R. 32 Mad. 377

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HINDU LAW—MITAKSHARA—*contd.*

8. ——— **Marriage**—*Mitakshara—Mayukha—Marriage—Samskara—Marriage of a co-parcener—Family purpose.* According to Hindu law a debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on the other co-parcener as a debt contracted for a family purpose and, therefore, for the benefit of the family. *Govindarazulu Narasimha* v. *Devarabhotla Venkatanarasayya, I. L. R. 27 Mad. 206,* dissented from. Under the Mitakshara as well as the Mayukha the word "Samskara" ordinarily includes marriage. SUNDRABAI *v.* SHIVNARYANA (1907)
I. L. R. 32 Bom. 81

9. ——— **Stridhan**—*Mitakshara—Succession—Stridhan—Maidan's stridhan—Priority between maternal grandmother and father's mother's sister.* Under the Mitakshara, the father's mother's sister is entitled to succeed to the stridhan of a maiden in preference to her maternal grandmother. JANGLUBAI *v.* JETHA APPAJI (1908)
I. L. R. 32 Bom. 409

10. ——— *Mitakshara—Stridhan—Succession—Competition between husband and step-son.* Under the Mitakshara school of Hindu law, when a married Hindu woman dies, leaving no issue, her husband is entitled to succeed to her *stridhan* in preference to her husband's son by another wife. BHIMACHARYA *v.* RAMACHARYA (1909) . . . **I. L. R. 33 Bom. 452**

11. ——— **Gift by widow**—*Mitakshara—Widow—Moveables inherited from husband—Gift invalid.* A Hindu widow is not competent under the Mitakshara to make a gift of moveables inherited by her from her husband, who died childless and intestate. PANDHARINATH *v.* GOVIND (1907)
I. L. R. 32 Bom. 59

12. ——— **Minor**—*Joint Mitakshara family—Next friend—Minor's money in Court—Managing member of Mitakshara family—Withdrawal of money from Court.* The managing member of a joint Hindu family governed by the Mitakshara school, who is also appointed guardian *ad litem* of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by s. 461 of the Civil Procedure Code. *Sham Kuar* v. *Mahanunda Sahoy, I. L. R. 19 Calc. 301; Appovier* v. *Rama Subha Aiyan, 11 Moo. I. A. 75; Garibulla* v. *Khalak Singh, I. L. R. 25 All. 407; L. R. 30 I. A. 165;* and *Kathusheri Pishareth* v. *Vallotil Manakel Narayanan, I. L. R. 3 Mad. 234,* referred to. HARIHAR PERSHAD SINGH *v.* MATHURA LAL (1908)
I. L. R. 35 Calc. 561
s.c. 12 C. W. N. 598

13. ——— **Liability of sons to pay father's debt**—*Mitakshara—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), ss. 234, 244, 252—Limitation Act (XV of 1877), Sch. II, Art. 179.* A money-decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands, even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality, and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under s. 244 of the Civil Procedure Code (Act XIV of 1882). *Umed Hathising* v. *Goman Bhaiji, I.L.R. 20 Bom. 385,* followed. There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree-holder relating to execution must alike be disposed of under s. 244 of the Civil Procedure Code (Act XIV of 1882). Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties. SHIVRAM *v.* SAKHARAM (1908) . . . . **I. L. R. 33 Bom. 39**

14. ——— **Mortgage**—*Mitakshara—Joint Hindu Family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.* The father of a Joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt. A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt. A creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage was taken to satisfy an antecedent debt or was justified by some family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt. So *held* by STANLEY, *C. J.*, KNOX, *J.* and AIKMAN, *J.*, concurring. A mortgage of joint family property was executed by the father of a joint Hindu family who had sons living at the time. The mortgage was for valuable consideration but it was not shown that it was executed to meet any antecedent debt or for any family necessity, on the other hand it was not alleged that the debt secured by the mortgage was tainted with immorality. *Held* by STANLEY, *C. J.*, and KNOX and AIKMAN, *JJ.*, that the mortgage in question could not be enforced against the sons' interests in the joint family property. *Per* BANERJI, *J.* (RICHARDS, *J.*, concurring):—As regards a Hindu son's liability to pay his father's debts not tainted with immorality there is no distinction in principle between a debt secured by a mortgage and an unsecured debt. Unless the debt is of such a nature that it is not the pious duty

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of the son to pay it, a mortgage of joint ancestral property made by the father is binding on and enforceable against the son and his interest in the property whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage. In a suit brought against the son to enforce the mortgage the onus is not on the plaintiff to prove that the debt was incurred for the benefit of the family, but it is for the son to prove that, having regard to the nature of the debt, it was not his pious duty to discharge it. The following cases were referred to :—*Debi Dat* v. *Jadu Rai, I. L. R. 24 All. 459, Jamna* v. *Nain Sukh, I. L. R. 9 All. 493, Badri Prasad* v. *Madan Lal, I. L. R. 15 All. 75, Lal Singh* v. *Deo Narain Singh, I. L. R. 8 All. 279, Manbahal* v. *Gopal Misra All. Weekly Notes, (1901), 57, Hanuman Kamat* v. *Daulat Mundar, I. L. R. 10 Calc. 525, Ram Dayal* v. *Ajudhia Prasad, I. L. R. 28 All. 328, Surja Prasad* v. *Golab Chand, I. L. R. 27 Calc. 762, Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu, I. L. R. 29 Mad. 200, Suraj Bansi Koer* v. *Sheo Parshad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88, Babu Singh* v. *Bihari Lal, I. L. R. 30 All. 156, Karan Singh* v. *Bhup Singh, I. L. R. 27 All. 16, Girdharee Lal,* v. *Kantoo Lal, L. R. I I. A. 321, Nanomi Babuasin* v. *Modhun Mohum, L. R, 13 I. A. 1 ; I. L. R. 13 Calc. 21, Hanoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree, 6 Moo. I. A., 393, Kameswar Pershad* v. *Run Bahadur Singh, I. L. R. 6 Calc. 843, Maharaj Singh* v. *Balwant Singh, I. L. R. 28 All. 508, Jamsethji N. Tata* v. *Kashinath Jivan Manglia, I. L. R. 26 Bom. 326, Chidambara Mudaliar* v. *Koothaperumal, I. L. R. 27 Mad. 326, Sami Ayyangar* v. *Poonamal, I. L. R. 21 Mad. 28, Luchman Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855, Khalilul-Rahman* v. *Gobind Pershad, I. L. R. 20 Calc., 328, Maheswar Dutt Tewari* v. *Kishun Singh, I. L. R. 34 Calc. 184, Kishun Pershad Chowdhry* v. *Tipan Pershad Singh, I. L. R. 34 Calc. 735, Balgobind Das* v. *Narain Lal, I. L. R. 15 All. 339, Lakshman Dada Naik* v. *Ramchandra Dada Naik, L. R. 7 I. A. 181, Madho Pershad* v. *Mehrban Singh, L. R. 17 I. A. 194, Beni Madho* v. *Basdeo Patak, I. L. R. 12 All. 99, Mahabir Pershad* v. *Maheswar Nath Sahai, I. L. R. 17 Calc. 584, Sita Ram* v. *Zalim Singh, I. L. R. 8 All. 231, Kishan Lal* v. *Garuruddhwaja Prasad Singh, I. L. R. 21 All. 238, Chail Behari Lal* v. *Gulzari Mal, 6 All. L. J. 133, Kallu* v. *Fateh, 1 All. L. J. 316, Chintamanray Mehendale* v. *Kashinath, I. L. R. 14 Bom. 320, Bhawani Bakhsh* v. *Ram Dei, I. L. R. 13 All. 216, Ran Singh* v. *Sobha Ram, I. L. R. 29 All. 544, Ramchandra* v. *Fakirappa, 2 Bom. L. R. 450, Ganga Pershad* v. *Ajudhia Pershad Singh, I. L. R. 8 Calc. 131,* and *Bhagbut Pershad Singh* v. *Girga Koer, I. L. R. 15 Calc. 717.* CHANDRADEO SINGH *v.* MATA PRASAD (1909)

I. L. R. 31 All. 176

15. ——————— *Mitakshara—Mortgage of ancestral property by one member—No decree can be passed against his share.* A member of a joint Hindu family governed by the *Mitakshara* cannot validly mortgage his undivided share in ancestral property held in co-parcenary on his own private account without the consent of his co-sharers. Hence where a father in such a family purports to mortgage the ancestral property neither for a lawful necessity nor for an antecedent debt : *Held,* that a decree for sale cannot be passed even in respect of the share of the father alone. *Chandra Deo* v. *Mata Prasad, I. L. R. 31 All. 176,* and *Balgabind* v. *Narain, I. L. R. 15 All. 339, P. C.* followed. KALI SHANKAR *v.* NAWAB SINGH (1909)

I. L. R. 31 All. 507

16. **Decree for family debt—***Mitakshara—Joint Hindu family—Position of minor member of the family not properly represented in the suit.* A Hindu family firm was sued for a debt contracted in the course of business by the firm. In execution of the decree in such suit a house belonging to the judgment-debtors was sold and the sale was confirmed, but the purchaser did not get actual possession. One of the judgment-debtors, who was a minor, applied to have the decree set aside and it was set aside as against him but not so the sale. *Held,* on suit by the son of the auction-purchaser for possession of the house purchased by his father, that the only plea tenable by the minor defendant was that the debt in respect of which the decree had been obtained was tainted with immorality or was otherwise not binding upon him. *Debi Singh v. Jia Ram, I. L. R. 25 All. 214, 223,* referred to. MATA DIN *v.* GAYA DIN (1909) . . . **I. L. R. 31 All. 599**

17. ——————— **Partition—***Property gifted away to one son to the detriment of another—Share in the property gifted.* When a Hindu father governed by the Mitakshara makes a gift of his moveable property to one son to the detriment of the other, not on account of affection for that son, but to punish and disinherit the other son: *Held,* that the alienation is bad and that in a suit for partition the son can claim a share in the property gifted to the other son. NAND RAM *v.* MANGAL SEN (1909) . **I. L. R. 31 All. 359**

18. ——————— **Father's liability as surety, if and how enforceable against son—***Mitakshara—Liability, if personal or extends to property—Antecedent debt—Limitation.* Where a Mitakshara father stood surety in respect of a mortgage debt, stipulating that in case the mortgagee was prevented from holding possession of the mortgaged property or from collecting the rents, the debt would be recoverable with damages from certain specified plots of the family property of the surety, and more than six years after the mortgagee was ousted from the mortgaged property, the mortgagee sued the son of the surety to enforce his rights under the surety bond : *Held,* that there was no "antecedent" or actual debt for which the surety was liable on the date of the bond, and the liability which subsequently arose cannot be regarded as a debt which apart from any question of legal necessity or benefit of the family was

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HINDU LAW—MITAKSHARA—*concld.*

binding on the family property in the hands of his son. The son was, if at all, personally liable to discharge the debt, and the personal remedy against the son being time-barred, there was no means of following ancestral property in his hands. *Quære:* Whether a Mitakshara son is under a pious obligation to discharge a debt incurred by his father standing surety. HIRA LAL MARWARI *v.* CHANDRABALI HALDARIN (1908)

13 C. W. N. 9

19. ——— Succession (Property Protection) Act (XIX of 1841)—*Jurisdiction Practice—Ex parte order.* The provisions of Act XIX of 1841 do not apply to the case of a family governed by the Mitakshara Law, inasmuch as in the case of the death of a member the property passes not by way of succession, but by survivorship. Before it can be held that a Court has jurisdiction under Act XIX of 1841, it must be found that the provisions of the law have been strictly complied with. Case in which it was held that Act XIX of 1841 could not be applied under any circumstances. SATO KOER *v.* GOPAL SAHU (1907)

12 C. W. N. 65

HINDU LAW—MORTGAGE.

1. ——— Mortgage executed in name of minor—*Civil Procedure Code (Act XIV of 1882) s. 562—"Preliminary point."* A mortgage in favour of a joint Hindu family is not void because it happens to be executed in the name of a member of the family who at the time of execution is a minor. *Mohori Bibi* v. *Dharmodas Ghose, I. L. R. 30 Calc. 539,* distinguished. *Held,* also, that the decision of an issue as to whether or not the document, which formed the basis of the suit was void in consequence of its having been executed in favour of a minor was a decision on a preliminary point, such as justified a remand under s. 562 of the Code of Civil Procedure. *Mata Din* v. *Jamna Das, I. L. R. 27 All. 691,* followed. MEGHAN DUBE *v.* PRAN SINGH (1907) . . **I. L. R. 30 All. 63**

2. ——— Liability of sons for father's debts—*Defence that debts were incurred for immoral purposes—Burden of proof.* According to the Hindu law of the Mitakshara school it is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt has contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of his father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge. *Maharaj Singh* v. *Balwant Singh, I. L. R. 28 All. 508,* distinguished. *Kishan Lal* v. *Garuruddhwaja Prasad Singh, I. L. R. 21 All. 238,* and *Karan Singh* v. *Bhup Singh, I. L. R. 27 All. 16,* followed. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21,* referred to. Where in such a case as above, the sons set up the defence that the debt was incurred for immoral purposes, the burden of proof is on them and not on the

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creditor. *Debi Dat* v. *Jadu Rai, I. L. R. 24 All. 459,* followed. *Jamna* v. *Nain Sukh, I. L. R. 9 All. 493,* dissented from. And merely general evidence of profligacy on the part of the father is not sufficient. *Chintamanrav Mahendale* v. *Kashinath, I. L. R. 14 Bom. 320,* referred to. BABU SINGH *v.* BIHARI LAL (1908) . **I. L. R. 30 All. 156**

3. ——— Sons' right to redeem—*Foreclosure of mortgage—Sons not made parties.* The mortgagees of a mortgage of joint family property executed by the father alone sued for and obtained a decree for foreclosure. At the time the suit was instituted the mortgagees knew that there were sons and grandsons jointly interested with the mortgagor in the mortgaged property, but, notwithstanding this, they omitted to make them parties to their suit. *Held,* that the sons and grandsons were not precluded from instituting a suit for redemption. *Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537,* referred to. *Debi Singh* v. *Jia Ram, I. L. R. 25 All. 214,* distinguished. RAM PRASAD *v.* MAN MOHAN (1908)

I. L. R. 30 All. 256

4. ——— Liability of other members of family for managing member's debts. *R R,* a member with *G L,* his uncle, of a joint Hindu family, got a decree for costs against *G L* and had him arrested in execution thereof. *G L* thereupon borrowed money on a mortgagee of joint family property and procured his release. *Held.* on a suit by the mortgagee for the sale of the mortgaged property, that the mortgage could not under the circumstances proceed against *R R's* interest in the joint family property. *Duleep Singh* v. *Sree Kishoon Panday, 4 N. W. P. 83,* distinguished. RAM RATAN *v.* LACHMAN DAS (1908)

I. L. R. 30 All. 460

5. ——— *Mortgage by a Hindu widow without legal necessity—Destruction of property by fire—Mortgagees rebuilding the property—Suit by reversioner at widow's death to recover possession of property—Mortgagee not entitled to claim repairs or to remove the construction before delivering possession.* A Hindu widow inherited a shop from her son and mortgaged it without any legal necessity recognised as such by Hindu law. The property having been destroyed by floods, the mortgagees rebuilt it with their own money. At the widow's death, the reversioner sued to recover possession of the property free from all incumbrances. *Held,* that the mortgagees, spent the money while holding the property under a mortgage not binding on the reversioner, and what they did must be presumed in law to have been done unauthorisedly so far as that reversioner was concerned. *Held,* further, that the building having been treated by the mortgagees as property mortgaged to them by the widow without legal necessity, there was no equity arising in their favour as against the reversioner, who was entitled to recover it in the condition in which it was when the widow died. *Vinayakrao* v. *Vidyashankar, 9 Bom. L. R. 404; Premji Jivan Bhate* v. *Haji*

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HINDU LAW—MORTGAGE—*concld.*

Cassum Juma Ahmed, I. L. R. 20 Bom. 298, and *Narayan v. Bholagir, 6 Bom. H. C. (A. C. J.) 82* distinguished. VRIJBHUKANDAS *v.* DAYARAM (1907) **I. R. R. 32 Bom. 32**

HINDU LAW—PARTITION.

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STRIDHAN—

DESCRIPTION AND DEVOLUTION OF STRIDHAN ; **I. L. R. 24 All. 67**

POWER TO DISPOSE OF STRIDHAN **I. L. R. 24 All. 82**

1. REQUISITES FOR PARTITION.

1. ——— **Necessaries to create partition**—*Definition of shares—Independent enjoyment.* Under the Hindu law, two things at least are necessary to constitute partition : the share must be defined, and there must be distinct and independent enjoyment. SHEO DYAL TEWAREE *v.* JUDOONATH TEWAREE. SHEO DYAL TEWAREE *v.* BISHONATH TEWAREE. SHIB DYAL TEWAREE *v.* BISHONATH TEWAREE. JUDOONATH TEWAREE *v.* BISHONATH TEWAREE . . . **9 W. R. 61**

2. ——— **Evidence of partition**—*Partition without actual division.* Under the Mitakshara law, there may be a partition in estate without any actual division of the lands into parcels, and allotment of those parcels to the different shares to be held by them in severalty. JOSODA KOONWAR *v.* GOURIE BYJONATH SAHAE SINGH **6 W. R. 139**

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3. ——— *Intention to divide—Partition without division by metes and bounds.* An actual partition by metes and bounds is not necessary to render a division of undivided property complete. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with ; and each member thenceforth has in the estate a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided. APPOVIER *v.* RAMA SUBBA AIYAN **8 W. R. P. C. 1 : 11 Moo. I. A. 75**

4. ——— *Declaration of intention to divide—Partition without division by*

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HINDU LAW—PARTITION—*contd.*

1. REQUISITES FOR PARTITION—*contd.*

metes and bounds. Quære : Is a mere signification of intention on the part of a joint Hindu family sufficient to constitute a separation without an actual partition by metes and bounds ? SADABART PERSHAD SAHOO *v.* LOTF ALI KHAN. PHOOLBAS KOOER *v.* LALL JUGGESSUR SAHI. BIKRAMJEET LALL *v.* PHOOLBAS KOOER. RAM DHYAN KOONWAR *v.* PHOOLBAS KOOER . . . **14 W. R. 340**

Review of s. c. rejected . . **18 W. R. 48**

5. ——— *Declaration of intention to divide.* According to Hindu law, the declaration of an intention to become divided in estate amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. VATO KOER *v.* ROWSHUN SINGH . . . **8 W. R. 82**

6. ——— *Intention of parties.* In ascertaining whether property once joint has become divided and separate, regard must be had to the act and intentions of the co-sharers, but when the character of the property has once been ascertained, the law fixes the course of succession. A partition between surviving co-sharers and the widow of a deceased co-sharer may operate as a complete severance of the joint property. RAM PERSHAD *v.* CHAINERAM **1 N. W. 11 : Ed. 1873, 10**

7. ——— *Arrangement by deed to effect separation.* An arrangement contained in a deed duly executed by the members of a joint Hindu family, to effect a separation of the property, is sufficient *primâ facie* evidence of a valid separation under Hindu law, and in such a case an actual division by metes and bounds is not necessary. KULPONATH DASS *v.* MEWAH LALL **8 W. R. 302**

8. ——— *Agreement to divide property—Intention of parties.* As regards the joint property of a Hindu family, there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds ; and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty severs the joint interest, and extinguishes the rights springing from united family ownership. RAMKISSEN SINGH *v.* SHEONUNDUN SINGH **23 W. R. P. C. 412**

s. c. in High Court **9 B. L. R. 310 note : 16 W. R. 142**

9. ——— *Agreement for partition—Mitakshara law—Onus probandi.* According to the Mitakshara, an agreement for a partition, although not carried out by actual partition of the property, is sufficient to constitute a division of the family, so as to entitle the widow of a deceased brother to succeed to his share of the ancestral property in preference to the surviving brothers. The fact of the family having separate house and field is, according to the Mitakshara, sufficient evidence of partition. The onus of proving re-union is upon the party pleading that there has been re-union after partition. SURANENI VENKATA GOPALA NARASIMHA ROY *v.* SURANENI LAKSHMI VENKAMA ROY **3 B. L. R. P. C. 41 : 12 W. R. P. C. 40 13 Moo. I. A. 113**

Confirming decision in Court below. SURANENY LAKSHMY VENKAMA ROW *v.* SARANENY VENKATA GOPALA NARASIMHA ROW . **3 Mad. 40**

10. ——— *Effect of deed as creating or not creating partition.* *A*, the son of a deceased zamindar, sued *B* and *C*, his widow and brother, for possession of the zamindari which was impartible. In order to prove that *C* was divided from the late zamindar, *A* filed and proved a deed of partition executed by them in respect of their moveable property and of a house, which concluded as follows : "There shall be connection only by relationship, but there shall be no pecuniary connection between us." *Held*, that the deed effected only a partial partition, and that the last clause must be referred to the co-parcener's right in partible property described in the instrument, and did not operate as a release of any right of succession to impartible property. PARVATHI *v.* THIRUMALAI . . . **I. L. R. 10 Mad. 334**

11. ——— *Effect of agreement to divide.* To constitute a partition, there need not be an actual partition by metes and bounds. An agreement to divide is sufficient to constitute partition. Two brothers drew up a memorandum of partition, whereby they agreed to divide the family property in equal shares, and provided that, if at any future time their sons did not agree and there were any partition, they should exercise ownership in accordance with this document ; neither was to take more than was mentioned in the document. *Held*, that this agreement constituted a partition between the brothers, and was binding on their descendants. ANANTA BALACHARYA *v.* DAMODHAR MAKUND **I. L. R. 13 Bom. 25**

12. ——— *Agreement to hold separately.* To effect a partition of ancestral property, there must be, in the absence of division by metes and boundaries, at any rate an agreement that each party interested shall henceforth enjoy the produce of a certain definite share of the joint property. ASHABAI *v.* TYEB HAJI RAHIMTULLA **I. L. R. 9 Bom. 115**

13. ——— *Unequivocal act or declaration of intention to separate—Suit for declaration of right by one member of joint family.* Though partition by metes and bounds is not necessary to effect a separation of a joint Hindu family, there must be some unequivocal act or declaration on the part of the family of their in-

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HINDU LAW—PARTITION—*contd.*

1. REQUISITES FOR PARTITION—*contd.*

tention to be separate. *Held*, that a suit for declaration of his right by one of the members, without stating that he asked for a divided or undivided share, was not a sufficient declaration of such intention. *In re* PHUL KOERI *alias* GHINA KOERI . . **8 B. L. R. 388 note**

S.C. DEBI PERSHAD *v.* PAUL KOERI *alias* GHINA KOERI . . . . . **12 W. R. 510**

MUKTAKASI DEBI *v.* UBABATI **8 B. L. R. 396 note : 14 W. R. 31**

14. ——— *Held*, on the evidence that there was sufficient evidence that the family had separated. *In re* NOWLAKHU KUNWARI . . . . **8 B. L. R. 389 note**

S.C. CHINTAMUN SINGH CHOWDHRY *v.* NOWLAKHU KUNWARI . . . **13 W. R. 469**

In re SAMANDRA KUNWAR **8 B. L. R. 390 note**

S.C. SUMUNDRA KOONWAR *v.* KALEE CHURN SINGH . . . **13 W. R. 199**

In re PURNAMASI DAYI **8 B. L. R. 395 note**

15. ——— *Partition effected without taking into account a minor co-parcener —Invalid partition.* A partition effected without reserving any share for a minor member of the family and without the consent of some one authorized to act on his behalf is invalid as against the minor. Three brothers, *S*, *L*, and *K*, were members of a joint Hindu family. In 1862, *S* and *L* divided the whole of the family property between them without reserving any share for their brother *K*, who was then a minor. *K* lived with *L* as a member of his family. *L* died in 1867, leaving a childless widow, with whom *K* continued to live till his death in 1876. *K* left an infant son (the plaintiff) only a year old. Subsequently *S* died in 1887, leaving two widows without issue. In 1889 the plaintiff, being still a minor, sued by his next friend to recover either the whole or one-third of the family property in the possession of the widows of *L* and *S*. The principal defences to this suit were (i) that it was time-barred, and (ii) that the plaintiff was not entitled to claim more than one-third of the property in suit. *Held*, that the partition made by *S* and *L* in 1862 was invalid, as it was made without reserving any share for their minor brother *K* and without taking him into account. *K's* son was therefore entitled to recover the whole of the ancestral property as the sole surviving male member of the family. KRISHNABAI *v.* KHANDGOWDA **I. L. R. 18 Bom. 197**

16. ——— *Separate appropriation, holding, and enjoyment—Mitakshara law—Minor—Joint family.* Where there was a separate appropriation, as well as a separate holding and enjoyment of distinct shares, it was held sufficient to constitute a legal partition under Mitakshara law, following *Appovier* v. *Rama Subba Aiyan*, *11 Moo. I. A. 75.* The fact of one of the members of the family being a minor is not sufficient to render the partition invalid, provided the interests of the minor are properly represented as by a manager appointed under s. 12, Act XL of 1858. Every member of a joint undivided family has a right to demand a partition of his own share. DEWANTI KUNWAR *v.* DWARKANATH **8 B. L. R. 363 note 10 W. R. 273**

17. ——— *Mitakshara law —Deed declaring each member entitled to definite share of property.* By a deed of Sharakatnama the members of a Hindu family, governed by the Mitakshara law, declared that each of the members was entitled to a definite fractional part of the whole estate. *Held*, that this was not sufficient to constitute a valid partition according to the Hindu law. *Appovier* v. *Rama Subba Aiyan 11 Moo. I. A. 75*, and *Suraneni Venkata Gopala Narashima Roy* v. *Suraneni Lakshmi Venkama Roy, 13 Moo. I. A. 113*, distinguished. *In the matter of the petition of* PHULJHARI KOOER **8 B. L. R. 385 : 17 W. R. 102**

18. ——— *Agreement to separate—Appropriation and recognition of separate holdings.* To constitute property separate property, it is not necessary that a division should be made by a revenue officer, nor is it necessary that the estate itself should be partitioned in accordance with a private agreement of the co-sharers by metes and bounds. It is sufficient that the co-sharers hold recognized shares, the profits of which shares they severally enjoy and appropriate. JEONEE *v.* DHURUM KOOER . . **3 N. W. 108**

MOHROO KOEREE *v.* GUNSOO KOEREE **8 W. R. 385**

MUNSOOROODDEEN *v.* MAHOMED SUFDAR **23 W. R. 259**

19. ——— *Construction of deed—Intention of parties—Alteration of status of parties.* In all cases of division of joint property not carried out by a partition by metes and bounds, the question whether the status of the family has been thereby altered is a question of intention of the parties, to be inferred from the instruments which they have executed and the acts which they have done to effect such division. An ikrarnama, which did not recite a previous status of in division and did not in terms declare that the parties thereto should thenceforth be an undivided family, was construed, nevertheless, to mean that the parties would thenceforth hold and enjoy the property, which was the subject of it, in severalty. DOORGA PERSHAD *v.* KUNDUN KOOWAR **13 B. L. R. 235 : 21 W. R. 214 L. R. 1 I. A. 55**

S. C. in High Court. LALLA MOHABEER PERSHAD *v.* KUNDUN KOOAR . . . **8 W. R. 116**

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HINDU LAW—PARTITION—*contd.*

1. REQUISITES FOR PARTITION—*contd.*

20. ——— *Deed of settlement—Joint carrying on of business—Separation of interest.* Where four joint sharers made a deed by which they were entitled to the lands and profits of the kothi in equal fourth shares, and they were each in possession of one-fourth share of the lands, and contributed in those shares to payment of revenue, and the lands stood some in the name of one and some in the names of others of the four sharers, and it was from the deed the clear intention of the parties that each should separately enjoy his one-fourth share which had been carried out :—*Held*, that the deed constituted a partition in interest among them as to their shares, though under the deed they were jointly carrying on the business of the kothi. JACKSON, *J.*, doubting. *Appovier* v. *Ram Subba Aiyan, 11 Moo. I. A. 75*, followed. LALLAH MOHABEER PERSHAD *v.* KUNDUN KOONWAR
2 Ind. Jur. N. S. 312
8 W. R. 116

21. ——— *Intention to divide.* Where a widow sued to recover from the brothers of her deceased husband a share of property which remained undivided at his death, a division of part of the family property having taken place during the lifetime of the husband, and she alleged an agreement to divide the rest of the property : *Held*, that the plaintiff had no right to recover the property which was actually undivided at the death of her husband, an intention to divide without more not being evidence of partition. The doctrine propounded in s. 291 of *Strange's H. L.*, dissented from. TIMMI REDDY *v.* ACHAMMA
Mad. 325

22. ——— *Decision of punchayet as to division—Evidence of partition.* In a suit in which the question was whether there had been a division, the sole evidence of division was the decision of a punchayat reciting that division ; the question, however, not having been at all material to the point then in dispute. *Held*, that the decision was not sufficient evidence of the division. RAMASHESHARAYA PANDAY *v.* BHAGAVAT PANDAY . . . . . **4 Mad. 5**

23. ——— *Agreement to hold in defined shares.* Suit by a widow to recover her husband's share, whom she alleged to be a divided member of a Hindu family, under an agreement to the following effect : "When we lived together, a disagreement arising amongst females, we have divided . . . Thus we shall from this date divide and enjoy the income of the land. When the moiety of lands belonging to our uncle *S* in the said three villages shall be equally divided, we shall also share our moiety equally, and obtain separate pottahs . . . We hold no pecuniary concern." *Held*, that, when the members of an undivided family agree among themselves with regard to the particular property that it shall thenceforth be the subject of ownership in certain defined shares, each

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1. REQUISITES FOR PARTITION—*contd.*

member has thenceforth a definite and certain share in the estate, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually divided ; *Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75*, followed. NARAIN AYYAR *v.* LAKSHMI AMMAL-
3 Mad. 280

SURANENY LAKSHMY VENKAMA ROW *v.* SURANENY VENKATA GOPALA NARASIMHA ROW
3 Mad. 40

S.C. on appeal to Privy Council
3 B. L. R. P. C. 41 : 12 W. R. P. C. 40
13 Moo. I. A. 113

LALLA SREE PERSHAD *v.* AKOONJO KOONWAR
7 W. R. 488

SHIB NARAIN BOSE *v.* RAMNIDHEE BOSE
9 W. R. 87

24. ——— *Deed of relinquishment effecting partition—Impartible estate—Inheritance.* P, an impartible zamindari descendible by inheritance according to the custom of primogeniture, passed, on the death of their father, to *V*, the eldest of three undivided Hindu brothers. In 1829 *V*. executed an instrument appointing *M*, his second brother, to be zamindar of P. This instrument recited that by the death of *R*, his uncle, without male issue, *V* had become entitled to succeed to his estates, unless *R's* widow, then pregnant should be delivered of a son. The instrument then provided that, in the event of the said widow giving birth to a son, *V* should retain the zamindari P, but that, if she gave birth to a daughter, *V* and his offspring should have no interest in the said zamindari, of which *M* should be sole zamindar, allowing maintenance to *C*, the third brother. *R's* widow gave birth to a daughter. *V* entered on possession of *R's* estates, and *M* took over the zamindari P. *C* died without issue. *M* died in 1835, and was succeeded by his only son, *D*, who died in 1861, leaving a widow, but no sons. In a suit instituted in 1873 by *S*, a son of *V*, to recover certain villages belonging to the zamindari P from defendants in possession and claiming as purchasers for value from *D* :—*Held*, by the Judicial Committee, reversing the judgments of the Courts below, that the instrument of 1829 was a renunciation by *V* for himself and his descendants of all interest in P, either as the head or as a junior member of the joint family, and that its effect was to make P, with its incidents of impartibility and peculiar course of succession, the property of the brothers *M* and *C*, as effectually as if, in the case of an ordinary partition between the elder brother on the one hand and the two younger brothers on the other, a particular property had been assigned to the latter ; and that consequently, as between *D* and the defendants of *V*, the zamindari was the separate property of the former, whose rights, if he left any undisposed of, passed on his death to his widow, notwithstanding the undivided status of the family, in accordance

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with the rule of succession affirmed in the *Shivagunga Case, 9 Moo. I. A. 539.* SIVAGNANA TEVAR *v.* PERIASAMI . **I. L. R. 1 Mad. 312**

S. C. PERIASAMI *v.* PERIASAMI **L. R. 5 I. A. 61**

25. ——— *Definement of shares—Intended separation—Separate enjoyment of profits.* Definement of shares in joint ancestral property recorded as separate estate in the revenue records in pursuance of an alleged intended separation between the members of a joint and undivided Hindu family does not necessarily amount to such separation, which must be shown by the best evidence, *viz.*, separate enjoyment of profits, or an unmistakable intention to separate interests which was carried into effect. AMBIKA DAT *v.* SUKHMANI KUAR . . . **I. L. R. 1 All. 437**

26. ——— *Evidence of separation—Definement of shares in ancestral property.* A four-anna ancestral share in a zamindari village was owned by two brothers in which the share of *H*, son of one of the brothers, was one-half, the remaining half being the share of the plaintiffs, the descendants of the other brother. In the village records there had been a definement of shares followed by entries of separate interest in the revenue records, and since 1264 Fasli the two plaintiffs had each been recorded as the owner of a one-anna share and *H* of a two-anna share thereof. The entire four-anna share had been in the possession of mortgagees from the year 1844 excepting the sir lands of which *H* held separately his own share, *viz.*, 10 bighas. On the 7th July 1883, *H* executed a deed of gift of his two-anna share in favour of the defendants and caused mutation of names to be made in their favour, surrendering to them at the same time possession of the sir land. *H* died on 21st January 1884, leaving neither son, widow, nor daughter, and the plaintiffs were his heirs-at-law. They brought this suit to set aside the deed of gift and for possession of the sir land from the defendants. The suit was dismissed by the Court of first instance, and on appeal the District Judge affirmed the decree, holding that the four-anna share was not joint and undivided property between the co-sharers, and that *H* was in separate possession of the two-anna share of which the defendants were the donees. On second appeal it was contended that, inasmuch as since 1844 there could have been no separate enjoyment of the four-anna share which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Held*, that from evidence of definement of shares followed by entries of separate interest in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated. *Ambika Dat* v. *Sukhmani Kuar, I. L. R. 1 All. 437*, discussed. RAM LAL *v.* DABI DAT **I. L. R. 10 All. 490**

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27. ——— *Execution of document intended to operate as a severance—Power of father to alter status of family.* A partition made by the father is binding on the sons not only in respect of the father's share, but also of their own shares, provided that it is made subject to the restrictions mentioned in the Hindu law. It becomes obligatory by the will of the father as regulated and restrained by the law, irrespective of the consent of the sons. When a father having five sons, three by one wife and two by another, executed in his last illness a document whereby, after retaining a small portion for himself, he directed that the family property should be divided into three-fifths and two-fifths shares, with the manifest intention that from the date of the execution of the document it should operate as a severance (i) of the interest of his sons by one wife from that of his sons by the other, and (ii) of the interest of all his sons from his own during his life; but neither the guardian of the infant sons nor the eldest son, who was of age, were parties to the instrument:—*Held*, that this was not a will, but a partition; that it was competent to the father thus to alter the status of his sons; that the question was whether the transaction was *bonâ fide* and in conformity with Hindu law, and not one of contract as in the case of a partition between brothers. KANDASAMI *v.* DORAISAMI AYYAR . **I. L. R. 2 Mad. 317**

28. ——— *Intention as to joint or several ownership.* No right vests in any member of a joint Hindu family to a specific share in the family property until some act has been done which has the effect of turning the joint ownership into a several ownership. This may be done by signification of intention. It is by such signification of intention taking place, having the effect of making the share of each member both several and defined, that a member of a joint Hindu family is enabled to dispose of his own share by sale whilst the family remains joint. RAGHUBANUND DOSS *v.* SADHU CHURN DOSS

I. L. R. 4 Calc. 425 : 3 C. L. R. 534

BULAKEE LALL *v.* INDURPUTTEE KOWAR

3 W. R. 41

29. ——— *Ascertainment and definition of shares—Income enjoyed in distinct shares.* In order to show separation in a Hindu family, it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy so to speak, and to convert it into a tenancy-in-common. *Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75*, followed. *Held*, therefore, where, although the ancestral property of a Hindu family had not been formally and completely partitioned by metes and bounds, the income of it had been enjoyed by

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the different members of it in distinct and defined shares, that the family was not a joint and undivided Hindu family. ADI DEO NARAIN SINGH *v.* DUKHARAN SINGH . **I. L. R. 5 All. 532**

30. ——— *Intention—Suit for separate share of joint estate.* Although a suit by a member of a joint Hindu family against his co-sharers for a separate share of the joint estate be not in terms a suit for partition, yet, if it appear that the intention of the plaintiff was to obtain the share which he would be entitled to on a separation, and the decree passed in the suit assigns him that share, such decree does in fact effect a partition, at all events, of rights, which, under the doctrine laid down in the case of *Appovier* v. *Ramma Subba Aiyan, 11 Moo. I. A., 75,* is effectual to destroy the joint estate. JOY NARAIN GIRI *v.* GIRISH CHUNDER MYTI

I. L. R. 4 Calc. 434 : L. R. 5 I. A. 228

31. ——— *Specification and registration of shares under the Land Registration Act (Beng. Act VII of 1876).* *B,* a Hindu governed by the Mitakshara law, died, leaving two minor sons, *J* and *K,* and also a widow, *L,* and two minor sons by her, the mother of *J* and *K* having predeceased him. On *J's* attaining majority, the Court of Wards, which had taken possession of all the property, withdrew from the management, and *L* then applied under Act XL of 1858 and obtained a certificate with respect to the shares of *K* and her two minor sons, and the names of the four brothers were recorded under the Land Registration Act with the specification of the shares of each. *Held,* that neither the granting of the certificate to *L,* nor the registration of the specific shares of each of the co-owners under the provisions of the Land Registration Act amounted to a partition such as to justify the Court in granting the certificate asked for. HOOLASH KOER *v.* KASSEE PROSHAD

I. L. R. 7 Calc. 369

32. ——— *Mitakshara law—Separation of joint family how effected—Agreement for partition, effect of—Right of survivorship.* Two brothers, members of a joint Mitakshara family, executed an ikarnama (agreement), whereby, after reciting that the declarants had remained joint and undivided and in commensality up to a certain date, and that portions of their properties, both moveable and immoveable, had been partitioned between them, they provided for the partition of the remaining joint properties by certain arbitrators appointed in that behalf. *Held,* that this agreement of itself amounted to a separation of the brothers as a joint family, and extinguished all rights of survivorship between them. *Sheo Doyal Tewaree* v. *Judoonath Tewaree, 9 W. R. 61,* and *Babaji Parshram* v. *Kashibai, I. L. R. 4 Bom. 157,* distinguished. *Ambika Dat* v. *Sukhmani Kuar, I. L. R. 1 All. 437,* commented upon. TEJ PROTAP SINGH *v.* CHAMPA KALEE KOER

I. L. R. 12 Calc. 96

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1. REQUISITES FOR PARTITION—*contd.*

33. ——— *Decree effecting partition—Separate estate.* In a suit brought by the younger of two Hindu brothers against his elder brother for the partition of lands belonging to an ancestral joint estate and against other defendants, claiming as encumbrancers or as absolute owners of portions of the said lands under titles derived from the plaintiff's father and elder brother, for the recovery of the plaintiff's share of the said lands freed from the interests claimed by these defendants, except in so far as such interests might be valid as against the plaintiff under the Hindu law, the Court passed an order to the effect that the property claimed was partible, and that the plaintiff was entitled to a moiety, but directed that, with a view to ascertain how far the money awarded to the plaintiff was affected by the acts of the plaintiff's father and elder brother, a commissioner should be appointed to investigate accounts and report thereon to the Court. Before the enquiry thus directed to be made was completed, and before a final decree was passed for the division of the property, the plaintiff died. *Held,* that the order passed by the Court was tantamount to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from its date, if they had not previously become so; and consequently that the plaintiff's interest in the property in suit would not pass to the defendant, his elder brother, as joint estate by survivorship, but to his own representatives as separate estate. *Appovier* v. *Rama Subha Aiyan, 11 Moo. I. A. 75,* referred to and followed. CHEDAMBARAM CHETTIAR *v.* GAURI NACHIAR

I. L. R. 2 Mad. 83 : L. R. 6 I. A. 177

34. ——— *Decree for partition—Decree awarding plaintiff's share, but postponing possession thereof till plaintiff attained majority—Effect of such decree.* On the 21st February 1894, a decree in a partition suit provided as follows: "Plaintiff is a minor twelve years old; until he attains twenty-one years, *N* (defendant) should for the next nine years annually deliver to him twenty maunds of paddy, and for this year ten maunds; after that plaintiff should be given one-sixth of the family lands; until then defendant is not to alienate the lands." The minor died, and in 1897 his widow, *S,* as his heir, applied for execution of the decree, claiming seventy maunds of paddy, being the amount due at the rate specified in the decree. It was objected that she was not entitled to execute, inasmuch as the decree had not effected a partition, and that the property at his death still remained joint family property which passed to the male survivors of the family, and that she was only entitled to maintenance. *Held,* that the effect of the decree was to make the applicant's husband a divided member of his family. It awarded him a one-sixth share of the family estate, and assigned to him a separate allowance. The mere fact that it postponed the actual possession of the share until he had attained the age of twenty -

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one years made no difference. The share vested in him from the date of the decree, and descended to his heirs. LAKSHMAN SARKA *v.* NARAYAN LAKSHMAN . . . . **I. L. R. 24 Bom. 182**

35. ——— *Death of plaintiff subsequent to decree for partition—Right of survivorship—Effect on vested right of plaintiff's representative.* A decree for partition operates as a severance of the joint ownership. Where, therefore, *M*, a minor and only son, by his next friend sued his father and certain alienees of the family property for partition and obtained a decree, and subsequent to decree and pending appeal the plaintiff died, and *M's* mother was brought on the record as deceased plaintiff's legal representative:—*Held*, that the rights of *M's* representative were not affected, as they would have been had the plaintiff died before decree; the right of survivorship which the defendant then possessed being extinguished by the decree. SUBBARAYA MUDALI *v.* MANIKA MUDALI **I. L. R. 19 Mad. 345**

36. ——— *Distribution of family estate, followed by separate possession, equivalent to informal partition.* The Courts below found that a distribution of ancestral estate among the members of a family had taken place in former years, and had been followed by continuous possession, without their having any intention to re-adjust or to hold on behalf of the family. The right of an individual member to claim another partition was therefore negatived. The parties, who had long discontinued joint residence, were members of a family consisting at the time of the distribution of four sons left by a Sikh Dewan, deceased. The son of one brother now claimed from the son of another, joining a third who still survived, partition of the property which had descended from the grandfather, with the increment since his time. That an actual partition had been effected, although probably no formal document of partition had been executed, appeared to their Lordships to be a just inference from the evidence. BUDHA MAL *v.* BHAGWAN DAS **I. L. R. 18 Calc. 302**

37. ——— *Arrangement for separate enjoyment.* A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons and died. The plaintiff, a female, the sole surviving member of the testator's family, sued to recover so much of the property as she might be entitled to. In deciding what was the extent of the property which the plaintiff was entitled to inherit, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment. SANKU *v.* PUTTAMMA . **I. L. R. 14 Mad. 289**

38. ——— *Separate enjoyment of portions of family property for several years—Entries in survey records—Dealings with portions of property—Sole enjoyment of a certain property by a branch of the family—Separate acquisition.* In a partition suit, it being found that the several branches of a Hindu family had lived separate for forty or fifty years, had enjoyed during that period separate and distinct portions of the family property or portions of the property in regular rotation, and had dealt with the separate portions in every respect as their own property, and that in the survey records the lands were entered in the names of the several branches in respect of their separate shares:—*Held*, that the evidence as to the mode of enjoyment by the several branches of a family during so long a period ought to be taken as establishing a tacit agreement of enjoyment according to their shares. There being no evidence on the record to show when and by what member of the family certain property in the possession of a particular branch of the family was acquired, and the entry in the survey records with respect to it being different from that of the ancestral fields, that is, the entry being in the name of the representative of that particular branch with no sub-division of shares, and the party seeking partition of such property having failed to give evidence to rebut the presumption arising from the sole enjoyment of the particular branch and the entry in the survey records. *Held*, that such property was the separate acquisition of that particular branch. *Moro* v. *Ganesh, 10 Bom. 444; Appoovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75*, and *Bannoo* v. *Kashee Ram, I. L. R. 3 Calc. 515* referred to. MURARI VITHOJI *v.* KUKUND SHIVAJI NAIK . . **I. L. R. 15 Bom. 201**

39. ——— *Award of arbitrators as to division of property followed by division of some of it—Decree in suit to enforce award—Date from which partition operates.* Disputes between the members of a Hindu family were referred to arbitrators who made an award as to how the whole of the property should be divided. In pursuance of the award, part of the moveable property was divided. Subsequently one of the members of the family died. The plaintiff, another member of the family, now sued to enforce the award and obtained a decree. *Held*, on appeal, that the partition should be considered to have taken effect not from the date of the decree, but from the date of the award which followed, as it was by an actual division of some of the moveable property, effected a division at that time, and consequently that the share allotted to the deceased member of the family passed to his heir. SUBBARAYA CHETTI *v.* SADASIVA CHETTI . . . **I. L. R. 20 Mad. 490**

40. ——— *Effect of award and record at settlement of widow's estate for life as establishing partition—Land Revenue Act, Central Provinces (XVIII of 1881), s. 87.* Where a Hindu and his widow had successively held the estate in suit as joint family estate in co-parcenary with the appellant or his predecessor:—*Held*, that the appellant succeeded at the widow's death. Though the widow was recorded under an award by the

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Collector in the settlement records as owner of an 8-anna share of the estate for her lifetime, that did not operate a separation in title or alter its devolution. S. 87 of the Land Revenue Act, Central Provinces (XVIII of 1881), did not affect the appellant's claim, for the award related solely to the widow's interest. REWA PRASAD SUKAL *v.* DEO DUTT RAM SUKAL . **I. L. R. 27 Calc. 515**
L. R. 27 I. A. 39
4 C. W. N. 582

41. ——— *Possession of one member of joint family at a time—What constitutes partition—Evidence as to impartibility—Compromise—Right of suit—Limitation.* A zamindari granted by the Government in 1803 to a Hindu descended in his family, possession being held by one member at a time. The estate, however, was not impartible. But whether it was, or was not, impartible was adjudged immaterial to the question raised on this appeal. The last zamindar having died without issue in 1888, his widow was in possession when this suit was brought by a male collateral descended from a great-grandfather common to him and to the last zamindar. The plaintiff claimed to establish his right as member of an undivided family holding joint property against the widow, who alleged that her husband has been sole proprietor. In proof of this, she relied on certain arrangements as having constituted partition, *viz.*, that in 1816 two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village, appropriated to him for maintenance, in satisfaction of his claim to inherit: again, that in 1866, the fourth zamindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, on the claim of his brother, granted to him two villages of the estate; and by the compromise this was made conditional on the sister's claim being settled; again, that in 1871, the fourth zamindar having died pending a suit brought against him to establish the fact of an adoption by him an arrangement was made for the maintenance of his daughter and two widows who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised. *Held*, that there was nothing in the above which was inconsistent with the zamindari, remaining part of the common family property; and that the course of the inheritance had not been altered. *Held*, also, that the claimant was not precluded by the family compromise of 1871, or in any way, from maintaining this suit, and that it was not barred by limitation. VIRAVARA THODHRAMAL RAJYA LAKSHMI DEVI *v.* VIRAVARA THODHRAMAL SURYA NARAYANA DHATRAZU
I. L. R. 20 Mad. 256
L. R. 24 I. A. 118

42. ——— *Unsuccessful suit for general partition of estate—Estate consisting of partible and impartible property—Effect of suit as regards rights of members to maintenance.* In a suit for general partition of Hindu family estate the plaintiff succeeded with regard only to a small portion thereof, the bulk being held to be impartible. *Held*, that the family did not, in consequence of these proceedings, become a divided one, and that, as regarded the impartible estate, the younger brothers retained their rights of maintenance. YARLAGARDA MALLIKARJUNA PRASADA NAYUDU *v.* YARLAGARDA DURGA PRASADA NAYUDU **I.L. R. 24 Mad. 147**
L. R. 27 I. A. 151

43. ——— *Effect of an unexecuted decree for partition—Agreement to divide.* Where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to divide without more is not of itself sufficient to effect a partition. Nor is a direction to divide in a decree—which in principle is not distinguishable from a material agreement to divide—more than an inchoate partition insufficient to change the character of the property, which continues a joint estate until there has been an actual partition by metes and bounds, or a division of title so as to give to each member thenceforth a definite and certain share which he may claim the right to receive and enjoy in severalty. BABAJI PARSHRAM *v.* KASHIBAI . . . . **I. L. R. 4 Bom. 157**

44. ——— *Decree for partition—Severance.* A decree for partition does not operate as a severance so long as it remains under appeal. SAKHARAM MAHADEV *v.* HARI KRISHNA
I. L. R. 6 Bom. 113

45. ——— **Evidence**—*Joint family—Evidence of separation—Conduct of parties as showing intention—Decree in litigation between members creating partition—Decree ascertaining shares of individual members.* Where it was found (i) that the result of former litigation had been to ascertain the shares of individuals of a Hindu family, and that, although there had been, from the nature of the property no partition, by metes and bounds, there was undoubtedly a numerical division, by which the share of each member was fixed, and (ii) that petitions by the various members under the Land Registration Act, 1876 (Ben. Act VII of 1876), clearly indicated individual and not joint ownership under the final decree in the litigation: *Held*, looking at the conduct of the parties, in order to arrive at their intention as to separation, and at the whole circumstances of the case, that, notwithstanding the imperfect form of the decree, a separation of the joint family was established. RAM PERSHAD SINGH *v.* LAKHPATI KOER (1902)
I. L. R. 30 Calc. 231
s.c. 7 C. W. N. 162 : L. R. 30 I. A. 1

46. ——— *Partition, proof of—Presumption of general division from the separation of one.* Separate residence is not, of itself,

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conclusive or even strong evidence of partition. There is no presumption of a general division among all the members of a co-parcenary from the fact that one of its members has separated. *Bulabux* v. *Rukhma Bai, I. L. R. 30 Calc. 725,* referred to. RANGANATHA RAO *v.* NARAYANASAMI NAICKER (1908) . . . **I. L. R. 31 Mad. 482**

47. ——— *Deed defining and allotting shares—Effect on deed of subsequent conduct of the parties—Effect of deed as regards minor members of joint family—Reunion of member after once separating himself.* An *ekrarnama* executed by the members of a joint family, some of whom were minors, stated in unambiguous terms that defined shares in the whole joint property had been allotted to the several co-parceners, and also gave liberty to any of the parties to it "either to live together as a member of the joint family as before or to separate his own business." *Held,* that the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was inconsistent with a separation in estate. It conferred on the parties no longer liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it, which was, on the principle of the case of *Appovier* v. *Rama Subba Aiyan 11, Moo. I. A. 75,* determined by the allotment to them of defined shares by the *ekrarnama.* The legal effect of the *ekrarnama* could not be controlled or altered by evidence of the subsequent conduct of the parties; but such conduct in this case was not inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition. *Held,* also, that the *ekrarnama* was binding on the minors. It followed from the admitted right of any co-parcener to claim partition that a valid agreement for partition could be made during the minority of one or more of the co-parceners. If it was unfair, or prejudicial to their interests, the minors could, by proper proceedings, on attaining majority set it aside so far as it concerned themselves. *Quære*: Whether in Bengal a member of a joint family once separated can re-unite only (according to the text of *Vrihaspati* quoted in the *Mitakshara,* Ch. II, s. 9) with a father, brother or paternal uncle. BALKISHEN DAS *v.* RAM NARAIN SAHU (1903) . . **I. L. R. 30 Calc. 738 s.c. 7 C. W. N. 578 : L. R. 30 I. A. 139**

48. ——— *Partition—Requisites for partition—Agreement amongst members of joint family to hold the property in defined shares—Agreement embodied in petition to Collector—Entry of names in village papers in accordance with petition—Mode of considering documentary evidence.* After the death of one of the members of a joint family in 1861 the other members mutually agreed that the joint property should be thenceforth held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector, dated 13th June 1861, to have their names entered to that effect in the official papers of the village. This was done, the petition was filed in the Collectorate, and entries were made in the village papers in accordance with it up to 1899 : *Held,* by the Judicial Committee (reversing the decision of the High Court), that on the evidence in, and circumstances of the case a partition of the property had been effected in 1861, and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time. The principles laid down in *Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75,* and *Balkishan Das v. Ram Narain Sahu, I. L. R. 30 Calc. 738 ; L. R. 30 I. A. 199,* followed. The High Court had proceeded on an erroneous method in considering whether each document was by itself sufficient to rebut the *primâ facie* presumption that as the family was joint before 1861 it continued to be joint and omitting to take into account the cumulative effect of all the documents, which taken together showed that all the transactions of the 38 years from 1861 to 1899 could only be reconciled and made consistent on one hypothesis, namely, that the petition of 1861 was a genuine document, and the agreement it embodied a real agreement. PARBATI *v.* NAUNIHAL SINGH (1909) . . . **I. L. R. 31 All. 412.**

2. PROPERTY LIABLE OR NOT TO PARTITION.

1. ——— **Liability to partition**—*Onus probandi. Primâ facie* all property is subject to partition, and the onus of proof is on the party seeking to except any property from the general rule of partition according to Hindu law. LUXIMON ROW SADASEW *v.* MULLAR ROW BAJEE **5 W. R. P. C. 67**

2. ——— **Division of compound**—*Inconvenience to co-sharers.* Where one of several joint owners desires to have a division of a compound hitherto held in common, mere inconvenience to the others is not a sufficient obstacle to such division. RAM PERSHAD NARAIN TEWAREE *v.* COURT OF WARDS . . . **21 W. R. 152.**

3. ——— **Dwelling-house**—*Right to partition.* Partition of a dwelling-house may be claimed as of right by a Hindu. HULLODHUR MOOKERJEE *v.* RAMNATH MOOKERJEE **Marsh. 35 : 1 Hay 71**

4. ——— *Suit by member of family or purchaser.* A suit for partition of a

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family dwelling-house may be brought either by one of the members of the family or by a purchaser from such member. JHUBBOO LALL SAHOO *v.* KHOOB LALL . . . . . **22 W. R. 294**

5. ——— **House built on family site by one member at his own expense**—*Right of co-parceners.* Where a member of a joint Hindu family built (at his own expense, with borrowed money) a house upon ground belonging to the family, it was held that each of the co-parceners was entitled to a share in the house and the site upon which it was built, equal in value to his share of the site. VITHOBA BAVA *v.* HARIBA BAVA **6 Bom. A. C. 54**

6. ——— **Office of dignity or pattam.** The pattam, or office of dignity in a family governed by the Aliyasantana law, is indivisible, and whether the family be divided or not, the pattam, no special arrangement having been made about it, descends to the eldest male of the surviving members of the family. The passage set out in a note to the case of *Munda Chetti* v. *Timmaju Hensu, 1 Mad. 380,* is not a correct interpretation of the original Canarese text of Bhutala Pandiya's work. TIMMAPPA HEGGADE *v.* MAHALINGA HEGGADE . **4 Mad. 28**

7. ——— **Hereditary, secular, and religious office**—*Mode of partition of such offices.* Hereditary offices, whether religious or secular, are no doubt treated by the Hindu text-writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of a performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation. MANCHARAM *v.* PRANSHANKAR . **I. L. R. 6 Bom. 298**

MITTA KUNTH AUDHICARRY *v.* NEERUNJUN AUDHICARRY . . . **14 B. L. R. 166**

8. ——— **Trust property**—*Joint trustees of temple—Suit for partition of rights as trustees. Held,* that rights as joint trustees to the management of, and superintendence of worship at, certain temples, none of the trustees having any personal pecuniary interest in the temples or their income, could not be made the subject of partition by a Civil Court, that is to say, that a Civil Court was not competent to grant a decree declaring that each of such trustees in rotation should for a certain definite period enjoy exclusively the rights of management and superintendence. *Mitta Kunth Audhicarry v. Neerunjun Audhicarry, 14 B. L. R. 166; Mancharam* v. *Pranshankar, I. L. R. 6 Bom. 298; Limba bin Krishna* v. *Rama bin Pimplu, I. L. R. 13 Bom. 548; Anund Moyee Chowdrain* v. *Boykant Nath Roy, 8 W. R. 193; Pranshankar* v. *Prannath, 1 Bom. 12;* and *Ram Soondur Thakoor* v. *Taruck Chunder Turkoruttun, 19 W. R. 28,* referred to. RAMAN LALJI MAHARAJ *v.* GOPAL LALJI MAHARAJ . . . **I. L. R. 19 All. 428**

HINDU LAW—PARTITION—*contd.*

2. PROPERTY LIABLE OR NOT TO PARTITION—*contd.*

9. ——— **Inam villages granted by Government**—*Ancestral estate.* Inam villages granted by Government to the grantee and his male heirs for services rendered to the State, are not, by the Hindu law in force in the Southern Mahratta country, distinguishable from other ancestral real estate, and are divisible among the heirs of the grantee. BODHRAO HUNMONT *v.* NURSING RAO **6 Moo. I. A. 426**

10. ——— **Nuptial gifts to one member of family**—*Marriage expenses defrayed out of common funds.* Nuptial gifts to a member of a joint Hindu family do not, by reason of the marriage expenses having been defrayed out of the common fund, fall into and form part of the common fund so as to be subject to partition. SHEO GOBIND *v.* SHAM NARAIN SINGH . . . . . **7 N. W. 75**

11. ——— **Places of worship and sacrifice**—*Division by giving turns of worship.* Under the Hindu law, places of worship and sacrifice are not divisible. The parties can enjoy their turn of worship, unless they can agree to a joint worship; and any infringement of the right to a turn in the worship can be redressed by a suit. ANAND MOYEE CHOWDHRAIN *v.* BOYKANTNATH ROY **8 W. R. 193**

12. ——— **Religious offices**—*Custom—Right to turn of worship.* According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns and of allowing alienation within certain restrictions. TRIMBAK RAMKRISHNA RANADE *v.* LAKSHMAN RAMKRISHNA RANADE **I. L. R. 20 Bom. 495**

13. ——— **Property acquired at charge of patrimony.** Whatever is acquired at the charge of the patrimony is subject to partition. JUDOONATH TEWAREE *v.* BISHONATH TEWAREE. SHEO DYAL TEWAREE *v.* JUDOONATH TEWAREE. SHEO DYAL TEWAREE *v.* BISHONATH TEWAREE. SHIB DYAL TEWAREE *v.* BISHONATH TEWAREE **9 W. R. 61**

14 ——— **Property acquired by Hindu while drawing income from his family**—*Alteration of mode of investment.* Property acquired by a Hindu while drawing an income from his family is liable to partition, and the quality of the fund cannot be altered by the mode of its investment. RAMASHESHARAYA PANDAY *v.* BHAGAVAT PANDAY . . . . . **4 Mad. 5**

15 ——— **Property acquired after agreement to divide**—*Private partition, effect of, as regards subsequently-acquired property.* Where there has been an agreement as to division of property, the Court will hold it to apply to property subsequently acquired accruing from the ancestral estate. INDERJEET KOOAR *v.* ISMUDH KOOAR **1 Ind. Jur. N. S. 141 : 10 Moo. I. A. 329 5 W. R. P. C. 14**

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16. ——— Impartible estate—*Zamindari.* In 1803, *G* being in possession of the zamindari of *M*, the permanent settlement was made with him and a sanad was granted to him as prescribed by Regulation XXV of 1802. In 1827, *C*, the only son of *G*, being in possession of the zamindari, got into debt, and the zamindari was sold in execution of a decree and bought by Government. In 1835 the zamindari was granted to *A*, the son of *C*, by Government and a sanad issued in the usual terms as prescribed by Regulation XXV of 1802. *A* died in 1864 leaving four sons, the three plaintiffs and *C*, his eldest son. *C* died in 1869 leaving an only son *J*, the defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zamindari as renter. *J* and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zamindari divided. By an agreement between the plaintiffs and the Court of Wards all the moveable and immoveable property, except the zamindari talukh, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1884 the plaintiffs sued for partition of the zamindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zamindari talukh. The defendant pleaded that the estate was not partible. *Held*, distinguishing the *Hunsapore Case, 12 Moo. I. A. 1*, and the *Shivagunga Case, I. L. R. 3 Mad. 290*, and following the principle laid down in the *Nuzvid Case, I. L. R. 2 Mad. 128*, that the zamindari was partible. JAGANATHA *v.* RAMABHADRA

I. L. R. 11 Mad. 380

17. ——— Saranjam—*Impartibility—Descent of saranjam.* A saranjam is ordinarily impartible and descends entire to the eldest representative of the past holder. NARAYAN JAGANNATH DIKSHIT *v.* VASUDEO VISHNU DIKSHIT

L. R. 15 Bom. 247

18. ——— *Cash allowances payable from the Government treasury—Impartibility—Custom of the family as to partibility—Senior member of the family—Right of eldership—Amount set apart for the celebration of a festival—Separate celebration of the festival after division—Expenses of the separate celebration—Expenses of collecting the saranjam and pension incomes—Omission of the lower Court to pass a decree for partition among all the co-sharers—Decree for partition among the co-sharers passed in appeal.* Saranjams are *primâ facie* impartible, the holders being required to make a suitable provision for their younger brothers. Where, however, it appeared that the members of a family had treated saranjams as partible, and had dealt with them as such in effecting partitions of the entire family estate, which consisted both of incomes and saranjams :—*Held*, that the Court was justified in concluding that the saranjams were either originally partible or had become so by family usage. The plaintiff, an undivided member of a Hindu family, sued his co-sharers for division of saranjam and other family property. The defendant No. 1 contended that the saranjam was impartible. In any case, he claimed to retain certain sums in his capacity as the eldest representative of the family for the performances of certain offices. *Held*, that, the parties having effected division of the saranjams on previous occasions, the saranjams were either originally partible or had become so by family usage. *Held*, further, that, the right of vadilki (eldership) never having lost its original character of impartibility, it was impartible and transmissible to the eldest representative of the family. Where in a suit for partition a certain sum was claimed by the eldest representative of the family for the purpose of celebrating a certain festival:—*Held*, that, the branches of the family being completely separated, each branch would celebrate the festival apart and would necessarily require funds for its separate celebration, and that therefore the sum claimed by the eldest representative for the celebration of the festival could not be left undivided. The Court of first instance having omitted to decree the shares of the defendants other than defendant No. 1, who demanded partition, their shares were declared and allowed in appeal. *Ramchandra* v. *Venkatrav, I. L. R. 6 Bom. 598*, and *Bhujangrav* v. *Malojirav, 5 Bom. A. C. 161*, referred to. MADHAVRAV MANOHAR *v.* ATMARAM KESHAV

I. L. R. 15 Bom. 519

19. ——— Sheri lands—*Lease by Government for term of years.* The general Hindu law as to partition, which lays down that, except in certain special cases determined by family custom or usage, partition of all family property can be made, is equally applicable to sheri lands leased by Government for a certain number of years ; there is no Act of Legislature which excludes lands leased by Government from its operation. DATTATRAYA VITHAL *v.* MAHADAJI PARASHRAM

I. L. R. 16 Bom. 528

20. ——— Proceeds of sale of a co-parcener's share—*Claim of co-parceners to proceeds—Joint or separate property.* In a suit for partition of family property it appeared that one of the deceased co-parceners had sold to a stranger his undivided share in almost all the immoveable property of the family, and with part of the proceeds had discharged some debts, and with the rest had purchased certain lands now claimed by his widow as his separate property. *Held*, that the proceeds of the sale of the co-parcener's share, so far as they were in excess of the requirements of his creditor's equity, were not divested of the character of co-parcenary property, and the lands purchased therewith were consequently property subject to partition and not separate property as contended by

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2. PROPERTY LIABLE OR NOT TO PARTITION—*contd.*

his widow. KRISHNASAMI AYYANGAR *v.* RAJAGOPALA AYYANGAR . **I. L. R. 18 Mad. 73**

21. ———— **Enfranchisement**—*Enfranchisement of inam service land in name of office-holder —Effect of enfranchisement—Liability to partition.* Three items of land, numbered 5, 6 and 7, were originally village service *inams*, having been annexed by the State as emoluments to the office of *karnam* in a *raiyatwari* village. *R*, the father of plaintiff and first defendant and grandfather of second defendant, in March, 1889, established his right, as the heir to the late incumbent to this office of *karnam ;* and the lands were, in November, 1889, ordered to be delivered to *R* and were actually delivered to him in December, 1889. Before the actual delivery, *R* applied that the lands might be registered and a title-deed be issued in his name, as the Government were taking steps to enfranchise service *inams* in the district, and the *Inam* Commissioner in November, 1889, notified to *R* that his name was included in the register. In January, 1890, second defendant's father, the eldest son of *R*, died, and in February, 1890, *R* resigned the office of *karnam* in favour of his grandson, second defendant, who was duly appointed by the Collector. Item No. 5 was enfranchised, and a title-deed issued to and in the name of *R*. The *Inam* Commissioner, in 1891, passed an order that items 6 and 7 had been "resumed and fully assessed." *R* had died at a date prior to this, and second defendant was holding the office. On a suit being instituted by plaintiff for partition : *Held, per* BHASHYAM AYYANGAR, *J.*, that when a personal *inam* is enfranchised by the imposition of a quit-rent, the resumption by the Government simply consists of so much of the assessment or *melvaram* as is equal to the quit-rent, neither the land nor the assessment in excess of quit-rent being resumed. Similarly, the enfranchisement of a service *inam* does not operate as a resumption and a fresh grant by the Government subject to the payment of a quit-rent, any more than it is so in the case of the enfranchisement of a personal *inam*. It stands on the same footing, so far as the family in which the village office is hereditary is concerned. The enfranchisement only converts the *inam* into ordinary property. *Narayana* v. *Chengalammal, I. L. R. 10 Mad. 1,* followed. *Venkata* v. *Rama, I. L. R. 8 Mad. 249,* explained. *Dharnipragada v. Kadambari, I. L. R. 21 Mad. 47,* and *Venkatarayadu* v. *Venkata Ramayya, I. L. R. 15 Mad. 284,* dissented from. *Per* MOORE, *J.*—Even assuming item No. 5 to be the self-acquisition of *R*, according to *Dharnipragada* v. *Kadambari, I. L. R. 21 Mad. 47,* and *Vankatarayadu* v. *Venkata Ramayya, I. L. R. 15 Mad. 284,* the plaintiff was entitled, as his son, to his share. As to items 6 and 7, there was no enfranchisement and no fresh grant or title-deed in favour of second defendant. They were liable to partition, and it was unnecessary, therefore, to decide whether *Narayana* v. *Chengalammal, I. L. R. 10 Mad. 1,* or *Dharnipragada* v. *Kadambari, I. L. R. 21 Mad. 47,* and *Venkarayadu* v. *Venkata Ramayya, I. L. R. 15 Mad. 284,* were correctly decided. *Venkata* v. *Rama, I. L. R. 8 Mad. 249,* explained. *Per* CURIAM, that items 5, 6 and 7 were liable to partition. GUNNAIYAN *v.* KAMAKCHI AYYAR (1902) . **I. L. R. 26 Mad. 339**

22. ———— **Lease**—*Suit for partition—Evidence that the joint property had been leased—Available for partition—Maintainability of suit.* In the course of the hearing of a suit for partition, brought by one of several joint *shrotriemdars* against the rest, it transpired that the lands of which partition was sought had, a few years before suit, been let on lease for a period of twenty-four years. *Held*, that this was no ground for rejecting the suit. Delivery of the lands which might be found to be in the possession of tenants could be given under s. 264 of the Civil Procedure Code. UPPALA RAGHAVA CHARLU *v.* UPPALLA RAMANUJA CHARLU (1902) **I. L. R. 26 Mad. 78**

23. ———— **Expenses for ceremonies of brother's sons—Share of step-mother—** *Value of stridhan to be deducted from share—Expenses for ceremonies of grandchildren.* In a suit for partition brought by a Hindu against his father and brothers, the brothers are entitled to have set apart from the family property a sum sufficient to defray the expenses of their prospective thread, betrothal and marriage ceremonies—such sum to be calculated according to the extent of the family property. A father's wife is on such partition entitled to a share equal to that of a son but from her share must be deducted the value of any *stridhan* received by her as a gift from her father-in-law, or husband. The children of a brother on such partition are not entitled to any sum for the performances of their prospective thread, betrothal or marriage ceremonies. JAIRAM *v.* NATHU (1906) **I. L. R. 31 Bom. 54**

24. ———— **Impartible Raj**—*Separation in estate, whether possible—Spes successionis—Cause of action—Leave to amend plaint.* In the case of an impartible Raj, during the life of the holder, the interest of a member of his family is only a *spes successionis*, which is not a subject for partition : also, there can be no separation in estate, as there is nothing upon which such separation can, operate. An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case. LALITESHWAR SINGH *v.* RAMESHWAR SINGH (1909) **I. L. R. 36 Calc. 481**

3. PARTITION OF PORTION OF PROPERTY.

1. ———— **Partial partition**—*Arrangement between members of family.* It is very doubtful whether, under the Hindu law, any partial parti-

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HINDU LAW—PARTITION—*contd.*

3. PARTITION OF PORTION OF PROPERTY —*contd.*

tion of the family property can take place except by arrangement. RADHA CHURN DASS *v.* KRIPA SINDHU DASS
I. L. R. 5 Calc. 474 : 4 C. L. R. 428

2. ——— *Suit for partition —Right to sue for partition of portion of property.* A person suing for partition is not obliged to include in his suit the whole of the property, but may confine his suit to the portion of the property which he is desirous of having partitioned; therefore, where in a suit for partition it was shown that some portion of the property was out of the jurisdiction of the Court, objections that fresh parties would be necessary if the mofussil property were included, and that thereupon the suit had not been properly brought, and that the leave of the Court had not been obtained previous to bringing the suit, were overruled. PADMAMANI DASI *v.* JAGADAMBA DASI
6 B. L. R. 134

3. ——— *Suit for partition of portion of joint property.* A member of an undivided family cannot sue his co-sharers for his share in a single undivided field, portion of the family property. He must sue for a general partition of all the property liable to partition. NANABHAI VALLABHDAS *v.* NATHABHAI HARIBHAI
7 Bom. A. C. 46

CHYET NARAIN SINGH *v.* BUNWARI SINGH
23 W. R. 395

4. ——— *Partition of part of family property—Suit for ejectment—Right of suit—Parties.* A Hindu sued for possession of a one-third part of a house, a portion of his family property. Defendant No. 1 claimed title from the purchaser at a Court sale held in execution of a decree against the plaintiff's father; the other defendants were undivided brothers of the plaintiff. The title claimed by defendant No. 1 was supported by the other defendants, but the plaintiff alleged that the purchase at the Court sale had been made benami for him. *Held*, that the suit was not maintainable, being a suit for partition of a specific item of the family property, but that the plaintiff might sue to eject defendant No. 1, joining his own brothers as defendants. VENKAYYA *v.* LAKSHMAYYA
I. L. R. 16 Mad. 98

5. ——— *Omission to mention certain portion of property—Subsequent consent to divide omitted property.* In a suit for partition plaintiff, when filing his plaint and schedules, made no mention of certain jewels in the possession of his wife. Defendant having filed a schedule in his written statement showing the existence of the said jewels, plaintiff admitted that they were with his wife, but declined to allow them to be divided unless a division were also made of the jewels which were in the possession of the defendants' wives and children. He, however, before the examination of witnesses, withdrew this condition and expressed his willingness to give defendant credit for half their value. *Held*, that the suit was on these facts not one for partial partition. *Per* O'FARRELL, *J.*—That where a suit is brought for division of the whole of the family properties, an omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition. VENKATA NARASIMHA NAIDU *v.* BHASHYAKARLU NAIDU . **I. L. R. 22 Mad. 538**

6. ——— *Suit for partition of portion of joint property—Cause of action.* In a suit between brothers who had been in joint possession of property of various kinds and carried on joint business until an alleged recent partition where the plaintiff sought to recover a proportion equal to his share of a sum of money said to have been taken by defendant from the joint funds. *Held*, that, unless the plaintiff could show that all the joint property had been divided excepting the sum in question or that all the property had been divided, and on an adjustment of accounts of past expenses there was a loss equal in amount to that item, he had no cause of action to sue for a moiety thereof. JUGOO LALL OOPADHYA *v.* MONOHAR LALL OOPADHYA . . . **19 W. R. 43**

7. ——— *Suit for partition of a portion only of joint family property.* A suit will not lie for partition of a portion only of joint family property. JOGENDRA NATH MUKERJI *v.* JUGOBUNDHU MUKERJI . **I. L. R. 14 Calc. 122**

8. ——— *Suit for partition of portion of joint property.* The plaintiffs and the defendants being jointly entitled to and in possession of three khanabaris in a village and other immoveable property, the plaintiff sued for partition of one of the khanabaris only. *Held*, that the suit would not lie. HARIDASS SANYAL *v.* PRAN NATH SANYAL . . . **I. L. R. 12 Calc. 566**

9. ——— **Suit by purchaser of a co-sharer's interest for partition of a specific part of joint property**—*Right of defendant co-sharers to require a general partition—Rules as to partition, general and partial.* Where a co-parcener or a purchaser of the rights of a co-parcener sues for partition, the partition must be general: a suit for a partial partition of a single property will not lie. SHIVMURTEPPA *v.* VIRAPPA
I. L. R. 24 Bom. 128

10. ——— **Separation of one member of family, effect of.** The separation of one member of a joint Hindu family does not necessarily create a separation between the other members nor cause the general disruption of the family. *Radha Churn Dass* v. *Kripa Sindhu Dass, I. L. R. 5 Calc. 475*, dissented from. UPENDRA NARAIN MYTI *v.* GOPEE NATH BERA
I. L. R. 9 Calc. 817 : 12 C. L. R. 356

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HINDU LAW—PARTITION—*contd.*

3. PARTITION OF PORTION OF PROPERTY —*contd.*

11. ——— **Wrongful possession by one co-sharer of portion of joint estate**—*Gift by father to one of several sons, co-sharers.* The wrongful possession of a portion of a joint estate, in every portion of which the sharers have equal rights, by one of them is no bar to the partition of the whole, and does not warrant the exclusive assumption of another portion by another of them. Assuming a co-sharer's right in the family estate not to have been lost, a deed of gift of a portion thereof to another co-sharer is a violation of his right not justified by the circumstance that the first co-sharer had wrongfully appropriated some of the joint property in which the others might have recovered their rights by an action-at-law. A co-sharer's hereditary right does not, however, entitle him to claim a partition of a portion only of the ancestral property. KALKA PERSHAD *v.* BUDREE SAH . . . . . **3 N. W. 267**

12. ——— **Right to partition of person in occupation of portion of ancestral dwelling house.** In a suit to obtain by partition half of an ancestral dwelling-house, in which defendant was living, the latter averred that the house in which plaintiff was living was likewise ancestral, and that in a partition between them the houses which they respectively occupied had fallen to their respective shares. Plaintiff had replied that his house was not ancestral, but had been purchased out of his own funds. *Held*, that it was necessary to enquire into plaintiff's title under the whole circumstances of the case, and when it appeared that he was in separate occupation of a portion of the ancestral dwelling-house whether he had a right to the partition of the one without bringing the other into hotchpot. RAM LOCHUN PATTUCK *v.* RUGHOOBUR DYAL **15 W. R. 111**

13. ——— **Partition of joint property situate in British India without taking into account other joint property situate outside British India.** A Court can grant partition of property belonging to a joint Hindu family situated in British India without taking into account other property belonging to the family situated outside British India. RAMACHARYA *v.* ANANTACHARYA . . **I. L. R. 18 Bom. 389**

14. ——— **Suit for partition of property where portion is impartible.** Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion. *Satrucharla Jagannadha Razu* v. *Satrucharla Samabhadra Razu, I. L. R. 14 Mad. 240*, referred to. MALLIKARJUNA PRASADA NAIDU *v.* DURGA PRASADA NAIDU **I. L. R. 17 Mad. 362**

HINDU LAW—PARTITION—*contd.*

3. PARTITION OF PORTION OF PROPERTY —*contd.*

15. ——— **Property left undivided at the time of partition**—*Suit to recover share of the produce—Amendment of plaint—Variance between pleading and proof.* The circumstance that there has been a partition between the members of a joint Hindu family does not, in the absence of any special agreement between them, alter their rights as to the property still undivided. As to this, they continue to stand to one another in the relation of members of an undivided Hindu family. A claim to a share of the produce of the property left undivided at a partition does not lie, because such a claim is based on the right to a particular share in the property itself which has no existence in the case of an undivided family. A suit for a share of the produce of the property left undivided at a partition cannot be amended by making it a suit for partition without entirely changing its character. GAVRISHANKAR PARABHURAM *v.* ATMARAM RAJARAM . . . **I. L. R. 18 Bom. 611**

16. ——— **Right to partial partition.** A member of a joint Hindu family may enforce by suit his right to a partition of a portion only of the joint family property. *Venkatachella Pillay* v. *Chinnaiya Mudaliar, 5 Mad. 166*, approved and followed. SUBRAMANYA CHETTYAR *v.* PADMANABHA CHETTYAR . **I. L. R. 19 Mad. 267**

17. ——— *Suit for partial partition—Family property available for partition at the time—Property mortgaged with possession to third party not included—Maintainability of suit.* One of two undivided brothers composing a Hindu family sold the whole of a house, which was in fact joint family property, alleging family necessity in justification of the sale. The other brother subsequently sold his undivided half share to two persons who now sued as plaintiffs for partition and possession of one-half of the house. The family owned another house which had, however, for some time been mortgaged with possession to a third party and was not available for partition at the time. On the plea being raised that the suit was one for partial partition and could not be sustained :—*Held*, that the suit was maintainable. Inasmuch as the other house was mortgaged with possession to a third party and therefore no longer available for immediate partition, the suit was one for partition of the whole of the family property liable to partition at the time. *Narayan Babaji* v. *Pandurang Ramchandra, 12 Bom. 148*, followed. KRISTAYYA *v.* NARASIMHAM **I. L. R. 23 Mad. 608**

18. ——— *Effect of partition of portion of property—Separate enjoyment.* Where the members of an undivided Hindu family have divided a portion of the estate and held their respective shares separately, such shares will be liable to the incidents attaching to separate estates, although the whole of the joint property has not been

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HINDU LAW—PARTITION—*contd.*

3. PARTITION OF PORTION OF PROPERTY —*contd.*

divided. A partition of joint property is valid as between the members of a Hindu family, although it has not been sanctioned by the Board of Revenue, it being shown that for several years after the partition the members of the family had separately enjoyed the shares which fell to them by the partition. HOOLAS KOONWAR *v.* MAN SINGH **3 Agra 37**

19. ——— *Partition of share of estate—Widow—Possession of estate for maintenance.* The proprietary right to a share in an undivided estate which includes and carries with it a right to claim and enforce a partition of that share must be a right of an absolute and unlimited nature, and does not belong to a Hindu widow who has been placed in possession of her deceased husband's share for her maintenance ; consequently, where the widow is not an absolute proprietor, but simply an assignee of the profits for a maintenance, she cannot claim partition of the share so assigned. BHOOP SINGH *v.* PHOOL KOWER . **2 Agra, Part II, 168**

20. ——— *Partition by father and sons—Partition among joint owners—Divisibility of portion remaining undivided.* The doctrine that when, after a partition of a joint family estate, a portion of the estate remains undivided, the portion which remains undivided cannot afterwards be partitioned, refers to a partition made by a father amongst his sons and their co-heirs. It does not refer to the case where a partition has been made by the joint owners amongst themselves. SHAMASOONDERY DASSEE *v.* KARTICK CHURN MITTRA . . . . **Bourke O. C. 326**

21. ——— *Joint Hindu family—Suit for partition—Partition of the whole joint family property not claimed.* The plaintiff, a member of a joint Hindu family, sued the defendant, another member of the same family, for partition of certain property, which had once been the property of the joint family as a whole, but which at the time of the suit had come to be the joint property of the plaintiff and the defendant only. *Held,* that it was not necessary for the plaintiff to include in the suit other property, which belonged jointly to the plaintiff, the defendant and other members of the joint family. *Purushottam* v. *Atmaram, I. L. R. 23 Bom. 596,* referred to. LACHMI NARAIN *v.* JANKI DAS (1901) . . . **I. L. R. 23 All. 216**

22. ——— *Division of family property—Agreement that share of one member in income of village should be paid him by managing member—Subsequent claim for partition.* By an agreement entered into by the members of a family of whom plaintiff was one, the parties became completely divided in interest in respect of all their property, but, so far as a certain village was concerned, it was agreed that plaintiff should receive one-fourth of the net income (on account of his fourth share in the village) from the eldest member of the family, who was to manage it. Plaintiff now sued for partition by metes and bounds of his one-fourth share in this village. *Held,* that the agreement was no bar to the suit. SUBBARAYA TAWKER *v.* RAJARAM TAWKER (1901) **I. L. R. 25 Mad. 585**

HINDU LAW—PARTITION—*contd.*

3. PARTITION OF PORTION OF PROPERTY —*concld.*

23. ——— *Partial partition—Lessee of shares of some lessors in entire village and of shares of other lessors in portion—Suit for partition as to portion jointly held by lessee and some lessors—Maintainability.* Plaintiff sued for partition of 100 kulis of land situated in the village of *A.* This village was in 1883 in the possession of the second, ninth and tenth defendants and one *L,* as tenants-in-common, and second defendant's share was one-half and the share of the others was one-sixth each. In 1887 the tenth defendant's one-sixth share and interest in the entire village (including the 100 kulis) was attached in execution of a decree against him. His interest in the 100 kulis was sold and purchased by the present first defendant, whilst one-half of his share in the rest of the village was purchased by the decree-holder *N.* In 1889 and 1891, respectively, *N* similarly purchased the one-sixth share in the village, including the 100 kulis, of *L* and of the ninth defendant, respectively. In 1894 *N* sold the entire interest acquired by him in the village to *A,* who in 1897 sold the same in equal moieties to the ninth and tenth defendants. In 1897 plaintiff obtained a lease from second defendant of her one-half share in the entire village exclusive of the 100 kulis, for a term of twenty-three years, and a similar lease from ninth and tenth defendants of their interest (amounting together to one-half share) in the village, without reservation. Plaintiff now sued for partition of the 100 kulis. His case was that by his leases he had acquired a right to the exclusive possession for twenty-three years of the entire village, exclusive of the 100 kulis, and that in respect of the latter he was entitled to joint possession for the same period with the first and second defendants (the shares of the three being, respectively, one-third, one-sixth, and one-half), and that, as he did not like such joint possession, he desired a partition of his one-third share. *Held,* that plaintiff was entitled to have partition, though he was only lessee for a term of years, and though that partition could only last for the period of his lease. The suit was not one for partial partition inasmuch as plaintiff was not entitled to partition of the rest of the village, to which he was entitled to exclusive possession under his leases for twenty-three years. The only portion of the village he could demand partition of was the 100 kulis, to which he was only entitled to possession jointly with the first and second defendants. RAMASAMI CHETTI *v.* ALAGIRISAMI CHETTI (1904) **I. L. R. 27 Mad. 361**

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION.

(*a*) GENERALLY.

1. ———— **Right of member of joint family to separate share.** Members of a joint family residing in joint premises are entitled, on the occurrence of a dispute between them and their co-sharers, to come into Court and ask to have their proper share assigned. The fact of their not having been in possession of a particular portion of the premises is no bar to a claim for such portion. BIMOLA *v.* DANGOO KANSAREE . **19 W. R. 189**

2. ———— **Member of family more than four degrees removed from acquirer**—*Remote relative.* Partition can effectually be demanded by a Hindu more than four degrees removed from the acquirer or original owner of the property sought to be divided, provided he is not more than four degrees removed from the last owner, however remote he may be from the original owner thereof. Devala's Text *Avibhakta Vibhaktanam,* discussed. MORO VISHVANATH *v.* GANESH VITHAL **10 Bom. 441**

3. ———— **Member of family governed by law of Aliyasantana.** Division of family property cannot be enforced by one of the members of a family governed by the law of Aliyasantana. MUNDA CHETTI *v.* TIMMAJU HENSU **1 Mad. 380**

4. ———— **Inheritance of talukhdari estate in Oude**—*Sanad recognizing primogeniture, effect of, as to existing rights of inheritance—Shares held by members of family—Mesne profits on specific and definite shares.* The ordinary rule is that, if persons are entitled beneficially to shares in an estate, they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed the right to sue for profits will arise, as well as the right to partition. A talukhdari estate which, before and after annexation, was subject to the common Hindu law of Oude, *viz.*, the Mitakshara, was restored after the general confiscation of 1858 to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukhdar of two other villages, and to him afterwards in 1861 was issued a primogeniture sanad of the above talukhdari estate. This sanad could not prevail against the family rights of inheritance ; and effect was given to family arrangements, with the same results as regards the two villages. On the contention that the family, by the effect of the sanads, was to have one head and sole manager in the talukhdar, who being accountable to the junior members for their shares of the profits was alone to hold the entire estate by primogeniture :—*Held,* that this kind of managership was entirely unknown to the common Hindu law of Oude ; and that apparently the Oude Estate Act, 1869, did not contemplate any such thing. At all events, there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was accordingly decreed to the members of the family suing for it. *Pirthi Pal Sing* v. *Jawahir Sing, L. R. 14 I. A. 37 : I. L. R. 14 Calc. 493,* as to the right to partition of a talukhdari estate, referred to and followed ; also the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family. SHANKAR BAKSH *v.* HARDEO BAKSH **I. L. R. 16 Calc. 397 L. R. 16 I. A. 71**

HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*a*) GENERALLY—*concld.*

5. ———— **Right to partition a second time after bonâ fide mistake in first partition**—*Inclusion in first partition of property not subject to partition—Re-partition.* The parties to a partition under a *bonâ fide* mistake included in the division certain property which did not belong to the family, but was held in mortgage from a third person who subsequently brought a suit for redemption and recovered it from the party to whom it had been allotted at the partition. *Held,* that the party who had lost his share was entitled to claim a re-partition. MARUTI *v.* RAMA **I. L. R. 21 Bom. 333**

6. ———— **Exclusive right to partition**—*Joint family—Mitakshara law—Gift to daughter out of joint property—Gift out of income. Held,* that partition of the property which was asked for in case the plaintiff had no exclusive right to it was rightly refused by the Courts in India. BACHOO *v.* MANKOREBAI (1907) **I. L. R. 31 Bom. 373 L. R. 34 I. A. 107**

(*b*) DAUGHTER.

7. ———— **Right of daughters to partition**—*Mother's property.* Though daughters succeed to their mother's property, they cannot call for a partition during her life. That is a right peculiar to the son and grandson as joint owners by birth with the father of the ancestral estate. MATHURA NAIKIN *v.* ESU NAIKIN **I. L. R. 4 Bom. 545**

(*c*) GRANDMOTHER.

8. ———— **Right of grandmother to maintenance in competition with mortgagee selling the estate**—*Right of residence secured on sale of house by mortgagee.* Although, according to the Mitakshara, a grandmother may, on partition, or if the estate is being wasted, or her maintenance

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(c) GRANDMOTHER—*concld.*

is not duly provided for, claim an assignment of a portion of the estate, yet she cannot call for partition, and her right to maintenance cannot affect a mortgage of the estate created before any portion has been assigned to her, except that, if the house she resides in is subject to the mortgage and is sold in execution of a decree upon the mortgage, the house must be sold subject to her right. VENKATAMMAL *v.* ANDYAPPA CHETTI **I. L. R. 6 Mad. 130**

(d) GRANDSON.

9. ——— **Right of grandson to sue for partition**—*Ancestral family property.* A grandson may, by Hindu law, irrespective of all circumstances, maintain a suit against his grandfather for compulsory division of an ancestral family property. NAGALINGA MUDALI *v.* SUBBIRAMANYA MUDALI . . . **1 Mad. 77**

10. ——— *Interest in ancestral property.* In a joint Hindu family governed by the Mitakshara law, a grandson has by birth a vested interest in ancestral property, which entitles him to enforce partition in the lifetime of his father and grandfather. *Deendyal Lal* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198 ; Laljee Singh* v. *Rajcoomar Singh, 12 B. L. R. 373 ;* and *Nagalinga Mudali* v. *Subbiramanya Mudali, 1 Mad. 77.* JOGUL KISHORE *v.* SHIB SAHAI . **I. L. R. 5 All. 430**

11. ——— *Suit for partition of ancestral estate by grandson, when both father and grandfather alive, when maintainable.* A member of a joint *Mitakshara* family can bring a suit for partition of his ancestral property during the lifetime of his father and grandfather, if they allow the property to be wasted, or imperil the plaintiff's interest. *Suraj Bhansi Koer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148 ; Subba Ayyar, I. L. R. 18 Mad. 179 ; Jugal Kishore* v *Shib Sahay, I. L. R. 5 All. 430,* followed. TELANG, *J.'s* decision in *Apaji Nahas* v. *Ramchandra I. L. R. 16 Bom. 29,* approved. RAMESHWAR PROSAD SINGH *v.* LACHMI PROSAD SINGH (1903) . **7 C. W. N. 688**

(e) ILLEGITIMATE CHILDREN.

12. ——— **Illegitimate son**—*Sudras.* Among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons ; and if his interest is endangered by reason of the property being left under the management of the latter, partition can be claimed during his minority. THANGAM PILLAI *v.* SUPPA PILLAI . **I. L. R. 12 Mad. 401**

13. ——— *Sudras—Illegitimate son—Claim to partition of property of father's brother's sons—Maintainability.* An illegitimate son claimed to be entitled to a share in the property of his father's brother's sons. *Held,* that he was not so entitled, and that the principle laid down in *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansing, L. R. 17 I. A. 128*—where it was held that an illegitimate son is a co-parcener of his father's legitimate son—should not be extended to the case of other collateral heirs, having regard to the rulings in *Krishnayyan* v. *Muttusami, I. L. R. 7 Mad. 407 ; Ranoji* v. *Kandoji, I. L. R. 8 Mad. 557 ;* and *Parvathi* v. *Thirumalai, I. L. R. 10 Mad. 334. Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam, I. L. R. 21 All. 99,* approved. KARRUPA GOUNDAN *v.* KUMARASAMI GOUNDAN (1901) . . **I. L. R. 25 Mad. 429**

(f) MINOR.

14. ——— **Suit by or on behalf of minor for partition**—*Mithila school of law—Suit by mother and minor children for partition—Malversation.* A suit cannot be brought by or on behalf of a minor to enforce partition unless on the ground of malversation, or some other circumstances which make it for his interest that his share should be set aside and secured for him. DAMOODUR MISSER *v.* SENABUTTY MISRAIN **I. L. R. 8 Calc. 537 : 10 C. L. R. 401**

15. ——— **Suit by minors for partition**—*In what cases there is a right of suit—Malversation.* Under the Hindu laws, a minor co-parcener cannot sue for partition unless his interests are (i) likely to be advanced thereby, or (ii) protected from danger. When an adult co-parcener has taken up a hostile position to the interests of minor co-parceners and denied their rights, or sets up his own independent title, or where the minors live separately and the adult co-parcener does not support them, in all these cases it is in the interest of the minors that their share shall be partitioned and set apart. The plaintiffs, who were minors, sued by their next friend for a partition of their ancestral property in the possession of their step-brother, the defendant. It appeared that soon after their father's death disputes and differences arose between plaintiffs' mother and their step-brother, which led to their separation in food and residence. The defendant managed the family property, but did not support the minors out of the rents and profits thereof. Hence the suit. *Held,* that, though no malversation was alleged or proved, the allegations in the plaint of disputes and separate residence and defendant's failure to support the plaintiffs were sufficient to justify the Court in permitting the plaintiffs to maintain the suit. MAHADEV BALVANT *v.* LAKSHMAN BALVANT **I. L. R. 19 Bom. 99**

16. ——— *Joint Hindu family—Right of minor member of a joint family to*

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*f*) MINOR—*concld.*

sue for partition. Held, that a minor member of a joint Hindu family may institute a suit for and obtain partition of his share in the joint family property if there exist circumstances such as in the interest of the minor render it advisable that his share should be set aside and secured for him. BHOLA NATH *v.* GHASI RAM (1907)
I. L. R. 29 All. 373

(*g*) PURCHASER FROM CO-PARCENER.

17. ——— Sale by a co-parcener of his share in specific property—*Rights of the vendee—Transfer of Property Act, s. 44.* A purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property. VENKATARAMA *v.* MEERA LABAI . . **I. L. R. 13 Mad. 275**

See CHANDU *v.* KUNHAMED, distinguished on the ground that the parties there were governed by Mahomedan law of inheritance.
I. L. R. 14 Mad. 324

18. ——— Purchaser from member of undivided Hindu family of share in the joint property. Two brothers constituted an undivided Hindu family. The eldest mortgaged half of certain family lands to *P* and the other half to the father (since deceased) of the contending defendants, and placed the mortgagees respectively in possession. Neither mortgage was binding on the younger brother who mortgaged his share of the same land to the plaintiff. The plaintiff obtained a decree on his mortgage and attached and brought to sale in execution and himself purchased the half share of his mortgager, and, having afterwards purchased the share of the elder brother and come to a settlement with *P*, brought a suit for a moiety of the land in the possession of the contending defendants as forming part of the half share of his mortgagor. *Held*, that the contest being between strangers to the family, and the plaintiff having purchased the entire rights of the family in the land in question, the suit was maintainable without a claim for partition of the whole property of the family. SUBBARAZU *v.* VENKATARATNAM **I. L. R. 15 Mad. 234**

19. ——— Claim against vendor and widow of undivided brother. A person who purchases the share of a coparcener in family property is entitled to recover that share on his vendor's succession to the property as against the vendor himself and the widow of his undivided brother. *Udaram Sitaram* v. *Ranu Panduji, 11 Bom. 76*, distinguished. MANJAPPA HEGADE *v.* LAKSHMI
I. L. R. 15 Bom. 234

20. ——— Suit for partition by a purchaser from a co-parcener—*Decree for share of co-parcener in specific property—Variance between pleading and proof.* In a suit to recover possession of property purchased by the plaintiff, if it is found that the property is not separate property of the plaintiff's vendor, but belongs to the joint family of which plaintiff's vendor is a member, the plaintiff is not entitled to a decree for his vendor's share in that property, and the suit must be dismissed. *Venkataramu* v. *Meera Labai, I. L. R. 13 Mad. 275*, followed. PALANI KONAN *v.* MASAKONAN . . . **I. L. R. 20 Mad. 243**

21. ——— Alienation of share by co-parcener—*His position and rights after such alienation—Position and rights of purchaser—Subsequent birth or death of other co-parceners.* The alienation by a Hindu co-parcener of his rights in part or the whole of the joint family property does not place the purchaser of such rights in his own position. The purchaser becomes a sort of tenant-in-common with the co-parceners, admissible as such to his distributive share upon a partition taking place. Such an alienation before partition does not deprive the alienating co-parcener of his rights in the joint family. As the purchaser does not, by the death of the vendor, lose his right to a partition, so his position is not improved by the death of the other co-parceners before partition. The purchasers, like his alienor, is liable to have his share diminished upon partition by the birth of other co-parceners, if he stand by and do not insist on immediate partition. GURLINGAPA SATWIRAPA GIDWIR *v.* NANDAPA CHANBASAPA SOLAPURI
I. L. R. 21 Bom. 797

22. ——— Purchase by stranger from one of two daughters jointly entitled to their father's property—*Decree for partition.* A purchaser, having purchased certain property from one of two sisters jointly entitled to their deceased father's property, under the Hindu law, re-sold it, whereupon the other daughter sued for a declaration that such sales were invalid as against her, and that the property might be restored to her and her sister, or that there might be a partition of it. *Held*, that, while one of two daughters cannot by any alienation alter the character of the daughters' estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property, or have that interest taken and sold in execution of a decree against her. Also that, subject to the same condition, she may demand a partition of the property. KANNI AMMAL *v.* AMMAKANNU AMMAL
I. L. R. 23 Mad. 504

23. ——— Purchase from member of an undivided family—*Undivided share of vendor in land forming part of the joint estate—Death of vendor—Subsequent suit by purchaser against survivors for partition of entire estate for recovery of the portion purchased—Maintainability*

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*g*) PURCHASER FROM CO-PARCENER—*concld.*

Plaintiff purchased 2 acres and 26 cents of land from *V*, being *V's* undivided moiety in two plots of land measuring 4 acres and 52 cents, which formed part of the joint property of an undivided Hindu family consisting of *V* and his two nephews (brother's sons). *V* subsequently died, leaving his two nephews him surviving. After *V's* decease, plaintiff instituted the present suit against the nephews, in which he claimed partition of the whole of the family property, and sought thereby to recover out of the half share which might fall to his vendor, *V* (now deceased), the specific 2 acres and 26 cents which he bought from *V*, or land of similar size and quality. *Held*, that the suit was maintainable. *Per* BHASHYAM AYYANGAR, *J.*—Plaintiff was entitled to recover, by partition, a moiety of the plots of land in question if such moiety could have been equitably allotted to the plaintiff's vendor's share in case a partition of all the family property, between him and his nephews, had been effected immediately before the sale to the plaintiff. Observations by BHASHYAM AYYANGAR, *J.*, on the character and incidents of an alienation, made by an undivided member of a Hindu family, of his share and interest therein. *Rangasami* v. *Krishnayyan, I. L. R. 14 Mad. 408*, considered. AIYYAGARI VENKATARAMAYYA *v.* AIYYAGARI RAMAYYA (1902)
I. L. R. 25 Mad. 690

(*h*) PURCHASER FROM WIDOW.

24. _____ Right of purchaser to sue for partition—*Assignee of widow.* A Hindu widow being competent under the Hindu law to put in a claim to enforce partition as against her co-sharers, there is nothing to prevent a purchaser of her estate at a sale in execution of a decree from enforcing a like claim. RUGHOONATH PANJAH *v.* LUCKHUN CHUNDER DULLAL CHOWDHRY
18 W. R. 23

25. _____ *Bengal school of Hindu law—Widow's estate—Joint widows.* Where a Hindu governed by the Bengal school of Hindu law dies intestate, leaving two widows, his only heirs, him surviving, either of those widows may sell her interest in her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow. The partition, if decreed, should be effected in such a way as would not be detrimental to the future interests of the reversioners. JANOKINATH MUKHOPADHYA *v.* MOTHURANATH MUKHOPADHYA
I. L. R. 9 Calc. 580 : 12 C. L. R. 215

26. _____ *Alienation by Hindu widow of share in family dwelling-house.* An assignee of a Hindu widow, though a stranger to the family, is in the same position as the Hindu widow, and is entitled to sue for partition of the joint family dwelling-house, and all that the Court has to see to is that the partition should be carried out in such a way as not to affect the rights of the reversioners. BEPIN BEHARI MODUCK *v.* LAL MOHUN CHATTOPADHYA . **I. L. R. 12 Calc. 209**

HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*h*) PURCHASER FROM WIDOW—*concld.*

(*i*) SON.

27. _____ Suit by son to enforce partition against father—*Mitakshara law—Undivided Hindu family—Ancestral immoveable property.* In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the lifetime, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family. KALI PARSHAD *v.* RAM CHARAN . . **I. L. R. 1 All. 159**

28. _____ *Right to property not acquired by birth.* In a suit brought by a son against his father to compel a division of moveable and immoveable property inherited by the latter from his paternal cousin :—*Held*, that, as regards the jewels of which plaintiff required an account, the plaintiff had no right of complaint, although his father, the defendant, had made an unjust and partial distribution of them. *Held*, also, that the suit to enforce a division of the immoveable property could not be maintained, inasmuch as neither the plaintiff nor the defendant acquired any right of such property by birth. RAYADUR NALLATAMBI CHETTI *v.* RAYADUR MAKUNDA CHETTI
3 Mad. 455

29. _____ *Suit for partition by a son against his father and uncles in lifetime of his father and against his father's will. Held*, by the Full Bench (TELANG, *J.*, dissenting), that under the Hindu law applicable to the Satara District (in the Presidency of Bombay), a son cannot in the lifetime of his father sue his father and uncles for a partition of the immoveable family property and for possession of his share therein, the father not assenting thereto. APAJI NARHAR KULKARNI *v.* RAMCHANDRA RAVJI KULKARNI
I. L. R. 16 Bom. 29

30. _____ *Suit by sons and nephewes against their father and uncles—Right of suit.* In a suit for partition of family property, the plaintiffs were the sons of one and nephews of others of the defendants who defended the suit. *Held*, that the suit was maintainable. *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni, I. L. R. 16 Bom. 29*, dissented from. SUBBA AYYAR *v.* GANASA AYYAR . . **I. L. R. 18 Mad. 179**

31 _____ Moveable ancestral property—*Ancestral business.* On the Bombay side of India a Hindu son has no right to enforce partition of ancestral moveable property in the hands of his father, or to claim a separate share in an ancestral business against his father's will, although the son alleges that his father is prejudiced

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*i*) SON—*contd.*

against him and intends to deprive him of his succession to such property and business. *Semble*: That a son cannot enforce partition of immoveable ancestral property under similar circumstances. RAMCHANDRA DADA NAIK *v.* DADA MAHADEV NAIK . . . . . **1 Bom. Ap. 76**

32. ——— *Right of a son to claim partition of moveable as well as immoveable property in his father's lifetime—Son's right to partition of property come to the possession of his father before the son's birth—Property acquired by litigation—Self-acquired property devised by a father to his son is taken by the son under the will and is self-acquired in his hands—Earnings of father as mill manager—Property left by testator to be held moveable or immoveable according to its condition at testator's death—Kapoli Bania caste, custom of, as to partition. Per* APPEAL COURT.—There is no distinction between moveable and immoveable property as regards the right of a son in an undivided family governed by the Mitakshara law to partition in the lifetime of the father. *Per* SCOTT, *J.*—Where the law of the Mayukha applies, a son is entitled to demand partition of moveable as well as immoveable property in his father's lifetime. Defendant's great-grandfather (*M*) died in 1792, leaving a will, dated 1789, whereby he directed his property to be equally divided among his five sons, of whom *R* (the grandfather of defendant) was one. The property became the subject of litigation, and was not divided until 1852, long after the death of *R* which took place in 1808. *R's* share was received in 1852 by the executors of his son, *N* (defendant's father), who had died in 1843. *Held*, that this property came to the defendant by inheritance and was ancestral property, and was not capable of being given or willed away by him. Further that as having regard to *M's* will there was no apparent intention on the part of the testator to convert into money such of his property as consisted of lands and houses, the general rule of law applied, *viz.*, that the property must be held to be real or personal according to the actual condition in which it existed at the testator's death. *Held*, also, that the defendant's son had a right to claim partition of this property, although the defendant had no son born to him at the time (1852) he came into possession of it. All property acquired out of the income of ancestral property is itself ancestral, whether acquired before or after the birth of a son. In order to entitle a co-parcener to hold, as property self-acquired by him, property which has been recovered by his exertions (*e.g.*, by litigation), such property must have been recovered from usurpers holding it adversely to the family; the co-parceners must have abandoned their rights; and where such abandonment is a matter of inference, the co-parceners, to whom it has been imputed, must have been in a position to sue. A son to whom his father

HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*i*) SON—*contd.*

leaves the self-acquired property by will takes the property under the will, and not by inheritance, and as property received by will is held by Hindu law to be received by gift, such property is self-acquired in the hands of the son, and is not subject to partition. The first defendant was sued by his son for partition. Some of the property in the defendant's hands consisted of his earnings as manager of a mill and of the investments of such earnings. The mill had been established in 1860, and the defendant bought thirty-nine shares out of the ancestral funds in his hands. He was appointed chairman of the company, and managed the mill for ten years without any remuneration. His management was very successful, and good dividends were declared every year from 1863. In 1870 he declined to work any longer without remuneration, and at a meeting of the shareholders he was appointed managing director and was granted a commission on all sales effected by the company. *Held*, that the commission so received by the defendant was his self-acquired property. Under the circumstances, it might safely be inferred that he did not obtain the appointment of manager by the direct influence of the shares which he held in the company. The gratuitous services which he had for years rendered to the shareholders had influenced them in giving him the appointment, and such influence could not be said to have been created by the direct instrumentality of the ancestral property. In a suit for partition brought by a son against his father:—*Held*, that the plaintiff was entitled to partition of the ancestral property as it subsisted at the date of suit. A custom alleged to exist among the Kapoli Bania caste, according to which a son is not entitled to the partition of ancestral property in his father's lifetime and against his father's will, held not proved. JAGMOHANDAS MANGALDAS *v.* MANGALDAS NATHUBHOY **I. L. R. 10 Bom. 528**

33. ——— **Son, partition by**—*Right of sons as against mortgagee of ancestral property.* In a suit by four sons, members of a joint family, for determination of right and partition of family property which had been mortgaged by their father as security for a loan and had been sold in execution of a decree, the father being still alive, as well as his second wife, who was not incapacitated by age from bearing children:—*Held*, that the mortgagee could not stand in a better position than the father against whom the sons had a right to require partition of the property so far as it was ancestral. LOCHUN SINGH *v.* NEMDHAREE SINGH . **20 W. R. 170**

34. ——— *Right of sons to partition—Indebtedness of father—Minor sons.* Under Mitakshara law, minor sons have rights in ancestral property, for a declaration of which by partition their mother can proceed against their father and his creditors. Partition in such a case

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*i*) SON—*contd.*

might be ordered against the will of the father, without actually taking the property out of his hands. Even where sons, because of their minority, are incapable of signifying their intention of enforcing partition, it is open to a Court to discover whether there are special circumstances which would make a partition desirable. LEKHRAJ KOOER *v.* SIRDAR DYAL SINGH **25 W. R. 497**

35. ——— *Suit for partition of property come to plaintiff's father from the father of his adoptive mother—Nature of property so devolved—Plaintiff joint owner with his father.* In a suit for partition brought by plaintiff against his father, as first defendant, and others, plaintiff sought to recover a share of property, which had come to first defendant from the father of the first defendant's adoptive mother: *Held*, that plaintiff was a joint owner with first defendant in the property, and was entitled to partition of it. *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu, I. L. R. 25 Mad. 687*, and *Karuppai Nachiar* v. *Shankara Narayana Chetty, I. L. R. 26 Mad. 300*, followed. VYTHINATHA AYYAR *v.* YEGGIA NARAYANA AYYAR (1904) . . **I. L. R. 27 Mad. 382**

36. ——— **Illatam son-in-law.** The question whether an illatam son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence. CHINNA OBAYYA *v.* SURA REDDI . **I. L. R. 21 Mad. 226**

37. ——— **Son born after partition—** *Property acquired subsequently to partition.* A Hindu having two sons divided his property between them, reserving no share for himself. A third son was subsequently born, who now sued for a partition of the property which had been divided and other property subsequently acquired by his brothers by means of its proceeds. *Held*, that the plaintiff was entitled to the relief claimed. CHENGAMA NAYUDU *v.* MUNISAMI NAYUDU **I. L. R. 20 Mad. 75**

38. ——— *Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation.* In the year 1875 one *V*, having at that time three sons, *viz.*, defendants Nos. 1, 2, and 3, divided his property, allotting one-third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3), who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of *V's* elder wife, and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born, and in 1894 he brought this suit by his mother (the younger wife) as next friend for a partition

HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*i*) SON—*concld.*

of the whole of *V's* property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share. *Held*, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years, and could not be disturbed. The plaintiff could only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family. GANPAT VENKATESH DESPANDE *v.* GOPALRAO VENKATESH DESPANDE **I. L. R. 23 Bom. 636**

(*j*) SON-IN-LAW OF LUNATIC.

39. ——— **Partition of lunatic's estate** —*Joint property in Mitakshara family*—The husband of a lunatic's daughter applied to the Court to declare his father-in-law, who was a member of a joint Mitakshara family, to be a lunatic, and appoint a manager of his property and a guardian of his person under Act XXXV of 1858. The Court found that the application was made with a view to taking consequent proceedings for partition. *Quare:* Assuming the application to be made with a view to a partition of the property, and that the lunatic was declared a lunatic under the Act, whether a partition could be had. *In the matter of the petition of* BHOOPENDRA NARAIN ROY. BHOOPENDRA NARAIN ROY *v.* GREESH NARAIN ROY **I. L. R. 6 Calc. 539 8 C. L. R. 30**

(*k*) WIDOW.

40. ——— **Widow, partition by—** *Ground for exclusion from right—Likelihood of remarriage.* There is no ground for the exclusion of a Hindu widow from a claim to partition, for, as the law now stands, she may re-marry and have issue. BIMOLA *v.* DANGOO KANSAREE . **19 W. R. 189**

41. ——— *Power of widow to enforce partition.* It is competent to the childless widow of a Hindu dying without other nearer heirs to enforce the actual divisions of the family property in which her husband at his death was entitled to share, when the separation of her husband has taken place and his share been ascertained, though not actually set apart in specie. RAM JOSHI *v.* LAKSHMIBHAI . . . **1 Bom. 189**

42. ——— *Discretion of Court—Widow with daughters and grandsons.* The question whether a Hindu widow is entitled to partition is one for the discretion of the Court in each particular case. In this case, where the plaintiff had daughters and grandsons, and the share she was entitled to through her husband was consider-

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*k*) WIDOW—*contd.*

able, she was held entitled to a decree for partition. SOUDAMINEY DOSSEE *v.* JOGESH CHUNDER DUTT **I. L. R. 2 Calc. 262**

43. ——— *Settlement by co-parcener on wife—Purchaser for value.* In pursuance of an ante-nuptial agreement made in consideration of marriage with the father of *A*, his intended wife, *A N*, an undivided member of a Hindu family, executed a post-nuptial settlement in favour of *A*, whereby he declared that during his lifetime his share in the joint family property should be enjoyed by husband and wife jointly, and after his death his share should belong to *A*. On the death of *A N*, *A* sued his co-parcener to recover by partition the share of *A N* in the joint family property. *Held*, that *A* was entitled to recover. ALAMELU *v.* RANGASAMI . **I. L. R. 7 Mad. 588**

44. ——— *Right of widows to partition, or to separate enjoyment of joint property.* A claim by one of several widows to an absolute partition of the joint estate, giving to each a share in severalty, is not maintainable. A case may be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance. Such relief ought to be granted when from the nature or situation of the property and the conduct of co-widows or co-widow, it appears to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate. Upon the death of the late Raja of Tanjore, the Government of Madras, in the exercise of their sovereign power, took possession of the estate and private property of the Raja. Subsequently, the Government made over to the widows and daughter of the Raja the landed and personal property, having previously obtained the opinion of the Hindu law officers of the Sudder Court on a question put with the view of ascertaining the Hindu law as applicable to the case. The order of Government contained the following direction: "The estate will therefore be made over to the senior widow, who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question by the other widows, her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her the next heirs of the late Raja, if any, will inherit the property." In a suit by two of the widows against the senior widow and the 14th defendant, the alleged adopted son of the late Raja, for a division of the moveable property which had been made over to the senior widow by the Government of Madras, and for the cancellation of the adoption of the 14th defendant. *Held*, that the claim of the 14th defendant by right of adoption being as lineal heir to the Raja in preference to the widows would not be maintainable, assuming the adoption to have been valid.

HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*k*) WIDOW—*contd.*

To that claim the absolute ownership of the Government in the interval from the death of the Raja until the act of State by which the transfer was made to the widows and daughters is fatal. JIJOYIAMBA BAYI SAIBA *v.* KAMAKSHI BAYI SAIBA. BAI SAIBA *v.* JIJOYIAMBA BAYI SAIBA . **3 Mad. 424**

45. ——— **Co-widows**—*Widows inheriting jointly—Order for separate possession and enjoyment.* Widows who take a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the estate between themselves. But where from the conduct of one or more of their number, separate possession of a portion of the inheritance is the only likely means to secure for each peaceful enjoyment of an equal share of the benefits of the estate, an order for separate possession and enjoyment may be made. *Jijoyimba Bayi Saiba* v. *Kamakshi Bayi Saiba, 3 Mad. 424*, referred to and approved. GAJAPATHI NILAMANI *v.* GAJAPATHI RADHAMANI **I. L. R. 1 Mad. 290 : 1 C. L. R. 97 L. R. 4 I. A. 212**

46. ——— *Co-widows—Arrangement for separate enjoyment.* Although the two widows of one and the same husband may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition converting the joint estate into an estate in severalty. The interest of one of two such co-widows cannot be sold. KETHAPERUMAL *v.* VENKABAI **I. L. R. 2 Mad. 194**

47. ——— *Co-heiresses—Suit to enforce partition.* Two widows, co-heiresses, in joint possession of property by the Hindu law are in the nature of co-parceners, and one of them can enforce partition against the other notwithstanding the limited character of their tenure, and although such partition is not binding on the reversioners. PADMAMANI DASI *v.* JAGADAMBA DASI **6 B. L. R. 134**

48. ——— *Co-widows of estate left by their deceased husband.* Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had before his death adopted a son, to whom also by will he bequeathed his estate. The adopted son died soon after the testator. *Held*, that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee; also that the estate, being jointly held by them, was partible, and either widow might maintain a suit for partition. SUNDAR *v.* PARBATI **I. L. R. 12 All. 51 L. R. 16 I. A. 186**

49. ——— *Division by co-widows of their late husband's estate—Alienation by one after the division—Validity of alienation as*

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*contd.*

(*k*) WIDOW—*contd.*

against surviving widow on deceased of alienor. A Hindu died leaving two widows, who divided his property by a formal registered partition deed, under which each took possession of her share, with powers of alienation over the property comprised in it. Certain alienations were made by one widow, who subsequently died. On the surviving widow claiming the whole of her late husband's property, including the portions so alienated :—*Held*, that there is no legal obstacle to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. A widow may alienate for her life any estate which comes to her by virtue of her widowhood, and may, therefore, enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation, provided that it does not extend beyond her life-interest. RAMAKKAL *v.* RAMASAMI NAICKAN . . **I. L. R. 22 Mad. 522**

50. _____ *Limitation Act (XV of 1877), Sch. II, Art. 127—Proof of exclusion from joint family property—Mere non-participation in, or refusal to live on, joint property, insufficient—Hindu law—Suit by one of three widows against her two co-widows for partition of widows' estate in their late husband's property—Proof of unchastity on part of plaintiff during widowhood, no ground for refusal—Tenant-in-common—Partition, a matter of right.* One Panguni died in or about the year 1881, leaving three widows him surviving. The three widows, as tenants-in-common, participated for some time in the profits of their late husband's property. After his decease, one of the widows began to lead an immoral life and refused to live with the other two. In 1895 she sued her co-widows for partition and for an allotment of her one-third share of the property. She claimed to have participated in the profits of the family property until 1890, but the defendants contended that she had ceased to participate therein for more than twelve years before the institution of the suit, and raised the plea of limitation. They also pleaded that plaintiff was not entitled to claim partition, by reason of her unchastity. It was proved that plaintiff had been living with her paramour subsequent to her husband's decease, and had supported herself without recourse to the family property, and had refused to live with defendants. *Held*, that the burden lay on the defendants of proving that plaintiff, who was admittedly a tenant-in-common with them till 1882, was excluded from enjoyment of the property. Mere proof of refusal on the part of the plaintiff to live with her co-widows, or of non-participation by her in the family property, did not establish ouster or exclusion by defendants, and there was no other evidence to show that she had abandoned her interest to their knowledge. *Held*, also, that proof of plaintiff's unchastity after her husband's death did not disentitle her to claim partition of the property by metes and bounds. A widow, being a tenant-in-common, is entitled to partition as a matter of right, and the Court has no discretion in the matter. SELLAM *v.* CHINNAMMAL (1901) **I. L. R. 24 Mad. 441**

51. _____ *Partition between co-widows—Mode of partition and enjoyment.* The fact of a co-widow having obtained Letters of Administration of her husband's estate and not having completely administered the estate is no bar to the maintenance of a suit for partition by the other widow. A co-widow has not the unqualified right to claim a partition of her husband's estate ; such partition cannot affect the rights of her co-widow to succeed to the estate after her ; nor can it affect the rights of any of the reversionary heirs of her husband. The partition that is to be effected as between co-widows must be so made as not to effect any permanent change in the property to be divided such as might affect the interests of the reversionary heirs. *Held*, in the circumstances of the case, that the relief of separate possession is the only proper and effectual mode of securing to the plaintiff the enjoyment of her distinct right to an equal share of her deceased husband's estate. That the plaintiff is entited to partition of her husband's estate and to separate possession of her one-half share. DAL KOER *v.* PANBAS KOER (1904) **8 C. W. N. 658**

52. _____ **Moveable property**—*Dayabhaga—Joint property—Partition— Widow—Reversioner, rights of—Waste, prevention of—Bill quia timet—Injunction—Receiver.* A Hindu widow governed by the Dayabhaga school has, in regard to moveable property inherited by her from a male, the same powers and is subject to the same restrictions in respect of management and alienation, as to immoveable property similarly inherited by her. *Cossinath Bysack* v. *Hurrosoondery Dossee, 2 Morley's Dig. 1898 ; Thakoor Deyhee* v. *Raj Baluk Ram, 11 Moo. I. A. 139 ;* and *Bhagwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487,* referred to. A Hindu widow, governed by the Dayabhaga school, inheriting her husband's share in joint properties, is entitled to claim partition of the properties, both moveable and immoveable, as against her husband's co-parceners ; but if there be a reasonable apprehension of waste by her of the moveable properties allotted to her share, sufficient provision should be made in the final decree for partition, for the prevention of such waste, to safeguard the interests of the reversioners. The remedy of the latter is not necessarily confined to a subsequent suit for injunction or a bill quia timet. *Soudaminey Dossee* v. *Jogesh Chunder Dutt, I. L. R. 2 Calc. 262 ; Janoki Nath Mukhopadhya* v. *Mothuranath Mokhopadhya, I. L. R. 9 Calc. 380 ; Cossinath Bysack* v. *Hurrosoondery Dossee, Clarke's Rules and Orders*

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HINDU LAW—PARTITION—*contd.*

4. RIGHT TO PARTITION—*concld.*

(*k*) WIDOW—*concld.*

(*Appx.*) 91; and *Bepin Behari Moduck* v. *Lal Mohun Chattopadhya, I. L. R. 12 Calc. 209*, referred to. *Biswanath Chandra* v. *Khantomoni Dasi, 6 B. L. R. 747; Hurrydoss Dutt v. Rungunmoney Dossee, 2 Sevest, 657;* and *Hurrydoss Dutt* v. *Uppoornah Dossee, 6 Moo. I. A. 433*, distinguished. DURGA NATH PRAMANIK *v.* CHINTAMONI DASSI (1904) . . . . **I. L. R. 31 Calc. 24 s.c. 8 C. W. N. 111**

(*l*) WIFE.

53. ——— Right of wife to demand partition—*Share of, on partition.* Although, when a partition does take place, a wife in a Mitakshara joint family is entitled to a share, she has no right herself to take the initiative and demand a partition. SUNDER BAHU *v.* MONOHUR LALL UPADHYA . . . . . **10 C. L. R. 79**

5. SHARES ON PARTITION.

(*a*) GENERAL MODE OF DIVISION.

1. ——— Mode of division—*Survivorship until partition—Rule for partition.* In joint families governed by the Mitakshara law, the principle of survivorship is in force until partition, and upon partition distribution amongst the different members of the family should be made, not according to the ordinary Hindu rule of heirship, but *per stirpes.* RAJNARAIN SINGH *v.* HEERALAL **I. L. R. 5 Calc. 142**

2. ——— *Method of ascertaining shares when some of the family remain united after a partial partition.* A Hindu died leaving two sons, *A* and *B*. *A* had one son, *C*, and *B* had three sons, *D, E, F*. *C* had three sons, *D* one, *E* two, and *F* one. In 1867 two of *C's* sons, the two sons of *E*, and the son of *F* brought a suit to obtain their shares of the family property. For the purpose of that suit the property was divided into twelve shares. Of the six shares due to *A's* branch, three were allotted to the two sons of *C*. Of the six shares due to *B's* branch, two were allotted to the sons of *E* and two to the son of *F*. The remaining five shares were enjoyed in common by the rest of the family, *C*, his third son, and the son of *D*, who remained in union. In 1872 *C* died. In 1879 the third son of *C* sued the son of *D* to recover his share of the family property, claiming three-fifths of the whole. The Subordinate Judge awarded him a moiety on the ground that the present state of the family alone was to be considered in ascertaining the shares. *Held*, that the plaintiff was entitled to the amount claimed by him. The rule that as between different branches division should be *per stirpes*, and as between sons of the same father *per capita*, applies to cases in which all the co-parceners desire partition at the same time, and not to cases of partial partition. Where a joint family in an advanced state of development is broken up by partition, regard must be had to the successive vested interests of each branch, and in order to secure equality of shares division *per stirpes* at each stage when a new branch intervenes is necessary. MANJANATHA *v.* MARAYANA **I. L. R. 5 Mad. 362**

HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*a*) GENERAL MODE OF DIVISION—*concld.*

(*b*) ADOPTED SON.

3. ——— Share of adopted son—*Son born after adoption of son.* The share of an adopted son where sons are afterwards born is one-fourth of the share of a son born to the adoptive father after the adoption. AYYAVU MUPPANAR *v.* NILADATCHI AMMAL . . . . . **1 Mad. 45**

4. ——— ——— *Share of an adopted son of a natural son on partition in a Mitakshara family—Intention as to joint or several ownership.* On partition in a Mitakshara family, an adopted son and the adopted son of a natural son stand exactly in the same position and each takes only the share proper of an adopted son, *i.e.*, behalf of the share which he would have taken had he been a natural son. The fact that such an adopted son, a member of a Mitakshara family, becomes upon adoption a joint owner of the family property, will not prevent the operation of the rule. RAGHUBANUND DOSS *v.* SADHU CHURN DOSS **I. L. R. 4 Calc. 425 : 3 C. L. R. 534**

5. ——— *Sudras—Suit for partition by adopted son.* Assuming that, according to the Mitakshara, the share of an adopted son on partition is limited to one-half of the share which he would have taken had he been a natural son, this rule does not apply to Sudras, amongst whom the adopted son is declared to be entitled to an equal share with a legitimate son born after the adoption. *Raghubanund Doss* v. *Sadhu Churn Doss, I. L. R. 4 Calc. 425*, doubted. RAJA *v.* SUBBARAYA . . . **I. L. R. 7 Mad. 253**

(*c*) DAUGHTER.

6. ——— Share of daughter—*Expenses for marriage of unmarried daughters.* Property sufficient to defray the expenses of the nuptials should be given to unmarried daughters, on a partition. DAMOODUR MISSER *v.* SENABUTTY MISRAIN **I. L. R. 8 Calc. 537 : 10 C. L. R. 401**

(*d*) GRANDMOTHER.

7. ——— Share of grandmother—*Right to maintenance until partition.* According to the Mitakshara, the mother, or the grandmother, is entitled to a share when sons or grandsons divide the family estate between themselves; but she cannot be recognized as the owner of such share until

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HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*d*) GRANDMOTHER—*contd.*

the division is actually made ; she has no pre-existing right in the estate, except a right of maintenance. JUDDOONATH TEWAREE *v.* BISHONATH TEWAREE. SHEO DYAL TEWAREE *v.* JUDOONATH TEWAREE. SHEO DYAL TEWAREE *v.* BISHONATH TEWAREE. SHIB DYAL TEWAREE *v.* BISHONATH TEWAREE . . . . **9 W. R. 61**

8. ——— A grandmother held not entitled to a share of the joint family property on partition. RADHA KISHEN MAN *v.* BACHHAMAN . . . . . **I. L. R. 3 All. 118**

PUDDUM MOOKHEE DOSSEE *v.* RAYEE MONEE DOSSEE . . . . . **12 W. R. 409**

Upheld on review in RAYEE MONEE DOSSEE *v.* PUDDUM MOOKHEE DOSSEE . **13 W. R. 66**

9. ——— *Self-acquired property of father on partition.* Under the Mitakshara law, a grandmother on partition is entitled to a share in the joint family property. *Semble :* The rule of law to be found in the second volume of Vyavastha Chandrika, pp. 356-359, which lays down that, when the father makes the partition of his own choice, his mother is not entitled to a share, is intended to apply only to the self-acquired property of the father. BADRI ROY *v.* BHUGWAT NARAIN DOBEY

I. L. R. 8 Calc. 649 : 11 C. L. R. 186

10. ——— *Grandchildren—Right of grandmother to share.* In a suit for partition among the members of a joint Hindu family, consisting of the heirs, in different degrees, of five brothers, a decree for partition according to certain proportions was made, subject, so far as the decree affected property derived through the eldest brother, to maintenance for his widow, *A*. Among other parties to the suit were *B*, the granddaughter by the eldest son of *A*, and *C*, her second son. C died in 1880, leaving a widow, *D*, and four infant sons. *A*, who was not a party to the partition suit, now sued *B* and *D* and the infant sons of *C* for a declaration that she as such widow and mother was entitled to a share in the partitioned properties equal to those of her granddaughter, *B*, and her grandsons, the infant sons of *C*. *Held*, that such a suit would lie, it not being a suit for partition exclusively among grandsons, and that *A* was entitled to an equal share with her granddaughter and grandsons iin the properties which under the partition decree had been allotted to the representatives of her husband, and to a life-interest in the income of the property remaining unpartitioned. SIBBOOSOONDERY DABIA *v.* BUSSOOMUTTY DABIA

I. L. R. 7 Calc. 191

11. ——— **Grandmother and mother, rights of, to a share**—*Partition of ancestral property—Suit by grandson.* *A*, a Hindu governed by the Bengal School of Hindu Law, died leaving his widow *B*, *C* the widow of his only predeceased

HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*d*) GRANDMOTHER—*concld.*

son *X*, *D* a grandson of *X*, *E* the widow of *Y*, a predeceased grandson, who was another son of *X*, and a great grandson *F*, son of *E*. *X*, before his death, bequeathed all his property by will to *A*. In a suit instituted by *D* for partition of the property left by *A* : *Held*, that the grandmother *B* and the mother *C* were both entitled to shares in the said property, the former getting $\frac{1}{3}$, and the latter $\frac{2}{3}$ths. *Gooroo Persaud Bose* v. *Seeb Chunder Bose, Mac. Cons. Hindu Law 29 ; Puddum Mookhee Dossee* v. *Rayeemoni Dossee, 12 W. R. 409 : 13 W. R. 66 ; Badri Roy* v. *Bhugwat Narain Dobey, I. L. R. 8 Calc. 649 ; Saralah Dossee* v. *Bhoobun Mohun Neoghy, I. L. R. 15 Calc. 292 ; Jeomoy Dossee* v. *Attaram Ghosh, s.c. Sarkar's Precedts. 743 ; Mac. Cons. Hindu Law 64 ; Jugomohan Halder* v. *Sarodamoyee Dosse, I. L. R. 3 Calc. 149 ; Torit Bhoosun Bonnerjee* v. *Tara Prosonno Bonnerjee, I. L. R. 4 Calc. 756 ; Kristo Bhabiney Dossee* v. *Ashutosh Bosu Mullick, I. L. R. 13 Calc. 39 ; Cally Charan Mullick* v. *Janova Dossee, Ind. Jur. N. S. 284 ; Gurugobind Shaha* v. *Anand Lall Ghose, 5 B. L. R. 15 ; Isree Pershad Singh* v. *Nasib Kooer, I. L. R. 10 Calc. 1017*, referred to. *Sibbo Soondery Dabia* v. *Bussoomutty Dabia, I. L. R. 7 Calc. 191*, distinguished. PURNA CHANDRA CHAKRAVARTI *v.* SAROJINI DEBI (1904)

I. L. R. 31 Calc. 1065
s.c. 8 C. W. N. 763.

(*e*) MEMBER ACQUIRING FRESH PROPERTY.

12. ——— **Share of member increasing joint estate**—*Double share.* Whatever is acquired at the charge of the patrimony is subject to partition ; but if the common stock is improved, an equal share is ordained. Where a co-parcener, with comparatively small detriment to the joint estate, acquires any separate property by his own labour or capital, the property is nevertheless to be considered joint, although the acquirer gets a double share. JUDOONATH TEWAREE *v.* BISHONATH TEWAREE. SHEO DYAL TEWAREE *v.* JUDOONATH TEWAREE. SHEO DYAL TEWAREE *v.* BISHONATH TEWAREE. SHIB DYAL TEWAREE *v.* BISHONATH TEWAREE . . **9 W. R. 61**

13. ——— *Property acquired by exertion of particular members—Double share.* Where, with small aid from paternal property separate and distinct properties are acquired principally through the exertions of particular members of a joint Hindu family, such members are entitled to a double share upon separation. SREE NARAIN BERAH *v.* GOORO PERSAUD BERAH . **6 W. R. 219**

14. ——— *Share of increment to estate.* Where one of the members of a joint undivided family purchases for the benefit of, and with funds belonging to the family, he is entitled to such a share of the property covered by that pur

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HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*e*) MEMBER ACQUIRING FRESH PROPERTY—*concld.*

chase as is equal to his original share in the corpus of the estate, on the principle that the increment must follow the same rule as the corpus. KALEE SUNKUR BHADOOREE *v.* ESHAN CHUNDER BHADOOREE **17 W. R. 529**

15. ——— *Recovery of property by one member at his own expense and labour.* The Court declined to extend to all the remote branches of a Hindu family separate in mess and estate, and having no common interest like those of brothers, the doctrine laid down in a solitary case in which an elder brother, who recovered certain property by his own money and labour, was awarded two-thirds of the property, and the younger brother obtained only one-third. BISHESWAR CHAKRAVARTI *v.* SHITUL CHUNDRA CHAKRAVARTI **8 W. R. 13**

(*f*) MOTHER.

16. ——— **Share of mother**—*Ancestral property—Mitakshara law—Share of mother on partition between father and sons.* Upon a partition of ancestral property between a father and his sons during the lifetime of the father, the mother is, under the Mitakshara law, entitled to a share. MAHABEER PERSAD *v.* RAMYAD SINGH **12 B. L. R. 90 : 20 W. R. 192**

17. ——— *Partition in father's lifetime—Mitakshara law.* By the Mitakshara law a son may sue during the lifetime of his father for a partition of the ancestral property. On such a partition being made, the mother is entitled to have a share allotted to her, by way of maintenance or otherwise, equal to a son's share. LALJEET SINGH *v.* RAJCOOMAR SINGH **12 B. L. R. 373 20 W. R. 337**

18. ——— *Share of step-mother—Partition between sons.* According to the leading authorities of the Mitakshara school, both mother and step-mother are equal sharers with the sons. DAMOODUR MISSER *v.* SENABUTTY MISRAIN **I. L. R. 8 Calc. 537 : 10 C. L. R. 401**

19. ——— *Partition among sons—Deceased son.* On a partition among her sons, a mother is entitled to obtain a share as representative of a deceased son, as well as one in her own right. JUGOMOHAN HALDAR *v.* SARODAMOYEE DOSSEE . . . . **I. L. R. 3 Calc. 149**

20. ——— *Half-brothers and mother—Mother's share.* Where there is a partition after the father's death between several brothers, some of whom are by one wife, some by another, and either wife survives at the time of partition, the property should be first divided between all the brothers and the widow takes an equal share with her own sons of the whole portion

HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*f*) MOTHER—*contd.*

allotted to them. Following the decisions quoted by Sir F. Macnaughten in his "Considerations of Hindu Law," but doubting their propriety. CALLY CHURN MULLICK *v.* JANOVA DASSEE **1 Ind. Jur. N. S. 284**

21. ——— *Step-mother—Partition between brothers.* In a suit for partition between brothers and half-brothers, the mother of the first three defendants (step-mother of the plaintiff) was held to be entitled on the partition to a one-fifth share in the estate. DAMODARDAS MANEKLAL *v.* UTTAMRAM MANEKLAL **I. L. R. 17 Bom. 271**

22. ——— *Partition by sons—Share of son.* On partition of the family property by the sons after their father's death, the mother is entitled to share equal to that of a son. If she has before the partition received property from the father either by gift or will, amounting to more than a son's share, she is entitled to nothing more on partition; if she has received less, she is entitled on partition to as much as will make what she has received equal to a son's share. JODOONATH DEY SIRCAR *v.* BROJONATH DEY SIRCAR **12 B. L. R. 385**

23. ——— *Partition after death of father—Sons of different wives.* On a partition after the father's death between brothers, the sons of different wives who are alive at the time of the partition, such wives are entitled to share with their sons. TORIT BHOOSUN BONNERJEE *v.* TARAPROSONNO BONERJEE **I. L. R. 4 Calc. 756 : 4 C. L. R. 161**

24. ——— *Share of widow mother on partition in ancestral and proceeds of ancestral property.* A Hindu mother on partition is entitled to a share equal to that of a son both in the ancestral property of her husband and in all property acquired with the proceeds of such ancestral property. *Sudanund Mohapattur* v. *Soorjoomonee Doyee, 11 W. R. 436,* dissented from. ISREE PERSHAD SINGH *v.* NASIB KOOER **I. L. R. 10 Calc. 1017**

25. ——— *Partition by sons—Widow's share—Will, construction of.* On partition of the joint family property by the sons after their father's death, the widow is entitled to get a share equal to that of each of the sons, and, if she has received any property either by gift or legacy from the father, she is entitled to so much only as with what she has already received would make her share equal to that of each of the sons. *Jadoonath Dey Sircar* v. *Brojonath Dey Sircar, 12 B. L. R. 385,* followed. Where a Hindu by his will, after bequeathing a legacy to his widow of R1,000 and appointing her executrix along with other executors, directed that his executors should divide the estate amongst his sons in accordance with the

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HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*f*) MOTHER—*contd.*

shastras after his youngest son had attained majority:—*Held*, that such direction did not amount to an absolute bequest to his sons so as to exclude the widow from being entitled to a share upon a partition between the sons. KISHORI MOHUN GHOSE *v.* MONI MOHUN GHOSE
I. L. R. 12 Calc. 165

26. _____ *Bengal school of law—Partition by sons—Succession to share given to a mother on partition.* Under the Bengal school of law, the share which a mother takes on partition among her sons is not taken from her husband's estate either by inheritance or by way of survivorship in continuation of any pre-existing interest, but is taken from her sons in lieu of, or by way of provision for, that maintenance for which they and their estates are already bound; and on her death that share goes back to her sons from whom she received it. SOROLAH DOSSEE *v.* BHOOBUN DOSSEE NEOGHY. UNNOPOORNAH DOSSEE *v.* BHOBBUN MOHUN NEOGHY . . **I. L. R. 15 Calc. 292**

27. _____ *Maintenance of Hindu widow where there are sons by different mothers, how chargeable.* When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavahana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Ch. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares allotted to the son or sons of whom she is the mother. *Jeeomony Dossee* v. *Attaram Ghose* (Macnaghten's *Cons. H. L. p. 64*) referred to and approved. HEMANGINI DASI *v.* KEDARNATH KUNDU CHOWDHRY
I. L. R. 16 Calc. 758
L. R. 16 I. A. 115

28. _____ *Mother's right to a share in lieu of maintenance, on a partition suit having been instituted.* After the institution of a partition suit by a member of a joint Hindu family consisting of six brothers and a mother, but before the summonses were served, one of the sons (defendant No. 1) transferred his share of the property, alleging it to be one-sixth, to a third party, who was subsequently added as a party defendant to the suit. At the time of the transfer both the transferor and the transferee had notice of the said suit. On a question having been raised as to what share of the property the transferee was entitled to:—*Held*, that, inasmuch as the suit for partition was instituted by one of the sons, the mother had an inchoate or quasi-contingent right, which ripened into an absolute right on a partition having taken place (which happened in this case), and therefore she having been entitled to a share, the transferee could not get more than what the transferor was entitled to at the time of the transfer, *i.e.*, one-seventh share of the property. JOGENDRA CHUNDER GHOSE *v.* FULKUMARI DASSI
I. L. R. 27 Calc. 77

JOGENDRO CHUNDER GHOSE *v.* GANENDRA NATH SIRCAR . . . . . **4 C. W. N. 254**

29. _____ *Mother's right to a share in lieu of maintenance on a partition—Right of a purchaser from one of the sons.* A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence. A purchaser from one of the sons has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. *Jogendro Chunder Ghose* v. *Fulkumari Dassi, I. L. R. 27 Calc. 77*, followed. AMRITA LAL MITTER *v.* MANICK LALL MULLICK . . . **I. L. R. 27 Calc. 551**
4 C. W. N. 764

30. _____ *Partition—Evidence of partition—Cesser of commensality—Partition by sons without giving mother a share—Decree altering shares on partition—Permission to sue—Suit for both moveable and immoveable property—Civil Procedure Code (Act XIV of 1882), s. 44, Rule (a)—Cause of action, identical.* Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property but it is not conclusive. *Anundee Koonwar* v. *Khedoo Lal, 14 Moo. I. A. 412*, followed. In this case it was held by the Judicial Committee that the evidence in other respects supported the theory that the cesser was adopted with a view to a partition, which was eventually completed. A partition was made between four sons forming a joint family governed by Mitakshara Law, without allotting their mother a share. *Held*, that, it not being shown that she consented to relinquish her share, or acquiesced in the partition, the mother was not bound by it. *Krishnabi* v. *Khangowda, I. L. R. 18 Bom. 197*, referred to. In a suit by the widow of one of the sons for the one-fourth share, which had on the partition been allotted to her husband, in which suit all the parties interested were represented: *Held* (varying the decree of the High Court), that the plaintiff was entitled to a one-fifth share only, and that the mother was entitled to have a one-fifth share allotted to her. *Held*, further, (affirming the decision of the High

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HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*f*) MOTHER—*concld.*

Court), that s. 44, rule (*a*), of the Civil Procedure Code (Act XIV of 1882), was not applicable to the suit (one for property, both moveable and immoveable) inasmuch as the cause of action was the same for both kinds of property. *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran, I. L. R. 10 Mad. 375,* referred to. GANESH DUTT THAKOOR *v.* JEWACH THAKOORAIN (1904)

I. L. R. 31 Calc. 262 ; s.c. L. R. 31 I. A. 10
8 C. W. N. 146

31. ——— *Mitakshara, Ch. I, ss. 6, 7 ; Ch. II, s. 9 ; Ch. VI, s. 4—Partition—Father—Son—Mother's share, allotment and enjoyment of—Maintenance.* Under the Mitakshara law when partition of joint family property takes place, during the father's lifetime, at the instance of a son, the mother of the son is entitled to a share equal to that of her husband and her son ; and she is entitled to have the share separately allotted, and to enjoy that share when so allotted. *Suraj Bunsi Koer* v. *Sheo Prosad Singh, I. L. R. 5 Calc. 148 ; Pursid Narain Singh* v. *Honooman Sahay, I. L. R. 5 Calc. 845 ; Sumrun Thakur* v. *Chunder Mun Misser, I. L. R. 8 Calc. 17 ;* and *Deendyal Lall* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198,* relied upon. *Quære :* Whether a share so allotted to a mother is in lieu of her maintenance. DULAR KOERI *v.* DWARKANATH MISSER (1905)

I. L. R. 32 Calc. 234
s.c. 9 C. W. N. 270

32. ——— **Mother's share on partition**—*Hindu law—Dayabhaga school—Life interest—Application for execution of decree by her executor—Refusal—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 232, 244.* Under the Hindu law, according to the Bengal school, when upon partition a share is given to the mother she gets it simply in lieu of, or as provision for her maintenance and not because she is a co-parcener in the estate, and the share reverts upon her death to her sons out of whose portion it was taken. *Kedar Nath Coondoo* v. *Hemangini Dassi, I. L. R. 13 Calc. 336, 340 ; Sorolah Dossee* v. *Bhooban Mohan Neogi, I. L. R. 15 Calc. 292,* and *Hemangini Dasi* v. *Kedar Nath Kundu, I. L. R. 16 Calc. 758,* followed. HRIDOY KANT BHATTACHERJEE *v.* BEHARI LAL MOOKERJEE (1906) **11 C. W. N. 239**

33. ——— *Partition amongst sons—Mother's share reverts on death to sons.* When the Hindu law prescribes a share being allotted to a woman upon a partition after her husband's death, it is a share given to her simply in lieu of maintenance and such share reverts according to the Bengal school, upon her death to those heirs of her husband out of whose portion the share was taken. TRIPURA SUNDARI DEBI *v.* DAKSHINA MOHUN ROY (1906) . **11 C. W. N. 698**

(*g*) PURCHASERS.

34. ——— **Suit by the purchaser of an undivided share of family property**—*Time when the share is ascertained.* The purchaser from a member of a joint Hindu family of his share of a house which belonged to the family, sued for the partition and delivery of possession of the share purchased by him. The number of persons entitled as co-parceners to the property of the family had increased between the date of the purchase and that of the suit. It did not appear whether the house constituted the whole or only part of the property of the family, and no question was raised as to the competency of the plaintiff to sue for a partial partition. *Held,* by the Full Bench, that the share to be awarded to the plaintiff should be computed with reference to the state of the joint family at the date of the suit. *Held,* by the Divisional Bench, that the decree appealed against by which the plaintiff was to recover the value of the share of the house computed as above and not the share itself, was right. RANGASAMI *v.* KRISHNAYYAN . . **I. L. R. 14 Mad. 408**

As to the rights of a purchaser from a co-parcener, *see* AMRITO LAL MITTER *v.* MANICK LALL MULLICK **I. L. R. 27 Calc. 551**
4 C. W. N. 764

35. ——— **Conveyance by father of immoveable property alloted to him in partition subsequently to the date of the conveyance**—*Validity—Consideration for conveyance inadequate—Property conveyed, the undivided family property of the assignor and his own sons—Purchaser's right limited to a charge on the property to the extent of the consideration paid—Transaction in effect a gift as to part and a sale as to remainder.* In 1898 *R* and his brother filed a suit against their father and their two younger brothers for partition. On 18th December 1898, before the decree was passed, *R* conveyed a house to the present first defendant. The decree was then passed, and by it the house in question was allotted to *R's* share. In 1900 a suit was instituted on behalf of *R's* minor sons against *R* praying for partition of the properties, which had been allotted to *R* by the decree in the suit of 1898. On October 8th, 1900, *R* applied to be, and was adjudged, an insolvent. The present plaintiff was appointed receiver in the minor's partition suit against *R*, but as the present first defendant (the alienee of the house in question) had not been made a party to it, the receiver was authorized to institute the present suit against the present first defendant in order to determine the validity of the conveyance. Though the conveyance had been executed prior to the decree, by which the house was actually allotted to *R*, it was not clear whether the house had not become the separate property of *R* under an agreement prior to the institution of the suit of 1898. *Held,* that, in any event, every member of an undivided family has a vested interest in joint family property, which interest will be affected by transactions entered into by him in favour of purchasers for value : *Ayyagiri Venkata Ramayya* v.

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HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*contd.*

(*g*) PURCHASERS—*concld.*

Ayyagiri Ramayya, I. L. R. 25 Mad. 690. The conveyance, therefore, could not be held to be inoperative and void by reason that the property conveyed was not vested in the vendor at the date of the conveyance. The validity and operation of the conveyance must be decided on the footing that it was a conveyance of ancestral property made by a Hindu father, the managing member of a joint Hindu family consisting of himself and his minor sons. *Held*, also, that, inasmuch as the conveyance purported to have been made only in part for valuable consideration, the estimated value of the house being R11,000, and the valuable consideration recited in the conveyance being only R1,000 the conveyance was, in effect, one for value to the extent of R1,000, and a conveyance by way of gift to the extent of R10,000. In these circumstances, if the property conveyed had been the sole and separate property of *R*, the conveyance would have been valid and operative in its entirety. But as the property conveyed was the joint property of *R* and his sons, effect could not be given to the conveyance, as if *R* had been the sole owner of the whole property, or even of a third part thereof. It is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share or any portion thereof; and such an alienation, if made, is void *in toto*. This principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable. In such a case the transaction can be upheld against the family, in respect of the alienor's interest in the joint family property, only to the extent of the value received, and *semble* that, if the conveyance be in respect of a reasonable portion of the joint family property, for the discharge of an antecedent debt (not incurred for an illegal or immoral purpose), the conveyance, as such, will bind the sons also. Under the circumstances of the present case: *Held*, that first defendant was not entitled to claim the benefit of the conveyance as such, in respect either of the whole house or *R's* one-third share therein, which subsequently to the conveyance had become vested in the Official Assignee. But as first defendant had paid value to the extent of R1,000, and that was an antecedent debt of *R*, binding also on his minor sons, first defendant was entitled to an equitable charge on the whole of the property to the extent of that R1,000 with interest thereon from the date of the conveyance, and was liable for rent. ROTTALA RUNGANATHAM CHETTY *v.* PULICAT RAMASAMI CHETTY (1904)

I. L. R. 27 Mad. 162

(*h*) WIDOW.

36. ———— Share of widow—*Son of husband's half-brother—Widow of husband's father.* The plaintiff, the widow and heiress of one *N*, brought a suit for partition of the estate of one *R* (her late husband's father) against *A*, a son of her late husband's half-brother, and *K*, the widow of *R*, the parties to the suit being the only members of the family then alive. *Held*, that *A* took a one-half share in the estate, the other half share being divisible between the widow of *R* and the widow of *N*. *Cally Churn Mullick* v. *Janova Dossee, 1 Ind. Jur. N. S. 284*, followed. KRISTO BHABINEY DOSSEE *v.* ASHUTOSH BOSU MULLICK

I. L. R. 13 Calc. 39

37. ———— Bengal school of law—*Partition of one item of joint family property by outside shareholder—Widow's share on such partition in lieu of maintenance.* The right of a widow (a member of a joint Hindu family) to a share in lieu of maintenance only arises when there is a partition of the joint family estate in the sense that it ceases to exist as a joint estate. Hence upon a partition enforced by a stranger in respect of property which forms merely one item of the joint estate, the widow is not entitled to such share, notwithstanding such division, the main estate remains undivided. *Held*, upon the facts of this case, that the widow was not entitled to such share. BARAHI DEBI *v.* DEBKAMINI DEBI

I. L. R. 20 Calc. 682.

38. ———— *Hindu Law—Dayabhaga—Acquisition of property through personal exertion of some co-parceners with slight assistance from joint funds—Partition—Shares.* Where a joint family karbar was built up after the death of one of four brothers living jointly and governed by the Dayabhaga law, with some slight assistance from the joint funds but through the personal exertion entirely of the three surviving brothers, in a suit for partition of the assets of the karbar brought by the widow of the deceased brother, she was entitled only to a half of the share of each of the surviving brothers. LAL CHAND SHAW *v.* SWARNAMOYEE DASI . **13 C. W. N. 1133**

39. ———— Mitakshara law—*Joint undivided property.* A Hindu widow, entitled by the Mitakshara law to a proportionate share with sons upon partition of the family estate, can claim such share, not only quoad the sons, but as against an auction-purchaser at the sale in the execution of a decree of the right, title, and interest of one of the sons in such estate before voluntary partition. BILASO *v.* DINA NATH

I. L. R. 3 All. 88

40. ———— Widow of deceased brother. Where there has been a general partition, but some of the property remains joint, the widow of a deceased brother will not participate in the undivided residue. BADAMOO KOOWAR *v.* WUZEER SINGH . **1 Ind. Jur. N. S. 144 : 5 W. R. 78**

41. ———— Right to an account—*Suit for partition referred to arbitration, but property not wholly partitioned—Infant's right to an account of his share of the property partitioned and unpar-*

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HINDU LAW—PARTITION—*contd.*

5. SHARES ON PARTITION—*concld.*

(*h*) WIDOW—*concld.*

titioned. *A*, a member of a Hindu joint family, died leaving a widow and no issue. By his will he appointed *B*, *C*, and *D*, members of the joint family, his executors, and gave his widow power to adopt. In pursuance of that power, the widow adopted *E*. The executors instituted a suit for partition of the joint estates, and the suit was referred to the arbitration of *Z*. He died without having partitioned the whole of the property, and an application was then made to the Court to determine the partition. The Court granted the application, and the suit came on for trial. The infant *E* asked for an account to be taken of the dealings of the joint property, and of the rents and profits on behalf of the estate of his late father, from the death of his father up to the appointment of a receiver. *Held*, that in respect of the properties remaining unpartitioned the infant was entitled to an account of the dealings of the joint property and of the rents and profits from the death of his father up to the time a receiver was appointed, but as to the properties already partitioned, he was not so entitled. SARAT CHUNDER SINGH *v.* NITYE SUNDER SINGH . **I. L. R. 27 Calc. 1013**

(*i*) WIFE.

42. ——— Mitakshara law—Share of wife—*Distribution by mortgages and sales in execution.* By vs. 1 and 2 of s. 7 of Ch. I of the Mitakshara, when a distribution of ancestral property is made during the lifetime of a father of a family subject to Mitakshara law, his wife, is entitled to an equal share with her husband and her sons. *Held*, in this case, that the mortgages by *A* and the sales in execution which occurred during his lifetime must, as against the defendants, be taken to be a distribution within the meaning of those verses; and as possession was taken by the defendants during *A's* lifetime, it must be considered a distribution made within that period, and therefore the widow was entitled to an equal share with her two sons. PURSID NARAIN SINGH *v.* HONOOMAN SINGH

I. L. R. 5 Calc. 845 : 5 C. L. R. 576

BULDEO SINGH *v.* MAHABEER SINGH

1 Agra 155

43. ——— *Mitakshara law—Ancestral property.* Under the Mitakshara law, where partition of ancestral property takes place between a father and a son, the wife of the father is entitled to a share. *Mahabeer Pershad* v. *Ramyad Singh, 12 B. L. R. 80; Laljeet Singh* v. *Rajcoomar Singh, 12 B. L. R. 373; Jodoonath Dey Sircar* v. *Brojonath Dey Sircar, 12 B. L. R. 385;* and *Pursid Narain Singh* v. *Honooman Sahay, I. L. R. 5 Calc. 845*, followed. SUMRUN THAKUR *v.* CHUNDERMUN MISSER . . . **I. L. R. 8 Calc. 17**

9 C. L. R. 415

SUNDUR BAHU *v.* MONOHUR LALL UPADHYA

10 C. L. R. 79

HINDU LAW—PARTITION—*contd.*

6. RIGHT TO ACCOUNT ON PARTITION.

1. ——— Right to account of past transactions—*Share in outstanding debts—Interest.* A plaintiff entitled on partition to half the property in the hands of his brother is bound to bring into hotchpot any ancestral property, or property acquired from ancestral funds which may be in his own hands, but is not liable to account for money received by him from his father while living in commensality with him and his brother, the circumstances of such receipt not being of a kind to impute fraud. Members of an undivided Hindu family making partition are entitled as a rule, not to an account of past transactions, but to a division of the family property actually existing at the date of partition. In a partition suit, the Court ought not to order an immediate money payment by the defendant to the plaintiff of his share in the outstanding debts due to the family estate, as if such outstanding debts had been recovered and the money were in the hands of the defendant. As a member of an undivided Hindu family is not bound to effect a partition by paying a certain sum of money to his co-parceners, the Court in a partition suit ought not to award interest on money decree to be paid by the defendant to the plaintiff. LAKSHMAN DADA NAIK *v.* RAMACHANDRA DADA NAIK. RAMACHANDRA NAIK *v.* LAKSHMAN DADA NAIK . . . . **I. L. R. 1 Bom. 561**

S.C. on appeal to Privy Council.

I. L. R. 5 Bom. 48

2. ——— *Account in partition suit. Held*, that, in the case of joint enjoyment by the members of the whole family, or enjoyment by different members, of different portions of the family property, the Court will not, except under special circumstances, order an account to be taken of past transactions, but will make division of the property actually existing at the date of partition. *Lakshman Dada Naik* v. *Ramchandra Dada Naik, I. L. R. 1 Bom. 561 : I. L. R. 5 Bom. 48*, followed. KONERRAV *v.* GURRAV

I. L. R. 5 Bom. 589

3. ——— Account of mesne profits—*—Infant ejected and excluded from enjoyment of family property.* The rule which limits the right of members of a Hindu family seeking partition to a division of the family property existing at the date of division does not apply to the case of an infant who has been ejected by the manager from the family house and excluded from enjoyment of the family property. In such a case the manager is bound to account to the infant for mesne profits from the date of his exclusion. KRISHNA *v.* SUBBANNA

I. L. R. 7 Mad. 564

4. ——— Liability of manager to account on occasion of partition—*Right of members who were minors at time of management to an account from manager—Manager also guardian of minors—Nature of account to be rendered by a manager on partition—Family idol and property appertaining thereto—Right of mother to a share*

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HINDU LAW—PARTITION—*contd.*

6. RIGHT TO ACCOUNT ON PARTITION—*contd.*

of estate on partition. A manager of a Hindu family cannot refused to render any account whatever of his management on the occasion of a partition or required the other members of the family to accept his *ipse dixit* as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objections the other members of the family can take to it, must depend on the conduct of the manager and the other members of the family, the nature of the property and the circumstances of the family, and cannot be stated in definite terms. Members who were minors during the management cannot be taken to have consented to the management, and are entitled, when they attain their majority, to hold the manager liable not only for acts amounting to fraud, but also where the management, has been grossly negligent and prejudicial to their interests; the presumption, however, being that in the absence of evidence the property for partition is such as it exists at the time of the suit for partition. A brother sued his three brothers for partition of their father's estate, which consisted of moveables and immoveables and a banking business. As senior member of the family, he also claimed the rajseva (family idol) and the property appertaining to it. The mother (*K*) of the first three defendants, and *M*, the widow of a deceased brother of the plaintiff, and *N*, his aunt, the widow of his father's brother, were also defendants to the suit. The three brothers (defendant Nos. 1, 2, and 3) alleged that their father had died in 1864, at which time they were minors; that the plaintiff had managed the estate ever since, and had in 1865 obtained a certificate of guardianship and administration to their estate under Act XX of 1864; that the plaintiff's management had been fraudulent, improper and wasteful and prejudicial to their interests as minors, and they contended that they were entitled to an account from him of the property at the date of their father's death and of the proceeds, income, and profits from that date to the date of suit. They contended that, as the plaintiff had been appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases, and other transactions entered into by him were necessary and for their benefit. The lower Court held that the family being united, the Minors Act did not apply, and that the fact that the plaintiff had obtained a certificate of guardianship did not enlarge his liability to account, and that on the authorities the manager of a Hindu family was not bound to account for past transactions, nor for mesne profits, unless in cases of fraud or gross extravagance, and that the state of the family property as it existed at the time of partition was to be the basis of the distribution. On appeal to the High Court:—*Held*, that the defendants were entitled to an account from the plaintiff, and that it was open to them to raise objections with regard to the plaintiff's man against. *Held*,

HINDU LAW—PARTITION—*contd.*

6. RIGHT TO ACCOUNT ON PARTITION—*concld.*

also, as to the nature of the account which the plaintiff should render of past transactions, that, having regard to the circumstances of the family and the nature of the family property, the plaintiff, in producing the books of the firm since the father's death which contained an account of all transactions relating to the firm's property and of the moveable and immoveable property, had done all that he could be expected to do, whether as the family manager or as certificated administrator of the defendants' interests in the family property. *Held*, also, that the circumstances that the plaintiff had obtained a certificate of administration of the estate of the minors and sold their interests in certain houses, without the consent of the Court, could not give them a counter-claim against the plaintiff, unless they proved that they had been prejudiced by the sale. As to ornaments purchased since the death of the father, it was directed that they should be brought into hotchpot by all the parties in making the partition. As to remissions of tenants' rent and compromises of suits, although a considerable loss was shown to have resulted from them, it was held that the defendants had failed to show that they were improper or uncalled for, and there was no evidence to make the plaintiff himself liable for them, or to forbid their being transferred to the general account. The losses in trade also were properly debited to the general business of the firm, and the plaintiff was not personally liable for them. *Held*, also, that the plaintiff was entitled to take the rajseva (family idol) and keep it with the property appertaining thereto as the family idol and the property thereof with liberty to such members of the family as are or shall become marjadas to have access to it for the purpose of worship. *Held*, also, that *K*, the mother of the first three defendants (step-mother of the plaintiff), was entitled on this partition to a one-fifth share in the estate. DAMODARDAS MANEKLAL *v.* UTTAMRAM MANEKLAL

I. L. R. 17 Bom. 271

7. EFFECT OF PARTITION.

1. ——— **Finality of partition**—*Ground for re-opening partition—Fraud—Mistake—Property subsequently recovered.* Partition once effected is final and cannot be re-opened on the ground of the inequality of shares. It can be reopened only in case of fraud, or mistake, or subsequent recovery of family property. MOW VISHWANATH *v.* GONESH VITHAL . . . **10 Bom. 444**

2. ——— **Apportionment of debt for which father was jointly liable**—*Effect of separation in estate.* A family having become separate in estate with apportionment of a debt, once joint, among its several members, the sons of one of the latter, on their father's decease, are not liable for the whole debt for which he at one time was responsible jointly with the rest of the family,

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HINDU LAW—PARTITION—*contd.*

7. EFFECT OF PARTITION—*contd.*

but only for his portion of the debt. DURGAPERSHAD *v.* KESHOPERSAD SINGH
I. L. R. 8 Calc. 656 : 11 C. L. R. 210
L. R. 9 I. A. 27

3. ——— **Effect of partition on liability of a divided son where debt was incurred by the father before partition**—*Decree against father and execution proceedings against son's property in father's lifetime.* In 1890 a person subject to the Hindu law incurred a debt for purposes that were neither illegal nor immoral. In 1891 he divided the family property with his son, and a house fell to the son's share under the division. In 1893 the creditors sued the father in respect of the debt, and, having obtained a decree, sought in the father's lifetime to make the son's house liable in execution thereof. *Held*, that property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of his father, even though the debt has been incurred before the partition, provided that the partition is not shown to have been made with a view to defraud or delay creditors. KRISHNASAMI KONAN *v.* RAMASAMI AYYAR
I. L. R. 22 Mad. 519

4. ——— *Contract by managing member of joint family, consisting of a father and two sons—Subsequent partition, by which one son became divided—Liability of divided son (to extent of family property taken at the division) for loss arising under the contract.* Whilst a father and two sons were carrying on business as an undivided trading Hindu family, the father, as managing member, entered into a contract by which he undertook to pay to plaintiff any shortfalls that might take place in respect of consignments of indigo. Subsequently to this contract, one of the sons became divided from the family. Short falls having occurred, the plaintiff sued to enforce the contract against the divided son as well as the two other members of the family. *Held*, that the son was liable only to the extent of the family property which had come to him under the partition. *Krishnasami Konan* v. *Ramasami Ayyar, I. L. R. 22 Mad. 519*, distinguished. RAMACHANDRA PADAYACHI *v.* KONDAYYA CHETTI (1901)
I. L. R. 24 Mad. 555

5. ——— **Mortgage of an undivided share**—*Joint Hindu family—Effect on such mortgage of a subsequent partition.* A mortgage of an undivided share which, under a partition, has been allotted to another co-sharer, cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, but the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. *Byjnath Lall* v. *Ramoodeen Chowdry, L. R. 1 I. A. 106*, and *Hem Chunder Ghose* v. *Thako Moni Debi, I. L. R. 20 Calc. 533*, referred to. AMOLAK RAM *v.* CHANDAN SINGH (1902) . . **I. L. R. 24 All. 483**

HINDU LAW—PARTITION—*contd.*

7. EFFECT OF PARTITION—*contd.*

6. ——— **Transactions amounting to partition or separation**—*Reunion—Agreement to reunite—Minor—Presumption when one co-parcener separates himself—Agreement to remain united—Mitakshara Law.* According to the text of *Vrihaspati* (*Mitakshara*, Ch. II, s. 9), a reunion in estates, properly so called, can only take place between persons who were parties to the original partition. *Semble :* An agreement to reunite cannot be made on behalf of a person during his minority. There is no presumption, when one co-parcener separates from the others, that the latter remain united. Where it is necessary, in order to ascertain the share of the outgoing co-parcener, to fix the shares which the others are, or would be, entitled, to, the separation of one may be said to be the virtual separation of all. And an agreement amongst the remaining co-parceners to remain united or to reunite must be proved likely any other fact. In this case, in which the appellant claimed to be entitled on the death of his uncle in 1882 to the property of a joint family by right of survivorship, one of the members had admittedly separated himself in 1869, and no agreement by the other members to remain united or to reunite had been proved ; and, upon the circumstances of, and evidence in, the suit, it was held by the Judicial Committee that the appellant had not sufficiently established the state of jointness between himself and his uncle, which was necessary to make his claim successful ; and that, even had it been established, transactions in 1889 settled with the appellant's knowledge and consent amounted to a division amongst the members of the family, which would defeat his claim. BALABUX *v.* RUKHMABAI (1903) . . . **I. L. R. 30 Calc. 725**
s.c. 7 C. W. N. 642
L. R. 30 I. A. 130

7. ——— **Suit by minor on deed of partition**—*Joint family—Partition—Partition deed giving certain advantages to minor member of family—Right of person so benefited to sue on deed—Specific Relief Act (I of 1877) s. 23 (c).* By a deed of partition executed by the adult members of a joint Hindu family it was agreed that a certain minor member of the family, represented in the execution of the deed by his father, should receive a certain share in a particular village " by right of primogeniture," and the agreement further recited that the member in question had been put into possession of the share allotted to him. It was further agreed that, inasmuch as the property thus dealt with was subject to two mortgages, the other members of the family would be responsible for the payment of the mortgage debts and would indemnify the recipient of the mortgaged property in case of proceedings being taken against such property for satisfaction of the mortgage debts. *Held*, on suit by the minor (after attaining majority) to compel reimbursement by the other members of the family, that the partition deed was enforceable in favour

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HINDU LAW—PARTITION—*contd.*

7. EFFECT OF PARTITION—*concld.*

of the plaintiff, just as much as, if just and equitable, it would have been binding upon him, and that the plaintiff was entitled to sue for any benefit which the deed purported to secure to him. *Annamali Chetti* v. *Murugasa Chetty, L. R. 30 I. A. 220,* and *Gandy* v. *Gandy, L. R. 30 Ch. D. 57,* referred to. *Held,* also, on a construction of the partition deed, that the plaintiff was also entitled to sue having regard to the terms of s. 23 (c) of the Specific Relief Act, 1877. AWADH SARJU PRASAD SINGH *v.* SITA RAM SINGH (1906) . **I. L. R. 29 All. 37**

8. ——— Effect of partition of family property between two branches of the family without specification of individual shares of one branch. By an award the property of a joint Hindu family consisting of an uncle and two nephews was partitioned, one share being allotted to the uncle and one to the nephews, but nothing was said as to the shares to be taken by the nephews individually, nor did they express any desire to separate. *Held,* that the presumption was that the share of the nephews still continued to be joint property so far as they were concerned. *Balkishan Das* v. *Ram Narain Sahu, I. L. R. 30 Calc. 738,* distinguished. DURGA DEI *v.* BALMAKUND (1906) . . **I. L. R. 29 All. 93**

9. ——— Right of representation —*Divided son as nearest sapinda does not exclude divided grandson or great-grandson.* Partition does not annul the filial relation nor the right of succession incidental to such relation. The right of divided sons, grandsons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided son will not, on the principle of the exclusion of remoter by nearer sapindas, exclude the divided grandson in the succession to divided property of the ancestor. *Ramappa Naicken* v. *Sithammal, I. L. R. 2 Mad. 184,* referred to. *Mathuvaduganatha Tevar* v. *Periasami, I. L. R. 16 Mad. 15,* referred to. MARUDAYI *v.* DORAISAMI KARAMBIAN (1907) . . . **I. L. R. 30 Mad. 348**

8. AGREEMENTS NOT TO PARTITION AND RESTRAINT ON PARTITION.

1. ——— Condition against partition —*Effect of prohibition.* Where a neumputro, executed by the father of a joint Hindu family many years before his death, declared that his four sons were not to divide the property ; but that any single member of the family, desiring to make any particular arrangement, would be bound by the wishes of the others, and it happened eventually that one of the sons predeceased his father without issue, and another leaving two sons, who were not bound by the prohibition :—*Held,* that, as these grandsons were parties having interest in the property, conditions which do not and cannot affect them ought not to be held to restrain the other co-sharers.

HINDU LAW—PARTITION—*contd.*

8. AGREEMENTS NOT TO PARTITION AND RESTRAINT ON PARTITION—*contd.*

Quære : Is such a provision in the deed as that which prohibits partition valid, or is it contrary to Hindu law, *ultra vires,* and null and void ? JEEBUN KRISTO GOSSAMEE *v.* ROMANATH GOSSAMEE **23 W. R. 297**

2. ——— Agreement not to partition—*Perpetuity—Invalid agreement.* An agreement between co-parceners never to divide certain property is invalid by the Hindu law as tending to create a perpetuity. RAMLINGA KHANAPURI *v.* VIRUPAKSHI KHANAPURI . **I. L. R. 7 Bom. 538**

3. ——— Binding covenant. The members of a Hindu family, jointly and severally interested in a certain house and premises, covenanted for themselves, their heirs, and executors, that the said house and premises should never be partitioned, except by the unanimous consent of the contracting parties. *Held* by the lower Court, and confirmed on appeal, that whether valid or not as regards parties representatives by purchase, the covenant is binding upon those who are personally parties to the deed. RAMDHUN GHOSE *v.* ANUND CHUNDER GHOSE **2 Hyde 93**

4. ——— Purchaser of share of member of joint family—*Alienation.* The members of a joint Hindu family entered into an agreement not to partition their estate, which was to "continue in one joint undivided occupation as at present." *Held,* that a purchaser at a Sheriff's sale of the share of one of the contracting parties was not bound by the agreement. Such an agreement does not prevent a party to it from alienating his interests in the estate. ANAND CHANDRA GHOSE *v.* PRANKRISTO DUTT **3 B. L. R. O. C. 14 ; 11 W. R. O. C. 19**

5. ——— Dedication to idol— *Mortgage. R D,* a Hindu, died possessed of large property, both real and personal, and leaving surviving him two sons, *P D* and *A D,* his sole heirs, who after his death came to an amicable partition of some portion of the joint estate, but continued to hold jointly the family dwelling-house and the land thereto attached. On 26th November 1849, *P D* and *A D* executed a deed of trust of the joint family dwelling-house, among other properties, by which, after reciting that they had kept certain property joint, and that they had been performing the family ceremonies, etc., and that it was their intention that they should be performed in the same manner at the family dwelling-house, and after setting apart certain real property for the expenses thereof, it was agreed that "we will, during our lifetime, jointly perform the said acts after that manner and according to practice : on the death of one of us, the survivor and the executor or representatives of the deceased person will act after that manner and according to practice for a period of twenty years from the date of the

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death of him who shall die last; our executors or representatives will jointly perform, out of the proceeds of the aforesaid real property, the puja and so forth at our dwelling-house in Simla, in Calcutta and entertain strangers at the garden which once appertained to *R S B*. The said real property and our dwelling-house and the baitakhana in station Sulkea, etc., neither we nor our heirs or any of them will have the power to make a partition thereof during the said prescribed period. On the expiration of the said period, should our representatives wish to make a partition of all the said real property, etc., having made a division, they will have the power to perform the acts and ceremonies separately." The said dwelling-house was thereafter held jointly by *P D* and *A D* on the trust of the deed of 26th November 1849. *P D* in December 1849 died, leaving two adopted sons, *M D* and another, on the death of whom the plaintiff was adopted. *P D* also left a will, whereby he directed that the purport of the deed of 26th November 1849 should never be violated. *A D* died 30th January 1856, leaving a will whereof he appointed the defendants *N D*, *C G*, and *S G*, executors, and thereby he devised all his property, subject to certain legacies, to *C G* and *S G*. By his will he charged his executors not to fail to carry out the agreement. The ceremonies continued to be performed as directed in the deed by the plaintiff and the defendants *M D*, *N G*, *C G*, and *S G*. By deed dated 14th July 1863, *N D*, *C G*, and *S G*, mortgaged for valuable consideration, to the defendant *A B M* certain property, including an undivided share of the said dwelling-house. *A B M* afterwards instituted a suit on the mortgage against *N D*, *C G*, and *S G*, and by the decree in that suit it was, on 14th April 1870, ordered that the defendants should be absolutely foreclosed of all equity of redemption in the said family dwelling-house and other premises comprised in the mortgage. Subsequent proceedings, taken by *A B M* against the defendants *N D*, *C G*, and *S G*, resulted in *A B M* obtaining a writ of possession against them, which he endeavoured, but unsuccessfully, to have executed. The present suit was brought to have the deed of trust of November 26th, 1849, established and to have the trusts thereof declared. In 1854 two suits had been brought in the Supreme Court —one by *M D* and the present plaintiff, and the other by *A D*—in which suits decrees were made declaring the will of *P D* and the agreement of 26th November 1849 to be fully proved and established and binding on *A D* and his heirs and the representatives of *P D*. It was found on the evidence in the present suit that the agreement of 26th November 1849 was not fraudulent; that when *A D* died, the estate belonging to the representatives of *P D*, independently of the property set apart, was more than sufficient to meet any claims against the estate of *P D*; that the agreement of 26th November 1849 had, up to the present time, been

steadily acted on by the representatives of *P D* and by the representatives of *A D* until very recently; that *A B M* took the mortgage with notice of the agreeement and of the fact that it was being acted on under the decrees of the supreme Court. *Held*, that the family dwelling-house was not absolutely dedicated by the deed of 26th November 1849 to the worship of the deities and performance of the ceremonies mentioned therein, and therefore was not inalienable. But the prohibition in the deed of 26th November 1849 against partition of the family dwelling-house for twenty years after the death of the survivor of *P D* and *A D* implied also that three should be no alienation of it for twenty years. Until the end of the twenty years *A B M* was not entitled to possession in any shape. ANATH NATH DEY *v.* MACKINTOSH **8 B. L. R. 60**

6. ——————————— *Agreement restraining partition—Right of purchase of share—Trust for idol.* By an agreement entered into between five brothers, who formed a joint Hindu family, it was provided that none of the parties, "nor their representatives, nor any person, should be able to divide the real and personal property belonging to the family into shares; that while the male descendants of any of the brothers lived, the sons of the daughter of the deceased persons should not be entitled to the real and personal properties, nor to the proceeds thereof; that none of the brothers, nor any of their male descendants, should be able to adopt a son; that during the lifetime of the brothers, or of the one of them who should be the last survivor, their earnings should be regarded as joint property, and that, if any brother or son of a brother separated himself from the family, he should only get R20,000 as his share." The agreement further provided for the maintenance of widows and infant children, and that the sum of two lakhs of rupees should be taken from the joint khatta for the purpose of carrying on certain business. The family dwelling-house had belonged to the mother of the brothers. She made a gift by deed of the house and lands and houses appertaining thereto to an idol, and appointed her sons managers, and directed that they should live in the house, and should not have power to partition or alienate any portion of the properties settled. The deed contained provisions as to the disposition of the profits arising from the lands and houses, *viz.*, to provide accommodation for the families of the managers and to invest the surplus in the purchase of lands in the name of the idol. A son of one of the brothers sold his share in the family property. In a suit by the purchaser for partition and an account of the property:—*Held*, that the general scheme of the arrangement between the brothers was such as could only be binding upon the actual parties to it, not upon a purchaser from one of the parties and *á fortiori* not, upon a purchaser from the heir of one of the

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HINDU LAW—PARTITION—*contd.*

8. AGREEMENT NOT TO PARTITION AND RESTRAINT ON PARTITION—*contd.*

parties. *Anand Chandra Ghose* v. *Prankristo Dutt, 3 B. L. R. O. C. 14,* followed. The object of the arrangement was to settle the family property upon trust for the maintenance of the members of the family born and to be born. This could not be done by a gift and what cannot be done by a gift cannot be done by the intervention of a trust. The owner of property cannot by mere contract during his life prevent his heirs from partitioning property after his death, and such a prohibition is not binding upon an assignee of the heir. *Anath Nath Dey* v. *Mackintosh, 8 B. L. R. 60,* distinguished. *Held,* also, that there was a good gift of the family dwelling-house to the idol, and that the plaintiff was not entitled to any share therein. RAJENDER DUTT *v.* SHAM CHUND MITTER . **I. L. R. 6 Calc. 106**

7. ——— **Agreement by joint owners** —*Joint property—Deed by joint owners of the family property appointing trustees for the management of the property, effect of—Effect of deed by joint owners embodying an agreement not to partition the property.* By an instrument, purporting to be a deed of trust all the existing joint owners of the family property deputed the management of the property to trustees for the purposes of the family solely, giving the trustees certain specific directions with regard to the management of the property and the application of the funds. The beneficial rights of the owners was in no way aliened or altered by the deed. By a clause in the deed the joint owners bound themselves not to ask for partition of the property. *Held* (by PHEAR, *J.*), that an arrangement of this kind can only be operative just so long as all the joint-owners consent to its being operative and no longer. That it is not competent for owners of property in this country by any arrangement, made in their own discretion to alter the ordinary incidents of the property which they possess; a joint property therefore cannot be made impartible in perpetuity by any such arrangement, though the owners may, for sufficient consideration, bind themselves to forego their rights for a specified time and definite purpose by a contract which could be enforced against them personally. RADHANATH MUKERJEE *v.* TARRUCKNATH MUKERJEE . . **3 C. W. N. 126**

8. ——— **Clause restraining partition or enjoyment**—*Otherwise absolute gift of property.* Where a Hindu testator gave all his immoveable property to his sons, but postponed the enjoyment thereof by a clause that they should not make any division for twenty years:—*Held,* that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once. MOKOONDO LALL SHAW *v.* GONESH CHUNDER SHAW . . **I. L. R. 1 Calc. 104**

9. ——— **Land excluded from partition of family property and declared inalienable**—*Land dedicated to family idol—Subsequent purchase from escheat department of Government*

HINDU LAW—PARTITION—*concld.*

8. AGREEMENT NOT TO PARTITION AND RESTRAINT ON PARTITION—*concld.*

—*Sale in execution of decree.* By a partition-deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable, and the rest of the land was divided equally. Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of it—less than one-sixth—with the consent of the others. The house and its site were sold in execution of a decree against the builder. *Held,* that the other members of the family were not entitled to have the house removed or the sale cancelled. MALLAN *v.* PURUSHOTHAMA . . **I. L. R. 12 Mad. 287**

9. SEPARATE PROPERTY.

——— *Partition—Evidence —Associating agnatic relations in the management of estate—Maintenance in lieu of services—Marriage expenses, payment of. Held,* on the evidence, that there was a partition of the family property, so that the property in dispute was the separate property of the last male holder and that he did not hold it merely as a manager of a joint Hindu family. The fact that he availed himself of the services of the near agnatic relations in the administration of his property at the same time that he gave them maintenance and paid the expenses of their marriage and other ceremonies was not inconsistent with the position as a separated member. It was both natural and probable. DEOKI SINGH *v.* ANUPA SINGH (1905) **10 C. W. N. 338**

HINDU LAW—PRESUMPTION OF DEATH.

1. ——— **Person not heard of for more than twelve years.** According to Hindu law a person who has not been heard of for more than twelve years is presumed to be dead. MANKEE KOER *v.* KHEDOO LALL . . **2 Hay 623**

2. ——— *Disappearance—Absence for twelve years.* Where a Hindu disappears, and is not heard of for a length of time, no person can succeed to his property as heir until the expiry of twelve years from the date on which he was last heard of. JANMAJAY MAZUMDAR *v.* KESHAB LALL GHOSE . . **2 B. L. R. A. C. 134**

JUNMAJOY MOJOOMDAR *v.* KESHUB LALL GHOSE **10 W. R. 484**

BULBHUDDUR TEWAREE *v.* RAM TEWAREE **1 Agra 159**

3. ——— *Absence for twelve years.* The rule of English law, that a period of seven years' absence without tidings is sufficient to raise a presumption of death, cannot be applied in the case of a Hindu. The Hindu law has a rule of its own, requiring the lapse of twelve years before

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HINDU LAW—PRESUMPTION OF DEATH—*contd.*

an absent person of whom nothing has been heard can be presumed to be dead. SARODASUNDARI DEBI *v.* GOBIND MANI DEBI **2 B. L. R. A. C. 157 note**

In the matter of the petition of SHURNO MOYEE DOSSEE . . . . . **8 W. R. 421**

4. ——— *Absence for twelve years—Omission to perform ceremonies for death.* Where the husband disappears for the prescribed number of years, the mere omission of ceremonies being performed by his wife will not prevent the presumption of death from arising. GHASEE *v.* JUSONDEE . . . . . **2 Agra 226**

5. ——— **Suit on bond against representatives of obligor**—*Lapse of time to create presumption.* In a suit upon a bond, the plaintiff having sued the defendants, not on the ground of their personal responsibility, but as the legal representatives of the obligor, who was supposed to be dead :—*Held,* that the suit was not maintainable before the lapse of the time which raises the legal presumption of the death of the obligor, unless there was proof of special circumstances which warrant the inference of his death within a shorter period. KARUPPAN CHETTI *v.* VERIYAL . . . . . **4 Mad. 1**

6. ——— **Evidence Act, s. 108**—*Suit for administration.* The reversioners next after *J.* to the estate of *S*, deceased, sued to avoid an alienation of *S*'s estate affecting their reversionary right made by his widow. *J* had not been heard of for eight or nine years, and there was no proof of his being alive. *Held,* that his death might be presumed under the provisions of s. 108, Act I of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead. PARMASHAR RAI *v.* BISHESHAR SINGH **I. L. R. 1 All. 53**

7. ——— **Inheritance**—*Missing person—Claim after seven years—Co-owners—Absent co-owner—Claim to his share of property a question of evidence, not of succession.* *D, G,* and *B* were co-owners of certain khoti villages. *B* disappeared and was unheard of for more than seven years. In his absence, *D* received his (*B*'s) share of the rents and profits. *G* claimed to be entitled to a moiety of *B*'s share therein, and brought this suit against D. *Held,* that *G* was entitled to such moiety. *B,* having been absent and unheard of for more than seven years, might be presumed to be dead under s. 108 of the Evidence Act (1 of 1872) ; and *G,* as one of his two survivors, was entitled to a moiety of his property. Where the right of a party claiming to succeed to the property of another is based on the allegation that the latter has not been heard of for more than seven years, the question to be decided is one of evidence and not a part of the substantive law of inheritance. *Parmeshar Rai* v. *Bisheshar Singh, I. L. R. 1 All. 53,* concurred in. DHONDO BHIKAJI *v.* GANESH BHIKJI . . **I. L. R. 11 Bom. 433**

8. ——— **Presumption of date of death**—*Evidence Act, ss. 107, 108.* Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons, *G* and *S G,* having a son *D.* After the death of the first widow, the second came into sole possession of the property and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D* on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it. *Held,* that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 108 of the Evidence Act ; that under the circumstances the defendant's father must be held to have died prior to the time referred to ; that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him ; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed. *Mozhar Ali* v. *Budh Singh, I. L. R. 7 All. 297, Janmajay Mazumdar* v. *Keshab Lal Ghose, 2 B. L. R., A. C. 134 ; Guru Dass Nag* v. *Matilal Nag, 6 B. L. R. Ap. 16 ;* and *Parmeshar Rai* v. *Bisheshar Singh, I. L. R. 1 All. 53,* referred to. DHARUP NATH *v.* GOBIND SARAN. GOBIND SARAN *v.* DHARUP NATH . . **I. L. R. 8 All. 614**

9. ——— **Validity of adoption depending on whether natural son alive or dead**—*Onus of proof—Deed or will conferring estate on a person described as adopted son— Person not heard of for seven years.* Death is to be presumed after a certain interval (seven years) ; but there is no presumption as to the time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that because a person was alive in 1877, therefore he was alive in 1878. One *S* died in September 1878, leaving a widow, *B.* The year before his death his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, *S* adopted the plaintiff (his nephew) and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had therefore adopted the plaintiff. The deed further declared the plaintiff to be the owner of all *S*'s property with all the rights of a natural son, but provided that, in the event of the lost son returning, he should have half. In 1892 the plaintiff,

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HINDU LAW—PRESUMPTION OF DEATH—*concld.*

as *S*'s adopted son, brought this suit to recover some of *S*'s property, which was in the hands of the defendants, who claimed it as *S*'s heirs. They (*inter aliâ*) impeached the plaintiff's adoption. *Held*, that, in order to recover the property as the adopted son of *S*, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that at the death of the adoption *S* was without a son. It was therefore for the plaintiff to prove that Bala was then dead. There was at that time no presumption that Bala was dead, and, there being no evidence on the point, it was impossible to say when he died, or consequently that the adoption was valid. *Held*, however, that plaintiff was entitled to succeed as donee under the deed of adoption. It was clearly *S*'s intention to give the estate to the plaintiff as being his adopted son. But if the adoption was invalid, the gift had no effect. The onus here was on the defendants. It was for them to show that Bala was at that date alive and the adoption therefore invalid. That burden they had not discharged, and the plaintiff therefore was entitled to a decree. RANGO BALAJI *v.* MUDIYEPPA

I. L. R. 23 Bom. 296

HINDU LAW—RECOVERED PROPERTY.

——— **Decree for possession.** The Hindu law on the subject of "recovered" property applies to cases in which the property has passed from the family to strangers, and has been held by them adversely to the family, and not to cases where the property has been held by one claiming (though unfoundedly) to be a member of the family. Merely obtaining a decree for possession is not "recovering" the property. "Recovery," if not made with the privity of the co-heir, must at least be *bonâ fide*, and not in fraud or by anticipation of the intentions of the co-heir. BISSESSUR CHUCKERBUTTY *v.* SEETUL CHUNDER CHUCKERBUTTY

9 W. R. 69

HINDU LAW—RESTITUTION OF CONJUGAL RIGHTS.

See HINDU LAW—MARRIAGE.

——— *Suit for restitution of conjugal rights—Plaintiff's suit not barred by his being out of caste. Held*, that to bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation. It is not a defence that the plaintiff is out of caste, nor ought a decree to be made conditional on the plaintiff being restored to caste. *Paigi* v. *Sheo Narain, I. L. R. 8 All. 78*, and *Binda* v. *Kaunsilia, I. L. R. 13 All. 126*, referred to. SAHADUR *v.* RAJWANTA (1905) . . **I. L. R. 27 All. 98**

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See LIMITATION ACT, 1877, SCH. II—ART. 118 . **I. L. R. 25 Bom. 26**

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See TITLE—EVIDENCE AND PROOF OF TITLE—GENERALLY.

L. R. 28 I. A. 1

1 POWER OF REVERSIONERS TO ALIENATE REVERSIONARY INTEREST.

1. ——— **Expectancy**—*Sale or mortgage of reversionary right in ancestral property—Onus of proof in contracts by reversioners as to their expectant rights—Transfer of Property Act (IV of 1882), s. 6, cl. (a).* The Hindu law which prevails in the N.-W. Provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir-apparent. It is necessary, when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business for the Court, when the question is raised to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner of the family property, in which the reversioner had an

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HINDU LAW—REVERSIONERS—*contd.*

1. POWER OF REVERSIONERS TO ALIENATE REVERSIONARY INTEREST—*concld.*

estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced, and that no unfair advantage was taken of the reversioner's youth and inexperience. ACHHAN KUAR *v.* THAKUR DAS
I. L. R. 17 All 125

Affirmed by Privy Council in SHAM SUNDER LAL *v.* ACHHAN KUNWAR . **I. L. R. 21 All. 71**
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2. ———— Power of reversioners to alienate reversionary interest—*Transfer of Property Act (IV of 1882), s. 6, cl. (a)—Hindu reversioner's contingent right—Mortgage of such right, validity of.* The interest of a Hindu reversioner expectant upon the death of a Hindu female cannot validly be mortgaged by the reversioner. *Brahmadeo Narayan* v. *Harjan Singh, I. L. R. 25 Calc. 778,* overruled by *Sham Sunder Lal* v. *Achhan Kunwar, L. R. 25 I. A. 188.* NAND KISHORE LAL *v.* KANU RAM TEWARY (1902)
I. L. R. 29 Calc. 355
s.c. 6 C. W. N. 395

3. ———— Reversionary right, nature of—*Transfer of Property Act (IV of 1882), s. 6.* The right of a presumptive reversionary heir under Hindu Law is no more than a *spes successionis* or expectancy of succeeding to the property. Such expectancy cannot be transferred under s. 6 of the Transfer of Property Act. MANICKAM PILLAI *v.* RAMALINGA PILLAI (1905)
I. L. R. 29 Mad. 120

2. POWER OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS.

(*a*) WHO MAY SUE.

1. ———— Suits by reversioners—*Suit to set aside alienations by Hindu widow—Suit to restrain Hindu widow from committing waste—Contingent reversionary interest.* Persons having a contingent reversionary interest in lands, expectant on the death of a Hindu widow, though they cannot sue for a declaration of title to the lands as against third persons, may sue as presumptive heirs to set aside alienations of the property made by the widow, upon the ground of there being no legal necessity for such alienations, or to restrain her from committing waste. Unless such suits could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for the alienations. Nor would it be possible to prevent the widow from committing irremediable mischief to the estate. CHOTOO MISSER *v.* JEMAH MISSER . **I. L. R. 6 Calc. 198 : 6 C. L. R. 588**

(*Contra*), RAM MONOHUR SINGH *v.* KOOLDEEP NARAIN SINGH . . . . **11 W. R. 514**

2. ———— *Alienation by female tenant for life—Waste—Ground for suit.*

HINDU LAW—REVERSIONERS—*contd.*

2. POWER OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS—*contd.*

(*a*) WHO MAY SUE—*contd.*

A bill *quia timet* by a reversioner against the daughter of an intestate Hindu in possession of personalty dismissed. A Court of equity will not interfere, unless it is shown that there is danger from the mode in which the tenant for life in possession is dealing with the property. The mere fact of the tenant for life keeping in hand for about three months part of the corpus for the alleged purpose of an eligible investment does not amount to waste nor is in derogation of the rights of those entitled in reversion. HURRY DOSS DUTT *v.* UPPOORNAH DOSSEE . . . . . **6 Moo. I. A. 433**

3. ———— *Sale by widow in excess of power—Suit by reversioners for share of land sold on payment of proportionate amount of sum properly lent—Decree for redemption.* The widow of a Hindu sold to the defendants a portion of her husband's estate for less than its market value and for a sum in excess of what she was justified in raising by sale. The plaintiffs, two or three reversioners entitled to the estate, sued, on the death of the widow, to recover from the purchasers two-thirds of the land sold upon payment of two-thirds of the sum which the widow was justified in raising. *Held,* that the plaintiffs were entitled to the relief claimed. SUBRAMANYA *v.* PONNUSAMI
I. L. R. 8 Mad. 92

4. ———— *Declaratory decree, suit for—Waste by Hindu widow—Suit to set aside compromise by Hindu widow.* Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature. UPENDRA NARAIN MYTI *v.* GOPEE NATH BERA
I. L. R. 9 Calc. 817 : 12 C. L. R. 356

5. ———— *Alienation by Hindu widow—Forfeiture of estate—Right of reversioners.* A Hindu widow, entitled to a life-estate only, granted a patni of the lands. *Held, first,* that this did not work a forfeiture entitling the reversioners to enter. *Secondly,* (STEER, *J.* dissenting), that the reversioners were not entitled to have the patni set aside. *Thirdly,* that the patnidar, being a party to the suit was entitled to appear against that part of the decree which declared that the act of the widow has caused a forfeiture of her estate, as well as against the part of it which set aside his patni. LALL SOONDAR DOSS *v.* HURRYKISSEN DOSS
Marsh. 113 : 1 Ind. Jur. O. S. 32 : 1 Hay 339

6. ———— *Contingent reversioner.* A person having only a contingent estate during the lifetime of a Hindu widow is permitted

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2. POWER OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS—*contd.*

(*a*) WHO MAY SUE—*contd.*

to sue simply on the ground of necessity that the contingent reversioner may be under of protecting his contingent interest. It is therefore essential to see that he has such an estate as entitles him to come in that way, *i.e.*, that he holds the character which he professes. THAKOORAIN SAHIBA *v.* MOHUN LALL . . . **7 W. R. P. C. 25**
11 Moo. I. A. 386

7. _____ *Interest sufficient to give right to sue. Held*, under the circumstances, that the plaintiff had sufficient interest to enable him to maintain a suit to question the adoption of a son. BROJO KISSORE DOSSEE *v.* SREENATH BOSE . . . . . **8 W. R. 241**

8. _____ *Remote reversioner.* Suits to set aside improper alienations by a widow cannot be brought by those whose rights are only inchoate and remote, as are those of a minor who is only entitled in reversion after the life-estate of his mother and sister, in the event of their surviving their mother, whose alienations he seeks to set aside. BAMA SOONDUREE DOSSEE *v.* BAMA SOONDUREE DOSSEE . . **10 W. R. 301**

Granting review in s. c. . **10 W. R. 133**

9. _____ *Suit for declaration by a remote reversioner—Specific Relief Act (1 of 1877), s. 42—Parties.* The plaintiff, claiming a remote reversionary interest in the estates of a deceased Hindu, sued for a declaration of the invalidity of an adoption made by the widow. It appeared that the nearer reversioners (who were in the first instance joined as defendants in the suit) refused to call in question the validity of the adoption, and that the plaintiff himself had concurred in it at the time when it took place. *Held*, (i) that the plaintiff was entitled to bring the suit without proof of fraud on the part of the nearer reversioners; (ii) that the nearer reversioners were rightly impleaded in the suit. GURULINGASWAMI *v.* RAMALAKSHMAMMA . . . . **I. L. R. 18 Mad. 53**

10. _____ *Suit by reversioner to set aside an adoption by a Hindu widow—Right of suit—Remote reversioners—Succession to vatan property—Hereditary Offices Act (Bombay Act V of 1886), s. 2.* The right to sue to set aside an adoption by a Hindu widow is, as a general rule, limited to the nearest reversionary heir, and if he, without sufficient cause, refuses to institute proceedings, or if he has precluded himself by his own act and conduct from so doing, or has colluded with the widow, or concurred in the alleged wrongful act, the next presumable reversioner will be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversioner claims to sue, the Court must exercise a judicial discretion in determining whether

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the remote reversioner is entitled to sue, and should require the nearer reversioner to be made a party to the suit. *A*, a separate Hindu, died possessed of certain property, a portion of which was vatan land, and left him surviving a widow *R*, a daughter *M*, and the plaintiffs, who were his brother's sons. Subsequently *R* adopted *V* as a son. *M*, who lived with *R* and *V*, did not take any steps to dispute the alleged adoption. The plaintiffs now sued for a declaration that the adoption, if made in fact, was invalid, and that they were entitled to succeed to the property of *A* on the death of his widow *R*. *Held*, that, as the plaintiffs were entitled under s. 2 of Bombay Act V of 1886 to succeed to the vatan property in preference to *M*, after the death of *R*, and were the presumptive reversionary heirs after *R*, to the vatan property, and the only persons interested in disputing the adoption so far as the vatan property was concerned, the lower Court exercised a proper discretion in allowing the suit to be maintained by the plaintiffs. *Anund Kunwar* v. *Court of Wards, I. L. R. 6 Calc. 764 : L. R. 8 I. A. 22*, and *Gulab Singh* v. *Rav Kurun Singh, 14 Moo. I. A. 193 : 10 B. L. R. 1*, referred to and followed. RAMABAI *v.* RANGRAV
I. L. R. 19 Bom. 614

11. _____ *Suit to set aside alienation by Hindu widow—Grandsons of daughter of alienor's deceased husband. Held*, in a suit to set aside an alienation made by a Hindu widow of property which had been of her deceased husband in his lifetime, that the sons of the son of a daughter of the alienor's late husband were, their father and grandmother being dead, reversioners, and as such entitled to sue to set aside the alienation made by the widow. *Krishnayya* v. *Pichamma, I. L. R. 11 Mad. 287*, and *Babu Lal v. Nanku Ram, I. L. R. 22 Calc. 331*, referred to. SHEOBARAT KUARI *v.* BHAGWATI PRASAD . . **I. L. R. 17 All. 523**

12. _____ *Suit to set aside alienation—Right of remote reversioner—Relinquishment of right of suit.* Although a suit to set aside an alienation, alleged to have been illegally made by a Hindu widow, of property belonging to the estate of her deceased husband should usually be brought by the next and not by a remote reversioner, yet such a suit may be brought by other than the next reversioner where it can be considered as one brought by a person who, by the express declaration of those having prior rights, was entitled to maintain it by reason of their consent, and of their relinquishment in his favour of the right of suit. When this relinquishment is once shown, the suit is open to no objection on the score of its having been instituted without the plaintiff, at the time of the institution, having shown that the prior rights of others had been waived or abandon-

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ed in his favour. AMMUR SINGH *v.* MURDUN SINGH . . . . . **2 N. W. 31**

13. ——— *Right to bring a suit for declaratory decree.* A suit for a declaratory decree must be brought by the nearest reversioner; but there is no objection to a suit by a more distant reversioner when the prior right of the nearer reversioner or reversioners have been waived. BHIKAJI APAJI *v.* JAGANNATH VITHAL **10 Bom. 351**

14. ——— *Suit by reversioner with consent of reversioner having right to sue.* A suit by a reversioner to set aside an alienation is cognizable if the title of the reversioner has been injured by a distinct act of alienation, and if the widow who ought to have brought the suit has relinquished her life-interest and signified her assent to the suit proceeding. BHEEM RAM CHUCKERBUTTY *v.* HUREE KISHORE ROY . **1 W. R. 359**

15. ——— *Suit to set aside adoption—Right to sue.* The mere possibility of succeeding to the estate held by a widow for life does not confer on the person having it the right to sue to contest an adoption alleged to have been made by the widow. Such a suit must be brought either by the presumptive heir, or in the case of his refusal to sue, or precluding himself by act or word from suing, or of his concurring in, or colluding with, the alleged adoption, by the next reversioner. In the latter case, the plaint must state why the presumptive heir does not sue, and the Court will, in the exercise of its discretion, decide whether the plaintiff is competent to sue. GYANENDRO NATH ROY *v.* LOBONGOMUNJURI DABI **11 C. L. R. 198**

16. ——— *Alienation by widow—Suit for declaratory decree.* Where a Hindu widow in possession as such of her deceased husband's property alienates it, only the person presumptively entitled to possess the property on her death may sue for a declaration of his right as against such alienation, unless such person has precluded himself from so suing by collusion and connivance, when the person entitled next to him may so sue. RAGHU NATH *v.* THAKURI **I. L. R. 4 All. 16**

17. ——— *Hindu widow—Alienation—Suit by reversioner to set aside alienation—Nearest reversioner—Collusion.* The only person who can maintain a suit to have an alienation by the widow of a childless Hindu declared inoperative beyond the widow's own life-interest is the nearest reversioner who, if he survived the widow, would inherit; unless it is shown or found that he refused without sufficient cause to sue, or precluded himself by his own act from suing, or colluded with the widow, in which case only can the more remote reversioners maintain such a suit. *Anund Koer* v. *Court of Wards, L. R. 8 I. A. 14: I. L. R. 6 Calc. 764,* and *Raghunath* v. *Thakuri, I. L. R. 4 All. 16,* referred to. *Ramphal Rai* v. *Tula Kauri, I. L. R. 6 All. 116,* and *Madan Mohan* v. *Puran Mal, I. L. R. 6 All. 288,* distinguished. PHULA *v.* KANTA PRASAD . **I. L. R. 9 All. 441**

18. ——— *Suit by reversioner when nearest reversioner cannot sue.* When the immediate reversioner is in possession of a part of the property, and not in a position to institute proceedings to set aside alienations, the next reversioner is entitled to sue to protect his own future rights. BALGOBIND RAM *v.* HIRUSRANEE **2 W. R. 255**

19. ——— *Persons not the next reversioners—Right to sue.* Where it appeared there were other persons nearer than plaintiffs, and that there had been no disclaimer of their right on their part:—*Held,* that plaintiffs, who, according to the ordinary Hindu law of inheritance, were not the next heirs, could not maintain the suit. GOOSHAEEN TEEKUMJEE *v.* PURSOTUM LALLJEE **3 Agra 238**

20 ——— *Suit to set aside adoption—Right of suit.* Although a suit, to contest an adoption made by a Hindu widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule the suit must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering. The rule laid down in *Bhikaji Apaji* v. *Jagannath Vithal, 10 Bom. A. C. 351,* approved. Reference made to *Kooer Golab Singh* v. *Rao Kurun Singh, 14 Moo. I. A. 187.* If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest competent to sue. In such a case upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent in that respect to sue, and whether it was requisite or not that any nearer

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heir should be made a party to the suit. In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of the husband of a daughter of a brother of the father of the deceased, under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that, as an adopted son, this minor had the same rights as a naturally-born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out that he could only have succeeded as a distant bandhu, and that he had not a vested, but at most a contingent interest. And *held*, that, there being in fact heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated. ANUND KUNWAR *v.* COURT OF WARDS. . . . **I. L. R. 6 Calc. 764**
8 C. L. R. 381 : L. R. 8 I. A. 14

21. ——————— *Collusion between widow and transferee. Held*, that where the widow and plaintiff, the transferee, were engaged in a scheme for evading the restrictions put by the Hindu law upon the widow's right of alienation, and were making use of the forms of a suit in furtherance of the fraud, it was quite competent for the lower Appellate Court to determine and satisfy itself (some of the persons really interested being minors, and the transaction being open to suspicion as prejudicial to their reversionary rights) of the true nature of the transaction at the instance of the remote reversioner, even had the nearer reversioner been present and consented to the decree being passed in plaintiff's favour. DOWAR RAI *v.* BOONDA **Agra F. B. 57 : Ed. 1874, 43**

22. ——————— *Collusion between widow and next heir—Right of remoter reversioner to sue.* Where a daughter was colluding with the widow in making a transfer of divided property:—*Held*, that plaintiffs, the next reversioners after the daughter, were competent to maintain the suit to have the transfer declared null and void. JWALA NATH *v.* KULLU
3 Agra 55 : Agra F. B. Ed. 1874, 138

23. ——————— *Alienation by Hindu widow—Right to sue—Daughters.* The reversioners of the estate of a deceased Hindu sued his widow to set aside an alienation of the property by her, as not justified by legal necessity. The deceased had two daughters, who are still living. *Held*, that in the absence of any proof of collusion or connivance between the widow and her daughters, the plaintiffs, in the presence of the latter, were not

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competent to maintain the suit. *Anund Koer* v. *Court of Wards, L. R. 8 I. A. 14*, referred to. MADARI *v.* MALKI . . . **I. L. R. 6 All. 428**

24. ——————— *Next presumptive reversioner—Intervening woman's estate.* The plaintiff's grandson (daughter's son) of a deceased Hindu sued during the lifetime of his mother to set aside a will made by his mother's father in favour of an idol under the management of his step-mother, the testator's second wife. *Held*, that, there being no evidence of collusion or contrivance, the plaintiff, not being the next reversioner, was not competent to maintain the suit. The fact that his mother's estate, should it ever come into her possession, would be only a limited estate, would not affect the plaintiff's subsisting position in respect of his right to sue. *Madari* v. *Malki, I. L. R. 6 All. 428*, followed. ISHWAR NARAIN *v.* JANKI
I. L. R. 15 All. 132

25. ——————— *Suit in lifetime of daughter of last male owner—Suit by reversioner to establish invalidity of a sale by a widow—Daughter of last male holder not joined.* Under the Hindu law obtaining in the Madras Presidency, a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding the fact that he left a daughter, who was alive at the date of suit, but was not joined as a party. RAGHUPATI *v.* TIRUMALAI
I. L. R. 15 Mad. 422

26. ——————— *Alienation—Fraud.* *S* was entitled, under the Mitakshara law to succeed, on the death of *M*, her mother, to the real estate of *N*, her father. Certain persons disputed *S*'s right of succession and claimed that they were entitled to succeed to *N*'s estate on *M*'s death, and complained that *M* was wasting the estate. The difference between such persons and *M* and *N* were referred by them to arbitration, and an award was made and filed in Court which, among other things, partitioned the estate between *S* and such persons. *G*, who claimed the right to succeed to the estate on *S*'s death, sued for the cancellation of the award on the ground that it was fraudulent and affected his reversionary interests. *Held*, relying on *Dawar* v. *Boonda, Agra F. B. 57 Ed. 1874, 43*, that the suit was maintainable, notwithstanding that *G* was not the next reversioner. GAURI DAT *v.* GUR SAHAI . **I. L. R. 2 All. 41**

27. ——————— *Partition between widow and mother, both claiming life-interest—Alienation by mother—Declaratory decree.* Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration and an award was made dividing the property between the disputants. It did not appear that either of them claimed the

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property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased, as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it, having under the Hindu law a life-interest only in the property. *Held*, that, inasmuch as the donor was in any circumstances entitled to maintenance, and the decision come to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners. *Held*, also, that the plaintiffs were competent to maintain the suit as reversioners to the widow and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death. GOPI CHAND *v.* SUJAN KUAR . . . . **I. L. R. 8 All. 646**

28. ——— *Alienation by Hindu widow—Acquiescence—Right to sue— Daughter.* A reversioner of the estate of a deceased Hindu sued for cancellation of a sale-deed executed by the widow, on the ground that it was executed without legal necessity, and for a declaration that the alienation was void and incapable of affecting his right of succession. A daughter of the deceased was still living and had taken no steps to set aside the sale. *Per* MAHMOOD, *J.*, that mere delay by a reversioner in instituting a suit to set aside an illegal sale made by a childless Hindu widow cannot be understood to amount to acquiescence inthe sale. The acquiescence which would entitle a more remote reversioner to maintain the suit must be such as would amount to an equitable estoppel, precluding the first reversioner from contesting the validity of the sale made by the widow. *Duleep Singh* v. *Sree Kishoon Panday, 4 N. W. 83,* followed. Also *per* MAHMOOD, *J.*, that the existence of female heirs, whose right of succession cannot surpass a "widow's estate," does not affect the status of the nearest presumptive reversionary heir to the full ownership of the estate, and that such presumptive heir can maintain a suit for declaratory relief such as was prayed for in the present suit, irrespective of the question of collusion or concurrence by such female heirs in the alienation by a childless Hindu widow or other female heir holding a similar estate. *Chunderkoomar Hazaree* v. *Dwarkanath Purdhan, S. D. A. (1859), 1623,* and *Bal Gobind Ram* v. *Hirusranee, 2 W. R. 255,* followed. *Bhagwandeen Doobey* v. *Myna Baee, 11 Moo. I A. 487; Gajapathi Nilamani Patta Maha Devi Garu* v. *Gajapathi Rhadamani Patta Maha Devi Garu, L. R. 4 I. A. 212;* and *Ram Lal* v. *Bansee Dhur, S. D. A. N.-W. P. (1866), 67,* referred to, *Anund Koer* v. *Court of Wards, L. R. 8 I. A. 14,* distinguished. *Per* OLDFIELD, *J.*, that the nearest reversioner being the widow's daughter who herself could only take a limited interest in the property and who had herself taken no steps to set aside the sale, the Court would be exercising a proper discretion in permitting the plaintiff as the next reversioner after the daughter to bring the suit. BALGOBIND *v.* RAMKUMAR . . . **I. L. R. 6 Calc. 431**

29. ——— *Right of daughter to sue. Held*, that a daughter was competent to sue during the lifetime of her mother, the encumbrancer, the daughter being the immediate reversioner to the property, and her reversionary right being seriously threatened. GOLAB KOONWER *v.* SHIB SAHAI . . . . **2 Agra 54**

30. ——— *Son's power to sue in lifetime of mother.* The daughter's son during the lifetime of his mother is not such a reversioner as is competent to challenge the act of his maternal grandmother. RADHA KISHEN *v.* BUKHTAWUR LALL . . . . . **1 Agra 1**

31. ——— *Suit to set aside alienation of ancestral property—Right of remoter reversioner to sue.* In a suit by a reversioner to set aside an alienation of ancestral property, where plaintiff questioned the acts of alienation effected jointly by his father and his aunt, it was held that he was entitled to maintain the suit even though his father, and not he, was the immediate reversioner. RETOO RAJ PANDEY *v.* LALLJEE PANDEY **24 W. R. 399**

32. ——— *Right of succession—Nephews.* The right of succession accrues to nephews (sisters' sons) whether born before or after the death of their maternal uncle, not on the death of the maternal uncle, but on the death of his widow; and the nephews can sue to question the validity of alienations made by the widow without legal necessity. GOBIND MOONEE DOSSEE *v.* SHAM LALL BYSACK. KALEE COOMAR CHOWDHRY *v.* RAMDASS SAHA . . . **W. R. 1864, 153**

33. ——— *Alienation by uncle—Right of nephew. Held*, that a nephew is not competent by Hindu law to object to any alienation of ancestral property directly or indirectly made by his uncle. GUNGA DEEN RAWUT *v.* MODHOO SUDUN . . . . **3 Agra 4**

34. ——— *Right of nephew—Consent of heirs—Daughters-in-law.* A nephew (who would be next-of-kin entitled to the property) can, with the consent of his father and his uncles, the persons immediately entitled to succeed to the property, maintain a suit for proprietary possession

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against the daughters-in-law of a deceased Hindu, who have no other right in the property than a right to maintenance. LADOOIAH *v.* SANVALEY **3 Agra 191**

35. ——— *Suit by step-son or step-grandson—Suit in lifetime of widow.* A reversioner in the position of son or step-grandson may sue in the lifetime of a Hindu widow in possession to prevent waste. CHUMMUN MOHUNT *v.* RAJENDRA SAHOO . . . **7 W. R. 119**

36. ——— *Alienation by widow—Right of reversioner to sue.* A sale by a widow of property derived from her husband, who is divided in interest from his own family, is valid for her life. Such a sale will not be set aside at the instance of a divided brother of the husband. BHAGAVATAMMA *v.* PAMPANA GAUD **2 Mad. 393**

37. ——— *Power of reversioner to assign his interest—Right of assignee—Waste.* A reversionary contingent interest subject to the life-estate of a Hindu widow may be assigned. The assignee of such an interest is entitled to restrain the widow from committing waste. RYCHURN PAUL *v.* PEARY MONEE DASSEE **Marsh. 622**

38. ——— *Assignee of reversioner—Suit by assignee—Widow's estate.* During the existence of a Hindu widow's interest in an estate, inasmuch as she has in her the whole estate of inheritance, the assignee of a reversionary heir to her husband has no interest therein as such assignee, which will enable him to bring a suit to have a mortgage and decree affecting the estate set aside. This is so even though the assignee is the next heir to the property after the assignor. RAICHARAN PAL *v.* PYARI MANI DASI **3 B. L. R. O. C. 70**

RAM BUNSEE KOONWAR *v.* MOHESHUR KOONWAR **1 W. R. 338**

39. ——— **Administration suit by reversioners**—*Practice—Conduct of proceedings.* Under Hindu law, a person entitled to an estate in reversion expectant on the death of a Hindu widow is entitled to bring a suit for administration. *Clowes* v. *Hilliard, L. R. 4 Ch. D. 413,* distinguished. If a dedication by a testator, of property to which a reversionary heir would be entitled is not valid, and the executors propose to carry out the dedication, such an act would entitle the reversionary heir to seek the assistance of the Court and have the property properly administered. *Hem Chunder Sanyal* v. *Sarnamoyi, I. L. R. 22 Calc. 354,* referred to. Where a person entitled to an estate in reversion brings a suit against the executors of the estate for administration, and subsequently thereto an administration suit is brought by one executor against his co-executors and a consent decree obtained without the reversioner being made a party, such reversioner will be entitled to bring his suit to a hearing; and, upon a second decree being made, the accounts and inquiries already had under the first decree will be adopted in the second decree, so far as it can be applied and the reversioner, who brought the first suit, will be entitled to the conduct of the proceedings. *Zambaco* v. *Cassavetti, L. R. 11 Eq. 439; Mellor* v. *Swire, L. R. 21 Ch. D. 647,* followed. ROJOMOYEE DASSEE *v.* TROYLUKHO MOHINI DASSEE (1901) **I. L. R. 29 Calc. 260 s.c. 6 C. W. N. 267**

40. ——— *Reversioner, suit by, to set aside adoption—Reversioner in such suit represents all interested in the reversion, but does not in suits questioning alienations—Alienation by limited owner gives rise to only one cause of action.* Although in suits relating to alienations by a qualified owner, the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to be held to represent the remote reversioner, provided the matter is decided after a fair trial; and this principle will apply equally when a remote reversioner is allowed to sue under special circumstances to set aside an adoption. An unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of alienation, to all reversioners. In such cases there is only one cause of action to be sued upon. The true purpose of the concession of a right of suit in these cases is the protection of the interest of the person or persons, who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. The reversioner actually suing does not only do so for himself, but also on behalf of all the rest. *Rani Anund Koer* v. *The Court of Wards, L. R. 8 I. A. 14, 22,* referred to. *Brojo Kishoree* v. *Sreenath Bose, 9 W. R. 463, 465,* referred to. Suits involving questions as to adoptions stand on quite different grounds from those impeaching the validity of alienations. The grave and important nature of disputes relating to adoptions, makes it desirable that the adjudication in such cases should be made final as far as possible. Where the presumptive reversioner or with the permission of the Court, a more remote reversioner brings such a suit, the Court ought to require him to disclose the names of other persons interested in the reversion and direct

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notices to be served on them, to enable them to be made parties should they so desire. *Ayyadorai Pillai* v. *Solai Ammal, I. L. R. 24 Mad. 405,* approved. *Adilakshmi* v. *Venkataramayya, 13 Mad. L. J. 359,* not followed. CHIRUVOLU PUNNAMMA *v.* CHIRUVOLU PERRAZU (1905) **I. L. R. 29 Mad. 390**

(*b*) WHEN THEY MAY SUE AND HOW.

41. ——— Cause of action, accrual of— *Suit for possession—Effect on reversioner of adoption by widow.* The right of a reversionary heir to succession, on the death of a widow in possession, is a contingent one. It is only on the death of the widow, when his rights as reversioner are converted into a right to immediate possession, that he is required to sue for possession of the estate. The mere fact of the adoption of another party does not prejudice his rights. Those rights are invaded only when the adopted son, on the death of the widow, takes possession of the property as adopted son. JUGGENDRONATH BANERJEE *v.* RAJENDRONATH HOLDAR . . **7 W. R. 357**

42. ——— *Suit for possession of share of estate.* Where the plaintiff was entitled to a share of the estate of the defendant, a widow, in case she should die not having exercised the right to adopt:—*Held,* that a suit for his share on the widow's failure to adopt within a year must be dismissed, the plaintiff having no present right to possession. S. 162 of *Strange's Manual, H. L.,* dissented from. RAMAN AMMAL *v.* SUBHAM ANNAVI *alias* SUBRAMANIYAN ANNAVI **2 Mad. 399**

43. ——— *Suit to set aside alienation of estate by widow.* Where the transfer sought to be set aside was made by the widow in favour of her daughter, who was lawful heir to the property:—*Held,* that the plaintiff, a reversioner, had no present ground of action, as his reversionary right was not prejudiced thereby. UDHUR SINGH *v.* RANEE KOONWAR . . **1 Agra 234**

44. ——— *Suit to set aside alienation of property in possession of widow.* Where property to the immediate possession of which a Hindu widow is entitled is conveyed away by parties having no right to it, the cause of action for a suit to recover possession is afforded thereby to the widow, and not to the reversionary heirs. JOY MOORUTH KOOER *v.* BALDEO SINGH **21 W. R. 444**

45. ——— *Suit for share of estate or to set aside alienation.* A Hindu reversioner, entitled, after the death of a tenant for life, to a share in the inheritance, cannot lay claim to any definite share, nor can he sue to set aside a transaction affecting the inheritance, so far only as it would affect his probable share. KESHAVA SANABHAGA *v.* LAKSHMINARAYANA **I. L. R. 6 Mad. 192**

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2. POWER OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS—*concld.*

(*b*) WHEN THEY MAY SUE AND HOW—*concld.*

46. ——— *Suit for compensation money paid to lessee of widow for right of working quarries on land leased to him—Quarries worked for purposes of State Railway—Waste—Right of widow to work quarries.* Land inherited by a widow from her husband was leased by her. The authorities of a State Railway worked quarries on part of it and Government paid R5,000 as compensation to the lessee. The reversionary heirs sued to establish their right to the money. *Held,* that the money paid by Government, whether regarded as the price of stone bought or compensation for wrong done, should be regarded as part of the produce of the estate, and should not be treated as part of the estate itself or as proceeds of the conversion of part of it into money. The right of a widow to work quarries on land inherited from her husband considered. SUBBA REDDI *v.* CHENGALAMMA **I. L. R. 22 Mad. 126**

3. RIGHT TO POSSESSION.

1. ——— Suit for immediate possession—*Waste on account of alienation by widow.* In cases where the sale by a Hindu widow has been set aside on the ground that no legal necessity has been proved, before a decree for immediate possession can be given to the plaintiff, it must be clearly proved that the property has deteriorated owing to the sale or has been wasted by the purchasers. CHUTTURDHAREE SINGH *v.* HURCOOMAREE . . . . . **1 Hay 107**

2. ——— Right of reversioners on alienation being set aside—*Act of widow involving forfeiture of estate.* Although an alienation of property by a widow for other than allowable purposes may be declared void, yet the reversioners are not entitled to immediate possession, unless the widow has committed some act involving forfeiture of the property. KISHNEE *v.* KHEALEE RAM . . . . . **2 N. W. 424**

BAMASOONDUREE DOSSEE *v.* BAMA SOONDUREE DOSSEE . . . . . **10 W. R. 133**

in which case, however, a review was granted. *See* S. C. . . . **10 W. R. 301**

RUGHOOBAR DYAL SINGH *v.* BHEKAREE SINGH **22 W. R. 472**

3. ——— Suit for possession on account of waste—*Alienation by widow not involving forfeiture.* Plaintiff, who was the reversioner of her father's estate, sued, during the lifetime of her mother, who held a life-estate as widow of her

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HINDU LAW—REVERSIONERS—*contd.*

3. RIGHT TO POSSESSION—*contd.*

husband, for possession of such estate, on the ground that her mother had, without reason, alienated the whole estate, with a few slight exceptions, absolutely to certain persons, who had again re-sold portions thereof. The defendants pleaded that the suit would not lie in the lifetime of the plaintiff's mother. It was found that the alienations were not fraudulent. *Held*, that the plaintiff was not entitled to have possession of the property delivered to her, inasmuch as the alienation did not amount to a total destruction of the benefit derivable from the right of succession, and could not therefore be called waste, but that she was entitled only to a declaration that the alienation made by the widow and the subsequent alienations by her alienees should not affect or prejudice the plaintiff or reversioner's interests beyond the lifetime of the widow. MUDDUN MOHUN SHAHA *v.* ANUNDMOYI . **5 C. L. R. 49**

4. ——————— *Alienation by widow—Fraud, proof of.* A Hindu widow being in possession of certain lakhiraj lands in which she had a life-interest, the zamindar brought a suit against a minor reversioner and others to resume the land, obtained an *ex parte* decree, and, whether under colour thereof or not, afterwards obtained possession. The widow, who was then dispossessed, brought a separate suit to recover the property, in which the reversioner, who had meantime come of age, was joined as a co-plaintiff. Owing to a petition presented by the widow, this suit was treated as having come to an end. *Held*, that, in the circumstances, and the consequent jeopardy to the title of the reversioners, the reversioner above referred to was competent, without showing fraud on the part of the widow, to bring a suit to have the land reduced to his possession, and to prevent the zamindar from acquiring title by adverse possession. CHUNDER KOOMAR GANGOOLY *v.* RAJ KISHEN BANERJEE . . . . . **14 W. R. 322**

5. ——————— *Collusion of widow with parties in adverse possession.* Suit by a Hindu daughter, for herself and as guardian of her minor son, to recover possession of her deceased father's separate estate. The legal representatives of the estate were, first the deceased's widow, and after her, the plaintiff and her son. The widow not only failed to occupy and manage the estate, but, in collusion with the other defendants claiming under a hostile title, abandoned her rights, alleging that her husband was not separate, but a member of a joint family, and left the hostile holders undisturbed. To preserve the separate estate from becoming extinguished by the operation of the law of limitation, it was necessary to remove the adverse occupants and to place the estate in the possession of some person to be appointed to represent it; and as the widow (the legal representative) never was in possession and did not ask for it, but repudiated all claim to it, it was held that no one had a better right to the possession than the plaintiff, and possession was accordingly decreed to her as manager during the widow's lifetime. GUNESH DUTT *v.* LALL MUTTEE KOOER . . . . . **17 W. R. 11**

See RADHA MOHUN DHUR *v.* RAM DAS DEY **3 B. L. R. A. C. 362 : 24 W. R. 86 note**

SHAMA SOONDUREE CHOWDHRAIN *v.* JUMOONA CHOWDHRAIN . . . . . **24 W. R. 86**

6. ——————— **Right to manage property as trustee**—*Alienation by widow without necessity—Waste.* When a widow is proved to have made alienations without legal necessity, the reversioner may be appointed to act as her trustee. DINKISHEN SHATRAH *v.* GUNGADHUR MOOKERJEE **2 Hay 582**

7. ——————— **Agreement to divide reversion**—*Agreement to divide reversion when it should fall in, creates no vested right, but only right to claim specific performance.* Three brothers, *S*, *R* and *K* and their father made an arrangement which amounted to a division of the family properties. The father and *R* and *K* continued, however, to live together. The father died first and then *R*, leaving him surviving *A*, his widow, and *B*, his daughter. *A* and *B* did not claim *R*'s share, but were content with maintenance. There was, however, no surrender by *A* of her rights. *S* and *K* entered into an agreement between themselves to the effect that *K* should enjoy *R*'s share and maintain *A* and *B*, *S* being given a small piece of land at once, and that after *A*'s death *S* was to take half of *R*'s share. *B* died unmarried in *A*'s life-time and *S* predeceased *A* who died in 1891. In a suit brought in 1901 by the son of *S* to recover one-half share of *R*'s property: *Held* (WALLIS, *J.*, dissenting), that *K* and *S* were expectant reversionary heirs and the agreement between them was in effect to divide the reversion when it should fall in. The right of *K* as such presumptive reversionary heir was incapable of transfer on the principle embodied in s. 6 of the Transfer of Property Act, and the agreement did not operate to vest any property in *S* as from the date of agreement and the suit was not therefore maintainable. *Per* BODDAM, *J.*—The agreement gave only a right to claim specific performance thereof when the reversion should fall in, which right became barred as it was not enforced within the statutory period after the death of the widow. *Per* WALLIS, *J.* The widow not having claimed her husband's share and having contented herself with maintenance, *S* and *K* were not in the position of expectant heirs, although the widow by asserting her right might have reduced them to that position. Under the circumstances, the agreement was something more than a mere contract on the part of *K* to convey to *S* a half share on the widow's death. The effect of the agreement was to give *S* a vested interest in a half share in the lands to take effect in posses-

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HINDU LAW—REVERSIONERS—*contd.*

3. RIGHT TO POSSESSION—*concld.*

sion on the widow's death and the suit was therefore maintainable. PINDIPROLU SOORAPARAJU *v.* PINDIPROLU VEERABHADRUDU (1907)
I. L. R. 30 Mad. 486

4. RELINQUISHMENT BY WIDOW TO REVERSIONERS.

1. ——— Effect of relinquishment by female—*Title of reversioner on relinquishment.* The succession of females according to Hindu law is not regular succession and is not based upon the ordinary theory of spiritual benefit. Therefore, if they relinquish their rights in favour of the reversioner, the case is again brought back to the normal state of succession, the effect being to vest in him a complete title. GUNGA PERSHAD KUR *v.* SHUMBHOONATH BURMAN . **22 W. R. 393**

2. ——— Effect of relinquishment by widow—*Consent of reversioners—Relinquishment to second reversioners.* According to Hindu law, a widow in possession can relinquish, and, by relinquishing, anticipate for the reversioners their period of succession. A relinquishment in favour of second reversioners is also valid if made with the consent of the first reversioners. PROTAB CHUNDER ROY CHOWDHRY *v.* JOY MONEE DABEE CHOWDRAIN . . . . . **1 W. R. 98**

3. ——— *Surrender of life-estate—Title of reversioners.* The surrender of her estate by a Hindu widow, or mother to persons who at that time are unquestionably the heirs by Hindu law of the person from whom she has inherited, vests in those persons the inheritance which they would take if she at that time were to die. *Shama Soonduree* v. *Surat Chunder Dutt, 8 W. R. 500,* and *Gunga Pershad Kur* v. *Shumbhoonath Burman, 22 W. R. 393,* followed. NOFERDOSS ROY *v.* MODHU SOONDARI BURMONIA
I. L. R. 5 Calc. 732 : 5 C. L. R. 551

4. ——— Surrender of possession by widow in consideration of maintenance—*Arrangement by reversioners to pay widow maintenance for her life instead of possession of property.* Where persons who are presumptively the next in succession to a widow come into an arrangement by which she surrenders possession to them and receives a maintenance from them, such arrangement must be held to be binding as a family arrangement, and would not be altered by one or other of the reversioners dying during the lifetime of the widow. LALLA KUNDEE LALL *v.* LALLA KALEE PERSHAD . . . **22 W. R. 307**

5. ——— Acceleration of succession by Hindu widow—*Surrender of life-estate by widow to heir.* A Hindu widow can accelerate the succession of the heir by conveying absolutely her life-estate to him, but it is essential that she should surrender her estate, so that the whole estate should become at once vested. A Hindu widow executed

HINDU LAW—REVERSIONERS—*contd.*

4. RELINQUISHMENT BY WIDOW TO REVERSIONERS—*concld.*

an ikrarnama in favour of her daughter's son, then apparently the heir who would ultimately succeed, but adding that she would retain possession for her own life. *Held,* that this could not operate to exclude the daughter, nor after her the son of another (deceased) daughter, not born at the date of its execution. BEHARI LAL *v.* MADHO LAL AHIR GAYAWAL . . **I. L. R. 19 Calc. 236**
I. L. R. 19 I. A. 30

5. ARRANGEMENTS BETWEEN WIDOW AND REVERSIONERS.

1. ——— Arrangement by next reversioner allowing her to keep possession—*Loss of rights by widow on re-marriage—Act XV of 1856, s. 2.* Where a widow having lost her rights in her husband's estate on account of remarriage under the provisions of s. 2, Act XV of 1856, was allowed to retain possession by the next reversioner:—*Held,* that such arrangement by the next reversioner was only binding upon him, and not on the heirs of such reversioners, who, on the death of the former, were entitled to sue for possession of the property by dispossessing the widow. KAISHO *v.* JUMNA . . **1 Agra 140**

2. ——— Relinquishment by Hindu widow of her life-interest to reversioner—*Gift by reversioner to widow of moiety of estate—Declaratory decree, suit for—Suit by reversioner in lifetime of widow—Right of suit—Specific Relief Act (I of 1877), s. 42.* *M* died, possessed of certain immoveable properties, and leaving two widows, one of whom died shortly after him, leaving a daughter's son *R*. The other widow, *S*, came to an arrangement with *R* under which, on 9th December 1889, two deeds were executed, by the first of which *S* relinquished to *R* her life-interest in the properties she inherited as widow of *M*, and by the other *R* conveyed to *S* an absolute right in half the properties so relinquished, retaining the other half himself. *R* died on 27th November 1890, and his widow *P* came into possession of the half share of the properties belonging to him. In a suit by the plaintiff, as the next reversionary heir of *M* for a declaration that the deeds were invalid, and did not affect his reversionary right:—*Held,* that the suit was maintainable in the lifetime of the widow. *Isri Dut Koer* v. *Hansbutti Koerain, I. L. R. 10 Calc., 324 : L. R. 10 I. A. 150,* referred to. *Pirthi Pal Kunwar* v. *Guman Kunwar, I. L. R. 17 Calc. 933 : L. R. 17 I. A. 107 ; Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee, I. L. R. 8 Calc. 761 ;* and *Kattama Natchiar* v. *Dorasinga Taver, 15 B. L. R. 83 : 23 W. R. 314 : L. R. 2 I. A. 169,* distinguished. *Held,* also, following the case of *Nobokishore Sarma Roy* v. *Harinath Sarma Roy, I. L. R. 10 Calc. 1102,* that the moiety of the properties which was given by *S* to *R*, was absolutely alienated in his favour, and the plaintiff

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5. ARRANGEMENTS BETWEEN WIDOW AND REVERSIONERS—*concld.*

was not entitled to question the validity of the alienation, so far as that portion of the properties was concerned. *Held*, further, that, though the effect of the decision in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* is to make the widow and the presumptive reversioners competent to deal with the estate absolutely for certain purposes, the widow cannot, with the consent of the presumptive reversioner, convert her life-interest in any portion of her husband's estate which she retains for herself into an absolute interest freed from all restraint on alienation. *Behari Lal* v. *Madho Lal Ahir Gayawal, I. L. R. 19 Calc. 236*, referred to. The plaintiff was therefore entitled to a declaration that the deeds were inoperative in affecting his reversionary interest, so far as regarded the moiety in possession of *S.* HEM CHUNDER SANYAL *v.* SARNAMOYI DEBI . **I. L. R. 22 Calc. 354**

3. ——— **Hindu widow, alienation by** —*Release by reversioners, effect of—Suit for possession after death of the widow—Estoppel.* When a reversioner whose title accrues on the death of a Hindu widow is found to have relinquished for consideration his interest in favour of the widow by a deed during her lifetime, he is not entitled to maintain a suit for possession after the death of the widow against a person who had purchased the property from the widow several years before the relinquishment by the reversioner. KALI KISHORE PAL *v.* ABDUL KARIM . . **2 C. W. N. 132**

4. ——— **Contract made in settlement of disputes as to estate**— *Condition restraining power of leasing property—Transfer of Property Act (IV of 1882), ss. 10 and 15.* In an ikrarnama executed by a Hindu widow on the one side and her husband's cousins on the other, in settlement of disputes regarding her husband's estate, one of the conditions agreed upon was that, if either of the parties should want to execute a lease jointly, or individually, "it would be executed and delivered by mutual consultation of both the parties;" and if "the document be not signed and consented to by both the parties, it shall be null and void." In a suit brought on the basis of the ikrarnama to set aside a lease granted by the widow:—*Held*, that there is nothing in any statute law which renders such a provision inoperative; neither ss. 10 and 15 of the Transfer of Property Act (IV of 1882) nor any principle underlying them is applicable to it; it is not an unreasonable provision; there was no absence of equity in the arrangement, and effect should be given to it. KULDIP SINGH *v.* KHETRANI KOER **I. L. R. 25 Calc. 869 2 C. W. N. 463**

6. CONVEYANCE BY WIDOW WITH REVERSIONERS' CONSENT.

1. ——— **Effect of conveyance by widow and reversioners**—*Title of alienee.*

HINDU LAW—REVERSIONERS—*contd.*

6. CONVEYANCE BY WIDOW WITH REVERSIONERS' CONSENT—*contd.*

A Hindu widow in possession and the apparent next taker, by joining in one conveyance, can make a complete title. KISHEN GEER *v.* BUSGEET ROY **14 W. R. 379**

TRILOCHUN CHUCKERBUTTY *v.* UMESH CHUNDER LAHIRI . . . . . **7 C. L. R. 571**

2. ——— *Alienation for legal necessity, binding effect of, on other reversioners—Consent of next reversioner.* Under the Hindu law current in Bengal, a transfer or conveyance by the widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person, not a party thereto, who is the actual reversioner, upon the death of the widow, from asserting his title to the property. NOBOKISHORE SARMA ROY *v.* HARI NATH SARMA ROY . **I. L. R. 10 Calc. 1102**

3. ——— *Power of remoter reversioner to question alienation.* Observations on the power of a remoter reversioner to question alienations by a Hindu widow in which the next reversioner has concurred. SIA DASI *v.* GUR SAHAI **I. L. R. 3 All. 362**

4. ——— **Ratification by reversioner of conveyance by widow**—*Receipt of rent by reversioner from alienee of widow—Subsequent suit to set aside alienation.* Where a tenure granted by a widow is recognized, after her death, by the reversionary heir, who receives rent from the holder of the tenure, such receipt amounts to a ratification of the tenure, and a suit to set aside, on the ground of the widow's incompetency to grant it cannot succeed. MOHESH CHUNDER BOSE *v.* UGRA KANT BANERJEE . . . **24 W. R. 127**

5. ——— **Gift by Hindu widow of her own interest and that of consenting reversioner.** A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimuty Dibeah* v. *Rany Koond Luta, 4 Moo. I. A. 292; Koer Goolab Singh* v. *Rao Kurun Singh, 14 Moo. I. A. 176; Sia Dassi* v. *Gur Sahai, I. L. R. 3 All. 362;* and *Raj Bullubh Sen* v. *Oomesh Chunder Rooz, I. L. R. 5 Calc. 44*, referred to. *Ramphal Rai* v. *Tula Kuari, I. L. R. 6 All. 116*, distinguished. RAMADHIN *v.* MATHURA SINGH . . **I. L. R. 10 All. 407**

6. ——— **Alienation by Hindu widow of a portion of her estate with consent of some of the reversioners**—*Suit by other reversioners to set aside alienation.* The principle enunciated by the Full Bench in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102*, is not applicable to a case where some only of the reversioners have consented to an alienation by the widow, and where therefore only a portion of the widow's estate has been alien-

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6. CONVEYANCE BY WIDOW WITH REVERSIONERS' CONSENT—*contd.*

ated. RADHA SHYAM SIRCAR *v.* JOY RAM SENAPATI . . . . I. L. R. 17 Calc. 896

SRISTIDHUR CHURAMONI BHUTTACHARJEE *v.* BROJO MOHUN BIDDYARUTON BHUTTACHARJEE I. L. R. 17 Calc. 900 note

7. ——— Fraudulent consent given by nearest reversioners—*Suit by a subsequent nearest reversioner to set aside alienations.* In a suit brought by the nearest reversioner of a Hindu widow who had alienated portions of her husband's estate with the consent of the nearest reversioner alive at the date of the alienation (since deceased), it was found that the alienations were colourable transactions fraudulently got up for the purpose of defeating the plaintiff's claim:—*Held*, that the consent of the nearest reversioner, who must have been aware of the fraud, was of no avail to validate the transactions impeached, and that they were therefore invalid as against the plaintiff. KOLANDAYA SHOLAGAN *v.* VEDAMUTHU SHOLAGAN I. L. R. 19 Mad. 337

8. ——— Sale by a Hindu widow—*Whether the reversioner consented that she should sell the whole inheritance or only her life-estate.* The sale by a Hindu widow of a share in village lands of which share her husband had been proprietor, having taking place without justifying necessity, could extend no further than to transfer her interest as a widow, for life, unless the consent of the reversionary heir had been given to her selling the whole inheritance. The appellant's case was that this consent had been given. The evidence of its having been given was the fact that this heir, having been appointed the widow's mukhtar for the purpose, had executed, on her behalf, a sale-deed containing words to the effect that the vendee had become (as the English translation on the record expressed it) "absolute" owner of the share sold. This heir, however, received no consideration to induce him to relinquish the reversionary title; and, on the death of the widow, his descendant claimed the inheritance against the vendee's son, then in possession. *Held*, that it had not been made so clear that the conveyance transferred the whole estate of inheritance as to cause it to follow that the reversionary heir, when shown to have consented to the transfer by the widow, must be taken to have consented to a transfer by her of the whole estate of inheritance. Therefore the judgment of the Appellate Court below, that the transfer extended only to the widow's life-estate, must be maintained. JIWAN SINGH *v.* MISRI LAL I. L. R. 18 All. 146 L. R. 23 I. A. 1

9. ——— Transfer by Hindu widow of part of her estate—*Consent of reversioner.* A Hindu widow with the consent of *A*, the then nearest reversioner, sold part of the property inherited by her from her husband. *A* predeceased

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the widow, and on her death *B*, *C*, and *D* were the nearest reversioners, and they now sued to recover the property. It appeared that the sale was not justified by circumstances of legal necessity and that *D* had been born after the sale had taken place. *Held*, that the sale was not binding on the plaintiffs or any of them. MARUDAMUTHU NADAN *v.* SRINIVASA PILLAI . . I. L. R. 21 Mad. 128

10. ——— Alienation by widow and reversioner—*Sale in execution of decrees for their debts.* A Hindu widow can, with the consent of next reversioner at the time, alienate the estate so as to give an absolute title to the purchaser; but an execution-sale in satisfaction of debts contracted by her and the reversioner for the time being cannot have the effect of a sale by her and that reversioner. MOHIMA CHUNDER ROY CHOWDHURI *v.* GOURI NATH DEY CHOWDHURI . 2 C. W. N. 162

7. REMOTE REVERSIONERS.

1. ——— Declaratory suit—*Right of suit—Remote Reversioner—Declaratory decree—Nearest Reversioner, interests of—Specific Relief Act (I of 1877), s. 42.* A declaratory suit by a remote reversioner, who would take an absolute interest is maintainable in the presence of the immediate reversionary heir, who is only the holder of a life estate, under s. 42 of the Specific Relief Act (I of 1877). *Ishwar Narain* v. *Janki, I. L. R. 15 All. 132*, dissented from. Where the nearest reversioner precludes himself or herself from maintaining a declaratory action by omitting to sue within the statutory period and thus practically concurs in an alleged improper alienation, the remote reversioner is entitled to maintain the suit. *Govinda Pillai* v. *Thyammal, 14 Mad. L. J. 209*, followed. ABINASH CHANDRA MAZUMDAR *v.* HARINATH SHAHA (1905) . I. L. R. 32 Calc. 62 s.c. 9 C. W. N. 25

2. ——— Sister's son—*Remote reversionary heirs—Priority of heritable right—Pedigrees—Evidence Act (I of 1872), s. 81 sub-s. 5.* The immoveable property of a deceased Hindu was claimed by the plaintiffs in right of their father *S S* as the nearest reversionary heir to the deceased on the death of his widow in 1896. The Subordinate Judge found on the plaintiffs' pedigrees that *S S* and the deceased were descended from a common ancestor seven degrees removed and that *S S* was the preferential heir. The Judicial Commissioner dismissed the suit finding that the appellants had made no attempt to support the finding of the Court below and that they were not entitled under the pedigree filed by the defendants. *Held*, that the decree of the first Court must be affirmed, the evidence being sufficient to maintain it and there having been misapprehension by the Court of Appeal

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HINDU LAW—REVERSIONERS—*concld.*

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as to the absence of attempt to support it. *Held*, also, with regard to the plaintiffs' pedigrees that although they were not family records handed down from generation to generation and added to from time to time, they were nevertheless admissible in evidence so far as they consisted of declarations shewn to have been made or adopted *ante litem motam* by deceased members of the family touching the family reputation or tradition on the subject of its descent. To render a statement inadmissible as having been made *post litem motam* the same thing must be in controversy both before and after it is made. KALKA PARSHAD *v.* MATHURA PARSHAD . . . **L. R. 35 I. A. 166**

8. DECREE AGAINST WIDOW, EFFECT OF.

——————— *Hindu widow—Effect of decree against widow in possession—Reversioners.* A reversioner succeeding to an estate after the death of the widow of the former owner will be bound by a decree obtained against the widow, provided that there has been a fair trial of the suit in which such decree was passed. *Katama Natchiar* v. *The Rajah of Shivagunga, 9 Moo. I. A. 543,* and *Hari Nath Chatterjee* v. *Mothur Mohun Goswami, I. L. R. 21 Calc. 8,* followed. MADAN MOHAN LAL *v.* AKBARYAR KHAN (1905) **I. L. R. 28 All. 241**

HINDU LAW—SEPARATE PROPERTY.

——————— *Acquisitions out of salary, primâ facie separate property—Succession Certificate Act (VII of 1889), s. 19—Discretion of Court in granting certificate.* Money connected with insurance, the premia for which are paid out of the salary of a deceased Hindu, is *primâ facie* his separate property. *Mahadeva Pandia* v. *Rama Narayana Pandia, 13 Mad. L. J. 75,* followed. Where an application for a succession certificate under Act VII of 1889 by the widow of the deceased in respect of such money is opposed by his brother on the sole ground that the deceased was educated at the family expense, the certificate ought to issue in favour of the widow. RAJAMMA *v.* RAMAKRISHNAYYA (1905) **I. L. R. 29 Mad. 121**

HINDU LAW—STRIDHAN.

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HINDU LAW—STRIDHAN—*contd.*

See HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—UNCHASTITY. **I. L. R. 26 Mad. 509**

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN.

1. ——————— **Definition of "stridhan"**—*Different classes of stridhan—Woman married in Asura form.* The etymological import of the word "stridhan," and the different views with which it is regarded in the Eastern and Western schools of Hindu law, pointed out. The Mitakshara recognizes only one class of stridhan, and includes in that class all property acquired by a woman by inheritance. According to the last-mentioned authority, a woman's stridhan, if she has been married by the Asura form, upon her death childless, goes to her mother, her father, and their kindred,—*i.e.*, to the sapindas of her father in the first instance,—and, failing them, to her mother's next of kin; but if a woman has been married according to one of the approved forms, her stridhan descends, upon her death childless, to her husband and his sapindas. Over stridhan acquired by inheritance (so far as it consists of immoveable property) a woman's power of alienation is limited. The Vyavahara Mayukha also considers property acquired by a woman by inheritance to be stridhan, but classes stridhan under two heads—stridhan in a narrower sense, embracing particular species, for which a peculiar mode of devolution is prescribed, and stridhan generally (including stridhan acquired by inheritance), which descends in the same line as if the woman had been a male,—*i.e.*, to her sons and the rest,—and this notwithstanding her having left daughters. Authorities bearing upon the subject of stridhan considered and commented upon. VIJIARANGAM *v.* LAKSHUMAN **8 Bom. O. C. 244**

2. ——————— **Property given to a woman by a stranger**—*Mayukha—Inheritance—Devolution of such property—Daughter's daughter not entitled to it—Son's widow preferred as gotraja sapinda.* By the law of inheritance laid down in the Mayukha, a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds therefore, in preference to the daughters of a deceased daughter. BAI NARMADA *v.* BHAGWANTRAI **I. L. R. 12 Bom. 505**

3. ——————— **Property of daughter bequeathed to her by father before her marriage.** The property of a daughter bequeathed to her by her father before her marriage falls within the category of stridhan. JUDOONATH SIRCAR *v.* BUSSUNT COOMAR ROY CHOWDHRY **11 B. L. R. 286 : 16 W. R. 105 : 19 W. R. 264**

4. ——————— **Gift by son to mother for maintenance.** A gift of money by a son to his

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HINDU LAW—STRIDHAN—*contd.*

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mother for her maintenance comes within the definition of stridhan in the Hindu law. DOORGA KOONWAR *v.* TEJOO KOONWAR . **5 W. R. Mis. 53**

5. ——— Property purchased or acquired by mother—*Property inherited by daughter from mother—Interest of Hindu daughter in mother's property.* *A*, a Hindu widow, died intestate, leaving her surviving sons of her husband's elder brothers, a sister, and the husband and children of a deceased sister. At the time of her death *A* was possessed of certain articles of jewellery given to her on her marriage, and of certain other articles of jewellery, and of Government paper, standing in her name, which she had purchased herself. She was also possessed of a share of a house and some Government paper, which had been left to her by the will of her mother. The provisions of the will in question being obscure, the parties interested under it had referred their difficulties to arbitration, and by the award the arbitrators allotted to *A* the share of the house of which she had died possessed "to be held by her in severalty as a Hindu daughter in a manner prescribed by the Hindu law as prevalent in Bengal," and allotted the Government paper to her, "to be taken and enjoyed by her absolutely." In a suit by the sons of *A*'s husband's elder brothers claiming the whole of her property as her stridhan: *Held*, that, as far as the source was concerned, all the gifts under the will might well be *A*'s stridhan, and that, as the award gave her an absolute interest in the Government notes, they were her stridhan and passed to the plaintiffs together with all the jewellery and the Government notes purchased by her; but that, as the award gave her only the interest of a Hindu daughter, in the house, and that, as what a daughter inherits from her mother does not become her stridhan, the plaintiffs had no claim to the share of the house. PRANKISSEN LAHA *v.* NOYANMONEY DASSEE . . **I. L. R. 5 Calc. 222**

6. ——— Stridhan inherited by daughter from mother—*Preferential heirs on death of daughter.* Stridhan inherited by a daughter from her mother passes on the daughter's death to the person who would be the next heir to the mother's stridhan. Where *B* inherited stridhan from *A*, her mother, it was held to pass on the death of *B* to the sons of *A* in preference to the children of *B*. HURI DOYAL SINGH SARMANA *v.* GRISH CHUNDER MUKERJEE **I. L. R. 17 Calc. 911**

7. ——— Succession of daughter to property of mother—*Daughters as heirs to exclusion of sons—Mitakshara law—Mayukha law—Ratnagiri District.* According to the Mitakshara (which, and not the Mayukha, is the paramount authority in the Ratnagiri District), the daughter, as to property inherited from her mother, takes an absolute estate which classes her as stridhan and descends to her own heirs, *i.e.*, to her daughters to the exclusion of her sons. JANKIBAI *v.* SUNDRA **I. L. R. 14 Bom. 612**

HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*contd.*

8. ——— Shares in villages held by wife of former proprietor—*Mitakshara.* A share in a pattidari village given by a Hindu proprietor to his wife may become her stridhan within the contemplation of the Mitakshara, s. 11, cl. 1, enabling her to make a valid gift of it. THAKRO *v.* GANGA PRASAD . . **I. L. R. 10 All. 197**
L. R. 15 I. A. 29

9. ——— Property acquired by woman by inheritance. According to Hindu law, property acquired by a woman by inheritance is not to be classed as stridhan. SENGAMALATHAMMAL *v.* VALAYNDA MUDALI . . . **3 Mad. 312**

10. ——— Property acquired by a Hindu widow by adverse possession. A property acquired by a Hindu widow by adverse possession is her stridhan. MOHIM CHUNDER SANYAL *v.* KASHI KANT SANYAL . **2 C. W. N. 161**

11. ——— Properties acquired after her husband's death—*Reversioner—Burden of proof.*—Where after the death of a Hindu widow the plaintiff claimed, as the reversionary heir of her husband, certain properties some of which were inherited from her husband and some acquired by her after her husband's death: *Held*, that there is no presumption of law that property acquired by a Hindu widow after her husband's death forms part of her husband's estate. The question from what source the purchase-money came is one of fact, and it is for the plaintiff to start his case with proof sufficient to shift the onus, proof at least of facts from which an inference can be drawn. DAKHINA KALI DEBI *v.* JAGADISWAR BHUTTACHARJEE **2 C. W. N. 197**

12. ——— Husband's estate inherited by widow—*Benares law—Power of disposition of widow.* *Held* that, according to the law of the Benares school, no part of her husband's estate, whether moveable or immoveable, to which a Hindu widow succeeds by inheritance, forms part of her stridhan or peculiar property; and the text of Katyayana must be taken to determine, first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her husband. BHUGWANDEEN DOOBEY *v.* MYNA BAEE **9 W. R. P. C. 23: 11 Moo. I. A. 487**

13. ——— Immoveable property inherited by mother from son. According to the Mitakshara and the Vivada Chintamoni, all property that a woman inherits does not thereby become stridhan, so as after her death to descend to her heirs. Immoveable property which, in default of other intervening heirs, has been inherited by a mother from her son descends, on the mother's death, not to her heirs but to the heirs of the son from whom she inherited it. PUNCHANUND OJHAB *v.* LALSHAN MISSER . . **3 W. R. 140**

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HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*contd.*

14. ——— Property inherited by sister from brother —*Law in Bombay Presidency.* A sister on this side of India, taking as heir to her brother, takes his property as stridhan with an absolute power of disposition over it; and such property upon her death passes in the first instance to her daughters. The sons of such sister have not a vested interest in it as co-parceners with their mother. Property acquired by a married woman by inheritance with the exception of property inherited by a widow from her husband classes as stridhan, and descends accordingly. BHASKAR TRIMBAK ACHARYA *v.* MAHADEB RAMJI . **6 Bom. O. C. 1**

15. ——— Immoveable property inherited by a married woman from her father. According to the Hindu law of inheritance, as received in the Bombay Presidency, immoveable property inherited by a married woman from her father, whether or not it be strictly entitled to the name of stridhan, descends on her death to her own heirs, and not to her father's ascendants according to what is called the "melancholy succession." An inheritance descending on a married woman from her father must be classed as stridhan and descends accordingly. NAVALRAM ATMARAM *v.* NANDKISHOR SHIVNARAYAN . **1 Bom. 209**

16. ——— Gifts by husband to wife from motives of affection—*Ornaments for ordinary wear.* Gifts of affection given by a husband to his wife after marriage are stridhan, and it is not necessary to the preservation of their character as stridhan that they should be constantly worn. If given unreservedly, they become the wife's stridhan. If ornaments appear to be ornaments which a wife would ordinarily wear in her station of life, and not those which would be purchased for use only on extraordinary occasions, such as marriages and the like, the presumption is that they are for the ordinary use of the wife and given to her without reservation. They would therefore be regarded as gifts of affection and would constitute stridhan, and would not be liable to attachment and sale for the satisfaction of the husband's debts. RADHA *v.* BISHESHUR DASS **6 N. W. 279**

17. ——— Ornaments given to wife at her marriage—*Ornaments given after marriage —Sons and daughters.* Where the wife of a Hindu dies, leaving one son and two daughters, such of her ornaments as were given to her at her marriage pass to her daughters, and not to her son. Those given to her after marriage or by her husband or kindred pass, according to the Mayukha, to the son and daughters in equal shares. ASHABAI *v.* TYER HAJI RAHIMUTTULLA . . **I. L. R. 9 Bom. 115**

18. ——— Gift by father to daughter—*Mesne profits—Inheritance.* A Hindu, by a deed, dated in 1840, gave his daughter, a childless widow, an estate for life in certain property, with remainder on her death to his brother's grandsons; the daughter was put in possession, was dispossessed in 1858, and died in 1862. Under the terms of the deed, the property then went to the survivor of the two grandsons, who in 1864 sold his rights and interests in the property. In 1865 the purchaser brought a suit and recovered possession from the defendants. His representatives now sued for mesne profits of the property from 1860 to 1865. *Held*, that the plaintiffs were not entitled to mesne profits which had accrued due, but were uncollected, in the lifetime of the daughter; that such mesne profits would go to her heirs, who would alone be entitled to them. GURU PRASAD ROY *v.* NAFAR DAS ROY **3 B. L. R. A. C. 121: 11 W. R. 497**

19. ——— Grant to wife and her heirs male—*Devise by widow to sons—Rights of daughter.* A Hindu granted certain land to his wife *C* and her sons and grandsons for ever. *C* devised the land to her son by will. *Held*, that the land became the stridhanam of *C*, that the devise was inoperative under Hindu law, and that the land descended to *C*'s daughter. BHUJANGA RAU *v.* RAMAYAMMA . . **I. L. R. 7 Mad. 837**

20. ——— Right of daughter to succeed—In a suit for land it appeared that it had been given to one *S* deceased, after her marriage, by her father. The donee died leaving her brother, defendant No. 1, her son (since deceased), the husband of defendant No. 2, and the plaintiff, her daughter. Defendant No. 1 was in joint possession on behalf of defendant No. 2. *Held*, that the plaintiff was entitled to the land. MUTHAPPUDAYAN *v.* AMMANI AMMAL **I. L. R. 21 Mad. 58**

21. ——— Enfranchisement of service inam. Land which formed the emolument of the office of moniegar was enfranchised in favour of a Hindu woman, who died leaving her surviving defendant No. 2 (her husband) the plaintiff (her unmarried daughter), and two sons and two married daughters who were not parties to this suit. The plaintiff sued to recover the land to which she claimed to be entitled under the Hindu law of inheritance. *Held*, that the property belonged to the deceased as her stridhanam descendible to her heirs, and (without deciding what control, if any, defendant No. 2 had over the property) that the plaintiff was entitled to succeed according to the law of inheritance applicable to such property. SALEMMA *v.* LUTCHMANA REDDI **I. L. R. 21 Mad. 100**

See DHARANIPRAGADA DURGAMMA *v.* KADAMBARI VIRRAZU . . . **I. L. R. 21 Mad. 47**

22. ——— Enfranchisement in favour of widow—*Right of widow.* Lands which had been held by a deceased as moniem service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's

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HINDU LAW—STRIDHAN—*contd.*

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life-estate : *Held*, that the right of the widow under the grant was not limited to that of a widow's estate. SUBBARAYA MUDALI *v.* KAMU CHETTI
I. L. R. 23 Mad. 47

See SITAPATI *v.* NARASIMHAM
I. L. R. 23 Mad. 48 note

23. ——— Widow's savings from the income of the husband's estate. A widow's savings from the income of her limited estate are not her stridhan ; and if she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. ISHRI DUTT KOER *v.* HANSBUTTI KOERAIN
I. L. R. 10 Calc. 324 : 13 C. L. R. 418
L. R. 10 I. A. 150

24. ——— Arrears of maintenance due to widow. Arrears of maintenance due to a Hindu widow at her death do not necessarily revert to the estate from which they were to be derived, on the ground that they were not separated from the corpus of that estate during her life. COURT OF WARDS *v.* MOHESSUR ROY . . . **16 W. R. 76**

25. ——— Immoveable property acquired from deceased uterine brother— *Power of alienation—Husband's heirs.* Immoveable property acquired by a childless Hindu widow from her deceased uterine brother is her stridhan and stridhan with which the heirs to her husband have nothing to do. Over such property her control is absolute and unimpeachable, and the relations of her husband have no such reversionary status in respect of it as will entitle them to sue to set aside an alienation of it by her. MUNIA *v.* PURAN
I. L. R. 5 All. 310

26. ——— Purchase of immoveable estate with money received from husband *—Proceeds of jewellery.* A widow who received presents of moveable property from her husband from time to time during their married life, after his death purchased immoveable estate, partly out of such property and partly with money, the proceeds of jewellery forming part of her stridhanam. *Held*, that she could dispose of such immoveable estate as her stridhanam. VENKATA RAMA RAO *v.* VENKATA SURIYA RAO
I. L. R. 2 Mad. 333 : 8 C. L. R. 304

Affirming on appeal decision of High Court in s. c.
I. L. R., 1 Mad. 281

27. ——— Widowed daughter with dumb son—*Bengal school of law—Daughter's son—Disqualification for inheritance.* Under the Bengal school of the Hindu law, a widowed daughter having a son who is dumb at the time the succession opens out (but is not shown to be incurably dumb, is entitled to succeed to her mother's stridhan in preference to a daughter's son. CHARU CHUNDER PAL *v.* NOBO SUNDERI DASI **I. L. R. 18 Calc. 327**

HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*contd.*

28. ——— Right of step-son to inherit *—Inheritance to stridhanam.* A Hindu widow, having stridhanam acquired from her husband, died leaving no issue. The defendant, who was the son of her elder sister, took possession. The step-son of the deceased now sued to recover the stridhanam property. It was found that the marriage of the deceased had been celebrated in the Brahma form. *Held*, that the plaintiff was entitled to succeed. BRAHMAPPA *v.* PAPANNA . **I. L. R. 13 Mad. 138**

29. ——— Moveable property inherited by a widow from her husband— *Devolution of such property on the widow's death.* Moveable property inherited by a Hindu widow, if not disposed of by her, passes on her death to the next heirs of her husband, whether such property be regarded as her stridhan or not. HARILAL HARJIVANDAS *v.* PRANVALAVDAS PARBHUDAS
I. L. R. 16 Bom. 229

See BAI JAMNA *v.* BHAISHANKAR
I. L. R. 16 Bom. 233

and GODHADHAR BHAT *v.* CHANDRABHAGABAI
I. L. R. 17 Bom. 690

30. ——— Devolution of stridhan belonging to a childless widow—*Grandson —Co-widow—Husband's nephew—Sapindas.* A childless Hindu widow died, possessed of stridhan consisting of ornaments given to her on her marriage and of a house purchased by her out of her own separate income. She left her surviving (i) a co-widow ; (ii) the plaintiff, who was grandson of another co-widow ; and (iii) a nephew (*i.e.*, brother's son of her husband. She had been married in one of the approved forms. *Held*, that the plaintiff was a nearer sapinda of the deceased than either her co-widow or her husband's nephew, and as such excluded both from inheriting the deceased's stridhan. GOJABAI *v.* SHAHAJIRAO MALOJI RAJE BHOSLE
I. L. R. 17 Bom. 114

31. ——— Husband's nieces—*Stridhanam—Bandhu.* A Hindu widow, married according to one of the approved forms, died without issue, leaving her surviving the plaintiffs, who were the daughters of her husband's deceased brother, and the first defendant, who was the adopted son of her sister's daughter, and the second defendant, who was the adopted son of her maternal uncle, and the third defendant, who was the widow of her brother. The defendants having taken possession of her stridhanam property on her death, the plaintiffs now sued as heirs under the Hindu law for possession. *Held*, that the plaintiffs were entitled to succeed. VENKATASUBRAMANIAM CHETTI *v.* THAYARAMMAH
I. L. R. 21 Mad. 263

32. ——— Succession—*Mithila law—* The husband's sister's sons are preferential heirs to the husband's paternal great-grandfather's great-grandsons in the succession to stridhan property.

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HINDU LAW—STRIDHAN—*contd.*

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MOHUN PERSHAD NARAIN SINGH *v.* KISHEN KISHORE NARAIN SINGH . **I. L. R. 21 Calc. 344**

33. ——— Sister-in-law—*Succession to stridhan property.* A childless Hindu widow, who had been predeceased by her parents, died leaving stridhanam property. Her brother's widow claimed to be entitled to inherit that property, and sued to enforce her claim. *Held,* that, whether the marriages of the deceased and her mother respectively had taken place in a superior or an inferior form, the plaintiff was not entitled to inherit the stridhanam property in question. THAYAMMAL *v.* ANNAMALAI MUDALI . . **I. L. R. 19 Mad. 35**

34. ——— Estate of married daughter in stridhanam property mother. Under the Hindu law in force in Southern India, a married daughter, who succeeds to her mother's immoveable stridhanam property, takes a life-interest only, and after death it passes to her mother's heir. VENKATARAMAKRISHNA RAU *v.* BHUJANGA RAU **I. L. R. 19 Mad. 107**

35. ——— Devolution of stridhan property—*Hindu law, Marriage—Presumption as to form of marriage.* Under the Hindu law of Benares school, in the absence of any evidence to the contrary, a marriage must be presumed to have taken place in one of the approved forms; therefore, the heir of a woman to her stridhan property is the nearest kinsman of her husband, and not of her father. *Thakoor Deyhee* v. *Rai Baluk Ram, 11 Moo. I. A. 139; Gojabai* v. *Shahajirao Malaje Raje Bhosle, I. L. R. 17 Bom. 114;* and *Gridhari Lal* v. *Government of Bengal, 1 B. L. R. P. C. 44 : 10 W. R. P. C. 31,* referred to. The Virmitrodaya cannot be referred to where the Mitakshara is clear. JAGANNATH PRASAD GUPTA *v.* RUNJIT SINGH . . **I. L. R. 25 Calc. 354**

36. ——— Woman's estate apart from stridhan—*Devolution of, according to Mayukha—Property inherited by a woman from a male owner—Property not of the class called "stridhan proper"—Reversion on her death to heir of last male owner not to be extended to stridhan.* In cases to which the Vyavahara Mayukha is applicable, a woman's daughter, and not her husband is the heir to her property, although not of the kind belonging to the class of "stridhan proper." The doctrine that property which has been inherited by a woman should revert on her death to the heirs of the last male owner is not to be extended to the devolution of stridhan. The heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family. The phrase "sons and the rest" in Ch. IV, s. 10, placitum 26 of the Mayukha, means merely "sons, grandsons, and great-grandsons," and the phrase "daughters and the rest" in placita, 14, 23, and 24 means "daughters and their issue" as contrasted with "sons, grandsons and great-grandsons." As regards property which does not class as woman's property in the technical sense, the "sons and the rest" take precedence over the "daughter and the rest." Failing both sons and daughters, the heirs to "stridhan proper" and "stridhan improper" are identical, save that as between male and female offspring the latter have a preferential right as regards "stridhan proper," while the former have a similar right as to "stridhan improper." The author of the Mayukha, like the author of the Mitakshara, does not regard the enumeration of specific kinds of stridhan in the old Smriti texts as exhaustive. He includes under the name all that by law becomes the property of the woman, only (unlike the author of the Mitakshara) he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated for purposes of inheritance. In doing this it seems quite reasonable to lay down that, as regards that class of property which is emphatically woman's property being expressly so named by the old sages, the female offspring should take precedence over the male; while as regards that which is not such, the general preference given to male offspring over female by Hindu law should have effect. On the other hand, there is no obvious reason why in the case of collateral relations any similar distinction should be maintained between the two classes. Under the rule of succession above stated, the woman is recognized as a fresh source of devolution. It is to be remembered that the property with which the rule in question deals, is not merely that which the woman obtains by inheritance, but may include that which has never belonged to her husband or any other relation, either on the husband's or the father's side, but is her own original acquisition. Such property is the woman's property; it is not the husband's property. Why, then, should it go on her death to any one except to those who are the woman's heirs, and how can the rule about the last male owner be made applicable to such property at all? MANILAL REWADAT *v.* BAI REWA . **I. L. R. 17 Bom. 758**

37. ——— Inheritance by a granddaughter for a limited estate—*Succession by heir of last full owner.* A Sudra (Lingayat) died in 1826 leaving his property to *A*, *B*, and *C*, his daughters, who enjoyed it for some time jointly. In 1860 a settlement was made by (i) *A*, the sole surviving daughter, (ii) *D*, who was the daughter of *B*, and (iii) the present plaintiff, who was the only son of *C* and also the step-son of *D*. Under the settlement, two-thirds of the property were given to the present plaintiff, and the rest was divided between *A* on the one hand and *D* and *E* on the other. *E* was the daughter of *D*. Subsequently *D* and *E* acquired *A's* share under a deed of gift, dated 5th June 1863. *D* died in 1883. *E* had died previously, leaving the present defendant (her husband) and a daughter *F*, who died an infant without issue in 1891. The plaintiff now sued to recover the property which passed to the line of *B*. *Held,* (*i*) that the settlement of 1860 on its true

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construction gave to *D* and *E* a life-interest only in the event of their having no descendants, but an estate of inheritance otherwise, and that that disposition was valid, and accordingly that in the event which happened they took a heritable estate; (*ii*) that under the settlement of 1860 and the deed of gift of 1863, *D* and *E* took as joint tenants with benefit of survivorship, and not as tenants-in-common, and accordingly that *D* became sole full owner of the property on the death of *E*, whose husband thus acquired no title as her heir; (*iii*) that *F* inherited the property, but only for a limited estate, and that the plaintiff was entitled to succeed as heir to *D*, the last full owner. VIRASANGAPPA SHETTI *v.* RUDRAPPA SHETTI
I. L. R. 19 Mad. 110

38. ——— Husband's younger brother of the half-blood—*Brother's son of the deceased female owner—Spiritual benefit.* The principle of spiritual benefit does not exclusively determine the right of succession as regards stridhan property. As regards succession to stridhan property, the son of the brother of the last full owner is a preferential heir to the younger brother of the half-blood of her husband. TOOLSEE DASS SEAL *v.* LUCKYMONEY DASSEE . . . . . **4 C. W. N. 743**

39. ——— Property inherited from a female—*Descent of stridhan.* Amongst property which becomes stridhan according to the law of the Mitakshara is property inherited from a female. It is not the case that where such stridhan has once devolved according to the law of succession which governs the descent of this peculiar species of property, it ceases to be ranked as stridhan and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Deyhee* v. *Rai Baluk Ram, 11 Moo. I. A. 139; Bhugwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487; Chotay Lall* v. *Chunno Lall, I. L. R. 4 Calc. 744: L. R. 6 I. A. 15; Phukar Singh* v. *Ranjit Singh, I. L. R. 1 All. 661;* and *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar, I. L. R. 3 Mad. 290,* referred to. DEBI SAHAI *v.* SHEO SHANKER LAL . **I. L. R. 22 All. 353**

40. ——— Immoveable property inherited by paternal grandmother from grandson—*Mitakshara law.* Immoveable property inherited by the paternal grandmother from the grandson does not rank as stridhan and on her death devolve as such on her heirs, but devolves on her death on the heirs of the grandson. PHUKAR SINGH *v.* RANJIT SINGH . **I. L. R. 1 All. 661**

41. ——— Property given to a woman after marriage by her husband's father's sister's son—*Inheritance.* With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father are preferable heirs to the husband. HURRYMOHUN SHAHA *v.* SHONATUN SHAHA
I. L. R. 1 Calc. 275

HINDU LAW—STRIDHAN—*contd.*

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42. ——— Stridhan of childless Hindu widow—*Succession to stridhan. Semble:* The stridhan of a childless Hindu widow, according to the law of the Western schools, goes to the collateral heirs of her husband, in preference to her own next of kin. THAKOOR DEYHEE *v.* BALUK RAM
2 Ind. Jur. N. S. 106: 10 W. R. P. C. 3
11 Moo. I. A. 135

43. ——— *Succession to stridhan.* Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, *S*, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her stridhan, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against *S* and his son by *C*, on the allegation that he and *J*, who were collateral relatives of the widow's husband, were entitled, under the Hindu law, to succeed in moieties to the properties left by her as her stridhan, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother who, in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower Appellate Court the plea as to adoption was given up. *Held,* that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her stridhan under the Hindu law. *Thakoor Deyhee* v. *Baluk Ram, 11 Moo. I. A. 135,* followed. *Munia* v. *Puran, I. L. R. 5 All. 210,* distinguished. CHAMPAT *v.* SHIBA
I. L. R. 8 All. 393

44. ——— Property inherited by female—*Succession to such property.* An estate inherited by a female does not become her stridhan. Such estate on her death goes to the heirs of the last male heir, and not to the heir of her separate property. JULLESSUR KOER *v.* UGGUR ROY
I. L. R. 9 Calc. 725: 12 C. L. R. 460

45. ——— Property inherited by female from male—*Law applicable in Carnatic.* The Mitakshara rule that property inherited by a female from a male is taken by her for only a restricted estate, and devolves on her death in the line, if any exists, of such male is applicable in the Carnatic. *Chotaylall v. Chunnoo Lall, L. R. 6 I. A. 15,* referred to. MUTTU VADUGANADHA TEVAR *v.* DORA SINGHA TEVAR
I. L. R. 3 Mad. 290
L. R. 8 I. A. 99

46. ——— Property inherited by daughter from father—*Succession to such property.* According to the law of the Mitakshara, a daughter's estate inherited from her father is, like that of a widow inherited from her husband, a

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HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*contd.*

limited and restricted estate, and does not, on her death, pass as stridhan to her heirs, but reverts to the heirs of her father. CHOTAY LALL *v.* CHUNNOO LALL . . . . . **14 B. L. R. 235**
22 W. R. 496

S. C. ON APPEAL TO PRIVY COUNCIL

I. L. R. 4 Calc. 744
L. R. 6 I. A. 15 : 3 C. L. R. 465

See, also, DEO PERSHAD *v.* LUJOO ROY
14 B. L. R. 245 note : 20 W R. 102

47. ——————— *Devolution of property.* *D*, the daughter of one *L*, died childless in 1866 possessed of certain immoveable property which she had inherited from her father *L*. *L's* sister *N* had one son *A* by her first husband *P*. *P* had a second wife *B*, whose son *K* was the father of the defendants. After *P's* death, his widow *N* married again and had a son who was the father of the plaintiff. The plaintiff in this suit claimed to recover the property of *D* from the defendants who had taken possession. He contended that the property having devolved on *A* through a female must continue to descend in that line, and that he was entitled. The defendants claimed as heirs of *A*. *Held*, that on *D's* death *A* was the nearest bandhu relation both of *D* and her father *L*, and consequently became full owner of the property. On *A's* death the defendants, as sons of his half-brother *K*, became his heirs and were entitled to the property. DALPAT NAROTAM *v.* BHAGBAN KHUSHAL
I. L. R. 9 Bom. 301

48. ——— **Devolution of stridhan**—*Daughters, betrothed and unbetrothed—Devolution of stridhan after first devolution.* A betrothed daughter is not entitled at her mother's death to share in her stridhan, but the unbetrothed daughters alone inherit with the sons. When stridhan has once devolved as such upon an heir, it does not continue to devolve as stridhan, but afterwards devolves according to the ordinary rules of Hindu law. SRINATH GANGOPADHAYA *v.* SARBAMANGALA DEBI . **2 B. L. R. A. C. 144 : 10 W. R. 488**

49. ——————— *Property of daughter bequeathed to her by father before marriage—Inheritance—Mother.* According to the Hindu law as current in Bengal, the mother succeeds to the property of her daughter bequeathed to her by her father before her marriage in preference to her husband. Such property falls within the category of stridhan. JUDOONATH SIRCAR *v.* BUSSUNT COOMAR ROY CHOWDHRY
11 B. L. R. 286 : 16 W. R. 105
19 W. R. 264

50. ——— **Impartible zamindari**—*Succession of woman to impartible zamindari.* If a woman succeeds to an impartible zamindari, the estate which devolves on her demise upon her son does not thereby become self-acquired property in the hands of the latter. MUTTAYAN CHETTI *v.* SANGILI VIRA PANDIA CHINNA PAMBIAR
I. L. R. 3 Mad. 370

51. ——— **Mithila law**—*Succession.* The stridhan property of a widow, governed by the Mithila law and married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son. BACHHA JHA *v.* JUGMON JHA **I. L. R. 12 Calc. 348**

52. ——— **Stridhan of co-wife**—*Right of adopted son to succeed to stridhan of co-wife of his adoptive mother.* A son adopted by one wife may succeed to a co-wife's stridhan. TEENCOWREE CHATTERJEE *v.* DINONATH BANERJEE **3 W. R. 49**

53. ——— **Sowdaick stridhan**—*Heirs of wife.* Sowdaick stridhan created by the husband descends not to his heirs, but to the heirs of the wife. KASHEE CHUNDER ROY CHOWDHRY *v.* GOUR KISHOER GOOHO . . . **10 W. R. 139**

54. ——— **Property inherited by a female from a female**—*Mitakshara—Benares school of Law.* Under the Hindu Law of the Benares school, property which a woman has taken by inheritance from a female is not her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males : see *Sheo Partab Bahadur Singh* v. *Allahabad Bank I. L. R. 25 All. 476.* In this case her sons were held entitled to succeed to such property in preference to her daughter. SHEO SHANKAR LAL *v.* DEBI SAHAI (1903) . **I. L. R. 25 All. 468**
s.c. L. R. 30 I. A. 202 :
7 C. W. N. 831

55. ——————— *Mitakshara—Property inherited by a female from a female—Benares School of Law—Property taken as heir of a talukdar under the Oudh Estates Act (I of 1869)—Act I of 1869, ss. 2 and 11—Power of alienation over property so inherited.* Under the Hindu Law of the Benares School, there is no distinction, as to the nature of the estate taken, between property inherited by a woman from a male, and property inherited by her from a female. In both cases she takes it, not absolutely as her *stridhan*, but for a qualified estate alienable only under the conditions applicable to such an estate, and with reverter after her death to the heirs of her predecessor in title : see *Sheo Shankar Lal* v. *Debi Sahai, I. L. R. 25 All. 468.* A woman succeeded to property as heir of her mother, a *talukdar*, under the Oudh Estates Act (I of 1869). *Held*, that, notwithstanding the terms of s. 2, which defines an "heir" as "a person who inherits property otherwise than as a widow" under the Act, and the provisions of s. 11, she had no power of alienation greater than, and irrespective of, her interest under the Hindu Law ; the Judicial Committee, in accordance with the

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principles laid down by them in other cases, being unwilling, notwithstanding the strong language of Act I of 1869, to put a construction on it which would give effect to an alienation of property made to the detriment of those beneficially interested in it. In this case it was *held*, that, apart from any grounds of necessity, she could not alienate the property beyond her own life-time; and a mortgage of it made by her was declared to be inoperative on her death, against the property in the hands of the heir to whom it had reverted. SHEO PARTAB BAHADUR SINGH *v.* ALLAHABAD BANK (1903)

I. L. R. 25 All. 476
s.c. L. R. 30 I. A., 209
7 C. W. N. 840

56. ———— Step sister's son—*Dayabhaga, Ch. IV, ss. 3, 29, 31, 33, 35-39—Stridhan, succession to—Husband's elder brother.* Under the Dayabhaga law a step-sister's son is entitled to succeed to a woman's *stridhan* in preference to her husband's elder brother. DASHARATHI KUNDU *v.* BIPIN BEHARI KUNDU (1905)

I. L. R. 32 Calc. 261
s.c. 9 C. W. N. 119

57. ———— Partition—*Mitakshara—Joint Hindu family—Share of mother on partition.* According to the *Mitakshara* law, the share which the mother in a joint Hindu family obtains on partition, after the death of the father, of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves, on her death, upon her own heirs, and not upon the heirs of her husband. *Bilaso* v. *Dina Nath, I. L. R. 3 All. 88; Bhagwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487; Mussumat Thakoor Deyhee* v. *Rai Baluk Ram, 11 Moo. I. A. 139; Chotay Lall* v. *Chunno Lall, L. R. 6 I. A. 15; Muttu Vaduganadha Tevar* v. *Dora Singha Tevar, I. L. R. 3 Mad. 290; Mohabeer Pershad* v. *Ramyad Singh, 20 W. R. 192; Lalljeet Singh* v. *Raj Coomar Singh, 20 W. R. 336; Sheodyal Tewaree* v. *Judoo Nath Tewaree, 9 W. R. 61; Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry, I. L. R. 16 Calc. 758; Beni Parshad* v. *Puran Chand, I. L. R. 23 Calc. 263;* and *Ganpat Rao* v. *Ram Chandar, I. L. R. 11 All. 296*, referred to. CHHIDDU *v.* NAUBAT (1901) **I. L. R. 24 All. 67**

58. ———— Daughter and daughter's daughters—*Savings or property purchased out of savings by widow out of money awarded to her by decree as maintenance—Stridhanam K*, a Hindu widow, purchased property with money received by her under a decree awarding maintenance made payable to her out of the revenues of a zamindari. She never had any right to or possession of her husband's estate, which was always in the hands of other persons, who were entitled thereto. *K* died leaving a daughter *M* her surviving, who subsequently also died leaving three daughters. The three daughters of *M* sold the property to plaintiffs, who brought this suit for a declaration that they were entitled to certain shares in the property and for delivery of the same. For the defence it was contended that the property in question was not the stridhanam of *K*, that *K* had taken only a limited and qualified interest therein, and that on *K's* death it devolved on her husband's lineal male descendants, and that, in consequence, the sale to plaintiffs conferred on them no title to the property: *Held*, that the property was *K's* stridhanam, and, consequently, *M* was, on her death, heir to it. There is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate, in every sense of the term, and devolves as such. As, in the present state of the law, the income is completely dissociated from the corpus, there is no presumption that savings or purchases with savings effected by a widow are increments to the corpus of the husband's estate and pass together with it. *Akkana* v. *Venakya, I. L. R. 25 Mad. 351*, approved; *saudamini Dasi* v. *The Administrator General of Bengal, L. R. 20 I. A. 12*, followed; *Isri Dut Koer* v. *Mussumut Hansbutti Koerain, L. R. 10 I. A. 150*, distinguished; *Soorlah Dossee* v. *Bhoobun Mohun Neoghy, I. L. R. 15 Calc. 292; Beni Pershad* v. *Puranchand, I. L. R. 23 Calc. 262; Chhiddu* v. *Naubat, I. L. R. 24 All. 67;* and *Sheo Shankar Lal* v. *Debi Sahai, I. L. R. 25 All. 468*, commented on. *Held*, also, that as a daughter's daughter is entitled to take (in preference to a daughter's son), the stridhanam of the grandmother, *K's* stridhanam passed, on the death of her daughter *M*, to *M's* daughters, who took only a limited and qualified estate. SUBRAMANIAN CHETTI *v.* ARUNACHELLAM CHETTI (1905) . . . . **I. L. R. 28 Mad. 1**

59. ———— Co-widow—*Mitakshara—Mayukha—Succession to stridhan property of childless Hindu widow—Co-widow preferred to husband's brother and brother's son—"Sapinda," meaning of—Construction of tests, rule of—Island of Bombay, succession in.* Under the Mitakshara as also under the Mayukha as read with the Mitakshara, a co-widow is entitled to succeed to the *stridhan* property of a widow dying without issue in preference to her husband's brother or brother's son. According to the Mitakshara definition of *sapinda*, husband and wife are *sapindas* to each other and the same theory has been adopted by the author of the Mayukha. The rule of succession to the *stridhan* property of a childless widow laid down in the Mitakshara and adopted in pl. 28 of the Mayukha, was not intended to be modified in its operation by what is stated in pl. 30 of the same work. The proper construction of the text of Brihaspati in pl. 30 indicated. Shama

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HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*contd.*

Churn's construction of the text approved. *Lallubhai Bapubhai* v. *Mankuvarbai, I. L. R. 2 Bom. 388; Gajabai* v. *Shrimant Shahajirao Maloji Raje Bhosle, I. L. R. 17 Bom. 114, 118, Bachha Jha* v. *Jugmon Jha, I. L. R. 12 Calc. 348, Krisnabai Martand* v. *Sripati Pandu, 8 B. L. R. 12,* referred to. Questions of the Hindu law of inheritance to property in the Island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha where the latter differs from it. But as a general principle, the Mitakshara and the Mayukha should be so construed as to harmonize with one another wherever and so far as that is reasonably possible. *Gajabai* v. *Shrimant Shahajirao Maloji Raja Bhosle, I. L. R. 17 Bom. 114, 118,* referred to. BAI KESSERBAI *v.* HUNSRAJ MORARJI (1906) **I. L. R. 30 Bom. 431**
10 C. W. N. 802
s.c. L. R. 33 I. A. 176

60. ——— *Mitakshara—Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.* According to the Mitakshara a surviving co-widow is entitled to succeed to the *stridhan* property of her deceased co-widow as the nearest surviving *Sapinda* of the husband. KRISHNAI *v.* SHRIPATI (1905)
I. L. R. 30 Bom. 333

61. ——— **Sister**—*Mitakshara—Stridhanam, devolution of—Sister takes precedence over sister's son—Nature of right.* Under the Mitakshara Law, where a woman not married in any of the approved forms dies issueless, her *stridhanam* property, in the absence of nearer heirs, passes to the sister in preference to the sister's son. The Mitakshara is the paramount authority in this Presidency and in the absence of a consensus of opinion among the commentators, and where there is no evidence of usage to the contrary, the general doctrine of Mitakshara Law must prevail over the Smriti Chandrika. A woman taking *stridhanam* property of a deceased female by inheritance will take only a limited interest in such property. *Muthappudayan* v. *Ammani Ammal, I. L. R. 21 Mad. 58, 62,* referred to. *Selemma* v. *Latchmana Reddi, I. L. R. 21 Mad. 100, 103, 104,* referred to. RAJU GRAMANY *v.* AMMANI AMAL (1906)
I. L. R. 29 Mad. 358

62. ——— **Full brothers of husband**—*Stridhan—Succession—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara.* A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband: *Held,* that under the Mitakshara by which the parties were governed, for the purpose of succession to the non-technical *stridhan* of a widow, who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother. PARMAPPA *v.* SHIDDAPPA (1906)
I. L. R. 30 Bom. 607

HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*contd.*

63. ——— *Succession—Stridhan—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara—Hindu Law.* A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband. *Held,* that under the Mitakshara, by which the parties were governed, for the purpose of succession to the non-technical stridhan of a widow, who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother. PARMAPPA *v.* SHIDDAPPA (1906)
I. L. R. 30 Bom. 607

64. ——— **Mother of childless woman**—*Stridhan—Property of daughter received from father after marriage—Maurasi mukarari lease, rent nominal—Anwadheya—Devolution of stridhan belonging to a childless woman.* When a *maurasi* and *mukarari* lease of a property was granted by a father to his daughter after her marriage, reserving merely the right to receive a nominal sum annually: *Held,* that under the Dayabhaga the interest in the property transferred to the daughter under the lease was her *stridhan* falling within the class *Anwadheya,* and that on her dying childless her mother was entitled to inherit it in preference to her husband. *Junon Nath Sirkar,* v. *Bussent Coomar Ray Chowdhry, 19 W. R. 264: 11 B. L. R. 286; Hurry Mohun Shaha* v. *Shonatun Shaha, I. L. R. 1 Calc. 275;* and *Gopal Chundra Paul* v. *Ram Chandra Pramanik, I. L. R. 28 Calc. 311,* referred to. RAM GOPAL BHUTTACHARJEE *v.* NARAIN CHANDRA BANDOPADHYA (1905) . **I. L. R. 33 Calc. 315**
s.c. 10 C. W. N. 510

65. ——— **Property inherited by daughter from her father**—*Stridhan—Succession—Devolution.* Under the Mitakshara law, as interpreted in this Presidency, the daughter takes an absolute interest in property inherited from her father and, on her death, it devolves on her daughter in preference to her son. GULAPPA *v.* TAYAWA (1907) . . . . **I. L. R. 31 Bom. 453**

66. ——— **Pitridatta Ayautuka Stridhan, succession to**—*Son or married daughter, preferential heir—Dayabhaga—"Kanya," meaning of.* Under the Dayabhaga School of Hindu Law, son is the preferential heir to a married daughter to *pitridatta ayautuka stridhan,* property of the mother. The word "*kanya*" in Dayabhaga, Chap. IV, s. ii, para. 16, means an unmarried daughter. *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya, I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15,* followed. PROSANNO KUMAR BOSE *v.* SARAT SHOSHI GHOSH (1908)
I. L. R. 36 Calc. 86
12 C. W. N. 924

67. ——— **Property inherited by maiden daughter, nature of interest taken in**—*Stridhana—Daughter takes only limited estate.*

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HINDU LAW—STRIDHAN—*contd.*

1. DESCRIPTION AND DEVOLUTION OF STRIDHAN—*concld.*

Inherited property is not *stridhanam* and the case of a maiden daughter succeeding to the *stridhanam* property of her mother is no exception to this general rule. The maiden daughter so succeeding takes only a limited estate. The inclusion by Vignaneswara of inherited property in the definition of stridhanam is not in accordance with other authorities and ought not to be accepted as law. *Virasangappa Shetti* v. *Rudrappa Shetti, I. L. R. 19 Mad. 110,* followed. *Venkatarama Krishna Rao* v. *Bhujanga Rau, I. L. R. 19 Mad. 107,* not followed. *Narasayya* v. *Venkayya, 2 Mad. L. J. 149,* not followed. JANAKISETTY SOORYUDU *v.* MIRIYALA HANUMAYYA (1909)
I. L. R., 32 Mad. 521

2. GIFT OF STRIDHAN.

1. ——— Nature of gift of stridhan —*Maintenance, provision for.* A gift of stridhan is not equivalent to a provision for maintenance. JOYTARA *v.* RAMHARI SIRDAR
I. L. R. 10 Calc. 638

3. EFFECT OF UNCHASTITY.

1. ——— Unchastity as incapacitating woman from holding stridhan—*Inheritance and keeping possession of stridhan. Per* TURNER, *Offg. C.J.,* and OLDFIELD, *J.*—Unchastity in a woman does not incapacitate her from inheriting stridhan. *Per* PEARSON and SPANKIE, *JJ.*—Unchastity in a woman does not preclude her from keeping possession by right of inheritance of stridhan. GANGA JATI *v.* GHASITA
I. L. R. 1 All. 46

2. ——— Inheritance. Unchastity does not debar a Hindu woman from inheriting the *stridhan* property of her female relatives. *Ganga Jati* v. *Ghasita, I. L. R. 1 All. 46,* followed. *Ramnath Tolapattro* v. *Durga Sundari Debi, I. L. R. 4 Calc. 550; Ramananda* v. *Raikishori Barmani, I. L. R. 22 Calc. 347,* distinguished. NOGENDRA NANDINI DASSI *v.* BENOY KRISHNA DEB (1902)
I. L. R. 30 Calc. 521; s.c. 7 C. W. N. 121

4. POWER TO DISPOSE OF STRIDHAN.

1. ——— Power of married woman to dispose of stridhan—*Immoveable property bought with stridhan.* Under the Hindu law, a married woman is at liberty to make any disposition the likes of money constituting her stridhan or separate and peculiar property, and if she purchases immoveable property with such stridhan, she has a right to sell that immoveable property. LUCHMUN CHUNDER GEER GOSSAIN *v.* KALICHURN SINGH
19 W. R. 292

HINDU LAW—STRIDHAN—*concld.*

4. POWER TO DISPOSE OF STRIDHAN—*concld.*

2. ——— *Mitakshara—Joint Hindu family—Partition—Share of mother on partition.* The share which is taken by the mother in a Joint Hindu family upon partition of the family property being her *stridhan,* she is capable of alienating it at her pleasure. PAL RAI *v.* SURAJ BALI (1901) . . . **I. L. R. 24 All. 82**

3. ——— Saudayik—*Bequest by will—Power of disposal subject to husband's consent—Gurav service—Vritti.* Saudayik stridhan is that which is obtained by a married woman or by a virgin in the house of her husband or of her father, from her brother or parents. Except in the kind known as Saudayik, a woman's power of disposal over her stridhan is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will. BHAU *v.* RAGHUNATH (1906) . . **I. L. R. 30 Bom. 229**

5. PARTITION.

——— Share of step-mother—*Partition—Stridhan—Value of stridhan to be deducted from share—Expenses for ceremonies of grandchildren.* In a suit for partition brought by a Hindu against his father and brothers, the brothers are entitled to have set apart from the family property a sum sufficient to defray the expenses for their prospective thread, betrothal and marriage ceremonies, such sum to be calculated according to the extent of the family property. A father's wife is on such partition entitled to a share equal to that of a son, but from her share must be deducted the value of any *stridhan* received by her as a gift from her father-in-law or husband. JAIRAM *v.* NATHU (1906) . . . **I. L. R. 31 Bom. 54**

HINDU LAW—SUCCESSION.

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1. GENERAL RULES	5352
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See HINDU LAW—
CUSTOM—INHERITANCE—SUCCESSION;
MITAKSHARA;
DAYABHAGA.

1. GENERAL RULES.

1. ——— Bandhus—*Succession Father's sister's daughter's son entitled in preference to paternal grandfather's sister's son.* It is a cardinal princi-

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HINDU LAW—SUCCESSION—*contd.*

1. GENERAL RULES—*concld.*

ple of Hindu Law that the nearer line excludes the more remote and the ground of distinction in favour of a party, who is able to trace his descent with less intervention of females will not apply where he competes with one of a nearer line. The father's sister's daughter's son, being an *atmabandhu*, is entitled to succeed in preference to the paternal grandfather's sister's son —a *pitribandhu*. *Balusami Pandithar* v. *Narayana Rao, I. L. R. 20 Mad. 342*, referred to. KRISHNA AYYANGAR *v.* VENKATARAMA AYYANGAR (1906) . . . **I. L. R. 29 Mad. 115**

2. ——— **Right of representation**—*Divided son as nearest sapinda does not exclude divided grandson or great-grandson.* Partition does not annul the filial relation nor the right of succession incidental to such relation. The right of divided sons, grandsons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided son will not, on the principle of the exclusion of remoter, by nearer sapindas, exclude the divided grandson in the succession to divided property of the ancestor. *Ramappa Naicken* v. *Sithammal, I. L. R. 2 Mad. 184*, referred to. *Muthuvaduganatha Tevar* v. *Periasami, I. L. R. 16 Mad. 15*, referred to. MARUDAYI *v.* DORAISAMI KARAMBIAN (1907) . **I. L. R. 30 Mad. 348**

3. ——— **Succession certificate**—*Sister's daughter—Sister's daughter's son—Spiritual efficacy the criterion of inheritance—Succession Certificate Act (VII of 1889), s. 6.* Where the daughter of the sister of a deceased Hindu governed by the Dayabhaga school and her son applied under the Succession Certificate Act for a certificate to collect the debts due to the estate of the deceased: *Held* (without expressing a final opinion), that competency to offer funeral oblations being the principal ground for succession under the Dayabhaga law, *primâ facie* a sister's daughter and a sister's daughter's son are not heirs, and as such are not entitled to have the certificate. *Umai Bahadur* v. *Udoi Chand, I. L. R. 6 Calc. 119, Collector of Madura* v. *Moottoo Ramalinga Sathupathy, 12 Moo. I. A. 397*, and *Moniram Kolita* v. *Keri Kolitani, I. L. R. 5 Calc. 776; L. R. 7 I. A. 115*, distinguished. KRISHNA PADA DUTT *v.* SECRETARY OF STATE FOR INDIA (1908). **I. L. R. 35 Calc. 631**

4. ——— **Collateral succession**—*Property not taken from 'ancestor' does not devolve with incidents of ancestral property.* Property inherited by one from a collateral relation, as a brother, uncle, etc., is not taken as, and subject to the incidents of, ancestral property and his male descendants are not coparceners with him in respect of such property. *Karuppai Nachir* v. *Sankaranarayanan Chetty, I. L. R. 27 Mad. 300*, followed. GURUMURTHI REDDI *v.* GURAMMAL (1908) **I. L. R. 32 Mad. 88**

HINDU LAW—SUCCESSION—*contd.*

2. IMPARTIBLE PROPERTY.

1. ——— ——— *Impartible property —Liability of, for debts in the hands of successor —Impartible property, which is not self-acquired, is not assets for debts of previous holder.* Debts contracted by the holder of an impartible estate, which is not such holder's self-acquired property, are not binding on his successor, who takes by survivorship, when they are contracted for purposes which will not be binding on him, if the property was ordinary partible property; and such property is not assets in the hands of the successor for the payment of such debts, because he could not have questioned any alienation of the same by his predecessor. *Per* SANKARAN NAIR, *J.*—An undivided member, who succeeds to ancestral impartible property to the exclusion of nearer heirs of the last holder, does so only by right of survivorship. *Katama Nachiar* v. *The Raja of Sivaganga, 9 Moo. I. A. 539, 611, 614;* and not simply as a member of the family of which he and the last holder were undivided members. When the acquisition or recognition of ownership is due to a process of evolution or to judicial decisions extending over a comparatively long period of time, such ownership may carry with it certain incidents appropriate to it in its earlier stages, but from which rights of ownership acquired in well-known and recognized modes are free. The decisions which, by negativing co-parcenary rights in impartible estates and the power of questioning alienations incidental thereto, have recognised ownership in the holders of such estates do not therefore render it necessary to disregard the course of decisions in the Presidency and hold that such estate in the hands of the successor must be treated as assets for the payment of debts contracted by his predecessor. NACHIAPPA CHETTIAR *v.* CHINNAYASAMI NAICKER (1906). **I. L. R. 29 Mad. 453**

2. ——— *Succession—Impartible estate—Estate devised to widow of owner—Suit by reversioner—Compromise—Estate taken by reversioner.* The owner of an impartible estate to which the rule of primogeniture applied died leaving a will, which purported to give the whole estate absolutely to his widow. After the death of the testator the next reversioner sued to recover the estate and pleaded that the will set up by the widow was invalid. The parties to this suit entered into a compromise, the main provisions of the compromise being that the widow should be the "gaddi-nashin" during her life and should give the plaintiff a monthly allowance, and that after the death of the widow the plaintiff or any representative (*kaem makam*) who might be living, should be the absolute owner of all the moveable and immoveable properties possessed by the testator and should occupy the "gaddi." The plaintiff reversioner predeceased the widow. *Held*, on a suit by the widow of this reversioner to recover the estate as against certain other members of her husband's family, who were in possession,

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that the effect of the compromise was that a vested interest in the estate in the character of an impartible estate was subject to the life interest of the widow, limited to the plaintiff reversioner and that upon his death the estate descended to his heir according to the rule of primogeniture and not to his widow. *Rani Mewa Kuwar* v. *Rani Hulas Kuwar, L. R. 1 I. A. 157; Govind Krishna Narain* v. *Abdul Qayyum, I. L. R. 25 All. 546; Bachcho Kunwar* v. *Dharam Das, I. L. R. 28 All. 347,* and *Ram Shankar Lal* v. *Ganesh Prasad, I. L. R. 29 All. 451,* referred to. *Abdul Wahid Khan* v. *Nuran Bibi, I. L. R. 11 Calc. 597,* distinguished. HARPAL SINGH *v.* LEKHRAJ KUNWAR (1908) **I. L. R. 30 All. 406**

3. DISQUALIFICATIONS.

1. ——— **Lunacy**—*Succession—Joint Hindu family*—A member of a joint Hindu family, who has acquired by his birth an interest in the joint family property, is not divested of that interest by subsequently becoming insane. *Deo Kishen* v. *Budh Prakash, I. L. R. 5 All. 509,* followed. TIRBENI SAHAI *v.* MUHAMMAD UMAR (1905) **I. L. R. 28 All. 247**

2. ——— **Murder—Unchastity**—*Mother, party to murder of her son cannot succeed as heir to such son —Unchastity of mother no bar to her succeeding as heir to her son—Degradation does not involve loss of proprietary rights.* A mother, who has been a party to the murder of her son, cannot succeed by inheritance to the property of such son. Under the Mitakshara Law, female heirs other than the widow are not precluded from inheriting by reason of unchastity. *Kojiyadu* v. *Lakshmi, I. L. R. 5 Mad. 149,* followed. Degradation, without exclusion from caste, does not involve loss of proprietary rights; neither has aggravated unchastity that effect. *Per* WALLIS, *J.*—The unchastity of the widow is expressly laid down as a ground of exclusion in numerous texts, but there is no such authority in favour of excluding other females. Degradation does not affect proprietary rights of the degraded person since the passing of Act XXI of 1850. *Per* SANKARAN-NAIR, *J.*—The mother's claim to succession rests on consanguinity and not on religious merit, and incapacity to inherit due to inability to perform sacrifices cannot therefore be presumed. Text of Hindu law considered. VEDAMMAL *v.* VEDANAYAGA MUDALIAR (1907) . . . **I. L. R. 31 Mad. 100**

4. MITAKSHARA.

1. ——— **Right of females to inherit**—*Succession—Mitakshara*—In the case of Hindus governed by the Mitakshara law, no females, except those expressly named in the Mitakshara as heirs, can inherit. A grand-daughter,

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therefore, cannot succeed to the estate of her grandfather. *Gauri Sahai* v. *Rukko, I. L. R. 3 All. 45; Jagat Narain* v. *Sheo Das, I. L. R. 5 All. 311; Nanhi* v. *Gauri Shankar, All. Weekly Notes (1905), 241,* and *Koomud Chunder Roy* v. *Seeta Kanth Roy, W. R. Sp. No. F. B. 75,* followed. *Banshidhar* v. *Ganesh, I. L. R. 22 All. 338, Nallanna* v. *Pannal, I. L. R. 14 Mad. 149,* and *Ramappa Udayan* v. *Arumagath Udayan, I. L. R. 17 Mad. 182,* dissented from. JAGAN NATH *v.* CHAMPA (1905) . . . **I. L. R. 28 All. 307**

2. ——— *Mitakshara—Succession—Right of females to inherit.* Under the Hindu law of the Benares School females not expressly named in the Mitakshara as heirs do not inherit. The son's daughter, not being so named, is therefore not an heir to her grandfather. *Gaur Sahai* v. *Rukko, I. L. R. 3 All. 45; Jagat Narain* v. *Sheo Das, I. L. R. 5 All. 311; Ramanand* v. *Surgiani, I. L. R. 16 All. 221,* and *Koomud Chunder Roy* v. *Seetakanta Roy, W. R. Sp. number F. B. Rulings, 75,* followed. *Girdhari Lall Roy* v. *The Bengal Government, 12 Moo. I. A. 445; Lakshmanammal* v. *Tiruvengada, I. L. R. 5 Mad. 241; Narasimma* v. *Mangammal, I. L. R. 13 Mad. 10,* and *Ananda Bibee* v. *Nownit Lal, I. L. R. 9 Calc. 315,* referred to. *Bansidhar* v. *Ganeshi, I. L. R. 22 All. 838; Nallanna* v. *Ponnal, I. L. R. 14 Mad. 149,* and *Ramappa Udayan* v. *Arumagath Udayan, I. L. R. 17 Mad. 132,* dissented from. NANHI *v.* GAURI SHANKAR (1906) . **I. L. R. 28 All. 187**

3. ——— **Stridhan**—*Mitakshara—Succession—Held,* that the stridhan of a Hindu woman governed by the Mitakshara law would, on her death without issue, go to the sons of her husband's sister in preference to the sons of her own sister. GANESH LAL v. AJUDHIA PRASAD (1906) . . . **I. L. R. 28 All. 345**

5. MISCELLANEOUS CASES.

1. ——— **Palayam or Pollien**—*Succession to. Impartibility—Grant of sanad under Reg. XXV of 1802—Effect of—Lineal primogeniture, when estate held in co-parcenary—Maintenance, amount of—Privy Council, practice of, to interfere with amount settled in India.* The question whether an estate is subject to the ordinary Hindu Law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Raja Yarlagadda Durga, L. R. 17 I. A. 134,* followed. Acceptance of a sanad in common form under Reg. XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate. The zemindari of Udayarpalayam in the Carnatic, represents the ancient Palayam of Udayar, having been granted and accepted, after the cession of the Carnatic, as equivalent in value to the ancient Palayam. It has retained its impartible character

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in spite of the acceptance by the Poligar of a sanad under Reg. XXV of 1802 as is corroborated by the fact that, since the grant of the sanad, the zemindari has been uniformly enjoyed as an impartible estate. When impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. *Naraganti* v. *Venkatachalapati, I. L. R. 4 Mad. 250,* followed. It is not the practice of the Judicial Committee to interfere in a question as to the amount of maintenance. That is a matter with which the Courts in India are better qualified to deal. KACHI KALIYANA RENGAPPA KALAKKA THOLA *v.* KACHI YUVA RENGAPPA KALAKKA THOLA UDAYAR (1905)

10 C. W. N. 95

2. ——— **Grihast Goshains**—*Succession—Custom—Adoption of chela by widow of deceased Goshain.* The plaintiff set up a custom as prevalent amongst the Grihast Goshains of Hardwar and other places adjacent in the United Provinces whereby the widow of a deceased Goshain was entitled, with the concurrence of the elders of the sect to adopt a chela and successor to her deceased husband. *Held,* on the evidence, that such custom was not established. *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar, 14 Moo. I. A. 570; Khuggender Narain Chowdry* v. *Sharupgir Oghorenath, I. L. R. 4 Calc. 543,* and *Govind Doss* v. *Ramsahoy Jemadar, 1 Fulton 217,* referred to. *Semble:* that the sect of Grihast Goshains living mostly in these provinces at Hardwar, Dehra Dun and other adjacent places are subject generally to the ordinary rules of Hindu law. *Collector of Dacca* v. *Jagat Chunder Goswami, I. L. R. 28 Calc. 608,* referred to. CHHAJJU GIR *v.* DIWAN (1906)

I. L. R. 29 All. 109

3. ——— **Kutchi Memons**—*Succession—Sons administering the property of deceased father.* Among the Kutchi Memons, who are governed by Hindu law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs. *Veerasokkaraju* v. *Papiah, I. L. R. 26 Mad. 792,* followed. HAJI SABOO *v.* ALLY MAHOMED (1904)

I. L. R. 30 Bom. 270

4. ——— **Woman's estate**—*Succession—Form of marriage, proof of—Brahma and Asura marriages, essentials of.* A married woman of the Kavarai caste (sudra) having died issue less, the question arose between the husband and the parents of the deceased as to who was entitled to succeed to her property. The evidence showed that at the marriage of the deceased woman, the Vivaha *homam* and the *saptha-pathi* were not performed and it was argued for

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the parents, that in the absence of these ceremonies the marriage was not in the Brahma, but the Asura form and that the parents and not the husband were entitled to succeed to the property. The evidence also showed in that community it was not customary to perform these ceremonies. It was also proved that the jewels given to the bride were given as presents to her and not as bride-price and that the father when giving his daughter decked with jewels, pronounced the sloka, appropriate to the Brahma and Daiva forms of marriage: *Held,* that according to Hindu Law, it must be presumed in the absence of evidence to the contrary that a marriage was in the Brahma form. Such a presumption cannot be made when it is shown that a certain community have till recently been following the Asura form of marriage. Though in this case the Court will not presume that the marriage was in the Asura form. The Asura form of marriage is not approved even for the Sudra classes. The distinctive mark of the Asura form is the payment of money for the bride, as the absence of such payment is of the approved forms. The offerings and ceremonies necessary to constitute a valid marriage are the same in the Brahma and the three other approved forms and the Asura form. *Held,* further, the non-performance of the *homam* and *sapthapathi* may thus be relied upon to show there was no valid marriage where they form with or without others, a criterion of the intention to enter into the contract of marriage, but it cannot be relied upon to prove that the marriage was in any particular form. The customary payments of a trifling sum of money known as Payidimudupu cannot be regarded as bride-price. *Held,* on the facts stated above, that this was a Brahma marriage and therefore that the husband was the heir of his wife. AUTHIKESAVULU CHETTI, *v.* RAMANUJAM CHETTY (1909) . **I. L. R. 32 Mad. 512**

HINDU LAW—USURY.

1. ——— **Rate of Interest**—*Act XXVIII of 1855.* Act XXVIII of 1855 did not repeal the Hindu laws as to the rate of interest. Such rate is governed by the strict rules of Hindu law, as originally laid down by Monu and other lawgivers. RAMLAL MOOKERJEE *v.* HARAN CHANDRA DHUR

3 B. L. R. O. C. 130: 12 W. R. O. C. 9

2. ——— *Hindu law—Contract—Act XXVIII of 1855.* Act XXVIII of 1855 does not affect or supersede the rules of the Hindu law as to interest. HAKMA MANJI *v.* MEMAN AYAB HAJI . . . . **7 Bom. O. C. 19**

3. ——— **Amount of interest recoverable**—*Interest exceeding principal.* By the Hindu law, interest exceeding in amount the principal sum cannot be recovered at one time. Act XXVIII of 1855 has not, by repealing s. 12 of Regulation V of 1827 or otherwise, altered this rule of the Hindu law. KHUSHALCHAND LALCHAND *v.* IBRAHIM FAKIR. RAM KRISHNABHAT *v.* VITHABA BIN MALHARJI

3 Bom. A. C. 23

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HINDU LAW—USURY—*contd.*

See KADARI BIN RANU *v.* ATMARAMBHAT **3 Bom. A. C. 11**

4. ——— **Interest exceeding principal** —*Usury laws—Act XXVIII of 1855—Contract Act (IX of 1872), s. 10.* According to Hindu law, arrears of interest more than sufficient to double the debt are not recoverable, and the law upon this point was not affected by the Act (XXVIII of 1855) for the repeal of the usury laws, nor by s. 10 of the Contract Act. *Semble :* The rule of Hindu law in question has not properly anything to do with the legality or illegality of any contract, but is rather a rule of limitation. RAMCONNOY AUDICARRY *v.* JOHUR LALL DUTT **I. L. R. 5 Calc. 867 : C. L. R. 204**

5. ——— *Interest exceeding principal—Mad. Reg. XXXIV of 1802.* Regulation XXXIV of 1802 having been repealed, a claim in a suit between Hindus for an amount of interest exceeding the principal sum due is maintainable. ANNAJI RAU *v.* RAGHUBAI *alias* SITHUBAI **6 Mad. 400**

6. ——— *Interest exceeding principal—Mad. Reg. XXXIV of 1802.* Where part payments were made on a bond, and credited in discharge of the principal, and an action was brought for the balance of the principal and for interest, and the lower Court allowed a sum for interest as due at the date of the plaint which was greater than the principal, the High Court disallowed the excess. The provision in s. 4 of Regulation XXXIV of 1802, against an award of interest in excess of the principal, refers only to the amount claimed for interest at the time the suit is brought. The rule of Hindu law as to recoverable arrears of interest discussed. KAKARLAPUDI SITARAMARAJA *v.* UPPALAPADI JANAKAYYA . . . . . **1 Mad. 5**

7. ——— *Interest exceeding principal.* By Hindu law the amount recoverable at any one time for interest or arrears of interest on money lent cannot exceed the principal ; but if the principal remained outstanding, and the interest be paid in smaller sums from time to time, there is no limit to the amount which may be thus received in respect of interest. The previous decisions of the Sudder Court to the contrary overruled. DHONDU JAGANNATH *v.* NARAYAN RAM CHANDRA **1 Bom. 47**

8. ——— **Damdupat, rule of**—*Interest exceeding principal*—The Hindu law rule of damdupat does not operate when the defendant is other than a Hindu. NANCHAND HANSRAJ *v.* BAPUSAHEB RUSTAMBHAI **I. L. R. 3 Bom. 131**

9. ——— *Interest—Rule of damdupat when applicable—Mortgage—Hindu creditor claiming interest from a debtor not a Hindu—Redemption, suit for.* In a redemption suit brought by a Mahomedan against a Hindu, it was found on taking the accounts that a sum of R17,519 was due by the plaintiff (mortgagor) to the defendant (mortgagee). Of this sum, R6,500 were the principal, and the remainder (R11,019) was for interest. The plaintiff contended that the defendant being a Hindu was bound by the rule of damdupat, and could not claim as interest more than the amount of the principal. *Held,* that the rule of damdupat did not apply ; and that the plaintiff was liable to the defendant for the whole amount. The rule of damdupat only applies when the debtor is a Hindu. DAWOOD DURVESH *v.* VULLUBHDAS PURSHOTAM **I. L. R. 18 Bom. 227**

10. ——— *Damdupat—Bond purporting to be executed in adjustment of past debt—Principal for the purposes of damdupat.* In the case of a bond purporting to be executed in adjustment of a past debt, the principal for the purpose of the rule of damdupat is the amount of such bond, and not the balance of the unpaid principal actually advanced on an earlier bond. *Per* JENKINS, *C.J.*—Neither the texts, the commentaries, usages or the cases forbid the conversion by subsequent agreement of interest into capital, nor is there any such prohibition involved in the rule of damdupat as it has been formulated. SUKALAL *v.* BAPU SAKHARAM **I. L. R. 24 Bom. 305**

11. ——— *Interest—Rule of damdupat—Balance of principal actually due at date of suit—Part payments of principal.* The rule of damdupat limits the arrears of interest recoverable at any one time by the amount of principal remaining due at that time. DAGDUSA SHEVAKDAS *v.* RAMCHANDRA . **I. L. R. 20 Bom. 611**

12. ——— *Interest exceeding principal—Usury—Contract.* The rule of Hindu law, prohibiting the recovery of interest exceeding in amount the principal sum lent, is not applicable to suits brought in Mofussil Courts in Bengal. DEEN DOYAL PORAMANICK *v.* KYLAS CHUNDER PAL CHOWDHRY . **I. L. R. 1 Calc. 92 : 24 W. R. 106**

PRAN KRISHNA TAWARY *v.* JADU NATH TRIVEDY **2 C. W. N. 603**

13. ——— *Interest exceeding principal—Suits between Hindus in mofussil—Act XXVIII of 1855, s. 2.* In suits between Hindus in the mofussil, interest exceeding the principal may be awarded. HET NARAIN SINGH *v.* RAM DEIN SINGH **I. L. R. 9 Calc. 871 : 12 C. L. R. 590**

14. ——— *Interest exceeding principal—Debtor and creditor—Damdupat.* Since the passing of Act XXVIII of 1855, a Hindu creditor may claim from his Hindu debtor interest in excess of the principal sum lent, should such interest have accrued. The rule of law prohibiting the recovery of interest in excess of the principal sum lent was in force in the mofussil of Bengal not as a provision of Hindu law, but as a statutory rule introduced by Regulation XV of 1793, and embracing all persons contracting in the mofussil. SURJYA NARAIN SINGH *v.* SIRDHARY LALL **I. L. R. 9 Calc. 825 : 12 C. L. R. 400**

15. ——— *Interest exceeding principal—Amount recoverable in execution of decree—Damdupat, rule of.* The rule of Hindu law which limits the amount recoverable at one time by

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way of interest to the amount of the principal, does not apply to an amount recoverable in execution of the decree of a Civil Court. BALKRISHNA BHALCHANDRA *v.* GOPAL RAGHUNATH
I. L. R. 1 Bom. 73

See RAMACHANDRA *v.* BHIMRAO
I. L. R. 1 Bom. 577

16. ——— *Mortgage—Payment in grain—Damdupat. Held,* that the rule of damdupat applied to a mortgage, the advance having been in cash, although the interest was to be paid in grain. ANANDRAO BABAJI BARVE *v.* DURGABAI
I. L. R. 22 Bom. 761

17. ——— *Mortgage with possession—Mortgagee to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year.* The damdupat rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But where these profits are by the terms of the bond received for only a portion of the interest on the mortgage debt, the general rule of damdupat will govern such mortgage accounts. SUNDARABAI *v.* JAYAVANT BHIKAJI NADGOWDA
I. L. R. 24 Bom. 114

18. ——— *Interest—Rule of damdupat—Mortgage.* The rule of damdupat applies to mortgages where no account of the rents and profits has to be taken. BALKRISHNA BABAJI *v.* HARI GOVIND . . **I. L. R. 15 Bom. 84**

19. ——— *Interest exceeding principal—Mortgage transactions.* The rule of Hindu law which declares that interest exceeding in amount the principal sum cannot be recovered at any one time is not applicable to mortgage transactions. NARAYAN BIN BABAJI *v.* GUNGARAM BIN KRISHNAJI . . . **5 Bom. A. C 157**

20. ——— *Interest exceeding principal.* The rule of Hindu law that interest beyond the amount of the principal sum cannot be recovered at any one time applies as well to mortgage transactions as to other loans. But where the mortgagee enters into possession of the mortgaged property, and in taking the accounts between the mortgagor and mortgagee credit is given to the latter for the rents and profits received by him as against the principal and interest due, the above rule cannot equitably be applied. NATHUBHAI PANACHAND *v.* MULCHAND HIRACHAND
5 Bom, A. C. 196

21. ——— *Interest—Rule of damdupat—Mortgage.* A mortgagee is entitled to have interest added to the principal at the rate stipulated in the mortgage-deed, and to appropriate the rents and profits received by him in or towards satisfaction of such interest, but after such appropriation, if the amount of interest due on the mortgage exceeds the amount of principal then, according to the rule of damdupat, the mortgagee's claim must be limited to double the principal amount. *Nathubhai Pananchand* v. *Mulchand Hirachand, 5 Bom. A. C. 196,* explained. GANESH DHARNIDHAR MAHARAJDEV *v.* KESHAVRAV GOVIND KULGAVKAR . . . **I. L. R. 15 Bom. 625**

22. ——— *Rule of damdupat—Applicability of the rule—Mortgage, the terms of which make an account current necessary.* The operation of the rule of damdupat is excluded in all mortgages, the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be. *Ganesh Dharnidhar* v. *Keshavrav Govind, I. L. R. 15 Bom. 625,* overruled. GOPAL RAMCHANDRA *v.* GANGARAM ANAND SHET
I. L. R. 20 Bom. 721

23. ——— *Damdupat—Mortgage—Liability to account—Decree on mortgage—Further interest from date of suit to decree ordered by the Court—Discretion of Court—Civil Procedure Code (Act XIV of 1882), s. 209.* Where under the terms of a mortgage there is a liability to account, the rule of damdupat does not apply. The law as laid down in *Gopal* v. *Gangaram (I. L. R. 20 Bom. 721)* is not limited only to cases in which at date of suit an account between the mortgagor and mortgagee is actually kept. In a suit brought by a mortgagee against his mortgagor (both parties being Hindus) the decree ordered the defendant to pay interest from the date of suit to decree upon the total found due after applying the rule of damdupat at the date of suit. It was objected that this order of further interest violated the rule of damdupat. *Held,* that the discretionary power as to awarding interest conferred on the Courts by s. 209 of the Civil Procedure Code (Act XIV of 1882) may be exercised without reference to the law of damdupat. DHONDSHET *v.* RAVJI . **I. L. R. 22 Bom. 86**

24. ——— *Interest exceeding principal—Mortgage transaction. Held,* in a case of deposit for redemption of a mortgage, that the principal and an equal sum for interest was sufficient and that no more interest could accrue during the year of grace, as the law prohibited interest in excess of the principal. SHEOBART *v.* DHAREE THAKOOR . . . . **2 Agra Pt. II, 194**

25. ——— *Interest exceeding principal—Rule of damdupat—Mortgage transactions.* According to the Hindu law of damdupat, interest exceeding the principal sum lent cannot be recovered at any one time. Cases bearing upon the subject of damdupat, and how far and when that law is applicable to loans upon mortgage, reviewed and considered. NARAYAN *v.* SATVAJI
9 Bom. 83

26. ——— *Interest exceeding principal—Damdupat, rule of—Mortgage transactions—Suit for foreclosure.* In a suit for foreclosure of an equitable mortgage: *Held,* that the plaintiff could not recover interest to an amount exceeding the principal sum lent; the rule of

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damdupat being applicable in a case of a mortgage by a Hindu where no account of rents and profits is to be taken. GANPAT PANDURANG *v.* ADARJI DADABHAI . . . **I. L. R. 3 Bom. 312**

27. ——— *Interest exceeding principal—Rule of damdupat—Limitation.* In a suit by the assignees of the equity of redemption for possession on payment of the mortgage money: *Held*, the question of the period for which interest was to be allowed was therefore to be determined by Act XV of 1877, the Act in force at the date of the institution of this suit, art. 132 of which applied; but as the rule of damdupat is not affected by Limitation Acts, the defendants could not be allowed as interest more than the amount of the principal on which it was to be paid. HARI MAHADAJI *v* PALAMBHAT RAGHUNATH **I. L. R. 9 Bom. 233**

28. ——— *Interest recoverable at any one time, amount of—Damdupat, rule of—Act XXVIII of 1855—High Court, Ordinary Original Civil Jurisdiction.* The rule of Hindu law, known in Bombay as the rule of damdupat, that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum, is neither a mere moral precept nor limited in its application to other than stipulated interest, and as a part of the Hindu law of contract is in the absence of any legislative enactment to the contrary, the law as between Hindus in the High Court in its Ordinary Original Civil Jurisdiction. Act XXVIII of 1855 deals exclusively with the rate of interest which may be allowed, and there is nothing in that Act inconsistent with the rule of damdupat. *Nathobhai Panachand* v. *Mulchand Hirachand, 5 Bom. A. C. 196,* distinguished. NOBIN CHUNDER BANNERJEE *v.* ROMESH CHUNDER GHOSE **I. L. R. 14 Calc. 781**

29. ——— *Interest—Rule of damdupat—Account directed by decree in mortgage suit between Hindus—Interest for periods before, during, and after, the six months allowed by decree for redemption.* Where a mortgage decree, in a suit between Hindus, directed an account to be taken of what was due to the plaintiff for principal and interest, the latter to be computed at the contract rate for six months, provided for redemption on payment of the amount due within the six months, and directed in case of default of payment that interest due be added to the principal sum, interest thereafter to be computed on the aggregate amount at 6 per cent.:—*Held*, that in taking the account the rule of damdupat was rightly applied to the interest accruing on the mortgage debt both previous to and during the six months allowed for redemption, notwithstanding the form of the decree. *Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose, I. L. R. 14 Calc. 781,* referred to; and that the same rule was applicable to the interest accruing after the period of six months had elapsed. When the rule of damdupat has once been applied in any account directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time. RAM KANYE AUDICARY *v.* CALLY CHURN DEY **I. L. R. 21 Calc. 840**

30. ——— *Interest—Mortgage, Decree on—Damdupat, rule of—Report of Registrar, Confirmation of.* Where the mortgagee obtained the usual mortgage decree, and on the Registrar's report there was found due on the mortgage a total sum less than double the amount of the principal:—*Held*, that the mortgagee was entitled to claim further interest at 6 per cent. on the total amount found due by the Registrar until sutisfaction of the judgment-debt. *Held*, also, that the rule of damdupat is not applicable, if it was not applicable at the time when the decree became final and binding. *Semble:* Such time being from the date of the confirmation of the Registrar's report. *Buggoban Chunder Roy Chowdhry* v. *Pran Coomaree Dassee, I. L. R. 23 Calc. 906,* and *Kanaye Lall Khan* v. *Anund Lall Dass, I. L. R. 23 Calc. 903,* followed. LALL BEHARY DUTT *v.* THACOMONEY DASSEE . . . **I. L. R. 23 Calc. 899**

KANAYE LALL KHAN *v.* ANUND LALL DASS **I. L. R. 23 Calc. 903 note**

BUGGOBAN CHUNDER ROY CHOWDHRY *v.* PRAN COOMAREE DASSEE **I. L. R. 23 Calc. 906 note**

31. ——— *Rule of damdupat—Mortgage by Mahomedan to Hindu—Assignment of mortgaged land by mortgagor to Hindu assignee—Subsequent suit by mortgagee against assignee—Interest.* *A*, a Mahomedan, having in 1869 mortgaged certain land for R61 to *B*, a Hindu, afterwards assigned it to *C*, who was also a Hindu. At the date of this assignment the interest due on the mortgage (R122-15-10) was much more than the principal debt. *B* (the mortgagee) subsequently sued *A* and *C* for R270, being R61 for principal and R209 for interest. *A* did not appear. *C* contended that, the plaintiff and himself being Hindus, the law of damdupat applied, and that only as much interest as principal could be recovered. The lower Courts passed a decree for the principal (R61) together with all interest due at the date of the assignment to *C*. They disallowed subsequent interest, as the amount then due was already more than the principal. On appeal to the High Court:—*Held* (confirming the decree), that *C* was not personally liable to pay anything at all, but that land which he had purchased was charged with the amount due at the date of his purchase. Unless, therefore, he wished the land to be sold, he should pay that amount. The rule of damdupat did not apply in this case to the original mortgagor, who was a Mahomedan. He charged the land with a debt which included principal and interest, and he and his land were liable for both. He could not by any assignment prejudice his creditor or reduce the amount due to him, nor could he by assigning his

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HINDU LAW—USURY—*concld.*

land to a Hindu free it from any charge that existed on it at the date of the assignment. HARILAL GIRDHARLAL v. NAGAR JEYRAM
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32. ——— *Rule of damdupat—Mortgage—Original mortgagor a Hindu—Assignment of mortgage to Mahomedan purchaser—Suit by Mahomedan purchaser for redemption—Rule of damdupat how far applicable.* A Hindu mortgaged his property in 1843 to a Mahomedan for R150, with interest at 12 per cent. per annum. On the 5th April 1880, the Hindu mortgagor's interest was sold to the plaintiff, who was a Mahomedan. In March 1893, the plaintiff sued for redemption, both parties to the suit being Mahomedan. *Held*, that as long as the mortgagor was a Hindu (*i.e.*, until 1880) the rule of damdupat applied, and that as soon as the interest doubled the principal, further interest stopped. The sum of R300 was therefore the full amount of debt for which the land could be charged and liable in the hands of a Hindu debtor. But on the 5th April 1880 the plaintiff (a Mahomedan) became the debtor. The rule of damdupat then no longer applied: the stop was removed, and interest again began to run. The decree therefore ordered the plaintiff to redeem on payment of R300 (*i.e.*, double the principal R150) with further interest at R12 per annum from the date of his purchase (5th April 1880) until payment. ALI SAHEB v. SHABJI . . . I. L. R. 21 Bom. 85

33. ——— *"Damdupat" rule—Inapplicability to case governed by Transfer of Property Act (IV of 1882).* The "*damdupat*" rule is inapplicable to cases of mortgage governed by the Transfer of Property Act. *Ram Kanye v. Cally Churn, I. L. R. 21 Calc. 841*, referred to. MADHWA SIDHANTA ONAHINI NIDHI v. VENKATARAMANJULU NAIDU (1903)
I. L. R. 26 Mad. 662

34. ——— *Interest—Damdupat—Interest accrued due not affected by the rule of damdupat.* Plaintiff advanced R714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover R33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest. *Held*, that the claim should be allowed; since the rule of *damdupat* had no application to a right that has already accrued. The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights. A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off. NUSSERWANJI v. LAXMAN (1905) . I. L. R. 30 Bom. 452

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HINDU LAW—WIDOW—*contd.*

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——— gift to widow—

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——— power of widow; power of disposition or alienation—

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1. INTEREST IN ESTATE OF HUSBAND.

(*a*) BY INHERITANCE.

1. ——— Right of widow in husband's property—*Registration of name.* A widow under the Hindu law is entitled to succeed to her husband's property, and to have her name registered as proprietor. DEEPO DEBIA *v.* GOBINDO DEB 16 W. R. 42

2. ——— Estate taken by widow—*Life-estate.* A widow is entitled by law to a life-estate in her husband's property. GIRDHAREE SINGH *v.* KOOLAHUL SINGH 6 W. R. P. C. 1: 2 Moo. I. A. 344

3. ——— *Immoveable property—Nature of right.* A Hindu widow has an absolute right to the fullest beneficial interest in her husband's property inherited by her for her life. She takes as heir a proprietary estate in the land absolute for some purposes, although in some respects subject to special qualifications, and her disposition of the property is good for her life. The propositon that a widow has no estate in her husband's immoveable property, but only the personal enjoyment of the usufruct, is untenable. KAMA-

HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND—*contd.*

(*a*) BY INHERITANCE—*contd.*

VADHANI VENKATA SUBHAYA *v.* JOYSA NARASINGAPPA . . . . . 3 Mad. 116

4. ——— *Possession of, and partition between, co-widows of estate left by their deceased husband.* Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had before his death adopted a son, to whom also, by will, he bequeathed his estate. The adopted son died soon after the testator. *Held*, that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee; also that the estate, being jointly held by them, was partible, and either widow might maintain a suit for partition. SUNDAR *v.* PARBATI . I. L. R. 12 All. 51 L. R. 16 I. A. 186

5. ——— *Childless widow—Mitakshara law—Qualified interest.* A childless widow, under the Mitakshara law, takes only a limited interest in her husband's estate, similar to that taken by a childless widow according to the law of the Bengal school. PANCHCOURIE MAHTOON *v.* KALEE CHUEN . . . 9 W. R. 490

6. ——— *Widow succeeding in default of male issue—Qualified interest.* A widow, who succeeds to the estate of her husband in default of male issue, whether she takes by inheritance or by survivorship, does not take a mere life-estate. The whole estate is for the time vested in her, though in some respects for only a qualified interest. She holds an estate of inheritance to herself and the heirs of her husband; and upon the termination of that estate, the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death. MONIRAM KOLITA *v.* KERI KOLITANI I. L. R. 5 Calc. 776: 6 C. L. R. 322

7. ——— *Childless Jain widow—Separate property of husband.* A childless Jain widow acquires an absolute right in her husband's separate property. HARNABH PERSHAD *v.* MANDIL DASS . . I. L. R. 27 Calc. 679

8. ——— *Right to divided property.* According to the Hindu law, a widow cannot claim an undivided property. REWAN PERSAD *v.* RADHA BIBEE 7 W. R. P. C. 35: 4 Moo. I. A. 137

9. ——— *Right of widow as to vested property of husband under a will.* The doctrine of the Hindu law that a widow succeeding as heir to her husband cannot recover property of which he was not possessed does not apply when the husband has a vested interest under a wil or deed, the actual enjoyment being postponed. HURROSOONDERY DEBEA CHOWDHRANEE *v.* RAJ ESSUREE DEBEA . . . . . 2 W R. 321

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HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND —*contd.*

(*a*) BY INHERITANCE—*contd.*

10. ——— *Interest of Hindu widow in husband's property, power of disposal of, as against reversioners.* The widow of one of the brothers of a divided Hindu family, governed by the Mitakshara law, does not acquire an absolute interest in her husband's separate estate, but only such an interest as would render her acts conveying her interest to a third party binding as against herself, but not as against the reversionary heirs, unless the alienations were made under legal necessity. CHEET BANOO *v.* RAM KISHEN SINGH. RAM KISHEN SINGH *v.* CHEET BANOO . **W. R. 1864, 102**

11. ——— *Suit by reversionary heir—Hindu widow—Burden of proving ownership of the husband through whom title is made.* It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor, who has died leaving a widow, to show that the property claimed in the suit and found in her possession has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death must have been included in that which belonged to him unless she shows that she obtained the property from another source. RAN BIJAI BAHADUR SINGH *v.* INDARPAL SINGH . . . . **I. L. R. 26 Calc. 871**
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4 C. W. N. 1

See DAKHINA KALI DEBI *v.* JAGADISHWAR BHUTTACHARJEE . . **2 C. W. N. 197**

12. ——— *Trustee—Daughter's estate.* The title of a Hindu widow to her husband's property, though a restrictive one, is not in the nature of a trust. *Quære:* Whether by the Hindu law current in Bengal the interest of a daughter in the estate of her deceased father is of the same nature as that of a widow. HURRYDOSS DUTT *v.* UPPOORNAH DOSSEE . **6 Moo. I. A. 433**

13. ——— *Power of husband to cut down by deed wife's absolute estate to a life-interest.* Where a Hindu wife is entitled to an absolute estate in certain property, her husband cannot cut down her interest to a life-interest by any dowl which he may make. MOHIMA CHUNDER ROY *v.* DURGA MONEE . . **23 W. R. 184**

14. ——— **Liability of heir for debts left by widow.** By Hindu law a widow is allowed, during her lifetime, to make the fullest use of the usufruct of her husband's estate; but whatever part of it she leaves behind at her death becomes the property of the next heir, and is not liable for her personal debts, unless such debts have been contracted under legal necessity and for the benefit of the estate. CHUNDRABULEE DEBIA *v.* BRODY **9 W. R. 584**

HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND—*contd.*

(*a*) BY INHERITANCE—*contd.*

15. ——— *Widow's estate in moveables inherited from her husband—Liability of such property for her debts after her death.* Under the Hindu law in force in the Presidency of Bombay, a widow inheriting from her husband, or a mother from her son, may have an absolute power of disposal over moveable property so inherited but any undisposed of residue of such property reverts on her death to the estate of the last male holder, and passes as his property to his heirs. It is not therefore her personal property liable in their hands for her debts. BAI JAMNA *v.* BHAISHANKAR **I. L. R. 16 Bom. 233**

See HARILAL HARJIVANDAS *v.* PRANVALAVDAS PARBHUDAS . . **I. L. R. 16 Bom. 229**

16. ——— **Savings or accumulations by widow.** One *M* died in 1872, leaving him surviving his widow *F*, and a grandson *G*, and a daughter-in-law. The widow (*F*) on her husband's death became entitled to a widow's estate in his immoveable property, and accordingly entered into possession and management thereof. Under certain agreements made between her and one *K*, the latter received the rents of certain portions of the said immoveable property, and in consideration paid *F* certain fixed annual sums. On the 26th May 1883, there was a balance of R1,787-10-3 due from *K* to *F* in respect of the yearly privilege of recovering and receiving the said rents. *F* died intestate on the 18th December 1884, and the plaintiff, having obtained letters of administration to her estate, demanded payment of the said sum of R1,787-10-3 from *K*. It appeared that, after *F's* death, *K* had paid this sum to *G*, who was *F's* grandson and the reversioner expectant on the determination of *F's* widow's estate, and on her death had succeeded to all the immoveable property as the right heir of her husband *M*. The question was whether the said sum of R1,787-10-3 belonged to *F's* estate, or remained portion of the immoveable property of *M*, and as such properly payable to *G* as his heir. *Held*, that the plaintiff was entitled to recover it as part of *F's* estate. There was nothing to show it to be "savings or accumulations" so as to give it to the heir to her husband's estate. RIVETT-CARNAC (ADMINISTRATOR GENERAL, BOMBAY) *v.* JIVIBAI . **I. L. R. 10 Bom. 478**

17. ——— **Accumulations.** The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that she may receive them in a lump sum; but whether she receives them as they fall due, or after they have accumulated in the hands of others, her right is the same. GRISH CHUNDER ROY *v.* BROUGHTON . . **I. L. R. 14 Calc. 861**

18. ——— **Acquisitions by widow—** *Liability of property purchased by her for her debts*

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HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND—*contd.*

(*a*) BY INHERITANCE—*contd.*

—*Liability of heir to pay widow's debts—Power to borrow money on security of estate.* The property acquired by a Hindu widow by purchase, with moneys borrowed on her own credit, is liable to be sold in satisfaction of her debts. Where a Hindu widow has acquired property purchased by moneys borrowed on the credit of her husband's estate, it is equitable that the heir of the husband, who takes in succession to her, should not be permitted to take such acquired property freed from the liability of satisfying a debt contracted by the widow to enable her to make the acquisition, and if the heir claims to take the acquisition, he is bound to satisfy the debt. A Hindu widow may encumber her husband's estate for her own maintenance; consequently, it seems that, if she can derive no income from the estate sufficient for her maintenance, there being no funds for cultivation, she would be at liberty to borrow money, on the security of the estate, for the purposes of cultivation and provision for herself. OODEY SINGH *v.* PHOOL CHUND . . . . **5 N. W. 197**

19. ——— **Money advanced by widow**—*Presumption as to its being husband's property.* Where Hindu widows acquire property by advancing money during an interval when they are out of possession of their deceased husband's estate, the money so advanced cannot be presumed to be a part of the proceeds of that estate. GOBIND CHUNDER MOJOOMDAR *v.* DULMEER KHAN **23 W. R. 125**

20. ——— **Funeral expenses of widow**—*Liability of husband's estate for such expenses.* Under the Hindu law, the estate of the husband is liable for the funeral expenses of the widow; her stridhan cannot be charged with such expenses. *Sadashiv* v. *Dhakubai, I. L. R. 5 Bom. 450,* referred to. RATANCHAND *v.* JAVHERCHAND **I. L. R. 22 Bom. 818**

21. ——— **Rents of immoveable property**—*Execution of decree for money—Application for receiver of rents of immoveable property of deceased Hindu in the hands of his widow. Held,* that a Court executing a simple money-decree obtained against a sonless separated Hindu was not competent to appoint a receiver of the rents, accruing since his decease, of the judgment-debtor's immoveable property, then in the hands of his widow as her widow's estate, such rents not being assets of the deceased, but the personal moveable property of the widow, and this even if the decree-holder had not, as in fact he had, agreed for consideration not to execute his decree against the moveable property of the widow. KANNO DAI *v.* LACY **I. L. R. 19 All. 235**

22. ——— **Migration by widow of a subject of French India to British India**—*Acquisition of domicile in British India—Character of her widow's estate.* Migration, by the widow of a Hindu subject of French India, to British India, and acquisition of a British Indian domicile, does not change the character of the estate held by the widow; and, if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her husband will be held by her according to the customary law of French India. MAILATHI ANNI *v.* SUBBARAYA MUDALIAR (1901) **I. L. R. 24 Mad. 650**

23. ——— **Compromise**—*Widow—Effect of compromise entered into by a Hindu female with limited estate. Held,* that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court; the reversioners can only be bound by decree made after a full contest in a *bonâ fide* litigation. *Gobind Krishna Narain* v. *Khunni Lal, I. L. R. 29 All. 487,* followed. MAHADEI *v.* BALDEO (1908) . . **I. L. R. 30 All. 75**

24. ——— **Mukaddam's estate**—*Widow in possession of husband's estate as inferior proprietor—Effect of enlargement of estate of inferior proprietor by action of Government.* An under-proprietor, whose status was described by the term "mukaddam" died, and his estate devolved upon his widow. Whilst this estate was in the possession of the widow, the Government proceeded to make a settlement with the mukaddams, excluding the superior proprietor, to whom an allowance by way of malikana was given. *Held,* that the enlarged estate, of which the widow thus became possessed, was still a Hindu widow's estate merely; the action of Government had not the effect of making her a zemindar with a title independent of that which she derived from her husband. *Keech* v. *Sandford, 2 W. & T., 7th Ed. 693,* referred to by STANLEY, *C. J.* KASHI PRASAD *v.* INDA KUNWAR (1908) . **I. L. R. 30 All. 490**

25. ——— **Right of residence**—*Attachable interest—Right of residence of widow in family house is personal and cannot be attached in execution.* The right of a widow, under the Hindu law, to reside in her husband's family house, is a purely personal right and cannot be transferred. Such right cannot be attached in execution under s. 266 of the Code of Civil Procedure. SALAKSHI *v.* LAKSHMAYEE (1908) . . **I. L. R. 31 Mad. 500**

(*b*) BY DEED, GIFT, OR WILL.

26. ——— **Devise by will**—*Widow's estate—Married woman.* The rule of Hindu law by which widows take only a qualified estate in their husband's property has no application to a devise

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HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND—*contd.*

(*b*) BY DEED, GIFT, OR WILL—*contd.*

under a will to married women. CHUNDER MONEY DASSEE *v.* HURRY DASS MITTER **5 C. L. R. 557**

27. ——— *Construction of will—Estate taken by widow—Alienation by justifying necessity.* The will of a Hindu testator who died in 1852 leaving a widow and daughters contained the following provisions: "To my wife *B*, who is my next heir, I gave the following properties on these conditions: I shall have entire control of them during my lifetime, and after my death my wife taking possession of them shall perform with the proceeds my obsequies and the expenses for the marriage, maintenance, and support, according to the family usage of my three daughters. She shall have 4 annas of talukhs A and B, in the possession of my step-mother, for her necessary expenses and the performance of charity. According to the above conditions, my step-mother shall take possession of these two properties and my wife of all the remaining real and personal estate." *Held*, that the widow took only a life-estate. *Held*, further, that the daughters were entitled to a declaration that a sale by the widow to the defendants of the properties given by the will was for her life only, the defendants being unable to show any justifying necessity which would entitle her to sell the entire estate. KULLIANBUTTI KOER *v.* TULAPAL SINGH **11 C. L. R. 204**

28. ——— *Joint tenancy—Tenancy-in-common—Appointment of person "to be the heirs" of testator—Widow's estate in property devised to her by her husband's will.* *B*, a Hindu, died in 1876 leaving by his will all his property to his widow *H* and his adopted son *N* "as his heirs," with a direction that they should maintain themselves out of the income, and pay one *D* R1,000 a year for managing it. *N* died intestate in 1880 in *H's* lifetime, and *H* then claimed the whole estate, contending that under the will she and *N* had been joint tenants, and that on his death she took his share by survivorship. *N* left a widow, the plaintiff *L*. *Held*, that under the will *H* took only a widow's estate in half the property, and that (subject to her right, as a Hindu widow, to a widow's estate in a half share) the entire property vested absolutely in *N*. On *N's* death, the property (subject as aforesaid) vested in the plaintiff *L*, as his widow and heir, for a widow's estate, and she became entitled to joint possession with the defendant *H*. A widow taking under her husband's will takes only a widow's estate in the property bequeathed to her, unless the will contains express words giving her a larger estate. HIRABAI *v.* LAKSHMIBAI **I. L. R. 11 Bom. 573**

Affirming on appeal the decision in LAKSHMIBAI *v.* HIRABAI . . . **I. L. R. 11 Bom. 69**

29. ——— **Deed of arrangement giving property to widow "for her sole use and benefit"**—*Interest in property of husband.* A deed of arrangement and release in the English form, between members of a Hindu family in respect of certain joint estate, claimed by a childless Hindu widow of one of the co-heirs in her character of heiress and legal personal representative of her deceased husband, declared that she was entitled to the sum therein expressed as the share of her deceased husband "for her sole absolute use and benefit." *Held* (reversing the decree of the Supreme Court at Calcutta), that these words were not to receive the same interpretation as a Court of equity in England would put up on them, as creating a separate estate in the widow; but that the deed must be construed with reference to the situation of the parties and the rights of the widow by the Hindu law, and that, as the deed recited that she claimed and received the money as her husband's share in the joint estate in her character as his heiress and legal personal representative, such words must be construed to mean that it was to be held by her in severalty from the joint estate, and as a Hindu widow she had only a life-estate in the corpus, the same at her death devolved as assets of her deceased husband upon his personal representative in succession. In reversing such decree, the Judicial Committee directed that interest at the usual rate allowed by the Supreme Court should be allowed from the death of the widow. RABUTTY DOSSEE *v.* SIBCHUNDER MULLICK . . **6 Moo. I. A. 1**

30. ——— **Gift of moveable and immoveable property**—*Power of alienation.* Under a gift of moveable and immoveable property by a Hindu to his wife, the wife takes only a life-estate in the immoveable property, and has no power of alienation over it, while her dominion over the moveable property is absolute. A Hindu wife takes by the will of her husband no more absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the lifetime of her husband, and whether in respect of a gift or a will, it is necessary for the husband to give her in express terms a heritable right or power of alienation. KOONJBEHARI DHUR *v.* PREMCHAND DUTT **I. L. R. 5 Calc. 684: 5 C. L. R. 561**

31. ——— **Gift of immoveable property by husband**—*Life-interest—Heritable interest—Alienable interest.* The plaintiff, alleging himself to be joint in estate with *A*, his grandnuncle, sued to set aside an absolute gift of the house in suit made by *A* in favour of his wife, as also the subsequent sale of the house by the wife of the defendant. The lower Appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid, and dismissed the suit. On appeal, plaintiff contended that he was the heir of the donee, and that, under the deed of

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HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND—*contd.*

(*b*) BY DEED, GIFT, OR WILL—*contd.*

gift, she had no power to alienate. *Held*, that from the wording of the deed of gift, it appeared that the husband intended to give and did give to his wife an heritable estate in, and power of alienation over, the property the subject of the gift, and therefore the sale by the wife was valid. *Koonjbehari Dhur* v. *Prem Chand Dutt, I. L. R. 5 Calc. 684*, referred to. KANHIA *v.* MAHIN LAL **I. L. R. 10 All. 495**

32. ———— Deed of adoption by widow to deceased husband—*Interest and powers of adoptive mother.* The widow of a separated Hindu made an adoption to her deceased husband under a power to adopt conferred upon her by her husband's will. The deed by which the adoption, the validity of which was not disputed, was evidenced, contained amongst others, the following conditions: "that during my" (*i.e.*, the adoptive mother's) "lifetime, I shall be the owner and manager of the estate, and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of *I C M* born of me." *Held*, that these words conferred upon the widow an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made, so far as her position as manager was concerned. KALI DAS *v.* BIJAI SHANKAR . . **I. L. R. 13 All. 391**

33. ———— Deed of gift to widow, Construction of—*Life-estate.* In this case the decision of the High Court, reported in *7 B. L. R. 93*, was reversed by the Privy Council, who held that the effect of the instruments was to give the widow an estate for life with power to use the proceeds as she chose, and consequently that the proceeds, or property purchased by her out of the proceeds, would belong on her decease to her heirs. BHAGBUTTI DEVI *v.* BHOLANATH THAKOOR **I. L. R. 1 Calc. 104 : 24 W. R. 168 L. R. 2 I. A. 256**

34. ———— Gift containing power of adoption—*Interest in moveable and immoveable property.* A Hindu gave a power of adoption to his wife, directing that so long as the wife should live she should remain in possession of all his property, moveable and immoveable, ancestral as well as self-acquired. *Held*, that the widow took a life-interest in her deceased husband's property with remainder to the adopted son. *Bhugbutti Daee* v. *Bholanath Thakoor, L. R. 2 I. A. 256*, followed. BEPIN BEHARI BUNDOPADHYA *v.* BROJO NATH MOOKHOPADHYA . . . **I. L. R. 8 Calc. 357**

35. ———— Bill of sale, construction of—*Estate of, as heiress of her son—Estate given to be held in severalty absolutely.* *M*, a member of a joint Hindu family, died, leaving three sons, *K*, *G*, and *D*, and a widow, *R*, who was mother of *G*, and *D*. *G* having died, *R*, claiming as mother and

HINDU LAW—WIDOW—*contd.*

1. INTEREST IN ESTATE OF HUSBAND—*concld.*

(*b*) BY DEED, GIFT, OR WILL—*concld.*

heiress of *G*, joined with *D*, in bringing a suit for partition against *K* and the other members of the joint family. The decree in the suit, which was made by consent of all parties, declared *R* and *D* entitled to two equal twelfth parts of the joint estate, and *K* to one-twelfth share, and referred it to certain persons as arbitrators, and not as commissioners only, to make the award. The arbitrators allotted certain land to *R* and *D* as their two-twelfths of the joint immoveable property, "to be held by them in severalty absolutely:" to *K* they allotted other land as his one-twelfth share and in pursuance of an arrangement come to between *K* and *R*, and *D*, they directed *K* to sell and convey his one-twelfth share to *R* and *D*, on receiving from them the sum at which it was valued. *R* and *D* paid the money, and *K* conveyed his share to them by a Bengali bill of sale, in which, after stating that he conveyed it in accordance with the award, he added: "Becoming from this day invested with my rights, you have become proprietors of the right of gift and sale. I have no further connection with the said land. Paying the taxes, revenue, etc., to Government, and causing mutation of names, you will continue, with your sons and grandsons in succession to enjoy possession in perfect peace." In a suit brought by *K* against the executor of *R*, to recover a moiety of the property awarded to her and *D* and of the property conveyed to them by the bill of sale, upon an allegation that *R* took this property only as mother and heiress of *G*, and that upon her death it devolved upon him as *G's* next of kin:—*Held*, reversing the decision of MACPHERSON, *J.*, that *R* took an absolute estate, and not merely a life-interest, both in the property awarded to her and in the property conveyed by the bill of sale. BOLYE CHAND DUTT *v.* KHETTERPAL BYSACK **11 B. L. R. 549**

2. POWER OF WIDOW.

(*a*) POWER TO COMPROMISE.

1. ———— Nature of power to compromise—*Assertion of rights—Right of appeal.* A Hindu widow, as representative of the entire estate in litigation, has the same control with respect to compromise as she has with respect to the assertion of rights and with respect to appeal against an adverse decision. TARINI CHARAN GANGULI *v.* WATSON **3 B. L. R. A. C. 437 : 12 W. R. 413**

2. ———— Nature of compromise by widow—*Reversioners—Alienation.* A compromise by which a Hindu widow gives up all her rights in her husband's estate, receiving only a life-interest in a part of it, cannot but be regarded as an alienation, and is not binding against the reversioners. INDRO KOOER *v.* ABDOOL BURKUT **14 W. R. 146**

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*a*) POWER TO COMPROMISE—*contd.*

3. ——— **Compromise of suit**—*Disclaimer of interest.* In a suit for the recovery of a share of joint property the plaintiff's maternal aunts, childless Hindu widows, who were entitled to a prior life-interest to which the plaintiff's reversion was subject, filed a petition disclaiming their interest and assenting to the suit. *Held*, that the Judge might make a decree founded upon the disclaimer of the widows. RUJONEEKANT MITTER *v.* PREMCHAND BOSE . . . **Marsh. 241: 1 Hay 513**

SHAMA SOONDUREE *v.* SHURUT CHUNDER DUTT **8 W. R. 500**

4. ——— **Effect of compromise**—*Power to bind reversioners.* Hindu widows have no power by a compromise between themselves to affect the rights of the successor to the estate on their death. DHARAM CHAND LAL *v.* BHAWANI MISRAIN . . . **I. L. R. 25 Calc. 89 1 C. W. N. 697**

5. ——— **Compromise made by widow, effect of**—*Claim under alleged adoption—Minor daughters.* In a suit in which a claim was made, in virtue of an alleged adoption, to the estate of a deceased Hindu, the widow made a compromise, which was not in writing, with the claimant wherein the adoption was admitted, but alleged to have been on condition that the widow should enjoy the entire property for her life without power of alienation, and that, after her death, her minor daughters should take the self-acquired property, and that the claimant should succeed to the ancestral estate. *Held*, that the daughters could not under any circumstances be bound by the compromise. Judgment of the High Court reversed on the facts. IMRIT KONWUR *v.* ROOP NARAIN SINGH **6 C. L. R. 76**

6. ——— **Ikrarnamah**—*Alienation—Reversioner—Limitation.* *C*, the brother of *A* and *B*, died in 1835, and an order for mutation and registration of names having been obtained by *A* and the heirs of *B* on the 28th March 1835, *K* the widow of *C*, instituted a suit to have the order cancelled and to have her possession confirmed, and on the 4th September 1837 obtained a decree, which, however, was reversed on appeal on the 24th July 1839, the Appellate Court declaring that *K* was not entitled as her husband's heir. A special appeal having been preferred to, and admitted by, the High Court, an ikrarnamah was filed by *K* on the 15th September 1841, reciting that she had "given up her claim of having the appeal heard" "as a matter of amicable adjustment settling all disputes" as therein provided. By the ikrarnamah it was provided that the milkiut and mokurari of certain mouzahs should be held by *A* and *B's* heirs, and that mouzahs *X*, *Y*, and *Z* should remain in *K's* possession for her life without power to make zar-i-peshgi leases or mortgages, and that on her death such mouzahs should pass to the heirs of *A* and *B*. On the ikrarnamah being filed, the Court struck off the appeal and made an order on the 14th September 1841, to the effect that the ikrarnamah should "in no way affect the rights of the minors," the heirs of *A* and *B*. *Held*, that the ikrarnamah and order of the 14th September 1841 could not be regarded as affecting the rights of the reversioners of *C's* estate on the expiration of the widow's life-interest. *Held*, also, that the suit by *K* and the succeeding compromise was tantamount to an alienation by her, and that there was consequently no adverse possession during her life, and that the period of limitation in a suit by the reversioners must be calculated from her death. SHEO NARAIN SINGH *v.* KURGO KOERY. SHEO NARAIN SINGH *v* BISHEN PROSAD SINGH **10 C. L. R. 337**

7. ——— **Family settlement**—*Hindu Law—Widow's estate—Family settlement to settle dispute to which widow a party, if binds reversioners.* A family settlement putting an end to dispute between members of the same family, to which a Hindu widow is a party, cannot bind the reversioners to her husband on her death. A plea that such a settlement was binding on the reversioner was disallowed when the party who benefited by the transaction was found to have known that he had not the right to set up. ASHARAM SADHANI *v.* CHANDI CHURN MUKERJEE (1908) . . **13 C. W. N. 147**

(*b*) POWER OF DISPOSITION OR ALIENATION.

8. ——— **Power of alienation**—*Alienation for religious or charitable purposes—Necessity—Right of Crown taking poperty to set aside alienation—Onus probandi.* Under the Hindu law, a widow, though she takes as heir, takes a special and qualified estate. If there be collateral heirs of her husband, she cannot of her own will alienate the property except for special purposes. For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. The restrictions on her power of alienation are inseparable from her estate, and independent of the existence of heirs capable of taking on her death. If for want of heirs the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown has the same power of protecting its interest as an heir by impeaching any injurious alienation by the widow. The onus is on those who claim under an alienation from a Hindu widow to show that the transaction was within her limited powers. COLLECTOR OF MASULIPATAM *v.* CAVALY VENCATA NARAINAPAH **2 W. R. P. C. 61: 8 Moo. I. A. 529**

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

9. ——— *Power to dispose of property by will—Right to dispose of.*—A Hindu widow succeeding to the immoveable property of her deceased husband, and also claiming as heir to her only daughter, who died after her father childless and unmarried, is only entitled during her life to a widow's estate. The doctrine laid down in the original Court that ancestral property after partition can be disposed of by will, in the same way as self-acquired property, disapproved of, as opposed to the authorities and general spirit of Hindu Law. LAKSHMIBAI *v.* GANPAT MOROBA. GUNPAT MOROBA *v.* LAKSHMIBAI . **5 Bom. O. C. 128**

10. ——— *Widow of Hindu having undivided property—Self-acquired property—Payment of debts.* The widow of an undivided Hindu has no right to sell his property for payment of his debts, even though it be self-acquired. NAMASIVAYA CHETTI *v.* SIVAGAMI . **1 Mad. 374**

11. ——— *Alienations by a widow of her husband's estate in order to pay his time-barred debts—Widow's status as distinguished from that of a manager—Liability of alienees—Rights of reversioners.* According to the Hindu law, a widow is competent to alienate her husband's estate for the purpose of paying his debts, even though they may be barred by the law of limitation. Her alienations for such a purpose are legal and binding on the reversionary heirs. A widow stands in a different position from that of a manager of a joint family. The latter can act only with the consent, express or implied, of the body of co-parceners. In the widow's case, the co-parceners are reduced to herself, and the estate centres in her. She can therefore do what the body of co-parceners can do subject always to the condition that she act fairly to the expectant heirs. The rights of these heirs impose, on persons dealing with a widow, the obligation of special circumspection, failing which they may find their securities against the estate to be of no avail after the widow's death. CHIMNAJI GOVIND GODBOLE *v.* DINKAR DHONDEV GODBOLE **I. L. R. 11 Bom. 320**

12. ——— *Gift adverse to collateral heir of husband.* A childless widow rani has no power to alienate her deceased husband's property as against his collateral heir by a waseeutnamah or deed of gift. KEERUT SINGH *v.* KOOLAHUL SINGH . . . **5 W. R. P. C. 131**
2 Moo. I. A. 331

13. ——— *Power to dispose of immoveable poperty by will—"Inherited."* A widow has no power to dispose by will of immoveable property inherited by her from her husband. The word "inherited" used in the Mitakshara, in regard to a woman's stridhan, does not include immoveable property so as to make it her peculium, but refers only to personal property over which alone

HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

she has absolute dominion. GOBURDHUN NATH *v.* ONOOP ROY . . . **3 W. R. 105**

RAM SHEWUK ROY *v.* SHEO GOBIND SAHOO **8 W. R. 519**

14. ——— *Right to dispose of land, portion of stridhan. Held,* that a widow cannot, under Hindu law, dispose of immoveable property given to her by her husband which has become a portion of her stridhan. GUNPUT SINGH *v.* GUNGA PERSHAD . . . **2 Agra 230**

15. ——— *Right to alienate stridhan, except land.* A Hindu wife or widow may alienate her stridhan, whether it be moveable or immoveable, with the exception, perhaps, of lands given to her by her husband. DOE D. KULAMMAL *v.* KUPPU PILLAI . . . **1 Mad. 85**

16. ——— *Power to alienate land being her stridhanam.*—Land received by a woman from her husband as stridhanam cannot be alienated even after the husband's death to the prejudice of the daughters as next heirs without their consent. GANGADARAIYA *v.* PARAMESWARAMMA **5 Mad. 111**

17. ——— *Power to dispose of property by will.* A woman cannot execute a will regarding any property she inherits from her husband or father. She may dispose of her stridhan by gift, will, or sale, unless it is immoveable property given her by her husband. TEENCOWREE CHATTERJEE *v.* DINONATH BANERJEE . **3 W. R. 49**

18. ——— *Stridhan—Power of disposition by will.* Where a Hindu lady has received presents of moveable property from her husband from time to time during their married life, and after his death, partly out of such property and partly from funds raised by the mortgage of jewels admitted to be her stridhanam, purchased immoveable property :—*Held,* that that was her stridhanam and that she consequently could dispose of it by will. VENKATA RAMA RAU *v.* VENKATA SURIYA RAU **I. L. R. 1 Mad. 281**

In the same case in the Privy Council it was held as follows, affirming the decision of the High Court. The testamentary power of a Hindu female over her stridhanam being commensurate with her power of disposition over it in her lifetime, and both being absolute, no distinction can be taken as regards a widow's power of disposition by will over immoveables in the purchase of which she has invested money given to her by her husband. Such estate is subject to the disposition which the general law gives her the power to make of her stridhanam. VENKATA RAMA RAO *v.* VENKATA SURIYA RAO **I. L. R. 2 Mad. 333**
8 C. L. R. 304

19. ——— *Right of alienation of moveable and immoveable property.* A

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

Hindu widow's right to alienate moveable property inherited from her husband, without the consent of his heirs, is absolute. With respect to immoveable property inherited from her husband, a Hindu widow is little more than a tenant for life and trustee for the heirs of her husband, and she is restricted from alienating it by her sole independent act, unless for necessary subsistence, or for purposes beneficial to the deceased. BECHAR BHAGAVAN *v.* BAI LAKSHMI . . . . **1 Bom. 56**

20. ——— *Power to dispose of property—Immoveable and moveable property.* By the law of the Western schools, as well as by the law of Bengal, a Hindu widow is restricted from alienating any immoveable property which she has inherited from her husband. *Quære :* Is there any distinction in respect of moveable property ? THAKOOR DEYHEE *v.* RAI BALUK RAM
2 Ind. Jur. N. S. 106 : 10 W. R. P. C. 3 11 Moo. I. A. 139

KOTARBASAPA *v.* CHANVEROVA . **10 Bom. 403**

21. ——— *Right of alienation of immoveable property. Held,* that a Hindu widow, having a life-interest only in immoveable property inherited from her husband, has an independent power of sale over the same to the extent of such life-interest and no further. MAYARAM BHAIRAM *v.* MOTIRAM GOVINDRAM
2 Bom. 331 : 2nd Ed. 313

22. ——— *Non-ancestral and ancestral property—Agarwala Banias of Saracgi sect of Jains.* Amongst Agarwala Banias of the Saraogi sect of the Jain religion, a widow has full power of alienation in respect of the non-ancestral property of her deceased husband ; but she has no such power in respect of the property which is ancestral. SHIMBHU NATH *v.* GAYAN CHAND
I. L. R. 16 All., 379

23. ——— *Power of, to dispose of personalty inherited by her from her husband. Held,* that, under the Hindu law as understood in the Benares school, a widow has an absolute right to dispose of the personalty inherited by her from her husband ; that under the Hindu law Government promissory notes ought to be treated as personal property ; that jewels, shawls, etc., are of the nature of stridhan ; and that in Hindu law books the word "corrody" is used solely with reference to land, and that Government promissory notes cannot be included in the said term "corrody." DOORGA DAYEE *v.* POORUN DAYEE
1 Ind. Jur. N. S. 128 : 5 W. R. 141

24. ——— *Widow's property in moveables left to her by the will of her husband.* In Western India a widow takes absolutely all moveable property bequeathed to her by her husband, and may dispose of such property by will. DAMODAR MADHOWJI *v.* PURMANANDAS JEEWANDAS
I. L. R. 7 Bom. 155

HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

25. ——— *Moveable property inherited from husband—Devolution of such property.* Under the Mitakshara law, a widow has no power to bequeath moveable property inherited by her from her husband. In the Presidency of Bombay, moveable property inherited by a widow from her husband devolves on her death to her husband's heirs. If the decision in the case of *Damodar* v. *Purmanandas, I. L. R. 7 Bom. 155,* is to be regarded as necessarily giving to the heir of a widow on her death such moveable property inherited from her husband as remains undisposed of by her, it must be treated as of no authority. GADADHAR BHAT *v.* CHANDRABHAGABAI
I. L. R. 17 Bom. 690

See HARILAL HARJIVANDAS *v.* PRANVALAVDAS PARBHUDAS . . **I. L. R. 16 Bom. 229**
and BAI JAMNA *v.* BHAISHANKAR
I. L. R. 16 Bom. 233

26. ——— *Widow's power to dispose of moveables bequeathed to her by her husband—Mayukha law. Held,* that a widow in Gujarat, under the law of Mayukha, had power to bequeath moveable property taken by her under the will of her husband which gave her express power of free disposition. *Gadadhar Bhat* v. *Chandrabhagabai, I. L. R. 17 Bom. 690,* distinguished. *Per* RANADE, *J.*—There is a three-fold distinction between the moveable and immoveable property, between title by bequest and a title by inheritance, and a distinction between the Mayukha and Mitakshara, which must be borne in mind before the rights of a widow in Gujarat, claiming under a will which gave her express powers of free disposition over the residue of moveable property, are negatived solely on the authority of the Full Bench decision quoted above. If the widow in this case had made no disposition herself, the moveable property, in respect of which freedom of disposition had been allowed her, would have gone to the reversioner as her husband's heir. MOTILAL LALUBHAI *v.* RATILAL MAHIPUTRAM
I. L. R. 21 Bom. 170

27. ——— *Widow's estate—Moveable property.* The restriction placed by the Hindu law on a widow's power of alienation of her husband's estate extends to moveable as well as immoveable property. NARASIMAH *v.* VENKATADRI
I. L. R. 8 Mad. 290

28. ——— *Right of childless widow to alienate moveable property—Mithila law—Inheritance.* Under the Mithila law, a childless Hindu widow, although she cannot alienate the immoveable property, has an absolute right over the moveable property inherited from her husband, and can alienate it in any manner she pleases and she has also an absolute power to dispose of the profits of the estate during her lifetime. BIRAJUN KOER *v.* LUCHMI NARAIN MAHATA
I. L. R. 10 Calc. 392.

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

29. ——— *Immoveable property—Will—Bequest—Gift.* An absolute bequest by a Hindu of his separate immoveable property to his widow confers on her as full dominion and power of alienation over that property as if the bequest had been made to a stranger. SETH MULCHAND BADHARSHA *v.* BAI MANCHA . **I. L. R. 7 Bom. 491**

30. ——— *Power to dispose of property by will.* Where a widow of a Hindu who had received a share of the estate of her husband, consisting of moveable and immoveable property, from her co-widows, purported to dispose of her property by will to the prejudice of the co-widows :—*Held*, that the alienation was invalid. GURIVI REDDI *v.* CHINNAMMA **I. L. R. 7 Mad. 93**

31. ——— *Grant of money in lieu of maintenance—Power of disposal.* Where a sum of money was given to a widow, without restriction, in lieu of maintenance by her deceased husband's family :—*Held*, that it became absolutely her's, and that she could dispose by will of landed property acquired by means of it. NELLAIKUMARU CHETTI *v.* MARAKATHAMMAL **I. L. R. 1 Mad. 166**

32. ——— *Gift—Interest with husband in joint property.* Where a Hindu wife has a joint interest with her husband in landed properties, partly acquired by purchase, partly (as sowdayakam) by gift from her father :—*Held*, that she was entitled on her husband's death to part with her interest in those properties. MADHAVARAYYA *v.* TIRTHA SAMI . . **I. L. R. 1 Mad. 307**

33. ——— *Restriction on alienation—Proof of legal necessity.* The restrictions on a Hindu widow's power of alienation are inseparable from her estate. Their existence does not depend on that of heirs capable of taking on her death. The plaintiffs sued as purchasers of the equity of redemption from *S*, a Hindu widow, to redeem a mortgage effected by her husband *B*. The mortgage deed recited that a portion of the mortgaged land was held by *B*, not as owner, but as mortgagee from a third party. *S* was alive when the suit was instituted, but she died after the settlement of issues. The plaintiff then filed a supplementary claim to succeed as *B's* next heir. The defendants (the sons of the mortgagee contended that the plaintiff could not redeem because the sale by *S* was invalid. They also claimed compensation for loss of the rents and profits of a portion of the mortgaged property redeemed from *B* by the original owner. The Subordinate Judge allowed the plaintiff's claim. In appeal, the District Judge confirmed his decree, being of opinion that the sale was valid as against the defendants, because there were no collateral heirs. On appeal to the High Court :—*Held*, following the decision of the Privy Council in *Collector of Masulipatam* v. *Cavaly Venkata Narrainapah, 2 W. R. P. C. 61: 8 Moo. I. A 529*, that the plaintiffs, who were bound to make out their title, could not succeed on the strength of an alienation by a Hindu widow, unless they proved that the alienation was made for purposes which the Hindu law recognized as necessary. DHONDO RAMCHANDRA *v.* BALKRISHNA GOVIND NAGVEKAR . . **I. L. R. 8 Bom. 190**

34. ——— *Adoption made on promise of settlement by adoptive father on adopted son—Specific performance, right to—Alienation by widow in accordance with promise—Limitation—Immoveable property.* Where a member of the Talabda Koli caste of Hindus, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption, but died without having executed such settlement :—*Held*, that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract survived ; and the property in the hands of his widow was bound by that contract. Therefore, when the widow of the adoptive father, nearly thirty years after his death, gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son :—*Held*, that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had waived. The nature of a Hindu widow's estate in immoveable property considered. BHALA NAHANA *v.* PARBHU HARI **I. L. R. 2 Bom. 67**

35. ——— *Right of widow to dispose by will.* By Hindu law the widow of a collateral does not take an absolute estate in the property of her husband's gotraja-sapinda, which she can dispose of by will after her death. BHARMANGAVDA *v.* RUDRAPGAVDA **I. L. R. 4 Bom. 181**

36. ——— *Bengal school of Hindu law—Widow's estate—Joint widows—Partition —Purchaser from Hindu widow.*—Where a Hindu governed by the Bengal school of Hindu law dies intestate, leaving two widows, his only heirs, him surviving, either of those widows may sell her interest in her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow. JANAKI NATH MUKHOPADHYA *v.* MOTHURANATH MUKHOPADHYA **I. L. R. 9 Calc. 580 : 12 C. L. R. 215**

37. ——— *Widow with certificate under Act XXVII of 1860—Ground for setting aside sale—Fraud.* The sale by a widow (who has obtained a certificate under Act XXVII of 1860 to collect the debts due to her husband's estate) of a money-decree belonging to her husband's estate cannot be set aside except on the ground of fraud, either as not being the heir and

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

selling what she had no power to transfer, or as making a paper transfer to avoid the effect of execution. BHAGWAN DOSS *v.* LUCHMEE NARAIN **2 W. R. Mis. 19**

38. ——— *Sale by widow with consent of heirs.* An adopted son is not actually precluded from questioning acts done by his mother during his minority or before his adoption; but a sale by a widow with the consent of all legal heirs at the time existing, and ratified by decrees of Court, is binding on reversionary heirs as well as on an adopted son adopted long after the sale. RAJKRISTO ROY *v.* KISHOREE MOHUN MOJOOMDAR **3 W. R. 14**

39. ——— *Gift by Hindu widow of her own interest and that of consenting reversioner.* A Hindu widow in possession can, with the consent of a reversioner, make a valid gift, which will operate, so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimutty Dibeah* v. *Rany Koond Luta, 4 Moo. I. A. 292; Kooer Goolab Singh* v. *Rao Kurun Singh, 14 Moo. I. A. 176; Sia Dasi* v. *Gur Sahai, I. L. R. 3 All. 362;* and *Raj Bullubh Sen* v. *Oomesh Chunder Rooz, I. L. R. 5 Calc. 44,* referred to. *Ramphal Rai* v. *Tula Kuari, I. L. R. 6 All. 116,* distinguished. RAMADHIN *v.* MATHURA SINGH . . . . **I. L. R. 10 All. 407**

40. ——— *Gift with consent of reversioner—Subsequently-born reversioners.* The widow of a separated Hindu, being in possession as such widow of property left by her husband, executed a deed of gift of such property in favour of her daughter's son, her daughter being also a party to the deed. Subsequently to the execution of this deed of gift, the executant's daughter gave birth to another son. *Held,* that the deed in question could not affect more than the life-interests of the executant and her daughter, and could not operate to prevent the succession (as to a moiety of the property) opening up in favour of the subsequently-born son on the death of the survivor of the two ladies. *Ramphal Rai* v. *Tula Kuari, I. L. R. 6 All. 116.* referred to. DULI SINGH *v.* SUNDAR SINGH . . . . **I. L. R. 14 All. 377**

41. ——— *Power to defeat rights of reversioners.* A Hindu widow is not at liberty to defeat the rights of reversioners by alienating or wasting moveable property inherited from her husband. BUCHI RAMAYYA *v.* JAGAPATHI **I. L. R. 8 Mad. 304**

42. ——— *Forfeiture of property—Reversioner, right of, to possession.* A Hindu widow does not forfeit her interest in her deceased husband's separate estate merely by divesting herself of such interest. Such an act does not entitle the person claiming to be the next reversioner to sue for possession of the estate, or for a

HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

declaration of his right as such reversioner to succeed to the estate after the widow's death. PRAG DAS *v.* HARI KISHEN . **I. L. R. 1 All. 503**

43. ——— *Appointment of reversioner as manager—Lease by Hindu widow before he took over charge.*—Where a reversioner had obtained a decree for waste against a Hindu widow and was appointed manager of the estate, but did not take over charge of it for six years:—*Held,* that a pottah granted by the widow in the meantime was a valid lease. RAIE CHURN PAUL *v.* SAROOP CHUNDER MYTEE . **9 W. R. 598**

44. ——— *Right of purchaser at sale in execution of decree.* A purchaser in execution of the rights of a Hindu widow is entitled to question the validity of leases made by her. RAJKISHEN SIRCAR *v.* CHOWDHRY JAHEEOORUL HUQ . . . . **W. R. 1864, 351**

45. ——— *Mortgage by one of two co-widows invalid without the consent of the other—Their joint interest and title by survivorship—Construction of mortgage-deeds.* One of two co-widows mortgaged, without the consent of the other, part of the estate to which they were jointly entitled by inheritance from their deceased husband. *Held,* upon the construction of the deeds of mortgage executed by her, that they were not so framed as to bind the estate in the possession of the surviving widow after the death of the mortgagor. But assuming that the deeds had been so framed, and that there had been what would have been a justifying necessity for a sole widow, or co-widows jointly, to have mortgaged an estate which had belonged to the deceased husband (a state of things not decided to have existed here), such a necessity could not render a mortgage attempted by one co-widow binding upon the estate, which had descended upon the widows for their joint lives with survivorship between them, so as to affect the interest of the surviving widow. *Bhugwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487,* referred to and followed. GAJAPATI RADHAMANI GARU *v.* PUSAPATI ALAKAJESWARI **I. L. R. 16 Mad. 1 L. R. 19 I. A. 184**

46. ——— *Division by co-widows of their late husband's estate—Alienation by one after the division—Validity of alienation as against surviving widow on decease of alienor.* A Hindu died, leaving two widows who divided his property by a formal registered partition deed, under which each took possession of her share, with powers of alienation over the property comprised in it. Certain alienations were made by one widow, who subsequently died. On the surviving widow claiming the whole of her late husband's property, including the portions so alienated:—*Held,* that there is no legal obstacle to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. A widow may alienate for her life any estate which comes to her by virtue of her widowhood, and may therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation, provided that it does not extend beyond her life-interest. RAMAKKAL *v.* RAMASAMI NAICKAN . **I. L. R. 22 Mad. 522**

47. ——— *Right of widow to sell property inherited from her husband—Suit by reversioner to set aside sale by widow.* *B* having during his lifetime mortgaged certain property, the income of which was sufficient only to pay interest on a portion of the mortgage-debt, his widow, after his death, sold it before the mortgage-debt fell due. The reversioners sued to set aside the sale. *Held*, that, although there might have been no absolute necessity for the widow to sell the property to provide herself with maintenance, still, as there was no other family property, the property in question must necessarily have been sold at the expiration of the time fixed by the mortgage, and the sale by the widow ought to be supported. A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs. VENKAJI SHRIDHAR *v.* VISHNU BABAJI BERI **I. L. R. 18 Bom. 534**

48. ——— *Alienation by widow without legal necessity.* The property in dispute (consisting of 12 thikans or plots of land) was originally held by *A* and *B* as tenants-in-common, and they divided the income according to their respective shares. After *A's* death, his widow adopted *C* on condition that she was to remain in absolute possession and enjoyment for her life, and that *C* was to succeed to the estate after her death. The widow mortgaged 9 out of the 12 thikans, sold one, and granted a perpetual lease of another to the defendant. All these alienations to the defendant were made without any legal necessity. The defendant also purchased *B's* share in the thikans in dispute. Th plaintiff purchased *C's* rights, and on the widow's death, sued to set aside her alienations and to obtain joint possession with the defendant of all the thikans. The defendant pleaded (*inter aliâ*) that the widow's alienations were valid and binding on the plaintiff, and that the plaintiff's remedy was a partition suit. *Held*, that *A's* widow, not having higher powers than those of an ordinary Hindu widow who succeeds as heir to her sonless husband, could olny make valid alienations for purposes warranted by the law. As no legal necessity was shown in respect of the alienations in question, which were made long after disputes had commenced between her and her adopted son, they were not binding on him or on his alienee, the plaintiff. ANTAJI *v.* DATTAJI **I. L. R. 19 Bom. 36**

HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

49. ——— *Mortgage taken from Hindu widow—Unpaid interest claimed on her deceased husband's mortgages—Will, construction of.* A pardanashin widow executed a mortgage of part of the family estate to secure payment of the balance of interest alleged to be due on three previous mortgages, which had been executed by her husband in his lifetime. Justifying necessity for her to encumber was not shown, nor enquiry by the mortgagee as to her authority. Even if the transaction had been properly explained to her, as a Hindu widow she would have exceeded her powers. By his will her husband had declared that his widow should have full powers, but that, during the life of his minor son, she should not have power to transfer without legal necessity; and that she should have power to mortgage to pay revenue and other debts. *Held*, that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law; and that, under the circumstances, the mortgage executed by her was invalid. Notes promising to pay interest, additional to that contracted for in the mortgages, had been signed by the husband, which it was held could not affect the right to redeem, being unregistered. TIKA RAM *v.* DEPUTY COMMISSIONER OF BARA BANKI . . . **I. L. R. 26 Calc. 707**
L. R. 26 I. A. 97
3 C. W. N., 573

50. ——— *Assignment by widow—Decree for mesne profits of her late husband's land in her favour—Execution proceedings by assignee—Objections by reversioners—Validity of assignment.* The widow of a deceased Hindu, having been kept out of possession of land forming portion of her late husband's estate, obtained a decree for possession thereof and for mesne profits. She assigned the decree for mesne profits and subsequently died. Upon the assignee attempting to execute the decree in respect of mesne profits, the reversionary heirs contended that he had no right to do so on the ground that his assignor, the widow, could not alienate the mesne profits so as to enure beyond her lifetime. *Held*, that the right to mesne profits under a decree is not immoveable property, and that the decree was validly assigned. SAMI NATHA PILLAI *v.* MANIKKASAMI PILLAI **I. L. R. 22 Mad. 356**

51. ——— *Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption—Widow, alienation by—Alienee from widow bound to inquire if legal necessity for alienation—Evidence—Onus of proving necessity for alienation by the widow.* The plaintiff claimed, as the adopted son of one *K*, to recover possession of his adoptive father's property, which had been mortgaged by his (*K's*) widow, *R* (defendant No. 1), to the third defendant *B* prior to the plaintiff's adoption by her. The property had come into *R's* possession num-

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

bered with a mortgage effected by her husband, and in order to redeem that mortgage, she mortgaged the property again to one *Y*. She subsequently paid off *Y's* debt, amounting to R3,629, and in 1876 she mortgaged the property for R5,999 to *B*, who was put into possession. In 1881 she adopted the plaintiff, and in 1882 the plaintiff brought this suit to recover the property. He contended that *R* had no power to alienate or mortgage the ancestral immoveable property of her deceased husband, and he claimed, as the adopted son of *K*, to be entitled to the property free from the mortgages or other incumbrances with which *R* had attempted to charge it. For the defendants it was contended (*inter aliâ*) that the plaintiff could not impeach transactions effected by his adopive mother prior to his adoption. *Held*, that the plaintiff, as the adoptive son of *K*, had a right to impeach the unauthorized transactions of his adoptive mother *R*, who possessed only a widow's restricted power of alienation. The plaintiff was adopted by *R* to her husband, who was the last owner of the ancestral property. The plaintiff at once succeeded to that property upon his adoption, and as heir of his adoptive father was entitled to object to any alienation made by *R* on the principle that the restrictions upon a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. *Held*, also, that the plaintiff was entitled to redeem the property on payment of such amount only as was raised by *R* for the purpose of meeting expenses necessarily incurred by her. *Held*, further, that the onus of proving the necessity for alienation lay upon *B*. The Court found that there was no evidence that any sum beyond R3,629, the amount of *Y's* mortgage, was really required by *R*, and accordingly directed that the mortgage account should be taken between the plaintiff and *B* on the footing that the principal of the mortgage-debt was R3,629 only, instead of R5,999. LAKSHMAN BHAU KHOPKAR *v.* RADHA BAI . . . . **I. L. R. 11 Bom. 609**

52. ——————————— *Lease granted by Hindu widow while in possession of widow's estate.* A widow in possession of her widow's estate in a zamindari made a grant of a patni tenure under it to a lessee at a rent. In this suit, brought by the reversionary heir, on her death, with the object of having the grant set aside as invalid as against him, the patni lease was not proved to have been made with authority or from necessity justifying the alienation by the widow :—*Held*, that the patni was, on the death of the widow, only voidable, and not of itself void ; so that the plaintiff, the next inheritor of the zamindari, might then elect to treat it as valid. MODHU SUDAN SINGH *v.* ROOKE . . . **I. L. R. 25 Calc. 1**
L. R. 24 I. A. 164
1 C. W. N. 433

HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

53. ——————————— *Working quarries by Hindu widow on property inherited from husband.* The right of a widow to work quarries on land inherited from her husband considered. SUBBA REDDI *v.* CHENGALAMMA
I. L. R. 22 Mad. 126

54. ——————————— *Gift to Po-Brahmin—Alienation by widow for religious purposes.* When a Po-Brahmin receives a salary for the performance of his duties, a gift to him by the widow of the person whose exequial rites he has been appointed to perform, to reward him for having performed any of those exequial rites, is not a gift binding on the reversioners. MAHADEVI *v.* MEELAMANI . . . **I. L. R. 20 Mad. 269**

55. ——————————— *Grant by widow of jungleburi tenure—Power to bind reversioners.* The question whether a jungleburi tenure granted by a Hindu widow is binding on reversioners depends on the circumstances of the land. *Quære :* Whether such a tenure granted in respect of a chur where no legal necessity on behalf of the widow is shown could, under any circumstances, be binding on the reversioners. DROBOMOYI GUPTA *v.* DAVIS
I. L. R. 14 Calc. 332

56. ——————————— *Accumulations by Hindu widow—Accumulations, period up to which they may be dealt with—Legacy to Hindu widow.* The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that she may receive them in a lump sum ; but whether she receives them as they fall due or after they have accumulated in the hands of others, her right is the same. The question to be sought for in determining her right to deal with such income and accumulations of income is one of intention. If she has invested her savings in such a manner as to show an intention to augment her husband's estate, she cannot afterwards deal with such investments, except for reasons which would justify her dealing with the original estate ; but if she has evinced no such intention, she can, at any time during her life, deal with the profits. Where she invests her income making a distinction between the investments and the original estate, she can at any time thereafter deal with such investments, save in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the orignal estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. GRISH CHUNDER ROY *v.* BROUGHTON . **I. L R. 14 Calc. 861**

57. ——————————— *Accumulations — Period up to which accumulation may be dealt with —Intention to accumulate.* Under the will of

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HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

N C M, the testator left his estate to his brother, provided that, within a term of eight years, no son should be born to such brother, capable of being adopted as a son of the testator, in accordance with certain conditions made in the will. These conditions failed, and on the expiration of the term of eight years, the estate vested in the brother. The will made no provision for disposal of the rents and profits of the estate during the period the succession thereto was in abeyance. Disputes having arisen between the widow of the testator and his brother as to the right to such rents and profits, the brother eventually agreed to pay, and did pay, over to the widow a large sum by way of settlement of these disputes, for which sum the widow executed a release. The widow invested the sum so received in Government securities, and twenty years afterwards created with this fund a trust in favour of one *G C R*, and appointed *B* trustee thereof. On the death of the widow, the daughters of the testator tried to set aside this trust, claiming the funds as a portion of their father's estate with which the widow had no right to deal. *Held*, that, as the accumulations were handed over to the widow by the person entitled to the reversion after the estate had vested in him, and a release had been entered into between them, no presumption arose that the fund in question had been accumulated by the widow for the benefit of other heirs of the testator, and that, there being no such presumption, the facts of the case must be looked at to ascertain the intention of the parties regarding this fund. *Held*, as to this, that the conduct of the widow evidenced no intention to accumulate the sum received by her for the benefit of any person but herself, or that she ever intended to give up the power of disposing, expending, or dealing with it in any way. SOWDAMINI DASSI *v.* BROUGHTON **I. L. R. 16 Calc. 574**

58. ——————————— *Alienation, power of, over immoveable property—Bequest by husband—Will, construction of—Grant of absolute power, express or implied—Restrictions imposed upon power of alienation—Indian Succession Act (X of 1865), s. 82.* Though a mere gift of immoveable property by a Hindu husband to his wife does not carry with it the power of alienation, yet, where any such property is given by the husband to the wife with express power of alienation, or when this power is implied by the grant, she would acquire an absolute power of disposal over the property; and, when the gift is made by a will, the legatee is entitled, under the provisions of s. 82 of the Indian Succession Act, to the whole interest of the testator, unless it appears from the will that only a restricted interest was intended to be given. Where a will does not in express terms convey any estate of inheritance to a Hindu widow, still the widow will be entitled to alienate the property at her pleasure, if there is no restriction imposed by the terms of the will, so far as the power of alienation is concerned. Upon a construction of the will in this case, which provided as follows:—" If neither of them (the wives) have any children, then both my wives will enjoy and appropriate at their will the entire property, moveable and immoveable, in equal shares, in full proprietary right. In the absence of one, the other will similarly enjoy and appropriate at her will the entire aforesaid property in full proprietary right. In the event of her death, my next reversionary heir will have such moveable and immoveable property as will remain:" *Held*, that an absolute power of alienation was intended to be conferred on the widows. *Lalit Mohan Singh* v. *Chukkun Lal Roy, 1 C. W. N. 387; Lala Ramjiwan* v. *Dalkoer, I. L. R. 24 Calc. 466;* and *Rajnarain Bhaduri* v. *Kattayani Debi, 4 C. W. N. 337*, referred to. SARODA SUNDARI DASSI *v.* KRISTO JIBAN PAL (1900) . . . . **5 C. W. N. 300**

59. ——————————— A lease granted by a Hindu widow, in possession of her widow's estate, does not necessarily become void on her death, but is only voidable by the next inheritor of the estate. SADAI NAIK *v.* SERAI NAIK (1901) **I. L. R. 28 Calc. 532**
s.c. 5 C. W. N. 279

60. ——————————— *Property inherited by widow from her husband—Acquisitions with the income thereof—No indication of intention by widow to make the acquired property part of the husband's estate for the benefit of his heirs—Presumption that widow intended to retain control.* A Hindu widow inherited certain property from her husband; and, with the income thereof, acquired land on a usufructuary mortgage for 52 years. She assigned the unexpired portion of the term of the mortgage for consideration, and subsequently died. The reversionary heirs to her late husband then sued her assignees for the property. There was no evidence that the widow had ever indicated any intention to make the property part of her husband's estate for the benefit of his heirs. *Held*, that there was no presumption that the widow intended to part with her power of disposition for the benefit of her reversionary heirs. The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. Inasmuch as the widow's absolute power of disposition over the income derived from the widow's estate is now fully recognized, she will be presumed, in the absence of an indication of her intention to the contrary, to retain the same control over the investment of such income. Nor is that presumption affected by the fact that properties thus acquired by her are managed and enjoyed by her, without any distinction, with properties

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HINDU LAW—WIDOW—*contd.*

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inherited from her husband. She is the sole and separate owner of the two sets of properties, so long as she enjoys them, and is absolutely entitled to the income from both. The title of the assignees of the widow was upheld. *Isri Dut Koer* v. *Hansbutti Koerain, I. L. R. 10 Calc. 324, 337;* and *Saodamini Dasi* v. *The Administrator-General of Bengal, L. R. 20 I. A. 12,* referred to. AKKANNA *v.* VENKAYYA (1901) . **I. L. R. 25 Mad. 351**

61. ——— *Enfranchisement of land in favour of widow as personal inam land—Lease by widow—Sale of the land by her reversioners—Validity of lease—Title of purchaser.* Certain land had been enfranchised in favour of a Hindu widow as personal *inam* land. The widow executed a lease in respect of it in favour of the defendants. The reversioners of the widow sold the land to plaintiff, who, after the widow's death, sued to recover possession of it from the lessees, on the ground that their lease was not valid as against the reversioners, nor as against plaintiff, as their vendee. *Held,* that the plaintiff had shown no title. SUBBA NAIDU *v.* NAGAYYA (1901) **I. L. R. 25 Mad. 424**

62. ——— *Widow's estate—Alienation by widow—Subsequent adoption—Right of adopted son to claim property alienated—Limitation—Act XV of 1877, Sch II, Art. 144.* Where a Hindu widow alienates part of the immoveable property belonging to her husband's estate, and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. Where such a suit is brought during the widowhood, it is governed by Art. 144 of Sch. II to the Limitation Act, and the starting point for the period of limitation is the date of the adoption. If the alienation is for a necessary purpose, the adoption does not divest the alienee, and the adopted son succeeds only to the remaining portion of his adoptive father's property. If the alienation is not for a necessary purpose, the subject of the alienation is severed from the inheritance only during the widowhood, and the remainder therein vests, at the moment of adoption, in the adopted son, as a vested remainder to fall into possession at the termination of the widowhood. Observations by BHASHYAM AYYANGAR, *J.*, on the effect of an alienation by a Hindu widow. SREERAMULU *v.* KRISTAMMA (1902) . **I. L. R. 26 Mad. 143**

63. ——— *Alienation by one of two co-widows—Effect on the inheritance and on the interest of the alienor.* Though one of two co-widows, who is not the managing member on behalf of both, cannot charge the inheritance, even where the transaction is for the benefit of the estate, an alienation by her will bind her own interest in the property during her life-time. VADALI MAMIDIGADU *v.* KOTIPALLI RAMAYYA (1902) **I. L. R. 26 Mad. 334**

HINDU LAW—WIDOW—*contd.*

2. POWER OF WIDOW—*contd.*

(*b*) POWER OF DISPOSITION OR ALIENATION—*contd.*

64. ——— *Lease — Limitation—Hindu widow, lease granted by—Suit by reversioners for khas possession—Limitation Act (XV of 1877), Sch. II, Arts. 91, 118, 125, 141.* A lease granted by a Hindu widow is on her death, only voidable, and not of itself void. *Modhu Sudan Singh* v. *Rooke, I. L. R. 25 Calc. 1,* followed. *Sadai Naik* v. *Serai Naik, I. L. R. 28 Calc. 532,* referred to. On the death of a Hindu widow, a suit by a reversioner to recover possession of immoveable property, by setting aside a lease executed by her, is governed by Art. 91, and not by Art. 141, of Sch. II to the Limitation Act (XV of 1877). *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri, I. L. R. 13 Calc. 308; Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337; Mohesh Narain Munshi* v. *Taruck Nath Moitra, I. L. R. 20 Calc. 487; Shrinivas Murar* v. *Hanmant Chavdo Deshapande, I. L. R. 24 Bom. 260; Janki Kunwar* v. *Ajit Singh, I. L. R. 15 Calc. 58; Mahabir Pershad Singh* v. *Hurrihur Pershad Narain Singh, I. L. R. 19 Calc. 629;* and *Chunder Nath Bose* v. *Ram Nidhi Pal, 6 C. W. N. 863,* referred to. *Sheo Shankar Gir* v. *Ram Sewak Chowdhri, I. L. R. 24 Calc. 77,* distinguished. BIJOY GOPAL MUKERJI *v.* NIL RATAN MUKERJI (1903) **I. L. R. 30 Calc. 990; s.c. 7 C. W. N. 864**

65. ——— *Mitakshara—Property given or devised to wife by husband—Widow's powers of alienation. Held,* that, under the Hindu law, in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless such power is conferred in express terms. *Jeewan Punda* v. *Mussumat Sona, N. W. P. H. C. Rep. (1867), 63; Moulvie Mahomed Shumsool Hooda* v. *Shewuk Ram, L. R. 2 I. A. 7; Janki* v. *Bhairon, I. L. R. 19 All. 133,* and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 834,* referred to. SURAJMANI *v.* RABI NATH (1903) . **I. L. R. 25 All. 351**

66. ——— *Public policy, conveyance opposed to—Prayer for general relief—Hindu Law—Hindu widow, alienation by—Legal necessity—Family debts—Marriage expenses—Costs of litigation.* Although the English law relating to champerty has not been extended to India, a conveyance of property tending to foster gambling in litigation is void, as being unconscionable, speculative, and opposed to public policy. *Ram Koomar Coondoo* v. *Chunder Canto Mookerjee, I. L. R. 2 Calc. 233,* and *Fischer* v. *Kamala Naiker, 8 Moo. I. A. 170,* referred to. A suit to set aside alienations of property made by three Hindu widows in favour of the defendants was instituted by the plaintiffs *A*, *B* and *C*. The plaint stated that *B* and *C* were the reversioners to the widows and that they had conveyed their rights to *A*. It was prayed that possession of the property might be given to *A*, and there was a general prayer "for

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such further or other relief as the nature of the case may require." The lower Court dismissed the claim of *A*, but relying upon the prayer for general relief made a decree in favour of *B* and *C*. *Held*, that the plaintiffs *B* and *C* were entitled to no relief in the suit. *Held*, further, that a prayer for general relief is limited by the facts alleged and by the prayer for express relief. *Cargill* v. *Bower, L. R. 10 Ch. D. 502; Hiralal Mullick* v. *Matilal Mullick, 5 B. L .R. 682*, and *Jugal Kissore Lal Singh Deo* v. *Kartic Chunder Chottopadhaya, I. L. R. 21 Calc. 116*, followed. Amongst cases of legal necessity authorizing a Hindu widow to alienate properties inherited from a male, are (i) family debts not incurred by her, (ii) debts incurred by her for marriage ceremonies, and (iii) debts incurred by her for costs of litigation. *Ram Koomar Mitter* v. *Ichamoyi Dossi, I. L. R. 6 Calc. 36; Amjad Ali* v. *Moniram Kalita, I. L. R. 12 Calc. 62*, and *Hurry Mohun Rai* v. *Gonesh Chunder Doss, I. L. R. 16 Calc. 823*, followed. DEBI DAYAL SAHOO *v.* BHAN PERTAP SINGH (1904) . . **I. L. R. 31 Calc. 433**
s.c. 8 C. W. N. 408

67. _____ *Hindu widow—Sale by widow of deceased husband's property, partly for legal necessity and partly not—Suit by next reversioner to recover property on death of widow—Limitation Act (XV of 1877), Sch. II, Art. 141.* A separated Hindu died, leaving him surviving his mother, two widows and a daughter. After the death of the mother and the widows, the daughter sued to recover certain property, which had belonged to her father, but had been sold, by means of two sale-deeds, after his death by one of his widows. On the finding that one of the sales had been effected partly for legal necessity and partly not, and the other not for legal necessity, the Court decreed the plaintiff's claim as to the first sale no payment of such amount of the consideration for the sale as were supported by legal necessity, and as to the second sale unconditionally. On the finding that the suit was brought within twelve years from the date of the death of the widows, who both survived the plaintiff's grand-mother: *Held*, that the suit was not barred by limitation. *Govind Singh* v. *Baldeo, I. L. R. 25 All. 330*, and *Jhamman Kunwar* v. *Tiloki, I. L. R. 25 All. 435*, followed. RAM DEI KUNWAR *v.* ABU JAFAR (1905) **I. L. R. 27 All. 494**

68. _____ *Widow—Power of alienation—Power to grant permanent lease—Benefit of the estate.* A Hindu widow, as regards the management of the estate, has not less power than the manager of an infant's estate, and the reversioners are not entitled to set aside a permanent lease granted by her, which is found to be for the benefit of the estate and by which they are found to have been benefited. *Hunooman Persaud Panday* v. *Mussummat Babooe Munraj Koonweree, 6 Moo. I. A. 893*, and *Rameswar Pershad* v. *Run Bahadur Singh, I. L. R. 6 Calc. 843*, applied. DAYAMANI DEBI *v.* SRINIBASH KUNDU (1906) **I. L. R. 33 Calc. 842**

69. _____ *Hindu widow—Effect of relinquishment of the estate by a widow in favour of the present reversioners.* A Hindu widow in possession of a widow's estate in property of her deceased husband, a separated and childless Hindu, relinquished possession thereof to two persons who at the time were the next reversioners, they agreeing to pay her a maintenance allowance; but it did not appear that she intended to make them, if she could, full owners of the property, although certain incorrect recitals in the agreement entered into by the widow, when she gave possession of the property, might have lent colour to this suggestion. Both the persons thus put into possession predeceased the widow. *Held*, that the nearest reversionary heir to the widow's late husband was entitled to succeed on the death of the widow. *Quære:* Whether in these provinces a Hindu widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate? *Behari Lal* v. *Madho Lal Ahir Gayawal, I. L. R. 19 Calc. 236*, and *Ramphal Rai* v. *Tula Kuari, I. L. R. 6 All. 116*, referred to. RAJ KISHORE *v.* DURGA CHARAN LAL (1906) . **I. L. R. 29 All. 71**

70. _____ *Mitakshara—Mayukha—Succession—Co-widow's interest in the property of their deceased husband—Right of assigning her share—Partition—Alienation of her share—Valid during her lifetime—Survivorship.* It is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*, both under the Mitakshara and the Mayukha. She can, therefore, assign her share to anyone she chooses; and if she has already obtained her share by partition, she can alienate that share. But in either case the assignment or alienation cannot take effect or have validity beyond her lifetime. It is good as long as she lives; and, on her death, her interest in the property ceases and the share goes to the surviving co-widow or co-widows as the case may be. HARI *v.* VITAI (1907) . **I. L. R. 31 Bom. 560**

71. _____ *Reversioner—Suit—Limitation Act (XV of 1877), Sch. II, Arts. 91, 141—Immoveable property—Lease by Hindu widow for a term extending beyond her life—Reversioner's right of election to affirm it or treat it as a nullity.* A suit by a reversioner on the death of a Hindu widow to recover immoveable property of her husband, of which she was in possession for a widow's estate as his heir, and of which she had granted a lease for a term extending beyond her own life, is governed by the 12 years' period of limitation provided by Art. 141 of Sch. II of the Limitation Act, and not by the three years' period prescribed by Art. 91. A Hindu widow is the owner of her husband's property subject to certain

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restrictions on alienation, and subject to its devolving upon her husband's heirs upon her death. Her alienation is not absolutely void, but it is *primâ facie* voidable at the election of the reversionary heir, who may affirm it or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to his right of action. The institution of a suit for possession shows his election to treat the alienation as a nullity ; and in such a suit it is therefore unnecessary for him to ask for a declaration that it is inoperative. BIJOY GOPAL MUKERJI *v.* KRISHNA MAHISHI DEBI (1907)
I. L. R. 34 Calc. 329 ; L. R. 34 I. A. 87

72. ——————— *Widow — Alienation —Suit by reversioner to set aside the alienation —Limitation—Limitation Act (XV of 1877), Sch. II, Art. 91.* The plaintiff sued in 1904, as reversioner, to recover possession of property from the defendant to whom it had been given by way of gift in 1894 by the widow of a preceding owner. It was found by both the lower Courts that the alienation was not justified by any necessity recognised by Hindu law. The defendant pleaded that the suit was barred by limitation. *Held*, that it was not open to the defendant to rely on Art. 91 of the Limitation Act (XV of 1877) as a bar to the suit. *Harihar Ojha* v. *Dasarathi Misra, I. L. R. 33 Calc. 257*, followed. RAKHMABAI *v.* KESHAV RAGHUNATH (1906) . **I. L. R. 31 Bom. 1**

73. ——————— *Service inam—Alienation by widow.* A Hindu widow cannot alienate beyond her own life-time service inam enfranchised in her name under Madras Act IV of 1866. PINGALA LAKSHMIPATHI *v.* BOMMIREDDIPALLI CHALAMAYYA (1907) **I. L. R. 30 Mad. 434**

74. ——————— *Widow—Power of widow in possession of husband's estates—Alienation of estate made by widow with concurrence of reversioners—Consent at time of alienation—Subsequent ratification—Quantum of consent necessary—Custom excluding daughters from succession, evidence of.* A Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate, with the concurrence of the reversionary heirs, so as to bind the persons, who are the next reversioners, when the succession opens out on her death ; and this principle has been admitted by all the High Courts in India. *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102 ; Marudamuthu Naodan* v. *Srinivasa Pillai, I. L. R. 21 Mad. 128, Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni, I. L. R. 25 Bom. 129*, and *Ramphal Roy* v. *Tula Kuari, I. L. R. 6 All. 116*, referred to. The restriction sought to be placed by the Allahabad High Court on the widow's power to surrender in favour, or alienate with the consent, or presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death is at variance with this principle, and not in accordance with the practice in other parts of India, in which the Mitakshara law prevails. *Ramphal Rai* v. *Tula Kuari, I. L. R. 6 All. 116*, dissented from so far as it supports such restriction. Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, although there may be cases in which special circumstances may render the strict enforcement of this rule impossible. It is immaterial whether the concurrence of the reversioners is given at the time the alienation is made or whether the transaction is subsequently ratified. The maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur,*" referred to. A custom among the Bhale Sultan tribe of Chhatries in Oudh excluding daughters from succession was held to have been established on the evidence. BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH (1908) **I. L. R. 30 All. 1**
s.c. 12 C. W. N. 74 ; L. R. 35 I. A. 1

75. ——————— *Moveables inherited from husband—Gift invalid—Mitakshara.* A Hindu widow is not competent under the Mitakshara to make a gift of moveables inherited by her from her husband, who died childless and intestate. PANDHARINATH *v.* GOVIND (1907)
I. L. R. 32 Bom. 59

76. ——————— *Widow—Mortgage of husband's estate adversely to adoptive son—Suit to enforce mortgage against adoptive son—Lis pendens—Contentious suit—Application for leave to sue in formâ pauperis—Civil Procedure Code (Act XIV of 1882), s. 410.* A mortgage of part of her late husband's estate was executed by a Hindu widow in defiance of the rights of her husband's adopted son, and in fact in collusion with the mortgagee and in order to deprive the adopted son of his adoptive father's estate. Shortly before this mortgage was executed by the widow the adopted son had applied for leave to sue *in formâ pauperis* for the recovery of his adoptive father's estate. *Held*, on a suit by the mortgagees to enforce their mortgage against the adopted son, then in possession, that the suit must fail, both because the fact of the estate having to some slight extent benefited by the money borrowed was not sufficient under the circumstances to make the mortgage enforceable against the adopted son. *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree, 6 Moo. I. A. 393*, distinguished,—and also because of the application of the doctrine of *lis pendens. Faiyaz Husain Khan* v. *Prag Narain, I. L. R. 29 All. 339*, referred to. AMBIKA PARTAP SINGH *v.* DWARKA PRASAD (1907) . **I. L. R. 30 All. 95**

77. ——————— *Conveyance by a widow to reversioner of whole life estate, validity of—Conveyance not invalid by reason of contemporaneous agreement between the widow and reversioner.* Where

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a widow conveys the whole of her limited estate to the next reversioner in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement. The title of such reversion and that of the person, to whom the property is reconveyed in pursuance of such agreement, cannot be impeached by other reversioners. *Rangappa Naick* v. *Kamti Naick, I. L. R. 31 Mad. 336,* referred to and explained. *Hem Chunder Sanyal* v. *Sarnamoyi Debi, I. L. R. 22 Calc. 354,* referred to and distinguished. *Per* SANKARAN-NAIR, *J.* The validity of the renunciation by the widow is independent of the validity of the agreement as to the subsequent disposal of the property by the alienee. The surrender by the widow of her life estate to the next reversioner is analogous to the case of a widow divesting herself of her estate by adoption; and as an adoption cannot be questioned on the ground of improper motive in the widow, so the validity of the surrender cannot be affected by her motives or by any conditions that may be imposed by her. CHALLA SUBBIAH SASTRI *v.* PALURY PATTABHIRAMAYYA (1908) **I. L. R. 31 Mad. 446**

78. ——————— *Widow — Permanent alienation by widow of her husband's property—Alienation on the ground of necessity—Meaning of necessity—Alienation for preserving the estate —Alienation for improving the estate.* Under Hindu law, a permanent alienation of immoveable property by a widow can only be justified on the ground of necessity. The "necessity" involves some notion of pressure from without and not merely a desire to better or to develop the estate, for this last implies vast powers of management, which in practice would not easily be distinguishable from an authorization to embark upon speculative ventures. A Hindu widow can alienate immoveable property inherited by her from her husband in order to preserve the estate; but she is not entitled to alienate it merely in order to improve it. GANAP *v.* SUBBI (1908) **I. L. R. 32 Bom. 577**

79. ——————— *Reversioner—Consent given bonâ fide and for valuable consideration by the nearest reversioner to an alienation by a widow binds actual reversioner claiming through him.* Where the widow and the nearest reversioners execute a document, by which such reversioners, *bonâ fide,* and, in consideration of the widow conveying to them a portion of the property inherited by her from her husband, give up all their right to the remaining properties, and consent to the widow dealing with such properties as she chooses, the actual reversioners after the widow's death, who claim through such nearest reversioners, are bound by such consent and are estopped from questioning

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alienations made by the widow subsequent to such agreement. *Bajrangi Singh* v. *Monokarnika Bakhsh Singh, 12 C. W. N. 74,* followed. *Per* Sir ARNOLD WHITE, *C.J.,* and SANKARAN-NAIR, *J.* A surrender by a widow in favour of the next reversioner of her interest in the estate inherited from her husband is not valid, unless the widow's whole estate is extinguished. The same is the law in regard to alienations made with the consent of the nearest reversioners. *Per* Sir ARNOLD WHITE, *C.J.* The document in this case cannot be construed as extinguishing the widow's estate. The reversioners cannot by a general release of their reversionary right prospectively enable the widow to give an absolute title to property inherited from her husband. *Per* WALLIS, *J.*—The document in the present case is a conveyance by way of release by the reversioners and cannot operate to vest the property in the widow. Next reversioners cannot confer an unrestricted prospective power of alienation on the widow. The power of accelerating the reversioner's estate cannot be used by the widow as a means of enlarging her own estate or effecting alienations to strangers, as it it will be an abuse of the limited power vested in her. The reversioner's right to validate alienations is not derived from the power to surrender. The former is analogous to the power of sapindas to consent to an adoption; the latter is based upon the application of the English doctrine of merger. Partial alienations made by the widow will be valid, if made with the consent, of the next reversioners. *Per* SANKARAN-NAIR, *J.*—The document in this case must be construed as extinguishing the whole life estate of the widow. It amounts to a surrender of the whole to the reversioners and a reconveyance of part to the widow. A widow may alienate for necessary or for religious or charitable purposes, and in such cases, where reversioners consent, the consent is only evidence of necessity or fairness of the transaction, and it is not the consent, but the existence of facts evidenced by such consent, that validates the transaction. In cases not justifiable on the above grounds, an alienation made with the consent of reversioners is valid. In the last case it is the consent, which validates. As however in such cases, the alienations are upheld as a logical consequence of the recognition of the widow's right of surrender, they can be upheld only where a surrender will be valid, *i.e.,* where it extinguishes the life estate. The assent of sapindas necessary to validate an alienation, which does not extinguish the whole life estate of the widow, must be such consent as will suffice to validate an adoption made by the widow, *i.e.,* consent, which will raise the presumption that the transaction was a fair one, justified by Hindu law. Such consent, however, must have reference to the particular alienations sought to be impeached. RANGAPPA NAIK *v.* KAMPTI NAIK (1907) . **I. L. R. 31 Mad. 366**

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HINDU LAW—WIDOW—*contd.*

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(*c*) POWER OF ADOPTION.

80. ———— *Widow succeeding as a gotraja sapinda in a joint Hindu family to an estate not her husband's—Powers of adoption.* *A* and *S* were two joint Hindu brothers. *S* died in 1876 leaving a widow *P* and two daughters him surviving. After *S's* death, *P* continued to live with *A*, who died in 1877. *P* succeeded him as there was no issue or nearer heir to *A*. *P* adopted defendant 1 as a son. The plaintiffs, some of whom were reversioners entitled to succeed to *A* as his heirs after the termination of *P's* life estate, sued to recover possession of the property, alleging that *P* was not authorised to make the adoption she did, and it was, therefore, bad. *Held*, that the adoption by *P* was invalid. A Hindu widow who succeeds to an estate not her husband's, but as a *gotraja sapinda* of the last male holder under the rule established by *Lulloobhoy* v. *Cassibai* (*L. R. 7 I. A. 212*) and in consequence of the absence of nearer heirs, cannot make a valid adoption. *Amava* v. *Mahadgauda, I. L. R. 22 Bom. 416*, and *Payapa* v. *Appanna, I. L. R. 23 Bom. 327*, doubted. *Ramkrishna* v. *Shamrao, I. L. R. 26 Bom. 526*, followed. DATTO GOVIND *v.* PANDURANG VINAYAK (1908) **I. L. R. 32 Bom. 499**

3. DECREES AGAINST WIDOW AS REPRESENTING THE ESTATE OR PERSONALLY.

1. ———— **Effect of decree against Hindu widow**—*How far binding on inheritance.* The same principle which has prevailed in England as to tenants-in-tail representing the inheritance would seem to apply to the case of a Hindu widow, as there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow. A decree in a suit for a zamindari by a Hindu widow binds those claiming the zamindari in succession to her, unless it can be impeached on some special ground. KATTAMA NAUCHEAR *v.* RAJA OF SHIVAGUNGA **2 W. R. P. C. 31**
9 Moo. I. A. 539

BADAMOO KOOER *v.* WUZEER SINGH **1 Ind. Jur. N. S. 144 : 5 W. R. 78**

GOPAUL CHUNDER MAMA *v.* GOUR MONEE DOSSEE **6 W. R. 52**

See PERTAB NARAIN SINGH *v.* TRILOKINATH SINGH **I. L. R. 11 Calc. 186 : L. R. 11 I. A. 197**

2. ———— **Decree against widow in representative capacity**—*Execution of decree—Debts incurred by husband.* After the death of a member of a Hindu family, his widows were sued in their representative capacity, and decrees were obtained in respect of debts incurred by him in his lifetime on his own account. *Held*, that the decrees could only be executed against that property which passed from the deceased to his widows in their own right, and not against other portions of the joint family property. SADABURT PERSHAD SAHOO *v.* LOTF ALI KHAN. PHOOLBAS KOOER *v.* LALL JUGGESSUR SAHI. BIKRAMJEET LALL *v.* PHOOLBAS KOOER. RAMDHYAN KOOER *v.* PHOOLBAS KOOER . . . . . **14 W. R. 40**

3. ———— Under a decree in a suit on a bond against the widow of the deceased obligor, property to which her son, of whom she was guardian, was entitled as heir, was sold. In the advertisement of the sale the property was described as that of the widow, and the interest to be sold was described as that of the debtor. *Held*, that the purchaser as the sale acquired the property of the deceased debtor in the estate, and had a good title against the heir. ISHAN CHUNDER MITTER *v.* BUKSH ALI SOUDAGUR . **Marsh. 614**

S.C. BUKSH ALI SOWDAGUR *v.* ESSAN CHUNDER MITTER . . . . . **W. R. F. B. 119**

NUZEERUN *v.* AMEEROODEEN . **24 W. R. 3**

HULKHORY LALL *v.* SHEO CHURN LALL **24 W. R. 109**

See ABDUL KUREEM *v.* JAUN ALI **18 W. R. 56**

4. ———— **Decree against widow for arrears of revenue**—*Sale in execution of widow's interest—Purchaser, rights of—Reversioner.* The immoveable property of a Hindu widow was sold under a decree against her, and *A* was the purchaser at the sale. Afterwards and during the lifetime of the widow the lands in question were sold for arrears of revenue due by *A* to Government in respect of other lands, and *B* was the purchaser at the sale. After the death of the widow, the reversioner sued *B* for recovery of possession of the lands. *Held*, that the life-estate of the widow was alone acquired by the purchaser at the sale under the decree, and sold at the sale for arrears of Government revenue, and that interest having expired, the reversioner was entitled to recover the possession of the lands. DOORGA CHURN *v.* KASSYCHURN MOITREE . . **Marsh. 539 : 2 Hay 646**

KISTO MOYEE DOSSEE *v.* PROSUNNO NARAIN CHOWDHRY . . . . . **6 W. R. 304**

RAM SHEWUK ROY *v.* SHEO GOBIND SAHOO **8 W. R. 519**

5. ———— **Decree against widow personally and as guardian of son**—*Debts of husband and wife jointly, liability of estate for.* Where a decree is obtained against a Hindu widow, as guardian of her son, as well as in her own right, for a debt contracted jointly by her and her husband, the husband's property is liable to satisfy the whole decree, and the wife is therefore entitled to

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sell as much of the estate as is necessary to raise the full amount of the debt. GOLUCK CHUNDER PAUL *v.* MAHOMED ROHIM . . **9 W. R. 316**

6. ——— Decree for refund of deposit by mortgagee to prevent sale for arrears of revenue—*Estate in possession of Hindu widow—Effect of decree by mortgagee against widow.* A mortgaged estate, which was about to be sold for arrears of Government revenue, was saved from sale by the mortgagee depositing a sum sufficient to pay the revenue due. The mortgagee then sued the person in possession of the talukh, a Hindu lady, widow of the original mortgagor, seeking, under s. 9 of Act I of 1845, to obtain from her personally repayment of the money paid to save the estate from sale; not making the reversioners parties, and not praying that the talukh might be sold to pay the amount due. A decree was given in that suit to the mortgagee, on the execution of which decree the reversioners intervened. *Held*, by the Privy Council, that the mortgagee had no charge on the estate, and was not entitled to have it sold to pay the amount due: the action so brought was only a personal action, and the decree gave no remedy against the land; and it was intimated that this ruling did not affect the general doctrine, that, in a suit brought by a third person, the object of which is to recover or to charge an estate of which a Hindu widow is the proprietress, she will as defendant represent and protect the estate as well in respect of her own as of the reversionary interest. NAGENDRA CHUNDER GHOSE *v.* SREEMUTTY DOSSEE
8 W. R. P. C. 17 : 11 Moo. I. A. 241

7. ——— Decree in suit for arrears of rent—*Decree against widow in representative capacity—Purchaser, rights of.* *A* sued, under Act X of 1859, the widow of *Z*, as widow of *Z* and guardian of *Z's* son, for arrears of rent due by *Z*. He obtained a decree in 1862, against the widow as *Z's* representative, but it was declared that *Z's* son was not liable, on the ground that he had been adopted into another family. In a regular suit, *A* obtained a decree declaring *Z's* son to be the heir of his natural father *Z*. Certain estates of the deceased were then, in 1867, put up for sale under Act XI of 1859, in execution of *A's* decree for rent, and *A* became the purchaser. The certificate stated that the sale was of the right and interest of the widow, and that it took place under the decree in the regular suit. *B*, the holder of a prior decree for rent against *Z*, having failed to obtain execution against the same property, then sued *A* and *Z's* son for a declaration that he was entitled to sell the property on the ground that it had come to *Z's* son as *Z's* heir, and that only the interest of the widow (who had no interest) had been purchased by *A*. *Held* (reversing the decision of the High Court), that *A* was entitled to the property. The case of

HINDU LAW—WIDOW—*contd.*

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Ishan Chunder Mitter v. *Buksh Ali Soudagur, Marsh. 614*, approved of. COURT OF WARDS *v.* COOMAR RAMAPUT SINGH
10 B. L. R. 294 : 17 W. R. 459
14 Moo. I. A. 605

8. ——— *Personal decree against widow—Rent accruing after husband's death.* In execution of a decree in a suit under the provisions of Regulation VIII of 1831 against a Hindu widow for arrears of rent of a certain talukh, the interest of the widow in another talukh was sold in 1852 under Act IV of 1846; and in execution of another decree on a bond given by the widow for arrears of rent, a third talukh was sold in 1865. Both decrees were for arrears of rent which had accrued due after the death of the husband; and the suits were brought against the widow alone, the reversioner not being made a party. In a suit by the purchaser of the talukhs from the reversioner against the purchasers at the execution-sales to recover possession of the talukhs.—*Held*, that the plaintiff was entitled to recover. The decrees for arrears of rent were a personal debt of the widow, and not a debt against the estate of the deceased husband. Such decrees can be enforced by the sale of her interest only, except where the proceeding is one which authorizes the sale of the tenures under Bengal Act VIII of 1869. Even assuming them to be a charge on the husband's estate, the onus was on the defendants to prove that such charge was created by legal necessity, which they had failed to do. MOHIMA CHUNDER ROY CHOWDHRY *v.* RAM KISHORE ACHARJEE CHOWDHRY
15 B. L. R. 142 : 23 W. R. 174

See BRAJA LAL SEN *v.* JIBAN KRISHNA ROY
I. L. R. 26 Calc. 285

9. ——— *Widow in possession of husband's property—Personal debt—Right of purchaser.* Arrears of rent due to a zamindar by a Hindu widow in possession of her husband's property are not a personal debt of the widow, and on a sale of the property taking place in execution of a decree against the widow for such arrears, in a suit under Act X of 1859, the purchaser acquires the property absolutely, and not merely the rights of the widow. TELUCK CHUNDER CHUCKERBUTTY *v.* MUDDON MOHUN JOOGEE
15 B. L. R. 143 note : 12 W. R. 504

ANUND MOYEE DASSEE *v.* MOHINDRO NARAIN DASS . . . . . **15 W. R. 264**

CHOWDHRY ZUHOORUL HUQ *v.* GOOROO CHURN ROY . . . . . **15 W. R. 329**

RAJARAM BANERJEE *v.* SONATUN ROY
23 W. R. 404

10. ——— *Personal decree against person having life interest—Execution of decree.* A decree for arrears of rent was obtained

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by *H* against *B*, a daughter in possession for a life estate of property inherited from her father *R*. On the death of *B*, this property was taken by her two sons as heirs of her father *R*. The decree was for arrears which had accrued during the lifetime of *B*, and the sons had been substituted for *B* as judgment-debtors. On an application for execution of the decree:—*Held*, on the principle laid down in *Baijun Doobey* v. *Brij Bhookun Lall Awusti, L. R. 2 I. A. 275 : I. L. R. 1 Calc. 133*, that the debt was a personal debt, payment of which could be enforced only against the property left by *B*. The decree, therefore, could not be executed against the property, inherited by the sons from *R*. *Hurry Mohun Rai* v. *Gonesh Chunder Doss, I. L. R. 10 Calc. 823*, distinguished. KRISTO GOBIND MAJUMDAR *v.* HEM CHUNDER CHOWDHRY. KRISHNA GOPAL MAJUMDAR *v.* HEM CHUNDER CHOWDHRY **I. L. R. 16 Calc. 511**

11. ——— Decree executed against widow of mortgagor—"*Razinama decrees*"—*Right of purchaser.* Razinama arrangements, not made decrees of Court, but irregularly acted upon as if they had been so made, do not substantiate advances alleged to have been made by creditors; but, assuming such "razinamah decrees" to substantiate creditor's claims, proceedings in execution against the widow of the mortgagor alone as his representative cannot be effectual to pass to the purchaser of the equity of redemption at a sale in the course of such proceedings any right or interest in the property mortgaged. PAREYASAMI *alias* KOTTAI TEVAR *v.* SALUCKAI TEVAR *alias* OYYA TEVAR . . . . . **8 Mad. 157**

See, however, the same case on appeal to Privy Council. SIVAGNANA TEVAR *v.* PERIASAMI **I. L. R. 1 Mad. 312 L. R. 5 I. A. 61**

RAMASAMI CHETTI *v.* SALUCKAI TEVAR *alias* OYYA TEVAR . . . . . **8 Mad. 186**

12. ——— Execution of decree against widow as representing estate—*Sale in execution of decree—Widow's interest under deed of adoption—Right of purchaser against adopted son.* The plaintiff sued to follow into the hands of the defendant certain property to which the latter had by transfers acquired the title of the purchaser at an auction-sale held in June 1843. The ground of his claim was that the late owner, who died before the sale, had left his widow a permission to adopt a son, and thereupon in 1856 she had adopted the plaintiff. His contention was that the sale was of the widow's interest merely, the permission to adopt having given to her, in the event of an adoption, a life-interest in the property, and that, upon her death in 1865, his interest accrued. *Held*, that, as the proceeds of the execution-sale were not applied to satisfy only a liability incurred after the owner's death, but also decrees for other debts for which the estate was liable, there was no substantial ground to impeach the long title acquired by the respondent. DEBENDRO NARAIN ROY *v.* COOMAR CHUNDERNATH ROY . **20 W. R. 30**

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13 ——— Execution of decree against widow for arrears of maintenance—*Sale of right, title, and interest of widow—Maintenance of widow—Charge on estate of husband.* A Hindu died, leaving two sons, *S* and *M*, who became separate in estate. *S* died, leaving a son, *K*, who became a lunatic. *M* died, leaving a widow, *N*, and two sons, *B* and *C*; and on his death, his sons *B* and *C* took possession of their father's estate, and entered into an agreement with their mother, *N*, to pay her R200 per annum for maintenance, and hypothecated some villages as security for due payment. *B* died and *C* remained in exclusive possession of the property. After the death of *C*, his widows, *R* and *D*, and afterwards *D* alone, took possession of the estate. *N* sued *D* for arrears of maintenance accrued since the death of *C* and obtained a decree. In execution of that decree, she attached the rights and interests of *D* in certain properties, but she died before any sale took place. The plaintiff, the son of *K*, then obtained a certificate under Act XXVII of 1860 as representative of *N*. He was appointed a guardian of *K*, who was, in a suit brought by him before his insanity and before the death of *N*, declared, by a decree made in 1848, entitled to the estate of *C* as reversioner. The plaintiff executed the decree obtained by *N*, and caused the properties, which had been before attached to be sold in 1866. Some time after *D* died, and the plaintiff then sued the purchaser to recover possession of the property as the representative of his father under the decree of 1848, but was defeated on the ground set up by the defendants, the purchasers, that his father was no longer heir to *C* by reason of supervenient insanity when the succession opened out to him on the death of *N*. The plaintiff then brought this suit to establish his own title to the property as heir of *C*. It was contended by the defendants, among other things, that by the sale in execution in 1866, under the decree obtained by *N* against *D*, the absolute proprietary title passed, and not the life-interest of the widow only. *Held*, that the arrears of maintenance for which the sale in 1866, took place was the personal debt of *D*, and that nothing but her life-interest passed under the sale. BRIJBHOOKUN LALL AWUSTEE *v.* MAHADEO DOOBEY **15 B. L. R. 145 note : 17 W. R. 422**

Held on appeal to the Privy Council, affirming the decision of the High Court, that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover. BAIJUN DOOBEY *v.* BRIJ BHOOKUN LALL AWUSTI **I. L. R. 1 Calc. 133 : 24 W. R. 306 L. R. 2 I. A. 275**

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See BRAJA LAL SEN *v.* JIBAN KRISHNA ROY **I. L. R. 26 Calc. 285**

14. ——— Debt incurred by Hindu widow for legal necessity—*Decree for such debt against a person subsequently found not to be her legal representative—Sale of property under such decree, effect of.* A Hindu widow obtained medicine and medical aid on credit, and on her death her creditors sued the son she had purported to adopt and obtained a decree to the effect that the debt is to be satisfied first from the widow's assets and the remainder from the assets of the adopted son. The property in dispute was sold in execution of the decree, but the adoption was subsequently found to be invalid. *Held*, that the execution-sale in such a case could pass only the widow's right, title, and interest, and not the inheritance. *Baijun Doobey* v. *Brij Bhookun Lall Awustee, I. L. R. 1 Calc. 133*, and *Jugal Kishore* v. *Jotendro Mohun Tagore, I. L. R. 10 Calc. 985*, distinguished. RANJIT SINGH *v.* RAM CHANDRA MOOKERJEE . **4 C. W. N. 415**

15. ——— Decree in form personal against widow—*Sale in execution of decree—Right of purchaser.* Where an estate is sold in execution of a decree which in form is a personal decree against a widow, and the sale certificate purports to pass only the right, title, and interest of such widow, the purchasers at such sale cannot, in a suit by the reversionary heirs of the husband for possession of the property, give evidence to show that the debt for which the property was sold was chargeable on the estate of the deceased husband, with a view to establishing a right to more than the widow's interest. *Baijun Doobey* v. *Brij Bhookun Lall Awusti, L. R. 2 I. A. 275 ; I. L. R. 1 Calc. 133 : 24 W. R. 306*, cited. RADHA MOHUN MUNDUL *v.* SHOSHI BHOOSUN BISWAS **3 C. L. R. 530**

16. ——— Sale in execution of mortgage decree against widow—*Right of purchaser—Son's widow.* A Hindu having mortgaged family property died, leaving a widow and a son him surviving. The son died leaving a widow, the defendant. The mortgagee then sued the widow of the father as his representative, and the property was sold, and bought by the plaintiff in execution of the decree obtained against her. The plaintiff, having been dispossessed by the defendant, sued to recover the land. *Held*, that the defendant was not bound by the decree or sale, and that the plaintiff was not entitled to recover. *General Manager of the Durbhanga Raj* v. *Coomar Ramaput Sing, 14 Moo. I. A. 605*, distinguished. SIVA BAHGIAM *v.* PALANI PADIACHI . **I. L. R. 4 Mad. 401**

17. ——— Sale of right, title, and interest of widow. A money-decree, having been passed against *R*, a Hindu, was executed against his widow, whose right, title, and interest in certain property as representative of her deceased husband was sold by the Court. *Held*, that on the death of the widow *R's* daughter and heir was not entitled to recover from the purchaser the property sold. *General Manager of the Durbhanga Raj* v. *Coomar Ramaput Sing, 14 Moo. I. A. 605*, and *Ishan Chunder Mitter* v. *Buksh Ali Soudagar, Marsh. 614*, followed. VYDIANATHAYYAN *v.* MINAKSHI AMMAL . . **I. L. R. 5 Mad. 5**

18. ——— *Sale of right, title and interest of Hindu widow—Estate taken by purchaser.* The test to be applied in order to determine the exact interest which passes at a sale under the words "right, title, and interest" of a Hindu widow in any properties depends upon the question whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affects the whole inheritance of the property in suit. *Baijun Doobey* v. *Brij Bhookun Lall Awusti, L. R. 2 I. A. 275*, followed. JOTENDRO MOHUN TAGORE *v.* JOGUL KISHORE . **I. L. R. 7 Calc. 357 : 9 C. L. R. 57**

Held, on appeal to the Privy Council, affirming the decree of the High Court, that although a Hindu widow has, for some purposes, only a partial or qualified right, title, and interest in the estate which was her husband's, yet for other purposes she represents an absolute interest therein. The question whether, on the sale of the right, title, and interest of the widow in execution of a decree, the whole interest or inheritance in the family estate does or does not pass, depends on the nature of the suit in which the execution of the decree takes place. If the suit is a personal claim against the widow, then merely the widow's limited estate is sold. If, on the other hand, the suit is against the widow in respect of the family estate, or upon a cause not merely personal against her, then the whole of the inheritance passes by the execution-sale. The judgment which the decree has followed may be examined in order to determine which of these two results attends the execution-sale of the widow's right, title, and interest. The principle in *Baijun Doobey* v. *Brij Bhookun Lall Awusti, I. L. R. 1 Calc. 133*, referred to and applied. JUGUL KISHORE *v.* JOTENDRO MOHUN TAGORE **I. L. R. 10. Calc. 985 : L. R. 11 I. A. 66**

JYKISHOON SOOKUL *v.* SHUNKUR SHOOKUL **3 Agra 168**

19. ——— Decree against widow on bond—*Sale of right, title, and interest of widow in execution of decree—Purchaser of right, title, and interest, rights of.* In 1854 *A R* executed a bond in favour of *K* by way of security for a loan, and, in a suit against *A* (the widow of *A R*), *K* obtained a decree on the bond on the 24th of December 1859, in execution of which a share in a jalkar, which had belonged to *A R*, was put up for sale and purchased by *K*. At the time of sale the property

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sold was in the possession of *A*, on behalf of the two sons of herself and *A R*, who were minors. On the death of the two minor sons, unmarried and without isssue, *A* took possession of the property as their heir. In the decree of the 24th of December 1859 *A* was described as widow of *A R* and mother of the two minor sons. Neither the sale-proclamation nor certificate of sale was produced, but a purwannah from the Munsif to the Nazir was put in evidence, which referred to the sale-proclamation, and in which the parties were described merely as "decree-holder," and "judgment-debtor;" this purwannah also contained a schedule of the property intended to be sold, in which the interest was the "right and possession of the debtor" in the share of the jalkar. In a suit brought by the representatives of *K* to obtain possession of the property purchased by *K* at the sale in execution of his decree:—*Held*, that *K* did not by his purchase acquire the interest of the minor sons in the property sold, and that the plaintiffs were therefore not entitled to succeed. ALUKMONEE DABEE *v.* BANEE MADHAB CHUCKERBUTTY

I. L. R. 4 Calc. 677 : 3 C. L. R. 473

20. ——— Execution of decree against representatives of widow—*Civil Procedure Code, 1877, s. 234.* A Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the costs was taken out, the decree-holder, sought to take out execution against the next heirs of the late widow's deceased husband. *Held*, that the fact that the widow did not in her suit seek to recover any interest personal to herself, but that she contracted the judgment-debt in the effort to recover a portion of her husband's estate to which in its entirety the next heirs of her late husband had succeeded, was sufficient to make the whole estate liable, and would entitle the decree-holder to satisfy his decree against "the legal representative" of the late widow's husband, under s. 234 of Act X of 1877. *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry, 15 B. L. R. 142*, distinguished. In a decree against a Hindu widow, it should be stated whether the decree is a personal decree, or one against her as representing her deceased husband. RAMKISHORE CHUCKERBUTTY *v.* KALLYKANTO CHUCKERBUTTY

I. L. R. 6 Calc 479 : 8 C. L. R. 1

21. ——— Hindu widow in possession of husband's estate—*Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser.* A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinama, one of the terms of which was that the widow should remain in possession of and enjoy the property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land, being sold in execution was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband. *Held*, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the property. *Jugul Kishore* v. *Jotendro Mohun Tagore, I. L. R. 10 Calc. 985*, distinguished, and the principle in *Baijun Doobey* v. *Brij Bhookun Lall Awusti, I. L. R. 1 Calc. 133 : L. R. 2 I. A. 275*, applied. NARANA MAIYA *v.* VASTEVA KARANTA

I. L. R. 17 Mad. 208

22. ——— Mesne profits payable under a decree against a Hindu widow and other defendants—*Subsequent suit for contribution against the widow by one of the defendants from whom the whole amount of mesne profits had been realized—Sale in execution of decree—Rights of the auction-purchaser.* *M*, widow of *N*, a Hindu, and *K* (brother of *N*) jointly brought a suit against *C*, her sons and others, for recovery of possession of certain property which had devolved upon *N* and *K* by inheritance, obtained a decree, and were put into possession. *G*, one of the sons of *C*, subsequently brought a suit against *M* and the legal representatives of *K*, then deceased, and also against *J* (to whom *K* had sold a portion of the property after the decree), and obtained a decree with mesne profits for his share of the same property. *G* then sold the decree to *R*, who executed it for mesne profits against *J* alone, and realized the entire decretal amount from him. *J* thereupon brought two suits for contribution against *M* and the legal representatives of *K*, on account of the mesne profits payable by them, according to their respective shares, and obtained decrees. In execution of one of these decrees passed against *M*, he sold the property in suit belonging to the estate of *N*, and purchased a moiety of it himself. In a suit on the death of *M*, by the reversionary heirs of *N* to recover possession of his share of the property, in which his widow *M* had only a life-interest on the allegation that only her life-interest, and not the entire estate, passed:—*Held*, that the suit for contribution brought by *J* was a suit to recover a debt due by the estate. The amount of the debt in the shape of mesne profits had been decreed against *M* and others, as representing the estate of *N* and *K*, and it was not therefore a personal debt of *M*. That being so, the purchaser at the auction-sale took the entire estate and not merely the qualified interest of the widow. *Jugul Kishore* v. *Jotendro Mohun Tagore, I. L. R. 10 Calc. 985*, referred to. BARODA KANTA CHATTAPADHYA *v.* JATINDRA NARAIN ROY . **I. L. R. 22 Calc. 974**

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23. ———— Decree against widow how for binding on minor son—*Parties—Representation—Sale of equity of redemption—Mortgage—Redemption.* A widow does not represent the estate so as to bind the son when the existence of the minor son is, from whatever cause, altogether ignored, and there is nothing on the face of the proceedings to show that she is sued as representing the minor son. Accordingly, where the plaintiff, a minor, sought to redeem a certain property from the defendant, who had purchased the equity of redemption at an auction-sale, in execution of a decree obtained against the plaintiff's mother alone as representative of her deceased husband :—*Held*, that the plaintiff was entitled to redeem. The plaintiff having been ignored, the inheritance had not been substantially represented in the suit against his mother alone, and the plaintiff's right to the equity of redemption consequently remained unaffected by the sale to the defendant. AKOBA DADA *v.* SAKHARAM **I. L. R. 9 Bom. 429**

24. ———— Decree against widow as heir of husband—*Effect of, against reversioners—Res judicata—Compromise by widow.* A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R's* brothers, *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiff's rights, and conceded that the family was joint. After *K's* death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, *S*, *M's* son, who had been born after *K's* compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and upon these findings gave him a decree declaring his right to possession on *M's* death. The lower Appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi*, to maintain the suit. Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res judicata* against all who in the order of succession come after her and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bonâ fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be

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regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Anund Kooer* v. *Court of Wards, I. L. R. 6 Calc. 764 ; Nand Kumar* v. *Radha Kauri, I. L. R. 1 All. 282 ;* and *Katama Natchiar's Case, 9 Moo. I. A. 542,* referred to. Also that *M's* withdrawal of her suit was not a bar to the suit of the plaintiff. SANT KUMAR *v.* DEO SARAN **I. L. R. 8 All. 365**

See SACHIT *v.* BUDHUA KUAR **I. L. R. 8 All. 429**

25. ———— Decree against widow—*Liability of reversioners for acts of widow—Costs of suit for possession.* A Hindu, governed by the Bengal school of Hindu law, brought a suit for possession of a certain talukh, but died before decree, leaving him surviving a widow and two daughters. The widow was substituted in the suit instead of her husband, and she obtained a decree for possession. By a summary order made in execution of the decree the widow was put in possession of the talukh as well as of certain lands, which lands were claimed by a person not a party to the suit, as lands not belonging to the talukh. The claimant afterwards brought a suit for these lands against the widow. The widow died during the suit, and was succeeded by her daughters, who also died after a decree for possession of the lands had been obtained by the claimant against them, when their sons were substituted in their stead as defendants. It appeared that the widow, the daughters, and the daughters' sons had all been in possession of the disputed lands as a portion of the family estate. *Held*, that the reversioners, the daughters' sons, were liable as the legal representatives of the daughters, and as such were liable for all costs incurred in the suit brought by the claimant for possession of the disputed lands. CHUNDER COOMER ROY *v.* GONESH CHUNDER DASS **I. L. R. 13 Calc. 283**

26. ———— Sale in execution of mortgage decree against widow—*Principle of ascertaining what was purchased—Absent parties—Pleadings—Nature of suit—Hindu widow, when substantial representative of the inheritance—Equitable mortgage.* In a suit for a declaration of right to a particular property and possession thereof, plaintiffs were the reversioners expectant on the death of the mother and heiress of the last male holder at the time when the defendant purchased the property in execution of a decree, purporting to be a decree on an equitable mortgage, passed in a suit against the mother alone. The mother died subsequently, and the property devolved on the plaintiffs. The question in the suit was whether the sale affected the entire interest or only the limited and qualified interest of the Hindu mother. *Held*, by the Appellate Court (affirming the decision

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of the Court below), that for the purposes of ascertaining what estate was intended to be affected by the decree, the Court might look at the pleadings to ascertain the nature of the suit and what was the relief actually claimed. If there be ambiguity upon the face of the decree as to what was intended to be sold, the absence of the reversioners from the proceedings may constitute a material consideration. *Nanomi Babuasin* v. *Modan Mohun, L. R. 13 I. A. 1,* followed. It must be taken to be established with reasonable certainty that the inheritance may be bound by a decree in a suit to which the reversioners are not parties. In ascertaining what was purchased by the defendant the real question is what was liable to be sold under the decree and what in fact was sold. The belief of the purchaser that he was buying the absolute, and not the limited, interest, would not avail him if all that was put up for sale was the latter interest. *Per* AMEER ALI, *J.*—The words "mother and heiress" in the advertisement and the sale notification are merely descriptive, and indicate that it was only the qualified interest of the mother that was being sold. *Per* JENKINS, *J.* (in the Court below)—It is a rule of general application that the Court will not adjudicate so as to bind absent parties, though the Courts have under certain circumstances permitted the expectant reversioners to be represented by a Hindu widow entitled to immediate and present interest. The principle upon which a widow is regarded as a "substantial representative" of the inheritance is that she, by reason of the common interest, is as much concerned to resist the particular claim as those who are not parties, and that it is but reasonable to suppose that she will fairly and honestly contest the right and uphold and maintain the several interests which are adverse to those of the plaintiff. So where there is a charge created by the ancestor from whom the widow and the reversioners alike derive their title, there is such identity of interest as will justify the widow being treated as the "substantial representative." But where the widow is the person who has created the charge, there is no authority to shew that she sufficiently represents the reversioners. *Nogendra Chunder Ghose* v. *Sreemutty Kamini Dassee, 11 Moo. I. A. 241,* and *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry, 15 B. L. R. 142,* referred to. SRINATH DASS *v.* HARI PADA MITTER
3 C. W. N. 637

27. ———— Decree in compromise made by widow after adoption of son in suit on mortgage executed before adoption. *A*, executrix to the estate of her husband, executed a mortgage bond, partly for money due on bonds executed by her husband in his lifetime, and partly for payment of Government revenue due from the estate. She then adopted a son, *B*, under authority granted by the will of her husband. After the adoption, a suit was brought on the mortgage bond against *A*, and a decree was passed in terms of a compromise for payment by instalments, the mortgaged property remaining hypothecated as before. Default was made in payment of the instalments, and the decree-holder applied for execution of the decree, and *B* was substituted for *A* in the proceedings in execution. An objection was raised that the compromise decree was only a personal decree against *A*, and execution could not proceed against *B*. *Held*, that it was not a mere personal decree against *A*, but was binding on the estate inherited by *B* from his adoptive father. *Ishan Chunder Mitter* v. *Buksh Ali Soudugar, Marsh. 614; General Manager of Raj Durbhunga* v. *Ramput Singh, 14 Moo. I. A. 605: 10 B. L. R. 294; Bissessur Lall Sahoo* v. *Luchmessur Sing, L. R. 6 I. A. 233: 5 C. L. R. 477;* and *Hari Saran Moitra* v. *Bhubaneswari Debi, I. L. R. 16 Calc. 40: L. R. 15 I. A. 195,* referred to. NORENDRA NATH PAHARI *v.* BHUPENDRA NARAIN ROY
I. L. R. 23 Calc. 374.

28. ———— Decree against widow for husband's debt—*Liability of family property—Execution-sale—Minor sons bound though not parties to suit—Suit by sons to redeem mortgage.* One *G* died leaving him surviving a widow and two minor sons. The widow mortgaged some lands and a house to pay off a debt due by her husband. Subsequently a money decree was passed against her for another debt due by her husband, and the greater part of the mortgaged property was sold in execution and the equity of redemption thereof was purchased by the mortgagee (the defendant). The sons were not parties to the suit in execution proceedings. The sons afterwards brought this suit claiming that not having been parties to the suit their interest were not affected by the sale, and praying for redemption. The lower Courts allowed the claim and passed a decree for the plaintiffs. On second appeal:—*Held* (reversing the decree and remanding the case), that the Courts in determining the effect of an execution-sale must look to the substance of the transaction. The question was whether the debt for which the property was sold was a joint family debt, and whether it was the equity of redemption in the entirety of the mortgaged property that was offered for sale, bargained for, and intended to be bought. It was obvious that, if the sons had been parties to the suit in which the decree had been passed, they would have appeared by their mother and guardian, and there was no reason to suppose that anything would have been differently done in the suit if she had been described as their guardian instead of being treated as the representative of the estate. Under these circumstances, the sons were substantially represented in the suit, and the sale and proceedings therein should be treated as valid, unless the sons were able to show either that their father's.

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HINDU LAW—WIDOW—*contd.*

3. DECREES AGAINST WIDOW AS REPRESENTING THE ESTATE, OR PERSONALLY—*contd.*

debt, which was the foundation of the decree, was of such a nature that no liability arising from it could attach to the family property, or, if they failed in that, they might show that the entirety of the family property was, in fact, not sold. DEVJI *v.* SAMBHU . . . **I. L. R. 24 Bom. 135**

29. ——— Purchase at sale in execution of decree of widow's interest—*Private sale by widow—Cause of action to reversioner.* A purchaser at an execution-sale of the widow's life-interest is in no better position than a purchaser of the same interest from the widow herself; although his possession as against the widow is not a wrongful possession, and she would have no cause of action against him for the recovery of the property, the reversionary heir is entitled to recover possession, and the cause of action arises at the death of the widow. MOHIMA CHUNDER ROY CHOWDHURI *v.* GOURI NATH DEY CHOWDHURI **2 C. W. N. 162**

30. ——— *Sale of widow's estate—Right, title or interest of widow, when passes and when complete estate passes, by sale in execution of decree.* The question whether upon an execution sale, the mere right, title or interest of a Hindu widow or the complete title to the estate passes, depends upon the nature of the right, title and interest sold and upon the terms of the decree in execution of which the sale is held. *Held*, upon the evidence, that the mere right, title and interest of the widow passed in the present case. RAM LAL SHOOKOOL *v.* AKHOY CHARAN MITTER (1903) **7 C. W. N. 619**

31. ——— Personal decree by one partner against another for dissolution and for a definite sum of money—*Death of judgment-debtor—Right of decree-holder to execute—Joinder of undivided brother of deceased—Legality—Hindu Law.* Petitioner had obtained a decree against his three partners dissolving the partnership and ordering the first defendant to pay him a definite sum of money. Before the decree was executed first defendant died, and petitioner now sought to execute it, under s. 234 of the Code of Civil Procedure, against the widow and undivided brother of first defendant, who had been joined as defendants as the legal representatives of the deceased. The first defendant had not been sued in a representative capacity as managing member of his family, nor was it shown that the business was a family business. *Held*, that insomuch as the decree was purely *in personam* against the first defendant, and not a decree against any property represented by him, or winding up the affairs of the partnership and providing for payment of its debts and for distributing the surplus according to the shares of the partners, petitioner was not entitled to execute it as against the brother by attaching and bringing

HINDU LAW—WIDOW—*contd.*

3. DECREES AGAINST WIDOW AS REPRESENTING THE ESTATE, OR PERSONALLY—*contd.*

to sale joint family property, which had come to him by survivorship, whether it was ordinary family property or property acquired for the family by the partnership trade. *Held*, further, that execution should proceed only against the widow, who alone was the legal representative of the first defendant, and the brother's name should be removed from the record. Execution should be granted, under s. 234, against the widow, as the legal representative of the deceased first defendant. If the deceased had left any separate property it could be attached, even in the hands of the fifth defendant just as it might be attached, if it were found in the hands of any stranger. VEERAPPA CHETTIAR *v.* RAMASAWAMI AIYAR (1904) **I. L. R. 27 Mad. 106**

32. ——— Reversioner bound by decree obtained against widow without fraud or collusion, though without contest—*Alienation by one of several widows not invalid ipso facto.* A decree on a claim binding on the inheritance though obtained without contest against the widow in possession is binding on the reversionary heir in the absence of fraud or collusion. The widow as representing the estate is not bound to raise any defence when she is satisfied that the debt is really due. An alienation by one of two co-widows is not *ipso facto* invalid with reference to the interest of the other co-widow or of persons interested in the reversion. SUBBAMMAL *v.* AVUDAIYAMMAL (1906) . . . . **I. L. R. 30 Mad. 3**

33. ——— Money advanced on personal security of widow—*Decrees against widow binding only on her widow's estate—Res judicata—Civil Procedure Code (Act XIV of 1882).* Where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property late of the widow's husband in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal necessity. *Dhiraj Singh* v. *Manga Ram, All. Weekly Notes (1897) 67*, followed. *K* and *S* (two brothers) executed a usufructuary mortgage of their respective shares in certain property. The share of *S* was then purchased in execution of a simple money decree by *D*. The share of *K* was after his death brought to sale in execution of a simple money decree against *K's* widow and purchased by *G*. *G*. transferred his rights to *R*, who was *D's* brother. *D* sued for redemption of half the mortgaged property naming as defendants the mortgagee, the heirs of *S* and *R*. Pending this suit *R* died and *D* amended his plaint, claiming redemption of the whole. The heirs of *S* did not defend this suit, which was decided *ex parte* as against them, and the suit was compromised by *D's* widow. The heirs of *S* then claiming as next reversioners to *K* on the death of his widow, brought

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HINDU LAW—WIDOW—*contd.*

3. DECREES AGAINST WIDOW AS REPRESENTING THE ESTATE, OR PERSONALLY—*concld.*

the present suit, seeking to redeem half of the mortgaged property. *Held*, that the suit was not barred by s. 13 of the Code of Civil Procedure, inasmuch as the plaintiffs, though they might have done so, were not bound in the former suit to raise the defence that *D* was not entitled to redeem more than half of the mortgaged property. KALLU *v.* FAIYAZ ALI KHAN (1908) **I. L. R. 30 All. 394**

34. _____ Suit on simple bond executed by widow for legal necessity— *Widow's estate—Sale—Decree, personal—Sale does not affect reversioner.* A Hindu widow was sued on a simple bond executed by her for legal necessity, and property left by her husband was sold in execution of the decree obtained in the suit. *Held*, that the bond did not bind any immoveable property and the interest of the reversioners was not affected by the sale. GIRIBALA DASSI *v.* SRINATH CHANDRA SINGH (1908) **12 C. W. N. 769**

4. DISQUALIFICATIONS.

(*a*) RE-MARRIAGE.

1. _____ Effect of re-marriage—*Act XV of 1856, ss. 2, 3, 5—Inheritance.* A Hindu died leaving a widow and minor son and daughter. The widow re-married after her husband's estate had vested in her son. The son subsequently died, and his step-brother took possession of the property. The widow then brought a suit against the step-brother for possession. *Held*, that the suit was maintainable, and that she could properly succeed as heir to her son, notwithstanding her second marriage. AKORA SUTH *v.* BOREANI **2 B. L. R. A. C. 199 : 11 W. R. 82**

S.C. in Lower Court. OKHOORAH SOOT *v.* BHEDEA BARINEE . . . . . **10 W. R. 34**

2. _____ *Maraver caste—Forfeiture of property of first husband.* The Court, applying the principles of the Hindu law, *held* that a widow of the Maraver caste who has re-married has no claim to the property of her first husband. MURUGAYI *v.* VIRAMAKALI **I. L. R. 1. Mad. 226**

3. _____ *Lingaits—Custom in Wynaad—Widow marriage.* Among the Lingait Goundans in the Wynaad, a widow, who contracts what is known as an odaveli marriage, ceases to inherit her deceased husband's estate. KODUTHI *v.* MADU . **I. L. R. 7 Mad. 321**

4. _____ *Maintenance, power to sell husband's estate for.* Where a Hindu widow is re-married or is living with another man, it does not necessarily follow that she would not be entitled to sell her deceased husband's estate for her maintenance. AMJAD ALI *v.* MONIRAM KALITA **I. L. R. 12 Calc. 52**

HINDU LAW—WIDOW—*contd.*

4. DISQUALIFICATIONS—*contd.*

(*a*) RE-MARRIAGE—*contd.*

5. _____ *Act XV of 1856, s. 2—Suit by reversioner to establish his title to property sold in execution of decree obtained against widow as representing husband's estate.* In a suit brought by the plaintiff as the nearest heir of *O T*, who died intestate in 1873, to set aside a sale of immoveable property belonging to the estate of *O T* which had been sold in execution of a decree obtained by the defendant *J* against *B V*, the widow of *O T*, who had married again and whose husband was the brother of the purchaser at the execution-sale, the Court found on the evidence that the suit against *B V*, was collusive, and that the sale in execution was in fraud of the plaintiff's right. He was therefore entitled to a decree declaring that he was not bound by the sale of the 3rd November 1875, in the suit brought by *J* against *B V* as representative of her deceased husband, *O T*. *Held*, that whether the plaintiff was entitled to immediate possession of the property in the suit depended on the question whether *B V's* life-estate was defeasible on her re-marriage. She belonged to a caste in which re-marriage was permitted. The following issue was accordingly sent to the lower Court for trial: "Whether, by the usage of the country, the rights and interests of *B V* by inheritance in her deceased husband's property, the subject of this suit, ceased and determined on re-marriage in 1876 as if she had then died." PAREKH RANCHOR *v.* BAI VAKHAT **I. L. R. 11 Bom. 119**

6. _____ *Act XV of 1856, s. 2—Re-marriage of widow, who could have re-married before the Act was passed.* Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to re-marry, who could not previously have done so, and s. 2 applies to such persons only. *Held*, therefore, that a widow belonging to the sweeper caste, in which there is not, and in 1856 was not, any obstacle by law or custom against the re-marriage for widows, did not by marrying again forfeit her interest in the property left by her first husband: and that the reversioners could not prevent the sale of such interest in execution of a decree for enforcement of hypothecation. HAR SARAN DAS *v.* NANDI . **I. L. R. 11 All. 330**

7. _____ *Hindu Widows' Re-marriage Act (XV of 1856), ss. 2, 3, and 4—Hindu widow inheriting property from son—Widow's re-marriage—Castes in which re-marriage is allowed—Forfeiture of property inherited from son.* Under s. 2 of the Widow Re-marriage Act (XV of 1856), a Hindu widow belonging to a caste in which re-marriage has been always allowed, who has inherited property from her son, forfeits by re-marriage her interest in such property in favour of the next heir of the son. VITHU *v.* GOVINDA **I. L. R. 22 Bom. 321**

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HINDU LAW—WIDOW—*contd.*

4. DISQUALIFICATIONS—*contd.*

(*a*) RE-MARRIAGE—*concld.*

8. ——— *Rights of widow in deceased husband's property—Widows whose re-marriage is valid independently of Act XV of 1856. Held,* that a Hindu widow belonging to the Kurmi caste, in which the re-marriage of widows was permitted by custom of the caste, independently of Act XV of 1856, was not, by reason of her re-marriage, deprived of her right to remain in possession of her deceased husband's estate during her lifetime, and that a suit brought during her lifetime by the reversioners to the estate of her husband to obtain immediate possession of such estate could not succeed. *Har Saran Das* v. *Nandi, I. L. R. 11 All. 330,* and *Dharam Das* v. *Nand Lal Singh, All. Weekly Notes (1889) 78,* followed. RANJIT *v.* RADHA RANI . . **I. L. R. 20 All. 476**

9. ——— *Inheritance—Succession to a son of first marriage, notwithstanding re-marriage—Hindu Widows' Re-marriage Act (XV of 1856), ss. 2, 5.* The widow of a Hindu married a second time. Subsequently to her re-marriage, her son by her first marriage died childless. *Held,* that she was entitled to succeed to his property, notwithstanding her re-marriage. CHAMAR HARU DALMEL *v.* KASHI (1902) **I. L. R. 26 Bom. 388**

(*b*) UNCHASTITY.

10. ——— **Application of Hindu texts as to females debarred from inheriting—** *Widow—Mother.* The texts which pronounce that Hindu females are debarred from inheriting are confined in their application to the widow as such. KOJIYADU *v.* LAKSHMI . **I. L. R. 5 Mad. 149**

11. ——— **Effect of unchastity—** *Unchastity subsequent to descent of estate—Divesting of property.* It is a general rule of Hindu law that when the descent of an estate has taken place before the cause of exclusion from caste has arisen, the estate is not divested by the owner becoming an outcast. This rule would not apply to a wife who has become unchaste. DEOKEE *v.* SOOKHDEO **2 N. W. 361**

12. ——— **Forfeiture of inheritance—** *Act XXI of 1850. D,* a Pardasi Hindu, residing at Nasik, died leaving two widows, *B* and *P. B,* who was th first wife, though not incontinent, had been turned out of his house by her husband some time after he married *P.* In a suit by *B* to recover a moiety of *D's* estate, *P,* while admitting that she herself had been leading a life of prostitution since *D's* death, resisted a partition of his estate, on the grounds that *B* had, since *D's* death, cohabited with *M,* and subsequently married *R,* both of which allegations *B* denied. *Held,* that though by Hindu law incontinence excluded a widow from succession to her husband's estate, yet if the inheritance were once vested, it was not liable to be divested, unless her subsequent incontinence were accompanied by degradation; but that by Act XXI of 1850 deprivation of caste can no longer be recognized as working a forfeiture of any right or property, or affecting any right of inheritance. PARVATI *v.* BHIKEE **4 Bom. A. C. 25**

HINDU LAW—WIDOW—*contd.*

4. DISQUALIFICATIONS—*contd.*

(*b*) UNCHASTITY—*contd.*

13. ——— *Divesting of property—Forfeiture of inheritance.* Unchastity in a Hindu widow does not divest her of property which has become vested in her after the death of her husband. ABHIRAM DOSS *v.* SREERAM DOSS **3 B. L. R. A. C. 421 : 12 W. R. 338**

14. ——— *Divesting of property—Forfeiture of inheritance—Act XXI of 1850.* A Hindu widow, whom the property of her husband has once vested, does not forfeit by her unchastity her right to such property. *Semble:* Unchastity, followed by degradation or expulsion from caste, would not be sufficient to deprive a widow of an estate which she has taken by inheritance. MATANGINI DEBI *v.* JAYKALI DEBI **5 B. L. R. 466 : 14 W. R. O. C. 23**

15. ——— *Widow's estate, forfeiture of—Unchastity during widowhood—Divesting of property. Held* (KEMP, GLOVER, and MITTER, *JJ.*, dissenting), under the Hindu law as administered in the Bengal school, a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. *Per* KEMP, GLOVER, and MITTER, *JJ., contra.* KERY KOLITANY *v.* MONERAM KOLITA **13 B. L. R. F. B. 1 : 19 W. R. 337**

Held in the same case on appeal to the Privy Council,—It has not been established that the estate of a widow forms an exception to the general rule that the estate of a Hindu once vested by succession or inheritance is not divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritence. The general rule is stated in the Viramitrodaya, Ch. VIII, "On exclusion from inheritance," paras. 3, 4, and 5. This work, like the Mitakshara, may be referred to in Bengal in cases in regard to which the Dayabhaga is silent. A widow, who not having been degraded or deprived of caste, had inherited the estate of her deceased husband, *held* not liable to forfeit that estate by reason of subsequent acts of unchastity. *Quære:* As to the effect of her being degraded or deprived of caste for unchasity. MONIRAM KOLITA *v.* KERI KOLITANI **I. L. R. 5 Calc. 776 : 6 C. L. R. 322 L. R. 7 I. A. 115**

16. ——— *Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit—Caste Disabilities Removal Act (XXI of 1850), s. 1.* The step-son of a deceased Hindu widow sued as her heir for possession of certain property. The defence was that the widow had

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HINDU LAW—WIDOW—*contd.*

4. DISQUALIFICATIONS—*contd.*

(*b*) UNCHASTITY—*contd.*

deserted her husband in his lifetime and lived a life of unchastity, and that the plaintiff's right of inheritance was in consequence destroyed. *Held*, that, assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property in the absence of nearer heirs could not be affected by such degradation. *Held*, also, that, though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced; nor does it contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste; nor does it interfere with the forfeiture of such a right, as, *e.g.*, to participate with other members of a caste in the benefits of a religious institution appropriated to the members of the caste, or to participate jointly with fellow-castemen in the benefit of a caste institution; nor can it apply where the question is not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. *Kery Kolitany* v. *Moneeram Kolita, 13 B. L. R. 1*, referred to. *Held*, further, that, though under the Hindu law a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely the effect of rendering the tie of kindred but dormant; and, *e.g.*, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the Smritis and commentaries a consistent doctrine of "civil death" or "fiction of death." Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Nor does a wife's adultery, unattended by degradation, dissolve the marriage. *Held*, therefore, that the step-son was entitled to inherit the property as sapinda of the widow's late husband in the absence of nearer heirs. SUBBARAYA PILLAI *v.* RAMASAMI PILLAI . . . **I. L. R. 23 Mad. 171**

17. ——— *Widow's estate, forfeiture of—Unchastity during widowhood. Held*, under the Mitakshara law, that a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. The ruling of the majority of the Full Bench of the Calcutta High Court in *Kery Kolitany* v. *Moneeram Kolita, 13 B. L. R. 1*, followed. NEHALO *v.* KISHEN LAL **I. L. R. 2 All. 150**

8. ——— *Widow's estate, forfeiture of—Unchastity during widowhood.* It is sufficient for the protection of a Hindu widow's right to her husband's estate from forfeiture by reason of unchastity that such right has vested in her before her misconduct. It is not necessary for such protection that she should have acquired possession of the estate before her misconduct. BHAWANI *v.* MAHTAB KUAR . **I. L. R. 2 All. 171**

19. ——— *Proof of incontinence—Suspicion.* Infidelity in wife, or incontinence in a widow, in order to constitute a disqualification to inherit, must be positively proved, or at any rate there must be a reasonably well grounded suspicion of it having taken place. But *quære* as to anything less than positive proof being sufficient. RAMIA *v.* BHAGI . . **1 Bom. 66**

S.C. *In the goods of* DADOO MANIA **1 Ind. Jur. O. S. 59**

20. ——— **Adoption, right to make.** A Hindu widow, who has become unchaste, is living in concubinage, and is in a state of pregnancy resulting from such concubinage, is incompetent to receive a son in adoption. SAYAMLALL DUTT *v.* SAUDAMINI DASI . . **5 B. L. R. 362**

21. ——— *Adoption by mother-in-law—Subsequent adoption by daughter-in-law—Unchastity of widow after vesting of estate, effect of, on power of adoption—Suit to set aside adoption.* One *G* died, leaving him surviving his widow *Y* and his undivided son *R*, who subsequently also died, leaving him surviving his widow *P* and a son *V*, who died shortly afterwards. *Y* adopted the plaintiff, and immediately afterwards *P* adopted the defendant. The plaintiff sought to set aside the adoption of the defendant, alleging that it was invalid, inasmuch as to took place subsequently to his own adoption, and because of *P* being an unchaste widow. *Held*, that the adoption of the plaintiff was invalid. After the death of *R*, his estate vested in his widow *P*, the adoptive mother of the defendant. Her existence and the vesting in her of her husband's estate rendered the elder widow *Y* incapable of adopting. The estate, having thus vested in *P*, would not be divested by her subsequent unchastity, and therefore the enquiry into her chastity was irrelevant. KESHAV RAMKRISHNA *v.* GOVIND GANESH . **I. L. R. 9 Bom. 94**

22. ——— **Liability of decree for maintenance to be set aside or suspended.** A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by her husband's relatives either in a suit brought by them expressly for the purpose of setting aside the decree or in answer to the widow's suit to enforce her right. VISHNU SHAMBHOG *v.* MANJAMMA . **I. L. R. 9 Bom. 108**

23. ——— **Maintenance**—*Incontinence—Forfeiture of rights—Starving maintenance.* It is

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HINDU LAW—WIDOW—*concld.*

4. DISQUALIFICATIONS—*concld.*

(*b*) UNCHASTITY—*concld.*

a settled principle of Hindu law that a Hindu widow's right to claim maintenance is forfeited upon her unchastity. This rule is not to be restricted to women espoused, who are not of the rank of patni or wife. Where a widow became unchaste after her husband's death, and was leading an unchaste life at and about the date of suit :— *Held*, that she was not entitled to maintenance of any sort. *Quære :* Whether, if she were to begin to lead a moral life, she would not be entitled to a starving maintenance. *Honamma* v. *Timannabhat, I. L. R. 1 Bom. 559,* and *Valu* v. *Ganga, I. L. R. 7 Bom. 84,* referred to. ROMA NATH *alias* RAMANUND DHUR PODDAR *v.* RAJONIMONI DASI

I. L. R. 17 Calc. 674

See DAULTA KUARI *v.* MEGHU TIWARI

I. L. R. 15 All. 382

(*c*) MISCELLANEOUS.

24. ——— Widow of the disqualified heir—*Disqualified heir—Exclusion from inheritance.* The wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she herself free from any of the defects which exclude a person from inheritance under Hindu law. It is a canon of interpretation in Hindu law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it. *Per Curiam :* According to a well-known rule of interpretation in Hindu law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text. GANGU *v.* CHANDRABHAGABAI (1907)

I. L. R. 32 Bom. 275

HINDU LAW—WIFE.

See HINDU LAW—HUSBAND AND WIFE.

1. ——— *Husband and wife—Hindu law—Restitution of conjugal rights—Husband living with prostitute in his house—Cruelty, legal—Husband and wife.* Where the husband, a Brahmin, having expelled his wife was living in his house with a low caste prostitute, his claim for restitution of conjugal rights was, in the circumstances of the case, disallowed. *Per* HARINGTON, *J.:* A Court is not bound to order a Hindu wife to return to her husband, where there is reasonable ground for apprehending that a return to that husband will imperil her safety. *Per* MOOKERJEE, *J.:* There may be cases in which something short of legal cruelty may bar a suit for restitution of con-

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jugal rights, and the present case was eminently one of that description. *Dular Koer* v. *Dwarka Nath Misser, 9 C. W. N. 510. Semble :* Keeping a concubine in the house by the husband would be a sufficient justificattion for the wife to ask for separate habitation and separate maintenance. DULAR KOER *v.* DWARKA NATH MISSER (1905)

I. L. R. 34 Calc. 971

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See HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION . **5 C. W. N. 300**

See SUCCESSION ACT, S. 96. **I. L. R. 24 Mad. 299**

——— nuncupative will—

See PROBATE—OF WHAT DOCUMENTS GRANTED . **I. L. R. 25 All. 313**

1. POWER OF DISPOSITION.

(*a*) GENERALLY.

1. ——— **Power to make will**—*Origin and extent of power. Per* NORMAN, *J.*—The power of a Hindu to make a will is not of modern introduction, nor is it of local origin. Wills were known to, and in use amongst, Hindus not in the presidency towns only, but from one end of the peninsula to the other. The right to make a will is part of the Hindu law itself. The extent and nature of the disposition which a Hindu testator is capable of making is not a question of public expediency or of custom or usage, but must be regulated by rules to be found in, or directly deduced from, Hindu law. GANENDRA MOHAN TAGORE *v.* UPPENDRA MOHAN TAGORE . . . **4 B. L. R. O. C. 103**

2. ——— *Nature and extent of power.* The testamentary power of disposition by Hindus has been established in Bengal by the decision of Courts of justice. The nature and extent of such power cannot be governed by any analogy to the law of England,—the English system being one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament and adjusted by a long course of judicial determination to the wants of a state of society differing as far as possible from that which prevails among Hindus in India. BHOOBUN MOYEE DEBIA *v.* RAM KISHORE ACHARJEE **3 W. R. P. C. 15 : 10 Moo. I. A. 279**

3. ——— *Power of disposition of Hindus.* By the Hindu law as administered in the North-West Provinces, a Hindu has power to make a testamentary disposition in the nature of a will. A disputed will made by a Hindu, disposing of self-acquired estate among his family established. NANA NARAIN RAO *v.* HUREE PUNTH BHAO . . . . **9 Moo. I. A. 96**

4. ——— *Power over estate during life.* Any Hindu within these Provinces, whether governed by the Bengal mode of succession or otherwise, possesses a power to bequeath an estate by will co-extensive with his power over the estate in his lifetime. PITUM KOONWAR *alias* MUNAR BIBEE *v.* JOY KISHEN DOSS **6 W. R. 101**

5. ——— *Zamorins of Calicut—Power of disposition by a will.* The Zamorin of Calicut, although a member of a Kovilagom, is entitled to dispose of his separate property by a will. SRIDEVI *v.* KRISHNAN **I. L. R. 21 Mad. 105**

HINDU LAW—WILL—*contd.*

1. POWER OF DISPOSITION—*contd.*

(*a*) GENERALLY—*contd.*

6. ——— *Holder of impartible estate.* The holder of an impartible estate may alienate it by will to the same extent that he may alienate it by gift *inter vivos.* COURT OF WARDS *v.* VENKATA SURYA MAHIPATI RAMAKRISHNA RAU **I. L. R. 20 Mad. 167**

7. ——— *Mitakshara law.* Under the Mitakshara law, a father can dispose of his self-acquired property, moveable and immoveable, at his own will, and he can by will make an unequal distribution of the same amongst his heirs. BAWA MISSER *v.* BISHEN PROKASH NARAIN SINGH **10 W. R. 287**

8. ——— **Power to dispose of self-acquired immoveable property after adopting a son.** An adopted son does not stand in a better position, with regard to the self-acquired immoveable property of his adoptive father, than a natural-born son would occupy; and there is nothing in the Hindu law in this presidency to prevent a father from disposing by will of his self-acquired immoveable property, and so defeating the rights by inheritance of his adopted son. PURSHOTAM SHAMA SHENVI *v.* VASUDEV KRISHNA SHENVI . . . . **8 Bom. O. C. 196**

9. ——— **Power of disposition by will over ancestral property in Bombay.** A testator cannot in the town of Bombay dispose of ancestral property, even if it consist of moveables to the prejudice of the rights of an existing grandson. CHATTERBHOOJ MEGHJI *v.* DHARAMSI NARANJI . . . **I. L. R. 9 Bom. 438**

10. ——— **Power to dispose of separate and self-acquired property**—*Nephew's right to object to alienation.* A Hindu without male descendants may dispose by will of his separate and self-acquired property, whether moveable or immoveable, even in those parts of India which are governed by the Mitakshara; and the testamentary power may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos.* ADJOODHIA GIR *v.* KASHEE GIR . **4 N. W. 31**

11. ——— **Bequest to widow with power of alienation over immoveable property.** A testamentary bequest of immoveable property to a Hindu widow with an express power of alienation conferred held to be valid, and to authorize alienation by her. As a husband is not incompetent to give such an interest in property to his wife, it cannot be contended that he is incompetent to bequeath it. JEEWUN PUNDA *v.* SONA **1 N. W. Ed. 1873, 66**

12. ——— **Unequal division of ancestral property**—*Illegality of will. Held,* that a

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HINDU LAW—WILL—*contd.*

1. POWER OF DISPOSITION—*contd.*

(*a*) GENERALLY—*contd.*

will made by a Hindu dividing unequally ancestral property between his sons, and assigning a share to his wife with the power of disposing of it, was illegal under Hindu law. BULDEO SINGH *v.* MAHABEER SINGH . . . . . **1 Agra 155**

13. ———— Disposition of ancestral and self-acquired property—*Validity of will.* A Hindu may make an alienation of his property to take effect after his death. The Hindu law in Madras admits of the testamentary disposition of property, whether ancestral or self-acquired. The testamentary power of a Hindu in Madras is co-extensive with his independent right of alienation *inter vivos.* VALLINAYAGAM PILLAI *v.* PACHCHE **1 Mad. 326**

14. ———— Arbitrary disposition of self-acquired property—*Validity of will.* A will by which a testator gave to his brother four-fifths of his self-acquired property and only one-fifth to his son, *held* not to be invalid as being beyond his power of disposition. NARAYANASVAMI CHETTI *v.* ARUNACHALA CHETTI **1 Mad. 487 note**

15. ———— Power of disposition over ancestral property—*Hindu without male issue.* A will by a Hindu without male issue, kinsman, or co-parcener, which, after providing for the maintenance of his widow, daughters, and female relations devised ancestral as well as other real and personal estate to trustees upon certain charitable trusts, was impeached by reason, first, that the testator had authorized his widow in an event which happened to adopt a son, which act would have rendered him incompetent to exercise a testamentary power; secondly, that at the time of the execution of the will the testator was not of sufficient mental capacity to make a testamentary disposition; and, thirdly, that the testator being a Hindu had no power by law of devising ancestral estate by will. *Held,* on appeal, affirming the decision of the Sudder Court in India, first, that although, in the absence of male issue of the deceased, there was a strong presumption, arising from religious considerations, in favour of a delegation by the deceased to his widow of authority to adopt a son for him, yet that the evidence entirely failed to prove that fact; secondly, that the evidence established his mental capacity at the time of executing the will; and, thirdly, that by the Hindu law prevailing at Madras a Hindu in possession without issue male, kinsman, or co-parcener, had power to make a will disposing of ancestral as well as acquired estate. NAGALUTCHMEE UMMAL *v.* GOPOO NADARAJA CHETTY **6 Moo. I. A. 309**

16. ———— Extent of power of disposition—*Bequest to idol—Right of widow to maintenance.* Although the Courts in India recognize the power of a Hindu to make a will, yet the extent of the power of disposition by a testator is to be regulated by the Hindu law, and cannot interfere with a widow's right to a proper maintenance. A Hindu by will gave all the moveable and immoveable property to his family idol, and, after stating that he had four sons, he directed that his property should never be divided by them, their sons or grandsons, in succession, but that they should enjoy "the surplus proceeds only," and the will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol, and maintain the family, further directed that, whatever might be the surplus after deducting the whole of the expenditure, the same should be added to the corpus; and in the event of a disagreement between the sons and family, the testator, directed that, after the expenses attending the estate, the idol, and the maintenance of the members of the family, whatever net produce and surplus there might be should be divided annually in certain proportions among the members of the family. At the date of the will the members of the family were joint in estate, food, and worship. The accumulations of the income were divided as directed by the will. *Held,* first, that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the testator's four sons, and their offspring in the male line, as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol, and the provisions in the will for maintenance; secondly, that the fact of the division of the income arising out of the testator's estate among the members of the family after the testator's death did not constitute a division of the family. One of the sons of the testator died, leaving three sons, one of whom also died without issue, leaving a widow. *Held,* further, that the direction contained in the will that the property should go in the male line did not exclude the widow of the grandson of the testator, and that the widow was entitled to a third share of a fourth part of the property and accumulations, without prejudice to her right as a Hindu widow, when the property should be divided, SONATUN BYSACK *v.* JUGGUTSOONDREE DOSSEE . . **8 Moo. I. A. 66**

17. ———— Bequest for religious purposes—*Legacy by an undivided father of a Hindu family.* A Hindu made his will, whereby he bequeathed R600 to supply a silver image for a pagoda, and died leaving the defendant, his undivided adopted son, him surviving. He was not shown to have been possessed of any separate property. In a suit by the trustee of the pagoda to recover the above amount:—*Held,* that the legacy was not binding on the defendant. RATHNAM *v.* SIVASUBRAMANIA . **I. L. R. 16 Mad. 353**

18. ———— Power to dispose by will—*Paternal grandmother inheriting property from*

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HINDU LAW—WILL—*contd.*

1. POWER OF DISPOSITION—*contd.*

(*a*) GENERALLY—*contd.*

maiden grand-daughter—Estate taken by grandmother. A paternal grandmother in Gujarat, inheriting moveable and immoveable property from her maiden grand-daughter, takes an absolute interest in such property, and on her death the property goes to her heir and not to the heir of the grand-daughter and the grandmother can dispose of such property by will. GANDHI MAGANLAL MATICHAND *v.* BAI JADAB . . **I. L. R. 24 Bom. 192**

19. ——— Will omitting to provide for widow—*Validity of will. Semble:* The will of a Hindu would not be invalidated merely by its omitting to provide for his widow. VALLINAYAGAM PILLAI *v.* PACHCHE . . . **1 Mad. 326**

20. ——— Omission to provide maintenance for brother's widow—*Validity of will.* A will is not invalidated by the circumstance that another than the devisee is competent to confer a greater amount of spiritual benefit upon the testator, nor on the ground of its making no provision for the maintenance of the widow of the testator's deceased brother. ROOKMONEE DEBIA *v.* KRISHNO CHURN MISSER . **20 W. R. 147**

21. ——— Devise to prejudice of wife—*Zaminder without issue.* By the Hindu law a zamindar having no issue is capable of alienating by deed or will a portion of his estate which in default of lineal male issue and on intestacy would vest in his wife, without her consent. MULRAZ LACHMIA *v.* CHALAKANY VENCATA RAMA JAGANADHA ROW . . **2 Moo. I. A. 54**

22. ——— Right to deprive by will a widow of her share on partition—*Widow's share on partition.* Under the Hindu law in Bengal, a person has the right to dispose of his property by will so as to deprive his widow of her share on partition. *Bhobunmoyee Dabea Chowdhrani* v. *Ramkissore Acharj Chowdhry, S. D. A. Rep. (1860) 485,* followed. DEBENDRA COOMAR ROY CHOWDHRY *v.* BROJENDRO COOMAR ROY CHOWDHRY. PROSUNNOMOYI DASI *v.* BROJENDRO COOMAR ROY CHOWDHRY . . **I. L. R. 17 Calc. 886**

23. ——— Will against interest of widow and reversioner—*Inofficious will.* The will of a childless Hindu giving power to adopt a son, though opposed to the interests of the widow and the next heir in reversion, is not inofficious. SARODA SOONDERY DOSSE *v.* TINCOWRY NUNDY **1 Hyde 223**

24. ——— Effect on will of subsequent adoption—*Validity of will.* Where a separated Hindu made a will and subsequently adopted a son, the boy adopted and his father being aware of the provisions of the will, in which an adequate provisions was made for the adopted son, it was held that the subsequent adoption did not invalidate the will. VINAYAK NARAYAN JOG *v.* GOVINDRAV CHINTAMAN JOG . **6 Bom. A. C. 224**

HINDU LAW—WILL—*contd.*

1. POWER OF DISPOSITION—*contd.*

(*a*) GENERALLY—*contd.*

25. ——— Devise away from remote kinsman—*Separate property.* The title of a remote kinsman, though heir of a Hindu testator, who died without leaving issue, or any near relative surviving him, and with whom that remote kinsman had not been united in food, worship, or estate, cannot prevail against the title of a devisee of that testator, whether such property was by the testator self-acquired or held in severalty, either by virtue of a partition, or of the non-existence, or, if any did ever exist, the extinction of co-parceners. NAROTTAM JAGJIVAN *v.* NARSANDAS HURKISANDAS **3 Bom. A. C. 6**

26. ——— Alienability by co-parcener of his undivided share of ancestral property—*Mitakshara law.* It having been contended that as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Court, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one-third share. *Held,* that, under the Mitakshara law as received in Bombay, the father could not dispose of his one-third share by will. The doctrine of the alienability, by a co-parcener, of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond the decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharer's consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that, although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will were held to be sound and sufficient to support that decision. LAKSHMAN DADA NAIK *v.* RAMCHANDRA DADA NAIK **I. L. R. 5 Bom. 48**
L. R. 7 I. A. 181

Affirming the decision of the High Court in s.c. **I. L. R. 1 Bom. 561**

27. ——— Power of co-parcener to dispose of ancestral property. In a suit by an adopted son to set aside a will made by his father disposing of immoveable ancestral property:—*Held,* that the will was of no effect as a valid devise of property. At the moment of death the right of survivorship was in conflict with the right by devise, and the right by survivorship, being the prior title, took precedence to the exclusion of that by devisee. VITLA BUTTEN *v.* YAMENAMMA **8 Mad. 6**

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HINDU LAW—WILL—*contd.*

1. POWER OF DISPOSITION—*contd.*

(*a*) GENERALLY—*concld.*

See GOOROOVA BUTTEN *v.* NARRAINASAWMY BUTTEN . . . . . **8 Mad. 13 note**

28. ———— Devise against interest of unborn son—*Right of unborn son to ancestral property.* According to the Hindu law which obtains in the Madras Presidency, the right of a son in the womb to ancestral property cannot be defeated by a will or gift. *Quære:* Whether this rule would govern the case of an alienation for value. MINAKSHI *v.* VIRAPPA . . **I. L. R. 8 Mad. 89**

(*b*) DISHERISON.

29. ———— Power to disinherit sons—*Gift absolute to widow—Absence of express declaration of disherison.* A Hindu died leaving a widow, two infant sons and a daughter, and having made a will in English, of which the following is the material portion: "I give, devise, and bequeath unto my wife, *L. D*, and her heirs and assigns for ever, all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will." *Held* (reversing the decision of MACPHERSON, *J.*), that the wife took an absolute estate with full power of alienating the property, and not merely as trustee and manager for the infant sons. It is not necessary that there should be an express declaration of the testator's desire or intention to disinherit his sons if there is an actual gift to some other persons expressed in clear and unequivocal words. PROSUNNO COOMAR GHOSE *v.* TARRUCKNATH SIRCAR . . . . **10 B. L. R. 267**

S.C. TARUCKNATH SIRKAR *v.* PROSUNNO COOMAR GHOSE . . . . . **19 W. R. 48**

But *see* ROOPLAL KHETTRY *v.* MOHIMA CHURN ROY . . . . . **10 B. L. R. 271 note**

30. ———————— *Nuncupative will—Disinherison of an undivided son.* Under Hindu law, a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son. SUBBAYYA *v.* SURAYYA **I. L. R. 10 Mad. 251**

31. ———— Power to disinherit heir—*Reddi caste.* A father-in-law, although of Reddi caste, cannot disinherit his heir in favour of his son-in-law. TAYUMANA REDDI *v.* PERUMAL REDDI **1 Mad. 51**

32. ———————— *Provision for disherison on change of religion.* A will that provides for an heir becoming disinherited on changing his religion does not apply to the case of a Hindu becoming a Vedantist, nor does that form of Hinduism incapacitate him from being a manager. ANUND COOMAR GANGOOLY *v.* RAKHAL CHUNDER ROY . . . . . **8 W. R. 278**

33. ———————— *Intention to disinherit how shown—Exclusion from residuary estate.*

HINDU LAW—WILL—*contd.*

1. POWER OF DISPOSITION—*concld.*

(*b*) DISHERISON—*concld.*

In the exercise of the testamentary powers amongst Hindus, the intention to disinherit must be clear and unambiguous. Mere bequests of special portions of the testator's estate to the heir, without language of disherision, do not exclude him from the undisposed of residue. LALLUBHAI BAPUBHAI *v.* MANKUVARBAI . . **I. L. R. 2 Bom. 388**

34. ———— Power to disinherit one son in favour of another—*Gift or bequest to one son to exclusion of others.* A Hindu governed by the Mitakshara law, who has two sons undivided from him, cannot, whether his act be regarded as a gift or a partition, bequeath the whole, or almost the whole, of the ancestral moveable property to one son to the exclusion of the other. *Ramchandra Dada Naik* v. *Dada Mahadev Naik, 1 Bom. Ap. 76,* distinguished and explained. LAKSHMAN DADA NAIK *v.* RAMCHANDRA DADA NAIK. RAMCHANDRA DADA NAIK *v.* LAKSHMAN DADA NAIK **I. L. R. 1 Bom. 561**

S.C. on appeal to the Privy Council, affirming the decision of the High Court **I. L. R. 5 Bom. 48**

35. ———————— *Law of Western India.* In estates in which the ordinary Hindu law of inheritance administered in Western India applies, it is not competent to a father to dispose of his ancestral property to one son to the prejudice of the others. BHUJANGRAV BIN DAVALATRAV GHORPADE *v.* MALOJIRAV BIN DAVALATRAV GHORPADE . . . . **5 Bom. A. C. 161**

See the case of GANENDRA MOHAN TAGORE *v.* UPENDRA MOHAN TAGORE **4 B. L. R. O. C. 103**

in which it was held that the son cannot be disinherited by words expressing he is not to take any benefit under the will. He would take by right of inheritance whatever is not validly disposed of. The Privy Council, without deciding whether a son could be deprived of maintenance, considered an adequate provision had been made for him. JOTINDRA MOHAN TAGORE *v.* GANENDRA MOHAN TAGORE . **9 B. L. R. 377: 18 W. R. 359. L. R. I. A. Sup. Vol. 47**

Mere bequest of special portions of the testator's estate to the heir without language of disherison does not exclude him from the undisposed-of residue. TOOLSEY DAS LUDHA *v.* PREMJI TRICUMDAS **I. L. R. 13 Bom. 61**

2. NUNCUPATIVE WILLS.

1. ———— Validity of nuncupative will—*Hindu Wills Act (XXI of 1870).* A nuncupative will, or a verbal bequest, of his separate property, made by a separated Hindu, beyond the limits of the ordinary original jurisdiction of the High Court of Bombay, and not relating to any immoveable property to which the Hindu Will

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HINDU LAW—WILL—*contd.*

2. NUNCUPATIVE WILLS—*contd.*

Act (XXI of 1870) applies, is valid. BHAGVAN DALLABH *v.* KALA SHANKAR
I. L. R. 1 Bom. 641

2. ——— **Power to make nuncupative will**—*Moveable and immoveable property.* A Hindu may make a nuncupative will of property whether immoveable or moveable. SRINIVASAMMAL (CRINIVASAMMAL) *v.* VIJAYAMMAL . **2 Mad. 37**

3. ——— **Disherison of son**—*Powers of disposition by nuncupative will—Self-acquired property. Quære:* Whether, under Hindu law, a father has power by a nuncupative will to dispose of self-acquired immoveable property to the complete disinherison of a son. SUBBAYYA *v.* CHELLAMMA
I. L. R. 9 Mad. 477

4. ——— **Disherison of an undivided son.** Under Hindu law, a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son. SUBBAYYA *v.* SURAYYA . . **I. L. R. 10 Mad. 251**

5. ——— **Construction of a varaspatra.** In 1847 *A*, a Hindu widow, executed in favour of *B* a varaspatra (a deed of heirship) in the following terms: "My husband has died. We have no issue, and you are a son of my husband's cousin. Taking this into consideration, my husband expressed his wish, when he was on the point of death, that all the houses and shops situate in Poona, except the house at Benares, should be given to you, and that you should be made owner of all money-dealings connected with Poona. I therefore, in obeying his command, pass this deed of heirship to you, and make you owner of all the property mentioned above like our son. You therefore enjoy the property in your name joyfully." *Held*, that the varaspatra was evidence of a nuncupative will by *A's* husband in favour of *B*. Such a will by a Hindu would be quite effectual, except in cases governed by the Hindu Wills Act (XXI of 1870). HARI CHINTAMAN DIKSHIT *v.* MORO LAKSHMAN . . . . **I. L. R. 11 Bom. 89**

6. ——— **Proof of nuncupative will**—*Finding as to factum of will.* It was observed that a person who rests his title on so uncertain a foundation as the spoken words of a man since deceased is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place. The finding below as to the factum of the will in this case was, however, upheld. BEERPERTAB SAHEE *v.* RAJENDER PERTAB SAHEE . . **9 W. R. P. C. 15**
12 Moo. I. A. 1

7. ——— *Written words assented to, but not signed by, testator.* A testamentary paper drawn up in the lifetime of the testator, when, though very ill, he was in the full possession of his senses, and duly attested by the subscribing witnesses, who depose that it was drawn according to the instructions of the testator, and

HINDU LAW—WILL—*contd.*

2. NUNCUPATIVE WILLS—*concld.*

that he in their presence signified his assent thereto, was held to be sufficient under Hindu law. TARA CHAND BOSE *v.* NOBEEN CHUNDER MITTER
3 W. R. 138

8. ——— **Will, revocation of, by parol**—*Intention to destroy will not carried out.* The will of a Hindu may be revoked by parol, and where definite authority is given by him to destroy his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed. PERTAB NARAIN SINGH *v.* SUBHAO KOOER
I. L. R. 3 Calc. 626 : 1 C. L. R. 113
L. R. 4 I. A. 228.

3. TESTAMENTARY INSTRUMENTS.

1. ——— **Documents amounting to will**—*Validity of will.* *S*, a Hindu, having a wife and one daughter, executed in his last illness a document attested by two witnesses as follows:—"*S*, the proprietor of, etc. Up to this date I have no son of the body. Under these circumstances, the maliks of the whole of my estate, real and personal, are my wife, *B C*, and my daughter, *W C*. Therefore I, considering this for the purpose of registering the names of my wife and daughter in substitution of my own name, appoint *B* as my attorney. It is proper that the aforesaid attorney, after presenting himself before the hazoor, should petition to the above effect asking for a mutation. Whatever is done in the management of the case, I confirm it as my own act. Dated," etc. Three days before the death of *S*, *B*, the person named as mooktear, presented a petition of *S* to the Collector reciting the want of heirs male, and which then continued thus: "Under these circumstances, my wife, *B C*, and my daughter, *W C*, are my heirs. Be that as it may, after my death all my property, paying revenue to Government or rent-free, will devolve upon my aforesaid wife and daughter; consequently, keeping this in view, I file this petition to you, praying that, on striking off my name, the names of *B C*, my wife, and *W C*, my daughter, be substituted for my name as proprietors in regard of the estate, revenue-paying and rent-free, in the books of mutation and the Collectorate papers, and may remain current from this date." *Held*, that these two documents constituted a disposition of his property by *S* by a testamentary instrument, valid according to Hindu law; and that upon the death of *S* his wife and daughter acquired a joint interest in the property. KOOLDEBNARAIN SHAHEE *v.* WOOMA COOMAREE
Marsh. 357 : 2 Hay 370

2. ——— **Deed of permission to adopt**—*Absence of words of devise and intention to dispose of estate.* A registered deed of permission to adopt, which contained no words of devise, was held not to be of a testamentary character, there appearing no intention on the part of the maker that the document should contain any disposition.

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HINDU LAW—WILL—*contd.*

3. TESTAMENTARY INSTRUMENTS—*concld.*

of his estate, except so far as such disposition might result from the adoption of a son under it. BHOOBUN MOYE DEBIA *v.* RAM KISHORE ACHARJEE **3 W. R. P. C. 15 : 10 Moo. I. A. 279**

3. ——— **Will of a Hindu in favour of his wife made on his taking a son in adoption.** A Hindu, on taking a son in adoption executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land :—*Held*, that the instrument was a will. LAKSHMI *v.* SUBRAMANYA **I. L. R. 12 Mad. 490**

4. ATTESTATION AND PROOF OF WILLS.

1. ——— **Unattested will**—*Effect of probate.* Before the Hindu Wills Act, the will of a Hindu in writing signed by him, but not attested by witnesses, admitted to probate, and held to operate to pass not only moveable but also immoveable property. MANCHARJI PESTANJI *v.* NARAYAN LAKSHAMANJI . . . . . **1 Bom 77**

2. ——— *Signature—Rules of documentary evidence.* A will by a Hindu is not invalid because the text of it was not written by the testator himself, and because his signature is not attested. The rules of Hindu law relating to documentary evidence are not to be applied strictly in the case of wills. RADHABAI BIN RAMJI *v.* GANESH TATYA GHOLAP . **I. L. R. 3 Bom. 7**

3. ——— **Signature**—*Formalities of making will.* The will of a Hindu in the mofussil before the Hindu Wills Act need not have been signed by the testator, or made with any particular formality ; all that was requisite was that it be a complete instrument, and express the deliberate intentions of the testator. VINAYAK NARAYAN JOG *v.* GOVINDRAV CHINTAMAN JOG **6 Bom. A. C. 224**

4. ——— **Proof of will**—*Inofficious will.* *A*, a Hidnu, died, leaving two grandsons, *B* and *C*, to whom his estate descended. They were joint in food, worship and estate. The property was wholly situate in Bengal, and the family, who originally came from the Western Provinces, had long been resident there. *C* died leaving his widow *D* and his brother *B* surviving him. *B*, who was manager, died 2½ years after *C*. After *B's* death, *D* brought her suit to establish her right as widow of *C* to a moiety of the family property. The representatives of *B* set up an instrument, which they alleged to be the will of *C* whereby he bequeathed his share to *B*, reserving the maintenance to *D*. The Judge of the Zillah Court of Nuddea held that the alleged will of *C* was genuine, and dismissed *D's* suit. The High Court, on appeal,

HINDU LAW—WILL—*contd.*

4. ATTESTATION AND PROOF OF WILLS—*concld.*

held, (i) that *D* ought, firstly to have shown her title to sue,—*i.e.*, having admitted the family came from Mithila, she ought to have shown that they were no longer governed by the Mitakshara law ; (ii) that for several generations the rule of inheritance had been according to the Dayabhaga ; (iii) that the alleged will was not proved (there was evidence before the Court of the factum of the will adequate to the proof of an ordinary will, but the Court held that this evidence was outweighted by the internal improbabilities) ; (iv) that if the rule of inheritence was not according to the Dayabhaga, the will was inofficious. On appeal to the Privy Council : —*Held*, first, it would be a rash conclusion on the state of the evidence in the case to suppose a preference of the law of Bengal likely to be operative on the mind of the testator ; and therefore there was no foundation for treating the will as inofficious. Second, it was not necessary to decide whether the rule of inheritance was according to the Dayabhaga or the Mitakshara. Third, the evidence was adequate to the proof of an ordinary will, and there was no internal improbability of the will sufficient to discredit it. SURENDRA NATH ROY *v.* HIRAMANI BARMANI **1 B. L. R. P. C. 26 : 10 W. R. 35 12 Moo. I. A. 81**

5. ——— *Proof of execution of will—Handwriting.* By will dated in 1847 a testator directed his property to be held in a particular way, and gave his widow power to adopt. In 1848 she adopted a son under the will, with the knowledge of the members of the family, and the will was for a period of twenty-seven years generally recognized and acted on by the testator's family. The Judicial Committee held (reversing the decree of the High Court), in accordance with the finding of the Principal Sudder Ameen, that the will was proved. Where a will was executed by the testator signing with the Bengali letter "M" and it was argued that the testator being in very weak health, the firm way in which the "M" was written threw discredit upon it, the Judicial Committee preferred the decision of the native Judge on this point to that of the English Judges of the High Court, and expressed doubt as to the value of the style of such writing as evidence in favour of the will being forged. RAJENDRA NATH HALDAR *v.* JAGENDRA NATH HALDAR . . . . **7 B. L. R. 216 15 W. R. P. C. 41 : 14 Moo. I. A. 67**

5. CONSTRUCTION OF WILLS.

(*a*) GENERAL RULES.

1. ——— **Ascertaining meaning of testator in particular phrase.** To ascertain the meaning intended to be applied to a particular phrase, it is necessary, first, to consider the words of the will and next the surrounding circumstances,

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*a*) GENERAL RULES—*contd.*

which may affect the testator's meaning. *Soorjeemoney Dossee* v. *Denobundoo Mullick, 6 Moo. I. A. 526,* referred to. BHUGGOBUTTY PROSONNO SEN *v.* GOOROO PROSONNO SEN
I. L. R. 25 Calc. 112

2. ——— Statute of superstitious uses—*Inapplicability of English law to Indian wills.* The English law as to superstitious uses does not apply in the Courts in India. ADVOCATE-GENERAL *v.* VISHVANATH ATMARAM . **7 Bom. Ap. 9**

JUDAH *v.* JUDAH . . . **5 B. L. R. 433**

3. ——— Necessity of words of inheritance—*Interest in freehold estate.* No words of inheritance are requisite to continue to his heirs a Hindu's interest in a freehold estate. ANUNDMONEY DOSSEE *v.* DOE . **4 W. R. P. C. 51**
8 Moo. I. A. 43

4. ——— Person in existence at death of testator—*Person competent to take under a will.* The doctrine laid down by the Privy Council in the *Tagore Case, 9 B. L. R. 377,* that only a person, either in fact or in contemplation of law, in existence at the death of a testator can take under his will, is a general principle of Hindu law applicable as well to Hindus governed by the law of the Mitakshara as to those governed by the Dayabhaga. MANGALDAS NATHUBHOY *v.* KRISHNABAI
I. L. R. 6 Bom. 38

5. ——— Devise to persons who would be heirs—*Nature of interest taken by them. Quære:* Whether when a Hindu devises to his sons property which, in the absence of such devise, they would take as his heirs, the sons shall be considered to take as devisees or as heirs. VALOO CHETTY *v.* SOORYAH CHETTY
I. L. R. 2 Mad. 252

6. ——— Rule of English law as to undisposed-of residue—*Executor—Disherison.* The rule of English common law, that the undisposed of residue of personal estate vests in the executor beneficially does not apply to the will of a Hindu testator in India. LALLUBHAI BAPUBHAI *v.* MANKUVARBAI . . **I. L. R. 2 Bom. 388**

7. ——— Misdescription of legatee—The holder of an impartible estate may alienate it by will to the same extent that he may alienate it by gift *inter vivos.* A testator made a bequest to "*A B,* my avurasa son," knowing that *A B* was not his avurasa son. *Held,* that the misdescription was immaterial, and that *A B* took the bequest. COURT OF WARDS *v.* VENKATA SURYA MAHIPATI RAMAKRISHNA RAU . . **I. L. R. 20 Mad. 167**

8. ——— Intention of testator—*Mitakshara—Will, construction of—Voidability of restrictions and qualifications imposed—Bequest—Trust—Right of Suit—Limitation—Doubtful right—Compromise.* When from the terms of a will taken as a whole, the intention of the testator, to bequeath an estate of inheritance is manifest, the mere fact of some of the restrictions and qualifications imposed by the will being void does not affect the validity of the estate conveyed by it. *Rai Kishori Dasi* v. *Debendra Nath Sircar, I. L. R. 15 Calc. 409 : L. R. 15 I. A. 37 ; Lalit Mohan Singh Roy* v. *Chukhun Lal Roy, I. L. R. 24 Calc. 834 : L. R. 24 I. A. 76 ;* and *Rai Bishenchand* v. *Asmaida Koer, I. L. R. 6 All. 560 : L. R. 11 I. A. 164,* followed. *Shookmoy Chandra Das* v. *Monohari Dassi, I. L. R. 11 Calc. 684 : L. R. 12 I. A. 103,* distinguished. A Hindu governed by the Mitakshara law is competent to maintain a suit for partition of an ancestral property even when his father and grandfather are both alive, if they allow the property to be wasted and the plaintiff's interest imperilled. *Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148 : L. R. 6 I. A. 88 ; Jogul Kishore* v. *Shib Sahai, I. L. R. 5 All. 430 ;* and *Subba Ayyar* v. *Ganasa Ayyar, I. L. R. 18 Mad. 179,* followed. *Apaji Narhar Kulkarni* v. *Ram Chandra Ravji Kulkarni, I. L. R. 16 Bom. 29,* dissented from. When a deed of relinquishment operating to extinguish the plaintiff's right to a property is not void *ab initio,* if it is not set aside by a suit brought within the period of three years prescribed by law, the plaintiff's right to the property, if any, is barred. *Raghubar Dyal Sahu* v. *Bhikya Lal Misser, I. L. R. 12 Calc. 67,* and *Malkarjun* v. *Narhari, I. L. R. 25 Bom. 337 : L. R. 27 I. A. 216,* followed. *Sham Lal Mitra* v. *Amarendra Nath Bose, I. L. R. 23 Calc. 460,* distinguished. The compromise of a doubtful right is a sufficient foundation for an agreement amongst the members of a family, and shall be binding on them. *Stapilton* v. *Stapilton, 1 Wh. & Tud. 223 (7th edition),* followed. *Gordon* v. *Gordon, 3 Swanst 400,* and *Bibee Solomon* v. *Abdool Azeez, I. L. R. 6 Calc. 687,* distinguished. RAMESHWAR PROSAD SINGH *v.* LACHMI PROSAD SINGH (1904)
I. L. R. 31 Calc. 111

9. ——— *Partition between father and sons—Stipulation that father and junior wife should "hold and enjoy" the father's share—Effect—Construction of gifts to wives under Hindu law.* The general rule of Hindu law with regard to the construction of gifts by Hindus in favour of their wives is that the wife should not be deemed to take an absolute estate ; unless it is clear that this was the intention of the donor. By a deed of partition, entered into between a father and his sons by senior wife, after a recital that the junior wife had no issue up to date, it was declared that the father and his junior wife should hold and enjoy certain of the family properties perpetually from that day forward from generation to generation with powers of alienation by sale, gift, mortgage or otherwise. *Held,* that the parties intended that the junior wife

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*a*) GENERAL RULES—*contd.*

should acquire an estate in the properties. The fact that she may not have been a co-parcener was immaterial. It was competent for the co-parceners, who were entitled to participate in the partition, to agree that the share of one of the co-parceners should be held jointly or in common with a party, who otherwise would not have been entitled to participate in the partition. *Jogeswar Narain Deo* v. *Ram Chundra Dutta, I. L. R. 23 Calc. 670,* followed. *Seshayya* v. *Narasamma, I. L. R. 22 Mad. 337,* distinguished. *Held,* also, that the junior wife took as a tenant in common with her husband, and that after the death of the latter, she was entitled to a moiety of the property. MUTHU MEENAKSHI AMMAL *v.* CHENDRA SEKHARA AYYAR (1904) . . **I. L. R. 27 Mad. 498**

10. ——————————— *Will, construction of—Effect of gift without words of severance to persons forming an undivided Hindu family—Gift 'in equal shares'—Tenant in common—Share of will pass to his representatives—'Grandsons being sons' sons include a grandson by adoption—Analogy between an adopted son and an appointee under a power.* *C* died in 1881 leaving him surviving three sons, *Y* the plaintiff, *M* the first defendant and *P*. *P* died in 1896, leaving a son *B*, who died in the same year. The second defendant was the son of the first defendant *M*, the third defendant was the adopted son of the plaintiff *Y*, and the fourth defendant was the widow of *B*. The second and third defendants and *B* were alive at the time of *C's* death in 1881. The third defendant was adopted by the plaintiff in 1897. *C* by his last will and testament, dated 12th May 1881, disposed of three houses (referred to as Nos. I, II and III). The disposition in regard to No. I was in these terms, " . . . therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same "—subject to a payment of a small rent in respect thereof for charity. As regards Nos. II and III the will provided 'that out of a total income of R560 (being the total amount of the income of rent per month) deducting the aforesaid expenses of R181 the remaining amount whatever it may be shall be divided and paid by my executors to my three sons in equal shares' . . . . 'my executors shall divide and give away these properties to my own grandsons being my sons' son after my sons according to their respective shares. My sons shall have no right whatever to give as gift or to sell these properties.' The plaintiff brought this suit to have the will construed :—*Held, per* SIR ARNOLD WHITE, *C.J.*, that under the will of *C* house No. I vested absolutely in his three sons as members of a joint Hindu family and that the law of inheritance in undivided Hindu families applied. *B* having died without male issue his interest passed by survivorship to *Y* and *M* to

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd*

(*a*) GENERAL RULES—*contd.*

the exclusion of his widow, the fourth defendant. *Held,* further, that the sons took a limited estate as tenants in common in the income of Nos. II and III in the nature of an estate for lives, which subsists till the death of the last survivor, when this limited estate comes to an end and the provision for the division of the corpus will be carried out. On a proper construction of the will such limited estate of each son passed on his death to his representatives and not to the survivors. The interest of *P* went to his son *B* and on *B's* death his widow, the fourth defendant, took a widow's estate in her husband's interest. *Bryan* v. *Twigg, L. R. 3 Eq. 433, Pearce* v. *Edmeades, 51 R. R. 369,* and *M'Dermott* v. *Wallace, 59 R. R. 441,* referred to and distinguished. *Held,* also, that the third defendant, the adopted son of the plaintiff, took an interest under the will as grandson of *C*. *Per* SUBRAHMANIA AYYAR, *J.*—As regards item No. I the words from 'son to grandson' were words of purchase importing a grant of absolute property under the Hindu Law and the sons took an absolute estate. Having regard to the statement in the will that the testator formed an undivided family with his sons, and also to the fact that in disposing of the income and corpus of items Nos. II and III he had used the expressions 'in equal shares' and 'according to their respective shares' to indicate a tenancy in common, the devise of item No. I without such qualifying words was clear evidence of an intention, that the sons should take as a Hindu co-parcenary with rights of survivorship. The fourth defendant therefore could claim no share in item No. I. *Jogeswar Narain Deo* v. *Ram Chund Dutt, L. R. 23 I. A. 37,* referred to and distinguished. *Held,* further, that as regards items Nos. II and III the sons took an interest in the income only as tenants in common. The gift of the income being in equal shares and not limited to each son for his life, the share of each on his death went to his representatives. The fourth defendant therefore took the share of her husband as his heir. The division of the income among those entitled will not cease until the time for the division of the corpus arrives which will not be so long as any of the sons of the testator is alive. *Held,* also, that as regards the corpus of items Nos. II and III the words in the will 'my own grandsons being my sons' sons' include a grandson by adoption and that therefore the third defendant took an equal share with the other two grandsons. The right of the adopted son is analogous to that of an appointee under a power given by the donor, as regards the effectuation of the gift ; and the gift to an appointee will be good, if he be a person in existence at the testator's death. *Bai Motivahoo* v. *Bai Mamoobai, L. R. 24 I. A. 93,* referred to. YETHIRAJULU NAIDU *v.* MUKUNTHU NAIDU (1905)

I. L. R. 28 Mad. 363

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*a*) GENERAL RULES—*contd.*

11. ——— Principles of construction —*Will of a Hindu—Persona designata—Adoption a condition precedent to taking—Wife, bequest to—Hindu law, provisions of, and Hindu notions to be kept in mind—Election—Estoppel as against person in possession. Held,* on the construction of a will, under which a person claimed properties left by the testator as a *persona designata* to whom he alleged they were specifically bequeathed, that he testator assumed as a basis of his deposition that there was to be an adoption of that person as his son, and that that was the essential condition on which the bequest to him was made. The principles of construction deducible from the authorities are : (i) That the decision in each case of this nature must depend on the terms of the testamentary documents, which are in question ; (ii) that the provisions of the Hindu law are to be kept in mind in endeavouring to carry out the intentions of the testator and that it is not safe to apply the English principles against holding conditions to be conditions precedent in such cases ; and (iii) that if on an interpretation of the document it appears that the intention of the testator was that the fulfilment of a certain qualification was a condition precedent to the bequest taking effect, then the legatee cannot take the bequest, unless the condition be fulfilled. But if it appears that it was the intention of the testator that the legatee should take the bequest irrespective of the condition and the bequest was made to the legatee specifically, then the bequest will take effect even though the condition be not fulfilled. The bequest to the testator's wife was held in this case to confer on her a life-interest only. *Mahomed Shamsool* v. *Shewakram, L. R. 2 I. A. 7,* applied. A person, who elected to take a legacy under the will, was estopped from setting up a title contrary to its provisions. But when the party sought to be estopped was in possession the person asserting such estoppel could not succeed without proving his own title. PROBODH LAL KUNDU *v.* HARISH CHANDRA DEY (1905)

9 C. W. N. 309

12. ——— Unregistered memorandum of an oral gift—*Subsequent disposal by will—Presumption of advancement—Indian Trusts Act (II of 1882), s. 82—Transfer of Property Act (IV of 1882), s. 123—Hindu Law.* A Hindu widow brought a suit against the executor of her husband's will for a declaration that she was the sole owner of a house, which was purchased in her name by her husband and which was subsequently otherwise disposed of by her husband in his will. *Held,* that the plaintiff had not established her title to the house and that the disposal by will was valid. BAI MOTIVAHOO *v.* PURSHOTAM DAYAL (1905)

I. L. R. 29 Bom. 306

13. ——— Gift over—Defeasance—*Construction of will—Vesting of corpus in abeyance—Executors and trustees, position of—Adoption—Adoption of sons in succession.* Where under the terms of a will the corpus of the estate was not to vest, until the happening of a certain event, it would in the meantime vest in the heir, and on the death of the heir (intestate) it would devolve on his heir. Executors and trustees of Hindu wills executed before the 1st September 1870 are merely managers and no estate vested in them. *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu, I. L. R. 25 Calc. 103,* followed. A clause of defeasance in order to be operative must contain express words of necessary implication of a gift over to a definite person. The implication of a gift over to a second adopted son, who may never be adopted, cannot prevent the widow of the first adopted son from inheriting the share taken by the latter. Where a Hindu gave authority to his widow to adopt sons to him in succession, her power to adopt a second son would terminate on the first adopted son dying leaving a widow in whom the estate became vested. *Bhoobunmoyee Debia* v. *Ramkishore Acharj Chowdhry, 10 M. I. A. 279 : 3 W. R. (P. C.) ; Padma Kumari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 302 ; Keshav Ram Krishna* v. *Govind Ganesh, I. L. R. 9 Bom. 94 ; Thayammal* v. *Venkatarama, I. L. R. 10 Mad. 205 : L. R. 14 I. A. 67,* and *Tara Churn Chatterji* v. *Suresh Chunder Mukerji, I. L. R. 7 Calc. 122,* followed. AMULYA CHARAN SEN *v.* KALI DAS SEN (1905)

I. L. R. 32 Calc. 861

14. ——— Title acquired under will of deceased wife—*Property devised subject to mortgages—Compromise of claims of reversioners to estate of wife's father—Nature of devisee's title not thereby altered.* One Munni Lal died leaving certain property, of which his widow Jasoda Kunwar took possession. Jasoda Kunwar died leaving the property by her will to her daughter Anpurna, who also died after making a will leaving the property in question to her husband Ram Shankar Lal. Both the wills provided that the devisee was to pay off certain incumbrances existing on the property. After the death of Anpurna the property was claimed by the reversionary heirs to Munni Lal's estate, but this claim was settled by a compromise by which Ram Shankar Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property. *Held,* that the compromise did not convey to Ram Shankar Lal the title of the reversioners ; but that he took under the will of his wife and could not therefore raise any defence to a suit for sale brought by the mortgagees which Jasoda Kunwar or Anpurna could not themselves have raised. *Rani Mew Kunwar* v. *Rani Hulas Kunwar, L. R. 1 I. A. 157 ; Gobinda Krishna Narain* v. *Abdul Qayyum, I. L. R. 25 All. 546,* and *Bache Kunwar* v. *Dharamdas, I. L. R. 28 All. 352,* referred to. RAM SHANKAR LAL *v.* GANESH PRASAD (1907)

I. L. R. 29 All. 451

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*a*) GENERAL RULES—*concld.*

15. ——— Document containing directions, if will—*Construction—Operation after death—Revocability.* A document which contains directions regarding the executant's property after his death which in certain circumstances may be revoked, is a will. Instruments not drawn by professional men should be liberally construed. The document in question in this case would be ineffective as an instrument of transfer of immoveable properties owing to the properties not being specified in it, but would be given effect to if it were a will. *Held*, that the document was a will. RAM MANI DASI *v.* RAM GOPAL SHAHA (1908)
12 C. W. N. 942

16. ——— Widow's right to share on partition—*Direction as to management of property—Gifts—Express gift, or no words of gift—Partition.* An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition. *Debendra Coomar Roy Chowdhry* v. *Brojendro Coomar Roy Chowdhry, I. L. R. 17 Calc. 886*, referred to. Where, however, a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest. *Kishori Mohun Ghose* v. *Moni Mohun Ghose, I. L. R. 12 Calc. 165, Sorolah Dassee* v. *Bhoobun Mohun Neoghy, I. L. R. 15 Calc. 292*, referred to. Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons. *Jugomohan Haldar* v. *Sarodamoyee Dossee, I. L. R. 3 Calc. 149*, referred to. The share, which a widow takes as heiress of her son, is not *stridhan* property. *Jodoonath Dey Sircar* v. *Brojonath Dey Sircar, 12 B. L. R. 385*, referred to. POORENDRA NATH SEN *v.* HEMANGINI DASI (1908)
I. L. R. 36 Calc. 75
12 C. W. N. 1002

(*b*) ESTATES ABSOLUTE OR LIMITED.

17. ——— Direction as to enjoyment between widow and sons. Where a Hindu by his will, after bequeathing a legacy to his widow of R1,000 and appointing her executrix along with other executors, directed that his executors should divide the estate amongst his sons in accordance with the shastras after his youngest son had attained majority :—*Held*, that such direction did not amount to an absolute bequest to his sons so as to exclude the widow from being entitled to a share upon a partition between the sons. KISHORI MOHUN GHOSE *v.* MONI MOHUN GHOSE
I. L. R. 12 Calc. 165

18. ——— Words "share and share alike"—*Life-estate of widow in immoveable property.* *V* and *M*, Hindus residing in Bombay, made a deed of partition in 1823 of the whole of the family property, moveable and immoveable, which had come into their joint enjoyment on the death of their father. *V* died in 1850, having made a will prepared by an English solicitor, in the English language and form, by which, after various bequests to members of the family, he disposed of the residue of his estate, one-third share to his son *V* absolutely ; another third to his son *L* absolutely ; "and the remaining clear third share to my grandsons, *K*, *V*, *G*, and *N*, the sons of my late son *M*, deceased, their and each of their respective heirs, executors, administrators, and assigns, share and share alike." These residuary bequests, it was provided, were not to take effect until after the death of the testator's widow, who was appointed executrix and manager of the whole estate during her life ; but the estate was divided by the award of arbitrators in 1855, after making a provision for the widow, in substantial accordance with the directions of the will. *V* and *L* immediately thereafter took possession of their respective third shares of the moveable and immoveable estate, but the third share allotted to the four sons of *M*, who were all still infants, remained unapportioned until 1856, when, on a suit being filed, the greater part of the moveable property was apportioned. The immoveable property allotted to them remained unapportioned, and was managed, first, by the widow of *M* till her death in 1855 ; then by his eldest son *K*, till his death, without male issue, in 1859 ; then by the next eldest son *V* till his death, without issue, in 1864 ; and afterwards by the elder of the two surviving sons ; and the proceeds were treated throughout as though the property was held in co-parcenary by the four sons as a joint and undivided Hindu family. In a suit brought by *L*, the widow of *K*, against *K's* surviving brothers, and *S*, the widow of his brother *V*, in which *L* claimed to be absolutely entitled as heir of her husband [and also as heir of her daughter, who died after her husband's death, childless and unmarried] to a fourth part of the third share of the estate allotted by the award of 1855 :—*Held* in the lower Court, (i) that the words "share and share alike" occurring in the will of *V*, ought not to be construed as necessarily constituting a tenancy-in-common, with all the incidents attached thereto in English law, but that each of the four sons of *M* took a separate share in the third of the testator's residuary estate ; the share of each son going on his decease to those who would, according to Hindu (and not according to English) law, be his heirs as a separated Hindu ; (ii) that with regard to the immoveable property devised by the will and allotted by the award to the sons of *M*, there never was a union of estate, a co-parcenary, from the commencement ; and consequently there was no re-union in the sense of the Hindu law, not-

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

withstanding joint enjoyment and common residence; but only postponement for a time, and for purposes of convenience, of an apportionment of the estate, which was accordingly (among other things) decreed. LAKSHMIBAI *v.* GANPAT MORABA . . . **4 Bom. O. C. 150**

Held, on appeal, that the language of the testator showed an intention that this grandsons should take the one-third between them in severalty and as members of a divided family, and that the will must be so construed. And the doctrine that ancestral property after partition can be disposed of as self-acquired property was disapproved of as being opposed to the authorities and general spirit of Hindu law. GANPAT MOROBA *v.* LAKSHMIBAI **5 Bom. C. 128**

19. ——— "Maharani Sahiba," meaning of, as applied to wife or wives— *Oude Estate Act (I of 1869), ss. 8, 13, and 22—Unregistered will of talukdar—Decree for maintenance to widow under the will on which her suit was based, though her claim was for a different relief.* A talukhdar who died childless, but leaving two widows, bequeathed, by an unregistered will, to the "Maharani Sahiba" his entire estate, and gave a power to the same to adopt a son to him; also providing maintenance for both his widows after such adoption. *Held*, that to determine whether the will referred, in such bequest and power, only to the elder or to both of the testator's wives, extrinsic evidence of his intention was not admissible; but that the true construction was that which would indicate a reasonable and probable intention consistent with his views, as evidenced by his conduct, and his will generally. *Abbott v. Middleton, 7 H. L. C. 389*, referred to and followed. As his views appeared to favour single heirship, and the whole state of things, as well as the language of the will, pointed to the owner of the estate being one, and the donee of the power to adopt being one:—*Held*, that accordingly the words "Maharani Sahiba" were not here used as a collective term for both widows, but signified only the elder, although, when qualified, as they were in another part of the will, they might include both. *Held*, also, that, as if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior, but subject to be defeated by an adoption by the latter, this was an interest bringing her within the meaning of s. 13, para. I of Act I of 1869; so that maintenance bequeathed to her by the will was payable, notwithstanding its not having been registered (as that section required in other cases) as well out of the talukhdari as out of the non-talukhdari estate of the testator. *Held*, also, that this had been rightly decreed to her as she had sued upon the will, although her direct claim in her plaint was not for this, but to share the estate equally with the senior widow, a claim which was dismissed. INDAR KUNWAR *v.* JAIPAL KUNWAR . . . **I. L. R. 15 Calc. 725 L. R. 15 I. A. 127**

20. ——— Life estate—*Bequests of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.* The will of a Hindu contained the following devise in favour of the testator's grand-daughter *K*, who was unmarried at the date of the testator's death: "When *K* may marry, there is to be given to her out of my immoveable property one house which has been purchased from Shah Virji, Narsi's widow Lilabai. . . . That (house) is to be given to *Choru K* as kanyadan. The rent, which it may yield, *K* may enjoy after (she) my grand-daughter shall have married. And after *K's* decease (the ownership of) the said house shall duly be enjoyed by *K's* children. If by the will of God *K* should die without (leaving) descendants, then my 'Trustees' are duly to take back the said house into their possession." *Held*, that, under the above clause, *K* was entitled only to life-estate in the house. KARSANDAS NATHA *v.* LADKAVAHU **I. L. R. 12 Bom. 185**

21. ——— Absolute estate—*Bequest to sons with gifts over—Succession Act (X of 1865), ss. 82 and 111—Absolute estate given.* This appeal related to three clauses in the will of a Hindu, who bequeathed his property to his two sons, one of whom had a son. The other son was childless, his only issue having died before the will was made. There were gifts over on the death of either son. The Courts below, construing the first of the three clauses, decided that each of the two sons took a life-interest in the property comprised in that clause, as tenants-in-common; and that the ulterior interest, not having been validly disposed of, fell into the residuary estate. On this appeal, with reference to s. 82 of "the Indian Succession Act, 1865," made to apply to wills made by any Hindu in the town of Bombay, by s. 2 of the Hindu Wills Act, 1870, some doubt was expressed by the Judicial Committee whether in the clause it sufficiently appeared that the estates given to the sons were only estates for life. It was, however, in the view taken of the other clause of which the construction was in dispute, unnecessary to determine that point. In the next clause to be construed there were words which had been held by the appellate High Court to give to each of the two sons of the testator only a life-estate in a half share of the residuary estate. Whether those words, which followed a gift to the testator's two sons of the whole residue in equal shares, were so clear that only this restricted interest was intended to be given to them, was considered, in like manner, to be open to doubt in regard to the rule of construc-

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

tion imposed by s. 82. But this was also not required to be determined, as this clause, the 13th in the will, was not applicable under the circumstances. It was now determined that the third and last of the disputed clauses, No. 18 in the will clearly gave the residuary estate to the testator's two sons in equal shares, each an absolute estate, except in the case of the subsequent birth of a son or daughter. The two clauses, 13 and 18, were not, in the Committee's opinion, intended to be read together and reconciled, nor were they mutually explanatory. They were each intended to provide for different circumstances. *Held*, that the two sons of the testator must be declared to have each taken an absolute interest in the half share of the residuary estate. DADMODARDAS TAPIDAS *v.* DAYABHAI TAPIDAS . . **I. L. R. 22 Bom. 833**
2 C. W. N. 417

22. ——————————— *Absolute estate—Estate vested in trustees.* One *D* died leaving two sons, *G* and *V*. His will contained the following clauses; "5. As to the immoveable property which I have, the particulars thereof are as follows: There is on vadi (oart) situated on the Girgaum Back Road. In it there are small and large bungalows, chawls, stables, sepoys' and malis' sheds, making in all thirteen buildings. Thereof one bungalow, bearing No. 23, shall be given to my two sons, *G* and *V*, and to *K*, the widow of my brother *K M*, a denizen of paradise, (*i.e.*) to these three persons, to reside therein, and the remaining bungalows, chawls, stables, and the large bungalow in which I live shall be let for rent. And out of the rent that may be realized therefrom, the expenses of repairs, Government taxes and the servants' wages being paid, the surplus shall be paid to my son *G*. Out of such surplus this my son *G* shall pay the expenses of my house, of the maintenance of the said two sons, and of my said sister-in-law, *i.e.*, all such expenses as I carry on, and also R15 per month for the worship of (the deity) Thakorji of my house. In this manner moneys are to be paid as long as there may be son's heirs in my family. And when there may be no son (*i.e.*) male as heir in my family, the whole property shall be all used on religious and charitable account, as stated in the below-written clause 8. My two sons and my sister-in-law, making three persons, shall reside in the bungalow No. 23. And if one of them, *i.e.*, my two sons, *V*, shall disagree with the others, he shall go out of the said vadi at the Girgaum Back Road and reside elsewhere; and as to his (*V's*) expenses out of the money which my son *G* may receive from the trustees for defraying the household expenses, he (*G*) shall continue to pay at the rate of R30 per one month to *V* for his (*V's*) own expenses during his and his son's lifetime. And if this my son *V* should not act peaceably and harmoniously towards this my son *G* and towards my (said) sister-in-law, then the above-mentioned money shall not be paid to him for expenses." The Court of first instance

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

held that, under the will, *G* was entitled to the property absolutely. *Held*, by the Appeal Court, that the proper construction of the will was that *G* was not entitled to an absolute estate, but was entitled to be paid by the trustees the income for his life, to be assigned by him as mentioned in the will. The circumstance that the estate was vested in trustees and that the income was given as maintenance forbade the estate given to *G* and *V* or either of them being construed as an absolute estate. Moreover, as such an estate would admit females in the course of succession, this construction would not give effect to the intention of the testator, but would be to make a new will for him. VULLUBHDAS DAMODHAR *v.* THUCKER GORDHANDAS DAMODHAR . . **I. L. R. 14 Bom. 360**

23. ——————————— *Principles of construction of operative words in wills—Effect of context upon technical or deadly disposing words used—Gift over—Male line, succession in—Malik—Putra poutra di krame.* Case of the construction of a will and codicil, dated in 1865 and 1868 respectively, in which it was *held*, that one *L* took a life-estate only, and that a gift over on failure of male issue of *L* at any remote time was bad. The word malik is consistent with a life-estate, and may well be applied to a person who owns an estate for life as well as to the absolute owner. Ordinarily, without other expressions indicating in what sense the word is used, it implies absolute ownership. The words *putra poutradi krame* have always been understood as words of general inheritance, and, in the absence of a contrary intention being shown, would convey an absolute estate. But in construing both the word malik and the words *putra poutradi krame* the expressions in the whole will must be taken together without anyone being insisted upon to the exclusion of others. *Held*, in this case, notwithstanding the words *malik* and *putra poutradi krame*, that there being expressions excluding the succession of females and confining the succession to male heirs, and the gift over referring to the failure of male issue at any remote time, and not to the event of *L's* death without leaving male issue, and there being also expressions indicating an intention not to grant an absolute alienable estate, the will should be construed as giving to *L* only a life-estate. CHUKKUN LAL ROY *v.* LOLIT MOHAN ROY . . . **I. L. R. 20 Calc. 906**

In the same case on appeal to the Privy Council it was *held* that there are two cardinal principles in the construction of wills, deeds, and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

technical terms in their proper sense. *Doe d. Gallini* v. *Gallini, 5 B. & Ad. 621*, referred to and followed. In a Hindu will an heritable and alienable estate is to be understood by the use of the words "shall become malik" unless the context indicates a different intention. The words *putra poutradi krame* have acquired a technical force, and are used as meaning an estate of inheritance. That a testator may have imperfectly understood the words which he has used, or the effects of conferring an hereditary estate, would not justify the giving an interpretation to his words other than their legal meaning. A will contained the following in favour of the testator's sister's son, *viz.*, that he "becoming my *sthalabhishikta* (substitute) and becoming malik of all my estate and properties shall . . . enjoy, with son, grandson and so on in succession (*putra poutradi krame*) the proceeds of my estate." Provisions followed for the maintenance of this nephew's widow and of this daughter, should he die; and a gift over that, "in the absence of the said nephew's son, grandson, great-grandson, and so on, then of the sons born of my sisters . . the eldest, with son, grandson and so on in succession, shall" receive the ownership. On a claim by the nearest gotraja-sapindas of the testator against the nephew for the construction of the will:—*Held*, that on the true construction of the entire will, the *primâ facie* legal meaning of the disposing words used was not controlled by the context, so as to establish any contrary meaning by making it clear that the words were not used in their proper sense; that there was no intention expressed to give a succession of life-estates to the nephew and his male issue only—a disposition which would not have accorded with Hindu law; but that an alienable and heritable estate was devised to him. Specified property was given by the will in trust for the income to be expended for religious and charitable purposes, with an express prohibition of alienation of this property. There was also a gift of the testator's estates to Government for charitable purposes in the event of no one entitled to be the testator's sthalabhishikto remaining alive. If expressed as to the heritable estate in which the beneficial interest accompanied the gift, the prohibition of alienation would have been merely void, without any effect upon the disposition of that estate. Made, however, as to property given for religious and charitable purposes, it was valid by Hindu law. No decision as to the effect of the gift over the secular heritable estate was required, inasmuch as the contingency upon which it was limited to go over had not occurred, and might not occur. LALIT MOHUN SINGH ROY *v.* CHUKKUN LAL ROY. BEPIN MOHUN SINGH ROY *v.* CHUKKUN LAL ROY. PRIAMBADA ROY *v.* CHUKKUN LAL ROY

I. L. R. 24 Calc. 834
L. R. 24 I. A. 76
1 C. W. N. 387

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

24. _____ Use of words "putra poutradi krame"—*Condition subsequent.* In a will, the words "*putra poutradi krame*," recognized as apt for conveying an estate of inheritance, do not limit the succession to male descendants and will include female heirs of a female, where by law the estate would descend to such heirs. The will of a Hindu, who died, leaving only a widow, a daughter's daughter, and a brother, directed as follows: "7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof, '*putra poutradi krame*.'" "8. If the death of my wife should take place before my daughter's daughter arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards until she arrives at majority and bears a son." "9. If my daughter's daughter should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of R300 per mensem for her life." "20. If no son or daughter should be born to me, and if my daughter's daughter should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government." The will further directed the use of the money by the Government in that event, for certain charitable purposes. In an administration-suit brought by the Secretary of State in Council against the testator's brother, wife, and grand-daughter, for the carrying out of the trusts of the will:—*Held*, that cl. 7, if it stood alone, would confer an absolute estate on the daughter's daughter on the death of the widow; that the disqualifications in cl. 9 must come into operation, if at all, at or before the death of the widow; and that it was unnecessary to decide whether, if they had been conditions subsequent, they would or would not have been in violation of Hindu law; that cl. 20 was supplementary to cl. 9, and that by it the gift over to the Government was to take effect, if at all, immediately upon the widow's death in the event of the grand-daughter dying before her without having borne a son, or in the event of the grand-daughter being disqualified at the date of such death. One possible event not having been provided for by the will, *viz.*, that of the grand-daughter predeceasing the widow, having borne a son, their Lordships did not decide what would happen on the occurrence of that event. The rights of a son yet unborn would not, in the case supposed, be affected by any judgment in these proceedings. *Lady Langdale* v. *Briggs, 8 De Gex. M. & G. 391*, as explained in the *Tagore Case, 9 B. L. R. 377*, approved. RAMLALL MOOKERJEE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL

I. L. R. 7 Calc. 304: 10 C. L. R. 349
L. R. 8 I. A. 46

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

25. ——— "Malik," meaning of, as applied to female legatees—*Contingent bequest—Gift absolute—Life-estate—Succession Act (X of 1885), ss. 111 and 125—Direction against alienation.* A Hindu survivor of two brothers in a joint family under the Mitakshara law died, leaving a widow and two daughters, a brother's widow, and three daughters of his brother. In his will it was provided (*inter alia*) that his daughters and brothers' daughters "shall be maliks and come in possession in equal shares of all the moveable and immoveable properties." It was also provided that in the event of any of the daughters of the testator or of his brother dying childless, her share "shall devolve in equal shares on the surviving daughters, but such share shall have no connection with her husband's family." The will made a further provision that the daughters "shall not have on any account the right to sell or alienate their shares." *Held*, (i) the expression maliks ordinarily implies an absolute gift, and there is no authority for introducing into the will the idea that a female ought not to obtain anything beyond an estate for her lifetime. (ii) Having regard to s. 111 of the Indian Succession Act (applicable under the Hindu Wills Act, 1870) and the Privy Council case of *Norendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 23 Calc. 563*, the provision of survivorship applied only to the case of a daughter dying during the lifetime of the testator, and did not take effect in the present case, the daughter whose share was in question having died several years after the testator's death. (iii) As to the direction against alienation, s. 125 of the Indian Succession Act provides for a case like this, and the daughters receive their shares as if there was no such direction. (iv) The will was not open to the construction that there was a life-estate only conferred by it on the daughters. LALA RAMJEWAN LAL *v.* DAL KOER

I. L. R. 24 Calc. 406

26. ——— "Malik"—*Power to widow to adopt a son—Absolute estate.* *N* had two wives, one of whom died in his lifetime, leaving a daughter (the plaintiff) and *K*, who survived him, the mother of another daughter (the defendant). *N* died, having, in February 1844, made his will, which contained the following passage: "Whatever I have of moveable and immoveable property, my wife *K* is the malik thereof; she will pay whatever debts there exist and receive whatever dues there are receivable; and I have given commandment (permission) to my wife to adopt a son. When the adopted son attains his age, he will become the malik of the whole of my property and will perform the shrad and tarpan of my father and father's father; and in the event of any good or evil befalling the said adopted son, she will again adopt a son . . . and upon the adopted son attaining his age, he will become 'the malik' of the whole of the property." *K*, who survived the testator, did not adopt, but took possession of the property and remained in possession till she died in 1875; and after her death the testator's children held the properties in equal shares, with the exception of a house, which the defendant had taken sole possession of. The plaintiff brought this suit for partition, and for an account of that part of the property which had been in sole possession of the defendant. The defendant contended that her mother took an absolute estate under the will, and that she as her heir was entitled to the whole estate. *Held*, that the use of the word "malik" as applied to the widow did not necessarily mean that she should take an absolute estate, and that the directions in the will to adopt, and that the adopted son should become malik, rather indicated an intention on the part of the testator that the widow should only take a limited estate, and that the word "malik" as applied to the widow could not therefore be interpreted as giving her a larger interest. PUNCHOOMONY DOSSEE *v.* TROYLUCKO MOHINEY DOSSEE

I. L. R. 10 Calc. 342

27. ——— Disposition to widow as "malikatwa"—*Dayabhaga law.* *K*, a Hindu, died without issue leaving him surviving a widow *B*, having made and published his will wherein he stated, "I appoint my wife *B* to the 'malikatwa' after my demise as exercised by myself in respect of the family dwelling-house . . . . . wearing apparel, utensils, etc., whatever there is in respect of all the property aforesaid." *B* upon the death of *K* took possession of his properties. Upon *B's* death the plaintiffs, who claimed to be *K's* nearest of kin, brought this suit contending that the words of the will only conveyed a life-estate to his widow *B*, and that after her death they were entitled to *K's* properties. The defendant, who claimed to be *B's* nearest of kin, contended that the words of the will gave *B* an absolute estate in *K's* properties, and that he was entitled to the whole estate. *Held*, that the intention of the testator was to give his widow *B* an absolute heritable and alienable estate in his properties. RAJNARAIN BHADOORY *v.* ASHUTOSH CHUCKERBUTTY

I. L. R. 27 Calc. 44

and on appeal (affirming the above decision). RAJNARAIN BHADURI *v.* KATYAYANI DABEE

I. L. R. 27 Calc. 649
4 C. W. N. 337

28. ——— Testamentary bequest contained in wazib-ul-arz—*Devise by a Hindu in favour of a female—Presumption as to intention of testator concerning the estate to be taken by the devisee.* One *M R*, a separated Hindu, died in 1882, leaving him surviving two daughters and a daughter-in-law *S*, the widow of a pre-deceased son. During his lifetime *M R* had caused to be recorded in the wajib-ul-arz of two villages, D and A, owned by him—"*S*, wife of my son *S R*, shall be regarded as

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

owner after my death." In the wajib-ul-arz of a third village the following entry was recorded—"After my death *G*, the adopted son, and *S*, the wife of *S R*, shall have a right to the property." Subsequently to the death of *M R*, the nature of the estate taken by *S* in the villages D and A came before a Court of law, and *S* did not challenge the decree which was then passed declaring her interest to be only a life-estate. *Held*, that, under the above circumstances, and having regard to the sentiments prevalent amongst Hindus on the subject of the devolution of immoveable property upon females, the devise of the villages D and A must be taken to convey an estate for life only and not the absolute ownership in the villages. *Soorjeemoney Dossee* v. *Denobundhoo Mullick, 6 Moo. I. A. 526*, and *Mahomed Shumsool Huda* v. *Shewukram, L. R. 2 I. A. 7 : 14 B. L. R. 226*, referred to. *Hira Bai* v. *Lakshmi Bai, I. L. R. 11 Bom. 573*, and *Koonj Behari Dhur* v. *Prem Chand Dutt, I. L. R. 5 Calc. 684*, considered. MATHURA DAS *v.* BHIKHAN MAL **I. L. R. 19 All. 16**

29. ——— Bequest to widow—"*Take possession of and enjoy as owner*"—*Life-estate—Qualified power of control of Hindu widow.* Where a Hindu by his will directed that after his death his wife was to "take possession of and enjoy my property," and in another passage declared that "just as I am the owner so she is to be the owner," but there were no words of inheritance used, nor did he directly give his wife any power of disposition over the property. *Held*, that she took only a life-interest in the property. The Courts have always leaned against such a construction of the will of a Hindu testator as would give to the widow unqualified control over his property. HARILAL PRANLAL *v.* BAI REWA . **I. L. R. 21 Bom. 376**

30. ——— Devise to widow—*Widow's estate—Stridhan.* One *D*, a separated sonless Hindu, made a will in favour of his wife, of which the material clause was as follows :—"After my death the said Musammat . . . is to be the person in possession and ownership in place of me, the executant, of all the bequeathed property aforesaid by right of this will." *D* died, leaving a widow and a daughter who was married to one *J*. The widow obtained possession of the property comprised in the will on the death of *D*. The daughter died in the lifetime of the widow, who thereupon made a will leaving the property which had come to her from *D* to *J*. On the death of the widow certain persons alleging themselves to be the nearest reversioners to *D* claimed the property. *Held*, that on the wording of the will and having regard to the surrounding circumstances of the case, the testator having no near male heirs, and the plaintiffs, if reversioners at all, being remote reversioners, the intention of the testator *D* was to leave the property in question to his widow as her stridhan, to descend to her heirs. *Koonjbehari Dhur* v. *Prem-chand Dutt, I. L. R. 5 Calc. 684*, dissented from. *Mahomed Shumsool Huda* v. *Shewukram, L. R. 2 I. A. 7 : 14 B. L. R. 226*, and *Hira Bai* v. *Lakshmi Bai, I. L. R. 11 Bom. 573*, distinguished. JANKI *v.* BHAIRON . . **I. L. R. 19 All. 133**

31. ——— Disposition in favour of a widow and an adopted son—*Nature and extent of widow's interest thereunder.* By his will a Hindu testator, after providing for various bequests, dealt with the residue of his estate as follows : "My daughter-in-law and grand-daughters shall receive half of my whole estate, and my wife and my adopted son shall receive the other half." On the question as to what was the nature and extent of the interest to which the testator's widow was entitled thereunder :—*Held*, that, having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, the intention of the testator was not that his wife should take an absolute estate. The supposition is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. Though it was competent for the testator to provide for his wife in such a way that she should have absolute control over the property given her, that is not the provision which the Hindu law makes for a widow. The language of the will was not inconsistent with an intention on the part of the testator that the son, with his adoptive mother, should take a moiety with the incidents attaching to property held by an undivided family. Upon the true construction of the will, therefore, the widow was not intended to take any other estate than she would have taken if there had been an intestacy. SESHAYYA *v.* NARASAMMA **I. L. R. 22 Mad. 357**

32. ——— Bequest to widows—*Devise of immoveable property—Life-interest—Succession Act (X of 1865), s. 82—Hindu Wills Act (XXI of 1870), s. 3—Gift over.* A Hindu testator gave a twelve-anna share of his property to his two wives by cl. 2 of his will, which was as follows : "My first and second wives shall together be entitled to twelve annas of all the properties left by me, and *D* and *R*, sons of my father's sister's son, *R N C*, deceased, who have been living in commensality from the time of my predecessor, shall be entitled to a four-anna share in equal shares, according to the following rules." Cl. 4 was as follows : "If there should be any dispute or disagreement between my two wives, or if there being any disagreement between either or both of them and the executors abovenamed, she or they live in my family dwelling-house, or according to the rules of Hindu religion in some holy place, maintaining a good character, then each of them shall receive a monthly allowance of R10 for maintenance, but if otherwise, she shall be entirely deprived of her right." Cl. 9

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HINDU LAW—WILL—*contd.*

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(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

provided that no person of the family of the fathers of his two wives should be able to exercise any control over the money and property left by the testator. Cl. 5 provided for the education of the testator's sister's son. The gift over was to the effect that anyone acting contrary to the terms of the will should be deprived of his interest which should, in due course, devolve on the other heirs. It was found on the evidence that forfeiture under cl. 4 of the will had been incurred by the defendant *B*, the younger widow of the testator, by reason of her having broken the condition relating to residence. *Held*, that s. 82 of the Indian Succession Act (X of 1865), which enacts that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him," applied to the case. *Held*, also, that the will gave only a restricted interest to the widows, and that cl. 2 of the will should be construed as giving to the widows as joint tenants a life-interest in a twelve-anna share of the estate with the right of survivorship. The clause in the will as to residence was valid and binding. *Held*, further, that the plaintiff, the son of testator's sister, who was in existence at the date of the testator's death, and who was the next reversionary heir after his widows, was entitled to take under the gift over, and not the heirs to the stridhan of *P*, the elder widow of the testator. BHOBA TARINI DEBYA *v.* PEARY LALL SANYAL

I. L. R. 24 Calc. 646
1 C. W. N. 578

33. ———— Bequest to daughters— *Life-estate.* A Hindu testator died leaving three daughters. By his will he gave certain property in equal shares to his younger daughters and their descendants and disposed of the rest for the benefit of his elder daughter *S* and her son *R* as follows: "All the remaining rent should be collected by *S* and her son *R*; they shall, when necessary, let the land to other tenants and have it cultivated, and *R* shall pay the assessment and, subject to the directions of his mother, shall enjoy the land and shall not in any way alienate the property." *R* predeceased *S*. *Held*, that the testator's daughter took a life-estate with remainder to her son, and that on her death the property passed to the heirs of the son. SIVA RAU *v.* VITLA BHATTA

I. L. R. 21 Mad. 425

34. ———————— *Gift to daughter —Absolute estate—Daughters' estate.* A Hindu by will bequeathed to his daughters his separate property to be enjoyed by them "as they pleased." *Held*, that the daughters took an absolute estate. KAMARAZU *v.* VENKATARATNAM

I. L. R. 20 Mad. 293

35. ———— Bequest to daughters— *Absolute gift on condition—Meaning of the words "have issue."* The testator, after providing that his two daughters should after their marriage remain in his family, taking the income of his property without dividing it, and that, if they should disagree, the income only should be shared between them, added the following: "If both the said daughters shall have issue, they shall divide the said properties equally. Those who have no issue shall, as aforesaid, enjoy the income for their lives, and those who have issue shall enjoy the whole property." *Held*, to be the applicable principle, that where the language of a will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest a departure from it. Accordingly, the true construction was that the birth of issue was the event on which the absolute gift of a half share to either daughter was to take effect; and that there was no reason for construing the words "have issue" to mean "leave issue." Therefore, under the will, one of the daughters, whose only issue died before her, took a heritable share, and that share did not go over on her death to her surviving sister who had children. GURUSAMI PILLAI *v.* SIVAKAMI AMMAL

I. L. R. 18 Mad. 347
L. R. 22 I. A. 119

36. ———— Gift to sons— *Life-estate—Gift of residue—Meaning of words "have issue sons."* A Hindu died leaving a widow (*N*) and two sons (Damodar and Dayabhai), and a grandson *K*, the son of Dayabhai. Damodar had had two sons born to him in the testator's lifetime, but both had died in infancy and before the date of the will. This fact was not known at the hearing of the suit or of the appeal to any of the counsel appearing in the case, and was only disclosed after the first judgment of the Appeal Court had been delivered. By his will, dated 1885, the testator disposed of certain dwelling-houses which belonged to him and of the residue of his estate as follows: "8. I have given the houses to my wife *N* for her to enjoy the income thereof . . . In the event of the decease of my wife, *N*, my sons, Damodar and Dayabhai, may take in equal shares, half and half, the income that may be received, and may enjoy and may expend and may make donations for religious and charitable purposes, and the heirs also of both these my sons may always take the income from time to time and may divide and take the income. To the same no one has any claim or title." "13. Afterwards giving to all what is written in this will, all the residue of the estate (iskamat), the whole of it should be divided and taken in equal shares by my sons, Damodardas and Dayabhai . . . . And on the death of the two sons (kaza razae), he who may have issue sons, that issue is in every way the heir of his father's property, and if in the lifetime of the two above-mentioned sons one should not have issue sons, then, on his death, if my other

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

son should be alive, he should get all the estate, cash and whatever else there may be, in that no son can raise a dispute . . . . As to the rest, whichever son of mine may survive (hayatimo hoe) should get all that is given by me, and should there be no survivorship of that child, and should he have a son or sons, then he (or they) should get all, according to what is written above ; in that no one can raise an objection." *Held* (confirming CANDY, *J.*), that under cl. 8 Damodar and Dayabhai took only a life-interest in the house as tenants-in-common, and that the ulterior interest therein, not being validly disposed of, fell into the residue. *Held*, also, (varying the decree of CANDY, *J.*), that Damodar and Dayabhai each took a life-estate in a moiety of the residuary estate, and that, if Damodar died without leaving a son, his moiety would devolve upon Dayabhai, or, if he were dead, upon his son *K* (if then living), and if Dayabhai would die without leaving a son, his moiety would devolve upon Damodar if then living. DAMODARDAS TAPIDAS *v.* DAYABHAI TAPIDAS . . **I. L. R. 21 Bom. 1**

37. ——— Beneficial interest in surplus—*Prohibition of alienation.* A Hindu lady left by will to her sons lands belonging to her to support the daily worship of an idol, and defray the expenses of certain other religious ceremonies, with a provision that, in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to support of the family. *Held*, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable, and could not be presumed to be valueless. *Held*, also, that directions given by the testatrix in her will to the effect that her heirs should have no power of gift or sale over the property bequeathed, and that it should not be attached or sold on account of their debts, being inconsistent with the interest actually given, were wholly beyond her power, and must be rejected as having no operation. ASHUTOSH DUTT *v.* DOORGA CHURN CHATTERJEE
I. L. R. 5 Calc. 438 : 5 C. L. R. 296
L. R. 6 I. A. 182

38. ——— Direction in will operating as gift—*Power to adopt conferred on testator's widow determined on estate vesting in his son's widow—Gift of beneficial interest.* The following points were ruled in construing the will of a Hindu testator : (*a*) a direction to make over the estate to the son when he came of age is equivalent to a gift to him to take effect at that time ; (*b*) a provision to meet the contingency "if my son dies," in order to be consistent with an absolute gift on his attaining majority, must mean if my son dies during minority ; (*c*) dakildar, though ordinarily meaning "occupant," must be construed in reference to the context and held to mean possessor or manager, though without beneficial interest. *Held*, that the testator's widow took no power to adopt under the will in the event which happened, *viz.*, of his estate having vested in his son and afterwards in the son's widow. *Thayammal* v. *Venkatarama Aiyan, L. R. 14 I. A. 67 : I. L. R. 10 Mad. 305*, followed. TARACHURN CHATTERJEE *v.* SURESH CHUNDER MOOKERJI
I. L. R. 17 Calc. 122
L. R. 16 I. A. 166

39. ——— Executor and residuary legatee, powers of, to alienate when there is restriction against alienation in will. *D*, residuary legatee under a will, which provided that he should not be competent to alienate the properties he took under it, having obtained an order for grant of probate in his favour, sold certain properties covered by the will to *J*. In execution of a decree passed against *D* in his personal capacity, the properties were attached, and *J* preferred a claim on the ground of his purchase. The claim was allowed and the properties were released from attachment. In a suit brought by the decree-holder for a declaration that the properties were liable to be sold in execution of his decree : *Held*, that the position of *D* under the will being not merely that of an executor, but that of a residuary legatee as well, and the restrictions imposed upon *D* by the will invalid under the ruling in *Ashutosh Dutt* v. *Doorga Churn Chatterjee, I. L. R. 5 Calc. 438 : L. R. 6 I. A. 182, D* had power to made the alienation in favour of *J*. JAGOBANDHU DEY PODDAR *v.* DWARIKA NATH ADDYA . **I. L. R. 23 Calc. 446**

40. ——— Devise of lands to brother to be enjoyed jointly with the testator's widow—*Power of alienation during widow's lifetime.* A testator by his will directed that his lands should be enjoyed by his brother from generation to generation and for ever, with power to alienate the same by sale, gift or otherwise, but that he should enjoy them jointly with the testator's wife. Upon its being contended that the provision in favour of the wife merely conferred upon her, or recognized, a right to maintenance and that the power of the brother to alienate was as extensive during the life of the widow as after her death :—*Held*, that on the true construction of the will the testator did not intend the brother to have any power of alienation during the widow's lifetime. PERIYA AYAL *v.* NARAYANA PADAYACHI . **I. L. R. 23 Mad. 256**

41. ——— Bequest to "daughters and their respective sons"—*Construction—Restriction of descent to male issues—Absolute or life-estate—Woman's estate—Survivorship between daughters—Spiritual benefit—Remainder over to sons—Gift over—Succession Act (X of 1865), s. 111—Construction of will—Bequest to daughter—Absolute estate.* Where in a will a legacy was given in the

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

following words :—" On my death, my daughter, Surjamoni, who has got sons, and who is a resident of . . . shall possess as owner and possessor of all the rights of gift, sale, etc., in respect of all my property, moveable and immoveable, and on the death of my aforesaid daughter, the sons born of her womb will equally own all my property." *Held*, upon a construction of the will, that it was the intention of the testator to give to Surjamoni an absolute estate. GOVINDA CHANDRA GUPTA *v.* BENODE CHUNDER DUTT (1908) . **12 C. W. N. 44**

42. ——— Bequest to widow "on account of maintenance"—*Gift to widow of immoveable property—Widow's power of alienation.* A Hindu testator, leaving a grandson by adoption him surviving, besides certain moveable property, bequeathed to his wife *T* a house "on account of her maintenance." *Held*, confirming the decision of the Court below, that though it was competent to testator by apt language to clothe his widow with a power of alienation, yet in the absence of such words, regard being had to the surrounding circumstances and to the ideas which Hindus have regarding the interest ordinarily enjoyed by women in immoveable property, it must be presumed that testator only meant to bequeath a life-interest. *Held*, also, that the heir-at-law was not liable to make good moneys expended on the premises by one holding under the widow with knowledge of the contents of the will. NUNNU MEAH *v.* KRISHNASAMI **I. L. R. 14 Mad. 274**

43. ——— Direction as to management of endowment by testator's daughter and her husband and their male children successively—*Estate created by such direction.* A Hindu testator, after by his will creating an endowment for "religious worship in a *pagoda*," directed that the *sebaitship* should be held by his wife, and after his death by his son, and after his death "by my daughter and her husband Nundo Doolal Bose and their male children successively." *Held*, affirming the decision of the High Court, that the word "successively" controlled the whole gift to the daughter, her husband, and the male children ; and that the intention of the testator was to give life estates in the *sebaitship* to the sons of his daughter in succession. On the death of the last surviving son of his daughter the succession of *sebaits* failed, and the *sebaitship* reverted to the heirs of the testator. GOPAL CHUNDER BOSE *v.* KARTICK CHUNDER DEY (1902) . **I. L. R. 29 Calc. 716**

44. ——— Bequest of estate of inheritance—*Mitakshara School—Order of Succession not recognized by Hindu law—Agreement, if valid, when both parties under a mistake—Limitation.* A will or deed of settlement, executed with the express object of "perpetuating the right in his family" in certain self-acquired properties of a Hindu testator, assigned some of those properties

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

for the maintenance of his younger son, and declared that the rest of his property should be inalienably attached to his *guddi reasut*, the testator being the first incumbent of the *guddi* to be succeeded by his eldest son, and, after the death of the eldest son, by the eldest son of the said eldest son, and so on by order of lineal primogeniture. It further provided that the *guddinashin* for the time being should be the sole manager and administrator of the said estate, and the junior members of the family were to be maintained by him out of the said estate. *Held*, that the eldest son holding the said estate was not a mere trustee for his family ; and that the document conveyed an estate of inheritance to the testator's eldest son, in spite of the clauses relating to the perpetuation and inalienability of the said estate. *Shookmoy* v. *Monohurri*, *L. R. 12 I. A. 103*, where there were directions for accumulation and for no disposal of the property, distinguished. *Held*, further, that an *ekrarnama* executed subsequently by the testator's younger son in favour of the eldest son, relinquishing all his claims to the estate attached to the said *guddi*, was not void by reason of the ignorance of the parties as to the effect of certain inoperative clauses of the will regarding perpetuity and inalienability. The property was the self-acquired property of their father, in which they had no interest at their birth ; and the executant was relinquishing his rights, if any, in the estate. *Sri Raja Lakshmi* v. *Sri Rajah Suraj*, *L. R. 24 I. A. 118* ; and *Cooper* v. *Phibbs*, *L. R. 2 H. L. 149 at p. 170*, distinguished. *Held*, also, that the *ekrarnama*, being a valid instrument, was binding on a grandson of the executant who was born after its execution, and that no relief could be obtained by him in a suit brought by him to establish his right to a share in the estate without setting aside the *ekrarnama*, and the period of limitation for such a suit was 3 years. *Raghubar Doyal* v. *Bhikya Lal*, *I. L. R. 12 Calc. 69* ; and *Malkarjun Narahari*, *L. R. 27 I. A. 215*, referred to. RAMESHWAR PROSAD SINGH *v.* LACHMI PROSAD SINGH (1903) **7 C. W. N. 688**

45. ——— Words conferring absolute estate by subsequent terms held to confer only life estate—*Will, construction of—Self-acquired properties, power of acquirer over—Devise, effect of, when devisees not in existence at testator's death.* Properties acquired by a Hindu, who had inherited no ancestral property, out of income derived by him in Government service are his self-acquisition and he has complete power of disposition over them by will or otherwise to the prejudice of his male issue. Where some terms of a will apparently give an absolute interest, but subsequent provisions show that only a life interest was intended to be given, effect will be given to the intention of the testator by cutting down the effect of the former

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*contd.*

words and construing them as conferring a life estate only. When in making a provision for his sons, the testator uses words which, if strictly construed, would give them only a right to be maintained out of the income of certain moveable and immoveable properties, but subsequent portions of the will referred to them as "donees" and directed such properties to be handed to them on coming of age: —*Held*, that the sons were given a life interest in such properties. Where a testator after giving a life interest in certain properties to his sons devised the residue "in favour of the male issue of the sons, such issue failing, in favour of female issue and that again failing, in favour of the grand-daughters by his daughter" and where at the testator's death, there were no grand-children by his sons, but one of his daughters had two daughters alive:—*Held*, that the sons did not take the residue as on an intestacy, but that it was taken by the two daughters of the daughter, who were then alive. SOMASUNDARA MUDALIAR *v.* GANGA BISSEN SONI (1905) . . . **I. L. R. 28 Mad. 386**

46. _____ **Absolute estate**—*Will—Devise—Nature of estate devised—No presumption that it is of limited extent only.* Where a Hindu gave by will all his property, moveable and immoveable, to his mother with a direction to her to feed and clothe his widow so long as she should remain under her control: *Held*, that such a gift did not confer a less estate on the mother than would have been conferred had she been a male, *i.e.*, an absolute estate, and that a bequest by the donee herself by will of all the properties so bequeathed was a good and valid bequest. In Hindu law there is no presumption that a gift to a mother as such confers a limited estate only. Such a presumption exists only in the case of a gift or devise of immoveable property to the wife. *Mahomed Shamsul Huda* v. *Shewukram, L. R. 2 I. A. 7*, and *Annaji Duttatraya* v. *Chandrabi, I. L. R. 17 Bom. 503*, distinguished and explained; *Mussammut Kollany Koer* v. *Luchmee Persad, 24 W. R. 395*, and *Bhobo Tarini Debya* v. *Peary Lall Sanyal, I. L. R. 24 Calc. 646*, followed. ATUL KRISHNA SIRCAR *v.* SANYASI CHURN SIRCAR AND ANOTHER (1905)

I. L. R. 32 Calc. 1051
s.c. 9 C. W. N. 784

47. _____ *Mitakshara—Will, construction of—Property devised to wife as "malik"—Estate taken by widow.* Where a Hindu governed by the Mitakshara law devised immoveable property to his wife stating that she would be the "malik" of the property after his death: *Held*, that the word "malik" imported an absolute proprietary interest, and that, in the absence of any indication of a contrary intention on the part of the testator, the widow took an absolute, and not merely a life estate in the property so devised. *Surajmani* v. *Rabi Nath, I. L. R. 25 All. 351*, dissented from. *Jamna Das* v. *Ramautar Pande, I. L. R. 27 All. 364*, distinguished. *Lala Ramjewan Lal* v. *Dal Koer, I. L. R. 24 Calc. 406, Lalit Mohan Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 834*, and *Raj Narain Bhadury* v. *Asutosh Chuckerbutty, I. L. R. 27 Calc. 44* and *649*, followed. PADAM LAL *v.* TEK SINGH (1906)

I. L. R. 29 All. 217

48. _____ **Bequest to daughters "and their respective sons"**—*Construction of will—Whether absolute estate or estate for life—Principles of construction of Hindu wills—Hindu Wills Act (Act XXI of 1870)—Succession Act (Act X of 1865), ss. 82, 111.* The will of a Hindu directed his executors in case of failure of his sons, natural or adopted, and after the death of his wife "to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike." The testator left no sons and of two sons adopted by his widow after his death, the former died and the adoption of the latter was held by the Privy Council to be illegal. In a suit brought after the death of the widow by one of the two daughters: of the testator for construction of the will and a declaration of the rights of the parties, to which suit the other daughter and her sons and the adopted son of the plaintiff were made defendants: *Held* (reversing the decisions of the Courts in India), that according to the true construction of the will the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and that in the events that have happened the daughters were entitled to the testator's estate in equal shares for life with benefit of survivorship between themselves. The language of the will clearly showed that the testator's intention was to exclude his daughters' daughters from the succession, to which they would have been entitled under ordinary Hindu law, had their mother's estate been an absolute one. The principles as to construing the will of a Hindu laid down in *Mahomed Shumsool Hooda* v. *Shewukram, L. R. 2 I. A. 7, 14 : 14 B. L. R. 226, 232, 233*, followed. RADHA PRASAD MULLICK *v.* RANEE MANI DASSEE (1908)

I. L. R. 35 Calc. 896
s.c. L. R. 35 I. A. 118

49. _____ **Gift of immoveable property to a Hindu widow**—*Malik—Absolute state.* When the question was whether a Hindu

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*b*) ESTATES ABSOLUTE OR LIMITED—*concld.*

widow acquired a right to alienate the property (immoveable) in suit under a deed of gift or testamentary disposition of her late husband, wherein the word used was *malik wa khud ikhtiyar*, their Lordships held that in order to cut down the full proprietary rights that the word *malik* imports, something must be found in the context to qualify it and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word *malik*. The donee in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy, L. R. 24 I. A. 76, s.c. I. L. R. 24 Calc. 834*, was a man, but the principles of interpretation laid down in that case were of general application. *Kollany Kooer* v. *Luchmee Pershad, 24 W. R. 395*, referred to. SURAJMANI *v.* RABI NATH OJHA (1907) . . **12 C. W. N. 231**

50. ———————— *Construction—Bequest to widow—Power of appointment—Bequest for life, with power of alienation—Gift over.* A will addressed by the testator to his wife, was to this effect: "You are my legally married wife and entitled to the property to be left by me. Should I on a sudden die . . . you shall under this will become possessor of my properties, etc., and perform my *sradh* at a suitable cost; and for the benefit of my soul you shall purchase a house. . . and establish a *Mahadev* in it and perform its *sheva* and services, etc., and you shall fix a suitable allowance as *pronami* for my spiritual guide. You will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties. My daughter, Sreemutty Hara Kumari, shall become entitled to and possessor of whatever properties will remain after your death and she shall enjoy the same, keeping up and maintaining the aforesaid *shebas*, etc. . . The said daughter shall have the same rights in the aforesaid properties as you have, and he, to whom my said daughter may willingly give away those properties, shall possess the same and enjoy them keeping up and maintaining the *sheba*, etc." *Held*, that giving effect to all the words of the will, the widow took an estate for life with a power of alienation, and to the extent to which such power was not exercised, the daughter similarly took the property. HARA KUMARI DASI *v.* MOHIM CHANDRA SARKAR (1908) **12 C. W. N. 412**

(*c*) ADOPTION.

51. ———— **Adoption directed by will—** *Bequest of property by will to the boy named for adoption by testator—Conditional gift on adoption—Conditions proposed by natural father before consenting to give his son in adoption.* *G T*, a Hindu of the Bhatia caste, died on the 6th September 1867, having by his will, dated the same day, directed that, in case no son was born to him, his widow *S* (the plaintiff) should adopt the son of his nephew, who was to be

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*c*) ADOPTION—*contd.*

"made his adopted son." The following was the material part of the will: "15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife *S*, then I direct and order and appoint as follows: There is my nephew *D*. He has now one son to whom he has not as yet given a name. My wife *S* is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly, I give (him) as an inheritance all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own name as (if he were) the son of my loins, and (he) is to pay as much respect to my wife *S* as (if she were) his own mother; and agreeably to her directions he is to act righteously. And my wife is to have this lad married as (though he were her) own son, and upon his marriage, R20,000 are to be expended out of my property. And during the lifetime of my wife should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of *D* as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him in all respects agreeably to what is written above, and he is to obey my wife *S*. If by the will of Providence it should so happen that there may be no other son of *D*, then I appoint my nephew *D* as the heir of my property. And to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner." In 1870 this suit was filed by the plaintiffs (the widow and executrix of testator) for the purpose of having the will construed. The plaintiff complained, *inter alia*, that the defendant *D* had refused to give his infant son in adoption to the plaintiff, and had named him *S D* and had no other son. In his written statement filed in 1871 the defendant *D* denied that he had refused to give his said son in adoption. In a subsequent written statement filed on the 4th March 1872 he informed the Court that a second son (*N*) had since been born to him and he submitted to the Court what were the rights and interest of such sons under the will. A decree was made in the suit in March 1872. In January 1878, the plaintiff presented a petition to the Court, stating that *S D*, having been born on the 29th April 1867, was of the age of ten years and nine months; that, according to the custom of the testator's caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.*, in April 1878; that she was ready and willing to adopt him and had offered to do so, but that his father (the first defendant) had refused to give him in adoption. She prayed, *inter alia*, that it might be declared that in the event of the first defendant failing to give the said *S D* in adoption, the first defendant and his two sons took no benefit under the said will. The first defendant filed a counter petition in which he stated that he was

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HINDU LAW—WILL—*contd.*

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(c) ADOPTION—*contd.*

always willing to give his son *S D* to be adopted by the plaintiff on certain conditions, but that she had refused to consent to them, or to anything which would in the least interfere with her authority as a mother over the boy when adopted. He stated that the plaintiff was an adherent of a sect which held certain pernicious and immoral doctrines to which he was much opposed and which had been abhorred by the testator; and that unless certain conditions, which he suggested, were imposed upon the plaintiff, the moral character of his son, if adopted, would be in danger of fatal injury. *Held*, that the infant sons of the first defendant took nothing under the will unless adopted. *Held*, also, that the plaintiff was under no obligation to take the infant *S D* in adoption on the conditions proposed by the first defendant, his natural father. SHAMAVAHOO *v.* DWARKADAS VASANJI . **I. L. R. 12 Bom. 202**

52. ——— Adoption directed to be made not by testator's widow, but by the widow of his deceased son—*Adoption of testator's nephew directed by will—Bequest of property to such nephew—Persona designata.* *A*, a Hindu testator, by his will, dated the day before his death, declared that it was his wish to adopt his nephew *K* as his son, but that, if he should be unable to do so in his lifetime, his daughter-in-law, *L* (the widow of a deceased son *H*), was "to take the said *K* in adoption." His will then continued: "His adoption ceremony is to be performed. My property, which may remain as a residue after all the things mentioned in my will have been done, I give to this lad as his inheritance, and I appoint him as my heir." A subsequent clause of the will directed as follows:—"In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith, after the said *K* shall have been adopted, should he die without (leaving) any descendants, then *Choru L* is duly to adopt, out of my father *J A's* descendants, any lad who may be found fit. And if the said *L* should not be living at that time, then (any) lad (begotten) of the loins of my father, *J A*, who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property as mentioned above is duly to be given in inheritance. And his adoption ceremony is to be performed. And the outlays on the occasion of his marriage also are duly to be made as written above." *Held*, that the direction by the testator to his daughter-in-law to adopt a son was a direction to her to adopt a son to herself and her deceased husband and not to adopt a son to the testator; the former being the only adoption which she was by Hindu law competent to perform. *Held*, also, that, unless *K* was adopted as directed by the will, he was not entitled to the testator's property. His adoption was a condition precedent to his inheritance. KARSANDAS NATHA *v.* LADKAVAHU **I. L. R. 12 Bom. 185**

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(c) ADOPTION—*contd.*

Held, on appeal, that adoption was a condition precedent, and that the boy not having been adopted could not take under the will. *Bireswar Mukerji* v. *Ardha Chunder Roy, L. R. 18 I. A. 101 : I. L. R. 19 Calc. 452*, distinguished. *Shamavahoo* v. *Dwarkadas Vasanji, I. L. R. 12 Bom. 202*, followed. KARAMSI MADHOWJI *v.* KARSANDAS NATHA **I. L. R. 20 Bom. 718**

On appeal to the Privy Council:—*Held*, affirming the decree of the High Court, that the adoption was a condition precedent, and that the boy, not having been adopted, could not take under the will. KARAMSI MADHOWJI *v.* KARSANDAS NATHA **I. L. R. 23 Bom. 271**

53. ——— Gift to person as an "adopted son," though not actually so—*Gift, whether conditional—Persona designata.* Where a testator recited in his will that he had been keeping a minor as his adopted son, and thereby gave properties to him absolutely, describing him as adopted son:—*Held*, that by the true construction of the will the gift was not conditional upon adoption having been effected. SUBBARAYER *v.* SUBBAMMAL . . **I. L. R. 27 I. A. 162. 4 C. W. N. 805**

54. ——— Omission or refusal to adopt—*Widow with authority to adopt.* A Hindu will contained the following clause: "I give out of my two-anna share of the whole of my personal estates R7,000 to my mother (one of the defendants), and R5,000 to my wife (the plaintiff). Besides the two-anna share of the wealth in ready money and landed property which remains, you my brother will keep under your own charge; you are at present malik of the whole of the property; as master and manager of the entire property, you will perform all acts, you will cause one of your sons to be received in adoption." The brother died leaving a will, by which he committed to his wife and mother the charge of his own property and that of his brother, and also the duty of giving his son in adoption to his brother. The defendants,—*viz.*, his wife and mother,—proved the will and took possession of the property. The plaintiff omitted to adopt. Her husband died in 1851, and the suit was brought in 1867. *Held*, that the plaintiff, notwithstanding her omission to adopt, succeeded to her husband's estate for a Hindu widow's interest therein. *Held* by PEACOCK, *C.J.*, and MARKBY, *J.*, that the estate descended to the widow plaintiff, subject to the two legacies; and that she did not forfeit it even if she refused to adopt. PRASANNAMAYI DASI *v.* KADAMBINI DASI **3 B. L. R. O. C. 85**

55. ——— Double adoption—*Gift to sons by implication as devisees—Intention—Persona designata.* *N C G*, a Hindu, died without issue, leaving a widow (the plaintiff). He left a will by which he gave a conditional power of adoption in

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(c) ADOPTION—*contd.*

the following words : " My wife is supposed to be pregnant with child ; if her conception be true, and she be delivered of a male child, then there shall be no necessity for the adoption of children as mentioned below, but if a daughter be born, she will in that case adopt the twain mentioned below, and whatever property there shall exist consisting of moveables and immoveables, etc., my executors shall divide into three equal shares, and give the same to the daughter and adopted sons on their attaining the age of majority and if a son be born and happen to die before attaining majority, in that case she shall adopt the sons of my sisters mentioned below, and for that purpose I give her, that is to say my wife, permission that she, that is my said wife, shall, in conformity with our shastras, adopt the illustrious *S*, the third son of *R G*, and *O C*, the youngest son of *S G*, an inhabitant of Autpore—that is to say, the two sons of my two uterine sisters, in doing which there shall be no deviation. Should my wife not adopt the children after my decease, then the executors named hereinafter shall, according to this will and in pursuance of the permission given by me, cause the said two children to be received in adoption. If any of the said adopted sons depart this life before attaining the age of majority, then one of the uterine brothers of the deceased adopted son shall be received in adoption according to law in the room of deceased adopted son," etc. The plaintiff did not give birth to either son or daughter, nor did she adopt either of the persons indicated by the will. *S* died in 1865, and *O C* was living at the date of the suit and was of age. *Held*, that, whether the two persons indicated could or could not be legally adopted as pointed out by the will according to Hindu law, there was a gift to them as devisees by implication. DOSS MONEY DOSSEE *v.* PROSONOMOYE DOSSEE

2 Ind. Jur. N. S. 18

56. ——— Gift—Condition precedent—*Persona designata.* Assuming that the testator, in using the words, " According to our shastras, the said two adopted sons will perform our obsequies, and shall become successors of our ancestral and self-acquired property " intended to make a substantive gift to named individuals :—*Held*, that the gift is inoperative if the individuals do not fulfil the character of adopted sons. SIDDESSORY DOSSEE *v.* DOORGACHURN SETT

2 Ind. Jur. N. S. 22 : Bourke O. C. 360

57. ——— *Testamentary gift—Intention—Subsequently adopted son—Res judicata—Pending administration suit—Persona designata.* *P*, a Hindu inhabitant of Calcutta of the Sudra caste, having two wives,—*M*, the elder wife, and *N*, the younger,—but no issue by either of them, adopted two sons, the plaintiff and *S*. This double adoption took place on one and the same occasion, but the plaintiff went through the necessary ceremonies in point of time before *S P* gave the plaintiff in adoption to his wife *M*, and *S* to his wife *N*. *P* afterwards died, leaving *M N*, the plaintiff, and *S*, and leaving property and a will in which he said : " Having adopted two sons, I have given my elder son to my elder wife to bring him up, and they both are respectively nurturing the two sons, as sons born of their own womb. For the purpose of protecting and preserving the property after my decease, I appoint my elder uterine brother *A* executor, and my said two wives, *M* and *N*, executrixes. If either of these my two sons depart this life without issue (which God forbid !), I direct either of my wives whose foster son shall have died to take another son in adoption pursuant to this my direction, and having done so, should a similar misfortune happen, she shall have the option of adopting other sons in succession, and that son shall inherit the share of my deceased son. Further, besides one-half share of the moveable and immoveable properties of which I am possessed jointly with my elder uterine brother, whatever, etc., belonging to me in my separate, etc., account, my said executor and executrixes shall become possessed of the whole after my decease, and shall recover my dues and pay the undermentioned legacies, etc., etc. Afterwards, when my adotped sons shall have attained their ages of majority, my executor and executrixes shall account for and give them their shares on their becoming of age. If they continue to be unanimous, well and good ; if not, they may divide and receive their respective shares of the property and live separate as to food, etc., etc." The executor and two executrixes proved the will. Afterwards *S* died an infant and unmarried, and thereupon *N*, his mother in adoption, assuming to act under the will, adopted the defendant, *O* in his place, the other son, the present plaintiff, still living. The plaintiff and *O* afterwards, while still infants, filed a bill by their next friend against *P's* executor and executrixes for the administration of the estate. *N* afterwards died before the present suit which was brought by the plaintiff against *M*, the surviving wife, and *O*, praying that the plaintiff might be declared the only son and heir of *P*, and that an account might be decreed against the defendants. *Held* by the Court below and the Court of appeal, that there was a clear designation of the plaintiff and *S*, and of *O*, the subsequently-adopted son, to enable them to take under the will. *Held*, also, by both Courts, that the administration suit was no bar to the present suit. And held by TREVOR, *J.*, dissenting from the rest of the Court on the appeal, that the instrument executed by *P* was partly a will and partly a permission to adopt ; that as to the first part of the instrument, there was sufficient designation of the persons as held by the rest of the Court ; and as to the second part, that it was a condition precedent to any one taking under that permission that he should be a validly adopted son according to the Hindu law. MOTEMOTHONATH DAY *v.* ONOTHANATH DAY . **2 Ind. Jur. N. S. 24**

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd*

(*c*) ADOPTION—*contd.*

s.c. in Court below . **Bourke O. C. 189**

58. ———— Gift by implication—*Persona designata—Power to adopt.* A Hindu testator died, leaving a widow, and leaving also a will, which contained the following clause :—"My wife is supposed to be pregnant with child ; if a daughter be born, she will in that case adopt the twain mentioned below (the plaintiff and one *S G*) ; and whatever property there shall exist, consisting of moveable and immoveable, my executors shall divide into three equal shares, and give the same to the daughter and adopted sons on their attaining the age of majority." *S G* died ; no child was borne by the widow. The plaintiff, having attained his majority, brought a suit for declaration of his title, alleging that he had been duly adopted under the will ; but that, whether he had been adopted or not, he was entitled under the will to a share in the moveable and immoveable property of the testator. No valid adoption took place. *Held*, that there was no gift by implication to the plaintiff. The testator only intended him and *S G* to take under the will in the event of their being adopted. *Dossmoney Dossee* v. *Prossonomoye Dossee, 2 Ind. Jur. N. S. 18*, followed. ABHAI CHARAN GHOSE *v.* DASMANI DASI . . . . **6 B. L. R. 623**

59. ———— Persona designata—*Bequest to person not holding character supposed by testator.* Plaintiff sued as the widow of an adopted son for the property of the adoptive father, and also on the ground that the adopted son was the devisee of the adoptive father. The Civil Judge decided that the adoption of the plaintiff's husband was invalid according to Hindu law, and that the devise, having been made to the plaintiff's husband as adopted son, was invalid. *Held* (reversing the decision of the Civil Judge), that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, the person so indicated was entitled to take, although the testator conceived him to possess a character which in point of law could not be sustained. JAVANI BHAI *v.* JIVU BHAI **2 Med. 462**

60. ———————— *Son about to be adopted—Adoption.* Where in a will there was a clear indication of the testator's intention before making an adoption to give the greater part of his property to the boy whom he was about to adopt, and the bequest was by name to the latter, who was not selected as being the adopted son, but for reasons which, though likely to lead to the adoption, were independent of it :—*Held*, that the bequest was effectual, notwithstanding that there had been no adoption. BIRESWAR MUKERJI *v.* ARDHA CHANDER ROY. SHIB CHANDER ROY *v.* GOBIND MOHINI **I. L. R. 19 Calc. 452**
L. R. 19 I. A. 101

61. ———————— *False designation of person in bequest—Validity of bequest.* A bequest

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*c*) ADOPTION—*contd.*

was made to a person whom the testator falsely described as his "aurasa," or "naturally-born" son. This false description, not involving any condition that the legatee should be the testator's son did not invalidate the bequest to the designated person. *Fanindra Deb Raikat* v. *Rajeswar Dass, L. R. 12 I. A. 72 : I. L. R. 11 Calc. 463*, distinguished. VENKATA SURYA MAHIPATI RAMA KRISHNA RAO *v.* COURT OF WARDS
I. L. R. 22 Mad. 393
L. R. 26 I. A. 83
3 C. W. N. 415

62. ———— Adopted son where adoption is invalid—*Endowment—Gift to shebaits—Effect of ikrarnama between widows in favour of sons whose adoption was invalid.* A testator bequeathed all his property to a family thakur, and, to secure the debsheba, directed that his two widows should each adopt a son to him, the sons to become shebaits of the property dedicated, of which the widows, during the sons' minority, were to have control. When the two sons should have attained their majority the two widows, were, by the will, to make over to them as shebaits all the property dedicated ; and out of the surplus income, after payment of the expenses of the debsheba the two sons were to receive a fixed allowance, the residue being undisposed of. The widows, having purported to adopt according to the will, then bound themselves by an ikrarnama each to the other, to bring up the sons as their mothers and guardians, and, after payment of the expenses for the debsheba, to divide the surplus income into two equal shares, making accumulations, which should be handed over by each to the son adopted by her on his attaining majority. In a suit by the son purported to have been adopted by the elder widow, who was then dead, against the younger widow, and the son purported to have been adopted by her, in effect for the administration of the testator's estate, with a claim for relief based on acts of the widows, including the ikrarnama executed by them :—*Held, first*, that it being settled law that such an adoption was not valid, the plaintff could take nothing under the will, because there was no gift to him except in the character of shebait, there having been no intention on the part of the testator, who apparently had no doubt as to the legality of his scheme to bring in a stranger as shebait. *Monemothonauth Day v. Onothnauth Day, Bourke 189 : 2 Ind. Jur. N. S. 24*, distinguished. *Secondly*, that by the law of inheritance the widows as heirs took the office of shebait, and became entitled to the beneficial interest in the surplus income for their estates for life, so that each of them could contract to bind her own interest. *Thirdly*, that there was no trust imposed upon the surviving widow independently of the contract which she had made ; but that the ikrarnama, taken as part of the series of acts, gave to the boys, so far as the widows' interests extended, the same benefit

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(c) ADOPTION—*contd.*

that they would have taken had they been heirs; and although they were not, and could not have been at their age, parties to the ikrarnama, yet that they could insist on the performance of the contract, by which each widow bound herself to the other to deal with the estate in their favour. *Fourthly*, that each boy was entitled on attaining majority to half of the surplus income during the life of the surviving widow, and to the accumulations thereon; and accounts were accordingly directed against her. This widow, however, having died pending the appeal, after it had been argued, the testator's heir was added to the record, it resting with the plaintiff to apply to the Court below to add necessary parties SURENDRO KESHUB ROY *v.* DOORGASOONDERY DOSSEE . . . **I. L. R. 19 Calc. 513**
L. R. 19 I. A. 108

63. ——— Restricted power to widow to adopt. A Hindu in 1884 made a will therein described as being executed in favour of the testator's wife in which he said, "you must adopt for me a boy you like from the children that may be born in the families of my brothers" and after making certain provisions as to his property, etc., added "the principal object of this will is that you should adopt for me any suitable boy." After the testator's death, the widow, as in exercise of the power conferred on her by the will purported to adopt a boy who did not come within the description in the first of the above clauses, although one of the testator's brothers offered his own son in adoption. In a suit by the testator's brothers for a declaration that the adoption purported to have been made by the widow was invalid:—*Held*, that, notwithstanding the general terms of the second of the above clauses, the widow's power to adopt was restricted by the first, and the adoption purported to have been made by her was invalid. AMIRTHAYYAN *v.* KATHARAMAYYAN . . . **I. L. R. 14 Mad. 65**

64. ——— Bequest to a boy directed by the testator to be adopted by his widow —*Direction for the boy's maintenance—Rights of the legatee, no adoption having been made.* A Hindu made his will whereby he provided that his property should be enjoyed by his widow, who should maintain certain persons, including the plaintiff, whom she was thereby directed to take in adoption, and added: "My aforesaid wife shall enjoy all my abovementioned properties in every way as long as she may be alive, and after her death the same shall be taken possession of by the aforesaid adopted son. The testator died not having taken the plaintiff in adoption, and his widow did not adopt him. In a suit by the plaintiff for maintenance and for the declaration of his title under the will:—*Held*, that all the provisions of the will relating to the plaintiff were intended by the testator to come into effect only in the event of the adoption being made, and consequently that the plaintiff had no right to the family property or to maintenance in the family. ABBU *v.* KUPPAMMAL . **I. L. R. 16 Mad. 355**

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(c) ADOPTION—*contd.*

65. ——— Power to adopt conferred on testator's widow ended on estate vesting in his son's widow—*Gift of beneficial interest.* On a claim by the children of the testator's daughter, as against his brother's son,—*Held*, that the testator's direction to his executor (who was his elder brother) to make over whatever remained of his estate, after payment of debts, to his, the testator's, son ("when he comes of age") had the effect of, a gift to that son operating at that time; and that the words in the will, "if my minor son dies," meant, in order to be consistent with the above, "dies before attaining full age." On the death of the testator's son after attaining full age and leaving a widow, the testator's widow, although empowered by the will to adopt if the testator's son should die without son or daughter (which he did) could not exercise this power after the estate had, consequently upon the son's death, vested in his widow for her widow's estate. *Thayammal* v. *Venkataramma Aiyan, L. R. 14 I. A. 67 : I. L. R. 10 Mad. 205*, referred to and followed. The testator's son, having succeeded to the estate under the above provisions, himself made his will, whereby he directed that "his cousin brother" (the defendant above-mentioned), on attaining full age, "becoming dakilkar of my share as well as the share of my elder uncle," should maintain his, the testator's mother and widow. *Held*, that this was not an absolute gift of the beneficial interest, and that the claim of the children of the daughter of the parent testator was valid. TARACHURN CHATTERJI *s.* SURESH CHUNDER MUKERJI
I. L. R. 17 Calc. 122
L. R. 16 I. A. 166

66. ——— Right of adopted son to the corpus and surplus income during the lifetime of his adoptive mother—*Direction for accumulations with proper limitation—Power of Hindu testator.* After giving authority for the adoption of a son, a testator by the ninth clause of his will, after directing certain payments to be made out of the income of the estate, proceeded as follows:—"But in no case shall such adopted son have or exercise any control or dominion over my estate and effect until the death of my wife; after which events, I direct my said executors and trustees to make over the whole of my estate and effects, both real and personal, moveable or immoveable whatsoever and wheresoever and of what nature or quality soever, to such adopted son who shall survive my wife, if he shall have attained his age of eighteen years during the lifetime of my wife, or on his so attaining such age after her decease, to whom and his heirs I give, devise, and bequeath the same." *Held*, that the adopted son was not presently entitled to the surplus income or profits of the properties until the death of his adoptive mother, nor to have the corpus (even after provision being made for the payments mentioned in the will) of the estate made over to him. It is not

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*c*) ADOPTION—*contd.*

incompetent for a Hindu testator with proper limitation, to direct an accumulation of the income of property which under his will vests in his executors or trustees. In the absence of special provision, the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator. AMRITO LALL DUTT *v.* SURNAMOYE DASSEE

I. L. R. 24 Calc. 589
1 C. W. N. 345

67. ——— Bequest to testator's adopted son, not conditional on adoption having taken place. A testator stated in his will that he had been keeping a minor as his adopted son, and recited, in a bequest of property to him, "whereas my adopted son is a minor." On this appeal the question was whether the meaning and effect of the will was to entitle the minor to inherit under the bequest, assuming that he had not been validly adopted by the testator. *Held*, that the expression that the testator had been keeping the minor as his adopted son meant keeping him with a view to his adoption, and that the bequest to the minor was not conditional on his having been adopted, but was effectual, whether he had been adopted or not. SUBBARAYAR *v.* SUBBAMMAL (1900)

I. L. R. 24 Mad. 214

68. ——— Absolute bequest to widow—*Hindu widow—Testator—Alienation—Administrators—Title derived from such administrators.* When, by will, an authority to adopt is given to a Hindu widow, it does not necessarily follow that the widow takes only a life-estate in the property left to her under the will, especially when the power of disposition over the property is given to her. The intention of the testator must be gathered from the terms of the will itself. The defendant purchased certain immoveable property from the administrators to the estate of the widow of *R*, who, by his will, left all his moveable and immoveable properties to the widow, authorizing her to take in adoption one or two sons according as she might desire; the will gave her also the power of disposition over the estate. *Held*, that *R* bequeathed his estate in favour of his widow absolutely; and that the title obtained by the defendant through the administrators of the deceased widow could not be impugned. *Punchoo Money Dossee* v. *Troyluckoo Mohiney Dossee, I. L. R. 10 Calc. 342*, discussed and distinguished. TOOLSI DASS KURMOKAR *v.* MADAN GOPAL DEY (1901) . . . **I. L. R. 28 Calc. 499**

69. ——— Construction of document—*Document of a testamentary nature—Declaration made in wajib-ul-arz, by the sole proprietor of a village, as to his wishes respecting the devolution of the property after his death.* The sole proprietor of a certain village caused the following entry to be recorded in the village *wajib-ul-arz*: "I am the only *zamindar* in this village. I am a Marwari Brahmin. Seven years ago I adopted my sister's son, Murli. He is my heir and successor (*malik*). If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son. If more than one son be born to me, the property would be equally divided among them, including the adopted son, as brothers. I have two wives now. They will receive their maintenance from him (Murli)." A son was born to the person making this declaration, but he died before the plaintiff's suit was instituted. As to the adoption of Murli, it was found that, although Murli had been brought up by his alleged adoptive father, and more or less treated by him as his son, it was not satisfactorily proved that there had been any valid adoption, even if such adoption were legally possible. *Held*, that the declaration in the *wajib-ul-arz* above cited amounted to a testamentary declaration of the wishes of the proprietor of the village, and that the person described therein as the adopted son was entitled by virtue of it to half of the village. The description of the devisee as an adopted son was treated as a mere misdescription, which ought not to affect what appeared to be the real intention of the testator. *Fanindra Deb Raikut* v. *Rajeswar Dass, L. R. 12 I. A. 72, 89*, and *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee, L. R. 3 I. A. 253*, referred to. LALI *v.* MURLIDHAR (1901)

I. L. R. 24 All. 195

70. ——— Gift to third person conditional upon not-adoption—*Hindu will—Life estate—Adoption—Vesting.* A testator left a will, dated April 1888, by which he directed that his widow may adopt a son, who would take a life-interest in the estate, until he begot a son, when his interest would become absolute; in the event of his dying without male issue the widow may adopt a second, and in the event of such second son dying without male issue a third son; until adoption the estate was to be held in trust for *N* and *R*. If the widow died without adopting, or if above dispositions of the will were held invalid, then such portions of the estate, as to which there was intestacy, were to go to *N* and *R*. The testator died in 1888. The widow duly adopted a son in 1900. *Held*, that under the will *N* and *R* did not take an absolute interest during the lifetime of the widow and the estate did not vest in them during that period. *Bhoobun Moyee* v. *Ram Kishore, 10 Moo. I. A. 279: s.c. 3 Suth. P. C. 15; Akhoy Chunder* v. *Kalapahar Haji, 12 I. A. 198; Ram Lal Mukherjee* v. *Secretary of State, 8 I. A. 46: s.c. I. L. R. 7 Calc. 304*, referred to. That the adopted son validly got a life-interest in the estate of the deceased. In the eye of the law his capacity for inheriting was the same as if he was born in the testator's lifetime. *Babu Anaji* v. *Ratnoji, I. L. R.*

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HINDU LAW—WILL—*contd.*

3. CONSTRUCTION OF WILLS—*contd.*

(*c*) ADOPTION—*contd.*

21 Bom. 319, followed. SARAT CHANDRA MULLICK *v.* KANAI LALL CHUNDER (1904) **8 C. W. N. 266**

71. ———— Bequest over to widow— *Will—Construction of will—Bequest of absolute interest—Defeasance—Contingent bequest—Hindu Wills Act (XXI of 1870), s. 2—Succession Act (X of 1865), ss. 82, 111—Hindu Law—Adoption—Adoption by widow—Termination of authority to adopt—Vesting of estate in son's widow.* Under s. 82 of the Succession Act, which has been made applicable to Hindus by s. 2 of the Hindu Wills Act, a bequest in the words "My adopted son shall succeed to all the properties which I have" would, in the absence of a conflicting context pass the absolute interest to the adopted son. Where there is a bequest to an adopted son and on his death and until another adoption the estate is bequeathed to the testator's widow, and no time is mentioned in the will for the happening of the death of the adopted son, who survived the period of distribution. *Held*, that, under s. 111 of the Indian Succession Act and s. 2 of the Hindu Wills Act the bequest over to the widow was invalid. *Jotindramohon Tagore* v. *Ganendramohun Tagore, L. R. Sup. I. A. 47, 18 W. R. 359*, and *Narendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 26 Calc. 563 : L. R. 23 I. A. 18*, referred to. A Hindu died leaving an adopted son *A* and a widow *M* with authority to adopt three sons one after the death of another. *A* attained majority and died, leaving a widow on whose death the estate reverted to *M*, who then adopted the second defendant. *Held*, that under the Hindu Law a widow's power of adoption is limited, and that on the death of *A* leaving a widow, in whom the estate vested, the power of adoption vested in *M* came to an end and did not merely remain suspended during the lifetime of *A's* widow and that the adoption of the second defendant was invalid. *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry, 10 Moo. I. A. 279, 3 W. R. P. C. 15, Padma Kumari Debi Chowdhrani* v. *Court of Wards, I. L. R. 8 Calc. 302, L. R. 8 I. A. 229, Thayammal* v. *Vankatarama, I. L. R. 10 Mad. 205 : L. R. 14 I. A. 67, Tara Churn Chatterji* v. *Suresh Chunder Mukerji, I. L. R. 17 Calc. 123 : L. R. 16 I. A. 166, Krishnarav Trimbak Hasabnis* v. *Sankarrav Vinayak Hasabnis, I. L. R. 17 Bom. 164, Venkappa Bapu* v. *Jivaji Krishna, I. L. R. 25 Bom. 306*, and *Ram Krishna* v. *Shamrao, I. L. R. 26 Bom. 526*, followed. *Bykant Monee Roy* v. *Kristo Soondere, 7 W. R. 372*, not followed. *Villakni Venkata Krishna Rao* v. *Venkata Rama Lakshmi, I. L. R. 1 Mad. 174 : L. R. 4 I. A. 1, Kannepalli Suryanarayana* v. *Pucha Venkataramana, 10 C. W. N. 921, 4 C. L. J. 171 : I. L. R. 29 Mad. 382, Ram Soondur Singh* v. *Surbanee Dossee, 22 W. R. 121*, and *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi, I. L. R. 17 Calc. 518*, referred to. MANIKYAMALA BOSE *v.* NANDA KUMAR BOSE (1906) **I. L. R. 33 Calc. 1306**

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*c*) ADOPTION—*contd.*

72. ———— Gift over to testator's daughters—*Will—Construction—Authority to adopt—Bequest to adopted son—Authority to adopt declared invalid—Testacy or intestacy—Nature of interest taken by each daughter—Daughter with natural children and daughter with adopted child—Preferential right to inherit—Meaning of "to whom and whose respective sons I give, devise and bequeath the same"—Limitation, words of—Whether the suit defective for want of a general administrator.* A testator by his will authorised an adoption in a manner which in a suit brought by the adopted son was held to be invalid under Hindu Law. By the same will he further directed "his executors and executrix and trustees to pay out of the income and interest of his estate and effects monthly" certain expenses "and invest the rest and residue . . . in Government securities" . . and he declared that "in no case was such adopted son to have or exercise any control or dominion over his estate and effects until the death of his wife" after which event the executors and trustees were directed "to make over the whole of the estate and effects . . . . to such adopted son . . to whom and his heirs he bequeathed the same." *Held*, that this amounted to a present bequest to the adopted son accompanied by directions to accumulate and restraints on enjoyment and possession both of which would probably be held to be invalid beyond the date of majority of the adopted son. The will further directed that "in case none of such adopted sons surviving his wife or . . . surviving his wife and dying under the age of 18 years without leaving a son or sons, his executors should make over and divide the whole of his estate both real and personal unto and between his daughters in equal shares to whom and their respective sons he bequeathed the same." *Held*, that this was a valid gift over to the testator's daughters; and that the gift to the adopted son having failed the daughters became entitled to the estate absolutely and in equal shares, the words "and their irrespective sons" in the above clause being words of limitation and not of purchase. A preliminary objection, *viz.*, that the suit was defective for want of a party representing the estate of the testator, was overruled as all the parties, who could by any possibility have an interest in the estate, were already before the Court and the plaint asked for administration only in case such relief were deemed necessary and the Court in this case did not deem it to be necessary. RANEEMONEY DASSEE *v.* PREMMONEY DASSEE (1905) **9 C. W. N. 1033**

73. ———— *Will, construction of—Adoption—Authority to adopt declared invalid—Gift over to the daughters—Nature of interest taken by each daughter—Daughter with natural children and daughter with adopted child—Testacy*

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(c) ADOPTION—*contd.*

or intestacy—Meaning of words " to whom and their respective sons I give devise and bequeath the same "—Words of limitation—Succession Act (X of 1865), ss. 82, 111, 116, 117. *A* by his will directed that on his failure to adopt, his widow *B*, executor and trustee, should adopt three sons in succession in the event of any of the adopting sons dying without male issue during the lifetime of his widow, and the son so adopted should inherit his property, but was not to obtain possession until 18 years of age, and until the death of the widow *B*, whichever event should happen last. He also provided in his will that in case of such adopted son surviving the widow and dying under 18 years of age without leaving issue, his executors should make over and divide the whole estate both real and personal between his two daughters *E* and *F* in equal shares ; but should one of them die without issue, then the surviving daughter and her sons should be entitled to the share of the deceased daughter, or in case of either daughter leaving sons, the share of such daughter should be paid to her sons " share and share alike." *A* afterwards died, leaving surviving him his widow *B* and his two daughters *E* and *F*, but without adopting any son. On the 9th August 1876 *B* adopted *C*, who died unmarried on the 9th January 1881. Subsequently *B* adopted a second son *D*, on the 9th February 1881, who on the 1st August 1894 brought a suit in the High Court for construction of *A's* will. This was finally appealed to the Privy Council, which decided on the 2nd May 1900 that the powers of adoption conferred by the will of *A* were invalid in law. On the 2nd November 1900 *E* being childless adopted a son, *G*. *B* thereafter died on the 14th August 1904, and on the 19th December 1904 *E* instituted this suit for construction of *A's* will. *Held*, that the prior bequest of *A* had failed *ab initio* by reason of its object never having come into existence, and that such failure did not make the bequest to *E* and *F* void, but that they each took an absolute interest under the will of the testator *A* as tenants in common. *Jones* v. *Westcomb, 1 Eq. Cas. Abr. 248, Statham* v. *Bell. Cowp. 40, Meadows* v. *Parry, 1 V. & no B 124, Murra* v. *Jones, 2 V. & B 312, Mackinnon* v. *Sewell, 5 Sim 78, Avelyn* v. *Ward, 1 Ves. 420*, referred to *Held*, also, that there was a necessary implication in favour of the daughters *E* and *F* as the testator *A* wished to give them his property on failure of adoption, and s. 116 of the Succession Act enabled the Court to effect this necessary implication. *Okhoymoney Dassee* v. *Nilmoney Mullick, I. L. R. 15 Calc. 283*, referred to. Under Hindu Law a married daughter takes by inheritance a limited estate, but under a demise by will she takes an absolute estate, unless her interest is curtailed by express words or by necessary implication. S. 82 of the Succession Act referred to. *Ramasami* v. *Papayya, I. L. R. 16 Mad. 466, Lala Ramjivan Lal* v. *Da Koer, I. L. R. 24 Calc. 406, Mussamut Kollany*

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(c) ADOPTION—*concld.*

Koer v. *Luchmee Pershad, 24 W. R. 395, Bhoba Tarini Debya* v. *Peary Lall Sanyal, I. L. R. 24 Calc. 646, Atul Krishna Sircar* v. *Sanyasi Charan Sircar, 9 C. W. N. 784*, referred to. *Held*, further, that the words in the will " to whom and their respective sons I give devise and bequeath the same " did not indicate that the testator intended to create an estate for life in favour of his daughters with a remainder over to their sons, and such words could not be construed as creating joint estates in favour of his daughters and their sons. The word " sons" is a word of limitation and is intended to have the same effect as the words " sons, grandsons, etc." *Held*, also, that there being no contest as to the adoption of *G* by *E* after the death of the testator, *E* attained the status of a daughter with a son. It is now settled by law that an adopted son holds precisely the same position as a son born, as regards inheritance from the adoptive mother's relations, and the status of an adopted son, unless modified by express texts, is similar to that of a son born, as regards the performance of periodical obsequial ceremonies and inheritance. *Puddo Kumari Debi* v. *Jogat Kishore Acharya, I. L. R. 5 Calc. 615, Uma Sankar Moitra* v. *Kali Kumal Mozumdar, L. R. 10 I. A. 138*, referred to. It is premature to decide whether a gift is defeasable in the event of either daughter dying without male issue. *Lalit Mohan Singh Roy* v. *Chukan Lal Roy, L. R. 24 I. A. 76*, referred to. RADHA PRASAD MULLICK *v.* RANEE MANI DASSEE (1906)

I. L. R. 33 Calc. 947
s.c. 10 C. W. N. 695

74. ——— Adopted son to take after widow, if of good character—*Will—Contingent interest—Uncertainty—Implied contract on adoption not to make will.* A Hindu by his will gave his widow a life-interest in a house and provided that on her death their adopted son should have the house provided he was of good character and obedient to the widow. *Held*, that the condition, *viz.*, that the adopted son should be of good character and be obedient to the adoptive mother and should survive her, was a condition precedent to the adopted son taking under the will and was not void for vagueness. The adopted son had a contingent reversionary interest in the house during the widow's lifetime and this was inalienable. *Tattersall* v. *Howell, (1876) Meriv. 26*, followed. In Hindu adoption there is no implied contract with the natural father that in consideration of the gift of his son the adopter will not make a Will. *Surya Mahipati Ram* v. *Court of Wards, 3 C. W. N. 415 : s.c. L. R. 26 I. A. 83*, followed. SURENDRA NATH GHOSE *v.* KALA CHAND BANERJEE (1907)

12 C. W. N. 668

(d) BEQUEST TO IDOL.

75. ——— *Appointment of shebait.* A testator by will left certain property to

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*d*) BEQUEST TO IDOL—*concld.*

an idol and appointed a shebait. The person so appointed died without taking charge of the property or filling the office, and the lands remained in the possession of the testator's family. *Held*, that this property would follow the course of the other properties left by the testator, and be divided with them among the devisees under the will. SARODA SUNDARI DEBI *v.* GOBINDMANI DEBI
2 B. L. R. A. C. 137 note

76. ——— A bequest to an idol not in existence at the time of the testator's death is void. NOGENDRA NANDINI DASSI *v.* BENOY KRISHNA DEB (1902)
I. L. R. 30 Calc. 521 : s.c. 7 C. W. N. 121

77. ——— *Will—Endowment—Shebaitship—Validity of bequest—Intention of foundress—Usage—Custom.* Where the intention of the foundress of a private religious endowment was that all her lineal descendants should hold the *debutter* property and jointly perform the worship of the idol, and the testator (one of her descendants) bequeathed the *pala* or turn of worship to his wife and on her demise to one of his two nephews, grandnephew and their lineal descendants to the exclusion of the other nephew: *Held*, that the bequest was not in accordance with the intention of the foundress, nor the Hindu Law; and that there was no established usage or practice in the family to justify it. The office of *shebait* is not divisible except by custom. RAJESHWAR MULLICK *v.* GOPESHWAR MULLICK (1907)
I. L. R. 34 Calc. 828

(*e*) BEQUEST FOR PERFORMANCE OF CEREMONIES.

78. ——— *Bequest for giving feasts to Brahmins—Bequest of undivided share of joint property.* A bequest by a Hindu for the performance of ceremonies and giving feasts to Brahmins is valid. A Hindu has no power to bequeath his undivided share of joint family property. LAKSHMISHANKAR *v.* VAIJNATH
I. L. R. 6 Bom. 24

79. ——— *Managers, incapacity of, to act—Appointment of other managers.* Where particular persons have been appointed by will to be managers, and any of them become incapable and refuse to act, it does not follow that others should be appointed in their stead. Where managers by becoming Vedantists are incapable themselves for performing ceremonies contemplated in the will, they may make over to any person concerned the requisite expenses for such ceremonies. ANUND COOMAR GANGOOLY *v.* RAKHAL CHUNDER ROY . . **8 W. R. 278**

(*f*) BEQUEST FOR IMMORAL CONSIDERATION.

80. ——— *Condition of future cohabitation—Invalidity of bequest—Succession Act (X of 1865), s. 114.* A bequest by a Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void. TAYARAMMA *v.* SITHARAMASAMI NAIDU . . **I. L. R. 22 Mad. 613**

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*f*) BEQUEST FOR IMMORAL CONSIDERATION—*concld.*

(*g*) BEQUEST FOR CHARITABLE PURPOSES.

81. ——— **Valid dedication**—*Inheritance.* A Hindu testator in Bombay who left a nephew (son of a deceased brother) made a bequest for charitable purposes. The nephew, entitled either as heir or as legatee of the residue of the estate, contended that the only property of which the testator during his lifetime was in possession was joint family estate, and that under the law of the Mitakshara the testator had no power to dispose of it as he had attempted. A specific part of the testator's estate having after his death been set apart as applicable to the trust for the charitable purposes, and the nephew having received the residue, he agreed with the executors that he would act jointly with them in carrying out the trust, and became one of the trustees. *Held*, that the property had been validly dedicated to the charitable purposes; whether or not, the will alone was sufficient, with regard to the nature of the testator's interest in the estate, to constitute the trust as against the heir. PARMANANDAS *v.* VENAYEKRAO
I. L. R. 7 Bom. 19 : 12 C. L. R. 92
L. R. 9 I. A. 86

82. ——— **Gifts void for uncertainty** *Charitable gifts—Void gifts.* A testator by his will directed that his executors should "get a Shiva's temple erected at a reasonable cost in a suitable place within the compound of the brickbuilt baitakhana-house inclusive of the building and garden thereto," in which he had constantly resided. *Held*, that the direction was not void for uncertainty, and that under the circumstances 3 per cent. of the testator's moveable estate was a proper sum to allow for the cost of erecting the temple. *Held*, also, that a direction to the executors to "perform all the acts properly and *bonâ fide*, to the best of their respective information and judgment, and according to the provisions of this will," did not give the trustees an absolute discretion to fix the amount proper to be expended on the erection of the temple. The testator further declared that "the said executors or any of" his "heirs and representatives" should "not be able to make any kind of gift, sale, or alienation, or create any incumbrance on the" said baitakhana house, "and none of" his "heirs" should "be able to claim it in his own right;" but that the "executors" should "be competent to allow" the testator's "brother, *I L R*, and his sister's son, *S D R*, to use the said baitakhana and rooms, etc." *Held*, that this clause did not operate to

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*g*) BEQUEST FOR CHARITABLE PURPOSES—*contd.*

dedicate the baitakhana-house to the idol Shiva, nor to vest it in the executors, but that on the death of the testator it descended to his heir-at-law, freed from any prohibition against alienation. The testator further directed that his executors should "keep in deposit Government Promissory Notes of R9,500 (nine and half thousand rupees) for the preservation and suitable repairs of" the baitakhana "house in proper time, and for the daily and periodical worship of the said god Shiva, for his sheba (worship) and for the repairs of the temple," the expenses of these acts to be defrayed out of interest of the R9,500. *Held*, that (there having been no dedication of the baitakhana-house to the idol) the sum of R9,500 must be apportioned, one moiety going to the heir-at-law, to whom the baitakhana-house had descended and the other to the executors for the repairs of the temple and the worship of the idol. The testator further declared that, "if after the performance of all the above acts there remains any money or moveable property as surplus, then the executors shall be able to spend the same in proper and just acts for the testator's benefit." *Held*, that the direction contained in this clause was void for uncertainty. *Held*, also, that such direction did not amount to a valid precatory trust. *Mussoorie Bank* v. *Raynor, L. R. 9 I. A. 79 : I. L. R. 4 All. 500*, cited. Where Government securities in certain specified amounts are bequeathed by will, the interest thereon which has accrued due before the testator's death does not pass to the legatees. GOKOOL NATH GUHA *v.* ISSUR LOCHUN ROY. ISSUR LUCHMUN ROY *v.* GOKUL NATH GUHA. SHAM DAS ROY *v.* ISSUR LOCHUN ROY **I. L. R. 14 Calc. 222**

83. ——— **Sadavarat**—*Public charity*——*Well—Cistern—Preference given to unmarried daughters over married daughter. M*, a Hindu inhabitant of Bombay, died in 1886, leaving him surviving his widow, and three daughters, one married and two unmarried. The testator's will contained the following provisions : Cl. 6. "Should my wife die without leaving an heir, then as to whatever property of mine there may be left, the same be used as follows :—My trustee shall make the outlay for both the sadavarats and that for the work of repair of my property, out of my fund. And as to whatever surplus may remain out of the same, let my trustees pay to my brother *D M*'s son, named *B R*, R50 per one month for his expenses. As to the surplus moneys which may remain out of the same after taking *B R's* advice are to be used in making the outlays for building a well and avada (*i.e.*, cistern of water for animals to drink out of). Such moneys are truly to be used by my trustees. 10. In my country, at the village of Shri Anjar, I am at present carrying on a sadavarat. Similarly, out of my fund my trustees are always to continue (the same), and if there be heirs of mine, those also are to continue the same. The sadavarat shall never be stopped. 16. After my death, my trustees shall out of my income set up a sadavarat in the town of Shri Nassik. In that sidho (articles of food) are to be given to each person as follows : Flour weighing sixty rupees. Dal (pulse) weighing eight rupees. Salt and chillies. 18. A sadavarat of mine is now going on in the village of Shri Anjar, and I have written for another sadavarat to be set up at Shri Nassik. Thus my trustees are to carry on both the sadavarat in a good manner. And they are to pay the expenses thereof out of my funds. And when my trustees shall make over my property to any of my abovementioned heirs, or to any one who may hereafter be appointed as heir, in order that the expenses of both the sadavarats may be properly defrayed out of the interest (or rents), a sum of money sufficient for that or houses, whichever my trustees may choose, *i.e.*, property sufficient to maintain the expenses of both the sadavarats, shall be set apart. And as to the property which may remain, my trustees shall make over the same to my heir, but the sum or houses thus set apart for the expenses of the sadavarats are to be separated." *Held*, (i) that the bequest to the sadavarat at Anjar was valid. (ii) That the bequest to the second sadavarat which by cl. 16 the testator directed to be established at Nassik was valid, and was not void for uncertainty. The clear intention of the testator was that this sadavarat should be on the same scale as the one at Anjar, and there would therefore be no difficulty in ascertaining the nature of the sadavarat to be established and the sum to be expended upon it. (iii) That the bequest in cl. 6 in the building of a well and cistern was valid as a charitable trust. (iv) That under cl. 18 of the will the residue of the testator's property should go to the two unmarried daughters of the testator in preference to the married daughter. JAMNABAI *v.* KHIMJI VULLUBDASS . . . . **I. L. R. 14 Bom. 1**

84. ——— *Sadavarat—Bequest to a definite sadavarat—Bequest to two charitable objects, one of such bequests being invalid—Bequest of interest of a fund to A with invalid gift over of interest after A's death.* Where a testator by his will directed certain rents to be used "for sadavarat," and where from the wording of the will it appeared that the testator intended his executors to establish a definite sadavarat in some definite place, and not merely, at their discretion, themselves to distribute the income of the property at any indefinite place, and perhaps at many places, to Brahmins and travellers:—*Held*, that the bequest to charity was good, and an enquiry was directed as to the place at which such sadavarat should, at the proper time, be established, and a scheme for its administration was ordered to be prepared. A testator by his will directed that, it his daughters died without issue, the property of his daughters should be used by his executors for dharm and

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*g*) BEQUEST FOR CHARITABLE PURPOSES—*contd.*

for sadavarat. *Held*, following *Hoare* v. *Osborne*, *L. R. I Eq. 585*, that the bequest was good to the extent of one-half in favour of the sadavarat. The gift to dharm being invalid, the other half was undisposed of. A testator by his will directed that his wife should enjoy for life the interest of a sum of R4,000 which was deposited with a certain firm, and that after her death the interest should be given to *dharm*. There was no residuary clause in the will. *Held*, that the gift to *dharm* being clearly bad, and there being no residuary clause in the will, the corpus of the R4,000 was undisposed of and went to the testator's widow. MORARJI CULLIANJI *v.* NENBAI . **I. L. R. 17 Bom. 351**

85. ———— **Void bequests**—*Bequest to dharmada—Bequest void for uncertainty.* A bequest in favour on dharmada is void by reason of uncertainty. The law of this point is the same in the mofusil as in the presidency town. DEVSHANKAR NARANBHAI *v.* MOTIRAM JAGESHVAR **I. L. R. 18 Bom. 136**

86. ———— **Bequest to "dharma"**—*Charitable bequest—Bequest to "dharma" void.* One *G* by his last will and testament bequeathed certain properties to his daughter in the following words:—"They (the executors) shall deliver all other properties to her on her attaining proper age (*i.e.*,) 18 years, my daughter shall use and enjoy the properties for her life. These properties shall, after her, be taken by her issue. In case my daughter may not perchance have any such issue, she should dispose of as she pleases all the properties she may have. *In case she, perchance, being short-lived die before so attaining her age, the executors shall utilise those properties for dharmam.*" The daughter died issueless before attaining majority. The plaintiff, one of the executors, and the next heir of the deceased *G*, brought this suit for declaring the bequest to "dharma" void and to declare the right of plaintiff to succeed to the properties bequeathed to the daughter. MR. JUSTICE BODDAM held the bequest to "dharmam" void and decreed the plaintiff's claim. On appeal: *Held*, *Per* CHIEF JUSTICE.—The bequest to "dharmam" is void. *Runchordas Vandrawondas* v. *Parvatibhai*, *L. R. 26 I. A. 71*, followed. *Per* SUBRAHMANIA AYYAR, *J.*—The word "dharmam" when used in connection with gifts of property by a Hindu has a perfectly well-settled meaning and connotes *ishta* and *poorta* donations. The word is a compendious term referring to certain classes of pious gifts, and is not a mere vague and uncertain expression. The testator must be presumed to have used the word with reference to the definite objects inculcated by shastraic precepts and well known to the people and theretore the gift to "dharmam" is not void for indefiniteness. PARTHASARATHY PILLAI *v.* THIRUVENGADA PILLAI (1907) **I. L. R. 30 Mad. 340**

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*g*) BEQUEST FOR CHARITABLE PURPOSES—*contd.*

87. ———— *Bequest for dharma.* Where a testator gave bequests for dharma (religious and charitable purposes) which he explained to be "doing all good works of a permanent nature" and "acting in such a manner as to give me a good name":—*Held*, that the bequest was void. CURSANDAS GOVINDJI *v.* VUNDRAVANDAS PURSHOTAM . **I. L. R. 14 Bom. 482**

88. ———— *Gift to dharam—General and indefinite charitable bequest.* One *C S* died without issue on 6th January 1869, leaving two widows, *C* and *N*, who thereupon took a widow's estate in such of his immoveable property as was not validly disposed of by him. By his will, dated 5th January 1869, he appointed the defendant *V* and two others his executors and trusteees. The two latter were dead at the date of this suit. By his will be left two immoveable properties to his wife *C* for life and two to his wife *N*, and the residue of his property he left to his trustees directing them to apply the same in charity (dharam). The properties left to his widows were to revert on their death to the charity fund held by the said trustees. *C* died in 1871. *N* survived till 1888 and died in November of that your leaving a will. The plaintiff was the nephew (brother's son) and heir of the testator, and he sued to have his rights in and to his uncle's estate ascertained. He contended that the bequests for dharam were void, and that the property bequeathed for that purpose was undisposed of. He claimed to be entitled to the whole of the testator's immoveable property including that which had been devised to the widows for life. *Held*, that the devise to dharam was too general and indefinite for the Court to enforce, and was therefore void. VUNDRAVANDAS PURSHOTAMDAS *v.* CURSONDAS GOVINDJI . **I. L. R. 21 Bom. 646**

Held by the Privy Council on appeal that the bequest for dharam was void. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control. *Morice* v. *Bishop of Durham*, *9 Vesey 399 : 10 Vesey 521*, referred to and followed. RUNCHORDAS VANDRAVANDAS *v.* PARVATIBAI . . **I. L. R. 23 Bom. 725**
L. R. 26 I. A. 71
3 C. W. N. 621

89. ———— **Bequest of residuary estate**—*Will—Bequest to religious and charitable purposes.* The residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu Law was as follows: "And as to the rest and residue of my estate, I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may, in his discretion, think proper." The bequest of the residuary estate was held to be

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*g*) BEQUEST FOR CHARITABLE PURPOSES—*concld.*

a valid charitable bequest. The direction to spend and give away the whole of the residue in charity governs the words that immediately follow, and therefore the purposes for which the fund is to be spent must be charitable, although they may at the same time be religious. *Ramgopal Bonnerjea* v. *Sibkissen Bonnerjea, 1 Bom. H. C. 76 note,* followed. *In re White, 2 Ch. 41 ; Baker* v. *Sutton, 1 Keen 224 ; Pocock* v. *Attorney-General, L. R. 3 Ch. D. 342 ; Morarji Cullianji* v. *Nenbai, I. L. R. 17 Bom. 351 ; Deb Shankar Naranbhai* v. *Motiram Jageshwar, I. L. R. 18 Bom. 136 ; Runchordas Vandrawandas* v. *Parvatibhai, L. R. 26 I. A. 71 ; Morice* v. *Bishop of Durham, 10 Ves. 522 ; Gangbai* v. *Thavar Mulla, 1 Bom. H. C. 71 ; Advocate-General* v. *Damothar Madhowjee, 1 Bom. H. C. 76 note ; Blair* v. *Duncan, A. C. 37 ; Sib Chunder Mullick* v. *Treepoora Soondry, 1 Fulton 98 ;* and *Townsend* v. *Carus, 3 Hare 257,* referred to. PARBATI BIBEE *v.* RAM BARUN UPADHYA (1904) . . **I. L. R. 31 Calc. 895**
s.c. 8 C. W. N. 653

90. ——— *Will, construction of—Charitable bequest—Residuary bequest—Shebait, appointment of—Bequest to poor relatives—Uncertain bequest.* A testator by his will appointed *B* shebait for life and directed that after *D*'s death the eldest male issue of *B*, or if no issue, the adopted son of *B*, or if no adopted son, then such person as *B* should by deed or will appoint, should become shebait. *Held,* that the limitation to *B* was valid. A direction to the executors to set apart a specific sum for distribution among the testator's "poor relations, dependents and servants," is a valid charitable bequest. *Morice* v. *Bishop of Durham, 10 Ves. 522,* distinguished. *Attorney General* v. *Duke of Northumberland, 7 Ch. D. 745,* and *Horde* v. *Earl of Suffolk, 2 Mylne & Keene 59,* referred to. Where a testator devised specific immoveable property to *C* for life only, and further directed his executors to sell the residue of his moveable and immoveable properties and transfer it to a University : *Held,* that the reversion in the property devised to *C* for life passed on his death under the specific residuary devise, to the University. MANORAMA DASSI *v.* KALI CHARAN BANERJEE (1904)
I. L. R. 31 Calc. 616
s.c. 8 C. W. N. 273

91. ——— **Feeding and paying Brahmins**—*Will, construction of.* A direction in a will for feeding and paying the Brahmins on the day following the night of the *Sivaratri* is a valid bequest. *Dwarkanath Bysak* v. *Burroda Pershad Bysack, I. L. R. 4 Calc. 443, Lakshmisanker* v. *Vaijnath, I. L. R. 17 Bom. 351,* followed. KEDAR NATH DUTT *v.* ATUL KRISHNA GHOSE (1908) . . . **12 C. W. N. 1083**

(*h*) ELECTION, DOCTRINE OF.

92. ——— The doctrine of election applies to wills made in India. *D*, a Hindu widow, died, making a will in respect of property which she had inherited from her husband. She bequeathed R2,000 as a legacy to the plaintiff and the immoveable property to *K*, the defendant's father. The plaintiff and *K* were the heirs of her husband. The plaintiff sued for the legacy under the will, and for half the immoveable property as heir. *Held,* that the plaintiff should be put to his election whether to take the legacy under the will or half the property as heir of the testator's husband. MANGALDAS *v.* RANCHHODDAS BHAVANIDAS
I. L. R. 14 Bom. 438

(*i*) VESTED AND CONTINGENT INTERESTS.

93. ——— *Inability of widow to recover property not in possession of husband.* A Hindu testator, after the death of his widow, gave a moiety of his property to his brother *A*, and on his death to *A's* two sons, *B* and *C*. *A* died in the lifetime of the testator's widow, and a complete division of all *A's* property which was held in co-parcenary was agreed upon by *B* and *C*. *B* also died in the lifetime of the testator's widow, and on the death of the testator's widow *B's* widow claimed his share. *Held,* that *B* and *C* took *A's* moiety under the will as tenants-in-common, and that each of them had a vested interest in a one-fourth share, though the actual enjoyment was postponed until the death of the widow ; and that the claim of *B's* widow was not barred by the doctrine of Hindu law that a widow succeeding as heir to her husband cannot recover property not in the possession of her husband, which doctrine was held to be inapplicable to the case of property in which the husband had a vested interest under a will or deed, though the actual enjoyment thereof was postponed during the lifetime of another. REWUN PERSAD *v.* RADHA BEEBY
7 W. R. P. C. 35 : 4 Moo. I. A. 137

94. ——— *Joint tenancy—Tenancy-in-common—"Heirs of my property," effect of these words in Hindu will.* *B* died in 1876, leaving *H*, his widow, and *N*, an adopted son, him surviving ; and he directed by his will that *H* and *N* should be the heirs of his property." *N* died childless in 1880, leaving the plaintiff, *L* his widow, him surviving. *H* thereupon took possession of all *B's* property claiming as a joint tenant with *N* under the will to be entitled by survivorship on *N's* death. *Held,* that, under the will, *H* and *N* had been tenants-in-common, and not joint tenants ; and that the plaintiff, therefore, as *N's* widow was entitled to *N's* share. In the expounding of Hindu wills the Court should presume that the holder did not intend to depart from the general law beyond what he explicitly declares. *B*, while he had constituted his widow *H* as one of his heirs contrary to the general principles of Hindu law, which only gave her a right to maintenance, was silent as to how

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*i*) VESTED AND CONTINGENT INTERESTS—*contd.*

far her right of heirship was to extend. The right was to be construed in a manner most consistent with the general principles of Hindu law; and to hold that a joint tenancy had been created between *H* and *N* would be in distinct derogation of the joint family system, which is the keystone of Hindu law. It would be in effect to exclude the son's family, for the benefit of the widow, in total disregard of the relations and obligations of a Hindu family. The fact of *N* dying childless was an accident which could not be presumed to have been in the testator's contemplation. LAKSHMIBAI *v.* HIRABAI

I. L.R. 11 Bom. 69

Held in the same case on appeal, affirming the decree of the lower Court, that under the will *H* took only a widow's estate in half the property, and that (subject to her right as a Hindu widow to a widow's estate in a half share) the entire property vested absolutely in *N*. On *N's* death, the property (subject as aforesaid) vested in the plaintiff *L* as his widow and heir for a widow's estate, and she became entitled to joint possession with the defendant *H*. A widow taking under her husband's will takes only a widow's estate in the property bequeathed to her, unless the will contains express words giving her a larger estate. HIRABAI *v.* LAKSHMIBAI . . **I. L. R. 11 Bom. 573**

95. ——————— *Joint tenancy —Gift to husband and wife—Survivorship—Alienation by husband to creditor invalid.* A Hindu by his will granted jointly to his brother's son and *N*, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator, but because he was the husband of *N*. *Held*, that the grantees were joint tenants and not tenants-in-common, and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor. VYDINADA *v.* NAGAMMAL . . **I. L. R. 11 Mad. 258**

96. ——————— *Construction of right of transfer exercised by one of two legatees of property bequeathed equally to each—Alienation of share by widow—Severance of joint tenancy.* Where a Hindu testator bequeathed a 4-annas share of a zamindari to his youngest widow and her son, "for your maintenance," with power to them to alienate by sale or gift the property bequeathed:— *Held*, that on the true construction of such gift each of the two legatees took an absolute interest in a 2-anna share of his estate, and the words for your maintenance did not reduce the interest of either legatee to one for life only. *Held*, also, that the widow's conveyance of her share operated as a severance of a joint tenancy which had been created by the will between her and her son, and was effectual without her son's consent. *Vydinada* v. *Nagammal, I. L. R. 11 Mad. 258*, overruled. JOGESWAR NARAIN DEO *v.* RAM CHANDRA DUTT

I. L. R. 23 Calc. 670
L. R. 23 I. A. 37

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*i*) VESTED AND CONTINGENT INTERESTS—*contd.*

97. ——————— *Deed of gift—Devisees and donees.* A Hindu inhabitant of Calcutta died in 1837, leaving three sons, *G*, *T*, and *M*, and several daughters; he left property, moveable and immoveable, and a will, dated 29th October 1836, as well as a deed of gift of even date, but executed in point of time prior to the will. By the deed of gift he gave his property as follows: 'To his three sons, *G*, *T*, and *M*, his self-acquired estate and his patrimony, *i.e.*, his own share, agreeably to the will of his father, giving to them power of making a gift or sale, and to hold and enjoy themselves, sons, grandsons and so on in succession. His family dwelling-houses to remain in equal shares, his sons to dwell therein, but not to be able to let or sell them to any one else; then followed certain provisions with regard to a family idol, for religious observances, etc., after which the deed went on to say: "You will divide in three equal shares and receive the ready money and company's papers and bank's shares, etc., which I have; you will not be able to give in gift or sell these properties under twenty years of age; the children legitimately begotton by you will receive the same. If no son or daughter be born, or if there be no probability of its being born to any one of you (then), he will have the right and power of making a gift or sale of these. If any leave only a childless widow, then that childless widow shall have no claim or demand for any share in my real and personal property, etc., and the debsheba, and so forth. She shall not be able to make any claim on the plea of my having made a gift to her husband. Being for life under the control of my sons who may be in existence, she shall, for her food, raiment, and other expenses, get interest on R4,500. No gift and sale, etc., shall be made without providing for this." After which followed certain provisions for his daughters, etc. The will, after appointing one of his sons and three other persons executors, contained in its earlier clause similar provisions to those contained in the earlier part of the deed of gift; it also referred in express terms to a deed of gift. It afterwards went on to make several dispositions, among them the following: "10th section. If no issue be born to any of my sons and his wife survives him, she will enjoy and possess the share of her husband during her lifetime; she will not become vested with the right and power of making gift or sale (thereof). As long as she lives, she will live under the control and in the family of such of my sons as shall be alive; those sons will preserve the said property and maintain her. If she remain not under (their) control, then in that case she will have no concern with the said property, (but) during her life she will receive her food and raiment in consideration of her status (in life). All of the surviving sons will get that property in equal shares." "20th section. Besides the property of mine specified in this deed of gift, whatever property will (*i.e.*, may) be acquired after the date of this my will the same shall be taken by my sons in equal shares." "23rd section. The property of

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*i*) VESTED AND CONTINGENT INTERESTS—*contd.*

which I have made a gift to my sons they shall not be competent to make a sale or gift thereof within twenty years; when there will be any grandsons in the male line, they shall get all that property; if any one of them do not have a son (or) if there be no probability of (his) having a son at a subsequent period, he shall have power to make a sale or gift." It appeared that the testator had, at the time he executed these instruments, an intention to go on a pilgrimage to Brindabun. *G* and one of the other executors proved the will; the other executor died in 1844, since which time *G* remained in possession of the property. *T* died about 1858 without issue, and his widow *B* sued the surviving brothers *G* and *M* for her husband's share in the estate. This suit they compromised by a payment to *B*. *G* and *M* afterwards and within twenty years had issue sons and daughters. In a suit to have the will and deed construed: *Held*, that, although the deed was not produced when probate of the will was taken out, it was sufficiently proved before the Court in the present suit to allow its being acted on; that the provisions in the will controlled the inconsistent provisions in the deed of gift; that consequently the son's childless widow took her husband's share for life; that the sons having male issue took only a life-interest; that the grandsons during the lifetime of their fathers took nothing, but after the death of their father respectively took among them equally their father's share, the share of each son going to his own son or sons only, and not to grandsons of the testator generally. The restriction on alienation extended to both the moveable and immoveable property. *Held*, also, that the widow of *T*, having received a sum of money from *M* and *G* in lieu of *T's* share, that share went to *M* and *G* in equal shares for life, and on the death of either of them his share would go to his own sons absolutely. SATCOWRIE SEIN *v.* GOVIND CHUNDER SEIN . . **2 Ind. Jur. N. S. 56**

98. ——————— *Gift of estate subject to widow's vested interest—Curtailed enjoyment.* *V S*, a Hindu, died in 1858, leaving a will whereby he appointed *G* and *S* his executors to conduct his affairs as directed in the will. After payment of debts, legacies, etc., *G* and *S* were directed to manage the residue of estate and not to sell it during the lifetime of *L*, the junior wife of *V S*, to whom a monthly payment for life was to be made by them; after the death of *L*, *G* and *S* were directed to divide the property that remained in equal shares between them and to continue to enjoy the same in equal shares. *L* survived both *G* and *S*, who died in 1875 and 1879 respectively. *Held*—in a suit in 1879 by the divided nephew of *V S*, against *L*, and the representatives of *G* and *S*, to have his right to the estate of the testator, upon the death of *L*, declared and for an account—that there was no intestacy, and that the gift to *G* and *S* did not fail by reason of their deaths in the lifetime of *L*, but that *G* and *S* took a vested interest on the death of *V S*. KOLLA SUBRAMANIAM CHETTI *v.* THELLANAYAKALU SUBRAMANIAM CHETTI **I. L. R. 4 Mad. 124**

99. ——————— *Fund set apart by will for payment of monthly allowances proving insufficient—Right to supply deficiency from the general estate—Interest chargeable on property of a testator deposited with a firm.* *C*, a separated Hindu, died in 1874 possessed of a half share in two dwelling-houses, one situated in Bombay and the other in Kathiawar. He was also possessed of considerable moveable property. He left him surviving two widows and one daughter named *J*. By cl. 2 of his will, dated 4th July 1874, he directed, as to his share in the houses, that his wives should have a right to reside therein as long as they might live, and, in the event of their decease, that his nephew *B*, the son of his brother *V*, should be the owner; and should the decease of *B* take place, then whoever might be the son of *V* should be the owner. By a subsequent clause (the 16th) of his will the testator declared that, should the decease of his two wives take place, all his immoveable and moveable property should go to his nephews *B* and *M*, the sons of *V*. *B* and *M* both died in the lifetime of *C's* two widows. *M* died first, childless and unmarried. *B* left a widow him surviving, who claimed that under cl. 2 *B* took a vested estate in the testator's share in the two houses, which on his death devolved upon her, and that under cl. 16 *B* and *M* took a vested estate in joint tenancy; that on *M's* death his interest survived to *B*, and on his death devolved upon his widow. It was contended on behalf of the two widows of *C*, the testator, that the gift to *B* by cl. 2 and to *B* and *M* by cl. 16 was contingent, and had lapsed by their deaths; that the result was an intestacy so far as regards the property in question; that they consequently took a widow's estate in the immoveable property for their lives; and that upon their death the property should go to the testator's daughter *J*; and that, as to the moveables, they took absolutely. *Held*, that under cl. 2 *B* took on the death of the testator not a contingent but a vested estate in perpetuity, which on his death devolved on his widow; and that under cl. 16 *B* and *M* took a vested interest in joint tenancy in the whole of the residuary estate; that on the death of *M*, the survivor *B* took the whole absolutely, and on his death his interest was transmitted to his widow. *Held*, also, that the interest taken by *B* under the above clauses of the will was subject to the right of the testator's widows to reside in the houses, and to have their monthly allowances paid out of the moveable estate, and was subject also to the bequests, charitable and otherwise contained in the will. By cls. 15 and 16 of his will the testator directed that certain monthly allowances should be paid to each of his widows out of the interest of certain Government promissory loan

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*i*) VESTED AND CONTINGENT INTERESTS—*contd.*

notes which were to be purchased by his trustees. *Held*, that, if the particular sources of income, out of which the testator directed these allowances to be paid, should prove insufficient, the rest of the moveable property, or the income derivable from it, as well as the rents of the immoveable property, should contribute. The funds belonging to the testator's estate had, in accordance with the directions in his will, been kept in the firm of Visram Mowji, in which the testator had been a partner. *Held*, under the circumstances of the case, that the firm should be charged interest at the rate of six per cent. per annum. JAIRAM NARRONJI *v.* KUVERBAI **I. L. R. 9 Bom. 491**

100. ——————— *Executor, estate of—Administrator, suit by—Trustees—Notice—Charitable Trust—Parties.* *B K*, a Hindu, by his will, executed in Bombay and dated 6th January 1802, bequeathed a house to his wife *R* for her life in trust to allow the impersonations of Valabh to reside in it, and appointed four executors by name, but made no gift over of the house to those executors or to any one else. The will was proved by the four executors on 24th September 1808. On 23rd June 1820, *R* claiming as executrix according to the tenor, obtained an order granting probate to her as well as to the executors expressly appointed. The executors retired, and *R* acted alone in the management of the testator's estate. On 4th September 1862, *R* sold the house for its full value to the defendant, who had notice of the charitable trust affecting it. *R* died on 23rd March 1870. On 17th March 1871, the High Court, on the application of one *A D*, revoked the probate of *B K's* will granted to *R*, but without prejudice to any act done in due course of administration by *R*, and granted letters of administration *cum testamento annexo* and *de bonis non* of *B K* to *A T*. On 13th July 1873 *A T* died. On 1st May 1875 the plaintiff, who was the only son and heir of *A T*, instituted the present suit for the purpose of recovering from the defendant possession of the trust premises sold to him by *R*. The plaintiff was also one of the surviving heirs of *B K*, and, by virtue of a release executed to him by the other heirs, was the sole surviving heir who had any beneficial interest in *B K's* estate. The plaintiff, however, did not claim the house in the possession of the defendant as the beneficial owner, but to hold it for the purpose of giving effect to the trust created by the will of *B K*. On 28th January 1876 the plaintiff obtained letters of administration *cum testamento annexo* and *de bonis non* of *B K*, and it was on these letters that he now based his claim. *Held*, 1st, that the plaintiff had no ground of action as administrator of *B K*. *Held*, 2ndly, that independently of the provisions of the Succession Act and the Hindu Wills Act, 1870, which were not applicable to the case, the executors of a Hindu do not, in the character merely of executors, take any estate, properly so called, in the property of the deceased.

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*i*) VESTED AND CONTINGENT INTERESTS—*contd.*

That accordingly on the death of *R*, the devise for life in trust, there being no gift of the premises to the executors named in the will, the ownership in the premises would devolve upon the surviving heirs of the testator subject to the trust, and such heirs would accordingly be trustees under or by reason of the will of their ancestor, though succeeding to the property in their character of heirs. That the trusteeship thus vesting in all the surviving heirs the release, though operative to pass the legal estate, so as to vest it in the plaintiff alone, could not vest the trusteeship in him alone, and that accordingly the plaintiff could not maintain this suit unless joined by the other heirs of *B K*. *Held*, 3rdly, that even if the other heirs of *B K* had joined as plaintiff, still the suit, being one by trustees to disaffirm the completed act of a predecessor against the person claiming by virtue of such act, would not lie. *Semble:* That as it appeared that the impersonations of Valabh never had availed themselves, and never were likely to avail themselves, of the house, the sale of it by *R* to the defendant was not a breach of trust. MANIKLAL ATMARAM *v.* MANCHERSHI DINSHA . . . **I. L. R. 1 Bom. 269**

101. ——————— *Construction of will—Executor's interest.* By the first clause of the will of a Hindu the testator devised all his real and personal estate to his five sons. By a subsequent clause the testator provided as follows: "But should peradventure any among my said five sons die not leaving any son from his loins, nor any son's son, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them, will get any share out of the share that he has obtained of the immoveables and moveables of my said estate. In that event, of the said property, such of my sons and my sons' sons as shall then be alive, they will receive that wealth according to their respective shares. If any one acts repugnant to this, it is inadmissible. However, if my sonless son shall leave a widow, in that event she will only receive Company's rupees ten thousand for her food and raiment." *Held*, firstly, that by the words "not leaving any son from his loins, nor any son's son," the testator meant not an indefinite failure of male issue, but a failure of male issue of any of his sons at the time of the death of that son. *Secondly*, that there is nothing in such a devise by a Hindu against public convenience, or generally mischievous or against the general principles of Hindu law. SOORJEEMONEY DASEE *v.* DENOBUNDO MULLICK . . . **1 Ind. Jur. O. S. 37**
4 W. R. P. C. 114
6 Moo. I. A. 526

102. ——————— *Bequest by a Hindu to his wife—Life estate—Reversioner—Vested remainder—Contingent bequest.* One *J N* died in 1876, leaving a will which, after stating his property in detail, provided as follows: "When I die, my wife, named *S* is owner of that property

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*i*) VESTED AND CONTINGENT INTERESTS—*concld.*

And my wife has powers to do in the same way as I have absolute powers to do when I am present. And in case of my wife's death, my daughter *M* is owner of the said property after that (death)." *Held*, that *S* took only a life-estate under the will with remainder over to *M* after her death. *Held*, also, that the bequest to *M* was not contingent on her surviving *S*, but that she took a vested remainder which upon her death passed to her heirs. LALLU *v.* JAGMOHAN . **I. L. R. 22 Bom. 409**

103. ———— *Vested remainder —Words "malak and waras."* A Hindu died, leaving a will which provided (*inter alia*) as follows: "After my death, my wife, if she be alive, is the rightful heir, and if she be not alive, and after the death of my wife, my daughter *N* is my rightful heir (hakdar)." . . "As to my daughter *N*, whom I have, after the lifetime of myself and of my wife, appointed heir to my property, and as to the surplus the heir to the same is my daughter *N*." The testator died in 1894, *N* in 1895, and the wife in 1897. Thereupon the testator's step-mother claimed the property as his reversionary heir. *Held*, that under the will *N* took an estate vested in interest from the testator's death, which would pass to her heirs on her death, and the step-mother would have no title. There is no real difference in the meaning of the words "waras" (heirs) and "malak" (owner). *Lallu* v. *Jagmohan, I. L. R. 22 Bom. 409*, followed. CHUNILAL *v.* BAI MULI **I. L. R. 24 Bom. 420**

104. ———— *Words of inheritance—O putra pautradi, meaning of—Hindu widow's estate—Estate for life—Intention of the testator—Power given to adopt, effect of.* A will contained, amongst others, the following directions:—"After my death, my widow, being in possession for the term of her natural life (*jabat jiban*) of my properties, shall perform the *Iswar Seba* and other rites. My widow shall have power to adopt . . After the death of my widow, my brother's son and his sons and grandsons, etc. (*o putra pautradi*), being in possession of my properties, shall perform the *Iswar Deb Seba*." The widow died without adopting any son. *Held*, that the words "*o putra pautradi*" are equivalent to *putra pautradi krame* and are words of inheritance. The intention of the testator was to give the widow, not a Hindu widow's estate, but an ordinary life estate. The brother's son took a vested estate of inheritance, subject to the widow's life estate, and only liable to be divested by the widow's adoption of a son. The widow not having adopted any son, the brother's son took the ultimate estate absolutely, and his sons would inherit equally, though some of them were not born at the time of the testator's death. GOOROO DAS MUSTAFI *v.* SARAT CHUNDER MUSTAFI (1902)

I. L. R. 29 Calc. 699 : s.c. 6 C. W. N. 721

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*j*) ACCUMULATIONS.

105. ———— **Direction to accumulate income**—*Omission to create beneficial interest. Per* TREVELYAN, *J.*—A Hindu testator cannot direct the accumulation of the income of his estate for an indefinite period, if there is no beneficial interest created in the property in order to render the gift, whether under the will or *inter vivos*, valid. AMRITO LALL DUTT *v.* SURNOMONI DASI

I. L. R. 25 Calc. 662
2 C. W. N. 389

106. ———— *Direction to live jointly.* The meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects. A testator directed his sons, using the words "living jointly in respect of food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. *Held*, that this interest is not accurately represented by the words "joint estate" in England, nor is it analogous to the case of a testator in England who gives property to executors for the purpose of carrying on his trade, but is more analogous to the tenancy in common which prevails in England. The will also directed that on the death of a son, if that son died leaving a son, the share of that son was to go to that son's son, and if the son dying left no son, that the share should go to the survivors. *Held*, that the share of profits made during the joint lives of the sons, which belonged to the deceased son, goes over to the other sons of the testator as they would go according to law, as from a consideration of the various terms of the will itself there was an absence of all directions on the part of the testator to accumulate the profits or to dispose of the profits which were the property of the son. PRANKRISTO CHUNDER *v.* BAMASOONDARY DOSSEE . . . **9 W. R. P. C. 1**

S.C. BISSONAUTH CHUNDER *v.* BAMASOONDERY DOSSEE . . . . **12 Moo. I. A. 41**

107. ———— *Contingent remainders—Executory devise.* There is nothing in the general principles of Hindu law, or public convenience, to prevent a Hindu testator devising self-acquired property by way of remainder, or executory devise, upon an event which is to happen on the close of a life in being. The will of a Hindu testator, after devising all his real and personal estate among his five sons (a joint undivided family) contained this clause: "Should any among my said five tons die, not leaving any son from his loins, nor any son's sons, in that event neither his widow, nor his daughter, nor his daughter's son, nor any of them, will get any share out of the share that he has obtained of the immoveables and moveables of my said estate: in that event, of the said property, such of my sons and my sons' sons as shall then be alive, they will receive that wealth according to their respective shares. If any one acts repugnant

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*j*) ACCUMULATIONS—*concld.*

to this, it is inadmissible. However, if any sonless son shall leave a widow, if that event she will only receive R10,000 for her food and raiment." The family remained joint. *S*, one of the sons, died after the testator's death without issue male, but leaving a widow his heiress-at-law. *Held*, that, by the words "not leaving any son from his loins, nor any son's son," the testator meant not an indefinite failure of male issue, but a failure of male issue of any one of his sons at the time of the death of that son. *Held*, further, (i) that upon the death of *S* without male issue, his interest in the capital of the estate determined, and that his widow became entitled to hold and enjoy as a Hindu widow a fifth part of the accumulations from the testator's estate from the time of his death to the death of his son *S*; and (ii) that she was also entitled absolutely in her own right to the interest and accumulations which had since *S's* death arisen from such fifth part of the accumulations. By the decree *S's* widow was declared entitled to the R10,000 given by the will with the benefit of a residence in the family dwelling-house, and participations in the means of worship. The question of the amount of her maintenance as a Hindu widow was left open by the Judicial Committee, as that point could be raised on further directions after taking the account. SOORJEEMONEY DOSSEE *v.* DENOBUNDOO MULLICK **9 Moo. I. A. 123**

108. ——————— *Will—Direction to accumulate, when valid—Charitable bequest.* In Hindu Law, a direction to accumulate is not *per se* illegal, and such a direction should be given effect to, if it is not void as against public policy, nor given for an illegal object, nor otherwise inconsistent with Hindu law. *Amrito Lall Dutt* v. *Surnomoni Dasi, I. L. R. 25 Calc. 662*, followed. A direction to spend income in feeding poor, indigent Hindus is a valid charitable bequest under Hindu law. *Dwarkanath Bysack* v. *Burroda Persaud Bysack, I. L. R. 4 Calc. 443*, referred to. RAJENDRA LALL AGARWALLA *v.* RAJ COOMARI DABI (1906) **I. L. R. 34 Calc. 5**

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.

109. ——————— **Perpetuities—Trusts**—*Absence of disposition of beneficiary interest.* A Hindu by will attempted to create a trust for the accumulation for 99 years of the surplus income (after certain yearly payments) of his estate in the purchase of zamindaris, etc., from time to time, and empowered his trustees to continue such trust after the expiration of the 99 years' term. The will contained no disposition of the beneficial interest in the zamindaris so to be purchased. *Held*, that such trust was void. *Semble:* Perpetuity (save in the case of religious and charitable endowments) is not sanctioned by Hindu law. ASIMA KRISHNA DEB *v.* KUMARA KRISHNA DEB . **2 B. L. R. O. C. 11**

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

110. ——————— **Trusts.** A Hindu by his will left all his property "in full and absolute right, property, and ownership" (nevertheless upon the conditions and trusts, and with the intent and for the purposes thereinafter described), to certain persons named, and "to their successors in the trusts of the settlement thereinafter provided," declaring the "trusts and objects of his said will and settlement, and the methods, plans, and acts" he desired "to be performed and observed" by such persons and their successors in the trusts. He then desired that all his property should be preserved and held for ever under the trusts, and for the purposes of the said will and settlement. In the second, third, and fourth clauses of the will, the testator went on to direct the "executors and trustees" to pay to his sons therein named a certain monthly sum, "such payment to be continued after his decease to his children and descendants *per stirpes.*" After directing the executors and trustees to make other payments, etc., in the eighteenth clause he directed: "With respect to accumulations of money in the hands of the executors and trustees, I direct that the same be converted into such Government or other security as to the executors and trustees may seem best, and that the interest and produce of such security be accumulated and in like manner be invested, and that, when and so soon as the aggregate thereof shall amount to R3,00,000, it is to be transferred to, and divided among, my sons or the survivors, or survivor, together with the descendants of such of them as may be deceased, *per stirpes;* and as soon as new accumulations arise in the hands of the executors and trustees, that the same be again in like manner divided among my sons then living, or the survivor of their descendants, as before, and so on from time to time." In the twenty-first clause the testator made provision for the appointment of new "executors and trustees," "as it is my intent and desire that the disposition, the conditions, and control I am now devising in regard to the future arrangement and enjoyment of my property be perpetuated." In the Court below:—*Held per* MARKBY, *J.*, that trusts cannot be created by Hindus, but a testator may burthen his heir or devisee with a payment of a simple sum of money to a specified person (including an idol) in existence at the death of the testator. Such bequest cannot be held good as a trust created for the benefit of the legatee, but may be treated as creating an ordinary obligation for the payment of money. On appeal:—*Held per* PEACOCK, *C.J.*, that trusts have been and can be enforced against Hindus; the trustees in this case take upon such trusts as are valid; so far as they are invalid, the heirs are entitled to the beneficial interest. A Hindu cannot by his will do indirectly by intervention of trusts what he cannot do directly. *Per* MACPHERSON, *J.*—Both by Hindu law and the practice which has always prevailed in the Courts in India and in the

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

Privy Council, a Hindu may legally deal with his property so as to create a trust or relation in many respects similar to, although not necessarily identical with, that known in English law as the relation of trustee and *cestui que trust.* Even if trusts are not expressly recognised by the old Hindu law, there is nothing in it forbidding them, or repugnant to them, or inconsistent with their existence. *Held,* both in the Court below and on appeal, that the general scheme of the will failed, because the trusts were intended for on illegal purpose, namely, for the purpose of creating a perpetuity. *Per* PEACOCK, *C. J.*—The eighteenth clause is repugnant and void, also bad, because the persons to take were unborn at the time of the testator's death, and on the ground of uncertainty, it being impossible to ascertain at the testator's death who would be entitled to participate in the several divisions of accumulation directed to be made. As to the bequests in the second, third, and fourth clauses of the will:—*Held* in the Court below *per* MARKBY, *J.*, that they could only operate in favour of specified persons in existence at the death of the testator. On appeal:—*Held per* PEACOCK, *C.J.*, that they operated as "gifts to the sons for life, with remainders to such children of the sons as were in existence at the time of the death of the testator *per stirpes.*" *Per* MACPHERSON, *J.*—There was a good gift in remainder to the children of such sons as were alive at the time of the testator's death. It is not a violation of the principles of Hindu law to support estate which are to vest on the expiry of a life in being, in a case like the present, where the testator has given his property to trustees who have accepted it and are prepared to carry out his wishes. Their acceptance would be sufficient if any is necessary. KRISHNARAMANI DASI *v.* ANANDA KRISHNA BOSE. ANANDA KRISHNA BOSE *v.* RAJENDRA NARAYAN DEB . . **4 B. L. R. O. C. 231**

111. ——————————— *Trusts—Life-estate—Estates-tail—Gifts inter vivos—Disherison.* *P K T* died leaving an only son, *G M.* By his will after reciting, "I have already made such provision for my son *G M* as I consider sufficient, and he will take nothing whatever under this my will," he devised and bequeathed all his property, both real and personal, unto and to the use of *R. N, U. M. J M*, and *D P M* (thereafter called the trustees), their heirs, executors, etc., according to the nature and tenure of the property to have and to hold upon the trusts thereinafter declared, that is to say, as regards personalty, upon trust to collect and get in the same and thereout to pay his funeral expenses and debts and such legacies as might be payable in the ordinary course of administration within one year from the testator's death; after paying the funeral expenses, debts, and legacies, upon trust to sell and convert into money such portion of the personal estate as should remain unexpended, and not consist of money or security for money, and to vest the proceeds on good securities; and out of the annual income of the whole upon trust to pay the annuities given by the will and also any of the legacies so far as it would suffice, and after payment of the legacies and annuities to pay the surplus unexpended unto the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all the annuities and legacies should have fallen in and been fully paid and satisfied, in trust absolutely for the person or persons entitled to the beneficial or absolute enjoyment of the real property. As regards realty, upon trust, until all the debts and legacies had been paid and all the annuities had fallen in and been fully satisfied, to receive and collect the rents, issues, and profits thereof, and thereout in the first instance to pay (such if any) of the legacies and annuities as the personal estate or income derived from the trust-money and securities should be inadequate to defray, and to pay the residue to the person or persons for the time being to whom the real estate is devised, for the absolute use of such person or persons respectively. The testator then desired the trustees to hold the real estate generally for the use and benefit of such last mentioned person or persons for the time being so far as was consistent with the trusts and provisions of the will; and further, he directed that out of the net annual income the person entitled to the beneficial enjoyment to the real property or of the income or surplus income thereof should receive for his own use every year, R2,500 a month or R30,000 a year, and that the various legacies and annuities should only be paid gradually and as found possible by the trustees out of the balance remaining out of the last-mentioned payment; and so soon as all the legacies and annuities had fallen in or been paid or fully satisfied, then in trust forthwith to convey the real estate unto and to the use of the person entitled to the beneficial interest therein with and subject to such and the like limitations, provisions, and directions thereafter contained and expressed of and concerning "the real estate," so far as the then condition of circumstances will permit, and so far as such limitations and directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force and apply to the real estate or the conveyance or settlement of it as last aforesaid (if any such law there be). The testator then desired that all the gifts, devises, and limitations in his will thereinafter contained should be read and taken as subject to the devise and bequest thereinbefore made to the trustees and the various provisions and declarations made by him with reference thereto. The testator devised all his real property (subject to the before-mentioned devise to the trustees) "unto and to the use of *J M* for the term of his natural

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

life, and from and after the determination of that estate, to the use of the eldest son of *J M* born during the testator's life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the eldest son of *J M* according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of *J M* born during the testator's life, successively, according to their respective seniorities; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of *J M*, and the heirs male of their respective bodies issuing, so that the elder of the sons of *J M*, born in the testator's lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of *J M* born in the testator's lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing. And after the failure or determination of the uses and estates thereinbefore limited, to the use of each of the sons of *J M* who should be born after the testator's death successively according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and taken before the younger of such sons and the heirs male of their and his respective bodies issuing" On failure of these estates there were similar limitations to other members of the testator's family and their sons, sons' sons, etc. Further, the testator declared his will and intention to be "to settle and dispose of the estate in manner aforesaid as fully and completely as a Hindu born and resident in Bengal may give or control the inheritance of his estate, or a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England, whereby an entail may be barred, affected, or destroyed; provided always, and I hereby declare, that if any devisee or tenant-for-life, or in tail, or otherwise, or any person entitled to take as heir by descent or adoption or otherwise in any manner, under the limitations hereinbefore contained, shall permit or suffer the property so devised, etc., to be sold for arrears of Government revenue, etc., then and immediately thereupon the devise and limitations in this my will delared and contained shall wholly cease and determine as to him," etc. Finally, he appointed the trustees executors of his will. *J M* had no son born during the life of the testator. *G M*, the son of the testator, sued to have the will set aside, except as regards the payment of debts, legacies, and annuities. He also charged the executors with waste and asked for an account. *Held*, both in the Court below and on appeal, that the devises were not void, merely upon the ground that the estates were devised upon trust, and that the testator had power to create by means of a devise to trustees such estates and beneficial interest as he could have created without the intervention of trustees. But the entails intended to be created by the will were void, estates-tail being wholly opposed to the general principles of Hindu law. The plaintiff could not claim maintenance, sufficient provision having been previously made for him by his father. *Held* in the Court below, that, although the testator could not create an estate-tail, yet as it is clear that he intended to dispose of the whole inheritance, the devise must be construed as amounting to the creation of several successive life-interests, each commencing on the termination or the failure of the preceding, the whole completed by the gift of the entire estate of inheritance to take effect on the expiration of the last life-interest. The first series of such devises is not bad for remoteness, for there is nothing in Hindu law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect, if at all, immediately on the close of a life in being; therefore, as concerns only the succession of gifts for life only to *J M* and his sons, terminated by the absolute gift of the inheritance to an unborn person, the will is unimpeachable, because each of these gifts must take effect, if at all, at or before the close of a life in being; and the like conclusion would hold with regard to each of the other series of devises taken alone; but taken in the aggregate they may violate the rule against perpetuities; but the first series could not be affected by this, and therefore, as long as it stands, the plaintiff has no claim to a decision of the Court upon the validity of a devise which is subsequent in order of time. The plaintiff's suit must be dismissed. He is not entitled to immediate relief of any kind. *Held*, on appeal, that the devise to *J M* was valid, though it created only a life-estate. The intention of the testator was that *J M* should take an immediate vested beneficial interest in the real estate, subject to the charges for payment of legacies, annuities, etc., and in the R2,500 a month. The devise to *J M* was not bad for uncertainty. But the devises of estates-tail must be rejected as void, and cannot be converted by the Court into devises creating larger estates than the testator intended. The words of the devise cannot be construed to pass a general and absolute estate. As *J M* had no sons born in the lifetime of the testator, the devise to the use of the first and other sons successively of the eldest son of *J M* lapsed. By Hindu law a gift cannot operate to pass property unless the donee is in existence, so that, as soon as the property is relinquished and passes out of the donor, it may vest in the donee. That in the case of a will would be at

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

the time of the death of the testator, from which moment the will operates as a relinquishment (except in the case of a posthumous child of the testator or a son adopted by the widow of a testator). Therefore the devises to the sons of *J M* to be born or adopted after the death of the testator are not valid according to Hindu law. The gift to trustees does not cure the invalidity, for the law will not permit that to be done indirectly which cannot be lawfully done directly. The gift of the personalty fails because of the want of certainty at the time of the death of the testator, who would be the donee, and whether the donee was a person in existence or not. The gift over of the corpus of the personalty after the payment of the legacies and annuities was bad, and consequently the property in it is vested in the son and heir of the testator subsequently to the trusts for the payment of debts, legacies, and annuities, etc. But the right to receive the surplus rents and profits of the real estate and of the interest and dividends of the personalty, if there be any, is vested in *J M* for life, or until the time arrives for the conveying of the real estates, and the vesting of the corpus of the personalty. The heir-at-law cannot be disinherited by words expressing that he is not to take any benefit under the will. He will take by descent, by his right of inheritance, whatever is not validly disposed of by the will. Subject to the trusts for payment of the funeral and testamentary expenses and of the debts, legacies, and annuities, the plaintiff, as the heir-at-law of the testator, is entitled (notwithstanding the will) to a genetal estate of inheritance in reversion to the immoveable property of the testator, and by the terms of the will no estate, larger than an estate for life, has been validly created, andthere is a resulting trust in the plaintiff's favour. The plaintiff is not entitled to a declaratory decree against the unborn sons of *J M*, or the subsequent unborn devisees. The plaintiff is entitled to have the question of waste tried. He is also entitled to have an account of the moneys and securities which have come into the hands of the trustees, and to see how they have been applied, GANENDRA MOHAN TAGORE *v.* UPENDRA MOHAN TAGORE . . . **4 B. L. R. O. C. 103**

Held by the Privy Council, on appeal, that in construing transfers by gift among Hindus, a benignant construction is to be used, and the donor's intentions carried out, if ascertainable, to the extent and in the form which the law allows. Thus if an estate be given by a Hindu to *A* without words of inheritance, it will, in the absence of a conflicting context, give an estate inheritable as the law directs ; if to it be added an imperfect description of it as a gift of inheritance not excluding the inheritance imposed by law, an estate of inheritance would pass ; if a gift be in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction is to be rejected ; if a gift be to *A* and his heirs to be elected from a line other than that specified by law and, expressly excluding the legal course of inheritance, the gift is only good so far as consistent with the law—*A* would take a life-estate, and the other limitations would fail. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and by Hindu law no person can succeed as heir to estates described in terms which in English law would designate estates-tail. In order to make a gift under a will good by Hindu law, the donee, except in the case of an adopted child, or a child *en ventre sa mere*, must be a person in existence, capable of taking at the time when the gift takes effect. A child adopted after a man's death in pursuance of a power given by him is in contemplation of law begotten by that man. The law of wills among Hindus is analogous to the law of gifts ; and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred. A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator. *Soorjeemoney Dossee* v. *Denobundoo Mullick, 9 Moo. I. A. 123*, distinguished. Trusts are not unknown to Hindu law ; they can be created for carrying out such intentions as the law recognizes. There is no reason why a Hindu should not by will create an estate for life. Where the testator left his property to *A* for life with remainders, showing that *A* should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail :—*Held*, that *A* could not be declared entitled to more than a life-estate. Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid ; and that, as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property. The will directed that, as to the personalty, the trustees were, after all annuities and legacies had fallen in and been satisfied, to stand possessed of, and interested in, the corpus in trust absolutely for the person or persons entitled under the limitations in the will to the beneficial or absolute enjoyment of the real property. The High Court gave the tenant for life the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, but excluded him from any right to the subsequently accruing interest. *Held*, that he was entitled to the interest of the personalty after such falling-in and satisfaction. Where a son had received as a gift from his father property producing at the time

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

R7,000 a year, their Lordships, without deciding whether a son could be deprived of maintenance, considered that he had received an adequate maintenance. All the existing parties interested in a will being before the Court, a decree can be made as to the rights of all parties. *Lady Langdale* v. *Briggs, 8 De Gex M. & G. 391,* distinguished. JOTINDRA MOHAN TAGORE *v.* GANENDRA MOHAN TAGORE. GANENDRA MOHAN TAGORE *v.* JOTINDRA MOHAN TAGORE

9 B. L. R. P. C. 377 : 18 W. R. 359
L. R. I. A. Sup. Vol. 47

112. ——— **Bequest to a class**—*Vested and contingent interest.* A will made by a Hindu contained the following clause : " I bequeath to my elder daughter R25,000, subject to the condition that she shall invest the same in lands . . shall enjoy the produce . . . and shall transmit the corpus intact to her male descendants." Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently leaving the plaintiff, her husband, but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest. *Held,* that, as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed. SRINIVASA *v.* DANDAYUDAPANI

I. L. R. 12 Mad. 411

113. ——— *Void residuary bequests—Trusts for maintenance and religious trusts—Perpetuities.* A testator by his will directed as follows : " To my daughter *A B* I give the interest on a Government promissory note for R3,000, to be paid to her, as the same becomes due, during her life and if at her death there be any male issue of hers living, I give the said promissory note, to be divided equally among them if more than one, and if there be no such male issue living at the death of the said *A B*, the said security for R3,000 shall thereupon fall into the general residue of my estate." He also directed, after having bequeathed five, " one-sixth share shall be retained by my executors, and the income thereof accumulated and invested in Government securities until the son or sons of my eldest son *H*, if he shall have any son, shall attain full age, and shall thereupon be paid to such son or sons if more than one, in equal share . . . . and in case no son be born of my said eldest son, or no son shall attain full age, then such one-sixth share shall, on the death of the said *H*, be divided equally among such of my five others sons as shall then be living and the male issue of such of them as shall then be dead, such male issue taking the share of their respective fathers." Then after reciting that he was desirous of making, out of his immoveable property, a permanent provision for the benefit of his five younger sons and their male descendants, and that he was desirous of having the due forms of worship carried out after his death, he further directed that certain lands should be held by his executors on trust, to apply the rents and profits (i) in the celebration of certain poojas and in the performance of periodical turns of worship of the family thakoors and other religious festivals, at the same expense and in the same style as the testator himself had done, or at such expense and in such style as the executors should think fit ; and (ii) in the maintenance out of the surplus of the five younger sons, their wives, sons, and male descendants, and female descendants until their marriage. *Held,* that the bequests to the children of the daughter and to the children of *H* were void. CHUNDER MOONEE DASSEE *v.* MOTILALL MULLICK

5 C. L. R. 496

114. ——— *Gift to male issues—Remoteness—Applicability of English rules to Hindu wills.* A Hindu testator died in 1837, leaving four sons and two grandsons by a deceased son. By his will, dated in 1837, after directing that his property should be divided into five shares, of which his four sons were to take one each, and his two grandsons the remaining one, the testator made the following devise : " On the death of any or either of my said four sons, or of the said *R D* and *M D* (his grandsons) leaving lawful male issue, such male issue shall succeed to the capital or principal of the share, or respective shares, of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of 21 years ; but if any or either of my said four sons shall die without leaving any male issue, or if he or they shall die leaving such male issue, and the whole of such issue shall afterwards die under the age of 21 years, and without male issue, in such case the share or shares of my said sons so dying shall go to and belong to the survivors of my said sons and my said two grandsons for life and their respective male issue absolutely after their deaths in the same manner and proportion as is hereinbefore described respecting their original shares." *U*, one of the sons, died in 1853, leaving an only son *S*, born in the lifetime of the testator, who died shortly after his father intestate, and without male issue. In a suit by the widow of *S* claiming as his heir and representative to recover the share of *U* as having descended to *S* absolutely, and to obtain partition:—*Held,* that, inasmuch as *U* survived the testator, the gift to the male issue of the testator's sons was void for remoteness as including objects who might have come into existence after the testator's death, and therefore be incapable of taking. The rule that where there is a gift to a class, and some persons constituting that class cannot take in consequence of remoteness, the whole bequest must fail, as well as the principle of the English Courts in deciding questions of remoteness, that regard is to be had to possible and not to actual

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

events, is applicable to the interpretation of the wills of Hindus. The gift to the male issue being void, the subsequent limitations were also void. *S* therefore, and through him the plaintiff, was entitled to a share in such part of the testator's estate as by reason of the invalidity of the gifts in his will was undisposed of. SOUDAMINEY DOSSEE *v.* JOGESH CHUNDER DUTT . **I. L. R. 2 Calc. 262**

115. ——————— *Class of whom some only are in existence.* A bequest by a Hindu to a class of persons, some of whom are not in existence at the date of testator's death, is wholly void, and the fact that some of the class are then living and capable of taking will not enable the class to open out and let in any after-born members of the class. KHERODEMONEY DOSSEE *v.* DOORGAMONEY DOSSEE . . **I. L. R. 4 Calc. 455**
2 C. L. R. 112 : 3 C. L. R. 315

But *see* RAMLAL SETT *v.* KANAI LAL SETT
I. L. R. 12 Calc. 663

and RAI BISHEN CHAND *v.* ASMAIDA KOER
I. L. R. 6 All. 560 : L. R. 11 I. A. 164

116. ——————— *Gift to sons or daughters of M who may be alive at M's death—Gift to a class to be ascertained at future time—One member of such class in existence at testator's death—Tagore Case—Hindu Wills Act (XXI of 1870), s. 3—Succession Act (X of 1865), s. 98.* *P*, a Hindu, died in September 1886, and left two sons, *viz.*, the plaintiff and one *M*. By his will *P* left the residue of his property to trustees, who were to invest it in Government promissory notes and to pay the interest thereof to the wife of his son *M* and after her death to pay it to *M*. He further directed that after *M's* death "the amount of the interest is to be paid from time to time to his sons or daughters who may be alive according to what may be considered proper." By a subsequent clause he directed that, if there should be no one living of his son *M's* race or descent, the said Government notes should be given to a certain charitable fund. At the time of the testator's death the wife and one daughter (*C*) of *M* were living. Subsequently a son was born to *M*, but this child died shortly after its birth. The wife of *M* died in September 1889, and *M* himself died in October 1889. The plaintiff then filed this suit claiming the property in question as heir of the testator to the exclusion of *C*, the daughter of *M*. He contended that she could only claim as one of the class of "sons or daughters" of *M* mentioned in the will; that the gift to this class was void, as it included, or might include, persons who were not in existence at the time of the testator's death. *Held*, that *C* was entitled to the property under the will. The primary intention of the testator was that all the members of the class specified should take and his secondary intention was that, if all could not take, those

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

who could should do so. Here there was one member of the class who could take the property, and it might be inferred that the testator meant that she should take it, rather than that his intention should be defeated altogether. MANGALDAS PARMANANDAS *v.* TRIBHUVANDAS NARSIDAS
I. L. R. 15 Bom. 652

117. ——————— *Gift to a class some of whom are not in existence at testator's death—Right to live in a house given to parent and their children—Right of children under such gift independently of the parents.* *B*, who died in 1836, left a will, in the English form, whereby he bequeathed a house to his two sons *V* and *M*, and directed that they should not sell or mortgage it, but were either to live in it or enjoy the rents and revenue thereof for ever. He further directed as follows:—"My son-in-law *N* with his wife *S* and children to live in the house for ever." *V* died in 1838, and his four grandsons were the first four defendants in this suit. *M* became insolvent, and his interest passed to the Official Assignee, who was the fifth defendant. *S* was the testator's daughter, and she and her husband *N* went to live in the house in question when the testator first went to reside there, and they and their family had lived there ever since. Both the plaintiffs (her sons) were born in the testator's lifetime. *N* died in 1844. *S* died in 1887. Subsequently to her death, her children (the plaintiffs) continued to reside in the house and to occupy the rooms which they had always occupied until April 1889, when the first four defendants, who were grandsons of *V*, dispossessed them. The plaintiffs filed this suit, praying for possession of the rooms, and for a declaration that they and their families were entitled to reside there. The defendants contended (i) that there was no gift to *S's* children independently of *N*; (ii) that if there was a gift to the children, it was void, as being a gift to a class some members of which might have come into existence after the testator's death. *Held*, that the clause in the will could be construed as giving the right to live in the house to *S* and the children after *N's* death. The benefit was intended to be conferred not only on *N*, but also on his wife and children; that this was not a devise to a class in the sense in which that expression was used in *Leake* v. *Robinson, 2 Mer. 363, viz.*, a gift to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons. The benefit which each member of the class was to take was in no way dependent on the number of the children; each had a distinct and independent right to reside in the house, and the number of persons who might ultimately belong to the class was in no sense regarded as a criterion of the interest which each was to take. *Quære:* Whether *Soudaminey Dossee* v. *Jogesh Chunder*

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

Dutt, I. L. R. 2 Calc. 262, and *Kherodemoney Dossee* v. *Doorgamoney Dossee, I. L. R. 4 Calc. 455*, are not overruled by *Rai Bishenchand* v. *Asmaida Koer, I. L. R. 6 All. 560 : L. R. 11 I. A. 164*, KRISHNANATH NARAYAN *v.* ATMARAM NARAYAN

I. L. R. 15 Bom. 543

118. ——————————— *Gift to a class some of whom are not in existence at testator's death —Contingent gift—Subsequent gift valid, though prior gift void—Contingent gift—Succession Act, ss. 98, 100, 102, 103—Power of appointment given by will, effect of—General power of appointment.* *M P* by his will, dated 14th April 1873, after appointing his brother *J* to be his executor and directing the payment of legacies, bequeathed all his estate, moveable and immoveable, not otherwise disposed of to *J*, his executors, administrators and assigns, upon trust to collect outstandings and to pay debts and legacies and to stand possessed of the residue in trust (i) for his (the testator's) wife *B* and *A* the wife of his brother *J* during the life of both, or the survivor of them, for their or her sole use ; (ii) and from and after decease of the survivor of them in trust for the male issue of *J* if any there be ; (iii) and, in default of such male issue, in trust for any person or persons, in any shares or share, and in such manner as his brother *J* should by any deed or deeds or writing or writings appoint with or without power of revocation or new appointment. *J* proved the will, and as executor managed the estate until his death on the 17th October 1888. He had no male issue, but he had two daughters, who were the defendants in this suit. Shortly before his death, *viz.*, on the 7th October 1888, he made a will (as stated therein) in accordance with the authority given to him by the last clause of the will of *M P*. He directed that twelve months after the death of *B* (*M P's* widow), the estate should be divided equally between his two daughters, *K* and *M*. *K* was born in *M P's* lifetime, but *M* not until after his death. *Held*, that the trust in *M P's* will in favour of the male issue of *J* was void under the rule laid down in the *Tagore Case, 9 B. L. R. 377 : L. R. I. A. Sup. Vol. 47*. The testator plainly meant that the male issue of *J* living at the death of the survivor of the tenants for life should take the estate according to the rules of Hindu law, without distinguishing between those born in the lifetime of the testator and those born prior to that event, but subsequently to his death. At the death of the testator, *J* had no male issue, and the bequest was therefore a bequest to a person or persons not in being, and void. *Held*, also, regarding the subsequent creation of the power in favour of *J* as equivalent to a gift of the estate to him, that such gift was valid, although the prior gift was void. It was a gift to him if he should have no male issue ; a gift which, as he was alive at the death of the testator, was good under Hindu law. It was not a gift over to him on an indefinite failure of his male issue. It came into force immediately on the death of the surviving tenant for life if at that time he should have had no male issue alive between the death of the testator and the latter event. If a son had been born to him after the testator's death, the gift to him could not have come into operation. It was only in the event of no son being born to him that he could take. It would not therefore make any difference that the testator made an ineffectual and inoperative disposition in favour of such son if born. The rule of the *Tagore Case*, that the gift of an estate to take effect after the failure of previously created invalid estates is void, did not apply. *Held*, further, that the power of appointment given by *M P's* will operated to confer ownership upon *J* after the death of *B* upon his executing his will, and that the bequests given by his will to his daughters, the defendants, were valid bequests. *Held*, on appeal, that the devise in *M P's* will in favour of the male issue of *J* meant in favour of such male issue as should be living at the time of the death of the survivor of the tenant for life, whether born in the lifetime of the testator or after his death ; and as, at the death of the testator, *J* had no male issue, it was a gift to a person or persons not in being at that time, and therefore void under the rule in the *Tagore Case*. *Held*, also, that the devise over, in default of such male issue, was an alternative gift to take effect on an event to be determined at the death of the survivor of the tenant for life, and consequently was not open to objection. *Held*, further—as to the bequest to such person or persons as *J* should, by deed or writing, appoint—that there was no clear principle of Hindu law which forbade such a bequest being construed, and effect given to it, according to its plain and literal terms ; always subject, however, to the same restrictions as the Hindu testamentary law imposes on the testator himself, *viz.*, that the appointment should be made, so that (i) the appointee might be ascertained when the event arose on which he was to take (in this case, therefore, before the death of the surviving tenants for life), and (ii) the appointee be a person who was alive at the death of the testator. *Held*, accordingly, that in making this bequest the testator's intention was clearly to give *J* the ultimate disposal of the property, but not that it should form part of *J's* estate. The circumstance that English Courts, in such cases, treat the property, when the power has been exercised, as part of the estate of the appointor in the interest of creditors, and some other persons favoured by the Court of equity, could not affect the question as to what was the intention of *M P* when he made his will. Original Court's decree varied accordingly ; the share in the residue appointed by *J* to his daughter *M* (born after the testator's death) being declared to be part of *M P's*

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HINDU LAW—WILL—*contd.*

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(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

estate of which he died intestate, and to belong, therefore, to his (*M P's*) heir. JAVERBAI *v.* KABLIBAI . . . **I. L. R. 16 Bom. 492**

varying decree in s.c. in lower Court. **I. L. R. 15 Bom. 326**

119. ——————— *One member of such class in existence of date of gift—Will directing deed to be executed—Date of deed is date of gift.* A Hindu died in 1856 leaving a will whereby he directed his widow and executrix *L* to purchase an estate worth R20,000 for his grandson *T*, and that this estate should be conveyed to trustees, to be held by them in trust for *T* for his life or until his insolvency, and after his death for his son or other male heir. The executrix purchased the estate, but no trust deed was executed. *T* therefore brought a suit in 1871 to have the will carried out and a trust deed executed. *T R* (one of the plaintiffs in the present suit), who was *T's* uncle, was made a party to that suit, and a consent decree was passed which ordered that the executrix *L* and *T R* should execute a trust deed in accordance with the directions in the will. A deed was accordingly executed in 1876 whereby the property was conveyed to trustees on the trusts declared in the will. At the time of the testator's death, *T* had no sons, but at the date of the deed in 1876 he had one son *C* and in 1883 another son *G* (the defendant) was born to him. *T* died in 1890, *C* died childless in 1891. The plaintiffs, who were *T R*, the sol., and *T R's* son, the grandson, of the testator, now claimed the property. They contended that, as neither of *T's* sons were in existence at the date of the testator's death, they could not take under his will or under the deed which was afterwards executed to carry out the will; that, although at the date of the deed in 1876 one of the sons (*C*) was in existence, nevertheless he could only claim as one of a class, and that class was not ascertained or ascertainable at the date of the testator's death, nor at the date of the deed, *G* not having been born until 1883. The whole class was therefore excluded and the property after *T's* death was undisposed of. *Held*, that, in view of the direction of the will that a deed was to be executed which should declare the trusts of the property, it was the date of the deed subsequently executed which should be regarded in order to determine the validity of the limitations of the property bequeathed, and not the date of the testator's death, and that, under the deed, on the death of *T*, his son *C* became entitled to the property. In the case of a gift to a class if there is a person in existence at the time of the gift capable of taking and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift. TRIBHUVANDAS RUTTONJI *v.* GANGADAS TRICUMJI . . . . **I. L. R. 18 Bom. 7**

120. ——————— *Bequest to "children"—Meaning of the expression "children"—Gift to a class—Gift of income as required with trust for accumulation of balance.* Considerations which only show that a testator has made a disposition in his will which the Court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the Court to refuse to give effect to the plain language he has employed, *e.g.*, to read a bequest to "children" as a bequest to "sons" only. A bequest to "the children of *R* living at his decease," where some such children are in existence at the date of the will, need not be construed as a gift to a class of which some members might come into existence after the testator's death, when such a construction would manifestly defeat the primary object of the testator. A direction in a will to trustees to pay to a Hindu lady so much of certain dividends as she might from time to time require for her own use and support, etc., and to accumulate the surplus not required by her upon trusts, entitles the legatee to receive, if she requires it, the whole interest as it falls due, but not to claim afterwards amounts which she did not require as they fell due, and which have been accumulated, and this is so whether the trust for which accumulation is directed is valid or invalid. KRISHNARAO RAMCHANDRA *v.* BENABAI . . . **I. L. R. 20 Bom. 571**

121. ——————— *Members of a class not in existence at testator's death—Void gift—Intention of testator. Gift to widows of sons is a gift to a class.* A testator gave his property to his executors and trustees, who were to apply the income as directed. He further directed that after the death of the last survivor of his five sons the property should be divided as directed among the sons of his sons and daughters of his sons, and provision was made in certain events for the widows of his deceased sons. He left him surviving his five sons, three grandsons and three granddaughters. After his death two more granddaughters were born. *Held*, that the gifts to the sons, daughters, and widows of deceased sons were void. They were gifts to a class of which some members were not in existence at the time of the testator's death. The principle deducible from the authorities is that it is the primary duty of the Court so to construe the will as to carry out, as far as possible, the intentions of the testator, and that, if the Court comes to the conclusion that the testator had the primary intention of benefiting all the members of a class and if such intention fails by reason of its being void, yet if the Court can deduce a secondary intention that at least such members of the class should take as were in existence at the time of the

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testator's death, then effect should be given to such secondary intention but not otherwise. For the purpose of ascertaining these primary and secondary intentions, it is, of course, necessary to take all the material facts as to the testator's family into consideration and to read the various provisions of his will as a whole. A gift in a will to widows of sons is, in the case of Hindus, a gift to a class, as Hindus by their law are permitted to have more than one wife at the same time. *Ram Lal* v. *Kanai Lal, I. L. R. 12 Calc. 663*; *Krishnanath* v. *Atmaram, I. L. R. 15 Bom. 543*; *Mangaldas* v. *Tribhovandas, I. L. R. 15 Bom. 652*; *Tribhovandas* v. *Gangadas, I. L. R. 18 Bom. 7*; and *Krishnarao* v. *Benabai, I. L. R. 20 Bom. 571*, referred to. KHIMJI JAIRAM NARRAIJI *v.* MORARJI JAIRAM NARRAIJI **I. L. R. 22 Bom. 533**

122. ——— **Remoteness**—"*Descendants*"—*Bequest creating series of life-interests.* Under a bequest by a Hindu of R10 per month, followed by a direction to the following effect: "In this manner continue to pay in the legatee's name so long as he shall be alive; after his death continue to pay the same to his descendants from generation to generation": *Held, first*, that the legatee took only a life-interest under the bequest; *secondly*, that the words "from generation to generation" did not import more than what "absolutely" and "for ever" import in an English instrument; *thirdly*, that the descendants in existence at the time of the tenant-for-life's death took absolutely as a class; and, *fourthly*, that such descendants were entitled in equal shares to an amount sufficient to produce the monthly sum of R10. Remarks on the construction of Hindu wills. "Descendants" of the testator in a Hindu will would include children and grandchildren living at his decease, but not the testator's brother or widow. There is no rule of Hindu law imposing any restriction in point of time on the operation of a bequest creating a series of successive life-interests in each generation of a legatee's descendants; but, *semble*, the grounds of the rules against perpetuities are applicable to the property of Hindus, and the Court will be very reluctant to construe a Hindu will so as to tie up property for an indefinite period ARUMAGAM MUDALI *v.* AMMI AMMAL . . **1 Mad. 400**

123. ——— *Estate-tail—Accumulation.* A Hindu by his will directed that his estate should remain intact, and that the profits should be applied, in the first place, towards performing religious duties; and he provided that his immoveable property, business, and the capital stock thereof should also remain intact, and that his heirs, sons' sons, and great-grandsons in succession should be entitled to the profits, no person having any right of alienation. The testator then provided that his eldest son should act as manager and shebait and prepare accounts, and that he should have no power of alienation. He then made provisions for the payment of Government revenue, and declared that of the surplus profits, six-sixteenths should be applied in part towards the worship of his ancestral deities, and the residue towards the maintenance of all the members of the family and religious ceremonies; the remaining ten-sixteenths to be carried to the credit of his estate. In case of dispute between his eldest son and the testator's third wife, the mother of the testator's minor children, the testator directed that his eldest son should receive five-sixteenths of the ten annas share; if another son should be born of the testator's third wife, the remaining eleven-sixteenths was to go to her sons. If no son was born, then the eldest son was to take five and a half sixteenths, and the sons of the third wife the remaining ten and a half sixteenths, absolutely, as long as the family remained joint; the expenses of the debsheva and maintenance of the family were to be defrayed from the six annas share. In case of separation, the shares of the sons were to be placed to their respective credits every year, each son on attaining majority to be entitled to his share. The testator then provided that, in case of separation, his sons (with the exception of the landed properties and capital stock of the business, and the articles used by the idols) should be at liberty to take the moveable property absolutely according to the conditions laid down for the division of the ten annas share of the profits. He then provided for the maintenance of his third wife and minor sons out of the six annas share, each son on attaining majority to be entitled to his share under the will absolutely. After providing that his sons should live in his ancestral dwelling-house, but that none of them should have any power of alienation, the testator directed that, if any of his heirs died without male issue, the widow of such heir should receive maintenance only, and that his grandson by a daughter should get nothing, but his share should go over to the surviving sons. The testator finally directed that his eldest son, son's grandsons, and other heirs in succession, should perform the duties of kurta and shebait. In a suit by the widow of one of the testator's sons by his third wife, seeking to recover such a share of the testator's property as she would have been entitled to in case of intestacy:—*Held*, that the intention of the testator in disposing of the profits of the six annas share was not an intention to create a valid estate in the corpus in favour of any individual, but to tie up such corpus and to give the profits only to his male descendants; or, in other words, to create a sort of estate in tail male in the profits and that the bequest was void. *Held*, also, that the disposition of the ten annas share of the profits was void, there being in one event a direction to accumulate for ever without a disposition of the profits; and in the other event, the gift was void for the same reasons as the gift of the six annas share. *Held*, further, that the

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

disposition of the family dwelling-house, save in so far as it prohibited alienation, was good, and that there was a sufficient disposition of the moveable property. SHOOKMOY CHUNDER DAS *v.* MONOHARI DASI . . . . **I. L. R. 7 Calc. 269**
8 C. L. R. 473

Held on appeal by the Privy Council, affirming this decision, that the Hindu law does not allow such a disposition of property as would have been made by a testator whose intention was to give to his descendants the profits only of his estate for their benefit, and for the maintenance of religious services, but not to dispose of the estate itself. *Held*, that, according to the true construction of the will taken altogether, the testator's intention was not to pass the estate. This was confirmed by the clauses against alienation, and for the accumulation, as long as the family should remain joint, of a certain share of the profits; another portion being assigned for the religious services. This was not a case in which a testator, having expressed an intention that his estate should pass, had added a clause against alienation, in which case the latter clause would have been merely void. *Held*, accordingly, that this bequest was invalid. An account of the profits of the estate, from the date of the death of the testator, having been ordered by the decree of the Court below in favour of the inheritor of a share at whose instance the bequest was held invalid:—*Held*, that this did not mean that enquiry should be made into the different payments by the manager for the time being, or moneys taken out by the members of the family, but that it should be ascertained to what portion of the savings of the family, or of the accumulations made, such sharer would be entitled; and that this order was accordingly correct. SHOOKMOY CHUNDER DASS *v.* MONOHARI DASI . . **I. L. R. 11 Calc. 684**
L. R. 12 I. A. 103

124. ——————————— *Perpetuities—Trusts for worship—Recital in will as to intention to create perpetuity.* The testator by his will, dated 24th December 1873, which recited that he was desirous of disposing of his moveable and immoveable estate, so as to ensure a perpetual income for the worship of the family idols, and the maintenance of his heirs, after making provision for his funeral and shradh, and for the payment of a pecuniary legacy, gave and bequeathed all his moveable estate to the Official Trustee of Bengal for the time being, on trust out of the income to pay over the same to the trustees of the will, to whom he devised and bequeathed all his immoveable estate and the income of his moveable estate in the hands of the Official Trustee on trust for the maintenance of the family idol, subject to the following trusts:—In the first place, out of the income of the moveable estate, to keep all the houses in the trust premises in repair; in the second place, to suffer his

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

two widows, *K* and *L*, with their children and families to reside in the family dwelling-house during their lives and on their deaths to suffer all his heirs, according to the Hindu law of succession, to reside in such house for ever; in the third place, to pay out of the moveable estate to his wife *K* monthly R5 during her natural life, and to her children monthly R95, during the same period, and on her decease to her children and their heirs according to Hindu law, monthly R100 for ever, for their support and maintenance. (Similar trusts in favour of *L* and her children followed.) The residue of the income of the moveable estate was directed to be paid, by moieties to the widows, and on the death of each, her share was to be given to her issue in the same way as the other sums were directed to be paid to them respectively. *Held*, that the recital as to the testator's desire to establish a perpetuity did not invalidate the subsequent trusts, so far as they were otherwise good according to law; that the trust for the repair of the house was valid during the lives of the two widows and the survivor of them; that the trust to allow the two widows and their families to occupy the family dwelling-house was a trust for the widows and no one else, empowering them with their families and any others whom they might choose to make members of their families to reside in the house; that the trust to allow the testator's children, and their heirs on death of the widow, to occupy the house, was void; that the wives were entitled to R5 monthly, and the children of each, during the lives of their respective mothers, to R95, equally, that the trusts to pay R100 monthly to the children of each of the widows, on their respective deaths for ever, was void; that the gift of the residue to the widows in moieties was valid for their respective lives, but the gift to their issue on their respective deaths invalid, and that the trust for the worship, subject to the other trusts, so far as they were valid, was good. KALLY PROSONO MITTER *v.* GOPEE NATH KUR
7 C. L. R. 241

125. ——————————— *Bequest void for remoteness.* A Hindu testator died possessed of considerable property, and leaving a will, dated 12th September 1870, by which he appointed his wife executrix in the following words: "I appoint my wife, *A D*, executrix on my behalf, and vest her with entire authority and responsibility. After my decease, my said wife shall perform all duties according to my instructions embodied in the following paragraphs. [After reciting that his wife was a purda woman, and that his three sons were disobedient and extravagant, he appointed certain persons managers to perform certain duties under the will which could not be performed by a purda woman; and after various minor bequests and directions, he directed that, if it should appear to the executrix or executors for the time being that

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

they would not be able to protect the property, then they should form a family fund in the Government trust fund of all the property, and that the interest thereof should be employed in the performance of certain religious ceremonies and the family expenses, and then bequeathed as follows :— "Whatever Company's paper, moveable and immoveable property, etc., shall be formed into a family fund in the Government trust fund, my great-grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law. God forbid it, but should I have no great-grandsons in the male line, then my daughter's sons, when they are of age, shall take the said property from the trust fund and divide it according to the Hindu shastras in vogue." The testator left living at the time of his death one son's son, three sons, and a daughter and her sons, but no great-grandsons. *Held*, that the bequest to the great-grandsons was void and inoperative for remoteness, that the bequest to the daughter's sons was dependent on, and not alternative to, the gift to the great-grandsons, and therefore a bequest void under s. 103 of the Succession Act *Held*, also, that *A D* was invested under the will with only a representative character, and was therefore not entitled beneficially to any residue of the estate as against parties who might have any interest therein. BRAJANATH DEY SIRKAR *v.* ANANDAMAYI DASI

8 B. L. R. 280

126. ——— ——— *Successive interests, bequest of—Gift over after life-interest—Construction of gift to persons, and the heirs male of their bodies.* A will cannot institute a course of succession unknown to the Hindu law ; and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate-tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event ; but an important part of the rules relating thereto is : first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mullick Case, Soorjeemoney Dassee* v. *Dinobundoo Mullick, 9 Moo. I. A, 123*). Secondly, that a defeasance by way of gift over must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore Case, Jutteendro Mohun Tagore* v. *Ganendro Mohun Tagore, L. R. I. A. Sup. Vol. 47 : 9 B. L. R. 377*), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid. A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime ; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, on failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been born), making all persons interested parties, claimed that the trust and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime. *Held*, that the gift of the residue, so far as it purported to confer an estate of inheritance on the half-brothers and the heirs male of their bodies, were contrary to law and void ; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff ; and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed. KRISTOROMONI DASI *v.* NARENDRA KRISHNA BAHADUR

I. L. R. 16 Calc. 383
L. R. 16 I. A. 29

127. ——— ——— *Male issue—Gift to unborn person—Bequest void for remoteness.* Where a testator directed in his will that (first) "on the death of either of my four sons leaving lawful male issue, such issue shall succeed to the capital or principal of the respective shares of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of twenty-one years ; (second) if either of my four sons shall die leaving male issue and the whole of such issue shall afterwards die under the age of twenty-one years and without male issue, the share or shares of the sons so dying shall go and belong to the survivors of my said sons and to my two grandsons (named in the will) for life and their respective male issue absolutely after their death ; and (third) no the death of either of my sons without leaving any male issue his share is to go and belong to the survivors of my said sons and my two grandsons (named in the will) for life, and their respective male issue absolutely after their death in the same manner and proportions as hereinbefore described respecting their original shares : *Held, first*, that a vested interest was conferred upon the issue immediately upon the death of the father. The expression "to be paid or transferred to them respectively on attaining the age of twenty-one years" was a mere attempt to defer the period of payment to, or enjoyment by, such issue. *Second*, that the gift over was void, because the event on which it was to take

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HINDU LAW—WILL—*contd.*

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(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

effect might be indefinitely remote, even if the words "male issue" be construed as meaning sons. The meaning of "male issue" is not confined to sons alone. *Third*, that in accordance with the ruling in *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore, 4 B. L. R. O. C. 103*, a gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator cannot take effect; therefore, the gift to the unborn male issue of the sons and grandsons of the testator must fail. Where there is a gift to a class, and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail. *Held*, also, in accordance with *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore, 4 B. L. R. O. C. 103*, that a Hindu cannot, under any circumstances, make a gift by will to an unborn person or persons. BRAMAMAYI DASI *v.* JAGES CHANDRA DUTT . **8 B. L. R. 400**

128. ——————— *Gift void for remoteness.* Where a will gave the testator's widow permission to adopt and made provision for the adopted son entering into possession after her death, providing further that, if the adopted son died unmarried, the estate should pass to the testator's nearest sapinda gyanti:—*Held*, that the gift or bequest was, according to the doctrine laid down by the Privy Council in the *Tagore Case, 9 B. L. R. 377*, void and of no effect, because the nearest sapinda was a person who might not be in existence at the death of the testator, being one who could not be ascertained at that time. RAMGUTTEE ACHARJEE *v.* KRISTO SOONDUREE DEBIA . **20 W. R. 472**

129. ——————— *Hindu Wills Act (XXI of 1870), ss. 2, 3, and 6—Succession Act (X of 1865), ss. 98, 99 and 101—Gift to unborn persons.* A Hindu testator, by his will made in 1872, provided that, should he never have a son, his daughter's sons, when they came to years of discretion, should receive certain properties in equal shares; and he directed that, if his daughters had no sons, or should not be likely to have sons, then that such of his daughters as should reside in the ancestral family dwelling-house should receive a certain monthly allowance. The testator died in 1873, leaving only his daughters him surviving. *Held*, that, the will being governed by the Hindu Wills Act, the bequest to the daughter's son was valid. The rule of construction laid down in the *Tagore Case, 9 B. L. R. 377*, does not apply to wills of Hindus made since the passing of Act XXI of 1871. The words "create any interests" in the last proviso to s. 3 of the Hindu Wills Act should be read as referring only to the estate or interest which can be given, without reference to the further question to whom it can be given. ALANGAMONJORI DABEE *v.* SONAMONI DABEE

I. L. R. 8 Calc. 157 : 9 C. L. R. 121

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

Held, on appeal, that a gift by will to persons unborn at the time of the death of the testator, whether made prior or subsequently to the passing of the Hindu Wills Act, is void. The words "to create an interest," in the fifth proviso to s. 3 of the Hindu Wills Act, apply both to the quantity and quality of the interest created, and in their natural and ordinary meaning include the capacity of a donee to take. ALANGAMONJORI DABEE *v.* SONAMONI DABEE

I. L. R. 8 Calc. 637 : 10 C. L. R. 459

130. ——————— *Gift to grandsons after death of annuitants—Vesting, postponement of—Inconsistent declarations rejected.* A testator after charging certain annuities and other payments on his estate, gave the whole of his property to his grandsons in these words: "I give the whole of my property to my grandsons; but until those portions of the said property and the monthly stipends which I have given to some to enjoy for the natural term of their lives shall revert to the estate after their deaths, my estate shall not be divided amongst any of my grandsons or my great-grandsons. After all the pensioners have died, and after the enjoyment of the said pensions and property shall have ceased, the executor's power shall be annulled, and then my grandsons and my grandsons' heirs—that is to say, my great-grandsons—shall be able to divide the whole of the property and take their father's shares." He further directed that, for five years after his death, his family should remain joint, and allowed to his executors R400 for family expenses. *Held*, that the will contained sufficiently direct words of present gift to the grandsons, and that the clause in which it was attempted to postpone the enjoyment in possession, and other clauses which directed accumulation, must be rejected or disregarded as inconsistent or repugnant. *Held*, also, that the fact that the estate was subject to partial trusts or charges did not postpone the vesting in possession; nor would it, even according to English law, let in grandsons of the testator born after his death during the continuance of the trusts. *Alangamonjore Dabee* v. *Sonamoni Dabee, I. L. R. 8 Calc. 637*, discussed by PONTIFEX, *J.* KALLY NATH NAUGH CHOWDHRY *v.* CHUNDER NATH NAUGH CHOWDHRY

I. L. R. 8 Calc. 878 : 10 C. L. R. 207

131. ——————— *Gift of residue of income of property "to be used for the purposes of A and B as trustees think proper"—Gift to future children of testator's daughter—Power of appointment by will given to daughter in case no children born.* A Hindu inhabitant of Bombay by his will directed that his immoveable property in Bombay should be formed into a trust, of which he appointed certain trustees. Out of the net income of the trust, the trustees were to pay R50 to his

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wife and his daughter *M* for their personal expenses, and the residue was "to be used for the purposes of my wife and my daughter *M* and her children in such manner as my trustees think proper" *M* was thirty years of age at the hearing of the suit, and had no children. *Held*, that this was a gift of the residue of the net rents in equal shares to the wife and *M*, and that the survivor of them would be entitled during her life to the entirety of the said rents. The testator further directed that after *M's* death the trust was to stand valid during the lifetime of her children (if any), and that afterwards the heirs of such children should divide and receive the property. But if *M* had no children, then, after the death of the wife and *M*, the trust should become void, and the property was to be delivered to such person as *M* might by will appoint:—*Held*, (i) that the provision for the future children (if any) of *M* failed under the ruling in the *Tagore Case, 9 B. L. R. 377 : L. R. I. A. Sup. Vol. 47.* If any children should be born, the question would arise as to what would become of the property ; (ii) that the direction that the property should be delivered to such person as *M* should by will appoint was a valid direction, subject, however, to the limitation that the person to whom *M* appointed should be a person in existence at the death of the testator. BAI MOTIVAHU *v.* BAI MAMUBAI . **I. L. R. 19 Bom. 647**

In the same case on appeal to the Privy Council, *held*, that, even if Hindu wills are not be be regarded in all respects as gifts to take effect upon the death of the testator, they are generally to be regarded, as to the property which they can transfer and as to the persons to whom transfer can be made, as regulated by the Hindu law of gift. The *Tagore Case, 9 B. L. R. 377 : L. R. I. A. Sup. Vol. 47*, referred to and followed. A Hindu testator devised his immoveable property upon trust for the income to be appropriated to the maintenance of his widow and of his daughter, and of the children that might be born of her, the property to be divided among the heirs of such children. If there should not be any children born of his daughter, the property under the will should devolve upon those "to whom she might direct it to be delivered by making her will." The daughter having had no children, and questions having arisen between the daughter and the widow as to the administration of the estate according to the will :—*Held*, that there was not an absolute gift to the daughter, and that the persons to whom the property was given, though to be designated by her, did not take the gift from her, but from the testator. The judgment in *Hixon* v. *Oliver, 13 Ves. 108*, was not applicable. According to the already settled law, if the testator himself had designated the persons to take in the event of his daughter having no child, the gift would have been valid as an executory bequest, supported by preceding life-interests, but valid only under the following restriction, *viz.*, that to render the gift valid, the taker so designated must have been, either actually or in contemplation of law, in existence at the death of the testator. In this case, no principle of Hindu law stood in the way to prevent the testator from substituting his daughter for himself as the person empowered to designate ; but the same limitation held good as to the existence being requisite of the donee at the end of the donor's life, in order that the power might be validly exercised. There was no application of the English law of "powers," which was not fit to be applied generally to Hindu wills. Subject to the above restriction, the power in question was valid. It was not decided upon whom the property would devolve, if the power should not be exercised. BAI MOTIVAHU *v.* BAI MAMUBAI

I. L. R. 21 Bom. 709
L. R. 24 I. A. 73
1 C. W. N. 366

132. _____ *Executory bequest—Gift to an idol not in existence at the testator's death—Existence of idol—Dedication.* No valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death. The power conferred by will to make a gift must be a power to convey property to a person in existence, either actually or in contemplation of law, at the death of the testator. *Bai Motivahoo* v. *Bai Mamoobai, I. L. R. 21 Bom. 709 : L. R. 24 I. A. 73*, relied upon. UPENDRA LAL BORAL *v.* HEM CHUNDRA BORAL

I. L. R. 25 Calc. 405
2 C. W. N. 295

133. _____ *Succession Act (X of 1865), ss. 101, 102, and 159—Power of disposition of moveable property—Effect of subsequent void gift—Gift of balance of rents of immoveable property, in hands of trustees—Evidence of intention to limit duration of enjoyment of bequest—Gift by implication, what is necessary to constitute—Estates according to Hindu law in ancestral property, presumption as to—Effect of assent to provision of will by son of Hindu testator, where there is doubt whether property is ancestral or self-acquired.* Where it is doubtful whether the property with which the will of a deceased Hindu purports to deal is ancestral or self-acquired, the assent of his only son to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, will bind the latter as well as himself. A direction in the will of a Hindu to the following effect : "My remaining moveable property shall be dealt with by my son *G* according as he may think proper ; and when the sons of my son *G* shall attain the age of twenty-one years, the same shall be divided and duly received by *G* and his sons in equal shares," confers an absolute gift on *G*. If the gift over to *G's* sons, on their attaining the age of twenty-one years, were valid, the absolute

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*contd.*

estate of *G* would be liable to be divested on a son or sons of *G* attaining the age of twenty-one years, and asking for a division ; but that gift being clearly void under ss. 101 and 102 of the Succession Act (X of 1865), its insertion has no effect on the words of absolute gift preceding it. A direction in the will of a Hindu that immoveable property should be retained in the hands of trustees appointed by the will, and that the balance of the rents, profits, etc., after the payment of expenses, should be used and enjoyed by the testator's son *G* in such manner as he might think fit, with a provision empowering the sons of such son to call him to account for the management of the property on attaining the age of twenty-one, and with a direct, though void, gift over to the grandsons of such son, confers only a life-estate on the son *G*,—the vesting the property in trustees, the right of *G's* sons to ask for an account, and the gift over to *G's* grandsons, all showing an intention on the testator's part that the enjoyment of the bequest should be of limited duration within the meaning of s. 159 of the Succession Act (X of 1865). The constitute a gift by implication in a will, there must be a reasonable degree of certainty as to the persons intended to take and the nature of the estates which they are intended to take. A direction that until the son or sons of the tenant for life of immoveable property should attain a certain age, no person on behalf of such son or sons should ask the tenant for life for an account or raise any objection, does not sufficiently define the persons to take, or the estates in which they are to take, constitute a gift by implication. It would be difficult, if not impossible, for a Hindu to create by express terms the estates which arise by virtue of the doctrine of Hindu law in regard to the rights of male issue in ancestral property ; and even where the hypothesis that the testator intended (under a misapprehension of the law) to create such estates affords a key to the will and gives an adequate explanation of the various estates which would have to be implied in order to give full effect to the different directions contained in the will, yet if the estates cannot be implied from the words used in the will, the Court cannot create such estates for the testator by implication, since to do so would be to construct a will for him based upon his supposed intention, not on the words which he has used. ANANDRAO VINAYAK *v.* ADMINISTRATOR-GENERAL OF BOMBAY . . **I. L. R. 20 Bom. 450**

134. ——————— *Ancestral property—Trust by the father—Trust Act (II of 1882), s. 6—Will—Executors—Legatees.* A Hindu, who had a son living jointly with him, made a will whereby he appointed his son as heir to his whole property, which was ancestral, and also appointed trustees in order to administer the property until his son should attain 21 years. The trustees were empowered to take the whole of the property into their possession. *Held,* that the appointment of trustees was void since at the moment of the testator's death the whole of the property became the property of the son. *Held,* further, that no trust was created by the will because the property in question was not one transferable to the beneficiary. Certain legacies were devised by the will to relatives of the testator and others. *Held,* also, that as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies. HARILAL BAPUJI *v.* BAI MANI (1905) **I. L. R. 29 Bom. 351**

135. ——————— *Construction of will—Bequest to a class—Unborn person—Primary and secondary intentions.* There is no rule of Hindu Law to the effect that a gift *inter vivos* or a bequest to a class of persons some of whom are incapable of taking by reason of the rule that a gift is valid only, if it is made to a sentient being capable of taking, is void also as regards those who are in existence and capable of taking. The analogy of the rule of English law laid down in *Leake* v. *Robinson, 2 Mer. 868 : 16 R. R. 168,* in connection with class-gifts infringing the rule against remoteness does not hold good. Where a bequest to a class does not offend against the rule as to perpetuities, the only question is, what was the primary and what the secondary intention of the testator. In the case of a gift to a class consisting of children or descendants some of whom cannot take, the testator may be considered to have a primary and a secondary intention ; his primary intention is that all members shall take and his secondary intention is that, if all cannot take , those who can shall do so, and the general rule is that those members of the class take who are capable of taking at the death of the testator. *In re Coleman and Jarrom, 4 Ch. D. 165,* referred to. Where after giving prior life estates the testator bequeathed his properties to his sisters' sons, "that is to say, their sons, who are now in existence as also those who may be born hereafter" in equal shares : *Held,* that the secondary intention of the testator as deducible from the several clauses of the will was that at least those of the sisters' sons, who were in existence at the time of his death, though not specifically named, would take and such intention should be carried out. *Rai Bishen Chand* v. *Asmaida Koer, I. L. R. 6 All. 510 : L. R. 11 I. A. 164 ; Hurdey Narain* v. *Rooder Perkash, L. R. 11 I. A. 26 ; Ram Lal Set* v. *Kanai Lal Sett, I. L. R. 12 Calc. 663 ; Srinivasa* v. *Dandayudapani, I. L. R. 12 Mad. 411 ; Rai Kishori Dasi* v. *Dabendra Nath Sircar, I. L. R. 15 Calc. 409 ; Bhoba Tarini Debi* v. *Peary Lall Sanyal, I. L. R. 24 Calc. 646 ; Manjamma* v. *Padmanabhayya, I. L. R, 12 Mad. 393 ; Mangaldas Parmanandas* v. *Tribhuvandas Narsidas, I. L. R. 15 Bom. 652 ; Tribhuvandas Ruttonji Mody* v. *Gangadas Tricumji, I. L. R. 18 Bom. 7 ; Krishnarao Ram Chandra* v. *Benabai, I. L. R.*

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*k*) PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS—*concld.*

20 Bom. 571 ; Khimji Jairam Norronji v. *Morarji Jairam Narronji, I. L. R. 22 Bom. 536 ; Gordhandas Soonderdas* v. *Bat Ramcoover, I. L. R. 20 Bom. 449 ; Advocate General* v. *Karmali Rahimbhai, I. L. R. 29 Bom. 433 ; In re Moseley's Trusts, 11 Ch. D. 555 ;* and *Pearks* v. *Moseley, 5 App. Cas. 714 ;* referred to. *Rojomoee Dassee* v. *Troylukho Mohiney Dassee, I. L. R. 29 Calc. 260,* not followed. BHAGABATI BARMANYA *v.* KALI CHARAN SINGH (1905) . . . **I. L. R. 32 Calc. 992 s.c. 9 C. W. N. 749**

(*l*) BEQUEST EXCLUDING LEGAL COURSE OF INHERITANCE.

136. ——————— *Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.* A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows : "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs." In a suit between the survivor of the three nephews and the testator's heir :—*Held* by the High Court, that a gift by will upon condition that the subject-matter should descend to heirs male only is void by Hindu law. *Held,* also, that the gift was bad in so far as it restricted the subject-matter of the gift to male descendants, but that the language used relating to the gift over to the testator's surviving nephew or nephews was not inconsistent with the intention of the testator that the whole augmented share should pass to the plaintiff, the sole surviving nephew ; but that, having regard to the doctrine frequently acted upon by the Courts of India, he was only entitled to a life-estate therein. SHOSHI SHIKHURESSUR ROY *v.* TAROKESSUR ROY . **I. L. R. 6 Calc. 421**

Held, on appeal, by the Privy Council, that a gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favour of such person as can take, to the extent to which the will is consistent with the Hindu law ; and it is a distinct departure from that law to restrict the order of succession to males excluding females ; that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life. The gift over of a life-estate was competent ; it being to persons alive, and capable of taking on the death of the testator, and to take

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*l*) BEQUEST EXCLUDING LEGAL COURSE OF INHERITANCE—*contd.*

effect on the death of a person or persons then alive. On the death of one brother, his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor. TAROKESSUR ROY *v.* SOSHI SHIKHURESSUR ROY. SOSHI SHIKHURESSUR ROY *v.* TAROKESSUR ROY **I. L. R. 9 Calc. 952 : 13 C. L. R. 62, L. R. 10 I. A. 51**

137. ——————— *Restrictions on bequest—Restrictions upon estate bequeathed, effect of, if contrary to Hindu law—Restriction separable from valid dispositions.* In the will of a Hindu restrictions contrary to law made by the will upon the valid dispositions if they are separable from the latter, need not be held to invalidate them. Three documents, of which the second and third were executed by a testator after intervals of some years, together formed his will, containing a bequest of estate to his sons. This was held valid by the High Court, although the testator in the later documents had endeavour to impose restrictions upon the estate contrary to law, and therefore inoperative ; the principal of them being (*a*) prohibition of actual possession or alienation, by any son, of his share in the estate ; and (*b*) direction that the whole estate should be managed in a common cutcherry, with religious trusts, the sons to get only the remaining amount of profit according to their respective shares in perpetuity. At the same time, the Court held good a provision for defraying the marriage expenses of sons from joint funds, with the direction in the will that until the youngest son should attain majority none of the sons should have a right to partition ; any son who should separate from the others getting, up to the time of his attaining majority, merely maintenance, and not the profits accruing upon his share. A gift over was that on the death of a son surviving sons should take his share proportionately to their own, and that, if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share : the first part of this provision was held good, not being invalidated by the second, which, as constituting a gift to an indefinite class, would take effect. The judgment of the High Court to the above effect was upheld by the Judicial Committee. RAIKISHORE DASI *v.* DEBENDRANATH SIRCAR . . . **I. L. R. 15 Calc. 409 L. R. 15 I. A. 37**

138. ——————— *Construction of will—Bequest to a female on her death to her adopted son—Interpretation of the word 'Malik'—Bequest not conditional on adoption.* A testator bequeathed all his property to *S* and on her death to her adopted son *K*. *K* being the daughter's son of *S* could not be adopted under the Hindu Law. The testator further directed under the will that his daughter and

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*l*) BEQUEST EXCLUDING LEGAL COURSE OF INHERITANCE—*concld.*

his predeceased son's daughters were to be excluded. *Held*, that it was the intention of the testator to make *K* the object of his bounty irrespective of adoption. *Fanindra Deb* v. *Rajeswar*, *I. L. R. 12 I. A. 72*, referred to. MURARI LALL *v.* KUNDAN LALL (1909) . **I. L. R. 31 All. 339**

(*m*) RESIDUARY ESTATE.

139. ——————— *Residue undisposed of—Balance undispesed of, disposition of—Bequest to heir, effect of, on his right to residue—Disherison.* In a suit in which a will of one *L C* was alleged to be a forgery:—*Held*, on the evidence, that the will of *L C* was genuine. By the said will, *L. C* had directed R25,000 to be paid to the plaintiff's mother and her family. He appointed the defendant's father (*T L*) his executor, and gave him control and authority over the business. He did not, however, in express terms dispose of the residue of his property, and there was, after providing for the above legacy of R25,000 a considerable balance to the credit of the business at the time of the testator's death. *Held*, that such balance was a residue undisposed of by the will, and that the plaintiff was entitled to a half share of such residue which was to be divided as if there was no will. But the business itself from the date of the testator's death was to go to *T L*. Mere bequests of special portions of the testator's estate to the heir without language of disherison do not exclude him from the undisposed of residue. TOOLSEYDAS LUDHA *v.* PREMJI TRICUMDAS **I. L. R. 13 Bom. 61**

(*n*) SURVIVORSHIP.

140. ——————— *Gift to two persons for life jointly—Gift to a daughter and her children—Effect of power giving to a daughter if she had no children to dispose of property bequeathed by will—Bequest for house expenses—Bequest by testator of his wife's ornaments—Election.* *J*, a Hindu inhabitant of Bombay, died in November 1869, leaving a will, dated October 1869. He left a widow and one child, the plaintiff *M*, then about fourteen years of age. She had then been married for two years, but up to the time of this suit she had had no children. By this will the testator directed that his immoveable property in Bombay should be formed into a trust, and that the trustees were to collect the income thereof. By the fourteenth and fifteenth clauses of his will he directed that out of the trust fund R50 per month were to be paid both to his wife and daughter for their personal expenses. In the seventh clause he directed as follows: "After deducting expenses . . money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife

HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*n*) SURVIVORSHIP—*contd.*

and my daughter *M*, and for the children of my daughter *M* after her death agreeably to the fourteenth and fifteenth clauses of this will; and after paying the same, whatever income may remain is to be paid for the purposes of my wife and my daughter *M* and her children in such manner as my trustees may think proper." The eighth clause directed that, if *M* should have children, the trust should stand valid during the lifetime, and the trust-property should then be apportioned amongst the heirs. It then proceeded: "But should there be no children born of the womb of my daughter *M*, then after the death of *M* and my wife this trust is to become void, and the property delivered to such persons as my daughter *M* may direct it to be delivered by making her will." *Held*, (i) that the direction in the seventh clause amounted to a gift of the residue for the use of the testator's wife and *M*; that his wife and *M* were, under the clause, entitled to the income of the fund in equal shares during their joint lives, and that the survivor would take the whole for her lifetime. (ii) That *M* having no children at the date of the testator's death, the provision for her future children was void under the ruling in the *Tagore case, 9 B. L. R. 377: L. R. I. A. Sup. Vol. 47.* (iii) That the direction, that if *M* had no children she might dispose of the property by will, was valid, and amounted to an absolute gift to her if she gave the requisite direction by will. The gift did not offend against the rule in the Tagore case. The persons to whom the property is given would take it from *M*, and not from the testator. The testator by his will further directed that R750 a month were to be paid to his wife for the purpose of defraying the expenses of the house and the worship of thakur (God). *Held*, that no part of this sum could be awarded to *M*. The testator expected that she would live with the testator's wife and made no provision for the event of her ceasing to do so. The testator also disposed of ornaments described as "my own and my wife's ornaments." *Held*, that the clause did not raise a question of election. The wife's stridhan ornaments would not fall within the clause if there were other ornaments which she wore, and of which the testator had power to dispose. BAI MAMUBAI *v.* DOSSA MORARJI . . **I. L. R. 15 Bom. 443**

141. ——————— *Contingent executory bequest over—Period of distribution of property bequeathed—Succession Act (X of 1865), s. 111—Hindu Wills Act (XXI of 1870).* *A* Hindu at his death left three sons, the eldest of full age, and the other two minors. In his will were the directions: "My three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons, dying sonless, the surviving sons shall be entitled to all the properties equally." *Held*, that these words gave a legacy to the survivors contingently on the happening of a

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*contd.*

(*n*) SURVIVORSHIP—*concld.*

specified uncertain event, which had not happened before the period when the property bequeathed was distributable, that period of distribution being the time of the testator's death. It would be impossible to decide that the period was postponed by reason of the personal incapacity of some of the beneficiaries. Therefore, under s. 111 of the Succession Act, 1865, applicable under the Hindu Wills Act, 1870, the legacy to the surviving brothers could not take effect, and the original gift to the testator's three sons was absolute to each in equal shares and indefeasible on his death. NORENDRA NATH SIRCAR *v.* KAMALBASINI DASI

I. L. R. 23 Calc. 563
L. R. 23 I. A. 18

(*o*) FAMILY, MEANING OF.

142. ——————— *Specific trusts —Residue, illegal disposition of the—Period of trust, where one period prescribed illegal and the other legal.* A testator, devised certain property in trust for the maintenance and support of his family. *Held* (*per* WHITE, *J.*)—The word "family" means the relatives of the testator, whether connected by marriage or blood, who were living at the time of the testator's death and then formed part of his household and were maintained by him. *Held* (by the Appeal Court)—It is doubtful whether the above construction was not too wide and whether the more nearly true meaning may not be "the testator's descendants and their wives living at the time of his death." Specific trusts or specific estates good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder. *Tagore* v. *Tagore, 9 B. L. R. 377,* and *Krishna Ramani Dasi* v. *Ananda Krishna Bose, 4 B. L. R. O. C. 231,* followed. Where a testator prescribes two distinct periods during each of which he wishes the trusts to be in force, and one of such periods is legal and the other not, the trust will take effect during the period which is legal. KHETTER MOHAN MULLICK *v.* GUNGA NARAIN MULLICK . . . **4 C. W. N. 671 note**

(*p*) MAINTENANCE.

143. ——————— *Right of daughter to maintenance after her marriage—Married daughter in good circumstances—Trust for maintenance.* A Hindu testator, after making the Administrator-General of Bengal executor and trustee of his will, and giving his daughter an annuity of R5 a month for her life provided for the payment to *G C B,* whom he constituted the guardian of his daughter and of his only son during their minority of the sum of R225 "monthly and every month for the maintenance and education of my said son and the support of my said daughter and such other persons as live in my house and are supported at my expense," and further provided that all "the residue of my estate, moveable and immoveable, with all accumulations and additions" should be conveyed to his son on his attaining majority, "subject nevertheless to the trust of maintaining my said daughter." The daughter had married a man of means, and did not need any maintenance. *Held,* in a suit by the daughter for a construction of the will and for a specific sum to be set apart for her maintenance, that the plaintiff was not entitled to anything by way of a separate allowance for maintenance; she was only entitled under the will (apart from her annuity of R5 a month) to be provided for in case she were otherwise unprovided for. Where the construction of a will was not so difficult as to have required the assistance of the Court, it was *held* to be not a case where the estate should bear the costs. The suit was therefore dismissed with costs. NARAYANI DASI *v.* ADMINISTRATOR-GENERAL OF BENGAL

I. L. R. 21 Calc. 683

144. ——————— *Will, construction of gift to female—Gift for maintenance may be of an absolute estate—Where testator gives a female immoveable property for maintenance and makes several devises of other properties to others and adds a clause declaring the gifts to be absolute, the gift for maintenance will be an absolute gift—Devise in possession of land under an invalid will must be presumed to prescribe for the estate given by the will.* An absolute gift of immoveable property to a widow for maintenance is not unknown to Hindu for repugnant to their ideas or propriety. In construing a will, every portion of it must be given the full effect which, on a natural and grammatical construction of the will, must be allowed to it and no portion of it ought to be rejected, unless such a construction makes the provisions of the will inconsistent with each other or leads to results, which must be repugnant to the testator's ideas of propriety. Where a Hindu testator by his will gave immoveable property to a widow stating it to be for her maintenance and, after making various other gifts added a clause by which he declared that all gifts under the will should be absolute, there is no such inconsistency or repugnancy in giving the clause its natural and grammatical construction by making it applicable to the gift to the widow, and she will accordingly take an absolute interest in the property. By so construing the will, the subsequent clause only removes the ambiguity in the case of all the gifts and does not alter any material portion of the will. The statement by the testator that he gave such property 'out of sympathy' will not affect the absolute nature of the estate given, if there was no legal obligation on him to provide for such widow's maintenance in his will. Where a person takes possession of property under a will, which cannot legally operate to convey such property, the person so entering on possession

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HINDU LAW—WILL—*contd.*

5. CONSTRUCTION OF WILLS—*concld.*

(*p*) MAINTENANCE—*concld.*

must be presumed to prescribe for the interest, which the will purports to give him; and the burden of proving that he prescribed for something less will be on the party alleging it. RAMACHANDRA NAIKER *v.* VIJAYARAGAVULU NAIDU (1908) . . . **I. L. R. 31 Mad. 349**

6. REVOCATION OF WILL.

1. _____ *Mitakshara—Inheritance—Two grandsons through the same daughter take as joint ancestral estate—Practice—Costs of printing record.* Amongst Hindus actual destruction of a will, or its formal revocation, is not essential to constitute revocation. A Hindu will was executed in 1866, and registered while the testator was very ill. He recovered, and executed a power-of-attorney appointing a *vakil* to obtain the will out of the registry, but owing to some blunder it remained there till he died in 1869. There was some evidence that he thought he had destroyed it. His intention not to leave it as it was was established. *Held*, that it had been revoked. VENKAYYAMMA GARU *v.* VENKATARAMANAYYAMMA (1902) . . . **I. L. R. 25 Mad. 678: L. R. 29 I. A. 156: s.c. 7 C. W. N. 1**

2. _____ *Revocation—Will of self-acquired property of Hindu testator not revoked by birth of posthumous son—Hindu Wills Act (XXI of 1870), ss. 2 and 3—Indian Succession Act (X of 1865), ss. 56 and 57.* Under ss. 2 and 3 of the Hindu Wills Act and s. 57 of the Indian Succession Act, a will to which the Hindu Wills Act applies can be revoked only in the modes provided in s. 57 of the Succession Act. The incorporation of s. 57 of the Indian Succession Act in the Hindu Wills Act and the enactment of the provision of s. 3 of the latter Act show clearly that the Legislature intended that the rule of revocation by a change of circumstances should not be applied to the wills of Hindus. S. 57 of the Succession Act is exhaustive, as it provides that a will shall not be revoked except in certain ways. Wills of Hindus to which the Hindu Wills Act applies, can be revoked only in one of the modes, excepting marriage, provided in s. 57 of the Succession Act. A will by a Hindu of self-acquired property to which the provisions of the Hindu Wills Act apply, is not therefore revoked by the birth of a posthumous son. The same rule must be applied in the case of wills not governed by the Hindu Wills Act, as to apply a different rule to them will be inconvenient as well as illogical. SUBBA REDDI *v.* DORAISAMI BATHEN (1907) **I. L. R. 30 Mad. 369**

7. SELF-ACQUIRED OR FAMILY PROPERTY.

1. _____ *Will by member of joint family—Nature of property bequeathed—Self-acquired or family property* The question raised

HINDU LAW—WILL—*concld.*

7. SELF-ACQUIRED OR FAMILY PROPERTY—*concld.*

in a suit was whether certain property which a Hindu testator had purported to deal with by his will was his self-acquired property or was the family property of the testator and his son and grandson. *Held*, that the separate property of the testator would be (i) property acquired by his own exertions, (ii) without the aid of family funds, (iii) which he did not mix with family property with the intention of adding it to the family funds. Also, that a statement contained in the will was not evidence on the question whether the property dealt with by the will was or was not self-acquired, nor was the conduct of the testator's son in not objecting to the will, nor was a so-called reference to arbitration by the son and grandson. The fact that the property in the hands of the testator had increased during a long period to a considerable value from a small nucleus of family property was not sufficient to rebut the presumption that it was all family property. *Ramanna* v. *Venkata, I. L. R. 11 Mad. 246*, distinguished and explained. TOTTEMPUDI VENKATARATNAM *v.* TOTTEMPUDI SESHAMMA (1904) **I. L. R. 27 Mad. 228**

HINDU LAW—WORSHIP.

See CIVIL PROCEDURE CODE, 1882, s. 11. **I. L. R. 32 Calc. 102 10 C. W. N. 505**

See HINDU LAW—ENDOWMENT.

See IDOL.

_____ *Hindu temple—Temple of Shiva in Southern India—Right of Shanars or Nadars to worship—Custom—Trustee surrendering decree on appeal—Power of Court to join beneficiaries as co-plaintiffs—Compromise, unlawful—Civil Procedure Code (Act XIV of 1882), ss. 375, 437—Breach of trust—Introducing new worshippers contrary to usage.* Where it was proved that men of the "Shanar" or "Nadar" caste were by custom not allowed to worship in a temple dedicated to Shiva in which the customary ceremonies of Hindu worship were carried on: *Held*, that arguments directed against the soundness of the doctrine as to the exclusion of the Nadars and showing inconsistencies in the treatment of the Nadars by the worshippers at the temple in other respects were of no avail and could not be entertained. Where the hereditary trustee of the temple after a decree had been made in his favour as representing the worshippers at the temple and pending an appeal by the Shanars, sought to enter into a compromise with them by admitting their right to worship in the temple contrary to the decision of the Court, and it was alleged and not disproved that he did so for a corrupt motive: *Held*, that the Appellate Court very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs. The principles applicable to the case of a trustee, who betrays his trust by surrendering a decree

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HINDU LAW—WORSHIP—*concld.*

were well stated and applied by the High Court. In all cases where the Court sees that the trustees are wholly uninterested in the matter and there are parties, who are materially interested in the question, it never makes a decree in the absence of those parties who are alone interested in the contest; *Clegg* v. *Rowland, L. R. 3 Eq. 368, 373,* followed. It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it. *Attorney-General* v. *Pearson, 8 Merivale 353; 17 R. R. 101.* SANKARALINGA *v.* RAJESWARA DORAI (1908) **I. L. R. 31 Mad. 236**
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HINDU TEMPLE.

See PRE-EMPTION **I. L. R. 26 All. 389**

HINDU WIDOW.

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See ADOPTION . **I. L. R. 33 Bom. 107**

See CHAMPERTY, CRIMINAL PROCEDURE CODE, MAINTENANCE.

See HINDU LAW . **I. L. R. 31 All. 161**

See HINDU LAW—ALIENATION —WIDOW.

See HINDU LAW—PARTITION—RIGHT TO PARTITION—WIDOW.

See HINDU LAW—PARTITION—SHARES ON PARTITION—WIDOW.

See HINDU LAW—REVERSIONERS.

See HINDU LAW—WIDOW.

See LAND ACQUISITION ACT (I OF 1894). S. 32 . **I. L. R. 35 Calc. 1104**

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 125 . **I. L. R. 29 All. 239**

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——— power of alienation of—

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——— power of, to adopt—

See HINDU LAW—ADOPTION —REQUISITES FOR ADOPTION—AUTHORITY.

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See HINDU LAW — ADOPTION—FAILURE OF ADOPTION OR OMISSION TO EXERCISE POWER.

——— *Mortgage—Benamidar —Assignment of mortgage—Representatives of deceased mortgagee—Letters of administration, if obligatory in the case of Hindus.* The widow of a Hindu sufficiently represents her deceased husband when there is no other person, short of obtaining letters of administration to his estate who can be said to represent his estate. It is not obligatory on a Hindu heir to obtain letters of administration to the estate of the last owner. JOGENDRA CHUNDER DUTT *v.* APURNA DASSI (190) **13 C. W. N. 1190**

HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856).

See HINDU WIDOW **I. L. R. 31 All. 161**

1. ——— **s. 2**—*Hindu widow, re-marriage of —Effect of re-marriage on rights of inheritance accruing after such re-marriage.* The right of a Hindu widow, who re-marries during the lifetime of her son, to succeed by inheritance to the ancestral property of such son on his death, is not within any of the exceptions referred to in s. 2 of Act XV of 1856, and she is entitled to succeed notwithstanding her re-marriage. *Chamar Haru* v. *Kashi, I. L. R. 26 Bom. 388,* referred to and followed. LAKSHMANA SASAMALLA *v.* SIVA SASAMALAYANI (1905) . . **I. L. R. 28 Mad. 425**

2. ——— *Hindu widow—Re-marriage permitted by rules of caste—Widow not deprived of property of her first husband.* Where the rules of her caste recognise the right of a Hindu widow to re-marry, a re-marriage has not the result of divesting her of the property of her first husband. *Har Saran Das* v. *Nandi, I. L. R. 11 All. 330. Dharam Das* v. *Nand Lal, All. Weekly Notes (1889) 78,* and *Ranjit* v. *Radha Rani, I. L. R. 20 All. 476,* referred to. *G* died, leaving a widow *T* and a mother *K. T,* being permitted to do so by the custom of the caste, married again. *T* transferred her interest in her first husband's property to D and *S. K* purported to sell the same property to *L,* who mortgaged it to *K P* and *N R. Held,* on suit by *D* and *S* for recovery of the property transferred, that the plaintiffs were not bound to

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HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856)—*concld.*

reimburse the defendants (*K*, *L* and *L's* mortgagees) in respect of any debts of *G* which they might have paid. KHUDDO *v.* DURGA PRASAD (1906) . . . **I. L. R. 29 All. 122**

——— **ss. 2, 3, 4, and 5**—*Hindu widow—Gift of a son by first husband in adoption by widow after her re-marriage.* According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu law a right to give her son in adoption the Hindu Widow Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it. The right of guardianship, which under the provisions of Act XV of 1856, s. 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent. *Panchappa* v. *Songanbasawa, I. L. R. 24 Bom. 89*, considered. PUTLABAI *v.* MAHADU (1908)) . **I. L. R. 33 Bom. 107**

HINDU WILLS ACT (XXI OF 1870).

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7 B. L. R. 563

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HINDU WILLS ACT (XXI OF 1870)—*concld.*

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I. L. R. 35 Calc. 575

——— **holder in due course**—

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I. L. R. 36 Calc. 239

HOLDING.

See AGRA TENANCY ACT, ss. 22, 32 (2).
I. L. R. 31 All. 49

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10 C. W. N. 343

See BENGAL TENANCY ACT (VIII OF 1885), s. 16 . . **12 C. W. N. 436**

See EJECTMENT, SUIT FOR.
I. L. R. 34 Calc. 396

HOLIDAY.

See CIVIL PROCEDURE CODE, 1882, s. 307.
I. L. R. 20 Bom. 745

See LIMITATION ACT, 1877, s. 4.
I. L. R. 20 Mad. 469

See SANCTION FOR PROSECUTION—EXPIRY OF SANCTION . **I. L. R. 22 Calc. 176**

——— **time expiring on**—

See BENGAL RENT ACT, 1869, s. 29.
I. L. R. 4 Calc. 50

See DECREE—CONSTRUCTION OF DECREE—PER-EMPTION . **I. L. R. 3 All. 850**
I. L. R. 7 All. 107

See LIMITATION ACT, 1877, s. 5.

1. ——— **Good Friday**—*Admission of plaint.* The reception of a plaint for arrears of rent by the Collector on Good Friday, although by the circular order of the Board of Revenue such day is an authorized holiday, is not illegal. GOBIND KUMAR CHOWDHARY *v.* HARGOPAL NAG
3 B. L. R. Ap. 72 : 11 W. R. 537

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HOLIDAY—*concld.*

2. ——— **Sunday**—*Admission of plaint.* A plaint may be received and admited by a Munsif on a Sunday or other holiday. UNUNTORAM CHATTERJEE *v.* PROTAB CHUNDER SHIROMONEE **16 W. R. 231**

3. ——— *Trial on Sunday—Fining witnesses for non-attendance—Penal Code, s. 174.* When a Magistrate, while travelling in his district, tried a case partly at one place and then fixed Sunday at noon for the further trial of the case at another place, and the witnesses came three hours late and the Magistrate having then gone on they were subsequently sentenced by him under s. 174 of the Penal Code, for being intentionlly absent:—*Held,* that the proceeding was irregular. The Magistrate was wrong in fixing Sunday for the trial of the case, and the witnesses might, on the ground that it was a recognized holiday, have refused to attend. QUEEN *v.* HARGOBIND DATTA SIRKAR **8 B. L. R. Ap. 12**

4. ——— *Judicial work—Duty of Magistrate.* Magistrates should not take up judicial work on Sundays. GRIJAMONEE *v.* ISHENCHUNDER . . **W. R. 1864, Cr. 2**

5. ——— *Judge, duty of—Local investigation.* A Judge should not held a local investigation on Sunday. JHUBBOO SAHOO *v.* JUSSODA KOER . . . **17 W. R. 230**

6. ——— **Close holiday**—*Bengal Civil Courts Act (VI of 1871), s. 17—Proceedings on civil side of District Court during vacation—Jurisdiction—Irregularity—Consent of parties—Waiver.* S. 17 of the Bengal Civil Courts Act (VI of 1871) was framed in the interests of the Judges and officials of the Courts and probably also in the interests of the pleaders, suitors, and witnesses, whose religious observances might interfere with their attendance in Courts on particular days. On a close holiday, a Judge might properly decline to proceed with any enquiry, trial, or other matter on the civil side of his Court: and any party to any judicial proceeding could successfully object to any such inquiry being proceeded with, and, in the event of any such enquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. But, at the furthest, the entertaining and deciding upon a matter within the ordinary jurisdiction of the Court on a close holiday is an irregularity the right to which can be waived by the conduct of the parties; and a party, who on a close holiday does attend, and without protest takes part in a judicial proceeding, cannot afterwards successfully dispute the jurisdiction of the Judge to hear and determine such matter. *Bernett* v. *Potter, 2 C. & J. 622; Andrews* v. *Elliott, 5 E. & B. 502: 6 E. & B. 338;* and *Bisram Mahton* v. *Sahib-un-nissa, I. L. R. 3 All. 333,* referred to. RAM DAS CHACKARBATI *v.* OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY **I. L. R. 9 All. 366**

HOMESTEAD.

See BENGAL TENANCY ACT. **I. L. R. 31 Calc. 1014**
8 C. W. N. 454

See BENGAL TENANCY ACT, S. 182. **10 C. W. N. 944**

See OCCUPANCY TENANT. **I. L. R. 28 Bom. 72; 94**

HOMICIDE OR EPILEPSY.

See MEDICAL JURISPRUDENCE. **13 C. W. N. 622**

HOROSCOPE.

See EVIDENCE ACT, SS. 17 AND 18. **I. L. R. 17 Mad. 134**

See EVIDENCE ACT, S. 32, CL. 6. **I. L. R. 9 Calc. 613**
I. L. R. 17 Calc. 849

HORSE RACING MACHINE.

See GAMBLING ACT, S. 11. **I. L. R. 31 Calc. 542**

HOSPITAL, BEQUEST TO.

See WILL—CONSTRUCTION—CHARITABLE GIFT . . **6 C. W. N. 321**
14 B. L. R. 442

HOTEL-KEEPER AND GUEST.

1. ——— **Lodging or boarding-house-keeper and lodger**—*Inn-keeper—Liability for goods lost.* This suit was brought to recover the value of certain articles stolen from the plaintiff's rooms at an hotel in Bombay. The defendant was the licensed proprietor of the hotel, who was in the habit of entertaining, for shorter or longer periods, all comers willing to pay the usual charges, and the plaintiff was an exchange broker, doing business in Bombay, who had lived at the hotel for more than a year, paying for his board and lodging at first by the day, and afterwards by agreement at the rate of so much a month, but neither was the plaintiff under any obligation to remain, nor the defendant to accommodate him for any fixed time. *Held,* that the relation of inn-keeper and guest (and not that of boarding-house-keeper and lodger) subsisted between the parties; and that the defendant was *primâ facie,* and without proof of actual negligence, liable to make good the loss sustained by the plaintiff. There is no law but the Common Law of England to regulate the relation of inn-keeper and guest in Bombay, in a case between a European and Parsee. WHATELEY *v.* PALANJI PESTANJI **3 Bom. O. C. 137**

2. ——— **Liability of guest at hotel in respect of furniture used by him**—*Contract Act (IX of 1872), ss. 148, 1[illegible]7, 152—Contract—Bailment—Liability of bailee.* The defendant's wife went to stay at a hotel owned by the plaintiffs. While there, she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife and

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HOTEL-KEEPER AND GUEST—*concld.*

used by her during her illness. The plaintiffs subsequently sued to recover the value of such furniture from the defendant, *Held*, that, in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to ss. 151 and 152 of the Contract Act, 1872. *Shields* v. *Wilkinson*, *I. L. R. 9 All. 398*, referred to. RAMPAL SINGH *v.* MURRAY & CO. **I. L. R. 22 All. 164**

HOUSE-BREAKING.

See CRIMINAL TRESPASS. **I. L. R. 16 Calc. 657**
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See SENTENCE—CUMULATIVE SENTENCES

See SENTENCE—SENTENCE AFTER PREVIOUS CONVICTION **I. L. R. 17 All. 120**

——— **intent to have sexual intercourse which would be adlutery.** The prisoner was convicted of house-breaking, his object being to have sexual intercourse with the complainant's wife. *Held*, that the conviction was valid, the object, if accomplished, being an offence. ANONYMOUS . . . . **8 Mad. Ap. 6**

HOUSE-SEARCH BY MAGISTRATE.

See TORT . . **12 C. W. N. 973**

HOUSE TRESPASS.

See CRIMINAL TRESPASS. **I. L. R. 22 Calc. 123; 391**
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See NEGOTIABLE INSTRUMENTS ACT, (XXVI OF 1881), ss. 30, 39. **12 C. W. N. 644**

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See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMED AND UNREGISTRED DOCUMENTS. **I. L. R. 18 Bom. 369**

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See LIMITATION ACT, 1877, s. 14. **I. L. R. 20 Bom. 133**

See ONUS OF PROOF—DOCUMENTS RELATING TO LOANS, ETC. **I. L. R. 1 Bom. 295**

See PRINCIPAL AND SURETY—DISCHARGE OF SURETY . . **7 B. L. R. 535**

See PRINCIPAL AND SURETY— LIABILITY OF SURETY . . **4 C. L. R. 145**

See STAMP ACT, s. 34. **I. L. R. 18 Bom. 369**

1. LAW APPLICABLE TO.

1. ——— **Application of English law—** *Analogy between hundi and bill of exchange.* Where the analogy between native hundi and English bills of exchange is complete, the English law is to be applied. SUMBOONAUTH GHOSE *v.* JODDONATH CHATTERJEE . . . **2 Hyde 259**

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HUNDI—*contd.*

2. ACCEPTANCE.

1. ———— **Communication of acceptance to holder and drawer**—*Omission by drawee to notify non-acceptance.* An insolvent firm had drawn certain hundis on the plaintiffs payable to the defendant. The defendant had endorsed them to one *M*. The plaintiffs' Bombay firm was the agent of *M*, and *M* accordingly sent the hundis to the plaintiffs, as his agents, for realization. The hundis, however, were dishonoured, and *M* thereupon returned them to the defendant, and received their value from the defendant, who in this suit now sought to set off the amount so paid by them against the claim of the plaintiffs. It was contended that the plaintiffs were not liable, as there was no proof that the hundis had been accepted by them, it not having been shown that the acceptance had been communicated to *M*, the owner of the hundis, and that until such communication the plaintiffs were at liberty to cancel their acceptance. *Held*, that the acceptance by the plaintiffs was complete; and that the defendant was entitled to the set-off claimed. The hundis had come to the plaintiffs for acceptance on the 28th October 1884, and their non-acceptance had not been notified to *M* on the 3rd November. That would be an unreasonable period during which to hold the hundis *in dubio*. On the 30th October the plaintiffs had stated by letter to the drawer's firm that the hundis had been accepted. That meant that all things had been done to make the acceptance complete. The absence of entries in the plaintiffs' book, with reference to the hundis, afforded no inference that they were not accepted. *Semble:* A communication of acceptance to the drawer, or to a previous holder, binds the acceptor as well as a communication to the present holder, inasmuch as the acceptance enures for the benefit of them as well as for the actual holder, and the primary contract is between the drawer and the acceptor. PRAGDAS THAKURDAS *v.* DOWLATRAM NANURAM . **I. L. R. 11 Bom. 257**

2. ———— **Acceptance of hundi as conditional or absolute payment.** In a suit for the amount due on account of goods sold and delivered and money lent, the defence was that plaintiff had accepted *hundis* in discharge of the debt and was in consequence debarred from suing on the original consideration, and that his remedy, if he had one, was on the *hundis*. It was also contended that the *hundis* had been accepted as cash payment, in consideration of a discount of 2½ per cent. and that, in consequence, plaintiff had no cause of action, either on the original debt or upon the *hundis*, as he had taken the risk of the latter being dishonoured by the drawee. *Held*, that it is a question of fact, with regard to promissory notes or bills or *hundis*, whether the parties intended them to operate as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid. *Held*, also, on the evidence, that plaintiff had accepted the *hundis* unconditionally, and was, in consequence, precluded from suing on the original debt. JAMBU CHETTY *v.* PALANIAPPA CHETTIAR (1902) **I. L. R. 26 Mad. 526**

HUNDI—*contd.*

2. ACCEPTANCE—*concld.*

3. ENDORSEMENT.

1. ———— **Necessity for endorsement**—*Hundi given for particular purpose—Hundi payable to order.* A party who receives a hundi for a particular purpose must apply the same accordingly, and neither he nor any third party knowing the facts can by afterwards receiving the amount detain the same from the principal. *Quære:* Whether a hundi made payable "to order" is, according to Hindu law and the custom of native merchants, negotiable without a written endorsement by the payee. RAJROOPRAM *v.* BUDDOO **1 Ind. Jur. O. S. 93; 1 Hyde 155**

2. ———— *Assignment of hundi—Bills of Exchange Act, V of 1866.* A hundi which contains a direction on sufficient consideration to the drawee and accepted by him is within the terms of the Bills of Exchange Act, and such a document is assignable without any regular form of endorsement if sufficient cause appears in the handwriting of an endorser to indicate an intention to assign it. EAST INDIA BANK *v.* VULLIE GOOLWANY **[1 Ind. Jur. N. S. 247**

3. ———— **Proof of endorsement**—*Power of endorser to sue.* Where a hundi had been endorsed to purchasers who subsequently returned it to the endorsers, it was *held* by the Appellate Court (STEER, *J.*, *dissentiente*) that the Judge ought not to have decided against the endorser's claim because he had not proved that the note had been endorsed back to him. The Court would assume from his possession that he had a right to it, unless the contrary were shown. BYJNATH SAHOO *v.* BACHARAM . . **1 Ind. Jur. N. S. 76: 5 W. R. 86**

4. ———— **Cancelment of endorsement**—*Endorsee for purposes of collection, liability of.* An endorsee for purposes of collection of certain hundis, under the circumstances, ordered to cancel such endorsement and to re-deliver the hundis to the endorser. Such an endorsee not having received the amount of the hundis, was *held*, under the circumstances, not liable to be sued for the value thereof. GYANEE RAM *v.* PALEE RAM **2 N. W. 73**

5. ———— **Suit after endorsement**—*Bill payable to depositors—Member of joint family.* A hundi payable to the depositor is only payable to the drawer or his endorsee. When the drawer and his brother are members of an undivided Hindu family, it may be presumed that the latter is entitled to act for the former. VELIET DOSS *v.* BUNARUSSEE ROY . . **W. R. 1864, 262**

6. ———— *Suit by endorsee against acceptor—Notice not to discount, effect of—Bonâ fide holder for valuable consideration.*—To an action by the endorsee against the acceptor of a

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HUNDI—*contd.*

3. ENDORSEMENT—*contd.*

hundi, the defence was a certain verbal contract between acceptor and payee of which the plaintiff had notice ; and that by the custom of shroffs the defendant was exonerated by such notice. *Held*, that it is the custom of shroffs to make enquiries of the acceptors of hundis before discounting them. That a mere notice by the acceptor not to discount does not affect his liability to a person who takes a hundi *bonâ fide* and for valuable consideration after such notice. KHOSHAL CHUND *v.* LUCHMEE CHUND **Burke O. C. 151**

7. ——————— *Shahjoge hundi—Endorsee for realization—Effect of such endorsement—Maintainability of a suit by such endorsee for realization—Delivery, title by—Negligence—Payment to wrong person—Forged signature—Hundi made over to servant for realization, effect of—Estoppel.* A *hundi* payable to *Shahjoge* (to the respectable holder) was endorsed by the drawer "*hundi* sent for realization by *G* (drawer) to *B* of Calcutta (plaintiff)," and sent by him to the plaintiffs. The plaintiffs handed the *hundi* to one *S*, the plaintiffs' *jemadar* who had been in the habit of taking *hundis* on their behalf for acceptance and payment, to be taken by him to the defendants for acceptance. *S* took the *hundi* to the defendants, but subsequently, one *R*, who had no authority from the plaintiffs to receive payment, acting on information either from *S* or from some other source, represented himself to the defendants as a *jemadar* of the plaintiffs, wrongfully obtained the *hundi* from the defendants, forged the plaintiffs' signature to it, and obtained payment. The defendants, before such payment, had made no inquiries as to the position or respectability of *R*, and paid the *hundi* on the faith of the forged signature. *Held*, that such an endorsement, coupled with the delivery of the *hundi*, entitles the plaintiffs to sue for and receive payment of the *hundi* from the acceptors, though as between the drawer and the plaintiffs the latter are mere agents or parties with a defeasible title. Such an endorsement is in the nature of a restrictive endorsement, giving the endorsee the right to receive payment of the *hundi* and if necessary to sue the acceptor for the amount, but not to transfer his rights as endorsee to anybody else ; any defence which would be available to the acceptor against the drawer would be available against the endorsee. A *hundi* payable *shahjoge* is only payable to the respectable holder, and is not the same as a *hundi* payable to bearer. *Thakurdass* v. *Futteh Mull, 7 B. L. R. 275*, referred to. The *hundi* continued to be *shahjoge* even after such endorsement. *Gones Dass* v. *Luchmi Narayan, I. L. R. 18 Bom. 570*, referred to. *Held*, also, that the plaintiffs were entitled to claim the amount of the *hundi* from the defendants, unless they were guilty of such negligence or carelessness as would estop them from disputing the validity of the payment to *R*. Also that, even if *S* colluded with *R* and fraudulently obtained payment from defendants, there was no negligence on the part of the plaintiffs, in entrusting the *hundi* to *S*. Even if such an act was negligent, the negligence was not so immediately conducive to the payment of the *hundi* as to estop the plaintiffs from saying that *R* had no authority from them to receive payment and that the payment had not been made to them, *Robarts* v. *Tucker, 16 Ad. & El. 560 ; Bank of Ireland* v. *Trustees of Evans Charities in Ireland, 5 H. L. Cas. 389 ; Arnold* v. *The Cheque Bank, 1 C. P. D. 578 ; Mayor, etc., Merchants of the Staple of England* v. *Bank of England, 21 Q. B. D. 160*, and *Bank of England* v. *Vagliano Bros.*, [*1891*] *A. C. 107*, referred to. *Quære :* Whether such a *hundi* would not, before acceptance, pass merely by delivery to a respectable holder. *Goursimull* v. *Dhansuk Das, 7 B. L. R. 289, foot-note*, and *Thakurdass* v. *Futteh Mull, 7 B. L. R. 275*, referred to. BHUPUTRAM *v.* HARI PRIO COACH (1900) . . . . . **5 C. W. N. 313**

HUNDI—*concld.*

3. ENDORSEMENT—*concld.*

4. PRESENTATION.

1. ——————— **Time for presentation**—*Hundi payable on arrival—Liability of drawee—Time of presentation—The custom of akhoiteej at Jeypore—Negotiable Instruments Act (XXVI of 1881), s. 61.* A hundi was drawn in Calcutta upon a firm at Jeypore, and made payable on arrival at the place. The hundi reached Jeypore on the 5th April, but was not presented for payment until the 29th of that month, when it was dishonoured, and soon after the drawee's firm became insolvent. *Held*, that the hundi was presented within reasonable time, and the delay which occurred in its presentation did not absolve the drawers from liability. In considering the question whether a hundi has been presented within reasonable time, regard should be had to the situation and interests of both drawer and payee and to the distance of the place where the hundi is drawn from that where it is to be accepted. MUTTY LALL *v.* CHOGEMULL **I. L. R. 11 Calc. 344**

2. ——————— *Reasonable time—Question of time of presentation—Drawer without assests in hands of drawee.* Presentation for acceptance within reasonable time is a condition precedent to a right of action on a bill or hundi payable after sight. Where the drawer had not assets in the hands of the drawee at or subsequent to the date of the hundi :—*Held*, that the question of presentation within reasonable time was immaterial. NINKUND ANANTAPA *v.* MENSHI APURAYA **I. L. R. 10 Bom. 346**

3. ——————— *Presentation by purchaser.* A purchaser is bound to present a hundi for payment within a resonable time. GOPAL DASS *v.* SEETA RAM . . . . . **3 Agra 268**

4. ——————— *Suit by holder and indorsee against payee and indorser—Local usage as to presentment—Usage of presentment at Bushire—Negotiable Instruments Act (XXVI of*

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HUNDI—*contd.*

4. PRESENTATION—*concld.*

1881), ss. 70, 71, 75, and 137. The plaintiff as holder and indorsee of a hundi drawn on one *H* of Bushire sued defendant as payee and indorser to recover R1,193-4 on a hundi which had been dishonoured by the acceptor. It was found by the Court (i) that the local usage at Bushire was to present the hundi for payment at the bank, and for the acceptor to call at the bank at due date and effect settlement; (ii) that the hundi in question was presented for payment to the authorized agent of the acceptor at the bank on the due date; (iii) that the said agent refused payment and informed the bank that the acceptor would not pay the hundi. It was argued that presentment at the bank was not good presentment having regard to ss. 70, 71, and 137 of the Negotiable Instruments Act (XXVI of 1881). *Held*, that the local usage made the presentment a good presentment. IMPERIAL BANK OF PERSIA *v.* FATTECHAND KHUBCHAND

I. L. R. 21 Bom. 294

5. NOTICE OF DISHONOUR.

1. ——— **Reasonable notice**—*Custom—English law.* A purchaser is bound to give reasonable notice of dishonour, that is, within the time within which it is ordinarily given according to the custom of the merchants and bankers of the district, not the immediate notice required by English law in cases of bills of exchange. GOPAL DASS *v.* SEETARAM

3 Agra 268

2. ——— *Custom—English law.* Although the English law of prompt notice by return of post does not apply to cases of native hundis drawn by natives upon natives and endorsed by natives, yet reasonable notice of dishonour is essential. RADHA GOBIND SHAHA *v.* CHUNDER NATH DASS SHAHA . . . **6 W. R. 301**

See SUMBHOONAUTH GHOSE *v.* JUDDUNAUTH CHATTERJEE . . . . . **Cor. 88**

3. ——— *Hundi drawn by a manager of Hindu family—Liability of member of family—Notice of dishonour to the drawer—Negotiable Instruments Act (XXVI of 1881), s. 30.* The Negotiable Instruments Act (XXVI of 1881), in the absence of local usage to the contrary, applies to hundis. A member of a Hindu family whom it is sought to make liable by suit on a hundi drawn by the manager of the family is entitled to urge that no notice of dishonour had been given to the manager (drawer) so as to make the latter liable under s. 30 of the Negotiable Instruments Act. KRISHNASHET *v.* HARI VALJI BHATYE

I. L. R. 20 Bom. 488

4. ——— *Custom—English law.* As regards notice of dishonour in connection with hundi transactions amongst natives of this country, although the strict rules of English law as to the time within which service of such notice must be made do not apply, yet the endorsee is bound to give the endorser notice within a reasonable time of his intention to come upon him, so as to enable the latter to take the necessary steps for his own protection. The question as to what is reasonable notice is to be settled by local custom; and where a party has been prejudiced by the want of such notice, this is to be taken into consideration. ANUNT RAM AGURWALLA *v.* NUTHALL

21 W. R. 62

HUNDI—*contd.*

5. NOTICE OF DISHONOUR—*contd.*

5. ——— *English law—Non-payment of hundi.* Although the strict rules of English law as to bills are not applicable to hundis, notice of dishonour or non-payment must be given within reasonable time to enable the drawee or endorsee to protect himself against the claims of subsequent endorses. TULSHI SHAHU *v.* NURSINGRAM . . . . **12 C. L. R. 333**

6. ——— *Demand of a peth—Notice to endorser.* In order to charge the endorser of a dishonoured hundi, the holder must give reasonable notice of such dishonour to the endorser he seeks to charge. The demand of a peth cannot be deemed to be equivalent to a notice of dishonour. MEGRAJ JAGANNATH *v.* GOKALDAS MATHURADAS

7 Bom. O. C. 137

7. ——— **Hundi inadmissible in evidence for want of Stamp**—*Independent admission of loan—Suit on the original consideration.* In a suit based on the consideration independently of a hundi, it is not necessary to prove notice of dishonour. KRISHNAJI NARAYAN PARKHI *v.* RAJMAL MANIKCHAND MARWADI

I. L. R. 24 Bom. 360

8. ——— **Sufficiency of notice**—*Principal and agent—Custom—Delay in giving notice* The drawers of a hundi in favour of the plaintiff at Dacca (where all the parties to the hundi lived) were held not liable on proof that they were the gomastahs of the acceptor, that they had no interest in the hundi, and that, according to custom in Dacca, where the hundi was drawn and accepted, agents under such circumstances are not liable, although the agency does not appear on the hundi. They were also held discharged from liability, notice of dishonour not having been served on them till ten months after the due date of the hundi. HARI MOHAN BYSAK *v.* KRISHNA MOHAN BYSAK

9 B. L. R. Ap. 1: 17 W. R. 442

9. ——— *Promise to pay endorsed on hundi—Waiver of notice.* A promise to pay endorsed upon a hundi after it had been dishonoured, though not amounting to a waiver of notice, was held to be good and sufficient evidence that the endorser had received notice that the bill had been dishonoured. ALI *v.* GOPAL DASS

13 W. R. 420

s.c. before remand, GOPAL DAS *v.* ALI

3 B. L. R. A. C. 198

10. ——— **Damage to parties liable by omission to give notice**—*Formal written notice—Suit on hundi.* Previous formal written notice of

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HUNDI—*contd.*

5. NOTICE OF DISHONOUR—*concld.*

dishonour of a hundi is not necessary before suit brought, unless it can be shown that the parties charged have been prejudiced by such omission. GOVIND RAM MARWARY *v.* MATHOORA SABOOYA **I. L. R. 3. Calc. 339: 1 C. L. R. 429**

11. ——— *Suit on hundi—Negotiable Instruments Act (Act XXVI of 1881), ss. 93, 94, 98 (c).* In the absence of any local usage to the contrary, it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instruments Act (XXVI of 1881) should be applied to a hundi in the vernacular, the "reasonable time" within which such notice is to be given being determined according to the circumstances of the case. *Held*, therefore, that where the holder of such a hundi, which had been dishonoured, sued the prior endorsers on it, without having given them such notice and did not prove that they could not suffer damage for want of such notice, the suit must fail. MOTI LAL *v.* MOTI LAL . **I. L. R. 6 All. 78**

12. ——— *Notice of dishonour to drawer, where drawee has failed to accept.* S. 94 of the Negotiable Instruments Act (XXVI of 1881) recognises that the person to whom notice of dishonour is given should be informed, not only that the instrument has been dishonoured, and in what way, but also that he will be held liable thereon. So, where a drawee of a bill of exchange does not accept it, though the drawer is primarily liable, the payee should give notice of dishonour to the drawer. JAMBU CHETTY *v.* PALANIAPPA CHETTIAR (1902) . . **I. L. R. 26 Mad. 526**

13. ——— *Negotiable Instruments Act (XXVI of 1881), ss. 30, 93, 98—Liability of drawer.* In order to make the drawer of a *hundi* liable in case of dishonour by the drawee or acceptor thereof, it is necessary for the plaintiff to show that due notice of dishonour was given to the drawer, or that he (the drawer) did not suffer any damage for want of such a notice. *Krishnashet Bin Ganshet Shetye* v. *Hari Valji Bhatye, I. L. R. 20 Bom. 488*, and *Moti Lal* v. *Moti Lal, I. L. R. 6 All. 78*, referred to. AMIRUDDI BEPARI *v.* BAHADOOR KHAN (1903) **I. L. R. 30 Calc. 977 ; s.c. 7 C. W. N. 878**

6. LIABILITY ON.

1. ——— **Usage of shroffs**—*Consideration—Dishonour of hundi—Holder for value.* The plaintiff, as agent and banker of an Ajmir constituent, received a hundi for collection, and on its acceptance by the drawee, credited the Ajmer constituent with the amount as of the date when the hundi would become payable. *Held*, that, as between the plaintiff and the Ajmir constituent, the plaintiff upon such credit in account being given, became a holder for value. *Held*, also, that, the hundi being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of shroffs, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value. *Held*, also, that, as between the Ajmir constituent and the first indorser (the defendant and appellant) the giving by the Ajmir constituent to the defendant of another hundi which was never presented in Bombay for acceptance or payment was a consideration for the endorsement by the defendant to the Ajmir constituent of the hundi sent by the latter to the plaintiff and sued on by him. MULCHAND JOHARIMAL *v.* SUGANCHAND SHIVDAS . . . . **I. L. R. 1 Bom. 23**

Affirming the decision in SUGANCHAND SHIVDAS *v.* MULCHAND JOHARIMAL . . **12 Bom. 113**

2. ——— **Notice of dishonour**—*Negotiable Instruments Act (XXVI of 1881), s. 61—Presentment of hundi—Indemnity-bond.* In a suit on an indemnity-bond executed by way of collateral security by the maker of six hundis, it appeared that three of the hundis were paid, and when three which were unpaid were presented to the maker, he did not at once insist upon want of notice of dishonour or on non-presentment as a ground of discharge. *Held*, that, since the defendant did not prove that the drawee had effects of his to meet the hundis on presentment or that he had sustained damage by reason of the want of notice of dishonour, the plaintiff was entitled to a decree. SHANMUGAN *v.* CHINNASAMI **I. L. R. 14 Mad. 470**

3. ——— **Liability of drawer, acceptor, and indorsee**—*Separate contract—Decree against one without satisfaction.* The drawer, acceptor, and intermediate endorsers of a hundi which is dishonoured are all liable to the holder, but their liability is not joint as it arises out of different contracts, and a decree obtained against any one of them without satisfaction cannot be pleaded as a bar to a suit against any other of them. ABDOOR RUHMAN *v.* GUNNESH LALL **23 W. R. 444**

4. ——— **Defendants not all resident in jurisdiction**—*Parties—Act XXIII of 1861, s. 4—Bankruptcy of acceptor.* In a suit on a hundi payable at Calcutta, the acceptor there having become bankrupt before the hundi reached maturity, brought by the holder in the place where the hundi was drawn against the two partners of the firm that drew the hundi, and also the acceptor, who resided at the time of suit beyond the local jurisdiction of the Court passing the decree, the lower Appellate Court having dismissed the suit on the ground that the Court of first instance could not, without the sanction provided by s. 4 of Act XXIII of 1861, pass a decree against the defendant who resided beyond its jurisdiction :—*Held*, following the English law, that it was not necessary to sue the bankrupt defendant, and that the holder of a hundi is not bound, in the event of its dishonour, to sue all the parties liable under it, but may select any one or more of them. BASANT RAM *v.* KOLAHAL **I. L. R. 1 All. 392**

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HUNDI—*contd.*

6. LIABILITY ON—*contd.*

5. ———— **Cause of action**—*Suit on hundi—Inability to discover drawer.* Where, on account of a loan of R800, the lender gave the borrower two hundis for R1,500 and took away R693-7 as discount for R700, and the borrower, being unable to discover the drawer of the hundis, sued the lender, not on the hundis, but on two alleged loans of R800 and R693-7, respectively:—*Held*, that the only right of action left to the borrower was on the hundi themselves. RAM LAL SIRCAR *v.* GOPAL DOSS . . **7 W. R. 154**

6. ———— *Duplicate of lost hundi—Suit for money had and received.* The plaintiff obtained a hundi from a banker, *B*, at Baluchar for a certain amount drawn upon the firm of the latter at Calcutta. Afterwards on her representing to *B* that she had lost the hundi, *B* granted the plaintiff a duplicate, in the body of which it was stated that if the original had been accepted before presentation of the duplicate, the latter was to become null and void. The duplicate was presented to the agent of *B* at Calcutta, and payment was refused on the ground that the original had been presented and accepted and paid in due time. *Held*, that the plaintiff had no cause of action against *B* for non-payment of the duplicate hundi, nor for money had and received on account of the original consideration having failed. INDUR CHANDRA DUGAR *v.* LACHMI BIBI
7 B. L. R 682 : 15 W. R. 501

7. ———— **Accommodation bill**—*Transferees for value—Liability of party accommodated.* *P* drew a hundi on *S* (which *S* accepted for *P's* accommodation), which he transferred for value to *B*, who transferred it for value to *C*, who transferred it for value to *R N* at *R's* request, and on his behalf presented the hundi to *S* for payment, and *S* paid it. *Held*, that *S* was entitled to recover the amount of the hundis from *P*, but not from *N*. *Reynolds* v. *Doyle, 2 Scott's N. R. 45*, referred to. NAND RAM *v.* SITLA PRASAD. RAM PRASAD *v.* SITLA PRASAD
I. L. R. 5. All. 484

8. ———— **Stolen hundi**—*Shah jog hundi endorsed to a particular person—Payment by drawee without enquiry to wrong person—Liability of drawee to lawful owner of hundi—Conversion—Trover.* On the 8th December 1893, the plaintiff at Sholapur having brought a shah jog hundi, there drawn upon the defendants in Bombay, endorsed to *R* and sent it by post to him for collection. In course of its transmission it was stolen, and the name of *R* was expunged, and another name, *viz.*, that of *D*, was substituted. On the 9th December 1893, the hundi was presented for payment to the defendants in Bombay by a person giving his name as *D*, and the defendants paid it without inquiry as to the responsibility or position of the person to whom they paid it. The plaintiff sued the defendants for the value of the hundi. *Held*, (i) that the defendants were guilty of conversion of the hundi, and were liable to the plaintiff, the lawful owner thereof, in trover; (ii) that the hundi continued to be shah jog after being indorsed to a particular person. GANESDAS RAMNARAYAN *v.* LACHMINARAYAN
I. L. R. 18 Bom. 570

HUNDI—*contd.*

6. LIABILITY ON—*concl'd.*

9. ———— **Hundi payable at fixed date**—*Dishonour by non-acceptance—Cause of action—Right of suit—Negotiable Instruments Act (XXVI of 1881).* On 14th April 1889, the defendant at Gwalior drew a hundi for R2,500 on his firm at Bombay in favour of *D* payable forty-five days after date. It was subsequently indorsed at Gwalior by *D* to the plaintiff at Cawnpore, who sent it to the Bank of Bombay at Bombay for collection. It was to become payable on the 1st June 1889, but on the 23rd April 1889 the bank presented it to the defendant's firm at Bombay for acceptance, which was refused. The bank thereupon returned it to the plaintiff at Cawnpore, and it was never presented for payment. In a suit brought on the hundi, the defendant contended that the hundi being payable at a fixed date, and not having been presented for payment when due, no cause of action had arisen to the plaintiff. *Held*, (i) that dishonour by non-acceptance of a hundi payable at a fixed date gives an immediate cause of action against the drawer, and there is no need to wait until the maturity of the hundi or to present it for payment; (ii) that under the Negotiable Instruments Act (XXVI of 1881) the dishonour of a hundi by non-acceptance constitutes now, as it has always done, part of the cause of action in a suit against the drawer. RAM RAVJI JAMBHEKAR *v.* PRALHADDAS SUBKARN
I. L. R. 20 Bom. 133

7. INTEREST ON.

1. ———— **Usage of native bankers**—*Hundis drawn payable at sight.* According to the usage of native bankers at Moorshedabad, interest is claimable on hundis drawn at 111 days' sight. DUNPUT SINGH DOOGAR *v.* JUGUT INDUR BUNWAREE GOBIND DEB . . . . **4 W. R. 85**

8. PROPERTY IN HUNDI AND FORGED HUNDIS.

1. ———— **Property in hundi sent to agent for realization.** *S R*, the plaintiffs' agents in Calcutta, accepted hundis for R12,000 drawn upon them by a branch house of the plaintiffs' firm, and the plaintiffs at different times sent to *S R* hundis amounting in value to R11,400, with instructions to realize them, and to apply the proceeds towards payment of the R12,000. *S R* had paid R7,000 of this amount, and they had realized R6,400 out of the R11,400, when they stopped payment. At that time two unmatured hundis, for R2,500 each, remained in their hands, and these they endorsed over to the defendant after maturity in trust for their creditors. In an action by the plaintiff against the defendant to recover the two hundis:

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HUNDI—*contd.*

8. PROPERTY IN HUNDI AND FORGED HUNDIS—*contd.*

—*Held*, that the hundis, having been sent to *S R* for the special purpose of enabling them to meet their acceptances for R12,000, remained the property of the plaintiffs, subject to a lien of *S R* of R600. HAZARI MULL NAHATTA *v.* SOBAGH MULL DUDDHA **9 B. L. R. 1**

2. ——— **Forged hundi**—*Mercantile usage—Repayment to drawee by holder.* According to mercantile usage amongst Hindus, where a hundi, drawn "payable to owner" (shah jogi), is paid at maturity by the drawee to the shah or holder of the hundi, and such hundi afterwards turns out to be forged, the shah, though a *bonâ fide* holder for value, is bound to repay to the drawee the amount of such hundi with interest from the date of payment, provided that the drawee has been guilty of no laches in discovering the forgery and communicating the fact of such forgery to the shah. The shah, however, relieves himself from such liability by producing the actual forger. DAVALTRAM SHIRAM *v.* BALAKIDAS KHEMCHAND . **6 Bom. O. C. 24**

3. ——— **Forged endorsement**—*Suit to recover hundi.* The plaintiffs, being holders of a hundi, sent the same to their hoti in Calcutta without endorsement. The hundi was lost or stolen on the way and came into the defendants' hands as endorsees, the endorsement of the plaintiffs having been forged. The defendants, without notice of the forgery, paid full consideration for the hundi. *Held*, on appeal, reversing the decision of the Court below, that the plaintiffs were not entitled to recover the hundi from the defendants. *Per* PEACOCK, *C.J.*—It appeared from the evidence that the hundi in this case would pass, at any rate prior to acceptance, by delivery. GOURSIMULL *v.* DHANSUK DAS
7 B. L. R. 289 note : 16 W. R. 10 note

4. ——— *Suit to recover hundi—Bonâ fide holder for valuable consideration.* A hundi which had been purchased by the plaintiff at Delhi for value was, he alleged, endorsed by him to the firm of *R B D* of Calcutta, "for realization," and sent to that firm by post. Between Delhi and Calcutta the hundi was lost or stolen, and never reached the firm of *R B D*. It eventually came into the hands of the defendant, bearing no endorsement to *R B D*, but endorsed to *U D H*, and by *U D H*. The defendant alleged that he took it in the ordinary course of business, and for valuable consideration, from the gomastah of the firm of *U D H*, after the acceptors to whom it had been sent for that purpose had acknowledged their acceptance in favour of the firm of *U D H* of Calcutta, by whom it purported to be endorsed to the defendant's firm. When presented to the acceptors for payment, it was dishonoured, the acceptors stating that they had received notice not to pay the note, as it had been stolen. On the same day the defendant gave notice of dishonour to the firm of *U D H*, and demanded payment, but that firm stated that their endorsement

HUNDI—*contd.*

8. PROPERTY IN HUNDI AND FORGED HUNDIS—*concld.*

to the hundi was forged, and refused to pay. It was proved that, before taking the hundi, the defendant had sent to the acceptor's koti to ascertain if their acceptance was genuine. In a suit for the recovery of the hundi, or its value :—*Held*, by the Court below, that the endorsement of *U D H* was genuine, and that the plaintiff was not entitled to recover the hundi. The defendant, having taken the hundi in the ordinary course of business and after sufficient enquiry, was entitled to retain it : this was so, notwithstanding the endorsement "for realization" on the hundi. The hundi was one which passed by delivery without endorsement, and therefore if the endorsement of *U D H* was forged, the defendant still had a right to the hundi. On appeal, the Court *held* that the endorsement to the firm of *U D H* was not genuine ; and this being so, the fact that the defendant took the hundi in the course of business for valuable consideration, and without notice, did not give him a good title to retain it as against the plaintiff. The hundi was specially accepted, and there was nothing to show that by Hindu law such a hundi would pass as one payable to the holder without endorsement. THAKUR DAS *v.* FUTTEH MULL
7 B. L. R. 275 : 16 W. R. O. C. 3

9. JOKHMI HUNDI.

1. ——— **Equitable assignment of goods as security**—*Custom.* If the drawee of a jokhmi hundi refuses to accept it, and nevertheless as consignee takes possession of the goods against which it is drawn and which are referred to in it, the only remedy of the holder is against the drawer of the hundi, or the person from whom the holder bought it. The plaintiffs at *N* purchased, on 22nd December 1878, from *L*, for R4,000, a jokhmi hundi drawn in favour of plaintiffs by *L* upon his firm in Bombay. The hundi contained a statement that it was "drawn against" twenty-nine bales of wool shipped at Tuna, and it was made payable eight days after the safe arrival of the ship at Bombay. The plaintiffs obtained from *L*, at the same time, a letter addressed by him to his firm at Bombay, which contained the following passage : "Upon you a jokhmi hundi is drawn, the particulars whereof are as follows : (R4,000). The value having been received from Jadowji Gopalji, hundis for R4,000 drawn against 29 bags of sheep's wool shipped on board the *Hariprasad*, owner Daya Morarji, from the seaport town of Tuna . . . On the safe arrival of the vessel, do you be good enough to land the goods, and deliver the same to Jadowji Gopalji ; and as to the jokhmi hundis drawn before, if in respect thereof any money has to be paid to Jadowji Gopalji, do you be good enough to pay the same." The above letter was duly presented by the plaintiffs to *L's* Bombay firm on the 27th December 1878. Evidence was given that at the time the plaintiffs obtained the hundi and the letter, the goods referred to had been already shipped. On the

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HUNDI—*concld.*

9. JOKHMI HUNDI—*concld.*

1st January 1879, the firm of *L* was adjudicated insolvent by the High Court at Bombay. On the 5th January 1879, the ship arrived at Bombay with the goods in question on board, and on the 7th January the shipowners delivered them to the Official Assignee. The plaintiff sued the Official Assignee (as assignee of the estate and effects of *L*) and the shipowners to recover possession of the wool or the amount of the hundi, and contended that by the custom of Bombay the holder of a jokhmi hundi had a charge upon the goods mentioned therein, and that, in the event of the drawee failing to pay the amount of the hundi, the holder was entitled to obtain possession of the goods and realize by their sale the amount due to him upon the hundi. Plaintiff also contended that the above letter of the 22nd December 1878 operated as a valid equitable assignment of the wool to him. *Held*, that the plaintiff, as holder of a jokhmi hundi, had no charge upon the wool in question, and could not upon this ground recover from the defendants the possession of the wool or the amount due upon the hundi; but *held*, also, on the authority of *Burn* v. *Carvalho*, *4 M. & Cr. 690*, that the letter of the 22nd December 1878 operated as an equitable assignment of the wool to the plaintiffs, on the safe arrival of the vessel, as a security for the payment of the hundi, and that the plaintiffs were therefore entitled to obtain possession of the wool. JADOWJI GOPAL *v.* JETHA SHAMJI **I. L. R. 4 Bom. 333**

10. PAYMENT TO WRONG PERSON.

1. ——— *Stolen hundi—Payment by drawee to wrong person—Conversion—Measure of damages.* A drawee of a *hundi* negligently paying to a wrong person is liable for conversion and the measure of damages payable to the lawful owner is the full amount of the hundi. *Ganesh Das Ram Narayan* v. *Lachminarayan, I. L. R. 18 Bom. 570; Kleinwort Sons & Co.* v. *Comptoir National D'Escompte DeParis, L. R. 2 Q. B. 157*, followed. SAHU LALTA PERSAUD *v.* McLEOD (1905) . . . **9 C. W. N. 841**

HURT.

	Col.
1. CAUSING HURT	5552
2. GRIEVOUS HURT	5554

See COMPOUNDING OFFENCE.
I. L. R. 1 Bom. 147
10 Bom. 68

See CULPABLE HOMICIDE.
I. L. R. 3 Calc. 623
1 C. L. R. 141
I. L. R. 2 All. 522, 766
I. L. R. 3 All. 597, 776

See GRIEVOUS HURT.

See PENAL CODE, s. 81.
I. L. R. 17 Bom. 626

See PENAL CODE, ss. 319 to 330.

HURT—*contd.*

See SENTENCE—CUMULATIVE SENTENCES.
7 W. R. Cr. 60
9 W. R. Cr. 33
I. L. R. 11 Calc. 349
I. L. R. 7 All. 414
I. L. R. 16 Calc. 725
I. L. R. 19 Calc. 105

——— **grievous—**

See SENTENCE—CUMULATIVE SENTENCES.
2 W. R. Cr. 29
I. L. R. 6 All. 121
I. L. R. 7 All. 29, 414, 757
I. L. R. 9 All. 645
I. L. R. 16 Calc. 442, 725
I. L. R. 19 Calc. 105
I. L. R. 17 Bom. 260

1. CAUSING HURT.

1. ——— **Nature of injury constituting "hurt"**—*Causing serious disability.* Causing a disability for a fortnight is punishable for voluntarily causing hurt. QUEEN *v.* BISHNOORAM SURMA . . . . . **1 W. R. Cr. 9**

2. ——— **Penal Code, s. 328**—"*Other thing.*" The words "or other thing" in s. 328 of the Penal Code must be referred to the preceding words, and be taken to mean "unwholesome or other thing," and not "other thing" simply. QUEEN *v.* JOTEE GHORAEE . . . **1 W. R. Cr. 7**

3. ——— **Blow with umbrella**—*Penal Code, ss. 95, 319.* The pain caused by a blow across the chest with an umbrella was *held* to be not of such a trivial character as to come within the meaning of the Penal Code, s. 95, but to be hurt under s. 319. GOVERNMENT OF BENGAL *v.* SHEO GHOLAM LALLA . . . . **24 W. R. Cr. 67**

4. ——— **Penal Code, s. 324**—*Manner of using weapon.* On the construction of s. 324 of the Penal Code:—*Held*, that it is not necessary that the manner of use of the weapons must be such as is likely to cause death. ANONYMOUS **7 Mad. Ap. 11**

5. ——— **Administering harmful drugs**—*Penal Code, ss. 326, 328. Held*, by the majority of the Court (*dissentiente* SETON-KARR, *J.*), that the offence of administering deleterious drugs without endangering life is punishable under s. 328 of the Penal Code, and not under s. 326 as grievous hurt. QUEEN *v.* JOYGOPAL . **4 W. R. Cr. 4**

6. ——— **Causing hurt on grave provocation**—*Penal Code, ss. 324, 333.* Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under s. 334, and not under s. 324 of the Penal Code. REG *v.* BHALA CHULA . . . **Bom. 17**

7. ——— **Causing death after provocation**—*Disease of spleen.* The prisoner, having received great provocation from his wife, pushed her so as to throw her with violence to the ground, and after she was down struck her with his open hand. She died, and on examination it appeared there were

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HURT—*contd.*

1. CAUSING HURT—*contd.*

no external marks of violence on the body, but that there was disease of the spleen and that death was caused by rupture of the spleen. *Held*, that, under the circumstances, the prisoner was guilty of causing hurt, and not of culpable homicide not amounting to murder. QUEEN *v.* PUNCHANUN TANTEE **5 W. R. Cr. 97**

8. ——— Chance injury on provocation—*Penal Code, ss. 319-322.* Where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by the wife, the husband not knowing that the spleen was diseased, and showing by the blow itself and by his conduct immediately afterwards that he had no intention or knowledge that the act was likely to cause hurt endangering human life :—*Held*, that the husband was guilty of an offence under ss. 319 and 321 of the Penal Code, and not an offence under ss. 320 and 322. QUEEN *v.* BYSAGOO NOSHYO **8 W. R. Cr. 29**

9. ——— Causing death unintentionally—*Penal Code, s. 323.* Where, according to the prisoner's own confession (which was the only direct evidence against her), she, with a view to chastising the deceased, her daughter of eight or ten years of age, for impertinence, but without any intention of killing her, gave her a kick on the back and two slaps on the face the result of which was death :—*Held*, that the conviction should be under s. 323, Penal Code, of voluntarily causing hurt, and the punishment one year's rigorous imprisonment. QUEEN *v.* BESHOR BEWA **18 W. R. Cr. 29**

10. ——— Hurt caused in extorting confession of offence—*Penal Code, s. 330—Witchcraft.* To bring a case under s. 330 of the Penal Code, it must be proved that the hurt to the complainant was caused with intent to extort a confession of some offences or misconduct punishable under the Penal Code. That section therefore does not apply to a case where the confession extorted had reference to a charge of witchcraft. QUEEN *v.* MOONDEE . . . . **13 W. R. Cr. 23**

11. ——— Hurt caused to extort information of offence—*Penal Code, s. 330.* A charge may be made under s. 330, Penal Code, of causing hurt for the purpose of extorting information which might lead to the detection of an offence even if the supposed offence has not been committed. The offence which that section intended to describe is that of inducing a person by hurt to make a statement or a confession having reference to offence or misconduct ; and whether that offence or misconduct has been committed is wholly immaterial. QUEEN *v.* NIM CHAND MOOKERJEE **20 W. R. Cr. 41**

12. ——— Assault and causing hurt—*Penal Code, s. 352—Autrefois acquit.* A person who is tried and discharged for the offence of assault under s. 312, Penal Code, cannot again, upon the same complaint, be tried for "causing hurt." KAPTAN *v.* SMITH **7 B. L. R. Ap. 25 : 16 W. R. Cr. 3**

13. ——— Causing hurt—*Penal Code, s. 330—Causing hurt to constrain a person to satisfy a demand.* A husband, in order to constrain his wife to satisfy his demand that she should return to his house, voluntarily caused hurt to her. He was convicted under s. 330 of the Penal Code. *Held*, on appeal, that the conviction under that section was bad. QUEEN-EMPRESS *v.* ELLA BOYAN **I. L. R. 11 Mad. 257**

2. GRIEVOUS HURT.

1. ——— Nature of hurt constituting grievous hurt. What amounts to "grievous hurt" considered. REG. *v.* ANTA BIN DADOBA **1 Bom. 101**

2. ——— *Serious disability.* A disability for twenty days constitutes grievous hurt. QUEEN *v.* BISHNOORAM SURMA **1 W. R. Cr. 9**

3. ——— Proof of offence—*Penal Code, s. 320.* There must be evidence to prove that hurt as described in s. 320 of the Penal Code as grievous hurt, has been caused before a conviction can be had under s. 320 of that Code. QUEEN *v.* KAMINEE DOSSEE . . . . **12 W. R. Cr. 25**

4. ——— Requisites for offence—*Voluntary hurt—Penal Code, s. 325.* To make out the offence of voluntarily causing grievous hurt under s. 325, Penal Code, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in s. 320. QUEEN *v.* BUDRI ROY . . **23 W. R. Cr. 65**

5. ——— Joint attack by several persons resulting in serious injury—*Assault.* When the result of a joint attack by several persons on one man is the fracture of his arm, the offence committed is grievous hurt, and not assault. QUEEN *v.* RAMTOHUL SINGH . **5 W R. Cr. 12**

6. ——— Want of intention, likelihood, or knowledge that injury is likely to cause death - When there is neither intention, knowledge, nor likelihood that the injury inflicted in an assault will or can cause death, the offence is not culpable homicide, but grievous hurt. QUEEN *v.* MEGHA MEEAH . . . **2 W. R. Cr. 39**

7. ——— Want of intention to cause death—*Robbery.* Where, in a case of robbery attended with death, there was no intention of causing death or such bodily injury as was likely to cause death, the conviction was altered from voluntarily causing hurt in committing robbery to voluntarily causing grievous hurt in committing robbery. QUEEN *v.* CHAKOR HUREE . **6 W. R. Cr. 16**

8. ——— Grievous hurt in commission of lurking house-trespass—*Penal Code,*

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HURT—*contd.*

2. GRIEVOUS HURT—*contd.*

ss. 324, 457, 460. A person who, in the commission of lurking house-trespass by night, voluntarily attempts to cause grievous hurt to the owner of the house who tries to capture him, is punishable under s. 460, and not under ss. 457 and 324 of the Penal Code. QUEEN *v.* LUKHUN DOSS **2 W. R. Cr. 52**

9. ——— Conviction of grievous hurt —*Constructive guilt—Abetment—Penal Code (Act XLV of 1860), ss. 114, 325, with 149.* Where the accused persons have been acquitted of rioting, they cannot be properly convicted of grievous hurt under s. 325 by the application of s. 149 of the Penal Code, where it has not been found that these persons or any of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each member of the assembly knew to be likely to be committed in prosecution of that object. The mere presence as an abettor of any person would not, under the terms of s. 114 of the Penal Code, render him liable for the offence committed. *Empress* v. *Chatradhari Goala, 2 C. W. N. 49,* explained. In order to bring a person within s. 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that, if absent, he would have been liable to be punished as an abettor, and then to show that he was also present when the offence was committed. *Queen* v. *Niruni, 7 W. R. Cr. 49,* relied on. ABHI MISSER *v.* LACHMI NARAIN **I. L. R. 27 Calc. 566 4 C. W. N. 546**

10. ——— Beating a man found committing theft—*Presumption.* The prisoners found a man in the act of theft, and were beating and cuffing him, when one of the witnesses for the prosecution threatened to call a chowkidar, and they released him. Two days afterwards he was found drowned. *Held,* that there was no evidence to convict the prisoners of causing grievous hurt. All presumptions consequent on the man's body being found drowned should have been put aside, and the original assault alone considered. QUEEN *v.* NUNKOO DOSS . . . **2 W. R. Cr. 48**

11. ——— Driving over deaf man—*Penal Code, s. 338—Negligence.* Defendant was convicted under s. 338 of the Penal Code of causing grievous hurt. The evidence showed that the defendant was being driven in a carriage to her house through the streets of the town, between the hours of 7 and 8 P.M.; that the carriage was being driven at an ordinary pace, and in the middle of the road; that the night was dark, and the carriage without lamps, but that the horse-keeper and coachman were shouting out to warn foot-passengers; that the defendant's carriage came into contact with the complainant's father, an old deaf man, and that complainant's father was thereupon knocked down, run over, and killed. *Held,* upon a reference, that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused, and that there was no such evidence. The conviction was accordingly quashed. ANONYMOUS . . **6 Mad. Ap. 32**

HURT—*contd.*

2. GRIEVOUS HURT—*contd.*

12. ——— Grievous hurt on grave and sudden provocation—*Penal Code, s. 335.* Causing grievous hurt on grave and sudden provocation is punishable under s. 335 of the Penal Code, without any intention or knowledge of likelihood of causing such hurt. QUEEN *v.* UMBICA TANTINEE **4 W. R. Cr. 21**

QUEEN *v.* BHADOO PORAMANICK **4 W. R. Cr. 23**

13. ——— Hurt caused in house-breaking—*Penal Code, ss. 459, 460.* Ss. 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a "lurking house-trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly, and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking. QUEEN-EMPRESS *v.* ISMAIL KHAN **I. L. R. 8 All. 649**

14. ——— Charge of grievous hurt—*Committal for trial.* A prisoner charged with the offence of causing "grievous hurt" should be committed for trial to the Sessions Court. REG. *v.* ANTABIN DADOBA . . . **1 Bom. 101**

15. ——— Child-wife—*Culpable homicide not amounting to murder—Causing death by a rash and negligent act—Rashness and negligence—Penal Code, ss. 304, 304A, 325, 338—Husband and wife.* The prisoner, a fully developed adult man, was charged with causing the death of his wife, a girl aged about 11 years and 3 months, who had not attained puberty. The death was caused by hæmorrhage from a rupture of the vagina caused by the prisoner having sexual intercourse with the girl. For the defence it was alleged that he had had sexual intercourse with the girl on several previous occasions without injury to her, and there were circumstances in the case which showed that this was possible, and even not improbale, though the medical evidence was to the effect that, if such intercourse had previously taken place, the penetration was probably not so complete or with so much sexual vigour as on the occasion when the injury was caused. The medical evidence was further to the effect that the girl had not attained puberty, and was immature and wholly unfit for sexual intercourse; that under such circumstances sexual intercourse between the prisoner and the girl was likely to be dangerous to her, and to cause injuries more or less serious according to the degree of pene-

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HURT—*contd.*

2. GRIEVOUS HURT—*contd.*

tration effected. The prisoner was charged with (*a*) culpable homicide not amounting to murder under s. 304 of the Penal Code; (*b*) causing death by doing a rash and negligent act under s. 304A; (*c*) voluntarily causing grievous hurt under s. 325; and (*d*) causing grievous hurt by doing an act so rashly or negligently as to endanger human life or the personal safety of others under s. 338. *Held*, that, in such a case, when the girl is a wife and above the age of 10 years, and when therefore the law of rape does not apply, it by no means follows that the law regards the wife as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law; that no hard-and-fast rule can be laid down that sexual intercourse with a girl under a certain age must be regarded as dangerous, and punishable or over that age as safe and right, but that each case must be judged according to its own individual circumstances; that in such a case the jury have to consider and say whether under the particular circumstances of the case, having regard to the physical condition of the girl, and to the intention, the knowledge, the decree of rashness or negligence with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the criminal law. *Held*, further, that, if the jury were of opinion (*a*) that the act of the prisoner caused the death of the girl, that is to say, that the act of cohabitation on the part of the prisoner had the effect of rupturing the vagina and so causing the hæmorrhage which led to her death; (*b*) that the act of cohabitation between a fully developed man like the prisoner and an immature girl like his wife was itself a thing likely to lead to dangerous consequences; (*c*) that that act was one of such a character as to indicate a reckless indifference to the welfare of the girl or a want of reasonable consideration about what the prisoner was doing, one which the husband of the girl, if he had had a reasonable regard to her welfare, and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing, they would be justified in finding that the prisoner caused the death of a girl by a rash and negligent act. Under no system of law with which Courts have to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her. QUEEN-EMPRESS *v.* HURREE MOHUN MYTHEE **I. L. R. 18 Calc. 49**

16. ———— Proof of grievous hurt— *Penal Code (Act XLV of 1860), ss. 320 and 326—Remaining in hospital for twenty days—Presumption.* The accused were charged with causing grievous hurt. The Joint Sessions Judge, relying apparently on evidence that the injured person remained in a hospital for the space of twenty days, drew from that circumstance alone the inference that he was during that period unable to follow his ordinary pursuits, and convicted the accused under

HURT—*concld.*

2. GRIEVOUS HURT—*concld.*

s. 326 of the Penal Code (XLV of 1860). *Held*, reversing the convictions, that in the absence of any evidence that the injured person was unable to follow his ordinary pursuits during the space of twenty days, such an inference could not legally be drawn. Before a conviction can be passed for the offence of grievous hurt, one of the injuries defined in s. 320 of the Penal Code must be strictly proved, and the eighth clause is no exception to the general rule that a penal statute must be construed strictly. Proof of being in a hospital for the space of twenty days cannot be taken as equivalent to proof of grievous hurt. QUEEN-EMPRESS *v.* VASTA CHELA **I. L. R 19 Bom. 247**

17. ———— *Penal Code (Act XLV of 1860), ss. 304, 149, 326—Commitment for offences of rioting and culpable homicide not amounting to murder—Constructive guilt of members of unlawful assembly—Grievous hurt, whether it may be regarded as a minor offence or as involved in the offence under s. 304, read with s. 149—Conviction for grievous hurt on a trial for offences under ss. 148, 304, read with s. 149, Indian Penal Code.* The offence of causing grievous hurt is not a minor offence or an offence involved in the offence under s. 304 (culpable homicide not amounting to murder), read with s. 149, Indian Penal Code. S. 326 can only apply to a person who does a substantive act himself, namely, inflicts a blow which causes grievous hurt, as defined in the Code. A person accused of, and charged for, offences under ss. 148 and 304, read with s. 149, Indian Penal Code, cannot, in the event of the charges not being sustainable, be convicted of an offence under s. 326, Indian Penal Code. S. 304 of the Penal Code, read with s. 149, applies only to persons who, though not taking an active part in an unlawful assembly, are liable to be punished by reason of their being members of the unlawful assembly, and of a person being killed in prosecution of the common object of the assembly. RAM SARUP RAI *v.* EMPEROR (1901) . **6 C. W. N. 98**

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———— death of—

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4 Mad. Ap. 55.

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See DEFAMATION—IMPUTATION ON A WIFE . . **I. L. R. 25 Bom. 151.**

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HUSBAND AND WIFE—*contd.*

See EVIDENCE—CRIMINAL CASES—HUSBAND AND WIFE.
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7 Bom. Cr. 50
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HUSBAND AND WIFE;
MARRIAGE;
RESTITUTION OF CONJUGAL RIGHTS.

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIFE.

See HURT—GRIEVOUS HURT.
I. L. R. 18 Calc. 49

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION.
I. L. R. 18 Bom. 316

See KIDNAPPING **I. L. R. 17 Calc. 298**

See LIMITATION ACT, S. 23.
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See MAHOMEDAN LAW—ACKNOWLEDGMENT, MARRIAGE.

See MAINTENANCE, ORDER OF CRIMINAL COURT FOR.

See MARRIAGE.

See MARRIED WOMAN'S PROPERTY ACT, S. 8 . **I. L. R. 11 Bom. 348**

See PARSI MARRIAGE AND DIVORCE ACT, S. 30 . **I. L. R. 18 Bom. 366**

See PARSIS . . **3 Bom. A. C. 113**
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See PARTIES—PARTIES TO SUITS—HUSBAND AND WIFE.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . . . **Cor. 82**
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HUSBAND AND WIFE—*contd.*

See WITNESS—CIVIL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES.
I. L. R. 18 Bom. 468

——— maintenance—

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION, AND POWERS OF COURT . . **I. L. R. 26 Bom. 707**

——— suit for possession of wife—

See COURT-FEES ACT (VII OF 1870).
I. L. R. 28 Calc. 567

1. ——— Partnership as traders— *Authority from husband.* When a husband and wife are trading in partnership, it is only reasonable to presume that an authority from the husband on matters connected with the partnership is binding on the wife. KOTOO *v.* KO PAY YAH
6 W. R. 254

2. ——— Anti-nuptial settlement— *Wife, a minor—Settlement made by guardian—Fraud of guardian.* Where a wife (a minor) sought to enforce an ante-nuptial settlement as against the creditors of her husband, the settlement having been made and negotiated on her behalf by her father as her guardian; and the father, under such circumstances, had made a contract for her which was void as against third persons, on the ground of public policy:—*Held*, that such a contract could no more be enforced by the minor against those third persons than it could be enforced by her, had she been an adult and made the contract herself. It is unnecessary, in order to avoid an ante-nuptial settlement as against a minor wife and her children, where the conduct of the father who brought about the marriage has been shown to be fraudulent, to show that the minor was a party to the fraud. POGOSE *v.* DELHI AND LONDON BANKING CO.
I. L. R. 10 Calc. 951

3. ——— Wife's equity to a settlement—*Illegitimacy—Right to bastard's estate—Execution of decree.* *M*, the widow and administratrix of a bastard who had died intestate and without issue, received a letter in 1841 from the Lords Commissioners of the Treasury, stating that they did not deem it expedient to take any steps for the assertion of the rights of the claim with regard to her late husband's estate. Previous to this, *M* had obtained possession of that estate, and two months before the receipt of the letter she had contracted a second marriage. No settlement was made upon the marriage, and since the marriage her second husband had had the management of the property. In execution of a decree against the husband, his right, title, and interest in and to a portion of the property were put up for sale, and purchased by the plaintiff. The plaintiff's right to possession was disputed by *M*, who contended that her husband took no interest in the two-thirds of the property which went to the Crown which could be attached and sold in execution. In a suit by the plaintiff to establish her rights over the property:—*Held*, that the rights of her husband extended over the whole estate and

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HUSBAND AND WIFE—*contd.*

were rights which could be seized in execution and sold. *M's* husband being without property and in great difficulties, and subsisting only on a life-pension of R118 a month, *M* was entitled to a settlement. TOOLSEEMONEY DOSSEE *v.* CORNELIUS **11 B. L. R. 144**

4. ——— **Deed of separation**—*Agreement not to molest husband—Right of suit.* A suit is not maintainable by a wife for an allowance from her husband on an agreement, for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband, such stipulation falling within the general rule that a deed of separation entered into by husband and wife without the intervention of trustees is void. HUGHES *v.* HUGHES . . . . . **16 W. R. 250**

5. ——— **Principal and agent**—*Agency—Authority of wife to pledge husband's credit. Held,* that the liability of a husband for his wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In a suit by a creditor to recover from his debtor and her husband the amount of money lent by the plaintiff to the former on her notes of hand, it appeared that the defendants had always lived together, that the wife had an allowance wherewith to meet the household expenditure and all her personal expenses, and that the money had been borrowed without the husband's knowledge, and not to meet any emergent need, but to pay off previous debts, and had been raised by successive borrowings over a considerable period, the debts having increased by high rates of interest. It was also found that it had not been shown that the plaintiff looked to the husband's credit, or that the husband had ever previously paid his wife's debts for her. *Held,* that, under these circumstances, no agency on the wife's part for her husband had been established, and that the husband was therefore not liable to the claim. GIRDHARI LAL *v.* CRAWFORD **I. L. R. 9 All. 147**

6. ——— **Plea of coverture**—*Separate property of wife—Suit on promissory note—Personal decree.* The defendant, a married woman living with her husband, both domiciled in British India and resident in Calcutta, where they had been married on 21st May 1866, and having property to which she was absolutely entitled under the provision of the Succession Act, signed a promissory note in favour of the plaintiff for a debt due by her to the plaintiff, at the same time giving a verbal promise to pay the amount out of her own property. In a suit on the promissory note, in which the husband and wife were made parties, the wife pleaded her coverture. *Held,* that she was liable to pay the amount of the promissory note out of her own property, and the Court would, if necessary, make a personal decree against her. ARCHER *v.* WATKINS **8 B. L. R. 372**

7. ——— **Divorce**—*Suit for nullity of marriage—Suit by wife against husband—Costs of wife—Alimony—Maintenance—Suit between Mahomedans—Mahomedan law.* The English law which makes the husband in divorce proceedings liable *primâ facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans. A wife sued her husband for dissolution of marriage (both parties being Mahomedans) on the ground of his impotency and malformation. An interlocutory order was made by the Court adjourning the further hearing of the suit for one year, in order that the parties might resume cohabitation for that period. The husband desired to carry out the order of the Court and was anxious that his wife should live with him; she, however, refused to do so, and only paid occasional visits to his house. The suit was subsequently dismissed with costs. The wife appealed, and subsequently applied for alimony until the disposal of the appeal. *Held,* that, having regard to the conduct of the wife, she was not entitled to alimony. By Mahomedan law a husband's duty to maintain his wife is conditional upon her obedience, and he is not bound to maintain her if she disobeys him by refusing to live with him or otherwise. A *v.* B . . . **I. L. R. 21 Bom. 77**

8. ——— **Married woman's power to contract in respect of her separate property**—*Roman and English law.* A married woman is capable of contracting in respect of her separate estate. The doctrines of the Roman and English law upon the subject examined. NARAYANAN CHETTY *v.* JENSEN . . **2 Mad. 383**

9. — **Separate property of wife**—*Jewels given to wife during coverture.* Jewels given to a married woman during coverture by a relative or a stranger *held* to be property belonging to the separate use of the wife. *Held,* further, that the subsequent investment of the same in the purchase of real estate conveyed to the wife does not cause a change in the nature of such property. COHEN *v.* AUCTION & CO . . **1 Hyde 130**

10. ——— *Custom prevailing amongst Parsis as to ownership of presents made to a bride—Joint ownership—Right of survivorship.* By the custom prevailing amongst Parsis, presents of money and ornaments made to a bride at betrothal, and between betrothal and marriage, and at marriage and the increment thereof belong to the husband and wife jointly during their lives, and on the death of either pass absolutely to the survivor. *Semble:* The same custom prevails with regard to special and costly clothes (*i.e.,* clothes intended to be worn only on special occasions and ceremonies) presented during the same period. BYRAMJI BHIMJIBHAI *v.* JAMSETJI NOWROJI KAPADIA . **I. L. R. 16 Bom. 630**

11. ——— *Parsis—Ornaments given to wife by her father.* The rule laid down in *Graham* v. *Londonderry, 3 Atk. 293,* with regard to a husband's rights over ornaments given to his wife by her father applied to Parsis. DHANJIBHAI BOMANJI GUGRAT *v.* NAVAZBAI **I. L. R. 2 Bom. 75**

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HUSBAND AND WIFE—*contd.*

12. _____ *Husband managing separate property of wife.* Where husband and wife are living together, and the wife has property of her own which the husband is in possession of and manages, his possession must be considered to be his wife's. He has no right to part with such property without her consent. SOODA RAM DOSS *v.* JOOGUL KISHORE GOOPTO . . **24 W. R. 274**

13. _____ *Legacy—Purchase with wife's legacy.* *C*, a married woman, was entitled, under her father's will, to certain money "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled, *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C*, but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. *Held*, that the conversion by *C* of her legacy did not alter its character and conditions, and that the property purchased was her own separate property and was not subject to the debts or liabilities of her husband. HURST *v.* MUSSOORIE BANK . . . . **I. L. R. 1 All. 762**

14. _____ *Legacy—Property purchased with legacy—Sale in execution of decree—Right of purchaser.* *C*, a married woman, was entitled, under her father's will, to certain money "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled, *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C*, but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. *C* and her husband were married before Act X of 1865 came into force, and had acquired an Indian domicile. *Held*, that, even if English law were applicable in the case, and any interest in the property purchased passed to *C's* husband, it passed, in view of the agreement between her and her husband, on an implied contract that he would hold the property in trust for her, and that, where such property was purchased at a sale in the execution of a decree against *J* as his property, with notice that such property was claimed by *C* as her separate property, such purchase did not defeat the title of *C*. BERESFORD *v.* HURST . . . . **I. L. R. 1 All. 772**

15. _____ **Married Woman's Property Act (III of 1874), ss. 7 and 8**—*Succession Act (X of 1865), s. 4—Action for trover—Wife against husband.* The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture given to her by her mother. Since January 1875, she had lived separate from her husband, but the furniture remained in his house. In February 1875 her husband mortgaged the property to *B*, without the plaintiff's knowledge or consent. In June 1875 one *K C B*, a creditor, obtained a decree against the husband and *B*, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875 the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875 she preferred a claim in her own name to the property under s. 88 of Act IX of 1850. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4, and the Married Woman's Property Act, 1874. *Held*, that, under s. 7 of the latter Act, the suit was maintainable against the husband. *Held*, also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX of 1850 was also maintainable. *Brinsmead v. Harrison, L. R. 6 C. P. 584*, followed. HARRIS *v.* HARRIS. HARRIS *v.* KOYLAS CHUNDER BANDOPADIA . . . . **I. L. R. 1 Calc. 285**

16. _____ **ss. 4, 7, 8**—*Execution of decree against separate property of wife—Domicile—Agency.* The Married Woman's Property Act (III of 1874) applies to persons having an English domicile. Accordingly, the separate property of a married woman (whose husband's domicile is English) is alone bound by all debts, obligations, and engagements incurred by her in the management of a business carried on by her alone, and execution of any decree obtained against her in respect of such business should be limited to her separate property. The principle that the wife is impliedly carrying on business as the agent of the husband is excluded by the provisions of Act III of 1874. ALLUMUDDY *v.* BRAHAM **I. L. R. 4 Calc. 140 : 2 C. L. R. 431**

17. _____ **Execution of document by pressure and concealment of material facts**—*Trustee and cestui que trust—Independent advice.* Where a husband obtained the execution of a deed by his wife, creating a charge over her separate property, by concealment of material facts: *Held*, that the deed was not binding on the wife. TURNBULL & Co. *v.* DUVAL (1902) **6 C. W. N. 809**

18. _____ **Suit for restitution of conjugal right**—*Suit by an excommunicated member of a caste—Mussalman Kharwa community of Broach—Custom.* The plaintiff, an excommunicated member of the Mussalman Kharwa community of Broach, sued his wife (defendant No. 1)

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for restitution of conjugal rights. At the time of their marriage, the parties were members of the caste; but subsequently the plaintiff was excommunicated from his caste. The defendant contended that she should not be compelled by the Court to go and live with him as his wife before the plaintiff was re-admitted into the caste: *Held*, upholding the contention, that at the time of marriage she was not only a Mahomedan by faith but also a member of the Kharwa community; occupying that status, she married the plaintiff. It was, therefore, of the essence of the marriage contract that they married because they were members of that particular community and they must be regarded as having entered into the marital relation on the basis of that status. BAI JINA *v.* KHARWA JINA (1907) **I. L. R. 31 Bom. 366**

19. ——— **Implied authority of wife to pledge husband's credit, when rebutted.** The presumption of implied authority on the part of the wife to pledge her husband's credit for necessaries may be rebutted by proof of circumstances inconsistent with the existence of such authority. MAHOMED SULTAN SAHIB *v.* HORACE ROBINSON (1907) . . **I. L. R. 30 Mad. 543**

HUTS.

See TILED HUTS.

——— **right of tenant to remove—**

See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE, AND COMPENSATION FOR IMPROVEMENTS. **14 B. L. R. 201**

——— **seizure of, in execution—**

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MOVEABLE PROPERTY. **8 B. L. R. 508, 510 note: 512 note: 514 note 2 B. L. R. A. C. 77**

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—MOVEABLE PROPERTY . . **10 B. L. R. 448 I. L. R. 23 Calc. 778 3 C. W. N. 590 4 C.W. N. 470**

HYPOTHECATION.

See ACCOUNT . **I. L. R. 35 Calc. 298**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 257A. **I. L. R. 35 Calc. 870**

See MORTGAGE.

HYPOTHETICAL BUILDING SCHEME.

See LAND ACQUISITION ACT. **I. L. R. 33 Bom. 325**

HYPOTHETICAL DEVELOPMENT.

See LAND ACQUISITION. **I. L. R. 33 Bom. 28**

I

IDIOTCY.

See HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF INHERITANCE—INSANITY.

See INSANITY.

See REGISTRATION ACT, 1877, s. 35 (1871, s. 35) . . **I. L. R. 1 All. 465 L. R. 4 I. A. 166**

IDOL.

See CIVIL PROCEDURE CODE, 1882, s. 11. **I. L. R. 32 Calc. 102**

See CRIMINAL PROCEDURE CODE, SHEBAIT, s. 144 **8 C. W. N. 376**

See DEBUTTER.

See HINDU LAW—ENDOWMENT; SHEBAITS; WORSHIP.

See LIMITATION . **I. L. R. 32 Calc. 129**

See LIMITATION ACT, 1877, s. 7. **8 C. W. N. 809**

See PROCESSIONS.

See RIGHT OF WORSHIP. **I. L. R. 31 Mad. 236**

——— **bequest to—**

See HINDU LAW—PARTITION—AGREEMENT NOT TO PARTITION AND RESTRAINT ON PARTITION . . **8 B. L. R. 60**

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—BEQUEST TO IDOL. **2 B. L. R. A. C. 137 note**

——— **dedication to—**

See HINDU LAW—ENDOWMENT.

——— **gift to, and direction to establish—**

See HINDU LAW—GIFT—CONSTRUCTION OF GIFTS . **I. L. R. 29 Calc. 230**

——— **grant of letters of administration for debutter property of—**

See PROBATE ACT, ss. 18-23. **I. L. R. 12 Calc. 375**

——— **joint ownership in right of worship of—**

See HINDU LAW—PARTITION—RIGHT TO ACCOUNT ON PARTITION. **I. L. R. 17 Bom. 271**

——— **offerings to—**

See ATTACHMENT—SUBJECTS OF ATTACHMENT—OFFERINGS TO HINDU DEITY.

——— **position of—**

See LIMITATION ACT, ART. 144—ADVERSE POSSESSION . **I. L. R. 23 Calc. 536**

See PARTITION—RIGHT TO PARTITION—GENERAL CASES . **14 B. L. R. 166 I. L. R. 6 Bom. 298**

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IDOL—*concld.*

——— **public worship of—**

See PROCESSIONS.
I. L. R. 30 Mad. 185
L. R. 34 I. A. 93

——— **right of, to remove—**

See CIVIL PROCEDURE CODE, s. 11.
10 C. W. N. 505
I. L R. 32 Calc. 102

——— **suit brought in name of—**

See PARTIES—PARTIES TO SUITS—IDOL.
See PLAINT—AMENDMENT OF PLAINT.
I. L. R. 19 All. 330

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES.
6 C. W. N. 178

——— **suit for turn of worship of—**

See LIMITATION ACT, 1877, ART. 131 (1859, s. 1, CL. 16) . . 6 B. L. R. 352
I. L. R. 4 Calc. 683
I. L. R. 8 Calc. 807

——— *Right of suit of worshipper—Idol, location of—Religious ceremony.* A suit not based upon any right to the property in idols or to an office, but upon the plaintiff's supposed right as worshipper to insist on the observance of a ceremonial regulation relating to the particular temple in which the idol should be ordinarily located is not a suit of a civil nature and not maintainable in a Civil Court. LOKE NATH MISRA *v.* DASARATI TEWARI (1902) I. L. R. 32 Calc. 102
10 C W N. 505

ILLEGAL CESS.

See ABWABS.

See CESS.

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—ILLEGAL CESSES.

1. ——— **Wages and allowance of patwari.** A patwari's wages and allowances are in the nature of illegal cesses, and cannot be recovered in a suit for rent. MENGUR MUNDUR *v.* HUREE MOHUN THAKOOR . . . . . 23 W. R. 447

2. ——— **Payments in nature of rent in kind**—*Local custom.* Certain payments which were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform and had been paid by the raiyat for a long time according to local custom, were held not to be illegal cesses. *Orjoon Sahoo* v. *Anund Singh, 10 W. R. 257,* distinguished. BUDHUA ORAWAN MAHTOON *v.* JUGGESSUR DOYAL SINGH . . . 24 W. R. 4

3. ——— **Purabee**—*Consideration for agreement.* A purabee, when it is part of the consideration for which an agreement is entered into, is not in the nature of an abwab or illegal cess. JUGGODISH CHUNDER BISWAS *v.* TURRIKOOLLAH SIRCAR . . . . . 24 W. R. 90

ILLEGAL CONTRACT.

See CONTRACT ACT, s. 23.

——— **illegal distress—**

See LIMITATION . I. L. R. 36 Calc. 141

ILLEGAL GRATIFICATION.

See PENAL CODE, ss. 161-165.

See PENAL CODE, s. 161.
9 C. W. N. 547

See PUBLIC SERVANT . 5 C. W. N. 332
7 B. L. R. 446
21 W. R. Cr. 9
I. L. R. 1 All. 530
I. L. R. 4 Calc. 376

1. ——— **Public servant receiving money for services rendered**—*Penal Code (Act XLV of 1860), s. 161.* A person who receives money from others for the purpose or with the object of rendering any service to them is guilty of an offence under s. 161, Penal Code. *In the matter of* NAJEEMUDDIN . 4 C. W. N. 798

2. ——— **Attempt to obtain bribe—** *Penal Code, s. 161—Asking for bribe.* To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectually in implicit as in explicit terms. Where therefore *B*, who was employed as a clerk in the pension department, in an interview with *A*, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by "karrawai," and on the overture being rejected concluded by declaring that *A* would rue and repent the rejection of it:—*Held.* that the offence of attempting to obtain a bribe was consummated. EMPRESS *v.* BALDEO SAHAI I. L. R. 2 All. 253

3. ——— **Non-commission of act for which bribe was given**—*Penal Code, s. 161.* The taking of a bribe by a serishtadar to influence a Principal Sudder Ameen in his decisions is sufficient for a legal conviction, whether the serishtadar did or did not influence or try to influence the Principal Sudder Ameen since s. 161 of the Penal Code expressly mentions that "a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for what he has not done," is punishable. QUEEN *v.* KALEECHURN . . . . . 3 W. R. Cr. 10

4. ——— **Money paid to obtain release of person wrongfully confined.** Money paid for obtaining release of a person wrongfully confined by police officer cannot be regarded as illegal gratification, but as money extorted. AKHOY KUMAR CHAKRABUTTY *v.* JAGAT CHANDRA CHAKRABUTTY
4 C. W. N. 755

5. ——— **Taking bribe for inducing public servant to forbear to do certain official act**—*Penal Code, s. 162.* A person who accepts for himself or for some other person a gratification for inducing, by corrupt or illegal means, a

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public servant to forbear to do a certain official act, is punishable, not under s. 161, but under s. 162 of the Penal Code. QUEEN *v.* OBHOYCHURN CHUCKERBUTTY . . . . . **3 W. R. Cr. 19**

6. ——— **Patwari taking grain in consideration of showing favour to giver**——*Penal Code, ss. 161, 165.* A patwari taking grain as a consideration for showing favour to the giver in the discharge of his functions as patwari should be convicted under s. 161, and not s. 165 of the Penal Code. QUEEN *v.* MUDSOODDEEN **2 N. W. 148**

7. ——— **Agreement to restore village mahars to office on payment on R300 towards repair of a village temple**—*Penal Code (Act XLV of 1860), s. 161—Public servant—Revenue and police patel—Official Act.* The mahars of a certain village having been suspended from their office for some months, a meeting of the villagers was held at the house of the patel, at which the patel was present, to consider the question of their restoration to office, and an agreement was there come to that they should be restored on their paying a sum of R300 towards the repair of the village temple. *Held*, that the patel, being a public servant, had committed an offence under s. 161 of the Penal Code. QUEEN-EMPRESS *v.* APPAJI BIN YADAVRAO . . **I. L. R. 21 Bom. 517**

8. ——— **Proper order on conviction**—*Sentence—Order to refund money.* On a conviction of taking illegal gratification a simple order to refund the money taken is quite inadequate to the gravity of the offence. *In the matter of* MUTTY LALL CHATTOPADHYA . . **16 W. R. Cr. 74**

9. ——— **Demand of dusturi by Civil Court peon**—*Penal Code (Act XLV of 1860), s. 161.* A demand of *dusturi* by a Civil Court peon from the plaintiff, as a motive or reward for serving the summonses on his witnesses without an identifier, amounts to an attempt to obtain an illegal gratification within s. 161 of the Penal Code. *Empress of India* v. *Baldeo Sahai, I. L. R. 2 All. 253*, followed. *Queen-Empress* v. *Ramakka, I. L. R. 8 Mad. 5*, distinguished. RATAN MONI DEY *v.* EMPEROR (1905) . **I. L. R. 32 Calc. 292**
s.c. 9 C. W. N. 547

ILLEGITIMACY.

See HINDU LAW—MARRIAGE.

See HINDU LAW—SUCCESSION.
I. L. R. 32 Bom. 562

See HUSBAND AND WIFE.
11 B. L. R. 144

See ILLEGITIMATE CHILDREN.

See MAHOMEDAN LAW—ACKNOWLEDGMENT.

See MAHOMEDAN LAW—INHERITANCE.
I. L. R. 30 Calc. 68

See MARRIAGE.

ILLEGITIMACY—*contd.*

——— **proof of**—

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—PETITIONS.
I. L. R. 10 Mad. 334

See WITNESS—CIVIL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES.
I. L. R. 18 Bom. 468

——— **question of**—

See EXECUTION OF DECREE—EXECUTION BY OR AGAINST REPRESENTATIVES.
I. L. R. 2 Calc. 327
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See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES
I. L. R. 2 Calc. 327
L. R. 4 I. A. 66
I. L. R. 4 All. 92

1. ——— **Right to bastard's estate**—*Escheat—Non-assertion of claim by Crown—Estoppel.* *M*, the widow and administratrix of a bastard who had died intestate and without issue, received a letter in 1841 from the Lords Commissioners of the Treasury stating that they did not deem it expedient to take any steps for the assertion of the rights of the Crown with regard to her late husband's estate. Previous to this, *M* had obtained possession of that estate, and two months before the receipt of the letter she had contracted a second marriage. No settlement was made upon this marriage, and since the time of the marriage, *M's* second husband had had the exclusive management of the property. In execution of a decree against the husband, his right, title, and interest in and to a portion of the property were put up for sale and purchased by the plaintiff. The plaintiff's right to possession was disputed by *M*, who contended that her husband took no interest in the two-thirds of the property which went to the Crown which could be attached and sold in execution. In a suit by the plaintiff to establish her rights over the property:—*Held*, that the Crown would be estopped by the line adopted by the Commissioners of the Treasury in 1841 from asserting its claim to the two-thirds; and that *M* had a good title to the whole estate even as against the Crown. TOOLSEEMONEY DOSSEE *v.* CORNELIUS
11 B. L. R. 144

2. ——— **Letters of administration**—*Parties—Administrator General's Act, XXIV of 1867, s. 15—Succession Act (X of 1865), s. 224.* The plaintiffs applied for probate of the will of one *R D*, to be granted to them as executor and executrix thereof. The Administrator General had entered a caveat and appeared to oppose the application. The petition for probate was therefore ordered to be treated as a plaint, both parties to file a written statement, and the case was set down to be heard. At the hearing it appeared *R D* was illegitimate, and the issue for trial was whether the document was or was not her will. *Held*, that

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the Administrator General would be entitled to letters of administration under s. 15, Act XXIV of 1867, and that it was not necessary to make the Government a party to the suit. *Semble:* The Administrator General would have been entitled to apply for letters of administration under s. 224 of Act X of 1865. DEMELLO *v.* BROUGHTON . . . **11 B. L. R. Ap. 6**

ILLEGITIMATE CHILDREN.

See CUSTODY OF CHILDREN. **I. L. R. 4 Calc. 374**

See HINDU LAW—

INHERITANCE—ILLEGITIMATE CHILDREN.

MARRIAGE—VALIDITY OR OTHERWISE OF MARRAIGE. **7 C. W. N. 619**
3 B. L. R. P. C. 1

See HINDU LAW—PARTITION—RIGHT TO PARTITION—ILLEGITIMATE CHILDREN . . **I. L. R. 12 Mad. 401**

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——— succession to—

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——— *Succession Certificate Act (VII of 1889)—Successor to impartible zamindari not entitled to recover debts due to his predecessor without a certificate under the Act.* The successor to an impartible estate is not a co-owner with his predecessor in the moneys due to the latter before his death. He derives his title to such debts only at the death of his predecessor, as part of such predecessor's effects, and cannot recover them without obtaining a certificate under Act VII of 1889. The rule of succession in impartible estates is based on a theoretical co-parcenary and not on any actual unity of interest between the predecessor and his successor, and this theoretical community of interest can be applied only for the purpose of determining the succession and for no other purpose whatsoever. *The Pittapore Case, I. L. R. 22 Mad. 397*, referred to. Observations of SANKARAN NAIR, *J.*, in *Nachiappa Chettiar* v. *Chinnayasami Naicker, I. L. R. 29 Mad. 459*, considered and not followed. *Kali Krishna Sarkar* v. *Raghunath Deb, I. L. R. 31 Calc. 224*, not followed. RAJAH OF KALAHASTI *v.* ACHIGADU (1905)
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——— nature of—

See CIVIL PROCEDURE CODE, 1882, s. 359. **11 C. W. N. 740**

1. **——— Period of imprisonment of judgment-debtor**—*Civil Procedure Code, 1882, s. 342.* The Court cannot fix any period for the imprisonment of a judgment-debtor under Civil Procedure Code, s. 342. SUBUDHI *v.* SINGI **I. L. R. 13 Mad. 141**

2. ——— *Civil Procedure Code (Act XIV of 1882), s. 342—Imprisonment for debt—Period of imprisonment—Jurisdiction.* The Court cannot fix any term of imprisonment for a debt under s. 342, Civil Procedure Code, when committing a debtor to jail. *Subudhi* v. *Singi, I. L. R. 13 Mad. 141,* followed. SUJAN BIBI *v.* SAGAR MANDAL (1900) . . **5 C. W. N. 145**

3. **——— Simple or rigorous imprisonment**—*Civil Procedure Code (Act XIV of 1882), s. 359—Omission to specify the nature of the imprisonment when passing order under s. 359—The power to subsequently declare it to be rigorous—Jurisdiction—S. 622, Civil Procedure Code.* The imprisonment ordered under s. 359, Civil Procedure Code, may be either simple or rigorous, but the nature of the imprisonment must be specified when the order is made. *Government* v. *Radhoo Charan Ash, 18 W. R. Cr. 3,* referred to. When the Judge in passing orders under s. 359, Civil Procedure Code, omits to state whether the imprisonment awarded is to be simple or rigorous, it must be taken to be simple imprisonment. After the Judge has made an order under s. 359, his power under that provision of the law is exhausted and he has no jurisdiction subsequently by an administrative order passed without notice to the petitioner to determine that the imprisonment is to be rigorous. If he does so, his order is liable to be discharged by the High Court in the exercise of its revisional jurisdiction. SHEIKH AMIR ALI *v.* MATHOO SAHOO (1907) . . **11 C. W. N. 740**

IMPROPER QUESTIONS IN CROSS-EXAMINATION.

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See LANDLORD AND TENANT—BUILDINGS ON LAND; RIGHT TO REMOVE, AND COMPENSATION FOR IMPROVEMENTS.

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See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION RENT. **I. L. R. 24 Mad. 356**

See TRUST . **I. L. R. 11 Mad. 360**

1. **——— Occupier of land without title**—*Right to compensation for improvements.* Where a person had held a property on a false title, and the rightful owner had recovered possession after much trouble :—*Held,* that the former was not entitled to compensation for improvements which he had made for his own convenience, and which were not made as the latter would have required. WAHEDOOLLAH *v.* GOLAM AKBUR . . . **25 W. R. 205**

See FURZUND ALI KHAN *v.* AKA ALI MAHOMED **3 C. L. R. 194**

2. **——— Calingula constructed by Government**—*Necessary effect to cause water to flood plaintiff's lands—Rights of Government in connection with the distribution of water—Li-*

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IMPROVEMENTS—*contd.*

mitation Act (XV of 1877), s. 24—Continuing wrong. In 1882 a calingula was constructed by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiff's land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory injunction directing that the calingula be blocked up. *Held*, that they were entitled to the relief claimed. Government have the right to distribute the water of Government channels for the benefit of the public subject to the rights of a ryotwari land-holder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for his accustomed requirements. But the rights of Government in connection with the distribution of water do not include a right to flood a man's land because, in the opinion of Government, the erection of a work, which has this effect, is desirable in connection with the general distribution of water for the public benefit. The fact that the opening of the calingula was necessary for the protection of the tank, and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—did not deprive the plaintiffs of their right to have their property protected. Even if Government had been empowered by statute to construct the calingula in question, it would be for Government to show that they could not exercise their statutory powers without injuring the plaintiffs' lands. The position of persons acting under statutory authority discussed. *Held*, also, that the injury was a continuing one and that the suit was governed by s. 24 of the Limitation Act and was not barred by limitation. SANKARAVADIVELU PILLAI *v.* SECRETARY OF STATE FOR INDIA 1905) . . . . **I. L. R. 28 Mad. 72**

3. ———— **Water-course**—*Construction of new channel—Prior to construction water flowed naturally or percolated without definite course—Material alteration.* Plaintiff sued for an injunction to restrain defendant from making or using a water channel. Prior to the construction of the channel, all the water that flowed from the defendant's land on to the plaintiff's found its way there by natural flow or percolation and was not carried down by any definite water course. The effect of the channel was to collect water, which formerly flowed from a large tract of land at different points in a definite channel and to throw it all into a particular part of the plaintiff's channel. *Held*, that plaintiff was entitled to the relief sought. Even though no greater quantity of water might eventually be carried into plaintiff's channel than had hitherto run into it, the new channel effected a material alteration in the mode

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of the passage of the water from the defendant's land into that of the plaintiff. Such a change plaintiff was entitled to object to. VENKATAGIRI *v.* MUDDUKRISHNA (1905) . **I. L. R. 28 Mad. 15**

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See ACT OF STATE.
I. L. R. 11 Bom. 235

See BOMBAY REVENUE JURISDICTION ACT, S. 4 . **I. L. R. 18 Bom. 319**

See GRANT—CONSTRUCTION OF GRANTS.
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11 Bom. 162
I. L. R. 9 Mad. 307
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See INAM COMMISSIONER.

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See PARTITION—RIGHT TO PARTITION—GENERALLY **I. L. R. 21 Bom. 458**
I. L. R. 27 Bom. 353

See RESUMPTION—EFFECT OF RESUMPTION . . . . . **1 Bom. 22**
I. L. R. 9 Bom. 419
I. L. R. 10 Bom. 112
I. L. R. 11 Bom. 235

See SERVICE TENURE.
I. L. R. 17 Bom. 431
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———— **enfranchisement of**—

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, MADRAS.
2 Mad. 327

See RESUMPTION—EFFECT OF RESUMPTION . . **I. L. R. 26 Mad. 339**

See RIGHT OF SUIT—OFFICE OR EMOLUMENT . **I. L. R. 8 Mad. 249**
I. L. R. 15 Mad. 284
I. L. R. 20 Mad. 454
I. L. R. 21 Mad. 47
I. L. R. 22 Mad. 204
I. L. R. 23 Mad. 47

1. ———— *Enfranchisement of service inam—Madras Enfranchised Inams Act (IV of 1866)—Service inam enfranchised in widow's name under Act IV of 1866 not alienable by widow beyond her own life-time.* The enfranchisement of a service inam does not involve a resumption by Government and a fresh grant in favour of the

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persons named in the title-deed. It disannexes the inam from the office, converts it into ordinary property and releases the reversionary rights of the Crown in the inam, but does not confer on the persons named in the title-deed any rights in derogation of those possessed by other person in the inam at the time of the enfranchisement. Case law considered. *Narayana* v. *Chengalamma, I. L. R. 10 Mad. 1,* approved. *Gunnaiyan* v. *Kamakchi Ayyar, I. L. R. 26 Mad. 339,* approved. A Hindu widow cannot alienate beyond her own life-time service inam enfranchised in her name under Madras Act IV of 1866. PINGALA LAKSHMIPATHI *v.* BOMMIREDDIPALLI CHALAMAYYA (1907) **I. L. R. 30 Mad. 434**

2. ——— Enfranchisement of lands framing—*Enfranchisement, no resumption and fresh grant—Adverse possession, right acquired by, can be inherited or conveyed—Lapse of time does not change character of estate.* Where a service inam, which consists of land and not the assessment only thereon, is enfranchised, such enfranchisement only disannexes the land from the office and converts it into ordinary property releasing the reversionary right of the Crown in the inam. It has not the effect of a resumption and fresh grant so as to affect the rights of other persons existing at the time of the enfranchisement. *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya, I. L. R. 30 Mad. 434,* referred to. A person holding property adversely for less than the statutory period, acquires, as against every one but the true owner, an interest capable of being inherited, devised and conveyed ; and, where such an interest in service inam land is inherited by the widow, she takes only a widow's estate, which is not enlarged by subsequent enfranchisement ; nor is it, by continued possession for more than the statutory period, converted into an absolute estate. Mere lapse of time will not change the character of such estate, in the absence of evidence to show that she claimed an absolute interest in such properties. SUBBAROYA CHETTY *v.* AIYASWAMI AIYAR (1908) . **I. L. R. 32 Mad. 86**

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See INAM.

See INAMDAR.

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY. **I. L. R. 13 Bom. 442**

——— **rent fixed by—**

See MADRAS REGULATION XXV OF 1802, S. 4 . . **I. L. R. 16 Mad. 34**

See MADRAS RENT RECOVERY ACT, S. 1. **I. L. R. 16 Mad. 40**

1. ——— Certificate of, effect of—*Mad. Reg. IV of 1831.* The certificate of the Inam Commissioner does not afford conclusive evidence of the title of the person to whom it was granted, nor is his decision one over which the Civil Courts have

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no jurisdiction. His duties were not of a judicial character, but he was authorized to deal with those in possession of inams on certain terms varying with the nature of the holding which incidentally he was to determine, but for the prescribed purpose only, the nature of the title by which the person whom he found in possession actually held it. *Sundaramurti Nudali* v. *Vallinayaki Ammal, 1 Mad. 465,* distinguished. VISSAPPA *v.* RAMAJOGI **2 Mad. 341**

2. ——— Effect of decision of—*Right of suit by inamdar against Government officer infringing decision.* The Inam Commissioner's decisions, under Act XI of 1852, on matters falling within his jurisdiction, are final, except when and as modified by an appeal to Government in its judicial capacity under the Act, and binding not only upon the inamdar, but upon the Government itself in its executive capacity, and where a Government officer infringes the rights of an inamdar thus determined, an action lies against him in the Civil Court. VASUDEV PANDIT *v.* COLLECTOR OF PUNA **10 Bom. A. C. 471**

3. ——— In an enquiry under Act XI of 1852 the Inam Commissioner, on the 30th January 1865, decided that a certain inam village should be continued to the male descendants of the original grantee. *Held,* that the decision of the Inam Commissioner was only intended to regulate the duration of the exemption of the inam village from assessment, and not to regulate the enjoyment of it as between the heirs of the original grantee. VASUDEV ANANT *v.* RAMKRISHNA **I. L. R. 2 Bom. 529**

INAMDAR.

See BOMBAY LAND REVENUE ACT, SS. 85, 86 . **I. L. R. 16 Bom. 586**

See BOMBAY LAND REVENUE ACT, S. 216. **I. L. R. 18 Bom. 525**

See BOMBAY LOCAL FUNDS ACT, 1869, S. 8 . . **I. L. R. 17 Bom. 422**

See ENHANCEMENT OF RENT—RIGHT TO ENHANCE . . **6 Bom. A. C. 23**
I. L. R. 3 Bom. 141, 348
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See FOREST LANDS **I. L. R. 28 Mad. 69**

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See JURISDICTION OF CIVIL COURT—CUSTOMARY PAYMENTS. **I. L. R. 16 Bom. 649**

See LANDLORD AND TENANT—EJECTMENT—GENERALLY. **I. L. R. 19 Bom. 138**

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See MADRAS RENT RECOVERY ACT, s. 1.
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See RESUMPTION—EFFECT OF RESUMPTION . . . **1 Bom. 22**
I. L. R. 9 Bom. 419
I. L. R. 10 Bom. 112
I. L. R. 11 Bom. 235

——— **tenants under—**

See LANDLORD AND TENANT.
I. L. R. 30 Mad. 502

1. ——— **Rights of common.** Unless the terms of his inam grant authorize an inamdar to enclose a piece of land used immemorially as pasture ground by the inhabitants of his inam village, he cannot do so at will merely by virtue of his being an inamdar. VISHVANATH *v.* MAHADAJI
I. L. R. 3 Bom. 147

2. ——— *Arrears of assessment—Occupancy tenant—Purchaser from the occupancy tenant—Decree for assessment—Money-decree against the occupants—Charge on land.* The plaintiff, an inamdar, sued to recover assessment due for the years 1895-96 and 1896-97 from defendant No. 2, who came in as a purchaser from the original occupancy tenant on the 5th April 1899. The lower Courts passed a personal decree against defendant No. 2 for the arrears of assessment. *Held*, that defendant No. 2 was not liable, since an inamdar suing for assessment was not entitled to a charge on the lands, but only to a money decree against the occupants. *Ratanji* v. *Sakharam*, (*1884*) *P. J. 68*, followed. VINAYAK *v.* LAKSHMAN (1904)
I. L. R. 28 Bom. 92

3. ——— *Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (b)—Occupancy tenant —Claim by the inamdar to recover assessment according to the survey rates—Tenant setting up fixed assessment—Objections under s. 4 (b)—Civil Court—Jurisdiction.* The plaintiff, an inamdar, sued to recover from the defendant, an occupant, the assessment of the lands held by him in accordance with the survey rates. The defendant contended, among other things, that under certain Maphi istawa Kowls held by him, he had acquired the right to hold the lands permanently on payment of a fixed sum as rent. Plaintiff contended that by virtue of s. 4, cl. (*b*), of the Bombay Revenue Jurisdiction Act (X of 1876) the Civil Court was precluded from entertaining the defendant's contention. *Held*, that cl. (*b*) of s. 4 of the Bombay Revenue Jurisdiction Act (X of 1876) presented no bar to the hearing by the Civil Court of the contention set up by the defendant. An objection to come within 1st head of s. 4, cl. (*b*), of the Bombay Revenue Jurisdiction Act (X of 1876) must be "to the amount or incidence of any assessment of land revenue" itself and as such, in other words, apart from the question of any other and independent right, if an occupancy tenant complains that though he is bound to pay the assessment of land revenue, the amount or incidence of it as authorized by Government is too high, having regard to the nature of the soil and quality of his land and other like considerations, the objection is one purely and simply to such amount or incidence. But if, without questioning the legality or propriety of the amount or incidence *per se*, he asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the inamdar, he cannot be said to object to the amount or incidence of the assessment. Nor can such a tenant be said by his objection to object to the validity or effect of the notification of survey or settlement under the 3rd head of cl. (*b*) of s. 4 of the Bombay Revenue Jurisdiction Act (X of 1876). "Objections" in s. 4, cl. (*b*), of the Act can be raised by a suit or in defence to a suit. LAKSHMAN *v.* GOVIND (1904)
I. L. R. 28 Bom. 74

4. ——— *Dasname Sanyasi and Gosavi Zundivale—Kadim ancient haks—Escheat—Corporate body—Fluctuating communities —Duty of the Court, if possible, to find legal origin of existing facts.* The plaintiffs, whose title as inamdars of a village dated back to 1762, sued, on the strength of their title as inamdars, to recover, on account of certain haks, a sum of money, which they alleged was due to them and was wrongly taken by the defendant. The defendant alleged that the haks were Kadim (ancient, that is, which came into existence prior to the inam grant of the village to the plaintiffs' ancestors) and had escheated to Government. The Court below allowed the claim. On appeal by the defendant:—*Held*, confirming the decree, that in order to make out that the Government had become entitled to the haks (Dasname Sanyasi and Gosavi Zundivale) by virtue of an escheat, three things must be established, namely, (i) that there was a heritable grant to individuals, (ii) that the heirs of those individuals have failed, and (iii) that on the happening of these two conditions the haks would escheat to Government. The burden of establishing a title by escheat lies on those who assert it. The expressions Dasname Sanyasi and Gosavi Zundivale do not indicate individuals. They indicate a group or community of Sanyasis or Gosavis. The law of the country recognizes fluctuating communities as legal *personæ* capable of owning property, as, for instance, the caste and the village and the hakdars in the present case were communities composed of the religious elements their names indicate. A corporate body is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. On the dissolution of the corporation the cause of the grant fails, and the effect of a dissolution on the corporation's rent-charges is that they become extinguished. As in the case of the death of a grantee of an annual payment out of land to last during the term of his life the payment sinks into land on its determination, so where the grantee is a community and the

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INAMDAR—*concld.*

grant is to last during the term of its existence on its dissolution a similar result follows. Where there has been a well-established user extending over a long series of years it is the duty of the Court, if possible, to find a legal origin to the existing facts. SECRETARY OF STATE *v.* HAIBATRAO HARI (1904) . . . **I. L. R. 28 Bom. 276**

5. ——————— *Land Revenue Code (Bombay Act V of 1879), s. 83—Grantee of Royal share of revenue or of soil—Mirasi tenant—Enhancement of rent—Sheri lands—Contractual relation—Usage of the locality—Enhancement to be just and reasonable.* A grant to an Inamdar may be either of the Royal share of revenue or of the soil; but ordinarily it is of the former description and the burden rests on the Inamdar to show that he is an alienee of the soil. Where an Inamdar is alienee only of the land revenue, then his relations towards those, who hold land within the area of the Inam grant, vary according to certain well-recognized principles. If the holding was created prior to the grant of the Inam, then the Inamdar as such can only claim land-revenue or assessment; for he has no interest in the soil in rspect of which rent would be paid; but if the holding be later in its origin than the Inam grant, then the lands comprised in such holding would be the Sheri lands of the Inamdar and he would be entitled to place tenants in possession of them, even if only a grantee of revenue. With respect to the latter class of holding, direct contractual relations would be established between the Inamdar and the holder. If no such contract can be proved, recourse must be had to s. 83 of the Land Revenue Code (Bombay Act V of 1879). In the absence of satisfactory evidence of agreement, the rent is that payable by the usage of the locality and failing that, such rent as, having regard to all the circumstances of the case, shall be just and reasonable. In a suit by an Inamdar to enhance rent of Miras land, it must be determined whether what was paid was rent and whether the Inamdar has a right to enhance as against one, who holds on the same terms as the defendant does; the test is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure. RAJYA *v.* BALKRISHNA GANGADHAR (1905) **I. L. R. 29 Bom. 415**

INCITEMENT.

See NEWSPAPERS (INCITEMENTS TO OFFENCES) ACT **I. L. R. 36 Calc. 405**

INCOME.

See ACCUMULATIONS.

See HINDU LAW—ALIENATION— ALIENATION BY WIDOW—ALIENATION OF INCOME AND ACCUMULATIONS.

See MADRAS DISTRICT MUNICIPALITIES ACT . . **I. L. R. 27 Mad. 547**

INCOME-TAX.

See BENGAL CESS ACT, 1871. **I. L. R. 4 Calc. 576**

See BENGAL CESS ACT (BEN. ACT IX OF 1880) . . **I. L. R. 28 Calc. 637**

See CESS, ASSESSMENT OF. **11 C. W. N. 1053; I. L. R. 35 Calc. 82**

See MINES . **I. L. R. 34 Calc. 257**

——————— *Contract Act (IX of 1872) ss.69, 70—Money paid for income-tax by the person assessed and on whom demand is made cannot under these sections be recovered from a person who is alleged to be the party really liable to pay.* When the income-tax authorities assess a person in respect of certain income alleged to be derived by him and recover the tax so assessed from him, such person cannot, under s. 69 or s. 70 of the Contract Act, recover the amount so paid from another person on the ground that such other was in actual receipt of the income. S. 69 cannot apply, as the latter person, not being assessed, was not legally bound to pay the tax and s. 70 cannot apply as the person paying the tax did so on his own account and not on behalf of another. RAGHAVAN *v.* ALAMELU AMMAL (1907) **I. L. R. 31 Mad. 35**

INCOME TAX ACT (XXXII OF 1860).

See ESTOPPEL—STATEMENTS AND PLEADINGS . . **6 W. R. 252; 24 W. R. 173**

See RIGHT OF SUIT—INCOME TAX. **11 W. R. 425**

——————— **(IX of 1869), ss. 24, 25, 27**—*Appeal in criminal case—Failure to make payment—Sanction of Collector and discretion of.* There were strong grounds for urging that the Legislature intended that convictions under ss. 24 and 25, Act IX of 1869, should be summarily disposed of by the Magistrate, but the Court was not prepared to hold that the right of appeal was taken away. No jurisdiction was given to the Judge to reverse a conviction under these sections because he may regard it as one of hardship, nor had he to determine whether or not the failure to pay was in pursuance of an intention to avoid payment or not. By failing to make payment within the time specified in the notice the tax-payer was guilty of an offence within the terms of s. 25, and subsequent payment did not take the case out of the provisions of that section. To render such a conviction valid, it must be shown that the prosecution was instituted at the instance of the Collector, and the mere sending on the tehsildar's report with an expression of the Collector's general desire to prosecute defaulters cannot be held tantamount to the institution of a prosecution at the instance of the Collector. The provisions of s. 27 seem to imply that the Collector ought in each case to exercise his discretion as to whether a prosecution should be instituted. QUEEN *v.* CHEIT RAM **2 N. W. 113**

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INCOME TAX ACTS (IX OF 1869 AND XXIII OF 1869).

See APPEAL IN CRIMINAL CASES—ACTS—INCOME TAX ACT . **14 W. R. Cr. 71**

See SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.
7 Bom. Cr. 76
14 W. R. Cr. 70

INCOME TAX ACT (II OF 1886).

——— **ss. 3, 4, 5**—*Religious endowment—Sajjadanashin—Khankah—Liability of the Sasseram Sajjadanashin to pay Income-tax—Assessment of Income-tax—Exemption from assessment—"Salary"—Remuneration—Maintenance—Position of Sajjadanashin as distinguished from that of Mutwali—Wakf—Farrukhsyari property.* The Sajjadanashin of the Sasseram Khankah is not liable to be assessed with income-tax under the provisions of Act II of 1886 in respect of such moneys as he draws from the Khankah properties for the purpose of his own maintenance and that of his family. SECRETARY OF STATE FOR INDIA *v.* MOHIUDDIN AHMAD . . . **I. L. R. 27 Calc. 674**

——— **ss. 21, 22**—*Liability of agent of company not resident in India.* The liability for income-tax of the agent of a company not resident in British India, but in receipt through such agent of income chargeable under the Income Tax Act (II of 1886), is personal, and s. 22 does not make such liability conditional upon his having funds of the company in his hands. PLUNKETT *v.* NARAYAN PARASHRAM TULLU . **I. L. R. 22 Bom. 332**

——— **s. 30**—*Civil Procedure Code (Act XIV of 1882), s. 368—Bringing one out of several legal representatives of a defendant on record—Effect of decree on the estate—Sale of property for arrears of tax—Lis pendens—Purchase at sale for arrears of income tax—Subsequent sale in execution of prior mortgage decree—Duty of purchaser at revenue sale to pay amount due under mortgage and prevent sale in execution.* Plaintiff, as the assignee of a mortgage executed by the father of first defendant, sued the mortgagor, in 1894, on the mortgage. During the pendency of the suit, and before the decree in it was passed, the mortgagor died. Plaintiff thereupon brought the first defendant on the record, as legal representative, under s. 386 of the Code of Civil Procedure. In December, 1894, a decree for sale was passed which was never impeached as being fraudulent or collusive. As a fact first defendant was not the sole legal representative of the mortgagor, who left two other sons and three daughters. The second son was, at a date subsequent to the decree, assessed to pay income-tax for arrears of which the mortgaged property was sold (under the Revenue Recovery Act), and purchased by second defendant in 1896. In 1897 the mortgaged property was sold in execution of the decree in plaintiff's suit on the mortgage, and plaintiff became the purchaser, the sale being confirmed soon after, and plaintiff obtaining a sale certificate which purported to convey the whole of the mortgaged property to him, and obtaining delivery of

INCOME TAX ACT (II OF 1886)—*contd.*

——— **s. 30**—*contd.*

the property, under s. 318 of the Code of Civil Procedure, in 1898. Plaintiff was subsequently dispossessed by defendants Nos. 2 to 5, and brought the present suit to recover possession of the property. *Held*, that the sale of the property for arrears of income-tax affected only the share of the second son, and not the shares of the other co-heirs, and that, in consequence, the whole of the mortgaged property had not passed to the second defendant under that sale. *Held*, also, that the second defendant, by his purchase, had acquired only the equity of redemption in respect of the second son's share in the mortgaged property. The effect of s. 30 of the Income Tax Act is not to convert income-tax into an arrear of land-revenue, due in respect of the land which may be brought to sale for the realization of the income-tax, but merely to extend the procedure prescribed by the Revenue Recovery Act to the recovery of arrears of income-tax. *Held*, further, that the share of the second son was bound by the decree in the mortgage suit, notwithstanding that the second son was not joined in that suit as one of the legal representatives of the deceased mortgagor. Where a defendant in a suit dies, and the plaintiff, under s. 368 of the Code of Civil Procedure, brings a person on the record, whom he alleges to be the legal representative of the deceased defendant, such person sufficiently represents the estate of the decoased for the purposes of the suit, and, in the absence of fraud or collusion, the decree passed in the suit will bind the estate. *Held*, lastly, that the sale in execution of plaintiff's decree, subsequently to the second defendant's purchase in the revenue sale, extinguished second defendant's equity of redemption. KADIR MOHIDEEN MARAKKAYAR *v.* MUTHUKRISHNA AYYAR (1902) . . . **I. L. R. 26 Mad. 230**

——— **38, Rule 15.**

See EVIDENCE ACT, ss. 123, 124, 162.
I. L. R. 32 Mad. 62

——— **s. 47**—*Principal place of business of a person, power of Governor-General to declare.* S. 47 of the Income Tax Act, so far as it empowers the Governor-General in Council to declare which of several places of business should be deemed to be the principal place of business, applies only to the case of a company or a firm, and not to the case of an individual carrying on business. HADJEE AJAM GOLAM HOSSEIN *v.* SECRETARY OF STATE FOR INDIA (1901) . . **5 C. W. N. 257**

INCOME-TAX RETURNS.

See ONUS OF PROOF—DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR.
I. L. R. 23 Calc. 950
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See RULES MADE UNDER ACTS—INCOME TAX ACT (II OF 1886).
I. L. R. 26 Calc. 281

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INCOMPETENCE.

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See FISHERY, RIGHT OF.
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I. L. R. 29 Calc. 614

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See CIVIL PROCEDURE CODE, 1882, s. 310.
8 C. W. N. 55

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See PARTITION . I. L. R. 28 Bom. 201

See REVENUE SALE LAW, s. 37.
10 C. W. N. 497

See REVENUE SALE LAW, s. 54.
13 C. W. N. 407

See SALE FOR ARREARS OF RENT—INCUMBRANCES.

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES.

See SALE IN EXECUTION OF DECREE—IMMOVEABLE PROPERTY.
5 C. W. N. 497

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I. L. R. 30 Calc. 366

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See PRACTICE . I. L. R. 31 Bom. 465

——— contract of—

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I. L. R. 14 Bom. 299

INDEMNITY BOND.

See STAMP ACT, 1869, SCH. I, ART. 15.
I. L. R. 1 Mad. 133

INDEMNITY NOTE.

See STAMP ACT, 1879, SCH. I, ART. 5.
I. L. R. 5 Bom. 478

INDEPENDENT ADVICE.

See ATTORNEY AND CLIENT.
I. L. R. 36 Calc. 493

INDIAN COUNCILS ACT, 1861 (24 & 25 VICT., c. 67).

See BOMBAY CITY IMPROVEMENT ACT
I. L. R. 27 Bom. 424

——— (24 & 25 Vict., c. 67)—*Circular orders passed by Judicial Commissioner of Punjab.* The circular orders as to the liability of Government for debts of rebels, issued by the Judicial Commissioners of the Punjab, were outlaws within the meaning of 24 and 25 Vict., c. 67. SALIGRAM v. SECRETARY OF STATE
12 B. L. R. 167 : 18 W. R. 389
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——— s. 22—

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—SUBSTANTIAL QUESTION OF LAW.
I. L. R. 1 Calc. 431

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I. L. R. 18 Bom. 636

See HIGH COURT, JURISDICTION OF—NORTH-WESTERN PROVINCES, CIVIL.
I. L. R. 11 All. 490

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION.
I. L. R. 3 Calc. 63
I. L. R. 4 Calc. 172
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See STATUTES, CONSTRUCTION OF.
I. L. R. 11 All. 490

——— s. 42

——— power of Indian Legislatures to affect the prerogative of the Crown—

See MADRAS CITY MUNICIPAL ACT s. 341.
I. L. R. 25 Mad. 457

INDIAN COUNCILS ACT, 1892 (55 & 56 VICT., c. 14).

——— s. 5—

See BOMBAY CITY IMPROVEMENT ACT.
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INDICTMENT.

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——— cultivation of—

See CO-SHARERS—ENJOYMENT OF JOINT PROPERTY—CULTIVATION.
8 B. L. R. Ap. 45
23 W. R 428
25 W. R. 313, 374
I. L. R. 8 Calc. 446
I. L. R. 15 Calc. 214
I. L. R. 18 Calc. 10
L. R. 17 . 110

——— *Manufacture of indigo—Agricultural purposes—"Purposes of the tenancy"—Injunction—Specific Relief Act (I of 1877), s. 54, Illus. (k)—Bengal Tenancy Act (VIII of 1885), ss. 23, 25 (a), 188.* The manufacture of indigo cakes from indigo plants is not an agricultural purpose. Where a land has been let out for agricultural purposes generally, the erection of an indigo factory on any part of such land renders it unfit for the "purposes of the tenancy," and the landlord is entitled to a permanent injunction restraining the tenant from erecting the factory. SURENDRA NARAIN SINGH *v.* HARI MOHAN MISSER 1904) . . . **I. L. R. 31 Calc. 174**

INDIGO CONCERN.

See INDIGO FACTORY.
See LIEN . . **I. L. R. 2 Calc. 58**
11 W. R. 194
See PASTURAGE . **I. L. R. 31 Calc. 503**
See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—PERSONS BY WHOM RIGHT MAY BE ACQUIRED. **25 W. R. 117**
I. L. R. 11 Calc. 501

INDIGO FACTORY.

See LANDLORD AND TENANT.
I. L. R. 34 Calc. 718

——— assignment of—

See VENDOR AND PURCHASER—PURCHASERS, RIGHTS OF.
B. L. R. Sup. Vol. 54
10 W. R. 311

1. ——— **Lien by custom for price of seed**—*Liability of mortgagee of factory in possession.* *A* sold to *B*, the proprietor of an indigo concern, of which *C* was a mortgagee, certain bags of indigo seed. The agreement of sale contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. Subsequent to the sale, and after the seed had been planted, *C*, under a decree on his mortgage, obtained possession of *B's* factory. In a suit by *A* against *B* and *C* for he price of the indigo seed :—*Held*, that, in the absence of any agreement by *C* to pay the debts of *B*, *C* could not be held liable. There is no lien by custom upon an indigo factory, or upon the produce of an indigo factory, in respect of any debt of the factory. MONOHUR DASS *v.* MCNAGHTEN
I. L. R. 3 Calc. 231

INDIGO FACTORY—*concld.*

2. ——— **Mortgagee in possession after foreclosure**—*Liability for rent.* The mortgagee of an indigo factory foreclosed and took possession of the concern in the month of Jeyt 1282. The rents due from the raiyats for the year 1282 became due at the end of Jeyt 1282, and were collected by the mortgagee ; the rents for 1282 due to the land-owners from the owners of the indigo concern also became due at the end of Jeyt 1282. *Held*, that the mortgagee in possession was liable for them. MACNAGHTEN *v.* BHEEKAREE SINGH
2 C. L. R. 323

INDIGO PLANTER.

See INSOLVENT ACT, s. 60.
I. L. R. 21 Calc. 1018

INFANT.

See GUARDIAN.
See MINOR.

——— beneficiary—

See TRESPASS . **I. L. R. 36 Calc. 28**

——— **contract by**—*Contract Act (IX of 1872), ss. 10, 11, 68, 247 and 248—Infant's contracts, if illegal—Bond securing debts contracted during minority as well as sum advanced when adult, liability for—Fresh consideration—Infants Relief Act, 1874 (37 & 38 Vict., c. 62), s. 2.* There is nothing unlawful in an infant's paying for the property he has received and promised to pay for—only if he does not perform his promise he cannot be compelled by law to pay. *S*, an infant, had a business in piece-goods in the course of which he had various dealings with *K* and became indebted to her for a sum of Rs. 7,374-4, the price of goods supplied to his business. After attaining majority, *S*, executed a *tumsook* or bond by which he covenanted to pay back within one year, the above sum as well as a further sum of Rs. 76-12 advanced to him at the time of the execution of the *tumsook*. *Held*, that *S* was liable for the whole amount secured by the bond. KUNDAN BIBI *v.* SREE NARAYAN (1906)
11 C. W. N. 135

INFANT MARRIAGE.

See HINDU LAW—MARRIAGE—INFANT MARRIAGE, THEORY OF.
I. L. R. 1 Calc. 289

INFANTICIDE.

——— **Infanticide Act, VIII of 1870, s. 2**—*Rules made by Local Government, North-Western Provinces, Rule VI—Act XVI of 1873, s. 8, cl. (3)—Departures of women of proclaimed families from their homes—Omission to report such departures.* Although Rule VI of the Rules framed by the Government of the North-Western Provinces under Act VIII of 1870 (Infanticide Act), s. 2, declares it to be the duty of the village chowkidar to report on the occasion of his periodical visit to the police station, not only the occurrence, among proclaimed families in the village, of births, of the deaths of infants, and of the removal of pregnant women to

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other villages, but also, "other deaths, removals, and arrivals," this last duty is not cast upon him by the provisions of the Infanticide Act itself ; for Rule VI is not on this point consistent with the Act. *Held*, therefore, that a chowkidar who had omitted to report the departure of a woman of a proclaimed family from her home was not guilty of an offence under the Infanticide Act. *Held*, also, that the heads of proclaimed families are not bound by any of the rules framed under the Infanticide Act to give information to the chowkidar regarding the departure of the woman of their families. EMPRESS *v.* BHUPAL . . . **I. L. R. 6 All. 380**

INFANTS' RELIEF ACT, 1874 (37 & 38 VICT., C. 62), s. 2.

See INFANT . . **11 C. W. N. 135**

INFLUENCE.

See UNDUE INFLUENCE.

INFORMATION OF COMMISSION OF OFFENCE.

See ABETMENT . **4 B. L. R. A. Cr. 7**
24 W. R. Cr. 26

See ACCOMPLICE . **24 W. R. Cr. 55**
I. L. R. 21 Calc. 328

See CRIMINAL PROCEDURE CODES, s. 45 (1872, s. 90).

See PENAL CODE, s. 217.
I. L. R. 1 Mad. 266

See REMAND—CRIMINAL CASES.
9 B. L. R. Ap. 31

See SEARCH-WARRANT.
I. L. R. 35 Calc. 1076

1. ——— **Duty of Village Munsif.** The Village Munsif is bound to report the commission of all offences committed in his village to such person and in such manner as may be most likely to be effectual for the apprehension of the offenders. ANONYMOUS . . . . . **3 Mad. Ap. 31**

2. ——— **Duty of karnam of village**—The karnam of a village is not bound to report the commission of offences other than those specified in s. 138 of the Criminal Procedure Code. ANONYMOUS . . . . . **3 Mad. Ap. 31**

3. ——— **Obligation to give information**—*Penal Code, s. 176.* S. 176 of the Penal Code applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation. *In the matter of* PHOOL CHUND BROJOBASSEE **16 W. R. Cr. 35**

In the matter of the petition of LUCHMAN PERSHAD GORGO . . . . . **18 W. R. Cr. 22**

4. ——— **Presumption of knowledge of offence**—*Penal Code, s. 176—Refusal to join in offence.* The refusal of a person to join in a

INFORMATION OF COMMISSION OF OFFENCE—*contd.*

dacoity does not imply a knowledge on his part of the commission of that offence, or render him liable to punishment under s. 176 of the Penal Code for intentional omission to give notice or information for the purpose of preventing the commission of an offence. QUEEN *v.* LAHAI MUNDUL. **7 W. R. Cr. 29**

5. ——— **Omission to report offence**—*Penal Code, ss. 188, 176—Criminal Procedure Code, 1861, s. 138.* *Held*, that the prisoner could not be punished under s. 118 of the Penal Code, as there was no omission of an act which he was bound to perform which facilitated the commission of an offence ; but that he should be convicted under s. 176, Penal Code, as he was bound to report the offence under s. 138, Act XXV of 1861, after he was informed of it. GOVERNMENT *v.* KESREE
1 Agra Cr. 37

6. ——— *Criminal Procedure Code, 1882, ss. 87, 88—Penal Code, s. 176—Omission to give information to police—Proclamasion of offender—Presumption—Omnia presumuntur rite esse acta—Application of maxim.* *K* was convicted, under s. 176 of the Penal Code, of having intentionally omitted to inform the police of the presence of *V*, a proclaimed offender, at a certain village. It was presumed by the Court that *V* was a proclaimed offender because it was proved that the property of *V* had been attached under the provisions of s. 88 of the Code of Criminal Procedure, 1882. *Held*, that the prosecutor was bound to prove the fact of proclamation. A person legally bound to give information to the police of the presence of a proclaimed offender at a certain place ought not to be prosecuted for omitting to give such information where the police are already aware of the fact. *In re* PANDYA . **I. L. R. 7 Mad. 436**

7. ——— **Omitting to report a sudden, unnatural, or suspicious death**—*Penal Code (Act XLV of 1860), ss. 176, 201—Criminal Procedure Code (Act X of 1882), s. 45.* Before an accused can be convicted of an offence under s. 201 of the Penal Code, it must be proved that an offence, the evidence of which he is charged with causing to disappear, has actually been committed, and also that the accused knew or had information sufficient to lead him to believe that the offence had been committed. *Empress of India* v. *Abdul Kadir, I. L. R. 3 All. 279*, followed. *Held* (*per* PRINSEP and MACPHERSON, *JJ.*)—It is not necessary, in order to support a conviction under s. 176 of the Penal Code against a person falling within the provisions of s. 45 of the Criminal Procedure Code, for not giving information of an occurrence falling under cl. (*d*) of that section, to show that the death actually occurred on his land, when the circumstances disclosed show that a body has been found under circumstances denoting that the death was sudden, unnatural, or suspicious ; the finding of the body being a fact from which a Court might reasonably infer, in the absence of evidence to the contrary, that the death took place there. *Held* (*per* MITTER,

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INFORMATION OF COMMISSION OF OFFENCE—*concld.*

J.)—It is necessary, to secure a conviction in the latter case, to prove that the death took place or occurred in the village or on the land of the accused, and the finding of a body there does not of itself afford that proof. MATUKI MISSER *v.* QUEEN-EMPRESS . . . **I. L. R. 11 Calc. 619**

8. ——— Duty to report sudden death —*Crininal Procedure Code, s. 45—Owner of house. distinguished from owner of land—Penal Code, s. 176* Under s. 45 of the Code of Criminal Procedure every owner or occupier of land is bound to report the occurrence therein of any sudden death. The head of a Nayar family was convicted and fined under s. 176 of the Penal Code for not reporting a sudden death in the family house. *Held*, following former decisions of the Court, that the conviction was illegal, because s. 45 of the Code of Criminal Procedure does not apply to the owner of a house. QUEEN-EMPRESS *v.* ACHUTHA **I. L. R. 12 Mad. 92**

9. ——— Conviction of giving false information—*Penal Code, s. 203.* To justify a conviction for giving false information with respect to an offence under s. 203 of the Penal Code, it must be proved, not only that the person charged had reason to believe that an offence had been committed, but that the offence had actually been committed, and that the accused knew or had reason to believe that the offence had been actually committed. QUEEN *v.* JOYNARAIN PATRO . **20 W. R. Cr. 66**

10. ——— First information—*Criminal Procedure Code (Act V of 1898), s. 154.* Where, upon information received, from the chaukidar, of the offence (and which information was duly recorded in the Station Diary), the Sub-Inspector had gone to the Hospital to see the wounded man, and had there recorded the statement made by him: *Held*, that this record of such statement can in no sense be regarded as a first information of the offence within the meaning of s. 154 of the Code of Criminal Procedure. KING-EMPEROR *v.* DAULAT KUNJRA (1902) . . . . . **6 C. W. N. 921**

11. ——— ——— *Criminal Procedure Code, s. 154—First information, when should it be recorded—Police-officer's memorandum, in addition to entry in the diary.* Information on which an investigation has commenced is the first information of the occurrence. The law does not contemplate that when, in the course of the investigation, something has been elicited, a first information can thereupon be recorded. In every trial it is important that it should be known to the judicial officer what are the facts given out immediately after the occurrence and reported to the police, and the object of the first information is to render him so acquainted. In addition to the entry of the first information in the diary, if the police-officer makes any memorandum of what the first information said, that memorandum should be produced. KING-EMPEROR *v.* BHUT NATH GHOSE (1902) **7 C. W. N. 345**

INFRINGEMENTS.

See COPYRIGHT **I. L. R. 35 Calc. 463**
See EASEMENT **I. L. R. 35 Calc. 661**
See TRADE-MARK **I. L. R. 35 Calc. 311**
I. L. R. 34 Calc. 495

INHERENT POWER.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, CHAP. VII.
I. L. R. 31 Bom. 45

——— ——— *Jurisdiction—Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court.* The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Couse Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates; or from filing further suit relating to the same subject matter pending the hearing of the High Court suit. *Jairamdas* v. *Zamonlal* (*1903*) 27 Bom. 357, not followed. UDERAM KESAJI *v.* HYDERALLY (1908) **I. L. R. 33 Bom. 469**

INHERITANCE.

See GRANT . . . **8 C. W. N. 105**
I. L. R. 35 Calc. 1069

See HEREDITARY OFFICES ACT (BOMBAY ACT III OF 1874), SS. 4, 5.
I. L. R. 25 Bom. 470

See HINDU LAW—

CUSTOM—INHERITANCE AND SUCCESSION;

INHERITANCE;

STRIDHAN—DESCRIPTION AND DEVOLUTION OF STRIDHAN;

WIDOW—INTEREST IN ESTATE OF HUSBAND—BY INHERITANCE.

See MAHOMEDAN LAW—INHERITANCE.

See MALABAR LAW—INHERITANCE.

See NATIVE CHRISTIANS.
I. L. R. 31 Bom. 25

See OUDH ESTATES ACT, S. 22.

——— disqualification for—

See MALABAR LAW—CUSTOM.
I. L. R. 13 Mad. 209

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I. L. R. 14 Mad. 289

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INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE;

WIDOW—DISQUALIFICATIONS.

——— right of—

See HINDU LAW—ADOPTION.
I. L. R. 36 Calc. 824

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INHERITANCE—*contd.*

1. ——— Inheritance, partial acceptance or renunciation of—*Liability of heirs for rent.* There cannot be a partial acceptance or renunciation of an inheritance, nor can one of several heirs accept a part only of an inheritance, to the prejudice of the other heirs and of the creditors of the deceased. An acceptance in part has the effect of an acceptance of the whole and carries with it the same liability. If a person accepts the inheritance, in whole or in part, he is bound to discharge the liabilities which attach to the late tenants from whom he inherits, unless he can prove that he has since made a formal surrender of the holding to the landlord. MOAZAM HASSAIN CHOWDHURI *v.* BHOUDDIN (1900) . **5 C. W. N. 189**

2. ——— Chiefship of Tank—*Family custom—Inheritance—Primogeniture—Tank, Chiefship of, before British rule—Re-settlement by British Government, effect of— Claim of junior members for maintenance—Grants arising from different sources, if admit of election.* It was found that before the introduction of British rule, the country known as Tank belonged to the Chief for the time being as both ruler and proprietor. Also that succession devolved upon the eldest son, the other members of the family being entitled to maintenance only. On the introduction of British rule, the British Government recognised the proprietary title of the then Chief over some only of the villages, which formerly formed the Pergunnah of Tank, by conferring on him, as a hereditary jagir, a cash allowance of R25,000 per annum, together with the land revenue on the above villages "to be paid on condition of good service and descent from the Nawab integrally to the successor in the direct male line, who may be selected by Government as most competent." The Chief before his death settled one of the villages as a provision for his younger son, the present defendant, and on his death the Government transferred to him R5,000 of the cash allowance, whilst it sanctioned the appointment of the plaintiff, the only son of the predeceased eldest son of the Chief, to the position of the Chief subject to the above and certain other deductions. In a suit brought by the plaintiff against the defendant in which the former claimed the whole estate, the Chief Court gave the plaintiff the decree asked for and further put the defendant on his election as to "which maintenance he was to take," *viz.*, the village given him by the Chief or the cash allowance made by Government. *Held*, that the Chief Court was right in giving the estate to the plaintiff, as the settlement of the villages on the Chief by the British Government did not have the effect of creating a fresh estate subject to the ordinary law of inheritance, but only continued to the Chief the proprietorship of the villages with its incidence such as they were before the settlement. *Held*, also, that the defendant ought not to have been put to his election as to the cash allowance and the assignment of the village, as the two grants had arisen from different sources and were independent of each other. The question whether the grant of the village to the defendant was permanent or otherwise, was left opon. SARDAR MOHAMMAD AFZAL KHAN *v.* NAWAB GHULAM KASIM KHAN (1904). **8 C. W. N. 81**

INHERITANCE—*concld.*

INITIALS.

See WARRANT OF ARREST—CRIMINAL CASES . . . **5 C. W. N. 447**

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INJUNCTION—*contd.*

See CIVIL PROCEDURE CODE, 1882, s. 260.
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See HINDU LAW—DAYABHAGA.
I. L. R. 33 Calc. 1119

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I. L. R. 31 Calc. 214

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I. L. R. 18 Mad. 163

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I. L. R. 12 Bom. 419
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I. L. R. 18 Bom. 46

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I. L. R. 15 Bom. 309
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INJUNCTION—*contd.*

See SUITS VALUATION ACT (VII OF 1887) s. 8. . . **I. L. R. 33 Bom. 307**

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See VALUATION OF SUIT—APPEALS.
I. L. R. 18 Bom. 100 ; 207

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——— **enforcement of—**

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I. L. R. 26 Bom. 283

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——— **right to use of water—**

See EASEMENT **I. L. R. 30 Calc. 1077**

——— **suit for—**

See JURISDICTION OF CIVIL COURTS.
I. L. R. 30 Mad. 400

——— **to restrain levy of tax—**

See BOMBAY DISTRICT MUNICIPAL ACT (BOMBAY ACT III OF 1901), SS. 82 (*c*) AND 86 . **I. L. R. 27 Bom. 403**

——— **to restrain marriage.**

See HINDU LAW—MARRIAGE—RESTRAINT OF, OR DISSOLUTION OF, MARRIAGE.
I. L. R. 1 All. 349

See HINDU LAW—MARRIAGE—RIGHT TO GIVE IN MARRIAGE AND CONSENT.
I. L. R. 12 Bom 110
2 C. W. N. 521

See HINDU LAW—MARRIAGE—VALIDITY OR OTHERWISE OF MARRIAGE.
I. L. R. 14 Mad. 316

——— **to restrain sale.**

See MORTGAGE—POWER OF SALE.
I. L. R. 2 Bom. 252
I. L. R. 17 Bom. 711

——— **valuation of suit for—**

See COURT-FEES ACT (VII OF 1870), S. 7, CL. IV (*d*) . **I. L. R. 24 Mad. 34**

1. UNDER CIVIL PROCEDURE CODES.

1. ——— **Interim injunction**—*Principles on which it is granted.* The Court, in granting an *ad interim* injunction, will first see that there is a *bonâ fide* contention between the parties, and then on which side, in the event of obtaining a success-

INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

ful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property in *statu quo.* On those principles an injunction was granted to restrain the defendants from "selling, alienating, or otherwise disposing of" certain houses, the subject of a suit in which the plaintiff, claiming under the will of his father, sought to set aside proceedings in execution taken by an executor (under whom the defendants claimed) after the death, but before the grant of probate of the will of the deceased, and by which proceedings the executor had seized the houses in satisfaction of his own debt. GOMES *v.* CARTER
1 Ind. Jur. N. S. 411

2. ——— **Injunction against person out of jurisdiction of Court**—*Injunction to restrain marriage of minor pending application for guardianship—Injunction against person not party to proceedings.* During the pendency of an application for guardianship of a minor girl it was alleged on behalf of the applicant, the mother, that an improper marriage was going to be performed by the father and an injunction was prayed for to restrain various persons (including a person who was not a party to the proceeding and who was not within the jurisdiction of the Court) from marrying or allowing the marriage of the minor. The lower Court granted the injunction. *Held,* that the mere fact that a person resides outside the jurisdiction of the Court is not *per se* sufficient to prevent the Court from granting an injunction to restrain him from committing an act in such a case as this. HARENDRA NATH CHOWDHRY *v.* BRINDA RANI DASSI . . . **2 C. W. N. 521**

3. ——— **Power to make order for injunction**—*Civil Procedure Code, 1859, s. 92—Court in which suit is pending—Jurisdiction.* Where a Court has no jurisdiction to make an order, it can have no jurisdiction to modify such order. It was not lawful for a District Court, under s. 92 of Act VIII of 1859, to issue an injunction to stay waste, etc., or to appoint a receiver or manager, in respect of property in dispute, in a suit pending in a subordinate Court. The District Judge might withdraw the suit from the subordinate Court to the District Court under s. 6 of the Code, and then make orders in accordance with the terms of s. 92. *Semble :* A Court having jurisdiction to make orders under s. 92 had no right to make such orders without some evidence that the property in dispute in the suit was in danger of being wasted, damaged, or alienated by any party to the suit. DHUNDIRAM SANTUKRAM *v.* CHANDA NABAI
2 Bom. 103 : 2nd Ed. 98

4. ——— *Civil Procedure Code, 1859, s. 92.* S. 92, Act VIII of 1859, applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to endamage or make away with any property in dispute in the suit, and empowers the Court in such a

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INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

case to issue an injunction to the defendant to refrain from the particular act complained of, and in case of necessity to appoint a receiver or manager of so much of the property only as is in dispute. JOYNARAIN GEEREE *v.* SHIBPERSHAD GEEREE **6 W. R. Mis. 1**

5. ——— *Civil Procedure Code, 1859, s. 92—Ground for granting injunction.* The power given to the Civil Court by s. 92, Act VIII of 1859, of issuing injunctions and appointing a receiver *pendente lite* was intended to be exercised only in cases where property, which it was essential should be kept in its existing condition, was in danger of being destroyed, damaged, or put beyond the power of the Court. MUN MOHINEE DASSEE *v.* ICHAMOYE DASSEE . . . **13 W. R. 60**

6. ——— *Expression of intention to take attached property—Ground for granting injunction.* In a suit to recover a specific sum of money which had been attached by the Magistrate where defendant expressed his intention to take the money for the purpose of investing it in trade. *Held,* that defendant's admission was sufficient evidence to show that the money was in danger of being alienated within the meaning of s. 92 of the Code of Civil Procedure. GOLUCK CHUNDER GOOHO *v.* MOHIM CHUNDER GHOSE . **13 W. R. 95**

7. ——— *Injunction as to property, duration of—Receiver.* The power of a Court to attach property and to appoint a receiver extends only to the better management or custody of any property which is in dispute, and ceases when the suit comes to an end. An injunction in respect of property cannot be maintained after a claim is dismissed, or pending an appeal. MOHEÓODDEEN *v.* AHMED HOSSEIN . . **14 W. R. 384**

8. ——— An injunction could not be issued under s. 92, Code of Civil Procedure, on a mere allegation that the defendant wished to realize debts by bringing actions in Court, without proof of an intention of waste, damage, or alienation. PROSSUNO MOYEE DOSSEE *v.* WOOMA MOYEE DASSEE . **14 W. R. 409**

9. ——— **Grant of injunction**—*Stay of proceedings in mofussil against Court receiver.* Injunction granted by the Court to restrain proceedings in the mofussil against the Court Receiver. BEER CHUND GOSSAI *v.* HOGG . . **Cor. 56**

10. ——— *Stay of sale.* The plaintiffs, who were in possession of certain premises, brought a suit to restrain the defendant from selling a share in them which he had attached in execution of a decree upon a mortgage to him of that share, and to set aside the deed of mortgage. According to the plaintiff's case, they (the plaintiffs) were in possession under a decree of Court obtained upon a mortgage executed to them by the executor of the will of the last proprietor under a power contained in the will, and the mortgagors to the defendant, who were the brother and the son of the testator, had no interest in the property at the time of their mortgage to the defendant. The plaintiffs applied for an *ad interim* injunction, and the Court granted the application. RUPLAL KHETTRY *v.* MAHIMA CHANDRA ROY . . **5 B. L. R. 254**

SREENARAIN CHUCKERBUTTY *v.* MILLER. **5 B. L. R. 254 note**

11. ——— *Restraining execution of decree—Family dwelling-house—Suit for partition.* *A* obtained a decree against *B* and others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house, to the remaining moiety of which *C* (a Hindu) alleged he was jointly entitled, and that he and his family were in possession. On *A's* proceeding to obtain execution of his decree, *C* brought a suit, alleging that *A* had obtained no title under his purchase, and praying for partition of the property. On application for an interim injunction to restrain *A* from executing his decree pending the partition suit, the Court granted the application. ANANTNATH DEY *v.* MACKINTOSH . **6 B. L. R. 571**

12. ——— **Stay of execution of decree**—*Civil Procedure Code, s. 1859, s. 92.* The purchaser of a share of a decree who has failed in the endeavour to get the Court executing it to put him upon the record for the purpose of obtaining the benefit of the decree has no right to an injunction to prevent the decree-holder from executing the whole decree without regard to the sale, even if the purchase is made on behalf of the judgment-debtor; he could only get a right to an injunction of the kind if the sale amounted to a release from the decree-holder to the judgment-debtor from his liability under the decree. ROHIMUNNISSA *v.* LEAKUT ALI KHAN **22 W. R. 506**

13. ——— **Stay of sale in execution of decree**—*Civil Procedure Code, 1859, s. 92.* Certain immoveable property was attached in execution of a decree obtained by *L* against *N*. A claim was thereupon put in by *S*, but his claim was refused, and he brought a suit as provided by s. 246, Act VIII of 1859, against *L* to establish his right, and applied for and obtained an injunction under s. 92 restraining *L* from proceeding to execute his decree against the property in dispute. *N* was subsequently made a party to the suit under s. 73 of Act VIII of 1859. From the order granting the injunction *L* appealed to the High Court. *Held,* that this was not a proper case for the issue of an injunction under s. 92. There was nothing to show that the property in dispute was in danger of being wasted, damaged, or alienated by *L*, nor was the property in his possession. The proper course would have been for *S* to have applied by petition for a postponement of the sale, the attachment continuing. The Court ordered the injunction to be dissolved, and that an order should be entered on the execution proceedings staying the sale pending *S's* suit, leaving it open to *L*, in case there should be

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INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

undue delay, to make application to the Court for an immediate sale. LUTCHMEPUT SINGH *v.* SECRETARY OF STATE
11 B. L. R. Ap. 28 : 20 W. R. 11

See DOORGA CHURN CHATTERJEE *v.* ASHUTOSH DUTT . . . . . **24 W. R. 70**

14. ——— *Civil Procedure Code, 1882, ss. 492, 494—Temporary injunction—Practice—Notice to opposite party.* Where a Court made an order granting a temporary injunction under s. 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side and its order directing stay of sale of property in execution was passed *ex parte*, without the other side being given an opportunity to show cause. *Held*, that the order was irregular. Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit. *Held*, that, inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted. AMOLAK RAM *v.* SAHIB SINGH **I. L. R. 7 All. 550**

15. ——— **Notice under s. 494**—*Civil Procedure Code (Act XIV of 1882), s. 492.* The appellant took a lease of certain lands below Pareshnath Hill and commenced manufacturing hog's lard thereupon. The plaintiffs, who belong to the Jain community, applied for an injunction restraining the said manufacture on the ground that it wounded their religious prejudices. The Deputy Commissioner, without any notice to the opposite party, granted the injunction on the ground that the matter was urgent in connection with offending religious prejudices and causing rioting. *Held*, that an injunction should not issue in the absence of the opposite party without strong and grave reasons. That the Deputy Commissioner very erroneously applied the full powers of an injunction for purposes relating rather to his executive than to his judicial functions. *Freeman* v. *McArthur, 2 Tay. & Bell, 25*, approved of. BADDAM *v.* DHUNPUT SINGH
1 C. W. N. 429

16. ——— **Injunction in one suit pending appeal in another suit**—*Interim injunction—Civil Procedure Code (Act XIV of 1882), ss. 492, 546.* *A* brought a suit and obtained a decree against *B* on a mortgage-bond in the Court of a Subordinate Judge, which decree was confirmed by the High Court on appeal. *A* then applied for execution. In the execution-proceedings the sons of *B* intervened claiming a portion of the properties

INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

attached; this claim was dismissed, and the sons of *B* brought a regular suit before the same Subordinate Judge to have their rights to the property declared, and obtained an interim injunction restraining *A* from executing his decree pending the decision of their suit. This suit was dismissed, and the sons of *B* appealed to the High Court. *A* again applied for execution of his mortgage-decree, whereupon the sons of *B* applied for a further injunction restraining *A* from executing his decree pending their appeal to the High Court: this application was granted. *Held*, that the Subordinate Judge had no right to restrain the decree-holder from executing his decree merely on the possibility of the Appellate Court reversing his decision. GOSSAIN MONEY PUREE *v.* GURU PERSHAD SINGH
I. L. R. 11 Calc. 146

17. ——— **Injunction to stay sale pending suit to establish title**—*Civil Procedure Code, 1882, s. 492—Civil Procedure Code, 1859, s. 92—Superintendence of High Court under s. 622, Civil Procedure Code, 1882.* A claim by *R* to certain property which had been attached by *B* in the course of execution-proceedings in the Court of the first Subordinate Judge of Dacca having been rejected, *R* instituted a suit in the Court of the second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under s. 492 of the Civil Procedure Code to stay the sale of the property attached by *B* in the execution proceedings; but that application was rejected and *R* thereupon applied for and obtained from the Court of the first Subordinate Judge an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it. *Held*, in an application under s. 622 of the Code to set the latter order aside, that s. 492 of the Code of 1882 has, and was intended to have, wider application than s. 92 of Act VIII of 1859 had, and provides a remedy where property is "in danger of being wrongfully sold;" if the circumstances justified it, an order could have been obtained under that section from the Court of the second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided, and no express provision in the Code for stay of execution by a Court executing a decree on the application of a third party, the order of the first Subordinate Judge was made without jurisdiction, and should be set aside. *In the matter of the petition of* BROJENDRA KUMAR RAI CHOWDHURI, BROJENDRA KUMAR RAI CHOWDHURI *v.* RUPLALL DOSS . . . **I. L. R. 12 Calc. 515**

18. ——— **Contradictory affidavits**—*Irreparable injury—Letters Patent, 1862 and 1865—Civil Procedure Code, 1859, ss. 92 and 94—Appeable order.* The plaintiffs, being in possession of a certain mud dock used for docking and repairing vessels and being threatened by the defendants with a suit to eject them therefrom, sued for specific

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INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

performance of an alleged agreement between themselves and the defendants, under which they were, on certain terms, entitled to the use and occupation of the dock until the repairs of two of their vessels were completed; and for an injunction to restrain the defendants from ejecting them until the completion of the repairs. In support of an application for an interim injunction to restrain the defendants from taking proceedings to eject the plaintiffs until their suit had been heard, the affidavits of the plaintiffs stated that on the faith of the agreement one of their steamers had been docked and taken to pieces; that the repairs could not be finished for a considerable time, and that the vessel could not be removed from the dock without great loss and irreparable injury to them. The affidavits of the defendants denied the making of the agreements alleged by the plaintiffs, and set forth another agreement, under which they alleged the plaintiffs had been in possession of the dock, and which agreement having come to an end, they were entitled to eject the plaintiffs; they did not deny the loss to the plaintiffs which would be the result of moving the vessel before repairs were completed, nor did they allege any delay in making the repairs, but they submitted that such loss would be the consequence of the plaintiffs' own act in docking their vessel without any final agreement having been come to between the parties. The dock was situated in the district of Hooghly, and the defendants' suit for possession unless transferred to the High Court, would be tried in the Hooghly Court. There were facts which, in the opinion of the Court, went to show that the plaintiffs had acted *bonâ fide*. *Held* (*per* MARKBY, *J.*), on the above facts, that, inasmuch as the plaintiffs' statements, if true, raised a fair and substantial question for decision as to the rights of the parties, and looking to the inconvenience of allowing the same matter to be litigated simultaneously in different Courts between the same parties, the plaintiffs were entitled to an interim injunction restraining the defendants from bringing their suit until the plaintiffs' suit was heard. *Semble:* An interim injunction may issue, although there is a contradiction on the facts. On appeal the Court was of opinion that, under the circumstances, there was an equity which entitled the plaintiffs to be kept in quiet and undisturbed possession of the dock until the repairs were completed, and confirmed the order for an interim injunction but modified it by restraining the defendants not from bringing their suit, but merely from executing any decree they might obtain therein until the plaintiffs should have had a reasonable time to complete the repairs of their vessel. Although by the Letters Patent of 1865 the provisions of Act VIII of 1859 were not expressly made applicable to the High Court, as was done by the Letters Patent of 1862, *semble:* the order granting the injunction was an order under s. 92, Act VIII of 1859, and therefore an appeal lay under s. 94. MORAN *v.* RIVERS STEAM NAVIGATION COMPANY . **14 B. L. R. 352**

INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

19. ——— Suit for specific performance of agreement to give in marriage—*Civil Procedure Code, 1859, ss. 92, 93.* Ss. 92 and 93 of Act VIII of 1859 are not applicable to a suit for specific performance of a contract to give in marriage, and the Court will not grant an interim injunction to restrain the defendant from making another marriage with a third person. *In the matter of* GUNPUT NARAIN SINGH **I. L. R. 1 Calc. 74**

S.C. GUNPUT NARAIN SINGH *v.* RAJUN KOOER **24 W. R. 207**

20. ——— Temporary injunction—*Civil Procedure Code, 1882, s. 493—"Other injury."* The words "or other injury" in s. 493 of the Code of Civil Procedure do not include acts of trespass upon property. DARAB KUAR *v.* GOMTI KUAR . . . . **I. L. R. 22 All. 449**

21. ——— *Civil Procedure Code, ss. 492, 493—Temporary injunction restraining alienation of property in suit—Mortgage of such property not void—Contract Act (IX of 1872), s. 23.* The effect of a temporary injunction granted under s. 492 (*b*) of the Civil Procedure Code is not to make a subsequent mortgage of the property in question illegal and void within the meaning of s. 23 of the Contract Act (IX of 1872). Such a penalty must not be read into s. 493, which provides otherwise for the breach of an injunction granted under s. 492. DELHI AND LONDON BANK *v.* RAM NARAIN **I. L. R. 9 All. 497**

22. ——— *Civil Procedure Code, 1882, s. 492—"Wrongfully" sold in execution of decree.* An objection made under s. 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage-bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (*a*) a declaration of his right to the bond and (*b*) to recover a sum of money form the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s. 492 of the Code restraining the decree-holder from bringing the bond to sale in execution of the decree. *Held*, that, although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the

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INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*contd.*

execution-sale, and no practical injury to any one would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted subject to security being given by the appellant. KIRPA DAYAL *v.* RANI KISHORI . **I. L. R. 10 All. 80**

23. ——— *Civil Procedure Code, 1882, ss. 422 and 503—Appointment of receiver.* The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed is that, while in either case it must be shown that the property should be preserved from waste or alienation, in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged ; while in the latter case a good *primâ facie* title has to be made out. *Sidheswari Dabi* v. *Abhoyeswari Dabi, I. L. R. 15 Calc. 818*, approved. An order of the lower Court for appointment of a receiver under s. 503 of the Civil Procedure Code (Act XIV of 1882) was set aside, and an order for a temporary injunction, under s. 492 of the Code, granted. CHANDIDAT JHA *v.* PADMANAND SINGH **I. L. R. 22 Calc. 459**

24. ——— *Temporary injunction Civil Procedure Code (Act XIV of 1882), s. 493—Specific Relief Act (I of 1877), ss. 54, 56, 57—Breach of negative covenant.* Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook in consideration of the advance, to send all the mica produced from the mines to plaintiffs, and bound themselves not to send any of it to any firm other than plaintiffs,' or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement arranged to consign, and had already made consignments of, mica to another firm, and were keeping mica in stock. Plaintiffs filed this suit for specific performance, and for an injunction restraining defendants from acting in violation of the terms of the agreement. A temporary injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary injunction. *Held*, that the injunction was rightly granted. The granting of such an injunction, under s. 493 of the Code of Civil Procedure, is a matter of judicial discretion. *Quære :* Whether the principles which govern the grant of a temporary injunction under the Code of Civil Procedure are the same as those which are laid down in the Specific Relief Act relating to the grant of a perpetual injunction. *Nusserwanji Merwanji Panday* v. *Gordon, I. L. R. 6 Bom. 266*, referred to. SUBBA NAIDU *v.* HAJI BADSHA SAHIB (1902) **I. L. R. 26 Mad. 168**

25. ——— *Temporary injunction to restrain suit brought by defendant in the Small Causes Court—Civil Procedure Code (XIV of 1882), ss. 492, 493—Specific Relief Act (I of 1877), ss. 53, 54 and 56.* In a suit by plaintiffs in the High Court to recover damages for breach of contract they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Causes Court, in respect of the same contract, until the hearing of the High Court suit. *Held*, that an application to restrain a suit in the Small Causes Court does not come within the provisions of ss. 492 and 493 of the Civil Procedure Code. The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, s. 25, sub-cl. 8. As the injunction asked for is a perpetual one, it can, under the Specific Relief Act, only be granted by the decree made at the hearing. JAIRAMDAS GANESHDAS *v.* ZAMONLAL KISSORILAL (1903) **I. L. R. 27 Bom. 357**

26. ——— *Civil Procedure Code, s. 492—Indian Contract Act (IX of 1872), s. 23. Held*, that an alienation made pending a temporary injunction under s. 492 of the Code of Civil Procedure is not void under either s. 23 of the Indian Contract Act, 1872, or any other law. *Delhi and London Bank, Ld. v. Ram Narain, I. L. R. 9 All. 497*, followed. MANOHAR DAS *v.* RAM AUTAR PANDE (1903) **I. L. R. 25 All. 431**

27. ——— *Jurisdiction—Jurisdiction of High Court in granting injunctions in personam—Injunction to restrain proceeding with suit in Bareilly Court— Civil Procedure Code (Act XIV of 1882), ss. 492, 493.* The plaintiffs, in a suit instituted in the High Court for money due on a balance of account, sought for an injunction to restrain the defendants from proceeding with a suit previously instituted in the Court of the Subordinate Judge at Bareilly, in which the present defendants sought to recover from the present plaintiffs a sum of money as balance due to themselves on the same account. *Held*, that the High Court was competent to grant the injunction. The powers of the High Court to grant temporary injunctions are not confined to the terms of ss. 492 and 493 of the Civil Procedure Code. MUNGLE CHAND *v.* GOPAL RAM (1906) . . . **I. L. R. 34 Calc. 101**

28. ——— *Jurisdiction—General equity—Jurisdiction of High Court—Injunction to restrain proceeding with Small Cause Court suit—Civil Procedure Code (Act XIV of 1882), ss. 492, 493—Specific Relief Act (I of 1877), ss. 53, 54 and 55.* The plaintiff in a suit instituted in the High Court for specific performance of an agreement for lease of certain premises sought for an injunction to restrain the defendant from proceeding with a suit instituted by the latter in the Small Cause Court for ejectment of the former from

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INJUNCTION—*contd.*

1. UNDER CIVIL PROCEDURE CODES—*concld.*

the same premises. *Held*, that the High Court has power under its general equity jurisdiction to grant an injunction of this character, independently of the Code of Civil Procedure. *Jairamdas Ganeshdas* v. *Zamonlal Kissorilal, I. L. R. 27 Bom. 357*, dissented from. *Hukum Chand Boid* v. *Kamalanand Sing, I. L. R. 33 Calc. 927, Hart* v. *Grosser, 9 C. W. N. 748, Mungle Chand* v. *Gopal Ram, I. L. R. 34 Calc. 101*, referred to. RASH BEHARY DEY *v.* BHOWANI CHURN BOSE (1906)
I. L. R. 34 Calc. 97

29. ——— Injunction to restrain proceedings in Court beyond jurisdiction—*Jurisdiction of High Court—Injunction to restrain proceedings in a Moffusil Court—Jurisdiction of Courts of Equity—Foreign Courts.* The jurisdiction of the High Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt. *The Carron Iron Co.* v. *Maclaren, 5 H. L. C. 416*, followed. *Mungle Chand* v. *Gopal Ram, I. L. R. 34 Calc. 101*, not followed. A Court of Equity can only restrain a person from proceeding with a suit in a foreign Court, if the person sought to be restrained is within the jurisdiction of the Court. VULCAN IRON WORKS *v.* BISHUMBHUR PROSAD (1908) . **I. L. R. 36 Calc. 233**

2. SPECIAL CASES.

(*a*) ALIENATION BY WIDOW.

1. ——— Interim injunction, grounds for continuing to hearing—*Consent of next reversioner—Rights of remote reversioners.* A Hindu died, leaving a widow and also leaving *A*, his immediate reversionary heir, and *B* and *C*, more remote reversionary heirs. The widow obtained a certificate to collect debts, but such certificate did not empower her to deal with Government securities. *D* instituted a suit against the widow on a promissory note alleged to have been executed in his favour by her late husband, and obtained a decree. *A* then instituted a suit against the widow and *D* to have the decree set aside on the ground of fraud and collusion. This suit was compromised by *A's* surrendering up his reversionary interest to the widow for a consideration. *B* and *C* now sued the widow and *D* and *A* for the purpose of having the first-mentioned decree set aside, for a declaration that the decree on the compromise was inoperative to establish or confirm the fraudulent decree, or to enlarge the powers of the widow to deal with the Government securities, and obtained an interim injunction. *Held*, that, apart from the question as to whether an alienation by a widow and next reversioner without the consent of subsequent

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*a*) ALIENATION BY WIDOW—*concld.*

reversioners is binding on them, which question the Court was prepared to answer in the negative, it would under the circumstances of the case, be an abuse of the discretion of the Court not to continue the injunction until the hearing, when the truth or falsity of the charges made by the plaintiffs could be investigated on oral evidence. GOPEENATH MOKERJEE *v.* KALLY DOSS MULLICK
I. L. R. 10 Calc. 225

(*b*) BREACH OF AGREEMENT.

2. ——— Association of artizans for acquisition of gain—*Registration of association—Illegal agreement.* Where more than twenty artizans signed an agreement, whereby they constituted themselves an association for the purpose of enhancing the price of their work by bringing all the business of the trade into one shop, and dividing the prices of the work done amongst the members according to their skill, but which association was not registered as a company under Act X of 1866: *Held*, that the Court could not grant an injunction to restrain the breach of such agreement. BHIKAJI SABAJI *v.* BAPU SAJU
I. L. R. 1 Bom. 550

3. ——— Agreement for a charter-party—*Interim injunction—Threatened breach of charter-party.* Where a charter-party has been actually completed, the Court will, by injunction prevent an employment of the ship inconsistent with the terms of the charter-party; but where there is only an agreement for a charter-party, no such injunction will be granted. ABDUL ALLARAKHI *v.* ABDUL BACHA . . **I. L. R. 6 Bom. 5**

4. ——— Restraining partner from excluding co-partner from partnership. Injunction granted to restrain a partner from excluding his co-partner from the partnership business and from doing any act to prevent its being carried on according to the articles. VIRDACHELLA NATTAN *v.* RAMASWAMI NAYAKAN . **1 Mad. 341**

5. ——— Restraining co-sharer from cultivating indigo without consent—*Agreement not to grow indigo.* The Court refused to issue an injunction commanding a co-sharer in a certain village not to cultivate the ijmali land thereof without the consent of his co-sharers, or until the separation of his share by a butwarrah, because of alleged interference with the rights of the said co-sharers, holding that the remedy lay in an action for damages. CROWDY *v.* INDAR ROY
18 W. R. 408

6. ——— Interim injunction—*Injunction to restrain adoption—Practice.* *A*, a Hindu, died childless possessed of moveable and immoveable property. After his death, disputes arose between his widow (the defendant) and his father and brother. These disputes were settled by an agree-

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*b*) BREACH OF AGREEMENT—*contd.*

ment, one of the terms of which was that the widow (the defendant) should not adopt a son, and that certain property which she was to have during her life should after her death, go to her brother-in-law *P*. In 1872 *P* died, leaving his son, the plaintiff, him surviving. On the 25th August 1888, the plaintiff filed this suit, alleging that the defendant, in violation of the agreement, was about to adopt a son and praying for an injunction. On presenting the plaint, he applied for an interim injunction, alleging that the defendant intended to adopt a son the next day (Sunday, 26th August). The Court refused the interim injunction. ASSUR PURSHOTAM *v.* RATANBAI . **I. L. R. 13 Bom. 56**

7. ——— *Specific Relief Act (I of 1877), ss. 20, 21, 57—Contract Act (IX of 1872), s. 39—Contract for personal service—Contract for more than three years.* The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant, having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent. *Held*, that the defendant had no right to rescind the agreement, and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ. MADRAS RAILWAY COMPANY *v.* RUST **I. L. R. 14 Mad. 18**

8. ——— **Agreement not to work for a rival tradesman**—*Specific Relief Act (I of 1877), ss. 22, 54, and 57—Agreement made when under criminal charge—Discretion of Court in granting specific performance—Negative agreement—Damages—Form of decree.* The plaintiff was a milliner carrying on business in Bombay, and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service, and the plaintiff alleged that at the time he left it he was indebted to the plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered, and at the time of the agreement hereinafter mentioned the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner *B*. On the 1st February 1893, an agreement in writing was made between the plaintiff and the defendant whereby the defendant agreed as follows:—(i) to pay the plaintiff R1,950 in full settlement of the plaintiff's claim; (ii) to enter plaintiff's service as cutter and to serve him for ten years from the date of agreement; (iii) to serve plaintiff honestly; (iv) in case plaintiff

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*b*) BREACH OF AGREEMENT—*contd.*

was obliged to dismiss him for some "fault" then until the expiration of the said period of ten years, the defendant should not carry on the business of a cutter or tailor either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him. On the 15th February 1893, the charge of criminal breach of trust against the defendant was dismissed, the plaintiff offering no evidence in support of it. The plaintiff subsequently called upon the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of *B*. The plaintiff therefore filed this suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement. *Held*, dismissing the suit, that the parties were not really on equal terms and that in the exercise of the discretion permitted to the Court by s. 22 of the Specific Relief Act (I of 1877) the injunction should be refused. CALLIANJI HARJIVAN *v.* NARSI TRICUM . . . **I. L. R. 18 Bom. 702**

Held, in the same case on appeal, that the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant, but that, inasmuch as it had refused an injunction on the ground that pecuniary compensation was the plaintiff's proper remedy, it ought not to have dismissed the suit, but ought either itself to have awarded damages, or to have ordered an inquiry as to damages. The plaintiff being held to be entitled to a remedy, the appropriate remedy should be awarded. The Appellate Court accordingly passed a decree against the defendant, and awarded the plaintiff R10 as damages with costs of the appeal. CALLIANJI HARJIVAN *v.* NARSI TRICUM . . **I. L. R. 19 Bom. 764**

9. ——— **Contract for personal service**—*Contract not to practice as physician.* *A* agreed on certain terms to become assistant for three years to *B*, who was a physician and surgeon practising at Zanzibar. The letter which stated the terms "which *B* offered and which (as the Court found) *A* accepted, contained the words "the ordinary clause against practising must be drawn up." At the end of a year a disagreement took place and *A* ceased to act as *B's* assistant and began to practise in Zanzibar on his own account. *B* sued for an injunction to restrain him. *Held*, that *B* was entitled to an injunction restraining *A* from practising in Zanzibar on his own account during the period of three years. CHARLESWORTH *v.* MACDONALD **I. L. R. 23 Bom. 103**

10. ——— **Breach of negative covenant**—*Civil Procedure Code (Act XIV of 1882), s. 493—Temporary injunction—Specific Relief Act (I of 1877), ss. 54, 56, 57—Injunction.* Plaintiffs advanced money to the defendants for

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*b*) BREACH OF AGREEMENT—*concld.*

the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs, or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign, and had already made consignments of, mica to another firm, and were keeping mica in stock. Plaintiffs filed this suit for specific performance, and for an injunction restraining defendants from acting in violation of the terms of the agreement; a temporary injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary injunction: *Held*, that the injunction was rightly granted. The granting of such an injunction under s. 493 of the Code of Civil Procedure is a matter of judicial discretion. *Quære:* Whether the principles which govern the grant of a temporary injunction under the Code of Civil Procedure are the same as those which are laid down in the Specific Relief Act relating to the grant of a perpetual injunction. *Nusserwanji Merwanji Panday* v. *Gordon, I. L. R. 6 Bom. 266*, referred to. SUBBA NAIDU *v.* HAJI BADSHA SAHIB (1902) **I. L. R. 26 Mad. 168**

(*c*) BUILDING.

11. ———— Temporary injunction— *Damages.* Where a plaintiff sued the defendant for a perpetual injunction restraining him from building a house on a parcel of land alleged to be within the plaintiff's patni and let out to the defendant as a mere tenant-at-will, and the Court below had granted a temporary injunction *pendente lite*: *Held* that the temporary injunction must be maintained upon the plaintiff undertaking to indemnify the defendant in the event of the dismissal of his action: *Held*, further, that in such a case matters should be allowed to remain as far as possible *in statu quo*, and that the defendant must not be placed in a position to say afterwards, upon the basis of his own act, that on equitable considerations demolition should not be insisted upon. CHANDRA NATH PAL *v.* GOBIND CHOWDHRY (1900) **6 C. W. N. 308**

12. ———— Mandatory injunction— *Discretion of Court—Landlord cannot have mandatory injunction in respect of building, if, knowing of the obstruction he does not object.* Where the tenant of an agricultural holding constructs a building of a character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object but to take legal steps to stop the progress of the work; and, in default of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building. The same principle will apply where the party building is not the tenant, but one who does so under agreement with the owner of the kudivaram right. *Benode Coomaree Dossee* v. *Soudaminey Dossee, I. L. R. 16 Calc. 252*, followed. *Sankaralingam Chettiar* v. *Stephen Augustus Ralli, S. A. No. 959 of 1901 (unreported)*, followed. ULAGAPPAN AMBALAM *v.* CHIDAMBRAM CHETTY (1906) **I. L. R. 29 Mad. 497**

(*d*) COLLECTION OF RENTS.

13. ———— Suit to restrain collection of rents—*Damage, proof of.* An injunction to restrain the defendant from collecting, without any title, from the raiyats of the plaintiff's estate, two annas rent over and above the full sixteen annas in the rupee, may be granted without proof of actual damage. NADIRJUMMA CHOWDHRY *v.* RAM CHUNDER SURMA . . . **W. R. 1864, 362**

(*e*) CUTTING TREES.

14. ———— *Maxim: Cujus est solum ejus est usque ad cœlum—Question whether common law rights of owner can be limited by religious prejudices of neighbours.* Certain plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a *pipal* tree overhanging their property. The *pipal* tree grew in the inclosure of a temple, and the resistance was based on the ground that the tree was an object of veneration to Hindus, and that the lopping of its branches would be offensive to the religious feelings of the Hindu community. *Held*, that the plaintiffs were entitled to the injunction prayed for, and that the fact that the plaintiff's action might cause annoyance to a large number of Hindus was not a sufficient ground for cutting down the well-recognized common law rights of an owner of property. BEHARI LAL *v.* GHISA LAL (1902) . . . **I. L. R. 24 All. 499**

(*f*) DIGGING WELL.

15. ———— Restraining the digging of a well—*Zamindar—Talukhdar.* The digging of a well by a talukhdar intermediate between the zamindar and the raiyats is not an act of waste to restrain which the Court will issue an injunction. MUGNEERAM CHOWDHRY *v.* GUNESH DUTT SINGH **W. R. 1864, 275**

(*g*) ENCROACHMENTS.

16. ———— Encroachment on land— *Building over a dhora—Compensation not proper remedy.* The defendant encroached on an abut-

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*g*) ENCROACHMENTS—*concld.*

ment (dhora) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abutment was on the defendant's side of the wall. The lower Appellate Court awarded compensation for this encroachment on the ground that there was merely technical encroachment on the part of the defendant, because only a foot or so of the plaintiff's ground was covered thereby. *Held*, that relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will. *Goodson* v. *Richardson*, *L. R. 9 Ch. 221*, followed. JETHALAL HIRACHAND *v.* LALBHAI DALPATBHAI (1904)
I. L. R. 28 Bom. 298

17. ——— Mandatory injunction—*Trespasser.* A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him. NAVROJI MANEKJI WADIA *v.* DASTUR KHARSEDJI MANCHERJI (1904) . **I. L. R. 28 Bom. 20**

(*h*) EXECUTION OF DECREE.

18. ——— Stay of execution of decree—*Court of co-ordinate jurisdiction—Specific Relief Act (I of 1877).* An injunction did not, under the law as it stood before the Specific Relief Act, 1877, lie against the decree-holder, by assignment or otherwise to restrain him from executing a decree granted to him by a Court exercising co-ordinate jurisdiction with the Court in which the injunction was applied for, on the ground that the proceedings by which the decree was obtained against the person applying for the injunction were altogether illegal. The cases in which injunctions were granted by the Court of Chancery in England against proceedings in other Courts rested upon the assumption that the rights of the parties could not be enquired into, except through the Courts of Chancery, and are therefore not applicable to India. Injunctions to stay proceedings under the Specific Relief Act can only be granted in cases where the Court in which the proceedings are to be stayed is subordinate to that in which the injunction is sought. DHURONIDHUR SEN *v.* AGRA BANK . **I. L. R. 4 Calc. 380 : 2 C. L. R. 283 3 C. L. R. 421**

19. ——— Restraining decree-holder from executing decree improperly or illegally obtained—*Order substituting judgment-debtor—Sale or transfer of dena-powna.* *A*, the proprietor of an indigo concern which comprised a patni talukh after mortgaging the entire concern to *B*, allowed the patni talukh to be sold for arrears of rent under Regulation VIII of 1819 ; *C*, the darpatnidar of the talukh, whose rights were thus extinguished, then sued and obtained a decree for damages against *A*. After *C* had obtained this decree against *A*, *A* sold his equity of redemption in the entire mortgaged concern to *B*, and by this sale all the *dena* and *powna*, or liabilities and outstandings of the concern, were transferred from *A* to *B*. *C* then after notice to *B*, obtained an order by which *B* was made the judgment-debtor in the place of *A*. *B* took no proceedings within one year to set aside this order ; but, after the lapse of three years, upon *C* attempting to execute his decree, instituted the present suit to set aside the order, and for an injunction to restrain *B* from executing the decree against him. *Held*, *first*, that the purchase by *B* of the *dena-powna* of the indigo concern of which *A* had been the proprietor did not make *B* liable to pay the amount, for which *C* had obtained a decree against *A*, as damages for the extinguishment of his darpatni right ; *second*, that the order substituting *B* for *A* in the suit for damages was illegal ; *third*, that, although *B* was barred by limitation from suing to set aside that order, he was entitled to an injunction restraining *C* personally from executing the decree against him. DHURONIDHUR SEN *v.* AGRA BANK
I. L. R. 5 Calc. 86 ; 4 C. L. R. 434

20. ——— Injunction restraining execution of a decree obtained in a suit against plaintiffs' karnavan—*Specific Relief Act (I of 1877), s. 56 (b)—Suit by junior members of a tarwad.* In a suit brought in a subordinate Court by the junior members of a Malabar tarwad against their karnavan and others, the plaintiffs prayed for a declaration of the uraima right of their tarwad in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarwad, from executing a decree of a District Court, passed on appeal from a Munsif's Court, whereby certain lands of the devasom were decreed to be surrendered to them in the character of uralers, it appeared (i) that plaintiffs' karnavan was a party to the suit in which the abovementioned decree was passed ; (ii) that the plaintiffs' tarwad was otherwise entitled to the uraima right by adverse possession if not immemorial title. *Held*, that the injunction sought was not precluded by Specific Relief Act, s. *56* (*b*), and that the plaintiffs were entitled to the decree as prayed. APPU *v.* RAMAN
I. L. R. 14 Mad. 425

21. ——— Application for injunction to restrain execution of decree—*Specific Relief Act (I of 1877), s. 56—Multiplicity of proceedings.* Certain traders, having failed in business and being indebted to the defendant under a decree of the District Court of Trichinopoly, entered into a composition with their creditors, and a deed was executed to which the defendant became a party in respect of his judgment-debt. The defendant

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*h*) EXECUTION OF DECREE—*contd.*

subsequently applied for execution of this decree. The trustees, to whom the debtor's assets were made over under the deed, together with the debtors now brought a suit in the same Court for an injunction restraining the defendant from executing or proceeding to execute his decree. The plaint was rejected by the District Judge after it had been registered and numbered, and a written statement had been filed. *Held*, that the injunction sought for was not necessary to prevent a multiplicity of proceedings within the meaning of the Specific Relief Act, s. 56, cl. (*a*). *Semble :* The suit for the injunction prayed for was not maintainable with reference to the Specific Relief Act, s. 56, cl. (*b*). VENKATESA TAWKER *v.* RAMASHAWI CHETTIAR **I. L. R. 18 Mad. 338**

22. ———— Temporary injunction to stay sale in execution of decree—*Specific Relief Act (I of 1877), ss. 53 and 56—Jurisdiction to grant temporary injunction—Civil Procedure Code, 1882, ss. 492 and 311—Material irregularity in sale.* In a proceeding for execution of a decree, pending before the District Judge, certain immoveable properties having been ordered to be sold, an application was made by a third party that property No. 1 on the sale list should be sold after the other properties on the list. The application was rejected, and the appellant brought a suit in the Court of the Subordinate Judge for a declaration that the property was not liable to be sold, and he also applied for an injunction to stay the sale of that property, which was granted by the Subordinate Judge. The District Judge, in accordance with that injunction postponed the sale of property No. 1, and caused two other properties on the list to be sold. Objection was made under s. 311 of the Civil Procedure Code that the District Judge had acted with material irregularity in postponing the sale, inasmuch as the injunction was not binding upon him, being one not granted by a superior Court, and the Subordinate Judge having no power to grant it under s. 56 of the Specific Relief Act (I of 1877). *Held*, that s. 56 of the Specific Relief Act (I of 1877) applies only to perpetual injunctions, temporary injunctions being left by s. 53 to be regulated by the Code of Civil Procedure, and s. 56 was not intended to affect injunctions applied for under s. 492 of the Civil Procedure Code. The temporary injunction, therefore, granted by the Subordinate Judge was not *ultra vires ;* and the District Judge was bound to postpone the sale as he did, and he did not act irregularly in doing so. *Dhuronidhur Sen* v. *Agra Bank, I. L. R. 4 Calc. 380 : I. L. R., 5 Calc. 86*, on review, distinguished. *Brojendro Kumar Rai Chowdhry* v. *Rup Lal Das, I. L. R. 12 Calc. 515*, referred to. AMIR DULHIN *alias* MAHOMDIJAN *v.* ADMINISTRATOR GENERAL OF BENGAL **I. L. R. 23 Calc. 351**

23. ———— Right to injunction—*Specific Relief Act (I of 1877), s. 56, cl. (b)—Trust Act (II of 1882), ss. 91, 95—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Right to declaration of right to execute decree.* *A* mortgaged a land to *B* as either agent or benamidar for *C*. *B* sued on the mortgage and obtained a decree. *C* now sued *A* and *B* for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining *A* from paying the money to *B* and *B* from receiving the money from him. *Held*, that the plaintiff was entitled to the declaration, but not to the injunction. SETHURAYAR *v.* SHANMUGAM PILLAI . . . **I. L. R. 21 Mad. 353**

(*i*) INTRUSION ON OFFICE.

24. ———— Office of vatandar joshi—*Damages against intruder into office—Receipt by another of fees properly due to vatandar joshi.* The vatandar joshi of a village has the right to recover pecuniary damages from a person who has intruded upon his office and received fees properly payable to him ; but the Court will not grant any injunction against such intruder which would have the effect of forcing upon any section of the community the services of a priest whom they were unwilling to recognize, and forbidding them to employ a priest whose ministrations they desire. RAJA VALAD SHIVAPA *v.* KRISHNABHAT **I. L. R. 3 Bom. 232**

25. ———— Right to an office in a temple—*Civil Procedure Code, s. 11.* Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Courts found that plaintiffs possessed the right claimed, and granted the injunction. *Held*, that the suit was cognizable by a Civil Court under s. 18 of the Code of Civil Procedure, and that the injunction was properly granted. SRINIVASA *v.* TIRUVENGADA **I. L. R. 11 Mad. 450**

26. ———— Purchaser of share in kulkarni vatan and joshi vritti—*Obstruction in performance of duties—Specific Relief Act (I of 1877), s. 54.* The plaintiff, who had bought a share in a kulkarni vatan and joshi vritti, was obstructed by the defendants in the performance of his duties. *Held*, that he was entitled to an injunction against the defendants. MORO MAHADEV *v.* ANANT BHIMAJI **I. L. R. 21 Bom. 821**

27. ———— Property in word—*Specific Relief Act (I of 1877), ss. 42, 54—Use of word to which special meaning has become attached—Dharmakarta.* The vicharanakarta of a number of temples held a sanad from Government in which two of such temples were named and the others included in the word "vagaira"—(meaning literally "et cetera," or "and others"). The dharmakarta of the said

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*i*) INTRUSION ON OFFICE—*concld.*

two temples and of three minor ones only, having limited rights and duties and being in many respect subordinate to the vicharanakarta, had, in pursuance of immemorial custom, used a seal in connection with his office, which had never borne more than a single figure, without legend. He had now made and used in the conduct of temple affairs a new seal, bearing the same figure, but with the legend "Tirumalai" "Tirupati, vagaira devastanam dharmakarta" added to it. On the vicharanakarta suing for a declaration and for a perpetual injunction to restrain the use of a seal containing such words:—*Held*, that, although the legend might in a sense be accurate in representing what the defendant actually was, and the vicharanakarta had no property in the word "vagaira," yet the defendant should be restrained from using it upon the seal, since, from the manner in which that word had been used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, a special meaning had became attached thereto when used in connection with the two principal temples; and since the object of the dharmakarta in using it was to assert an extension of his rights and to claim a position co-extensive with that of the vicharanakarta, which in fact he did not possess. RAMANUJA PEDDA JIYANGARLU *v.* RAMA KISORE DOSSJEE . . . **I. L. R. 22 Mad. 189**

(*j*) NUISANCE.

28. ——— Nuisance from cotton mill —*Noise—Smoke and fluff of mill—Damages—Combination of injunction and damages—Specific Relief Act (I of 1877)—Delay—Acquiescence—Right of reversioners to sue.* The plaintiffs were owners of the Grant Buildings situated at Colaba in Bombay. The said buildings comprised two three-storeyed blocks known respectively as the eastern block and the western block. Each block consisted of four divisions, those in the eastern block being numbered, respectively, Nos. 1, 2, 3, and 4, and those in the western block being numbered Nos. 5, 6, 7, and 8. Each block contained thirty-four sets of rooms. The plaintiffs became owners of the Grant Buildings in 1868, and had ever since derived a considerable income from the rooms by letting them as dwelling-rooms to Europeans at an average rent of R50 a month. The defendants were owners of an adjacent cotton mill known as the Nicol Mill, which was erected in 1873. Prior to 1873, the site of the mill was occupied by the buildings of the Hydraulic Press Company, which were erected in 1868. These premises were in 1873 purchased by the Nicol Press and Manufacturing Company, who thereupon proceeded to built the Nicol Mill. On the 3rd August 1874, the erection of the mill having then just commenced, the plaintiffs' solicitor wrote to the secretaries of the Nicol Press and Manufacturing Company as follows: "It is rumoured

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*j*) NUISANCE—*contd.*

that it is intended to carry on the business of spinning and weaving in the buildings now being erected. A business of this nature carried on so close to the Grant Buildings will render our clients' property comparatively valueless, and we are instructed to bring this fact to your notice and to say that the Bank will not permit any business of the kind to be carried on to the detriment of their property." To this letter the company replied that the business of the Hydraulic Press Company had been previously carried on by that company on the same site without any remonstrance either from the plaintiffs or from the occupants of the Grant Buildings; that the value of the plaintiffs' property would be increased, not depreciated, by the erection of the new mill; that the plaintiffs had been aware of the intention of the Nicol Company to convert the Hydraulic Press Company's premises into a spinning and weaving mill, and that they should have entered their protest months before; that under the circumstances the plaintiffs had no right to interfere in the working of the mill, and that the Nicol Company, therefore, intended to continue the erection of the building and to use it when completed, for the purposes of the company. The mill was completed and commenced working in June 1876, with 13,644 spindles, there being room and engine-power sufficient for 40,000 spindles and 250 additional looms. In March 1877, the number of spindles was increased to 19,832, which was the number in the mill at the date of suit. Since March 1874, the eastern block of the Grant Buildings had been closed and not offered to tenants, the demand for rooms of the character having been only sufficient to fill the western block. In 1878, however, the demand again increased, and the eastern block was re-opened and let to tenants,—Division No 1 being opened in January 1878 and Division No. 2 in March 1878, Division No. 3 in November, and Division No. 4 in December 1878. Complaints having been received from the tenants of these divisions of the nuisance arising from the Nicol Mill, the plaintiffs in December 1878 sent instructions to counsel to prepare a plaint against the Nicol Press and Manufacturing Company. On the 26th of that month, however, a resolution was passed to wind up the company, and the working of the mill was discontinued. In consequence of this, no plaint was prepared, but the plaintiffs' solicitor sent a notice to the liquidators of the company referring to what had taken place and warning them not to sell the mill without giving the purchaser notice of the plaintiffs' intention to take proceedings against any person who should recommence to work the mill. Advertisements to that effect were also published in the English and native daily newspapers. On the 9th August 1880, hearing that the mill was to be put up to auction, the plaintiffs sent to the liquidators a similar notice. On the 25th August 1880, the defendants' mill was put up for sale and the notices were read

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*j*) NUISANCE—*contd.*

out by plaintiffs' solicitor. The defendants were present and heard the notice read. The defendants purchased the property for R3,61,000, and the sale was confirmed by the Court. On the 1st January 1881, the mill recommenced working, having been idle for two years. On the 26th January 1881, a notice was sent to the defendants to discontinue the working of the mill on pain of a suit. The defendants replied denying the nuisance and stating that any suit would be defended. The suit was filed on the 5th February 1881. The plaintiffs alleged a nuisance, especially to the tenants of the eastern block of the Grant Buildings, arising from the noise, smoke, and cotton fluff and smells issuing from the defendants' mill. They complained that the said nuisances would be much increased when the defendants carried out their intention of completing the number of spindles and looms for which the mill was built. They prayed for an injunction and R1,000 damages. The defendants denied the alleged nuisance, and contended that the plaintiffs were debarred from the relief claimed. At the time of the filing of the suit the only rooms in the Grant Buildings that were vacant were the following: In the east block two rooms in Division No. 1, one room in Division No. 3, and one room in Division No. 4. In the west block five rooms were vacant. The total net rental of the vacant rooms was R350 a month, and of the occupied rooms R2,410. Evidence was given that many tenants had vacated their rooms in the east block on account of the nuisance experienced from the mill, but that the demand for rooms was so great that other tenants were found to fill the vacancies almost as soon as they occurred. At the time of the hearing of the suit four rooms were vacant in the east block and none in the west block. Between the date of the filing of the suit and the hearing, changes had been effected in the mill which decreased the nuisance,—*e.g.*, new boilers were erected, smokeless coal was used, screens, steam-jets, and baffleplates were introduced. In order to diminish the noise, double fixed windows were put in on the north side of the mill and the cog-wheeled gearing was bricked up. At the hearing it was contended—(i) that the mill was no nuisance; (ii) that even if it was, the plaintiffs were debarred by their conduct from objecting; (iii) that the plaintiffs, being reversioners, were not entitled to sue. *Held*, on the evidence, (1) that the plaintiffs were not debarred from suing by acquiescence or laches, but that the defendants and the previous owners of the mill had been at every stage acquainted with the plaintiffs' intention to resist the working of the mill if it proved to be a nuisance; (2) that the working of the mill was a nuisance to the occupants of Divisions 2, 3, and 4 by reason of (*a*) the noise and also by reason of (*b*) the smoke and cotton fluff issuing from the mill during the monsoon; (3) that the only cause of action on which the plaintiffs could rely in support of their claim to an injunction was the diminution in the value of their property owing to the working of the mill being a nuisance in respect of the four rooms vacant in Divisions Nos. 2, 3, and 4, at the time of the filing of the suit; (4) that the efficacy of the changes and improvements made by the defendants after the filing of the suit for the purpose of diminishing the nuisance complained of depended so much on the good intention and constant personal care of the defendants and their servants that it ought not to influence the question of injunction when once the nuisance was proved to have existed; (5) that although (the plaintiffs being at the date of the suit entitled only to complain of the nuisance as to four out of sixty-eight sets of rooms) it might be said there was no material diminution of the value of the property arising from the nuisance, the Court, in considering the propriety of granting an injunction, would have regard to the fact that the injunction, if granted, would render it unnecessary, for the plaintiffs to bring an action in respect of all the other rooms in Divisions Nos. 2, 3, and 4 after giving the tenants notice to quit, and so prevent that multiplicity of suits on which an injunction is authorized by s. 54 of the Specific Relief Act. Under the special circumstances of the case, the question whether an injunction should go should be dealt with as if the plaintiffs had a right of action in respect of all the rooms in Divisions Nos. 2, 3, and 4; (6) the only interest of the plaintiffs in the Grant Buildings being a personal interest and the only object of the plaintiffs having been to secure the highest value for their property, and considering that from the nature of the case, an injunction, such as the plaintiffs prayed for, would place the defendants entirely in the power of the plaintiffs, the relief given to the plaintiffs should assume the form of pecuniary compensation rather than of an injunction, and directed further evidence to be taken as to the diminution in value of the plaintiffs' property caused or likely to be caused by the nuisance so far as it affected Divisions Nos. 2, 3 and 4 of the eastern block. After taking further evidence, the Court considered that the case would be best dealt with by a combination of damages and injunction, and made an order for an injunction to issue against noise, smoke, and cotton fluff so as to be a nuisance to the plaintiffs as owners or to their tenants for the time being of Divisions Nos. 2, 3, and 4. Such injunction not to issue in case the defendants should pay to the plaintiffs the sum of R40,000 before the expiration of a fortnight from the date of the decree. In the event of the payment of the said sum to them, an injunction to issue restraining defendants from working the said mill otherwise than with closed double glass windows on the side next the Grant Buildings, and also restraining defendants from allowing any smoke or cotton fluff to issue so as to cause such nuisance as aforesaid with liberty to plaintiffs

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*j*) NUISANCE—*contd.*

to apply in case the noise be materially increased beyond what it is at present. On appeal: *Held per* BAYLEY, *C.J.* (Acting), and WEST, *J.*, that admitting that money compensation was a right form of relief, it should be compensation measured by the premises not owned, but occupied by the plaintiffs; in other words, the rooms unlet. It was only in respect of these that the plaintiffs were competent to sue, and they could not be entitled to compensation on a more extensive ground. It was only in respect of the rooms in question that the present suit and the decree therein could guard the defendants against further actions. An award of R40,000 to the plaintiffs could not prevent any tenant of the rooms affected by the nuisance from suing the defendants on the same grounds as were taken by the plaintiffs in this suit. It would be unreasonable that the defendants should be made to pay as damages in bulk to persons not legally entitled what they might have to pay over again to those who are or may be entitled in detail. For the damages arising to the plaintiffs on account of the rooms unlet at the institution of the suit R1,000 would afford sufficient compensation, and the sum awarded should be reduced to that amount. The decree was varied accordingly, and a clause was also inserted distinctly providing against any increase of smoke, cotton fluff, or noise of machinery beyond what subsisted at the date of the decree; and further providing that in case any invention should be made by which the nuisance might easily be diminished, the decree was not to be deemed to prejudice the right, if any, the plaintiffs as owners or the tenants of the Grant Buildings possessed to require the defendants to introduce such invention into the said mill so as to cause the least annoyance reasonably possible. LAND MORTGAGE BANK OF INDIA *v.* AHMEDBHOY HUBIBBHOY . . . . **I. L. R. 8 Bom. 35**

29. ——— **Overhanging trees**—*Mandatory injunction—Perpetual injunction—Trees overhanging neighbour's land—Continuing nuisance—Threatened damage—Specific Relief Act (I of 1877), s. 55.* As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbours' land to the detriment of the latter, in case of breach of such an obligation, it is open to the Court to grant a mandatory injunction for the removal of the nuisance under s. 55 of the Specific Relief Act. *Lemmon* v. *Webb*, [1895] *A. C. I. Hari Krishna Joshi* v. *Sankar Vithal, I. L. R. 19 Bom. 420*; *Norris* v. *Baker, 1 Roll. 393*; *Baten's Case, 9 Rep. 53*; *Shelfer* v. *City of London Electric Lighting Company*, [1895] *I. Ch. 287*, referred to. A perpetual injunction restraining the defendant from planting trees the roots of which are likely to penetrate the foundation of the plaintiff's building and wall, is *held* to be unworkable. *Bindu*

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*j*) NUISANCE—*concld.*

Basini Choowdhrani v. *Jahnabi Chowdhrani, I.L.R. R. 24 Calc. 260*, referred to. LAKSHMI NARAIN BANERJEE *v.* TARA PROSANNA BANERJEE (1904) **I. L. R. 31 Calc. 944**

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY).

30. ——— **Injunction by one member of a joint Hindu family against another when granted**—*Joint family property.* In disputes between members of a joint Hindu family with respect of joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the family propetry, or acts amounting to ouster. ANANT RAMRAV *v.* GOPAL BALVANT **I. L. R 19 Bom. 269**

31. ——— **Suit by a co-parcener for an account of the profits of a joint family firm**—*Exclusion of partner from family partnership—Hindu law—Joint family.* A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property, and an award of his share in such profits when ascertained. This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm. GANPAT *v.* ANNAJI **I. L. R. 23 Bom. 144**

32. ——— **Mandatory injunction, when to be granted**—*Judicial discretion—Damages—Rights of co-sharers.* In granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. There is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. SHAMNUGGER JUTE FACTORY CO. *v.* RAMNARAIN CHATTERJEE . . . **I. L. R. 14 Calc. 189**

33. ——— **Co-sharers**—*Right to deal with joint property—Excavation of tank on joint property—Discretion of Court in granting injunction—Specific Relief Act (I of 1877), s. 55.* Before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharer, without the consent of the other should be restored to its former condition (as, for instance, where a tank has ben excavated), a plaintiff must show that he has sustained, by the act the complaints of.

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

some injury which materially affects his position. *Lala Biswambhar* v. *Rajaram Lal, 3 B. L. R. Ap. 63*, applied in principal. *Shamnuggur Jute Factory Co.* v. *Ram Narain Chatterji, I. L. R. 14 Calc. 189*, approved. The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order of that nature. JOY CHUNDER RUKHIT *v.* BIPRO CHURN RUKHIT. **I. L. R. 14 Calc. 236**

34. ——————— *Ijmali property —Cultivation of indigo by one co-sharer without consent of others—Injunction as between co-sharers —Practice of the English Courts in granting injunction, Applicability of.* *W*, while in possession of of an entire mouzah as ijaradar, had under an arrangement with the propritors built factories and cultivated indigo by reclaiming a quantity of waste land. On the expiration of his lease, *W*, who still held a portion of the mouzah in ijara from a 2-anna co-sharer, continued to cultivate indigo on the khas lands, as before, and, disregarding the opposition of the 14-anna co-sharers, claimed an exclusive title to do so. The 14-anna co-sharers thereupon brought a suit against *W* for ijmali possession of the khas lands, and prayed, among other things, for an injunction prohibiting the defendant from sowing indigo upon the ijmali lands without the plaintiffs' consent, and also for a general injunction to prohibit the defendant from throwing any obstacles in the way of plaintiffs' holding ijmali possession of the lands. The Court below granted an injunction prohibiting the defendant from growing indigo on the khas lands without the consent of the plaintiffs. *Held*, that the plaintiffs were entitled to an injunction, but having regard to the circumstances under which the defendant cultivated the lands, it was necessary to vary the injunction granted by the Court below by making it an injunction restraining the defendant from excluding by any means the plaintiffs from their enjoyment of the ijmali possession of the lands. RAM CHAND DUTT *v.* WATSON & CO. **I. L. R. 15 Calc. 214**

35. —— — **Village property**—*As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.* A village tank, on the site of an ancient one, was the common property of, and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancester with the general acquiescence of the village, claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown ; and from the evidence, including that afforded by a compromise

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses. *Held*, by the High Court that, whether or not they were entitled to exclude others from interfering with the repairs of the steps made by their ancestors, the plaintiffs were not entitled to an injunction prohibiting others from interfering with the general conservancy of the tank. MUTTAYA *v.* SIVARAMAN **I. L. R. 6 Mad. 229**

Held by the Privy Council, on appeal, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs or to insist on the work being done at the common cost ; the tank remaining the common possession of the village, and no class of the villagers having any right to, by injunction or otherwise, exclude the rest from contributing to the repairs. SIVARAMAN CHETTI *v.* MUTHAYA CHETTI **I. L. R. 12 Mad. 241 L. R. 16 I. A. 48**

36. ——————— **Digging so as to endanger neighbours' land**—*Specific Relief Act (I of 1877), s. 54—Threatened damage—Damage occurring after suit—Cause of action—Right of suit.* Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. And where actual injury has occurred subsequently to the filing of the plaint, the plaint may be amended so as to show the nature and extent of such injury. *Pattisson* v. *Gilford, L. R. 18 Eq. 259*, applied. BINDU BASINI CHOWDHRANI *v.* JAHNABI CHOWDHRANI **I. L. R. 24 Calc. 260**

37. ——————— **Light and air**—*Ancient lights* Principles on which the Court grants injunctions and assesses damages in the case of obstruction of ancient lights. Effect of alteration of widows on plaintiff's right. LACKERSTEEN *v.* TARUCKNATH PORAMANICK . . . . . **Cor. 91**

38. ——————— *Erection of buildings—Obstruction to light and air.* An injunction restraining the erection of buildings in Calcutta refused, a wall of 17 feet high at a distance of 20 feet not being such an obstruction as to call for the interference of the Court. Motion refused without prejudice to action for damages. BARROW *v.* ARCHER . . . . . **Cor. 9**

39. ——————— *Obstruction to light and air—Door, light admitted by.* When the Court is asked to interfere by injunction to restrain the obstruction of light and air to a dominant tenement, the question to be determind is, is the obstruction such as seriously to

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause a material injury to it—an injury which cannot be completely compensated by damages? English cases on the subject reviewed. The Court will in such cases interfere, as well by mandatory as by preventive injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy. The Court will look not merely to the use to which rooms in a dwelling-house from which light is obstructed are actually put at the time of the obstruction, but also to the use to which they may be put for all reasonable purposes of occupation. It is immaterial whether light is admitted through a widow or a door. In case of obstruction, the owner of the dominant tenement is in either case entitled to protection. RATANJI HARMASJI *v.* EDALJI HARMASJI . . . . **8 Bom. 181**

40. ——————— *Obstruction to light and air—Mandatory injunction—Infringement of right by neighbouring owners of buildings—Damages.* Where the plaintiff and the defendant, being owners, respectively, of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not built upon them or divide them by a wall :—*Held*, that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal. It should also be satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff that the consequences of the breach of agreement cannot adequately be compensated by damages. It should also satisfy itself whether the plaintiff protested against the new wall being built whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages. RANCHHOD JAMNADAS *v.* LALLU HARIBHAI. LALLU HARIBHAI *v.* RANCHHOD JAMNADAS **10 Bom. 95**

41. ——————— *Obstruction to light and air—Damages—Injury not compensated for by damages—Demolition of house— Execution of decree—Ancient lights.* Re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light is an injury which cannot be adequately redressed by an award of damages, and against which the Count will

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

grant relief by issuing a mandatory injunction directing the defendant to pull down so much of the house as is necessary to stop the injury. The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money compensation is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances. To determine what demolition of the house is necessary, the Court executing the decree was directed to employ a professional man agreed on by the parties if they could agree, or nominated by the Court if they could not. JAMNADAS SHANKARLAL *v.* ATMARAM HARJIVAN . . . **I. L. R. 2 Bom. 133**

42. ——————— *Obstruction to light and air—Substantial injury—Damages— Acquiescence.* Any act by which the control of light and air are taken out of the hands of the person entitled to them, or by which the access of light and air to the window of a dwelling-house is interfered with, is *primâ facie* an injury of a serious character. Where the defendant, without leave or licence, took possession of the plaintiff's window as completely as if he had blocked it up altogether :—*Held*, that no precedent warranted the substitution of damages for an injunction in such a case against the plaintiff's will. NANDKISHOR BALGOVAN *v.* BHAGUBAI PRANVALUBHDAS **I. L. R. 8 Bom. 95**

43. ——————— *Obstruction to light and air—Attachment for infringement of injunction—Opinions of surveyors.* When an injunction has been granted restraining a person from interrupting the access of light and air to certain windows, and the Court considers that the injunction has been infringed, an attachment will issue, even though the defendant has proceeded according to the advice of his surveyor and legal adviser in constructing the building complained of as a breach of the injunction. The Court in such cases does not consider itself bound by the opinion of surveyors, but will form its own judgment as to the probable effect of the structure complained of. PRANJIVANAS HURJIVANDAS *v.* MAYARAM SALMALDAS . . . . **1 Bom. 148**

44. ——————— *Specific Relief Act (I of 1877), s. 54—Remedy in damages.* Under the Specific Relief Act, 1877, s. 54, the Court may grant a perpetual injunction against a defendant who invades or threatens to invade a plaintiff's right (*e.g.*, to light and air) in cases there specified, and, *inter alia*, when the invasion is such that pecuniary compensation would not afford adequate relief. The rule so laid down differs from the rule upon which the decisions are

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

based in English law. In the latter the right to an injunction is a *primâ facie* right to which a plaintiff is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that *primâ facie* right. Under the Specific Relief Act, an injunction is not to be given when the remedy in damages is considered adequate. BOYSON *v* DEANE **I. L. R. 22 Mad. 251**

45. ——— *Mandatory injunction—Damages—Ancient lights.* Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted. Mere notice not to continue building so as to obstruct a plaintiff's rights is not when not followed by legal proceedings, a sufficiently special circumstance for granting such relief. *Jamnadas Shankarlal* v. *Atmaram Harjivan, I. L. R. 2 Bom. 138,* referred to. The law regarding relief by mandatory injunction explained. BENODE COOMAREE DOSSEE *v.* SOUDAMINEY DOSSEE **I. L. R. 16 Calc. 252**

46. ——— *Discretion of Court as to granting mandatory injunctions—Delay on the part of the plaintiff in bringing his suit.* A plaintiff brought his suit for proprietory possession of a plot of land, and secondly, for a mandatory injunction to demolish certain buildings which the defendant had erected on such plot. The suit, however, was not brought until upwards of two years from the time when the buildings complained of were completed. It was found that the plaintiff was not entitled to proprietary possession of the land claimed by him, but that he had a right of user over it, and that the defendant was not entitled to build upon the land. The Court, however, on account of the plaintiff's delay in bringing his suit, declined to grant the mandatory injunction asked for. *Benode Coomaree Dossee* v. *Soudaminey Dossee, I. L. R., 16 Calc., 252,* referred to. MUHAMMAD *v.* GULAB RAI . . . **I. L. R. 20 All. 345**

47. ——— *Injunction or damages—Lord Cairns' Act (21 & 22 Vict., c. 27)—Specific Relief Act (I of 1877).* The plaintiff owned a house in Girgaon Road, Bombay, in which he had resided with his family for twenty-four years. Through certain windows in the south wall of his house, numbered respectively 3, 5, 7, and 8, he had during all that time enjoyed free access of light and air. In 1887 the defendant purchased the land to the south of the plaintiff's house, pulled down the building that then existed upon it, and proceeded to build a new one on the same site, the north wall of which was about six feet distant from the south wall of the plaintiff's house, and was intended to be sixty-four feet high, *i.e.*, about twenty feet higher than the plaintiff's windows Nos. 7 and 8, which were in the plaintiff's loft. The plaintiff sued for an injunction. *Held,* that the plaintiff was entitled to damages, but not to an injunction. DHUNJIBHOY COWASJI UMRIGAR *v.* LISBOY . . . **I. L. R. 13 Bom. 252**

48. ——— *Damages—Specific Relief Act (I of 1877), s. 54, cl. (c)—Limitation Act (XV of 1877), s. 26—Mandatory injunction.* The plaintiff complained that the defendants intended to build so as to obstruct the passage of light and air through an ancient window in his house, and render a room therein unfit for use, and prayed for a perpetual injunction restraining the defendants from so building. It was proved that the wall intended to be built would so shut out the light and air as to render the room completely dark and unfit for use. The Subordinate Judge granted the injunction as prayed. The defendants appealed to the Joint Judge, who amended the lower Court's decree by ordering the removal of the injunction and directing, in its stead, a new window to be opened in the plaintiff's house to the east of the window in question. On appeal by the plaintiff to the High Court:—*Held,* reversing the decree of the lower Appellate Court, that the plaintiff had an absolute and indefeasible right to the easement he had acquired; and the only possible question was whether injunction or damages was the appropriate remedy under the circumstances of the particular case. *Held,* also, that, as the evidence established that, after defendants' wall was built, plaintiff's room would not remain substantially as useful to him as before the plaintiff was entitled to an injunction. *Holland* v. *Worley, L. R. 26 Ch. D. 578,* distinguished. The High Court also directed a mandatory injunction to issue to the defendants to remove the wall they had raised after the lower Appellate Court had passed the decree in their favour and pending the plaintiff's appeal to the High Court. KADARBHAI *v.* RAHIMBHAI . . . **I. L. R. 13 Bom. 674**

49. ——— *Light and air—Obstruction—Occupation uncomfortable—Rule of 45°—Decree.* In a suit for an injunction to restrain the defendant from obstructing the access of light and air to the plaintiff's windows, the first Court granted an injunction solely on the ground that the defendant's new building left the plaintiff with less than 45° of light, and dispensed with any further evidence. On appeal the lower Appellate Court reversed the decree on the ground that no evidence had been adduced to show that there was a diminution of light. *Held,* that both the lower Courts were in error and the case must be remanded

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

for the determination of the following issue: (i) Has there been a diminution in the quantity of light and air which has been accustomed to enter the windows of the plaintiff's house during the whole of the prescriptive period ? (ii) If so, has there been a privation of light and air sufficient to render occupation of the house uncomfortable? CHOTALAL MOHANLAL *v.* LALLUBHAI SURCHAND (1905) **I. L. R. 29 Bom. 157**

50. ——————— *Easement—Ancient lights—Injunction to restrain defendant from interfering with ancient lights. Quia timet action, necessary ingredients for.* There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will, if it comes, be very substantial. *Fletcher* v. *Bealey, L. R. 28 Ch. D. 688*, followed. GANGABAI *v.* PURSHOTAM (1907) . . . **I. L. R. 32 Bom. 146**

51. ——— **Infringement of right to Easement**—*Specific Relief Act (I of 1877), s. 54. Dhunjibhoy Cowasji Umrigar* v. *Lisboa, I. L. R. 13 Bom., 252* and *Ghanasham Nilkant Nadkarni* v. *Moroba Ram Chandra Pai, I. L. R., 18 Bom. 474*, followed and approved, as to the circumstances in which the Court will grant an injunction where a right to light and air is infringed. SULTAN NAWAZ JUNG *v.* RUSTOMJI NANABHOY **I. L. R. 20 Bom. 704**

52. ——————— *Specific Relief Act (I of 1877), s. 54—Easement—Injunction or damages.* It was not intended by s. 54 of the Specific Relief Act, 1877, that a man should not have an injunction granted to him unless his property would otherwise be practically destroyed if the injunction were not granted. Where the plaintiff had for over twenty years carried on the business of manufacturing a particular kind of cloth in a certain house, and the defendant built in the neighbourhood of that house in such a manner as to render the plaintiff's house practically useless for the purposes of his manufacture : *Held*, that the plaintiff was entitled to an injunction, and not merely to damages. *Aynsley* v. *Glover, L. R. 18 Eq. 544*, and *Holland* v. *Worley, L. R. 26 Ch. D. 585*, followed. *Dhunjibhoy Cowasji Umrigar* v. *Lisboa, I. L. R. 13 Bom. 252*, and *Ghanasham Nilkant Nadkarni* v. *Moroba Ram Chandra Pai, I. L. R. 18 Bom. 474*, referred to. YARO *v.* SANA-ULLAH **I. L. R. 19 All. 259**

53. ——————— *Easement—Damages—Practice where amount of injury does not justify injunction.* The plaintiff sued for an injunction restraining the defendant from erecting a building which interfered with the light and air coming to the plaintiff's house. The lower Appeal Court found that, though the light and air of the plaintiff's house was sensibibly diminished by the defendant's building, there was not such substantial damage done as would justify an injunction, and it dismissed the suit with costs, being of opinion that the plaintiff's remedy, if any, was a suit for damages. *Held*, that the lower Court was right in not granting an injunction, but instead of dismissing the suit, and referring the plaintiff to another suit for damages, ought itself to have directed an inquiry as to the damages sustained by the plaintiff by reason of the diminution of the supply of light and air to his house. KALLIANDAS *v.* TULSIDAS . . **I. L. R. 23 Bom. 786**

54. ——— **Water**—*Obstruction to right to flow of water—Substantial injury.* In cases of obstruction of right to an uninterrupted flow of water, it must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction. PONNUSAWMI TAVER *v.* COLLECTOR OF MADURA . . . . . **5 Mad. 6**

KRISTNA AYYAN *v.* VENKATACHELLA MUDALI **7 Mad. 60**

where it was found that no right of the plaintiffs had been invaded, no damage had accrued, and no case of prospective damage had been made out, so that he was not entitled to an injunction.

55. ——————— *Obstruction to flow of water—Erection of embankment—Requisite evidence to justify grant of injunction.* In a suit for an injunction to compel defendant to reduce to its original dimensions an embankment which he had recently raised from a certain height to a greater height, on the ground that the effect of defendant's act had been, and would be, to injure plaintiff's land by preventing the passage of water which used to overflow that land :—*Held*, that plaintiff was bound to establish not merely an injury, actual or prospective, caused by the act complained of, but an injury caused by infraction of some right which plaintiff possessed, or by the omission of something which defendant was legally bound to do. PRAN KRISTO ROY *v.* HORO CHUNDER ROY . . . . **10 W. R. 435**

56. ——————— *Right to have water carried off over neighbouring roof—Party-wall, right to built on or continue—Eaves projecting for more than thirty years over neighbouring property—Damages, Suit for—Issues.* Where the plaintiff's eaves had projected over the defendants' roof, which rested on a wall common between the parties, for more than thirty years, and the plaintiff had thus acquired a right to have the water carried

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

from his roof on to the defendants' roof, and where the defendants raised the common wall and removed the plaintiff's eaves :—*Held*, that the plaintiff was entitled to relief either by damages or injunction to determine which, issues were framed according to the state of the authorities and sent for the findings of the lower Court. NASARBHAI AHMEDBHAI *v.* BADRUDIN . . **I. L. R. 16 Bom. 533**

57. ——————— *Riparian owners—Lands belonging to different owners situated near tank common to both—Ordinary overflow through channel between boundaries—Portion of overflow customarily inundating both lands—Attempt by one owner to erect bank for protection—Effect to increase inundation of opposite land—Injunction refused to restrain opposite owner from preventing erection.* Plaintiff and defendants owned adjacent lands near which was situated a tank, which was common to both and the surplus from which had flowed from time immemorial down a channel which lay between the plaintiff's land and that of the defendants. The channel was insufficient to carry off all the water and some of it flowed over plaintiff's lands and some over those of the defendants. The flow was not the result of extraordinary flood, but was the normal state of things. Plaintiff desired to erect a bank to protect his land from the water, but defendants had prevented him. It was found that, if plaintiff did erect such a bank, it would throw back on the land of defendants more water than had customarily flowed over it and would increase the damage to which it had hitherto been subject. On a suit being brought by plaintiff for an injunction restraining defendants from interfering with the erection of the proposed bank : *Held*, that plaintiff was not entitled to an injunction. *Menzies* v. *Breadalbane, 3 Bligh N. S. 414*, followed. *Gopal Reddi* v. *Chenna Reddi, I. L. R. 18 Mad. 158*, distinguished. VENKATACHALAM CHETTIAR *v.* ZAMINDAR OF SIVAGANGA (1904) . **I. L. R. 27 Mad. 409**

58. ——————— **Right of way**—*Ownership of soil—Suit for trespass, injunction, and to close doors.* *G*, the owner of certain property, sold it in lots to different persons. The plaintiffs purchased a portion of the property, and obtained from *G* a conveyance, in which the southern boundary of the land purchased by them was stated to be "the land of the said *G* out of which he had allowed a passage six feet broad running almost straight west and east, and terminating on another passage leading," etc., the deed continued "which two passages the said *G* hath granted and allowed, and doth hereby grant and allow to" the plaintiffs "their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land, etc., together also with the right of the two passages for ingress and egress herein-

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

before mentioned." In a second deed conveying another parcel of land to the plaintiffs *G* said, with reference to the latter passage, "No one shall be able to throw sweepings or filth on the said road, or make it unclean ; if any one does at any time act thus, you will deal with him according to the laws in force." The defendant had become possessed of part of the northern portion of the land sold by *G*, and he also owned, under a distinct title, a house abutting on the lane in dispute, but having no doors opening into it. Shortly before the institution of the present suit, the defendant constructed three doors opening on to the lane, two of which were used for the purpose of cleaning two privies on the defendant's premises, and the third was used by the defendant and his servants as a means of access to the lane. In a suit by the plaintiffs seeking damages for trespass, and an injunction against the alleged wrongful user of the lane by the defendant, and praying that he might be ordered to close the three doors :—*Held* (*per* COUCH, *C. J.* and MARKBY, *J.*, overruling the decision of MACPHERSON, *J.*), that the plaintiffs had not such a property in the soil of the lane as would entitle them to prevent the defendant from making new doors on to the lane, and to restrain him using the doors already made ; they had only a right of way but an injunction was granted restraining the defendant from using his doorway for the purpose of cleaning his privies or in any other manner so as to obstruct the free use by the plaintiffs of the lane. MADANMAHAN SEN *v.* CHANDRAKUMAR MOOKERJEE **9 B. L. R. 328 : 18 W. R. 379**

59. ——————— *Obstruction to right of way—Special damage—Injunction and not compensation granted.* The defendants closed a gateway leading across a level crossing of their railway over which there was a public right of way. The plaintiff alleged that by the closing of this gateway access to his bungalow during the monsoon was completely stopped ; and he sued to have the the gateway reopened. The lower Appellate Court found that there was a public right of way over the level crossing ; that it had been obstructed by the defendants ; and that the plaintiff had suffered special damage by the obstruction. On special appeal to the High Court, it was contended by the defendants that the plaintiff was only entitled to compensation, and not to an injunction. *Held*, that the inconvenience caused to the plaintiff was real and substantial ; that the plaintiff was entitled to the user of the right of way in question, and under the circumstances to an injunction against its obstruction. G. I. P. RAILWAY COMPANY *v.* NOWROJI PESTANZI . **I. L. R. 10 Bom. 390**

60. ——————— *Easement—Easements Act (V of 1882)—Right of way enjoyed for*

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*k*) OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY (LIGHT AND AIR, WATER, RIGHT OF WAY)—*contd.*

Agricultural purposes—Change of use—Increase of servitude. The defendants had a right of way to their field through an adjoining field of the plaintiff. Until shortly before suit, the defendants' field had only been used for agriculture, and the way through the plaintiff's field was used by them for ordinary agricultural purposes. The defendants, however, converted their field into a timber depôt and began to use the way across the plaintiff's field for purposes connected with the timber trade. The plaintiff sued for an injunction. *Held*, that plaintiff was entitled to an injunction restraining the defendants from using the way otherwise than for agricultural purposes. DESAI BHAOORAI *v.* DESAI CHUNILAL **I. L. R. 24 Bom. 188**

61. ——————— *Suit to prevent erection of door—Door erected after suit filed, but before hearing—At hearing the Court may grant mandatory injunction directing removal of door although only preventive relief prayed for in plaint—Practice—Procedure.* Plaintiff sued to restrain the defendants from erecting a certain door. The plaint also contained a prayer for "such other relief as the Court might think fit." After filing the plaint, the plaintiff applied for an *interim* injunction pending the hearing of the suit, which, however, was refused. The defendants thereupon erected the door, and at the hearing contended that, inasmuch as the plaint prayed only to prevent the erection of the door and not for its removal when erected, the plaintiff could not obtain the latter relief in this suit, but must file a fresh suit. The lower Court dismissed the suit, holding that on the erection of the door a new and different cause of action had arisen, for which a fresh suit must be filed. On appeal: *Held* (reversing the decree, and remanding the case), that on the suit as framed the Court could grant a mandatory injunction for the removal of the door. The suit was rightly framed in the light of the circumstances which existed when it was brought. It was the defendant's subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit. MAGANLAL PUNJASA *v.* CHHOTALAL GHELA (1901) **I. L. R. 26 Bom. 136**

62. ——————— **Possession of property**—*Practice—Procedure—Fact alleged by plaintiff and not denied in defendant's written statement or at hearing—Presumption—Repeated violation of legal right—Damages—Adequate remedy—Specific Relief Act (I of 1877), s. 54.* In a suit praying for an injunction restraining the defendant from interfering with the plaintiff's possession of certain land, the plaintiff in the plaint alleged obstruction by the defendant. It was not denied by the defendant in his written statement, or put in issue at the hearing. *Held*, that it might be presumed that the defendant did not deny the fact of obstruction. Repeated violation of an established legal right cannot in ordinary cases be adequately met by damages, nor can these damages be satisfactorily ascertained. APAJI PATIL *v.* APA (1902) **I. L. R. 26 Bom. 735**

(*l*) POSSESSION OF JOINT PROPERTY.

63. ——————— *Specific Relief Act (I of 1877), s. 54—Judicial discretion of Court—Where the act of the defendant amounts to an ouster of the plaintiff from the possession of the joint property.* In a case where the act of the defendant amounts to an ouster of the plaintiff from the possession of joint-property, pecuniary compensation not being an adequate relief, an injunction would be the proper remedy. *Anant Ramrav* v. *Gopal Balvant, I. L. R. 19 Bom. 269*, followed. SOSHI BHUSAN GHOSE *v.* GONESH CHUNDER GHOSE (1902) **I. L. R. 29 Calc. 500**

(*m*) PUBLIC OFFICERS WITH STATUTORY POWERS.

64. ——————— **Acts of trespass committed by public functionaries**—*Municipal Act (Bom. Act II of 1865), ss. 131, 160.* Principles upon which the Court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers considered. If the Municipal Commissioner of Bombay is desirous of putting in force the provisions of s. 131 of the Municipal Act (Bombay Act II of 1865) and compelling a householder (whose house has been taken down) to set the foundations back to the general level of the street, he must exercise his powers when, or within fourteen days after, the householder gives notice, under s. 160 of the Act, of his intention to re-build. Where a trespass of a continuing nature has been committed by the defendant, but has been discontinued before suit brought, the Court will not interfere by injunction to restrain the defendant from continuing such trespass, merely because the plaintiff entertains vague apprehensions that the trespass may be recommenced. CHABILDAS LALLUBHAI *v.* MUNICIPAL COMMISSIONERS OF BOMBAY **8 Bom. O. C. 85**

65. ——————— **Act of corporate body**—*Injunction to restrain libel—Trustees of Port of Bombay—Bombay Act I of 1873—Resolutions of corporation.* The Court will not grant an injunction to restrain the publication of a libel; not to restrain, at the suit of an individual, an act of a corporate body on the ground of such act being *ultra vires*, except where such individual has been damaged by such act in his rights of ownership, commodity, or easement. There is no authority for the proposition that an individual is entitled to protection by way

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*m*) PUBLIC OFFICERS WITH STATUTORY POWERS —*contd.*

of injunction against the act of a corporation though in excess of their powers, which affects that individual's character and reputation, whether private, professional, or commercial, which he would not have been entitled to had the act complained of been committed by individual defendant, on the ground that the act in question was one which the corporation had no power to do under their instrument of incorporation. The Trustees of the Port of Bombay have the power to record their decisions and opinions with regard to matters connected with the business they have under their Act power to transact; whether such decisions or opinions are confined to statements of what they believed to be actual facts, or extended also to the giving of advice for the conduct of their successors in office with regard to such business, and whether the expression of such decisions, opinions, or advice may or may not contain statements injurious to the character or reputation of others. Where therefore the plaintiff sought for an injunction to restrain the Trustees of the Port of Bombay from publishing two resolutions alleged to reflect injuriously on his character and reputation, on the ground that it was not within the powers conferred on the Trustees by Bombay Act I of 1873 to discuss or pass resolutions affecting his character, and that the publication of such resolutions was calculated to injuriously affect him in his commercial relations with the Government:—*Held*, that the injunction could not be granted. *Held*, also, that, though the Court, under certain circumstances, might have the power of so framing an order for injunction as to produce the effect of cancelling the minutes of a resolution recorded in the books of a corporate body, yet that it could not order the Trustees of such body to pass and record a resolution dictated by the Court. SHEPHERD *v.* TRUSTEES OF THE PORT OF BOMBAY . . **I. L. R. 1 Bom. 132**

66. ——— Right of municipal officers to levy taxes. *Quære:* Whether the Court ought to interfere by way of injunction with the exercise of a right, or alleged right, of officers of a municipal body to levy taxes and dues. HORMASJI KARSETJI *v.* PEDDER . . . . **12 Bom. 199**

67. ——— Powers of High Court to grant injunction against municipality— *Specific Relief Act (I of 1877), Ch. VIII.* There is nothing in Ch. VIII of the Specific Relief Act to prevent the High Court from granting an injunction against a municipality as part of the remedy in a regular suit. *Moran* v. *Chairman of Motihari Municipality, I. L. R. 17 Calc. 329,* considered. *Ganga Narain* v. *Municipality of Cawnpore, I. L. R. 19 All. 313,* referred to. STRACHEY *v.* MUNICIPAL BOARD OF CAWNPORE **I. L. R. 21 All. 348**

68. ——— Powers of public body to collect tax—*Water-rate—Injunction to restrain collection.* Where a public body has received by statute a discretionary power to levy and is laid under an obligation to collect a rate, an injunction cannot be granted by a Court so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation. MUNICIPAL COMMISSIONERS, MADRAS *v.* BARANSON . . **I. L. R. 3 Mad. 201**

69. ——— Suits by agents of company to restrain it from carrying into effect a resolution of directors—*Power to appoint solicitors to company—Practice.* By the Memorandum and Articles of Association of the new Dharamsey Poonjabhoy Spinning and Weaving Company, the plaintiffs, firm of *M F & Co.* were appointed agents of the company for twenty-five years, and it was provided that they should have the general control and management of the Company. Cl. 98 of the Articles provided that the said firm, as such agents, should have full power and authority (*inter alia*) to appoint and employ, in or for the purposes of the transaction and management of the affairs and business of the company, such solicitors as they should think proper. An agreement, dated 26th August 1874, was also entered into between the company and the partners in the firm of *M F & Co.*, the executors, administrators, and assigns, for the time being constituting the partnership firm of *M F & Co.*, whereby it was agreed that the said firm should be agents to the company for twenty-five years to buy and sell, etc., and particularly to exercise all the powers contained in cl. 98 of the Articles of Association. Messrs. *C & B* were duly appointed solicitors to the company, and acted as such for a considerable time. Merwanji Framji, one of the members of the said firm of *M F & Co.*, died in the middle of March 1876. The plaintiffs complained that *G*, one of the shareholders in the company, became desirous of ousting the plaintiffs from the position of agents of the company, and of becoming the managing director of the company; that in July 1881 he procured his own election and that of certain nominees of his as directors of the company; and on the 8th August 1881 procured the passing of a resolution at a board meeting to the effect that as Messrs. *C & B*, the company's solicitors, were also the solicitors of the agents, it was desirable, for the interest of the company, that a change should be made, and that Messrs. *H C & L* be appointed solicitors of the company. The plaintiffs alleged that the only object of passing the said resolution was to facilitate the design of *G* of ousting the plaintiffs from their agency, and getting the management of the company for himself; that Messrs. *H C & L* had been for a long time the solicitors of *G*, and had been advising him in his designs upon the company and upon the plaintiffs, and they contended that the resolution was a breach of

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INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*m*) PUBLIC OFFICERS WITH STATUTORY POWERS —*concld.*

the contract between the company and the plaintiffs and a violation of the Articles of Association of the company. The plaintiffs sued *G* and two other directors of the company and the company itself, and prayed for an injunction against the defendants to restrain them from committing any breach of the agreement of 26th August 1874, and in particular from carrying into effect the resolution appointing Messrs. *H C & L* as solicitors for the company, and to restrain them from doing anything inconsistent with the Memorandum and Articles of Association. The defendants contended that the contract of the 26th August 1874 had been determined by the death of Merwanji Framji, and that the powers conferred on the agents by cl. 98 of the Articles were, subject to the general powers of managements, vested in the directors by the Articles, and that the case was not one in which an injunction could be granted. It being admitted that the conduct of the defendants would be supported by the company in general meeting owing to their having a preponderance of votes:—*Held*, that, inasmuch as the Court would not, by a decree for specific performance or by injunction, compel the Company to retain the plaintiffs in the confidential position of agents, it would not restrain the defendants or the company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principal part of the contract, *viz.*, the agreement that the plaintiffs should be the agents of the company for twenty-five years; and further, *Semble*, that on the merits of the case the Court would not interfere on behalf of the plaintiffs. NUSSERWANJI *v.* GORDON
I. L. R. 6 Bom. 662

(*n*) TRADE MARK.

70. ——— **Restraining use of trade mark.** Injunction granted to restrain a bazar dealer from using trade marks similar to those of a Glasgow firm trading in India. EWING *v.* CHOONEE LALL MULLICK . . . . **Cor. 150**

71. ——— *Fraudulent intention.* In an application for an injunction to restrain the use of a trade mark, it is not a sufficient defence to say there was no fraudulent intention, and that is no reason for not granting the application. GRAHAM *v.* KER, DODS & CO.
3 B. L. R. Ap. 4

72. ——— **Infringement of patent**—*Label—Details different but general similarity likely to deceive.* The plaintiffs sued the defendant for an infringement of their label used on tins of aniline dye, which they imported into Bombay. The label covered the top of the tin, and bore upon it the picture of an elephant in the centre of a curved band; the rest of the label being a combination in

INJUNCTION—*contd.*

2. SPECIAL CASES—*contd.*

(*n*) TRADE MARK—*contd.*

green, red, and gold representations, for the most part, of coins, medals, and tracing. The defendant was the agent in Bombay of Cassella & Co. of Frankfort. Prior to 1892, Cassella & Co. had imported aniline dye into Bombay in tins bearing a label, the chief feature of which was an elephant. Of that label however, the plaintiffs did not complain. But in January 1892, Cassella & Co. adopted a new label, also bearing the picture of an elephant different in some respects from the picture on the plaintiffs' label and with new surroundings, to none of which, taken separately, did the plaintiffs object, but they complained that in its general effect this new label was so similar to their trade mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers. *Held*, that the plaintiffs were entitled to an injunction against the defendant. *Per* SARGENT, *C.J.*—The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the mofussil. After a careful examination, I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that, notwithstanding such differences as undoubtedly exist in respect to the colour and size of the elephant and in some other respects they would regard the labels as symbolical of the plaintiffs' goods. The remarks of LORD SELBORNE in *Johnston* v. *Orr Ewing, 7 Ap. Ca. 219*, relied on. *Per* STARLING, *J.*—It is quite possible for a label no part of which is a copy of another label, to be a colourable imitation of that other label and to be like it in general appearance as to be likely to deceive purchasers. BADISCHE, ANILINE, AND SODA FABRIK *v.* MANECKJI SHAPURJI KATRAK . . . **I. L. R. 17 Bom. 584**

73. ——— *Interlocutory application—Adinterim injunction to restrain defendant from using plaintiff's alleged trade mark—Overwhelming primâ facie case—Irreparable injury.* Where the plaintiffs by an interlocutory application sought to restrain the defendants from using the word "camelhair" in respect of certain belting sold by them alleging that in so using the words there was a false representation that the defendants' said goods were of the plaintiffs' manufacture: *Held*, that the plaintiffs' right to an *ad interim* injunction depended on their making out a strong, if not an overwhelming *primâ facie*, case that the words complained of signified that the belting was exclusively of the plaintiffs' manufacture and that the use of the description was such as was calculated to deceive purchasers into the belief that they were purchasing goods to the plaintiffs' manufacture, and that irreparable injury might be done, if the relief sought were not given. *Reddaway* v. *Banham*, [*1899*] *A. C. 199*; and *Reddaway* v. *Stephenson, Unreported*, referrred to. *Held*,

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INJUNCTION—*contd.*

2. SPECIAL CASES—*concld.*

(*n*) TRADE MARK—*concld.*

further, that failing to make out a strong *primâ facie* case as above the plaintiffs' remedy was to apply for expedition of the suit. REDDAWAY & Co., LTD., *v.* SCHRODER SMIDT & Co. (1905).
8 C. W. N. 151

See JOHN SMIDT *v.* REDDAWAY & Co.
I. L. R. 32 Calc. 401

(*o*) MINING OPERATIONS.

74. ——————— *Temporary injunction—Mining operations commenced by defendant under bonâ fide claim of title—Loss to plaintiff from non-cultivation—Balance of convenience—Standing by—Principles on which temporary injunction should be granted.* The Defendant Company acting under a *bonâ fide* claim of right began to cut an incline and sink a pit for the purpose of working the minerals in certain lands and had already finished constructing a railway siding when the plaintiffs sued for a declaration of their under-ground rights in the said lands and for a permanent injunction restraining the Defendant Company from interfering with the same. They also applied for a temporary injunction pending the hearing of the suit restraining the defendant Company from proceeding with the boring operations on the allegation that the lands were being rendered unfit for cultivation thereby. The Court of first instance granted a temporary injunction mainly on the ground that the object of the suit would be frustrated, if the Defendant Company were allowed materially to alter the features of the locality. *Held*, that in making this order the Court had overlooked certain material considerations. The balance of convenience in this case was in favour of the Defendant Company being allowed to continue the mining operations. The loss caused to the Company by stoppage would be out of all proportion to the loss apprehended by the plaintiffs, specially as the plaintiffs (of whose title there was no evidence) would, if successful, be able to recover damages from the Company, which was a substantial one and which did not enter as a mere wanton trespasser. Moreover, it appeared that the plaintiffs stood by for a considerable time whilst the Defendant Company was spending a large amount of money over the works sought to be stopped. This is a circumstance of considerable importance in dealing with an application for injunction, especially in the case of a mining Company. SINGARAN COAL SYNDICATE *v.* INDRA NATH CHATTERJEE (1906) **10 C. W. N. 173**

3. DISOBEDIENCE OF ORDER FOR INJUNCTION.

1 ——————— **Remedy for disobedience of order**—*Contempt of Court.* The proper remedy

INJUNCTION—*concld.*

3. DISOBEDIENCE OF ORDER FOR INJUNCTION—*concld.*

for disobedience of an order of injunction passed by a Civil Court is committal for contempt. *In the matter of the petition of* CHANDRAKANTA DE
I. L. R. 6 Calc. 445 : 7 C. L. R. 350

2. ——————— *Perpetual injunction—Disobedience to order—Contempt of Court—Second suit for injunction—Res judicata—Act XV of 1877 (Indian Limitation Act), Sch. II, Art 179—Limitation.* Where a plaintiff has once sued for and obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff, if in future the defendant ignores such injunction, to sue again for a similar relief ; in fact, such a suit would be barred by the principle of *res judicata.* When a Court issues an order to a party in a suit for abstention from any particular act, and when the person to whom the order has been issued disobeys that order, he is guilty of contempt of Court, and the Court can take proceedings to enforce its authority, notwithstanding anything contained in Art. 179 of the second Schedule to the Indian Limitation Act, 1877. RAM SARAN *v.* CHATAR SINGH (1901)
I. L. R. 23 All. 465

4. REFUSAL OF INJUNCTION.

——— **Execution**—*Decree restraining defendant in user of land—Sale of land in execution of another decree—Purchaser at such sale in possession—No execution granted of former decree.* The plaintiff obtained a decree restraining the defendant in his user of certain land, and applied for execution. Meanwhile the land had been sold in execution of another decree against the defendant, and the purchaser at the Court-sale obtained possession. The plaintiff thereupon applied that the purchaser should be made a party to the execution proceedings and that execution should go against him as well as against the defendant. *Held*, that no order for execution could be made. It could not go against the defendant, as all his interest in the land had been sold in execution of a decree ; and it could not go against the purchaser, as an injunction does not run with the land. DAHYABHAI *v.* BAPALAL (1901) . . . **I. L. R. 26 Bom. 140**

INJURY.

See CRIMINAL INTIMIDATION.
I. L. R. 30 Calc. 418

See DAMAGES—SUITS FOR DAMAGES—TORT.

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—SUBSTANTIAL INJURY.

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INJURY—*concld.*

——— **anticipation of**—

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6 B. L. R. 154
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See INJUNCTION—UNDER CIVIL PROCEDURE CODE . . **14 B. L. R. 352**

——— **by dogs, without provocation**—

See DAMAGES, SUIT FOR.
I. L. R. 36 Calc. 1021

——— **or obstruction to rights of property**—

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY.

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY.

——— **inland Navigation**—

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I. L. R. 36 Calc. 516

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——— **before granting certificate to collect debts**—

See SUCCESSION CERTIFICATE ACT (VII OF 1889), s. 7 . . **5 C. W. N. 494**

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See CRIMINAL PROCEDURE CODES, s. 176 (1872, s. 135) . **I. L. R. 3 Calc. 742**

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See COURT-FEES ACT (VII OF 1870), s. 19H . . . **6 C. W. N. 898**

INSANITY.

See CHARGE TO JURY—SPECIAL CASES—UNSOUNDNESS OF MIND.
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I. L. R. 13 All. 126

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See HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—INSANITY.

See IDIOTCY.

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I. L. R. 14 Mad. 289

——— **of judgment-debtor**—

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.
I. L. R. 19 Mad. 219

1. ——— **Death caused by insane person.** Unsoundness of mind as absolving a man from the consequences of death caused by him observed upon. QUEEN *v.* NOBIN CHUNDER BANERJEE
13 B. L. R. Ap. 20 : 20 W. R. Cr. 70

2. ——— **Unsoundness of mind, test of**—*Knowledge of wrong-doing.* The tests to determine whether a person ho has committed an act which is charged against him as an offence was of sound mind at the time of its commission is whether he knew that he was doing wrong. QUEEN *v.* JOGO MOHUN MALA . . . **24 W. R. Cr. 5**

3. ——— *Penal Code s. 84—Plea of insanity in criminal cases—Legal test of responsibility in cases of alleged unsoundness of mind.* S. 84 of the Penal Code (Act XLV of 1860) lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from the medical test, that the criminality of an act is to be determined. The accused killed his two young children with a hatchet. The reason given for the crime was that, while he was laid up with fever, the crying of the children annoyed him. It was alleged that the fever had made him irritable and sensitive to sound, but it did not appear that he was delirious at the time of perpetrating the crime. There was no attempt at concealment, and the accused made a full confession. *Held*, that, as the accused was conscious of the nature of his act, he must be presumed to have been conscious of its criminality. He was therefore guilty of murder. QUEEN-EMPRESS *v.* LAKSHMAN DAGDU . . **I. L. R. 10 Bom. 512**

4. ——— *Penal Code (Act XLV of 1860), s. 84.* Where the unsoundness of mind deposed to was not such as would make the accused incapable of knowing the nature of the act or that he was doing what was contrary to law, it was *held* to be insufficient to exonerate him from responsibility for crime under s. 84 of the Penal Code. QUEEN-EMPRESS *v.* RAZAI MIA
I. L. R. 22 Calc. 817

5. ——— *Penal Code (Act XLV of 1860), s. 84—Legal test of criminal liability.* A person subject to insane impulses, but whose

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cognitive faculties appear to be unimpaired, is not by virtue of s. 84 of the Indian Penal Code exempt from criminal liability. *Semble:* In extreme cases it is difficult to say that the cognitive faculties are not affected when the will and the emotions are affected. It may therefore be said that, under the provisions of s. 84 of the Penal Code, exemption from criminal liability by reason of unsoundness of mind extends as well to cases where insanity affects the offender's will and emotions as to those where it affects his cognitive faculties. *Queen-Empress* v. *Lakshman Dagdu, I. L. R. 10 Bom. 512; Queen-Empress* v. *Venkatashami, I. L. R. 12 Mad. 459;* and *Queen-Empress* v. *Razai Mia, I. L. R. 22 Calc. 817,* followed. QUEEN-EMPRESS *v.* KADER NASYER SHAH . . . **I. L. R. 23 Calc. 604**

6. ——— **Question of sanity of prisoner on criminal trial**—*Procedure.* If the Court entertains doubt as to the sanity of a prisoner, the fact of such insanity should be put in issue and tried. REG. *v.* HIRA PANJA **1 Bom, 33**

7. ——— *Criminal Procedure Code, 1861, ss. 389, 390, 394.* A prisoner who is insane and unaccountable for his actions, and therefore incapable of making his defence, instead of being tried, should be dealt with according to ss. 389 and 390, Code of Criminal Procedure. QUEEN *v.* KALAI . . . . **3 W. R. Cr. 57**

QUEEN *v.* SAHA MAHOMED . **3 W. R. Cr. 70**

QUEEN *v.* NOORKHAN CHOWDHRY **1 W. R. Cr. 11**

QUEEN *v.* MUSTAFA . . **1 W. R. Cr. 15**

Now under ss. 464-475 of the Criminal Procedure Code of 1898.

8. ——— *Criminal Procedure Code, 1861, ss. 391, 312—Examination of medical officer—Proof of insanity.* A Magistrate rightly commits for trial at the Sessions a prisoner charged with murder, whom he finds to be sane at the time of the preliminary investigation, although he was insane when he committed the act. When a prisoner is found to be insane at the time of his trial, the proper procedure applicable to his case is that prescribed by ss. 391 and 392 of the Code of Criminal Procedure. A mere written certificate of a medical officer that a prisoner is of unsound mind and incapable of making his defence is not sufficient evidence of the prisoner's insanity. The medical officer should be called as a witness and be personally and carefully examined. QUEEN *v.* RAM RUTTON DOSS . . . **9 W. R. Cr. 23**

9. ——— *Criminal Procedure Code, 1872, ss. 425, 232—Trial of fact of unsoundness of mind.* Where on the trial of a prisoner by a Sessions Judge the Judge, entertaining some doubt as to the prisoner's sanity, took the evidence of the Civil Surgeon, and himself decided that the prisoner was of sound mind and capable of making his defence, whereupon the trial proceeded and the prisoner was convicted:—*Held,* that the conviction must be set aside and a new trial directed reading ss. 232 and 425 of the Criminal Procedure Code together. The preliminary issue of soundness of mind or otherwise ought to have been tried by the jury, and not by the Judge personally. QUEEN *v.* BHEEKOO KALWAR **10 B. L. R. Ap. 10 : 19 W. R. Cr. 15**

10. ——— *Acquittal—Procedure.* Where a prisoner was declared by the Civil Surgeon to be insane at the time he was called on to make his defence, it was *held* that it was irregular to acquit him; proceedings should have been stayed and the prisoner detained, pending the orders of Government. *In the matter of* ROMON AUDHEEKAREE . . . . . **10 W. Cr. 37**

11. ——— *Criminal Procedure Code, 1861, s. 393.* Case in which the prisoner, notwithstanding that he had been convicted by the Sessions Judge, was acquitted by the High Court on the ground of insanity under s. 393 of the Code of Criminal Procedure, and directed to be kept in safe custody, pending the orders of the Local Government to be applied for by the Judge. QUEEN *v.* PURSORAM DOSS . . **7 W. R. Cr. 42**

12. ——— *Imbecile—Inability to understand proceedings—Code of Criminal Procedure (X of 1872), ss. 186 and 423.* The provisions of s. 186 of the Code of Criminal Procedure do not apply to a person who is of unsound mind; they apply to persons who are unable to understand the proceedings from deafness, or dumbness, or ignorance of the language of the country, or other similar cause. But where the inability to understand the proceedings is due to unsoundness of mind, the procedure provided in Ch. XXXI of the Code must be followed. Where a Magistrate found that an accused person convicted of theft was an imbecile and consequently unable to understand the proceedings, but that he was not of unsound mind, the High Court held that this distinction was without a difference, and, under s. 297 of the Code, annulled the conviction, and, declaring the accused to be of unsound mind, directed that he should be released on sufficient security being given that he would be properly taken care of, and prevented from doing injury to himself or any other person and for his appearance when required; and that, in default of such security being given, the case should be reported to Government. EMPRESS *v.* HUSEN **I. L. R. 5 Bom. 262**

13. ——— *Penal Code, s. 84—Confession by ganja-smoker of murder of wife.* The accused, who was a habitual ganja-smoker, was charged with the murder of his wife and infant son. In his confession he stated that he had killed his wife because she quarrelled with him and objected to go to another village where he proposed a change of home on account of their poverty: he adhered to this statement when placed for trial before the Court of Session. The High Court *held,* that this was not a plea of guilty on the charge of murder, but an allegation of sudden provocation, and he ought to have been put

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on his trial in order that the Court might ascertain whether the provocation was grave and sudden enough to prevent the offence from amounting to murder. *Held* (*per* BIRDWOOD and JARDINE, *JJ.*), that, unless the accused's habit of smoking ganja had induced in him such a diseased state of mind as to make him incapable of knowing the nature of his act or its criminality, s. 84 of the Penal Code did not apply in his favour. QUEEN-EMPRESS *v.* SAKHARAM . . **I. L. R. 14 Bom. 564**

14. ——— *Penal Code, s. 84—Plea of insanity in criminal cases—Legal test of responsibility in cases of alleged unsoundness of mind.* The accused stabbed a child (his brother's wife) with a sword and killed her. He was charged with murder, and a plea of insanity was set up at the trial. No motive could be assigned for his attack on the child, in which he persisted in the presence of other persons; and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was in evidence that he had abused some of his relations a short time before,—the abuse being probably due to irritability of mind caused by fever. He confessed the crime to the village Magistrate and answered questions put to him rationally, but before the committing Magistrate and the Sessions Judge he denied that he had killed the child. He was convicted of murder. *Held*, that, as the accused was not proved to have been by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law, the conviction was right. *Queen-Empress* v. *Lakshman Dagdu, I. L. R. 10 Bom. 512*, approved. QUEEN-EMPRESS *v.* VENKATASHAMI **I. L. R. 12 Mad. 459**

15. ——— **Jurisdiction of Criminal Courts**—*Criminal Procedure Code (X of 1872), ss. 426, 432.* The authority of the Criminal Courts over an accused, declared under s. 426 of the Criminal Procedure Code to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s. 432. EMPRESS *v.* JOY HARI KOR . . **I. L. R. 2 Calc. 356**

16. ——— **Insane delusion**—*Unsoundness of mind—Criminal liability, test of—Penal Code (Act XLV of 1860), s. 84.* Whether a person who, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is to be therefore excused, depends on the nature of the delusion. If he labours under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. The accused was convicted of having murdered his brother-in-law, a lad 8 years old. In his confession to the Magistrate the accused stated that he had seen the deceased arrange a clandestine meeting

INSANITY—*concld.*

between his wife and a young man, whom he actually saw enter his wife's room some time before midnight and again leave it after a considerable interval, and that in consequence of what he saw he had not a wink of sleep that night and was devoid of his senses at the time he killed the deceased. *Held*, that there was no doubt the accused did actually believe he had ocular proof of his wife's infidelity, and that, if he had acted under the immediate influence of such a delusion, the estimate of his guilt must be made upon the basis of the actual existence of the facts in regard to which the delusion existed, and had the accused acted under the immediate influence of such provocation his guilt would have been greatly reduced; but, as he did not do so, his offence was murder under s. 302 of the Penal Code, nor was there any ground for the application of s. 84 of that Code. GHATU PRAMANIK *v.* KING-EMPEROR (1901) . **I. L. R. 28 Calc. 613 s.c. 5 C. W. N. 665**

17. ——— *Unsoundness of mind—Delusion—Knowledge of the nature of the act—Penal Code (Act XLV of 1860), s. 84.* Where the accused cut his wife's throat without any rational motive, and was captured at once without any attempt on his part to escape or offer resistance, and the evidence showed that before the commission of the offence he suffered from a failure of reasoning powers, and also that he entertained delusions as to dangers which threatened his wife: *Held*, that the facts proved unsoundness of mind which prevented the accused from knowing the nature of his act, and that s. 84 of the Penal Code applied. DIL GAZI *v.* EMPEROR (1907) **I. L. R. 34 Calc. 68**

18. ——— **Voluntary drunkenness**—*Murder—Unsoundness of mind—Disease brought on by voluntary drunkenness—Criminal liability—Penal Code (Act XLV of 1860), ss. 84, 85 and 202.* Under s. 84 of the Penal Code, unsoundness of mind, producing incapacity to know the nature of the act committed or that it is wrong or contrary to law, is a defence to a criminal charge; but, by s. 85 of that Code, such incapacity is no defence, if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity, then s. 84 applies, though the disease may be of a temporary nature. EMPEROR *v.* BHELEKA AHAM (1902) **I. L. R. 29 Calc. 493: s.c. 6 C. W. N. 506**

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See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 . **I. L. R. 28 All. 387**

See PRE-EMPTION . **I. L. R. 27 All. 1**

See RIGHT OF SUIT—INSOLVENCY.
I. L. R. 16 Bom. 452

See SMALL CAUSE COURT, MOFUSSIL—PRACTICE AND PROCEDURE—MISCELLANEOUS CASES . **I. L. R. 2 Bom. 641**

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—INSOLVENCY.
I. L. R. 6 Mad. 430

——— effect of insolvency proceedings in French territory—

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—PRINCIPAL AND AGENT . **I. L. R. 26 Mad. 544**

——— of plaintiff—

See DECREE—ALTERATION OR AMENDMENT OF DECREE.
I. L. R. 16 Bom. 404

INSOLVENCY—*contd.*

——— order in, Appeal from—

See DISTRICT JUDGE, JURISDICTION OF.
I. L. R. 17 Mad. 377

——— proceedings—

See COSTS—TAXATION OF COSTS.
I. L. R. 24 Calc. 891

——— proceedings under Civil Procedure Code—

See CIVIL PROCEDURE CODE, 1882, s. 357.
I. L. R. 19 All. 144

See DEED—CONSTRUCTION.
I. L. R. 20 Bom. 310

See RECEIVER . **I. L. R. 15 Mad. 233**

——— setting aside adjudication.—

See CIVIL PROCEDURE CODE, 1882, s. 232.
4 C. W. N. 785

1. CASES UNDER ACT XXVIII OF 1865.

1. ——— Order for winding up estate —*Effect of an execution proceeding—Leave to proceed—Laches—Right of assignees and creditors.* An order made under Act XXVIII of 1865 for the winding-up of the estate of a trader not only stayed the further prosecuton of suits, etc., against him, but also prevented the completion of an execution against his immoveable or ordinary moveable property, if such execution had not been consummated by seizure and sale before the filing in Court of the resolution passed at the meeting of the creditors, unless the leave of the Court be given to the execution-creditor to proceed notwithstanding the winding-up order. Such leave was not to be given except upon special grounds. Laches of the execution-creditor was an obstacle to his obtaining such leave. Under the Insolvent Debtors Act (1 & 2 Vict., c. 110, English Repealed Act; 11 & 12 Vict., c. 21, India), the mere delivery of the writ of *fi. fa.* to the sheriff or his deputy for execution bound the goods as against the assignees in insolvency, subject to the right of the execution-creditor to have satisfaction of his debt by sale. But in bankruptcy the law is otherwise. The execution must be levied by seizure and sale before the date of the fiat or the filing of the petition for adjudication; otherwise the execution-creditor is entitled only to a rateable part of his debt with the other creditors. FINANCIAL ASSOCIATION OF INDIA AND CHINA *v.* PRANJIVANDAS HARJIVANDAS
3 Bom. O. C. 25

2. ——— Claims proveable under Act XXVIII of 1865—*Claim against directors of joint stock company.* A claim against the directors of a joint stock company to make good funds of the company expended by them on behalf of the company, in transactions that the company was forbidden by its articles of association to engage in, was proveable under Act XXVIII of 1865. LIQUIDATORS OF THE INDIAN PENINSULAR, LONDON AND CHINA BANK *v.* SCOTT . **5 Bom. O. C. 167**

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INSOLVENCY—*contd.*

1. CASES UNDER ACT XXVIII OF 1865 —*concld.*

3. ——— **Liability of trader for calls on shares**—*Act XXVIII of 1865, s. 24—Winding-up order—Discharge.* An insolvent trader, who has obtained his discharge under s. 24 of Act XXVIII of 1865, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a joint stock company, when the order for the winding-up of such company has been made prior to the time of the insolvent trader obtaining his discharge. *In re* MERCANTILE CREDIT AND FINANCIAL ASSOCIATION. PUNNETT *v.* VINAYAK PANDURANG . . **9 Bom. 27**

2. CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE.

1. ——— **Mortgage by insolvent**—*Priority—Rights of mortgagee—Official Assignee.* A mortgage executed by an insolvent (who has not obtained a certificate and discharge) is subject to the lien of the mortgagee in priority to the claim of the Official Assignee under the insolvency. KERAKOOSE *v.* BROOKS . **4 W. R. P. C. 62**
8 Moo. I. A. 339

2. ——— **Attachment by decree-holder**—*Priority—Vesting order.* An attachment made by a decree-holder prior to a vesting order in favour of the Official Assignee must have preference to the claim of the Official Assignee. SHEW NARAIN SINGH *v.* MILLER . . . **17 W. R. 234**

3. ——— **Attachment before judgment**—*Adjudication of insolvency subsequent to decree.* *P*, having attached *R M's* property and obtained a decree against him, subsequently had him adjudicated an insolvent. The Court ruled that the attachment was unaffected by the adjudication. *In re* RAMCOMYE MITTER . **Bourke O. C. 149**

4. ——— *Subsequent insolvency—Priority of Official Assignee.* Where an attachment previous to decree had been obtained against the property of the defendants, it was held that attachment did not give to the plaintiff any licence in respect of the property attached as against the assignee of the defendants, notwithstanding their insolvency having occurred after the plaintiff had obtained his order attaching the property. PETUMBER MUNDLE *v.* COCHRANE
1 Ind. Jur. N. S. 11 : Bourke O. C. 339

5. ——— *Vesting order, effect of, on attached property.* An attachment of property before judgment places it in the custody of the law, but does not alter the property in it. An order, therefore, vesting the property of an insolvent in the Official Assignee vests in that officer property of the insolvent which has been so attached. *In the matter of* GOCOOL DASS SOONDERJEE. PETUMBER MUNDLE *v.* GOCOOL DASS SOONDERJEE
1 Ind. Jur. N. S. 327 : Bourke O. C. 240

6. ——— *Effect of vesting order—Priority.* Certain property was attached before decree under Act VIII of 1859, s. 83. On the 11th of May the plaintiff obtained a decree in the suit against the person whose property had been attached. On the same day the judgment-debtor filed his petition in insolvency, and the usual vesting order was made. *Held*, in the Court below, that the Official Assignee was entitled to the goods, notwithstanding the attachment before decree followed by the decree. *Held*, on appeal, property attached before decree passes to the Official Assignee under an insolvency where the adjudication and vesting order are obtained after decree, and where the attaching creditor has not proceeded to sell. *Semble:* The Official Assignee has priority over the execution-creditor, unless the latter has actually sold under the attachment, and received the proceeds from the officer of the Court. RAMPERSAUD ROY *v.* CALLACHAND DASS **1 Ind. Jur. N. S. 325 and on appeal Id. 373**

7. ——— *Vesting order—Priority of Official Assignee.* The title of the Official Assignee of an insolvent under 11 & 12 Vict., c. 21 (the Insolvent Act), is preferable to that of a creditor of the insolvent who before the vesting order has obtained an order for attachment before judgment under ss. 83 and 84 of the Civil Procedure Code, 1859, in respect of the property comprised in such attachment. The effect of attachment before judgment is to secure that the property attached shall be forthcoming at the time of pronouncing the decree to abide whatever order the Court shall make upon it. A vesting order in insolvency is in effect an assignment in trust for the benefit of creditors, and is paramount to the right of an attachment before the judgment-creditor, as it is more equitable that property under the control of the Court should be applied for the benefit of all the creditors than for the exclusive advantage of one. JAVA RAMJI *v.* JADAVJI NATHA
1 Bom. 224

SAVA RAMJI *v.* JADAVJI NATHU. *Ex parte* GAMBLE . . **2 Bom. 165 : 2nd Ed. 142**

8. ——— *Priority of Official Assignee.* Where moveable property of defendants in certain suits in Civil Courts in the mofussil had been attached before judgment under ss. 83 and 84 of Act VIII of 1859, and so continued until decrees and orders for execution had been made in those suits, and warrants for such execution had been lodged with the Nazir of the Court:—*Held*, that those warrants at the latest, on their delivery to the Nazir, bound the property without re-seizure by him; and that accordingly the execution-creditors were entitled to preference as regarded the attached goods over the Official Assignee, in whom the estate of the defendants had become vested by the orders of the Insolvent Debtors' Court at Bombay, made before sale by the Nazir of the attached property, but subsequently to the delivery to him of the warrants for execution. *Held*,

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INSOLVENCY—*contd.*

2. CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE—*contd.*

however, also, that mere attachment before judgment does not so bind the property attached as to give to the attaching creditors priority over the Official Assignee, in whom the estates of the defendants had been vested by orders of the Insolvent Debtors' Court made subsequently to such attachment, but before decree and warrant for execution. *Doe d.O'Hanlon* v. *Paliologus, Mort., 323*, observed upon. GAMBLE *v.* BHOLAGIR

2 Bom. 150 : 2nd Ed. 147

9. ——— *Priority of Official Assignee—Civil Procedure Code, s. 81—Insolvency Act (11 & 12 Vict., c. 21), ss. 7 and 49.* The plaintiffs brought a suit against *P & Co.* for the recovery of a sum of money with interest, and on 15th May obtained a prohibitory order for attachment before judgment under s. 81 of Act VIII of 1859 under which they attached, on the 17th of May, the right, title, and interest of *P & Co.* in the premises in which they carried on business in Calcutta. On the 20th of May, *P & Co.* were adjudicated insolvents on the petition of other creditors, and the usual order was made vesting their estate and effects in the Official Assignee. On an application on behalf of the Official Assignee for an order releasing the property from attachment, the Court ordered the prohibitory order to be set aside, and the property attached thereunder to be released. BANK OF BENGAL *v.* NEWTON

12 B. L. R. Ap. 1

10. ——— *Vesting order—Priority of Official Assignee.* An attachment before judgment has no effect against the Official Assignee, who holds the property of the judgment-debtors under a vesting order of Court made before the order for attachment was passed. MILLER *v.* MON MOHUN ROY

I. L. R. 7 Calc. 213 ; 8 C. L. R. 213

11. ——— *Vesting order—Civil Procedure Code, s. 276—Official Assignee's title.* Where a vesting order has been made under 11 & 12 Vict., c. 21, s. 7, after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. *Shib Kristo Shaha Chowdhury* v. *Miller, I. L. R. 10 Calc. 150*, and *Gamble* v. *Bholagir, 2 Bom. 150*, followed. SADAYAPPA *v.* PONNAMA . **I. L. R. 8 Mad. 554**

12. ——— *Vesting order—Priority of claim of Official Assignee.* A creditor attached before judgment certain of his debtor's property. Between the date of attachment and the date of the decree subsequently obtained by the creditor, the property of the debtor became vested in the Official Assignee under a vesting order. The Official Assignee brought a suit to remove the attachment and for an injunction restraining the sale of the property. The Court of first instance decreed the suit in favour of the Official Assignee. On the case coming up before a Full Bench,—*Held, per* McDONELL, TOTTENHAM, and PRINSEP, *JJ.*, that where there has been an attachment prior to decree, and the property of a judgment-debtor subsequently becomes vested in the Official Assignee in insolvency previously to the decree, the vesting order will prevent such an attaching creditor from executing his decree against the property. *Per* GARTH, *C.J.*, and MITTER, *J.*, *contra*, that under the 34th Chapter of Act XIV of 1882, the Court had no power to remove the attachment before judgment or stay the sale at the instance of the Official Assignee. SHIB KRISTO SHAHA CHOWDHRY *v.* MILLER

I. L. R. 10 Calc. 150 : 13 C. L. R. 433

13. ——— *Insolvency of defendant whose property has been attached before judgment—Right of Official Assignee to attached property—Practice—Civil Procedure Code, 1882, ss. 278, 281, 351, and 487.* Plaintiffs filed a suit in a subordinate Court, and attached before judgment some moveable property of the defendant. Before the hearing of the suit, the defendant filed a petition in Bombay under the Insolvency Act, and a vesting order was made. *Held*, that the Official Assignee was entitled by an application to the Court, in which the suit was filed, to have the attachment raised before the defendant was declared an insolvent. Where a vesting order is made after attachment, and before decree, the title of the Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. In such a case, the Official Assignee can move by an ordinary motion instead of a regular suit. *Java* v. *Jadawji, 1 Bom. 224*, referred to. *Shib Kristo* v. *Miller, I. L. R. 10 Calc. 150*, and *Sadayappa* v. *Ponnama, I. L. R. 8 Mad. 554*, referred to and followed. TURNER *v.* PESTONJI FARDUNJI

I. L. R. 20 Bom. 403

14. ——— **Attachment under decree—***Priority of Official Assignee.* Where money due to the judgment-debtor was attached in the hands of the Administrator General in execution of a decree, and afterwards, before any further steps were taken by the attaching creditor, the judgment-debtor filed his schedule in the Court for the Relief of Insolvent debtors, and the usual vesting order was made :—*Held*, that the Official Assignee had priority over the attaching creditor under Act VIII of 1859. ROY CHUNDER ROY *v.* BAMPTON

2 Ind. Jur. N. S. 188

15. ——— *Priority of Official Assignee—Execution-creditor under decree of Small Cause Court.* On the 22nd July *A* brought an action in the Calcutta Court of Small Causes against the members of the firm of *B & Co.*, and obtained judgment on the same day. On the 23rd July property belonging to *B & Co.* was seized by a bailiff of the Court in execution of the decree. On the 26th July the members of the firm of *B & Co.* were adjudicated insolvents, and the usual vesting order was made. On the 30th July the Official Assignee gave notice to the seizing bailiff of his

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INSOLVENCY—*contd.*

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claim to the property seized.. *Held* (*per* NORMAN, *J.*, on a reference from the Small Cause Court), that the Official Assignee was entitled to the property in priority to *A*. COCHRANE *v.* GLADSTONE, WYLLIE & CO.

2 Ind. Jur. N. S. 337

16. ——— *Priority of Official Assignee as against execution-creditor.* The Official Assignee of the Insolvent Court is entitled, under the vesting order, to possession of the insolvents' estate, even when that estate has been attached in execution of a decree, and an order directing the sale of it has been passed. But if a sale has taken place before the vesting order, the property in the subject of the attachment has passed from the judgment-debtor to the auction-purchaser, and the proceeds of the sale are primarily charged with the satisfaction of the decree or decrees in execution of which the sale has been made. SARKIES *v.* BUNDHOO BAEE

1 N. W. Part 6, 81 : Ed. 1873, 172

17. ——— *Official Assignee—Priority.* *A* obtained a decree against *B*, and in execution attached property of *B* in Zillah Dinagepore in January 1868, which was sold on the 19th of March. In the meantime *B* had been adjudicated an insolvent, and the usual vesting order was made on March 6th. Notice of this order reached the Judge of Dinagepore after the sale, but before the sale had been confirmed and the proceeds handed over. *Held*, that the Official Assignee was entitled to the proceeds of the sale. INDRA CHANDRA DOGAR *v.* TARACHAND DOGAR

2 B. L. R. A. C. 61 : 10 W. R. 353

INDRA CHANDRA DOGAR *v.* OFFICIAL ASSIGNEE

11 W. R. 100

18. ——— *Execution-creditor—Official Assignee.* The property of *A* was attached under a decree obtained by *B*. After the attachment, but prior to the sale, *A* was adjudicated an insolvent, and the usual vesting order was made. On the following day the agents of the Sheriff, by the order of the Official Assignee, sold the property attached for the recovery of the amount of *B's* decree, etc., and the proceeds of the sale were handed over by them to the Official Assignee. Subsequently the petition of the insolvent was dismissed. Immediately thereupon, on the same day, *C*, another execution-creditor, attached the proceeds of sale in the hands of the Official Assignee. *B* applied to the Court to order the Official Assignee to hand over the proceeds to the credit of his cause. On the same day *A* filed a fresh petition in the Court for the Relief of Insolvent Debtors, and a second vesting order was made. *C* claimed that the proceeds of sale should be handed over to him. *Held*, that *B* was entitled to have the proceeds paid to him. WINTER *v.* GARTNER . **1 B. L. R. O. C. 79**

19. ——— *Priority of Official Assignee—Vesting order—Attachment of money in execution of decree.* In execution of a decree of the Small Cause Court, certain goods belonging to the judgment-debtor, together with a sum of R227 in cash, were seized on the 22nd November; and on the 30th, the R227, together with the proceeds of sale of some of the goods, were placed to the credit of the decree-holder in the books of the Court. On the 25th November, the judgment-debtor was declared an insolvent, and by a vesting order of the same date his estate was transferred to the Official Assignee. *Held*, that the execution was complete by the seizure of the money, and the Official Assignee was not entitled to the sum of R227 as against the execution-creditor. GRISH CHANDRA ROY *v.* PRASANNA KUMAR CHINA

4 B. L. R. O. C. 94

20. ——— *Priority of Official Assignee—Vesting order—Sale in execution of decree—Auction-purchaser.* In September 1867 *A* obtained a decree against *B*, and on 12th January 1868 caused a piece of land to be attached in execution. On 17th April 1868, it was sold by order of the Zillah Judge, and bought by *C*. Before this, however, the judgment-debtor *B* had filed his petition in the Insolvent Court, and on the 6th March 1868 a vesting order was made. On 24th July 1868, the Official Assignee sold the premises by the order of the Insolvent Court. The purchaser at the last-mentioned sale now sued to recover the property from the purchaser at the sale in execution of *A's* decree. *Held* (*per* COUCH, *C.J.*, BAYLEY, KEMP, and JACKSON, *JJ.*), that the vesting order passed the property to the Official Assignee, subject to being divested by a sale in execution of the decree; that the sale in execution by order of the Zillah Judge was legal, notwithstanding the vesting order; that the purchaser at the sale by order of the Insolvent Court had no right to recover it from him. The attaching creditor had a right to have the attached property sold, and the money realized by the sale paid to him. *Per* PHEAR, *J.*—The jurisdiction of the Zillah Judge to order the sale was not affected by the vesting order; but before making the order for sale, the Official Assignee should be heard; and unless special reason be shown upon the Official Assignee's application, the execution proceedings should be stayed or set aside. In the present case it must be assumed that the Judge made the order for sale in due course, and consequently that sale operated to pass the property out of the hands of the Official Assignee into those of the auction-purchaser. ANAND CHANDRA PAL *v.* PANCHILAL SURMA . **5 B. L. R. 691 : 14 W. R. F. B. 33**

In the same case it was afterwards held by the Division Bench that the title of the purchaser at a sale by the Official Assignee at the instance and with the concurrence of certain persons who held a mortgage on the property, dated 30th September 1866, on which they had obtained a decree for sale, did not prevail over the title of the attaching creditor at the

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INSOLVENCY—*contd.*

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sale in execution of his decree. ANAND CHANDRA PAL *v.* PUNCHEE LAL SOOR . **15 W. R. 257**

21. ——— *Execution-creditor, right of, against Official Assignee—Payment of proceeds of sale into Court. A* obtained a decree against *B* on 15th August 1870 and an order for execution thereof on 8th September. In pursuance of such order, the Sheriff attached certain property belonging to *B ;* and by order of Court of 14th September the Sheriff was directed to sell the property so attached, and the sale was fixed for the 1st December. On 30th November, *B* filed his petition in the Insolvent Court, and the usual vesting order was made. On 1st December, the property was sold by the Sheriff under the order of 14th September, and the proceeds were paid into Court. *Held,* that the execution-creditor was entitled as against the Official Assignee to be paid out of the proceeds. AGA MAHOMED ALI SHERAJI *v.* JUDAH **7 B. L. R. 50 : 17 W. R. 234 note**

22. ——— **Rights created by s. 295 how affected by insolvency and vesting order**—*Civil Procedure Code (Act XIV of 1882), s. 295—Insolvency Act (11 & 12 Vict., c. 21), s. 49.* An order under s. 295 of the Civil Procedure Code affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under s. 295 creates rights which are not affected by the insolvency. *Soobal Chander Law* v. *Russick Lall Mitter, I. L. R. 15 Calc. 202,* cited. HOWATSON *v.* DURRANT . **I. L. R. 27 Calc. 351 4 C. W. N. 610**

23. ——— **Partnership**—*Insolvency of one partner—Vesting order—Subsequent decree against insolvent and attachment of the firm property in execution—Claim by Official Assignee to set aside attachment—Civil Procedure Code, 1882, ss. 278, 283.* The defendant was the manager of a joint Hindu family, consisting of himself and two nephews carrying on a family business in Bombay, Madras, and other places. In a suit brought in the High Court of Bombay against him as manager of the said joint family, a decree was passed on the 11th April 1896, which was in terms against the defendant alone. On the same day certain property in Bombay in which (as found by the Judge) the nephews and the defendant were jointly interested, was attached in execution of the decree. Two days previously, however, *viz.,* on the 9th April 1896, the defendant had been adjudged an insolvent by the Insolvent Court at Madras under s. 9 of the Indian Insolvent Act (Stat. 11 & 12 Vict., c. 21). On the 6th May 1896, the Official Assignee took out a summons to have the attachment removed. *Held,* that the claim of the Official Assignee must prevail and the property be released from attachment. As at the time of the claim of the Official Assignee the defendant's schedule had not been filed, the claim was

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therefore governed by s. 278 and the following sections of the Civil Procedure Code (Act XIV of 1882). As at the time of the attachment the defendant's interest in the property had by the vesting order been completely divested from him and vested in the Official Assignee, the property was in his possession partly on accunt of the Official Assignee and partly on account of the solvent partners of his firm ; that is, wholly on account of other persons. All his property and all he could honestly dispose of, whether for his own benefit or for the benefit of the joint family, had prior to the attachment passed to the Official Assignee, and consequently there was nothing which the decree-holder could attach and sell. Where subsequently to the insolvency of one of several partners a decree is obtained against the firm and property of the firm is attached in execution, such attachment should be removed. By allowing the execution, the solvent partners abandon their right of administering the joint estate, and in the interest of the joint creditors the decree-holder must be restrained from going on with the execution, and the partnership assets will be applied by the Insolvent Court in paying the joint creditors rateably, the Official Assignee receiving the insolvent's share of the surplus, and the rest being handed over to the solvent partners. SARDARMAL JAGONATH *v.* ARANVAYAL SAVHAPATTY **I. L. R. 21 Bom. 205**

24. ——— *Charge on debts—Civil Procedure Code (Act XIV of 1882), s. 372—Devolution of interest of judgment-debtor upon Official Assignee.* In March 1897, *B* covenanted to repay by instalments a sum of money owing by him to plaintiff, and mortgaged his stock-in-trade and all outstandings and moneys then due and owing and thereafter—to become due and payable to him. *B* remained in possession. In July 1899, plaintiff sued *B* on the mortgage-deed. In August 1899, upon an *ex parte* application by the plaintiff, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. This injunction was subsequently dissolved. In the same month plaintiff gave notice to a person indebted to *B* that plaintiff claimed the amount of the debt under his mortgage. In September 1899, *B* was adjudged an insolvent, and the usual vesting order was made. In October 1899, plaintiff obtained a decree in his suit, by which it was ordered that *B* should pay the principal and interest due under the mortgage-deed and that in default of payment the mortgaged premises should be sold. In February 1900, the person indebted to *B* paid the amount of his debt to the Official Assignee. In September 1900, an order was made in plaintiff's suit against the insolvent, directing that the decree should be executed by the attachment of the money in the hands of the Official Assignee. In December 1900, plaintiff applied by summons in his suit against the insolvent for an order that the Official Assignee

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INSOLVENCY—*contd.*

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should pay over that money *Held*, that plaintiff was not entitled to the order. The decree, as a mortgage decree directing the sale of the chattels including the debt in question, was void and inoperative as against the Official Assignee, inasmuch as the whole right, title and interest of the defendant devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree had been passed. Nor was the position of the Official Assignee affected by the doctrine of *lis pendens*. The party seeking to bind him by the result of the suit (pending which the interest in its subject-matter had devolved upon the Official Assignee by operation of law) should have applied under s. 372 of the Code of Civil Procedure to have him joined as a party to the suit. *Miller* v. *Budh Singh Dudhuria, I. L. R. 18 Calc. 43*, referred to. PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901) . **I. L. R. 25 Mad. 406**

25. ——————— *Act for the Relief of Insolvent Debtors (11 & 12 Vict., c. 21), s. 7—Vesting order, effect of—Prior attachment by a judgment-creditor—Attachment, effect of—Civil Procedure Code (Act XIV of 1882), s. 295—Civil Procedure Code (Act VIII of 1859), s. 270.* A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order. *Soobul Chunder Law* v. *Rassick Lall Mitter, I. L. R. 15 Calc. 202*, approved. *A. B. Miller* v. *Lakhimoni Debi, 5 C. W. N. 761*, overruled. *Anand Chandra Pal* v. *Panchi Lal Sarma, 5 B. L. R. 691*, and *Shib Kristo Shaha Chowdhry* v. *Kishan Chand Golecha, I. L. R. 10 Calc. 150*, distinguished. An attachment does not confer any title; it merely prevents alienation. *Moti Lal* v. *Karrabuldin, I. L. R. 25 Calc. 179*, referred to. PEACOCK *v.* MADAN GOPAL (1902)
I. L. R. 29 Calc. 428 : s.c. 6 C. W. N. 577

26. ——————— *Civil Procedure Code (Act XIV of 1882), ss. 268, 483—Attachment of money before judgment—Decree—Subsequent insolvency of judgment-debtor—Claim of Official Assignee—Priority of Official Assignee.* The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment under s. 268 only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment. The plaintiff in a suit obtained an order for attachment before judgment of a sum of money belonging to the defendant. In due course a decree was obtained and subsequently to the decree the judgment-debtor was declared an insolvent. The Official Assignee then preferred a claim to the money under attachment, contending that the attachment was of no effect as against him, and asking that it might be set aside. *Held*, that the Official Assignee was entitled to the order asked for. KRISTNASAWMY MUDALIAR *v.* OFFICIAL ASSIGNEE OF MADRAS (1903)
I. L. R. 26 Mad. 673

27. ——————— **Banker and Customer**—*Fiduciary relationship, existence of, between—Ordinary relation that of creditor and debtor—No fiduciary relationship when customer pays money to banker without special directions.* The ordinary relation between a banker and customer, in respect of moneys paid by the latter to the former, is that of debtor and creditor, and no fiduciary relationship will be created in the absence of directions by the customer which convert the banker into a trustee in respect of the sums so paid. A trust will exist when the banker is to collect and remit but not where he is to use and repay. Where a customer remits money to a banker with directions to receive such money in fixed deposit for a certain period together with another sum to be remitted, the banker does not, when the latter amount is not paid, hold the former sum in trust by virtue of such direction, although he cannot claim to hold it as a fixed deposit payable only after the limited period. *In re Hallette's Estate, 13 Ch. D. 696*, referred to. *Dale's Case, 11 Ch. D. 772*, referred to. *Foley* v. *Hill, 2 H. L. 28*, referred to. *In re Brown ex parte Plitt, 60 L. T. R. 397*, referred to. *Burdick* v. *Garrick, 5 Ch. A. 233*, referred to. OFFICIAL ASSIGNEE OF MADRAS *v.* SMITH (1908)
I. L. R. 32 Mad. 68

3. RIGHT OF ELECTION AS TO LEASEHOLD PROPERTY.

——— **Right of Official Assignee to accept or disclaim leasehold property**—*Effect of taking possession—Liability for rent.* The Official Assignee has the right to elect whether he will accept or repudiate onerous (*e.g.*, leasehold) property belonging to an insolvent and as such vesting in the Official Assignee under the Indian Insolvent Act (Stat. 11 & 12 Vict., c. 21). Except under exceptional circumstances, the taking of possession of leasehold property by the Official Assignee is proof of election on his part to take the lease. *A* held certain premises in Bombay from plaintiff as a monthly tenant at a rent of R125, with liberty to either party to terminate the tenancy on giving one month's notice. On the 9th April 1896, *A* was adjudicated insolvent by the Court for the Relief of Insolvent Debtors at Madras, and on that day the usual vesting order was made vesting all his estate and effects in the defendant as Official Assignee. [On the 20th August 1896, the Sheriff who had taken possession of the premises in execution of a decree passed against *A*, handed over possession of them to the agent of the defendant, who remained in posses-

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INSOLVENCY—*contd.*

3. RIGHT OF ELECTION AS TO LEASEHOLD PROPERTY—*concld.*

sion until the 30th September 1896, when he gave them up to the plaintiff. The plaintiff brought this suit against the defendant for the rent (R750) due from 1st April 1896 to the 30th September 1896. *Held*, that the defendant was liable. By entering into possession on the 30th August 1896, the defendant had elected to accept the lease and had thereby become assignee of it. The acceptance dated back the vesting order, and the Official Assignee (the defendant) became liable for the rent during the period that he continued to be assignee, his liability ending when with the landlord's consent he surrendered the term. ABDUL RAZAK *v.* KERNAN
I. L. R. 22 Bom. 617

4. SALES FOR ARREARS OF RENT.

1. ——— **Validity of sale against Official Assignee**—*Insolvency Act, 11 & 12 Vict., c. 21—Rights of purchaser.* When a tenant of land owing arrears of tirvai (rent) takes the benefit of the Insolvent Debtors' Act, 11 & 12 Vict., c. 21, the Official Assignee must elect, and express his election to take the land *cum onere*, otherwise he acquires no interest in it. Where such election has not been made, and a suit for possession is brought by a purchaser at an auction-sale held by the revenue authorities for the arrears, the insolvent cannot plead a *jus tertii* in the assignee. CHINNA SUBBARAYA MUDALI *v.* KANDASAMI REDDI
I. L. R. 1 Mad. 59

2. ——— **Right to sell in execution of decree**—*Landlord and tenant—Official Assignee—Beng. Act VIII of 1869, ss. 59 and 60—Insolvency Act, 11 & 12 Vict., c. 21.* A decree for arrears of rent of an under-tenure was obtained against a tenant who become an insolvent, and whose tenure became vested in the Official Assignee by virtue of the provisions of the Insolvent Act, 11 & 12 Vict., c. 21. An application was made under ss. 59 and 60 of the Rent Law, Beng. Act VIII of 1869, for an order that the tenure should be sold for its own arrears. The Official Assignee objected to the sale, and contended that the decree-holder's only right was to prove in the insolvency for the amount of his debt. *Held*, that, whether the arrears of rent became due before or after the insolvency of the judgment-debtor, the decree-holder was entitled to sell the tenure in execution of his decree. CHUNDER NARAIN SINGH *v.* KISHEN CHAND GOLECHA
I. L. R. 9 Calc. 855

5. RIGHT OF OFFICIAL ASSIGNEE IN SUITS.

——— **Suit on promissory note endorsed by an insolvent**—*Right of Official Assignee to intervene—Civil Procedure Code, s. 73.* In a suit brought on a promissory note, dated 15th February 1872, made by the defendant and payable to one *L*, and endorsed by *L* to the plaintiff

INSOLVENCY—*contd.*

5. RIGHT OF OFFICIAL ASSIGNEE IN SUITS —*concld.*

for value, it appeared in evidence on the hearing of the case as an undefended cause that *L* had been insolvent, and that the note had been delivered to him and endorsed by him to the plaintiff between the dates of his obtaining his personal and his final discharge, and the suit was ordered to stand over and notice to be given to the Official Assignee. On an application by the Official Assignee that the suit should be adjourned, and the Official Assignee be added as a party, the Court held that he had a right to intervene, and an order was made postponing the hearing of the suit for a month to enable the Official Assignee to institute a suit on the note. KELLY *v.* HANLON . . . **10 B. L. R. Ap. 23**

6. PROPERTY ACQUIRED AFTER VESTING ORDER.

1. ——— **After acquired property**—*Purchaser from insolvent who had not obtained his discharge—Purchaser from Official Assignee—Rights of parties—Intervention of Official Assignee—Adverse possession.* Subject to the right and claim of the Official Assignee, and so long as he does not interfere, an insolvent, who has not obtained his final discharge, has power, with respect to after-acquired property, to buy and sell and give discharges and do all other acts which he could have done before his insolvency. The possession of such property by an insolvent in such a position may be adverse to the Official Assignee so as to bar the title of the latter by lapse of time. KRISTOCOMUL MITTER *v.* SURESH CHUNDER DEB
I. L. R. 8 Calc. 556 : 12 C. L. R. 253

2. ——— *Insolvency Act (Stat. 11 & 12 Vict., c. 21), ss. 7 and 27—Salary—Pension—Personal earnings of insolvent—Attachment previous to vesting order.* After-acquired property of an insolvent, whether it consists of salary, personal earnings, or property of a different kind, is property which vests in the Official Assignee, but subject to the provision of s. 27 of the Indian Insolvency Act as to salary and pension, and subject to the unwritten law as to personal earnings sufficient for the maintenance, according to his position in life, of the insolvent and his family. Accordingly, the Official Assignee is not entitled to claim such salary or income except by means of an order obtained under s. 27 of the Act, nor such personal earnings at all unless and until in either case the insolvent has accumulated a margin beyond what has been required for his adequate support. An attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency, and should be withdrawn on notice being given of the making of the vesting order. *In the matter of* DONAGHUE . **I. L. R. 19 Bom. 232**

3. ——— *Insolvency Act (11 & 12 Vict., c. 21), s. 7—Uncertificated insolvent—Mortgage by insolvent—Rights of Official Assignee.* The Official Assignee applied under the In-

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INSOLVENCY—*contd.*

6. PROPERTY ACQUIRED AFTER VESTING ORDER—*concld.*

solvency Act s. 36, for the delivery up to him of a house and furniture of which the occupants were in possession under a mortgage from an insolvent, dated December 1891. It appeared that the insolvent had been adjudicated in 1888, and had received her personal discharge in 1890, and had obtained the house in question under a deed of gift in April 1891, and had died intestate in May 1892, having never obtained a discharge under s. 59. The mortgagees took their mortgage with notice of the insolvency of the mortgagor. The Official Assignee did not become aware that the insolvent had acquired the property in question till September 1892, when he intervened and claimed the property free from the mortgage. *Held*, that the Official Assignee was entitled to the mortgaged property free from the mortgage. ROWLANDSON *v.* CHAMPION
I. L. R. 17 Mad. 21

4. _____ *Deceased insolvent-debtor—Whether it vests in his administrator or in the Official Assignee—Policy of insurance—Vesting order, Effect of—Insolvency Act (11 & 12 Vict., c. 21), s. 7.* The Official Assignee sold a policy of insurance on the life of an insolvent, who, after obtaining his personal discharge, died. The purchaser, having bought the policy mainly for the benefit of the insolvent, paid most of the sum realized by him upon it to the Administrator-General, who was about to take out letters of administration to the estate of the insolvent. *Held*, that the Administrator-General was entitled to the proceeds of the policy in preference to the Official Assignee. *In re* ACKRILL
I. L. R. 18 Mad. 24

5. _____ *Insolvency Act (11 & 12 Vict., c. 21), s. 7—Payment to insolvent, after vesting order, of debt due before, effect of.* Payment to an insolvent, after a vesting order has been made, of a debt due before the insolvency proceedings does not operate as a discharge of the debt wholly or *pro tanto* as against the Official Assignee, even if such payment was made *bonâ fide* without notice of insolvency. *Semble :* That the facts of the case showed that the defendant had notice of the act of insolvency on the part of the debtor ; or at all events that the circumstances were such as to put him on enquiry. *Kristo Comul Mitter* v. *Suresh Chunder Deb, I. L. R. 8 Calc. 556*, distinguished ; *Rowlandson* v. *Champion, I. L. R. 17 Mad. 21*, referred to. MILLER *v.* ABINASH CHUNDER DUTT
2 C. W. N. 372

6. _____ *Undischarged insolvent may sue for after-acquired property.* An undischarged insolvent has, in respect of after-acquired property, moveable and immoveable, a right against all the world except the Official Assignee and may sue to recover such property if the Official Assignee does not intervene. SRIRAMULU NAIDU *v.* ANDALAMMAL (1906)
I. L. R. 30 Mad. 145

INSOLVENCY—*contd.*

7. ORDER AND DISPOSITION.

1. _____ **Order and disposition**—*Insolvency Act, ss. 23, 24—Partners.* *R* carried on business in Calcutta in partnership with *B* and *C* under the style and firm of *B & Co.* Goods were consigned on triplicate account to *B & Co., B, B & Co.*, and another. The consignors wrote to *B & Co. :* "You will please hand over the goods, as per annexed list, to *B, B & Co.*, Calcutta ; they are bought, as you are aware, under special agreement on triplicate account." Before the goods had arrived *B & Co.* stopped payment. *B, B & Co.* were creditors of *B & Co.* After *B & Co.* had stopped payment, on the application of *B, B & Co., R* endorsed over, without consideration, the bills of lading to *B, B & Co.*, who thereby obtained delivery of the goods, and proceeded to sell the same. Within two months of the endorsement, *R* filed his petition of insolvency. *Held*, that, under s. 24 of the Insolvency Act, it appearing on the evidence that at the time of filing his petition the goods were, as to one-third, the insolvent's property, the Official Assignee was entitled to have the goods, etc., handed over to him, and an account in respect of such of the goods as had already been sold. *In the matter of* ROBINSON
2 Ind. Jur. N. S. 273

2. _____ *Insolvency Act, s. 23.* An insolvent, *J A*, executed the following document in Calcutta, dated May 16th, 1867, in favour of *M L & Co. :* "Dear Sirs,—In consideration of your having advanced to me the sum of RS,700, I hereby assign to you the whole of the furniture and fittings now lying at my house, Fairy Hall, Dum Dum, the whole of which I declare to be my property, free and unencumbered, and hereby authorize you to proceed to a sale of the said property by auction, should I fail to refund the amount of RS,700 on or before the 10th day of July next." The document was duly stamped and registered under s. 53 of the Registration Act. *J A* failed to pay the RS,700 ; and on the following day, *M L & Co.* placed a durwan, their own servant, on the premises at Fairy Hall, to assert their right to the possession of the furniture and to prevent its removable without their permission. An inventory was being made, and other steps taken preparatory to a sale. *J A* continued to reside in the house, and to use and enjoy the furniture as before, with the knowledge and consent of *M L & Co.* Before any sale took place, *J A* filed his petition in the Insolvent Court, and the usual vesting order was made. *Held*, that the furniture was in the "possession, order and disposition" of the insolvent within the meaning of s. 23 of the Insolvency Act. *In the matter of* AGABEG
2 Ind. Jur. N. S. 340

3. _____ *Specific appropriation—Insolvency Act (11 & 12 Vict., c. 21), ss. 23 and 24—Jurisdiction—Cause of action.* *St. & Co.*, merchants carrying on business at Glasgow, brought a suit against *J C*, Official Assignee, who resided in Calcutta, as assignee of the estate of *B & Co.*, merchants carrying on business at Cal-

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INSOLVENCY—*contd.*

7. ORDER AND DISPOSITION—*contd.*

cutta, and *Sm. & Co.*, merchants carrying on business at London. *St. & Co.* alleged in their plaint that they were the owners of certain goods, and sold the same to *B & Co.* and *Sm. & Co.*, and drew for the price on *Sm. & Co.*, who accepted the drafts; that the goods were shipped to *B & Co.* at Calcutta; that at the time when the acceptances were given it was agreed upon between *St. & Co.*, *Sm. & C.*, and *B & Co.* that they should be met and paid out of the sale-proceeds of the goods, "which were thereupon specially appropriated thereto;" that *Sm. & Co.* and *B & Co.* subsequently suspended payment,—namely, in December 1866 and January 1867; that in February 1867 *B & Co.* filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta, having previously delivered a portion of the goods, and endorsed the bills of lading for the remainder to *J S & Co.*, who had notice of the insolvent state of *Sm. & Co.* and *B & Co.*, without any consideration and without the consent or authority of *St. & Co.*, although the acceptances had not been met or returned, or the goods in any way paid for; that the proceeds arising from the sale of the goods had been handed over by *J S & Co.* to *J C*, who threatened and intended to apply the same in payment of the general body of creditors of *B & Co.* *St. & Co.* prayed that the rights of the parties to the suit might be declared; that an account might be taken of what had been received by *J C* in respect of the proceeds of such sale; that *J C* might be directed to pay to *St. & Co.* what on taking such account might be found due to them; that a receiver might be appointed; that meanwhile *J C* might be restrained by injunction from paying over the same to any one except *St. & Co.* On the case coming on for settlement of issues, the suit was dismissed by NORMAN, *J.*, on the ground that, from the facts alleged in the plaint, the inference was that the goods were in the possession, order, and disposition of *B & Co.*, as reputed owners, with the consent of *St. & Co.*, within the meaning of s. 23 of the Insolvency Act; and therefore the goods and the sale-proceeds rightly passed to *J C* as assignee; and further that the Court had not jurisdiction to declare the rights of all parties as prayed for; that the cause of action did not wholly arise within the jurisdiction, and it was not shown that leave had been granted to institute the suit. *Held*, on appeal, that the Court had jurisdiction to entertain the suit, and the plaint sufficiently disclosed a cause of action. *St. & Co.* had a right to have it tried whether they had an equitable charge upon the proceeds for the purpose of paying the bills. STERLING *v.* COCHRANE

1 B. L. R. O. C. 114

4. ——————— *Specific appropriation—Insolvency Act (11 & 12 Vict., c. 21), ss. 23 and 24—Jurisdiction—Cause of action.* *C & Co.*, merchants, carrying on business in Manchester, brought a suit against *J C*, Official Assignee, who resided at Calcutta, as assignee of the estate of *B & Co.*, merchants, carrying on business at Calcutta, and *S & Co.* and *M & Co.*, and other merchants carrying on business in London and Glasgow respectively. *C & Co.* alleged in their plaint that, under an arrangement with *B & Co.* and *S & Co.*, they shipped on the joint account of the three firms goods to *B & Co.* at Calcutta drawing for the price on *S & Co.*, who accepted their drafts in respect thereof; that *C & Co.* had a one-third share in the above joint accounts; *S & Co.* had a one-third share, and *S & Co.* and *M & Co.* had a one-third share between them; that the whole of the goods were purchased and paid for by *C & Co.*; that at the time the acceptances were given, it was distinctly agreed upon by all the parties that the bills should be met and paid out of the sale-proceeds of the goods, "which were thereupon specifically appropriated thereto; that *S. & Co.* subsequently suspended payment in December 1866 and *B. & Co.* in January 1867; that in February 1867 *B & Co.* filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta, having previously sold a portion of the goods, and delivered the remainder to *J S & Co.*, as agents for sale on account of *C & Co.*, and the other parties interested, *J S & Co.* being instructed by *B & Co.* to hold the same to a separate account of *B & Co.* that *J S & Co.* had received the proceeds of the sale of the whole of the goods; that the proceeds arising from the sale had been handed over by *J S & Co.* to *J C*, who threatened and intended to apply the same in payment of the general body of creditors of *B & Co.* *C & Co.* prayed that rights of the parties to the suit might by declared; that an account might be taken of what had come into the hands of *J C* in respect of the goods; that *J C* might be declared answerable to *C & Co.* for the amount which should be found to be due to them on such account; that *C & Co.* might be declared entitled to the sum so found due for the price of the goods and other payments made by them on account of the goods; that *J C* might be directed to pay to *C & Co.* what should be found to be due to them on taking an account; that the proceeds might be directed to be paid amongst the parties to the suit, according to their respective shares and interests therein; and that, in the meantime, *J C* might be restrained, by injunction, from paying over the same to any one except *C & Co.* On the case coming on for settlement of issue, the suit was dismissed by NORMAN, *J.*, on the ground that the Court had not jurisdiction to declare the rights of parties as prayed, and no cause of action was disclosed against the Official Assignee. *Held*, on appeal, that the Court had jurisdiction to entertain the suit, and the plaint sufficiently disclosed a cause of action. *C & Co.* had a right to have the question tried whether, by the alleged arrangement, the proceeds of the goods were specifically appropriated to payment for the goods, and the Court had clearly jurisdiction to compel *J C*, the Official Assignee, to apply the proceeds, as far as they may have been specifically appropriated. COLLIE *v.* COCHRANE

1 B. L. R. O. C. 131

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INSOLVENCY—*contd.*

7. ORDER AND DISPOSITION—*contd.*

5. ——— *Specific appropriation—Insolvency Act (11 & 12 Vict., c. 21), ss. 23 and 24.* In 1862 the plaintiff's former firm of *J S B & B*, of Manchester, entered into an agreement with *S & Co.*, of London, and *B & Co.*, of Calcutta, to purchase and ship, on the joint account of the three firms, certain goods to *B & Co.*, each firm taking one-third share of the profit or loss in the transaction; and by the agreement it was stipulated as follows: "*J S B & B* to draw at six months on *S & Co.* for cost of goods including packing charges; said bills to be discounted (and domiciled) at *Overend, Gurney & Co.* at 1½ per cent. in excess of bank's minimum rate. *B & Co.* to remit their three months' or six months' drafts, as may appear most desirable on *S & Co.*, in favour of *J S B & B*, which *Overend, Gurney & Co.* agree to take at 1½ per cent. above Bank minimum rate for three months and 1½ per cent. for six months as provision for said six months' drafts. *B & Co.*, on sale of goods, to specially remit proceeds to *Overend, Gurney & Co.* in first class bills drawn in favour of *Overend, Gurney & Co. Overend, Gurney & Co.* agree to give up *B & Co's* drafts on *S & Co.* on receipt of the said remittances under rebate. In the event of *S. & Co.* being brought under cash advances, *J S B & B* agree to find cash to the extent of one-third the amount." In 1863 *J S B*, one of the members of the firm of *J S B & B*, retired from the firm, which was carried on under the name of *T B & Bro.*, and the agreement of 1862 was continued by that firm with the two other firms of *S & Co.* and *B & Co.* Under it certain goods were, in September, October, and November 1866, purchased by the plaintiff and shipped to *B & Co.*, on triplicate account, and bills were drawn by the plaintiff on *S & Co.* as agreed, and were deposited with *A C & Co.*, not with *O G & Co.* On the 2nd January 1867, in consideration of the plaintiff taking on himself all the risk attaching to the said goods, *S & Co.* and *B & Co.*, transferred all their right, title, and interest in the said goods to the plaintiff. This agreement was signed on behalf of *B & Co.* by *L B* in his own name, one of the members of the firm then in London, who stated that he had the authority of his partners for so doing. On this agreement being made, *B & Co.*, by the direction of the plaintiff, handed over the goods and documents relating thereto to *B B & Co.*, of Calcutta, on the 16th January 1867. *B & Co.* stopped payment on the 27th December 1866, and *J H R*, the only partner of that firm then in Calcutta, filed his petition in the Insolvent Court there on the 7th February 1867. *L B* filed his petition in the said Court on the 18th May 1867. *S & Co.* stopped payment in December 1866. On the 16th March 1867, an order of the Insolvent Court was made in the matter of the petition of *J H R*, and in pursuance of this order *B B & Co.* delivered to the defendant, as Official Assignee of the estate of the said *J H R*, the unsold goods in their hands, which had been transferred to them by *B & Co.*, and the net proceeds of those which they had sold. *Held*, by NORMAN, *J.*, that the agreement of January 2nd was fraudulent and void against the creditors of *B & Co.*, under 13 Eliz., c. 5, if not void under s. 24 of the Insolvency Act. On appeal, *held* by PEACOCK, *C.J.*, that the goods were sent to *B & Co.* on a special trust, and there was a specific appropriation of the proceeds binding in the case either in the insolvency or bankruptcy; that the agreement of January 2nd was valid and binding on the assignee of *B & Co.*; that by it the property in the goods passed to *T B & Bro.*; but if it did not, the proceeds were specifically appropriated to taking up the bills of *B & Co.* on *S & Co.*; and until they were paid, *B & Co.* had no interest in the goods which could justify their assignee in stopping the remittance of the proceeds or of taking the property out of the possession of *B B & Co.*; that the plaintiff was entitled to the proceeds with interest from the time the proceeds and goods were handed over to the assignee, and that the goods were not in the order and disposition of *J H R* at the time of his filing his petition within s. 23 of the Insolvency Act. *Per* MARKBY, *J.*—Each of the two firms and Barlow wherein the outset part owners of these goods, and each became liable to the orders to contribute his share towards the cost price thereof. In November 1866 there ceased to be a binding agreement to remit the proceeds to *O G & Co.*, and no new agreement was substituted. The agreement of 2nd January did not renew the right to have the proceeds remitted for special appropriation, and it was, moreover, a fraudulent preference and void so far as *B & Co.* were concerned. On 16th January, when the goods were transferred to the plaintiff, he was merely a creditor, and therefore a transfer for his benefit, within two months of filing the petition of insolvency, was void under s. 24 of the Insolvency Act. BARLOW *v.* COCHRANE

2 B. L. R. O. C. 56

Affirmed by the Privy Council, where it was *held* that a firm, though insolvent, may part with or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud; so also the abandonment of a speculation whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one creditor to others after a debt has been incurred. MILLER *v.* BARLOW

14 Moo. I. A. 209

6. ——— *Insolvency Act. s. 24.* On the night previous to *B's* being adjudicated insolvent, about 10 P.M., the firm of *R B D*, at their place of business, promised to give *B* a loan of R5,000 if he would the next morning deliver to them goods to that amount, and would, in the meantime, satisfy them that he had sufficient goods in his godown, and allow the firm of *R B D* to put their lock on the door of the godown to secure the goods until they had received the value of the loan. Thereupon *B* took the gomastah of the firm of *R B D* to his godown, let him see that it contained goods worth more than R5,000, and allowed him to put a lock on the door, *B* at the same time

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INSOLVENCY—*contd.*

7. ORDER AND DISPOSITION—*contd.*

replacing his own locks. The gomastah and *B* then returned to the office of *R B D* where R5,000 were paid to *B*, who promised to deliver the next morning R5,000 worth of goods out of the godown which had been locked up. Having received the money, *B* absconded from Calcutta that same night, and never returned to his place of business. The next day he was adjudicated an insolvent. *Held*, that the goods in the godown were not in the order and disposition of *B* within the meaning of s. 24 of the Insolvency Act. *In the matter of* BUNGSEEDHUR KHETTEY. *Claim of* RAMLALL BUDREE DOSS **I. L. R. 2 Calc. 359**

7. ——————— *Insolvency Act, s. 23—Assignment of shares—Constructive trustee.* *N*, an original allottee of five shares in the *A* company, assigned them to *B*. No transfer was executed and no notice of the assignment was given to the company, which subsequently went into liquidation. *N* became insolvent. *B* sued the liquidators of the company for the amount due in respect of the five shares on the first distribution of assets. *Held*, that at the time of *N's* insolvency the plaintiff was the true owner of the shares within the meaning of s. 23 of the Insolvency Act (11 & 12 Vict., c. 21), and that, as he had omitted to give notice to the company of the assignment to him, and as he had procured no transfer to be executed in his favour which the company, under their articles of association, were bound to recognize, he had consented that the shares should remain in the order and disposition of *N*, and consequently the shares and the right to receive any distribution of assets in respect of them vested, upon *N's* insolvency, in the Official Assignee. *Semble:* The principle that a person who is under an obligation to convey property to another is, in a Court of equity, a trustee of such property, for the latter does not apply in cases where the reputed ownership clause of the Insolvency Act is in question. *Ex parte Littledale, 6 DeGex M. & G. 714*, and *In re Sketchley, 1 DeGex & J. 163*, followed. BHAVAN MULJI *v.* KAVASJI JASAWALA **I. L. R. 2 Bom. 542**

8. ——————— *Insolvency Act (11 & 12 Vict., c. 21), s. 24—Goods pledged by insolvent and redelivered to him on commission sale.* *M*, who carried on the business of a watch and clock maker in Calcutta, borrowed from *D M* R6,000, for which he gave a promissory note, and as collateral security for the payment of which sum he pledged certain articles consisting of watches, clocks, etc., with *D M*. The articles remained for some months in the custody of *D M*, who then redelivered them to *M* for sale on commission, the proceeds to be applied in liquidation of the debt. *M* gave a receipt for the articles, and some of them were sold by *M* on those terms. On the 2nd of May 1877, *M* filed his petition in the Insolvent Court, and such of the articles as remained unsold came into the possession of the Official Assignee. On an application by *D M* claiming the articles and praying for an order directing the Official Assignee to return them, it was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale, and it was contended that such receipt did not divest the true owners of possession. *Held*, that the articles were rightly vested in the Official Assignee. On the facts, the insolvent was the true owner of the goods. *D M's* interest ceased when he ceased to have possession of the goods; the receipt in this view only amounted to an agreement to sell and apply the proceeds in liquidation of the debt, and it could have been proved and a dividend recovered on it under the insolvency. Even if the interest of *D M* did not cease, the goods were in the order and disposition of the insolvent, there being nothing to show any publicity or notoriety in the change of possession of the goods. No amount of evidence would convince the Court that there was a custom of purchasing goods from a retail dealer and leaving them with him for commission sale. *Semble:* No such arrangement would be upheld as against the Official Assignee. *In re* MURRAY. *Ex parte* DWARKANATH MITTER **I. L. R. 3 Calc. 58**

9. ——————— *Insolvency Act (11 & 12 Vict., c. 21), s. 23—Reputed ownership—Possession—Consent of true owner—Partner out of jurisdiction—Mortgage of chattels—Priority.* In 1878 the members of the firm of *A & Co.* mortgaged the live and dead stock, chattels, and effects belonging to the firm to *B*, the mortgage-deed containing a clause to the effect that, as long as there was anything due on the mortgage, the mortgage property should be treated and considered as the property and in the order and disposition of the mortgagee. *A & Co.* subsequently obtained further advances from *B*; at this time *A* was residing out of the jurisdiction of the Court, and the instruments creating the further charges were signed by his attorney. *C* and *D*, the two members of the firm residing in Calcutta, remained in possession of the mortgaged property up to the 10th May 1880, when they became insolvent, and their property was vested in the Official Assignee, who entered into possession. On the 12th May, the mortgagee also entered into possession. On the 26th June, *A*, the remaining partner of the firm, returned to Calcutta and filed his petition of insolvency. Upon a petition by the mortgagee claiming to be paid his mortgage-money in priority to the other creditors of the firm:—*Held*, that the goods and chattels of the firm which were covered by the mortgage and further charges did not vest in the Official Assignee upon the insolvency of *C* and *D*. *Reynolds* v. *Bowley, L. R. 2 Q. B. 474*; *Ex parte Dorman, L. R. 8 Ch. 51*; and *In re Hill, Ex parte Lepage, I. L. R. 6 Calc. 636 note*, distinguished. *In the matter of* MORGAN. GUBBOY *v.* MILLER **I. L. R. 6 Calc. 633**
7 C. L. R. 29 : 9 C. L. R. 385

10. ——————— *Insolvency Act (11 & 12 Vict., c. 21), s. 23.* Where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who

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INSOLVENCY—*contd.*

7. ORDER AND DISPOSITION—*concld.*

has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit. *In the matter of* MARSHALL . . . **I. L. R. 7 Calc. 421**

Affirmed on appeal. *In the matter of* MARSHALL. BOILEAU *v.* MILLER . **10 C. L. R. 591**

11. ——— *Insolvency Act (11 & 12 Vict., c. 21), s. 23—Reputed ownership.* In 1883 *B* mortgaged to one *D* certain furniture standing in a house leased by him from one *V*. The mortgage-deed provided that until default the mortgagor should have free use of the mortgaged property; that the mortgagee should be at liberty to place a durwan in charge of the furniture; and that on default by the mortgagor the mortgagee should have power to enter the premises and deal with the goods as his own. A durwan was placed in charge, and in January 1884 the mortgagor defaulted and, was pressed for payment at different times previous to August 1884. On the 1st August, the mortgagee sent to the premises people from Messrs. Mackenzie, Lyall & Co. for the purpose of lotting and cataloguing the furniture. Admittance into the house was refused to them by *B*, although they were admitted into the compound by the durwan of the mortgagee. At about this date (but whether before or after the 1st August was not clear) *B* asked for further time for payment, which was granted. On the 4th August, the furniture was attached by *V* in execution of a decree for rent. On the 6th August, *B* filed his petition in insolvency, and on the 15th September the furniture was sold by the Official Assignee. On a hearing of the claims put in by the mortgagee and *V*:—*Held*, that on the 6th August the furniture was not in the possession, order, or disposition of *B* as reputed owner with the consent of the true owner; that under the circumstances brought out in evidence, the fact that further time for payment was granted had not the effect of a fresh consent on the part of the mortgagee to the goods being in the possession of *B* as reputed owner; that even if this had been so, the attachment under *V's* execution took the goods out of the order and disposition of *B*, and that the mortgagee was entitled to the benefit of that circumstance. *In re Agabeg, 2 Ind. Jur. N. S. 240*, questioned. *In the matter of* R. BROWN **I. L. R. 12 Calc. 629**

8. VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.

1. ——— **Assignment by debtor**—*Fraud on creditors — Fraudulent assignment.* Where *G & Co.* were unable to meet the bills of *T & Co.*, and wrote to *T & Co.*, "If you do not arrange for renewal or payment of them, we must stop payment;" *G & Co.*, knowing that they were insolvent, but for the purpose of delay, and not for any benefit to the estate, agreed to mortgage to *T & Co.*, what was substantially the whole

INSOLVENCY—*contd.*

8. VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR—*contd.*

of the estate. *T & Co.* renewed the bills, and the bills again falling due, and *G & Co.* being unable to meet them, *T & Co.*, paid them. Shortly afterwards *G & Co.* filed their petition of insolvency, without having carried out the agreement. In a suit by *T & Co.* the Court refused to decree specific performance of the agreement, and *held* that it was a fraud against the general body of the creditors. TEIL *v.* GORDON . **2 Ind. Jur. N. S. 142**

2. ——— *Assignment to one creditor—Fraud—Vendor remaining in possession.* When *A*, a holder of a hundi drawn up and accepted by the firm of *B*, procured that firm, when it was on the verge of insolvency, to sell him certain property in payment of the hundi; but, before his obtaining possession, *C*, another creditor of, and decree-holder against, the firm, got it sold in satisfaction of his debt:—*Held* on *A's* suit, that the sale in his favour could not, in the absence of any finding of fraud, be set aside merely on the ground that the effect of it had been to deprive the other creditors of their powers to have recourse to the property. DALOO RAM *v.* SHIVA PERSHAD **2 Agra 71**

3. ——— *Insolvency Act, s. 24—Voluntary assignment—Deposit of title-deeds—Right of Official Assignee.* The firm of *C N & Co.*, Calcutta, had an account with a Bank, of which *R* was the manager, under an arrangement that the Bank should discount bills accepted by *C N & Co.* to a certain amount, and that *C N & Co.* should keep in the Bank a certain fixed cash balance. In November, *R*, finding that the limit of the discount accommodation had been exceeded and the cash account overdrawn, declined to discount any more bills unless security were given for the amount then due to the Bank. *A*, the only partner in the firm of *C N & Co.*, then in Calcutta, verbally promised on 24th November to deposit with the Bank the title-deeds of the premises in which *C N & Co.* carried on their business; in consideration of such promise *R* discounted further bills from 24th to 29th November. *A* sent to *R* a letter on 25th November as follows: "In pursuance of the conversation the writer had with you yesterday, we now deposit the title-deeds of landed house property as security against our discount account." The letter enclosed certain title-deeds, of which *R* acknowledged the receipt. *R* subsequently discovered they were not the title-deeds which *A* had promised to deposit, and of this he gave *A* notice by letter on 28th November. *C N & Co.*, on 5th November 1870, suspended payment, and by the usual order their estate and effects vested in the Official Assignee, who thereupon, finding that the Bank claimed a lien on the deeds, brought a suit against the Bank for recovery of them. *Held*, that the deposit of the title-deeds was not void under s. 24 of the Insolvency Act.

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INSOLVENCY—*contd.*

8. VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR—*contd.*

MILLER *v.* CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA . . **6 B. L. R. 701**

4. ——— *Insolvency Act, s. 24—Assignment to trustees for benefit of creditors—Voluntary assignment—Onus probandi—Right of creditor to set aside deed.* Where two insolvent partners, being sued by two of their creditors and urgently pressed by others, called a meeting of their creditors to consult them as to the course to be adopted, and the creditors at such meeting resolved that the affairs of the insolvents should be wound up, under a deed of assignment in trust for the benefit of their creditors, and, in pursuance of this resolution (which was not shown to have been proposed by or to have originated with the insolvents), a deed of composition was drawn up and executed by the insolvents, whereby they assigned their entire property to trustees for the benefit of all their creditors, who, before a certain specified time, should sign the deed: *Held*, that, under these circumstances, the composition deed could not be considered a voluntary assignment within the meaning of s. 24 of the Insolvent Debtors Act, and the deed was accordingly upheld. The onus of proving an assignment to be voluntary within the meaning of the above section lies upon the person impugning it. *Quære:* Whether one of the creditors of an insolvent, without the consent or without using the name of the Official Assignee, can take steps in the Insolvent Court with a view to have an assignment by an insolvent to trustees set aside as voluntary. *In re* DHANJIBHAI KHARSETJI RATNAGAR . . . **10 Bom. 327**

5. ——— *Insolvency Act, s. 24—"Voluntary" conveyance by insolvent.* Where two days before a person was adjudicated an insolvent and his property had by order vested in the Official Assignee under the provisions of Stat. 11 and 12 Vict., c. 21, such person had, not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property:—*Held* by STUART, *C.J.*, that such assignment was not "voluntary" within the meaning of s. 24 of that statute, and was therefore not fraudulent and void under that section as against the Official Assignee. *Held* by PEARSON, *J.*, that such assignment was not a voluntary one in the sense that it was made spontaneously without pressure; that as the vesting order was not passed on petition by the insolvent for his discharge, that section was not relevant to the case. SHEO PRASAD *v.* MILLER **I. L. R. 2 All. 474**

In the same case before the Privy Council, a firm, trading in Calcutta, having been there adjudicated insolvent, the transfer of a debt, transferred by one of its branches located in Lucknow, was *held* upon the evidence to have been a voluntary assignment, void under s. 24 of the Stat. 11 and 12 Vict., c. 21, as against the Official Assignee. A draft, dated of the day on which at night the insolvent firm stopped payment in Calcutta, adjudication having followed on the second day after, purported to have been drawn by a debtor owing money to the Lucknow branch under its assignment in favour of the defendant to the amount of such debt. The latter received the money. *Held*, that, under all the circumstances, it was not necessary to decide whether the transfer was made on the date which the draft purported to bear, the conclusion upon all the facts being that the debt had been transferred "voluntarily" within the meaning of s. 24. MILLER *v.* SHEO PRASAD **I. L. R. 6 All. 84 L. R. 10 I. A. 98.**

6. ——— *Insolvency Act, ss. 23, 24—Equitable assignment of goods as security—Jokhmi hundi.* The plaintiffs at *N* purchased, on 22nd December 1878, from *L*, for R4,000, a jokhmi hundi, drawn in favour of plaintiffs by *L* upon his firm in Bombay. The hundi contained a statement that it was "drawn against" twenty-nine bales of wood shipped at Tuna, and it was made payable eight days after the safe arrival of the ship at Bombay. The plaintiffs obtained from *L*, at the same time, a letter addressed by him to his firm at Bombay, which contained the following passage: "Upon you a jokhmi hundi is drawn, the particulars whereof are as follows: (R4,000). The value having been received from Jadowji Gopalji. hundis for R4,000 drawn against 29 bags of sheep's wool shipped on board the 'Hariprasad,' owner Dayal Morarji, from the seaport town of Tuna . . . On the safe arrival of the vessel do you be good enough to land the goods and deliver the same to Jadowji Gopalji, and as to the jokhmi hundis drawn before, if in respect thereof any money has to be paid to Jadowji Gopalji, do you be good enough to pay the same." The above letter was duly presented by the plaintiffs to *L's* Bombay firm on the 27th December 1878. Evidence was given that, at the time the plaintiffs obtained the hundi and the letter, the goods referred to had been already shipped. On the 1st January 1879, the firm of *L* was adjudicated insolvent by the High Court of Bombay. On the 5th January 1879, the ship arrived at Bombay with the goods in question on board, and on the 7th January the ship-owners delivered them to the Official Assignee. In a suit against the Official Assignee (as assignee of the estate and effects of *L*) and the ship-owners to recover possession of the wool or the amount of the hundi:—*Held*, on the authority of *Burn* v. *Carvalho, 4 M. & Cr. 702*, that the letter of the 22nd December 1878 operated as an equitable assignment of the wool to the plaintiffs, on the safe arrival of the vessel, as a security for the payment of the hundi, and that the plaintiffs were, therefore, entitled to obtain possession of the wool. JADOWJI GOPAJI *v.* JETHA SAMJI . **I. L. R. 4 Bom. 333**

7. ——— *Stat. 11 & 12 Vict., c. 21, s. 24—Insolvent—Voluntary transfer.*

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INSOLVENCY—*contd.*

8. VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR—*contd.*

On the 12th March 1881, a firm, the partners of which were subsequently, within two months from that date, adjudicated insolvents under 11 & 12 Vict., c. 21, suspended payment. On the night of the previous day, the 11th March, one of the creditors of the firm, the impending bankruptcy of the firm having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented. The only pressure which appeared to have been exercised was that on the 11th March security was demanded from the insolvents. *Held*, that, there having been no pressure which could not be resisted, and no legal proceedings having existed against the insolvents, or which they could have feared, the transaction was a voluntary transfer, and therefore void under s. 24 of 11 & 12 Vict., c. 21. PHULCHAND *v.* MILLER . **I. L. R. 7 All. 340**

8. ——— *Assignment in fraud of creditors—Transferee in good faith and for value.* A transfer of property made to certain creditors fraudulently and in contemplation of the insolvency of the transferor is not voidable at the suit of another creditor if the transferees were purchasers in good faith and for consideration. GOPAL *v.* BANK OF MADRAS **I. L. R. 16 Mad. 397**

9. ——— *Mortgage to secure a barred debt since renewed—Fraudulent preference—Voluntary transfer—Civil Procedure Code, ss. 344, 351.* On 1st January 1886 a partnership theretofore existing between *A* and *B* was dissolved and the deed of dissolution provided, *inter alia*, for the execution by *B* on demand of a mortgage on the plantation house (then subject to a subsisting mortgage in favour of the Agra Bank) to secure the repayment of a debt due by the firm to the trustees of *A's* marriage settlement. A suit against the firm was pending at the date of the deed of dissolution, and it was dismissed by the Court of first instance, and an appeal was preferred to the High Court. Before the appeal came on for hearing, the debt to *A's* trustees was barred by limitation, but *A* by a letter consented to pay it, and the trustees demanded the execution of the mortgage as agreed on and offered to pay off the Bank. Shortly afterwards, *viz.*, in December 1888, the appeal came on in the High Court, which held that the appellant's claim was valid and called on the Court of first instance for a further finding. On 2nd January 1889, *B* executed a mortgage of the plantation house in pursuance of the above agreement, and in June the trustees paid off the Bank. In April, the High Court in the above appeal passed a decree for the appellant. In consequence of this decree, *B* became involved in pecuniary difficulties: in October he found himself insolvent, and ceased to carry on business, and in February 1890 applied under the Civil Procedure Code, s. 344, to be declared an insolvent. His application was opposed by the holders of the High Court

INSOLVENCY—*contd.*

8. VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR—*contd.*

decree on the ground that the mortgage of 2nd January 1889 had been executed with the object of defeating their claim. *Held*, that the execution of the mortgage of January 1889 afforded no reason for rejecting the application under the Civil Procedure Code, s. 351, since it was supported by consideration and did not amount to an act of fraudulent preference, not being a voluntary transfer. *Butcher v. Stead, L. R. 7 E. & I. Ap. 839*, followed. BROWN *v.* FERGUSON . . **I. L. R. 16 Mad. 499**

10. ——— *Mortgage by trading partnership of all its assets when solvent for advances present and future—Change of partners with continuance of mortgage liability—Validity of mortgage security.* If a trader assigns all his property, except on some substantial contemporaneous payment or substantial undertaking to make a subsequent payment, that is an act of insolvency, and is void against the creditors on his insolvency, simply because nothing is left wherewith to carry on the business; whereas, if he receives such assistance, something is left to carry on the business. A trading partnership before its insolvency, assigned by mortgage all its assets to a creditor, who simultaneously made a substantial advance to the firm, agreeing to make future advances. *Held*, that the mortgage would have covered such assets of the then-firm as were in existence at the time of the insolvency, and would not have been void, as against the other creditors and the Official Assignee, because the assistance was substantial, and the then solvent firm was not left by the assignment without means. Another question was raised upon the facts that, after the mortgage and before the insolvency, new partners entered the firm, and new stock-in-trade was brought in. The new partners were to be under the same liability to the secured creditors, the security continuing with respect to the new firm and the after-acquired stock, as it stood with respect to the old. *Held*, that this arrangement did not invalidate the prior security, amounting as it did to a mere substitution of persons and goods at the time of the change. Also the incoming partners received substantial consideration; for, although the obligation, under the former agreement with the old firm, for the rest of the advances not then made was remitted, a new obligation was entered into that a sum of money should be provided, which was afterwards supplied. The incoming partners got the benefit of a suretyship which the mortgagees had entered into for the former firm. These were the considerations to the incoming partners at the time. As the original contract would have been, the new one was, valid against the Official Assignee. KHOO KWAT SIEW *v.* WOOI TAIK HWAT **I. L. R. 19 Calc. 223 L. R. 19 I. A. 15**

11. ——— *Assignment of stock-in-trade—Equitable lien—Preferential credi-*

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INSOLVENCY—*contd.*

8. VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR—*concld.*

tor—Insolvency, act of—Insolvent Act (11 & 12 Vict., c. 21), s. 9. An insolvent in debt to a bank had given a promissory note for the full amount of the debt due. He also gave, by way of collateral security for the promissory note and for any future advances, a letter of lien over his stock-in-trade, etc., and undertook at the time to execute, whenever called upon to do so, an assignment of his business. This undertaking was never carried out. Two years and three months from the date of the loan the insolvent had addressed a letter to the Bank enclosing a cheque for R600, and requesting that it should be placed to the credit of the loan account. *Held*, that, as regards the amount of the debt secured by the letter of hypothecation, the Bank was entitled to rank as preferential creditor, such letter creating a good equitable charge on existing assets. The assignment contemplated by the letter of hypothecation amounted to an act of insolvency within the meaning of s. 9, Insolvent Debtors' Act, and created no equity available as against the Official Assignee. *In the matter of* SUMMERS
I. L. R. 23 Calc. 592

12. ——— *Attempted preference—Equitable mortgage by deposit of title-deeds—Onus of proof—Evidence Act (I of 1872), ss. 18 and 21—Admission by party—Omission to object to admissibility of evidence.* After an adjudication, under the Stat. 11 & 12 Vict., c. 21, of insolvency against a trader in Calcutta, a creditor brought this suit against him and the Official Assignee as co-defendants, the latter alone defending. The claim was for payment of a debt, and in default to obtain an order for the sale of land upon which the creditor averred that he held an equitable mortgage by deposit of title-deeds with him, before the adjudication, as security for the debt. *Held*, that the burden was upon the plaintiff of proving the deposit by way of equitable mortgage to have preceded the adjudication. The Courts below having differed as to whether this prior possession had or had not been proved, an examination of the evidence led to the conclusion that the plaintiff had failed to prove that the title-deeds had been deposited before the date of the adjudication as alleged by him. On the question whether the Courts below should, or should not, have received in evidence the testimony of a witness who had been informed by the plaintiff before the adjudication that documents relating to land had then been deposited with him as security by the person who was afterwards insolvent and who was the first defendant in this suit:—*Held*, that this, being an admission by a party within s. 21 of the Evidence Act, 1872, could not be used as evidence in the plaintiff's favour. *Held*, also, that an erroneous omission to object to the admission of such testimony did not make it available as a ground of judgment. MILLER *v.* MADHO DAS
I. L. R. 19 All. 76
L. R. 23 I. A. 106

INSOLVENCY—*contd.*

9. INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.

1. ——— **Application of Civil Procedure Code**—*Civil Procedure Code, 1859, ss. 273 and 280—Right of Official Assignee.* Ss. 273 and 280 of Act VIII of 1859 did not apply to cases of insolvency where the whole of the debtor's property is vested in the Official Assignee, and cannot be handed over to the Court in the manner contemplated by those sections. KISSOREEMOHUN CHATTERJEE *v.* KONNOY LOLL DUTT
1 Ind. Jur. N. S. 247

2. ——— *Civil Procedure Code, 1859, ss. 273-280.* The sections of Act VIII of 1859 (273-280, etc.) which enabled a defendant, arrested or in prison in execution of a decree, to obtain his discharge on application to the Civil Court, and giving up all his property, had no application in cases in which the prisoner had become insolvent, and the Court for the Relief of Insolvent Debtors had his case pending before it; but they did apply where the petition in insolvency had been dismissed or otherwise fully disposed of. *In re* SOOR PERSAUD . **2 Ind. Jur. N. S. 91**

3. ——— **Small Cause Court debtors**—*Civil Procedure Code, 1877, s. 336, cl. 5; and Ch. XX, ss. 344-360.* Cl. 5 of s. 336 of Act X of 1877 applies to Small Cause Court debtors: such persons can obtain the benefit of Ch. XX of that Act by applying to a Court which has jurisdiction under that chapter. MOIDIN *v.* SUNDARAMURTHIA
I. L. R. 2 Mad. 9

4. ——— **Application to Collector's Court for adjudication**—*Civil Procedure Code, 1877, ss. 2 and 344—Bengal Civil Courts Act, 1871, s. 15—Bengal Act VII of 1868.* A Collector's Court, though having Civil Court powers in some cases, is not a Civil Court under s. 15, Bengal Civil Courts Act, 1871, nor is it subordinate to a District Court within the meaning of s. 2 of the Civil Procedure Code, 1877. An application under s. 344 of Act X of 1877 for a declaration of insolvency made by a person imprisoned by order of the Collector under the provisions of Bengal Act VII of 1868 cannot be entertained. *In the matter of* BODRU ROHMAN . . . **3 C. L. R. 508**

5. ——— **Application to Munsif's Court for adjudication**—*Civil Procedure Code, 1882, ss. 344, 360—Attachment of debtor's goods—Applications to Munsif's Court.* A District Munsif's Court invested with insolvency jurisdiction by the Local Government under s. 360 of the Code of Civil Procedure cannot entertain an application made by a judgment-debtor, whose property has been attached, to be declared an insolvent, except where such application is transferred to it by the District Court. NARASAYYA *v.* NARASIMMA
I. L. R. 7 Mad. 510

6. ——— **Application on insufficient grounds**—*Civil Procedure Code, 1882, s. 244—Fulfilment of requirements of section after application.* When an application to be declared an

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INSOLVENCY—*contd.*

9. INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—*contd.*

insolvent under s. 344 of the Civil Procedure Code, 1882, was preferred, the requirements had not been fulfilled, as the applicant had not been arrested or imprisoned in execution of a decree for money, nor had his property been attached in execution of such a decree. Eleven days after the application had been preferred, the applicant's property was attached in execution of such a decree. One of the creditors subsequently objected to the application on the ground that when it was preferred the requirements of s. 344 had not been fulfilled. *Held*, that the application should not on that ground have been dismissed. MAKHAN LAL *v.* GULZARI LAL . . **I. L. R. 6 All. 289**

7. ——— **Application for adjudication after order for attachment of property** —*Civil Procedure Code, 1877, ss. 344 to 360—Jurisdiction—Subordinate and District Courts.* The lower Court ordered the attachemnt of a house belonging to the judgment-debtor in execution of a money-decree passed against him by that Court. The judgment-debtor then applied to be declared an insolvent under s. 344 of the Civil Procedure Code (Act X of 1877). *Held*, that it could not entertain the application. PURBHUDAS VELJI *v.* CHUGUN RAICHAND . . **I. L. R. 8 Bom. 196**

8. ——— **Application to have judgment-debtor declared insolvent**—*Jurisdiction —Deputy Commissioner—District Court—Insolvent judgment-debtors—Civil Procedure Code, 1882, ss. 344, 360—Costs.* The Court of a Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court," in Chota Nagpore under ss. 2 and 344 of the Civil Procedure Code. A Deputy Commissioner, therefore, invested by the Local Government with powers under s. 360 of the Code has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent. *In re Waller, I. L. R. 6 Mad. 430*, and *Purbhudas Velji* v. *Chugan Raichand, I. L. R. 8 Bom. 196*, followed. The question of jurisdiction not having been raised in the lower Court, the order was set aside without costs. JOYNARAIN SINGH *v.* MUDHOO SUDUN SINGH . . . . **I. L. R. 16 Calc. 13**

9. ——— **Application to be declared insolvent made to Court to which decree was transferred for execution**—*Civil Procedure Code, ss. 228, 239, 344, 360.* Where a decree had been transferred for execution from the Court of the District Munsif of E to that of the District Munsif of B, and an application was made by the judgment-debtor under s. 344 of the Code of Civil Procedure to be declared an insolvent and entertained by the latter Court: *Held*, that the District Munsif of B had no jurisdiction to entertain the application. VENKATASAMI *v.* NARAYANARATNAM **I. L. R. 11 Mad. 301**

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10. ——— **Jurisdiction of original Court to make declaration of insolvency**— *Civil Procedure Code, 1882, s. 344—Decree passed on appeal.* A suit for money was dismissed, but on appeal the High Court passed a decree for the plaintiff. The judgment-debtor made an application to the Court of first instance under Civil Procedure Code, s. 344, to be declared an insolvent. *Held*, that the Court had jurisdiction to make the declaration sought for. JAMBUVAYYAN *v.* VENKATARAYAR . . **I. L. R. 19 Mad. 65**

11. ——— **Jurisdiction of second class Subordinate Judge's Court invested by the Local Government with insolvency jurisdiction**—*Civil Procedure Code, 1882, ss. 344 to 360—Debt of a scheduled creditor exceeding R5,000.* Where a person, arrested in execution of a decree for money by the Court of a second class Subordinate Judge invested, under s. 360 of the Civil Procedure Code, with the powers conferred on District Courts by ss. 344 to 359, makes an application to the Subordinate Judge's Court under s. 344, that Court has power to entertain it and to make the declarations referred to in ss. 344 to 359, and the fact that a debt due to a scheduled creditor exceeds R5,000 does not deprive it of jurisdiction. SHANKAR RAGHUNATH *v.* VITHAL BABAJI **I. L. R. 21 Bom. 45**

12. ——— **Discharge, right of debtor to**—*Civil Procedure Code, 1859, s. 273.* The only question was under this section whether the debtor was possessed or not of any means. If not, he was entitled to his discharge. SIDDEE GOPAL SADHOO KHAN *v.* NUND LALL DEY **4 W. R. Mi. 8**

13. ——— *Civil Procedure Code, 1859, s. 273—Act XXIII of 1861, s. 8.* Where a lower Appellate Court, from the replies of a judgment-debtor whom it examined, and from the circumstances of the case as set forth in the evidence came to the conclusion that the judgment-debtor had not proved that he was not possessed of property, so as to be entitled to the benefit of s. 273, Act VIII of 1859, and s. 8, Act XXIII of 1861:—*Held*, that there was no error of law in this finding. ABDOOL RUHMAN *v.* ABDOOL SOBHAN **12 W. R. 125**

14. ——— *Proof of bonâ fides—Procedure.* In making the application prescribed by Act VIII of 1859, s. 273, it was necessary for the judgment-debtor to satisfy the Court that he was acting *bonâ fide*. After the Court was satisfied that the allegations made by the judgment-debtor in his application and under examination were true, it might call upon the execution-creditor to show cause. GLADSTONE, WYLLIE & CO. *v.* WOOMESH CHUNDER CHATTERJEE . **25 W. R. 96**

15. ——— *Civil Procedure Code, 1859, s. 273—Mala fides. C D* repaired *P's* ship on his express representation that the

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INSOLVENCY—*contd.*

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repairs would be paid for by a letter of credit which the owners had sent for that purpose. *P* applied the funds to the payment of other creditors. *C D* sued him for the amount of the repairs, and obtained a decree, in execution of which *P* was imprisoned. The Court having refused to give him his discharge under s. 273 of Act VIII of 1859, he appealed. *Held*, on appeal, that a person who gets work done on the representation that it is to be paid for out of certain specific funds, which funds he afterwards applies in paying sums due to other creditors, is guilty of *mala fides* and of giving undue perference, and is therefore not entitled to his discharge under s. 273 of Act VIII of 1859. PASSMORE *v.* CALCUTTA DOCKING COMPANY . **Bourke A. O. C. 74**

16. ——— *Civil Procedure Code, 1859, s. 273—Circumstances entitling debtor to release.* Where the judgment-debtor applied for his discharge under s. 273 of Act VIII of 1859, and the Court, not being satisfied of his inability to pay and that he was honest and *bonâ fide* in dealing with his property, refused the application:—*Held*, that a prisoner for debt, if he be perfectly honest, without present means of payment, and has given every facility in his power to his creditors taking possession of his property, is entitled to release; that nothing short of this will entitle him to it. CHYET RAM *v.* RAMCHUNDER DUTT . . . . . **Bourke O. C. 101**

17. ——— *Civil Procedure Code, 1859, s. 273; and Act XXIII of 1861, s. 8—Application of the Small Cause Courts.* A defendant, arrested in execution of a decree of a Small Cause Court, applied to that Court, under s. 273 of the Civil Procedure Code, averring that the only property which he had was immoveable property, and he was willing to place it at the disposal of the Court. *Held*, that the judgment-debtor was liable to be called upon to show cause for not proceeding against the property described in the application in execution of his decree. SHAW *v.* SUBRAMIER . . . . . **5 Mad. 108**

18. ——— *Civil Procedure Code, 1859, s. 273—Insolvency—Order for discharge—Jurisdiction of District Judge.* Except under very special circumstances, a Judge ought not to make an order for the discharge of a defendant under Act VIII of 1859, s. 273. A party who voluntarily brings himself into the Insolvency Court in Calcutta was incapable of applying to a District Judge for a discharge under the above section, the property which he may be possessed of within the jurisdiction of the former Court not being subject to the latter. KISTO LALL GOSSAIN *v.* JOY GOPAL BYSACK . . **21 W. R. 185**

19. ——— *Judgment-debtor—Application for discharge—Salary.* A judgment-debtor in receipt of a monthly stipend was not entitled to obtain a discharge under s. 273 of Act VIII of 1859, unless he submitted to place that stipend at the disposal of the Court, that provision might be made for satisfaction of the debt. ASDUTDOWLAH REZA HOSSEIN KHAN *v.* HAMISADOWLAH ABED KHAN **6 B. L. R. 575 : 15 W. R. 204**

But *see* COOMBE *v.* CAW . **13 B. L. R. 268 22 W. R. 257**

20. ——— *Arrest in execution of decree—Ground for discharge—Act VIII of 1859, s. 273—Salary.* The fact that a judgment-debtor, who had been arrested in execution of a money-decree, was in receipt of a salary, was not sufficient cause to show against his discharge under s. 8 of Act XXIII of 1861. COOMBE *v.* CAW **13 B. L. R. 268 : 22 W. R. 257**

21. ——— *Civil Procedure Code, 1859, s. 280—Evidence.* Where a judgment-debtor applied for release from imprisonment under the provisions of s. 280, Act VIII of 1859, and the judgment-creditor adduced *primâ facie* evidence that the applicant had wilfully concealed property, or rights and interests in property, which evidence was rebutted, the Judge was held to have done right in rejecting the application. When a party seeks the assistance of a Court in any case in which the best knowledge of the disputed facts is with himself, he is bound to place that knowledge before the Court with the sanction of an oath. GUNGA CHURN DHUR *v.* KULINGA PA SETEE . . . . . **12 W. R. 422**

22. ——— *Onus probandi—Civil Procedure Code, 1859, s. 280.* Where a judgment-debtor applied from jail for his own release, putting in an affidavit and afterwards a deposition on oath, to the effect that he had no property whatever to satisfy the decree against him:—*Held*, that it was incumbent on the decree-holder to prove that these statements were false, and that, in the absence of such evidence, the judgment-debtor was entitled to his discharge. ABDOOL SETTAR *v.* MAKHUM KOOER . . . **25 W. R. 182**

23. ——— *Civil Procedure Code, 1859, s. 273—Act XXIII of 1861, s. 8—Concealment of property.* Where a judgment-debtor arrested in execution of a decree applied for his discharge under s. 273, Act VIII of 1859, but while pretending to furnish a complete statement of his property was shown to have concealed a portion, the lower Court was held to have acted properly, under s. 8, Act XXIII of 1861, in ordering him to prison. GUNGA GOBIND MUNDUL *v.* BONOMALEE PAUL . . . . . **14 W. R. 54**

24. ——— *Act XXIII of 1861, s. 8—Order illegal for non-compliance with provisions of the law—Subsequent application for arrest. Held*, that an order discharging a judgment-debtor under s. 8, Act XXIII of 1861, being illegal on account of non-compliance with the procedure

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prescribed by law, might be quashed and afterwards treated as a nullity, so as not to bar any subsequent application for arrest. LUCHMEE NARAIN *v.* BHAIROW PERSHAD . . . **1 Agra Mis. 4**

25. ——— *Act XXIII of 1861, s. 8—Power of Judge to detain defendant in custody.* The discretionary power of a Judge to detain a defendant in custody otherwise than by committing him to prison in execution of a decree was confined to the case provided for in Act XXIII of 1861, s. 8. SAHIB RAUTAN *v.* IBRAHIM RAUTAN **1 Mad. 441**

26. ——— *Act XXIII of 1861, s. 8—Application for discharge—Act VIII of 1859, ss. 273 and 280.* S. 8 of Act XXIII applied only to applications made under s. 273 of Act VIII of 1859, not to applications made under s. 280. SMITH *v.* BOGGS . **5 B. L. R. Ap. 21**

27. ——— *Sufficiency of security.* The question of the sufficiency of the security tendered by the judgment-debtor is one entirely for the lower Court to determine. *In the matter of* BHOOBUN MOHUN BOSE **15 W. R. 571**

28. ——— **Application to be declared insolvent**—*Civil Procedure Code, 1882, s. 344—Onus probandi.* A person applying under s. 344 of the Code of Civil Procedure must satisfy the Court that his case comes within the provisions of s. 351, and the burden of proof lies upon him. MUMTAZ HOSSEIN *v.* BRIJ MOHUN THAKOOR **I. L. R. 4 Calc. 888**

29. ——— *Civil Procedure Code, 1882, s. 351—Insolvent judgment-debtor—"Unfair preference."* *J.*, in pursuance of a previous agreement with *B*, and on being pressed by *B*, who had a pecuniary claim against him, which nearly equalled half the amount of all the pecuniary claims against him, assigned to *B* the whole of his property by way of sale, in consideration in part of *B's* pecuniary claim against him. *Held*, that by such assignment *J* did not give *B* an "undue preference" to his other creditors within the meaning of s. 351 of Act X of 1877. JOAKIM *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 3 All. 530**

30. ——— *Civil Procedure Code, 1882, s. 351—Insolvent judgment-debtor.* A judgment-debtor applied to be declared an insolvent. Certain of the claims against him were claimed under decrees. The Court of first instance refused the application, notwithstanding the statements in the application were substantially true, and the applicant had not committed any act of bad faith mentioned in s. 351 of the Civil Procedure Code, on the ground that the applicant had contracted the debts for which such decrees had been made dishonestly, and that section gave the Court in such a case a discretionary power to refuse the application. *Held*, that the Court of first instance had taken an erroneous view of s. 351, and had assumed a wider discretion than the law conferred on it. If a person making an application to be declared an insolvent has not brought himself within cl. (*a*), (*b*), (*c*), or (*d*) of that section, then the Court has no discretion on other grounds to refuse the application. The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal, or concealment of property, the making false statements in the application, are all dealt with in s. 351, and are intended to confine the category of acts of misconduct that will debar the applicant from obtaining the relief and protection he asks. SALAMAT ALI *v.* MINAHAN . . . **I. L. R. 4 All. 337**

31. ——— *Civil Procedure Code, 1882, s. 351 (a)—Insolvent judgment-debtor—Accidental false statement in application.* Before rejecting an application by a judgment-debtor for a declaration of insolvency with reference to the provisions of s. 351 (*a*) of the Civil Procedure Code, it is necessary that the Court should be satisfied that the applicant has wilfully made false statements: unintentional inaccuracies are not sufficient grounds for rejection. KARIM BAKSH *v.* MISRI LAL . . . **I. L. R. 7 All. 295**

32. ——— *Civil Procedure Code, s. 351 (b)—Insolvent judgment-debtor—"Property"—Fraudulent intent.* S. 351 (*b*) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division; and it does not cover an omission by the judgment-debtor, in his application for a declaration of insolvency of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud. SUKRIT NARAIN LAL *v.* RAGHUNATH SAHAI . . . . **I. L. R. 7 All. 445**

33. ——— *Plaintiff imprisoned for costs of unsuccessful action.* A plaintiff imprisoned at the suit of the defendant for the costs of an unsuccessful action was not a proper object for the application of s. 281, Act VIII of 1859. *In the matter of* BEENARUSSEE DOSS . **Cor. 123**

34. ——— *Application for discharge—Plaintiff—Imprisonment for costs of suit.* S. 281 of Act VIII of 1859 did not apply to a plaintiff in custody for the costs of a suit. *In re* EDULJEE RUTTONJEE . **10 B. L. R. Ap. 27**

35. ——— *Civil Procedure Code, 1859, ss. 280 and 281—Bad faith.* A person in custody who had been guilty of bad faith in

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the transactions relative to which he was detained, but not with regard to his application under s. 280 of Act VIII of 1859, was entitled to his discharge. ANONYMOUS . **1 Ind. Jur. N. S. 8**

36. ——— *Civil Procedure Code, 1859, s. 281—Application for discharge—"Bad faith."* When an insolvent was brought up for the purpose of obtaining his discharge:—*Held*, that the "bad faith" mentioned in s. 281, Act VIII of 1859, must be in respect of the debt for which he was imprisoned, and with regard to which the application was made. ORIENTAL BANK *v.* MANIMADHAB SEN . . . **3 B. L. R. Ap. 14**

37. ——— *Application for discharge—"Bad faith"—Civil Procedure Code, 1859, s. 281.* "Bad faith" in s. 281, Act VIII of 1859, meant bad faith not only in respect of the application, but included bad faith on previous occasions. SMITH *v.* BOGGS **5 B. L. R. Ap. 22**

38. ——— *Application for discharge—"Bad faith"—Civil Procedure Code, 1859, s. 281.* "Bad faith" in s. 281 of Act VIII of 1859 referred only to bad faith in respect of an application under that section. *In re* GURUDAS BOSE . . . . **7 B. L. R. Ap. 23**

39. ——— *Application for discharge—"Bad faith"—Civil Procedure Code, 1859, s. 281.* In an application for discharge under s. 281, Act VIII of 1859, the "bad faith" must be bad faith in respect of the application. BUTLER *v.* LLOYD . . . . **12 B. L. R. Ap. 12**

40. ——— *Application for discharge—Omission to state in petition where property would be found.* In an application for discharge under ss. 280 and 281 of Act VIII of 1859, the properties entered in the defendant's schedule consisted entirely of moveables, and the petition did not state the place or places where such property would be found. *Held*, that it was a substantial defect in the application, which was refused. WATKINS *v.* ROHEENEE BULLUB **10 B. L. R. Ap. 11**

41. ——— *Cost of deposition of defendant.* Where the plaintiff, in order to make the proof referred to in s. 281, Act VIII of 1859, chooses to examine the defendant, he must pay for the oath and the cost of reducing the deposition of the witness to writing. It would be otherwise under s. 8, Act XXIII of 1861, in which case the fee is demandable from the applicant. EDMOND *v.* NIERSES **8 B. L. R. Ap. 22 : 16 W. R. 84**

42. ——— *Civil Procedure Code, 1859, ss. 275, 281—Application for discharge—"Bad faith."* The acts of bad faith referred to in ss. 275 and 281 were not limited to acts of bad faith committed by the prisoner in his application for discharge, or for the purpose of procuring his discharge, but included acts of bad faith in the manner of incurring his original liability. *In re* SOOPERSAUD . **2 Ind. Jur. N. S. 91**
In re SIBCHUNDER KURMOKAR **2 Ind. Jur. N. S. 93 note**

43. ——— *Civil Procedure Code, 1877, s. 351—Acts of bad faith—"Matter of the application."* The words used in cl. (*d*) of s. 351, "the matter of the application" embrace the insolvency, and all the facts and circumstances material to explain the insolvency. Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency may be held to be part of the matter of the application. A Judge would not be exercising a right discretion under s. 351 if he refused relief in the case of persons who, although knowing that they had not the means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually. BAVACHI PACKI *v.* PIERCE, LESLIE & Co. . **I. L. R. 2 Mad. 219**

44. ——— *Civil Procedure Code, 1882, s. 351—"Other act of bad faith"—Act of bad faith committed by applicant for declaration of insolvency antecedently to his application.* The expression "any other act of bad faith" as used in s. 351, cl. (*d*), of the Code of Civil Procedure, means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution and whether or not the bad faith is connected with the liability which has resulted in that decree. *Bavachi Packi* v. *Pierce, Leslie & Co., I. L. R. 2 Mad. 219*, approved. *Salamat Ali* v. *Minaham, I. L. R. 4 All. 337*, distinguished. GOPAL DAS *v.* BIHARI LAL . . **I. L. R. 17 All. 218**

45. ——— *Judgment-debtor in jail—Civil Procedure Code (Act XIV of 1882), ss. 336, 339, 344, 345, 349, 350, 351, 359—Arrest, imprisonment, meaning of—11 and 12 Vict., c. 21, s. 24—Undue preference.* A judgment-debtor arrested in execution of a decree for money, who has not on his committal to jail, expressed his intention of applying to be declared an insolvent under Ch. XX of the Code of Civil Procedure, is nevertheless entitled during his imprisonment to make an application for that purpose; and the Court may, under s. 349, pending the hearing of such application, release him on his finding security to appear when called upon. In deciding whether or no a payment made to a particular creditor amounts to an unfair preference within the meaning of s. 351 of the Code, the Courts may fairly (where there is

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no other reason for impeaching the transaction as an unfair preference apart from the provisions of the Insolvency Act) refer to, and be guided by, the provisions of the Insolvency Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings. *In the matter of* HASTIE
I. L. R. 11 Calc. 451

46. ——— *Civil Procedure Code, ss. 351, 352—Omission of Court to follow proper procedure—Declaration of insolvency, effect of.* A judgment-debtor, having applied to be declared an insolvent under s. 344 of the Code of Civil Procedure, entered the name of *A* in the list of his creditors together with the amount of the debt. No creditors appearing to oppose the application or prove their debts, the Court, without framing a schedule as required by s. 352, declared the judgment-debtor an insolvent under s. 351. In a suit brought by *A* to recover the debt:—*Held*, that, as the provisions of s. 352 had not been followed, the declaration under s. 351 could not operate as a decree between the insolvent and *A*, and that *A* was entitled to a decree. ARUNACHALA *v.* AYYAVU . . . **I. L. R. 7 Mad. 318**

47. ——— **Surety-bond**—*Execution—Act VIII of 1859, s. 204.* A surety-bond taken by the Court under s. 8 of Act XXIII of 1861, after judgment has been pronounced, could be enforced under s. 204 of Act VIII of 1859. ABDUL KARIM *v.* ABDUL HAQUE KAZI . . .
8 B. L. R. 205 : 15 W. R. 21

48. ——— **Court-fees**—*Act VIII of 1859, s. 381.* In cases under s. 8, Act XXIII of 1861, the fee for the oath and the cost of reducing the deposition of the defendant to writing was payable by the defendant. EDMOND *v.* NIERSES
8 B. L. R. Ap. 22 : 16 W. R. 84

49. ——— **Application by "unscheduled" creditor**—*Civil Procedure Code, ss. 352, 353—Creditor when to prove debt—Meaning of "then" in s. 352.* A judgment-debtor was declared an insolvent and a receiver of his property appointed under s. 351 of the Civil Procedure Code, and his creditors were ordered to come forward and prove their claims within a certain time. No creditor came forward for that purpose within such time, and in consequence the case was struck off the file, and the order appointing a receiver cancelled and no schedule was framed under s. 352. Subsequently a creditor applied to have his name entered in such schedule. *Held*, that the applicant, notwithstanding no schedule had been framed, was an "unscheduled" creditor, and was therefore entitled, under s. 353 of the Civil Procedure Code, to make the application. MADHO PRASAD *v.* BHOLA NATH . **I. L. R. 5 All. 268**

50. ——— **Application by creditor to prove claim**—*Limitation Act (XV of 1877), Sch. II, Art. 178—Civil Procedure Code, ss. 352, 353.* In July 1878 a person was declared an insolvent under the provisions of Ch. XX of the Civil Procedure Code. Only one creditor then proved his debt, and no schedule was framed. This creditor having applied for the sale of property belonging to the insolvent, another creditor, in May 1883, applied to prove his debt and to have his name inserted in the schedule which the Court then ordered to be framed. *Held*, that such application could not be treated as made under s. 353, as no schedule had been framed, but must be regarded as in the nature of a tender of proof of debt under s. 352. PARSHADI LAL *v.* CHUNNI LAL . . . **I. L. R. 6 All. 142**

51. ——— **Effect of discharge**—*Mortgage—Secured creditor—Receiver—Code of Civil Procedure, 1877, ss. 352 to 355.* A judgment-debtor arrested and imprisoned in execution, applied to be declared an insolvent, and included a mortgage-debt in his application. Notice was issued to the mortgagee, who failed to appear and prove his claim, and was consequently omitted from the schedule prepared under s. 352 of the Code of Civil Procedure. A receiver was appointed under s. 354; the whole of the property of the insolvent was made over to the receiver, including the nine fields mortgaged, which the insolvent held as tenant of the mortgagee. The receiver sold one out of the nine fields to satisfy the creditors entered in the schedule, and ultimately restored the remaining eight fields to the judgment-debtor. The mortgagee then sued to eject the judgment-debtor for default in payment of rent. The latter pleaded his discharge under s. 355. *Held*, that the discharge did not affect the mortgage-debt, and that a receiver is bound, as a condition of dealing with mortgaged property, in every case to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule, the position of the mortgagee being essentially different from that of the unsecured creditor. Case of *Chetalal v. Nahansi, Printed Judgments, Bombay, p. 89*, distinguished. SHRIDHAR NARAYAN *v.* ATMARAM GOVIND
I. L. R. 7 Bom. 455

52. ——— **Declaration of insolvency ultra vires**—*Civil Procedure Code, 1882, ss. 344, 351, and 356—Jurisdiction, Want of—Execution of a decree—Sale—Completion of sale.* The plaintiff Gangadhar obtained a decree against the defendant. In execution of that decree, certain property was attached on 5th March 1881. Although the judgment-debtor was not arrested in execution of that decree, nevertheless he, on the 18th October 1882, applied to the Court of the Subordinate Judge to be declared an insolvent under s. 344 of the Code of Civil Procedure (Act XIV of 1882). He was declared an insolvent under that section and the Nazir of the Court was appointed a receiver on 22nd December 1883. The receiver proceeded under the direction of the Court to convert the property of the

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insolvent into money under s. 356 (*a*) of the Code. Certain immoveable property was purchased by the petitioner Tukaram for R1,032 on 4th December 1884. Tukaram, after some time, presented an application, in which he stated that, inasmuch as the insolvent had not been arrested in execution of the decree obtained by Gangadhar, the Court had no jurisdiction; and he prayed that, if such was the case, the sale should be set aside, and the money returned to him. No appeal was preferred by the judgment-creditor, or other creditors of the insolvent, against the order of insolvency made under s. 351 of the Code. The Subordinate Judge referred the following question to the High Court, *viz.*, "whether a Court which has declared the insolvency of a judgment-debtor can direct the receiver to proceed under s. 356 of the Code and complete any sale, though the purchaser objects to the direction on the ground of want of jurisdiction in the Court, which objection seems to the Court to be valid, but too late." *Held*, that, as the declaration of insolvency was *ultra vires*, the Subordinate Judge should take no further steps to give effect to it, but leave the parties concerned to take such measures as they may be advised. GANGADHAR BHIVRAV *v.* DATTO KRISHNAJI **I. L. R. 9 Bom. 368**

53. ——— **Agreement to satisfy debts in full**—*Discharge from liability—Civil Procedure Code, s. 358.* An insolvent who had procured, and taken, and acted on an insolvency order which had been granted to him, because of the withdrawal of the opposition of his creditors, by reason solely of his engagement to pay a certain sum monthly until the whole of his debts should be discharged after his scheduled debts had been satisfied to the extent of one-third, applied under s. 358 of the Civil Procedure Code to be declared discharged from further liability in respect of his debts. *Held*, that, under the circumstances, his application had properly been refused. DOWNES *v.* RICHMOND . . . **I. L. R. 5 All. 258**

54. ——— **Refusal to adjudicate debtor insolvent, grounds for**—*Civil Procedure Code (Act XIV of 1882), s. 351, Ch. XX.* A Court cannot refuse the application of a judgment-debtor seeking to be declared an insolvent under the provisions of Ch. XX of the Civil Procedure Code unless it finds affirmatively that the applicant has brought himself within cl. (*a*), (*b*), (*c*), or (*d*) of s. 351 of the Code; and the fact that his schedule assets exceed his liabilities does not disentitle him to such relief. A judgment-debtor applied to be declared an insolvent under the provisions of Ch. XX of the Code of Civil Procedure. The District Judge refused the application on the ground that the assets were admittedly in excess of the liabilities and that he had made no effort for a period of two years to realize his property for the benefit of his creditors. *Held*, that the District Judge was bound to grant the application, as the applicant had not brought himself within cl. (*a*), (*b*), (*c*), or (*d*) of s. 351, in which cases alone he had a right to refuse the application. *In the matter of the petition of* JOWALLA NATH. JOWALLA NATH *v.* PARBATTY BIBI . . . **I. L. R. 14 Calc. 691**

55. ——— **Application for a declaration of insolvency showing that applicant has assets apparently in excess of his liabilities**—*Civil Procedure Code, 1882, s. 344 et seq.—Burden of proof.* It does not follow that, because a person has assets of a nominal value in excess of his liabilities, he is not entitled to be declared an insolvent. But where a person applies to be declared an insolvent and shows in his statement that his assets exceed his liabilities, he must show also that by the sale of his interests or other realization of his assets a sum would not be secured which would enable him to pay his debts in full. *Jowalla Nath* v. *Parbatty Bibi, I. L. R. 14 Calc. 691*, discussed. BALDEO DAS *v.* SUKHDEO DAS **I. L. R. 19 All. 125**

56. ——— **Ex parte decree subsequent to insolvency**—*Execution of decree—Civil Procedure Code, Ch. XX, ss. 344-360—Attachment—Receiver in insolvency.* An insolvent, to whose estate no receiver under Ch. XX of the Code of Civil Procedure had ever been appointed, entered in his schedule the names of certain persons as creditors for a sum of R210-9-3. These creditors subsequently obtained against the insolvent an *ex parte* decree for the sum so entered in the schedule, and in execution attached certain pay which the insolvent was then earning, but which he was not in receipt of at the time his schedule was filed, and did not appear therein as an asset of his estate. *Held*, that the judgment-creditors were entitled to take out execution, and were not prevented from so doing by reason of the insolvency proceedings. *In the matter of* BADAL SINGH *v.* BIRCH . . **I. L. R. 15 Calc. 762**

57. ——— **Execution of decree**—*Civil Procedure Code, s. 351.* A decree-holder in respect of whose judgment-debtor an order declaring him insolvent and appointing a receiver has been passed under s. 351 of the Code of Civil Procedure, and whose decree has been placed on the list of the judgment-debtor's schedule debts, cannot, *pari passu* with the proceedings in insolvency, go on executing his decree in the ordinary way against that judgment-debtor. *Badal Singh* v. *Birch, I. L. R. 15 Calc. 762*, and *Abdool Rahman* v. *Behari Puri, I. L. R. 10 All. 194*, distinguished. GAURI DATT *v.* SHANKAR LAL . . **I. L. R. 14 All. 358**

58. ——— **Procedure on claim made by creditor**—*Civil Procedure Code, ss. 315, 352—Proof of debt.* It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt and to

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INSOLVENCY—*contd.*

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apply to be admitted on the schedule under s. 352 of the Code of Civil Procedure. LAKSHMANAN *v.* MUTTIA . . . **I. L. R. 11 Mad. 1**

59. ———— Insolvent judgment-debtor —*Civil Procedure Code, ss. 344, 588—Notice to decree-holder.* A debtor was arrested on civil process. He presented a petition to the Court from which process issued alleging that he was unable to pay the debt and praying to be declared insolvent and to be released. The Court passed an order on the same day, directing that he should be released, and that the creditor should proceed against his property. *Held*, that the order was bad for want of notice. KOMARASAMI *v.* GOBINDU **I. L. R. 11 Mad. 136**

60. ———— Unfair preference—*Civil Procedure Code, 1882, s. 351.* A creditor can put pressure on his debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances. But a debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the aliquot share of the other creditors, acts fraudulently, and no title is given to that particular creditor as against the assignees who represent the creditors generally. *A* filed a suit and obtained a decree against *B*. During the pendency of the suit, and only four days before the decree was passed *B* assigned by way of mortgage nearly the whole of his property to one of his creditors, *C*. The assignment was made not to secure a fresh advance, but in consideration of past debts due to *C*. *C* was aware of *B's* embarrassments. Two years afterwards *B* was arrested in execution of *A's* decree. *B* thereupon applied to be declared an insolvent. *Held*, that the assignment by *B* of nearly the whole of his property to *C* amounted, under the circumstances, to an unfair preference, within the meaning of s. 351, cl. (*c*), of the Code of Civil Procedure (XIV of 1882). *B* was therefore not entitled to be declared an insolvent. DADAPA *v.* VISHNUDAS **I. L. R. 12 Bom. 424**

61. ———— Judgment-debtor declared insolvent pending suit—*Civil Procedure Code, s. 352—Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Decree-holder scheduling his decree under Civil Procedure Code, s. 352—Effect of schedule.* A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hyhothecation-decree was declared an insolvent, and the plaintiff schedule his decree as a claim under s. 352 of the Civil Procedure Code. *Held*, that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree, unmaintainable. ABDUL RAHMAN *v.* BEHARI PURI . . . **I. L. R. 10 All. 194**

62. ———— Debt not in schedule—*Civil Procedure Code, 1882, ss. 336, 337—Act VI of 1888—Execution of decree obtained against insolvent for such debt—Scheduled debts.* A person who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree merely because his property is in the hands of the receiver in insolvency. Such a person is liable to arrest under the circumstances, and in accordance with the procedure provided for by the Civil Procedure Code, Amendment Act (VI of 1888). PANNA LALL *v.* KANHAIYA LALL . **I. L. R. 16 Calc. 85**

63. ——————— *Civil Procedure Code, ss. 344, 350, 352, 357, 358—Omission to come in and prove debt.* A judgment-debtor arrested in execution of a decree filed his petition, and was adjudicated an insolvent under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend, and her name was not included in the schedule of creditors. The insolvent was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent: *Held*, that the discharge of the insolvent did not operate as a discharge of the debt under s. 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property. *Semble:* Under s. 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him, unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them. HARO PRIA DABIA *v.* SHAMA CHARAN SEN . . . **I. L. R. 16 Calc. 592**

64. ———— Receiver selling a mortgaged property of insolvent—*Civil Procedure Code, 1882, ss. 354, 355, and 356—Purchaser at such sale—Right of mortgagee unaffected by such sale.* By an order, dated the 9th July 1879, *A* was declared an insolvent under s. 351 of the Civil Procedure Code (Act XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of *A's* property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he

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INSOLVENCY—*contd.*

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was consequently omitted from the schedule of *A's* creditors. The receiver sold one of the fields which was purchased by *A's* undivided son, *G*. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors, the receiver made over to *A* the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued *A* for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, *G* sold to the defendant the field which he had purchased. In execution of his decree, the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it. *Held*, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under s. 354, he under s. 356 was directed to convert it into money. *G* therefore at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in *G's* shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done. The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee) or paying him off. S. 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with s. 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee. SHRIDHAR NARAYAN *v.* KRISHNAJI VITHOJI

I. L. R. 12 Bom. 272

65. ——— Insolvent but undischarged judgment-debtor—*Civil Procedure Code, 1882, ss. 351, 355, 356, and 357—Application by scheduled creditors to sell subsequently-acquired property of the insolvent.* The provisions of s. 357 of the Code of Civil Procedure are not applicable until the insolvent has been discharged under s. 351 or s. 355 of the Code. Hence where some of the scheduled creditors of a judgment-debtor, who had been declared an insolvent, and in respect of whose property a receiver had been appointed, but who had not been discharged, presented an application to the Court, purporting to be made under s. 357 of the Code of Civil Procedure praying for the sale of certain property which had come by inheritance to the judgment-debtor, and the Court, also purporting to act under s. 357 of the Code, made an order on such application allowing the property in question to be released from attachment on deposit by the insolvent of one-third of the scheduled debts: *Held*, that, although the Court might have acted under s. 356 of the Code yet, as its order purported to be under s. 357, it was *ultra vires* and must be set aside. GANESHI LAL *v.* MUSARRAT ALI. GIRWAR LAL *v.* MUSARRAT ALI

I. L. R. 16 All. 234

66. ——— Application by judgment-debtor to be declared insolvent—*Civil Procedure Code, 1882, ss. 344, 351, and 354—Order for sale of mortgaged property in execution—Sale in execution pending application—Effect of subsequent declaration of insolvency.* An order for the sale of mortgaged property had been made on the application of the mortgagee, who had got a decree, and before the sale had taken place, the mortgagor (judgment-debtor) applied to be made insolvent under s. 344 of the Civil Procedure Code (Act XIV of 1882). Five months after the sale, he was duly declared an insolvent under s. 351. *Held*, that the subsequent declaration of the mortgagor's insolvency did not affect the sale or render it illegal. No consequences in derogation of the ordinary rights of judgment-creditors follow from an application by the judgment-debtor under s. 344 of the Civil Procedure Code. It is only when a receiver is appointed under s. 351 that the property of the insolvent vests in the receiver under s. 354, and the rights of the creditor are interfered with. It is not provided that such an order shall have any retrospective effect. ISHVAR LAKHMIDAT *v.* HARJIVAN RAMJI . . . **I. L. R. 21 Bom. 681**

67. ——— Holder of decree on mortgage not entered amongst the scheduled creditors—*Civil Procedure Code, 1882, ss. 344 et seqq.—Decree-holder not debarred from executing his decree.* *Held*, that a judgment-creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Haro Pria Dabia* v. *Shama Charan Sen, I. L. R. 16 Calc. 592*, and *Shridhar Narayan* v. *Atmaram Gobind, I. L. R. 7 Bom. 455*, referred to. SHEORAJ SINGH *v.* GAURI SAHAI . . **I. L. R. 21 All. 227**

68. ——— Discharge of insolvent—*Civil Procedure Code (Act XIV of 1882) Ch. XX, ss. 344-360—Future earnings of insolvent, power of Court to compel payments out of, towards liquidation of debts.* The function of the Court, acting under Ch. XX of the Code of Civil Procedure, is to compel insolvent debtors to pay their debts if it can either by its compulsory process or, where that cannot be used, by withholding from them, when it has the power of doing so, the relief to which they might otherwise be considered entitled. The granting of an order of discharge under that chapter is to a certain extent discretionary with the Court, and if the Court be of opinion that an insolvent may reasonably be expected to possess an income

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INSOLVENCY—*contd.*

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accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hand and require him as a condition of such discharge to satisfy it by payments on account of his debts, that he really desires, so far as he can, honestly to discharge the debt that he owes. A Gyawal, who was in receipt of a very considerable income derived from offerings made by pilgrims, applied to be declared an insolvent under the provisions of Ch. XX of the Code of Civil Procedure. He was opposed by a judgment-creditor, who, *inter alia*, contended that the insolvent should be compelled to contribute out of his income towards the payment of his debts. The Court, finding that there were no assets, and holding that such income was not properly capable of being attached, and that it had no power to order an insolvent to pay anything out of future earnings towards the discharge of his debts declared the applicant an insolvent and granted him his discharge. *Held*, that the Court had power to withhold the discharge until the insolvent had satisfied it, by payments on account of his debts, that he really desired to discharge his debts, and that, under the circumstances of the case, both having regard to the fact that the inquiry into the estate of the insolvent had been insufficient and to the fact that he was in a position to contribute out of his income towards the payment of his debts, the order was wrong and should be set aside. POONA LAL *v.* KANHAYA LALL BHAIA **I. L. R. 19 Calc. 730**

69. ——— Procedure in case of dishonest applicant—*Civil Procedure Code, ss. 353, 359—Powers of Court.* A Court is competent to take action under s. 359 of the Civil Procedure Code at the instance of a creditor, after the hearing under s. 350 has determined. When once any of the frauds referred to in cl. (*a*), (*b*), or (*c*) of s. 359 have been proved at a hearing under s. 350, the Court must under s. 359 either itself pass sentence on the applicant who has committed such frauds, or must send him to a Magistrate to be dealt with according to law. The Court has no option to decline to adopt either of these courses. In acting under s. 359, the Court does not re-try the questions of fact decided by it t the hearing under s. 350, but has to proceed upon the findings come to at that hearing. An applicant for a declaration of insolvency who does not avail himself of his right of appeal from the order rejecting his application is concluded by the findings of fact at the hearing under s. 350, and cannot afterwards question them. *Per* STRAIGHT, *J.*—It is desirable that an application under s. 359 should be made immediately, or as soon as possible after the hearing under s. 350, but a delay of some months will not make the application unentertainable. KADIR BAKSH *v.* BHAWANI PRASAD . . . **I. L. R. 14 All. 145**

INSOLVENCY—*contd.*

9. INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—*contd.*

70. ——— Withdrawal of application by applicant without permission to renew—*Civil Procedure Code (1882), ss. 350, 359, and 373—Powers exercisable by Court under s. 359—Imprisonment—Payment of costs as a condition precedent to the granting of permission to withdraw.* A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by a creditor, pass an order of imprisonment under that section; and if on the motion of a creditor it has ordered the imprisonment of the applicant, it cannot subsequently act under the last clause of s. 359. *Kadir Baksh* v. *Bhawani Prasad, I. L. R. 14 All. 145*, referred to. Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i.e.*, without permission to renew the application: *Held*, that the Court could not make the payment by the applicant of the opposing creditor's costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application but that such proceedings were finally determined by the applicant's withdrawal. HAIDAR SHAH *v.* JAMNA DAS . **I. L. R. 17 All. 156**

71. ——— Application for declaration of insolvency—*Civil Procedure Code, s. 344—Who may apply for declaration of insolvency—Judgment-debtor arrested or imprisoned. Held*, that s. 344 of the Code of Civil Procedure does not apply to the case of a judgment-debtor who had indeed been arrested in execution of a decree for money, but who had been released after a few hours' detention owing to the creditor's failure to pay subsistence money, and some twenty days after his release applied to the Court to be declared insolvent. It is only a person against whom proceedings under s. 344 are actually pending who is entitled to make the application permitted by that section. JUMAI *v.* MUHAMMAD KAZIM ALI (1902) **I. L. R. 25 All. 204**

72. ——— Arrest—*Civil Procedure Code (Act XIV of 1882), ss. 336, 344—Arrest of judgment-debtor—Petition under s. 366—Release on furnishing security to apply to be declared insolvent within a month—Failure to apply within that time—Subsequent application under s. 344—Maintainability.* A judgment-debtor, who had been arrested, was released under s. 366 of the Code of Civil Procedure on furnishing security that he would, within one month, apply to be declared an insolvent. The month passed, and he failed to make the application. He was not arrested again, and, at a subsequent date, applied under s. 344 to be declared an insolvent. *Held*, that he was entitled to do so. ALAGAPPA CHETTI *v.* SARATHAMBAL (1902) **I. L. R. 25 Mad. 724**

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INSOLVENCY—*contd.*

9. INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—*contd.*

73. ———— Examination of insolvent—*Civil Procedure Code (Act XIV of 1882), ss. 345, 346 and 350.* The examination of an insolvent under s. 350, Civil Procedure Code, is only necessary where the judgment-debtor is declared an insolvent upon his own application, not where he is adjudicated an insolvent at the instance of the judgment-creditor. GOURI KANT BURMAN *v.* DAMODAR DAS BURMAN (1900)
5 C. W. N. 90

74. ———— Notice of insolvency—*Civil Procedure Code (Act XIV of 1882), ss. 347, 350, 351, 353 and 578—Notice of insolvency, irregularity in posting, effect of—Examination of insolvent in application by judgment-creditor—Adjudication order, grounds for setting aside—Fraud—Collusion—Creditor, claim by a —Onus of proving claim when so required under s. 353, Civil Procedure Code—Receiver in insolvency, purchase by.* The provision of s. 347 with regard to posting up the notice of insolvency in Court is, especially in the case of an application by the decree-holder, merely of a directory character and does not go to the jurisdiction of the Court to deal with the matter. *Reid* v. *Croft, 5 Bing. N. C. 68,* and *Wight* v. *Maunder, Beav. 512,* referred to. Non-compliance with the above provision is a mere irregularity, which, in the absence of any proof of prejudice, is cured by s. 578, Civil Procedure Code. The provisions of ss. 350 and 351, Civil Procedure Code, relate to an application by the judgment-debtor for relief under Ch. XX, and not to an application by the judgment-creditor. An adjudication order can only be set aside on the ground that it has been obtained by a fraudulent representation of indebtedness in favour of the creditor, who has obtained the order when there is no debt whatsoever, or for want of jurisdiction. When charges of fraud and collusion are made, they must be put in a sufficiently specific manner to enable the other side to combat them. *Wallingford* v. *The Mutual Society, L. R. 5 App. Cas. 697,* and *Ganga Narain Gupta* v. *Tilukram Choudry, I. L. R. 15 Calc. 533,* referred to. Under s. 352, Civil Procedure Code, when any creditor requires any other creditor to prove his claim, the onus is upon the creditor who has to prove his claim to establish it. It is a matter to be dealt with by the Judge upon the evidence forthcoming in the case. The purchase by a Receiver in insolvency of property belonging to the insolvent's estate is irregular, and the Court ought not to sanction such a purchase. RAM KOMAL SAHA *v.* BANK OF BENGAL OF AKYAB (1900)
5 C. W. N. 91

75. ———— Schedule—*Execution of decrees—Civil Procedure Code (Act XIV of 1882), s. 357—Debt not included in the Schedule—Insolvent debtor, discharge of —Right of creditor, not in the Schedule, against the discharged insolvent's property*

INSOLVENCY—*contd.*

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—Limitation Act (XV of 1877), Sch. II, Arts. 178, 179. A creditor whose debt has not been included in the scheduled debts, within the meaning of s. 357 of the Code of Civil Procedure, is entitled to proceed with the execution of his decree against the insolvent's property, notwithstanding his discharge. *Haro Pria Dabia* v. *Shama Charan Sen, I. L. R. 16 Calc. 592,* and *Sheoraj Singh* v. *Gouri Sahai, I. L. R. 21 All. 227,* referred to. On an application for execution of a decree having been made by the decree-holder, the salary of the judgment-debtor was attached. The judgment-debtor having represented that, as all his property had vested in a Receiver, he having taken insolvency proceedings, the execution could not be carried on, the Court released from attachment the salary of the judgment-debtor which had been attached. Subsequently, the insolvency proceedings came to an end, by the discharge of the Receiver. Within three years from the final discharge, the decree-holder made another application, asking the Court to revive his former application for execution. The judgment-debtor objected to the execution on the ground that it was barred by limitation. *Held,* that the case was governed by Art. 178, Sch. II, of the Limitation Act, and that the present application was one in continuation of the previous application, and, it having been made within three years from the time when the decree-holder became entitled to ask the Court to revive his former application by reason of the insolvency proceedings having been brought to an end by the discharge of the Receiver, was not barred by limitation. Where a decree directed that the "plaintiff shall not be able to take out execution of decree until the disposal of petition for insolvency made by the defendants before the District Judge of Patna," and the application for execution was not made until after three years from the date of the order of the first Court in the insolvency proceedings: *Held,* that the limitation applicable to the execution of such decree was that provided for by Art. 176, Sch. II, of the Limitation Act (XV of 1877), and that the application for execution was barred by limitation, it not having been made within three years from the date of the order of the first Court, under s. 351 of the Civil Procedure Code, granting the petition for insolvency, when the right to make the application first accrued. *Muhammad Islam* v. *Muhammad Ahsan, I. L. R. 16 All. 237,* referred to. ASHRAFUDDIN AHMED *v.* BEPIN BEHARI MULLIK (1902)
I. L. R. 30 Calc. 407

76. ———— Insolvency order, setting aside of—*Fraudulent misrepresentation of judgment-debtor's residence—Court, inherent power of—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 108, Ch. XX.* S. 108 of the Civil Procedure Code does not apply to the setting aside of an insolvency order. An insolvency order may be set aside, if it was ob-

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INSOLVENCY—*contd.*

9. INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE—*contd.*

tained by fraud or in the absence of jurisdiction on the part of the Court making the order. *Ram Komal Saha* v. *Bank of Bengal of Akyab, 5 C. W. N. 91* relied on. A Court has inherent power to set aside an insolvency order obtained from it by a fraudulent misrepresentation of the residence of the judgment debtor, such order being one without jurisdiction. SARAT CHANDRA MUKHERJI *v.* MAHOMED HOSSEIN (1904) . **8 C. W. N. 468**

77. ——— Order of Insolvency Court, if judgment of High Court—*Insolvency, jurisdiction of the High Court—Suit on order for costs awarded by Insolvency Court, if maintainable—Civil Procedure Code (Act XIV of 1882), s. 244—Limitation Act (XV of 1877), Sch. II, Art. 122—Interest.* An order of the High Court in the exercise of its insolvency jurisdiction is a judgment of the High Court and a suit based upon such order is maintainable. *In the matter of Candas Narrondas (Navivahu* v. *C. A. Turner), L. R. 16 I. A. 156 : s.c. I. L. R. 13 Bom. 520 ;* and *Attermony Dossee* v. *Hurry Doss Dutt, I. L. R. 7 Calc. 74 : s.c. 9 C. L. R. 357,* referred to. Such a suit is governed by Art. 122, Sch. II of the Limitation Act. The plaintiff sued to recover the amount of costs due under an allocatur issued by the Registrar of this Court on the 7th of September 1902 in respect of certain costs ordered by this Court in its insolvency jurisdiction on the 1st of June 1892. The order did not provide for payment of interest. *Held,* that the plaintiff was not entitled to interest on the amount. ANNODA PRASAD BANERJEE *v.* NOBO KISSORE ROY (1905) . . **9 C. W. N. 952**

78. ——— Arrest of insolvent—*Insolvency of judgment-debtor—Receiver appointed, but no order of discharge—Application by creditor to execute decree by arrest of insolvent—Maintainability.* S applied to the Court of a District Munsif to be declared an insolvent. After notice to his creditors, amongst whom was the present petitioner, the holder of a decree against *S*, the District Munsif passed an order declaring *S* insolvent. A receiver was appointed to take charge of the insolvent's properties and he was put in possession of all of them excepting two items, one of which was not included in the schedule. The receiver realised assets and made distributions among the creditors entitled, but no order was passed by the Court either discharging or refusing to discharge the insolvent. The present petitioner then applied to the Court for the arrest of the insolvent in execution of his decree :—*Held,* that, in the circumstances, the insolvent could not be arrested. If an insolvent prevents the receiver from obtaining possession of his properties or if it subsequently transpires that he has committed some act of bad faith then the Court may refuse his discharge, under s. 355 of the Code of Civil Procedure. *Semble :* That in such a case it might be open to creditors to apply to

INSOLVENCY—*concld.*

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execute their decrees. PANANGUPALLI SEETHARAMAYA *v.* NANDURI RAMACHENDRUDU (1905) **I. L. R. 28 Mad. 152**

10. AD INTERIM PROTECTION—PRACTICE.

——— *Insolvency—Application for ad interim protection—Practice.* In applications for *ad interim* protection, the practice is to postpone the grounds of opposition until the hearing, unless the ground imputes fraud or bad faith in respect of the opposing creditor's particular claim. *In the matter of* DINENDRA NATH MULLICK (1905) . . . **9 C. W. N. 221**

INSOLVENCY ACT (9 Geo. IV c. 73, s. 36).

——— Insolvency——*Mutual credit—Suit by assignees to recover surplus in Bank—Set-off of promissory notes.* *P & Co.,* having borrowed a large sum of the Bank of Bengal, deposited Company's paper with the Bank to a greater amount as a collateral security, accompanied with a written agreement authorizing the Bank, in default of repayment of the loan by a given day, "to sell the Company's paper for the reimbursement of the Bank, rendering to Palmer & Co. any surplus." Before default was made in the repayment of the loan, *P & Co.* were declared insolvent under the Insolvency Act, 9 Geo. IV, c. 73, by the 36th section of which it was declared that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other ; and that all such debts as might be proved under a commission of bankruptcy in England might be proved in the same manner under the Indian Insolvency Act. At the time of the adjudication of insolvency the Bank were also holders of two promissory notes of *P & Co.* which they had discounted for them before the transaction of the loan and the agreement as to deposit of the Company's paper. The time for repayment of the loan having expired, the Bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of *P & Co.,* against the Bank to recover the amount of the surplus :—*Held,* that the Bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Insolvency Act. YOUNG *v.* BANK OF BENGAL . . **1 Moo. I. A. 87**

INSOLVENCY ACT (11 & 12 Vict. c. 21).

See CONTRACT . **I. L. R. 34 Calc. 289**

See DEBTOR AND CREDITOR. **I. L. R. 20 Bom. 636**

See INSOLVENCY.

See INTEREST—MISCELLANEOUS CASES—INSOLVENCY PROCEEDINGS. **14 Moo. I. A. 209**

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

See PARTIES — PARTIES TO SUITS— OFFICIAL ASSIGNEE . **I. L. R. 18 Calc. 43**

1. ——— Priority of Official Assignee—*Decree, attachment in execution of—Vesting order—Official Assignee—Priority of claim—Civil Procedure Code (Act XIV of 1882), s. 244—Whether Official Assignee is the representative of the judgment-debtor.* A vesting order made under the Insolvency Act (11 and 12 Vict., c. 21) has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached, at his instance, previous to the passing of such order. *Anund Chunder Pal* v. *Punchoo Lall Soobalah, 14 W. R. F. B. 33*, followed. *Semble:* The Official Assignee is the representative of an insolvent judgment-debtor, within the meaning of s. 244 of the Civil Procedure Code. MILLER *v.* LUKHIMANI DEBI (1901) . . . **I. L. R. 28 Calc. 419 s.c. 5 C. W. N. 761**

2. ——— Second insolvency—*Insolvency—Second insolvency where insolvent has not got final discharge under the first—Duty of serving notices when on the insolvent and when on the creditors—Practice—Procedure.* A person may become insolvent a second time before he has received his final discharge under the first insolvency. *Morgan* v. *Knight, 33 L. J. (C.P.) 168*, followed. The appellant had been adjudicated an insolvent at the instance of a creditor, under s. 9 of the Indian Insolvency Act (11 and 12 Vict., c. 21), on the 21st January, 1898. On the 4th October, 1900, one of his creditors obtained a rule calling upon the insolvent to show cause why he should not forthwith proceed with the matter. The Commissioner made the rule absolute, and directed the insolvent forthwith to proceed with the matter of his insolvency. On appeal: *Held*, that the order of the lower Court should be reversed, and the rule discharged. When a person himself files a petition in insolvency, he has the carriage of it. He must serve notices on the creditors at his own expense, and bring the petition to a hearing. But when a person has been adjudicated an insolvent at the instance of a creditor, it is for the petitioning creditor to serve notices, but it is still the duty of the insolvent to attend when required, and point out the persons who are to be served. DOSSA GOPAL *v.* BHANJI DAMJI (1901) . **I. L. R. 26 Bom. 171**

3. ——— *Indian Insolvency Act (11 and 12 Vict., c. 21)—Jurisdiction—Summary proceeding—Order for Ejectment of Insolvency Tenant, on application of Landlord, whether valid.* On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:—*Held*, that there was nothing in the Insolvency Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant. MAUD ANDERSON, *In re* (1909) **I. L. R. 36 Calc. 489**

1. ——— s. 5—Jurisdiction—*Residence.* Where a person applied for the benefit of the provision of the Insolvency Act on a petition in which he described himself as "William Cockburn, of Doomrah Factory in Tirhoot," and stated in his petition "that he is now residing at No. 19, Garden Reach, in the Suburbs of Calcutta, within the jurisdiction of the High Court:"—*Held*, that the petition was rightly dismissed for want of jurisdiction. *In re* COCKBURN . . **2 Ind. Jur. N. S. 326**

2. ——— *Jurisdiction—British subject—Residence.* The insolvent, who was born in England of English parents, was the the widow of a surgeon and resided at Salem for some time before, and at the time of, the presentation of her petition to the Court. *Held*, that the 5th section of the Insolvent Debtors Act is as applicable to a "British subject" (in the sense in which that appellation is used in the Charter of the late Supreme Court) resident within the jurisdiction of the High Court of Madras as to an inhabitant within the local limits of the town of Madras. *In the matter of* RICKS . . . **3 Mad. 151**

3. ——— *Jurisdiction—Residence—Letters Patent, cl. 18.* The petitioner came down from Cawnpore, where he had resided for some time, to Calcutta, to file his petition. He stated that he intended to settle in Calcutta on obtaining his discharge. *Held*, that his being in Calcutta under these circumstances did not constitute residence. *Held*, also, that by cl. 18 of the Letters Patent the jurisdiction of the Insolvent Court was narrowed to the Bengal Division of the Presidency of Fort William, *i.e.*, that portion of the Presidency over which the authority of the Lieutenant-Governor of Bengal extends. *Semble:* Under s. 5 of the Insolvency Act, the residence of the petitioner must be within the local limits of the ordinary original jurisdiction of the High Court. *In the matter of* TIETKINS **1 B. L. R. O. C. 84**

4. ——— *Jurisdiction—Insolvent trader—"Reside."* The word "reside" in s. 5 of the Insolvency Act, when applicable to the insolvency of traders, includes an occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling. *In the matter of* HOWARD BROTHERS . . . **11 B. L. R. 254**

5. ——— *Jurisdiction—Bonâ fide residence.* An insolvent who is not a European British subject must either be a *bonâ fide* resident in Calcutta at the time he presents his petition or a trader carrying on business in Calcutta otherwise he does not come within the jurisdiction of the Court under the Act. *In the matter of* TARINEY CHURN GOHO . . **11 B. L. R. Ap. 26**

6. ——— *Jurisdiction—European British subject out of jurisdiction of High*

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 5**—*contd.*

Court—Residence. A European British born subject, residing in the Bombay Presidency, but outside the local limits of the jurisdiction of the High Court, is entitled to come to Bombay and present a petition in the Court for the Relief of Insolvent Debtors and obtain the benefit of the Insolvent Act, as the original jurisdiction of the Supreme Court was in that respect continued to the High Court by cl. 18 of its Letters Patent. *In re* BLACKWELL . . . . **9 Bom. 461**

7. ——— *Jurisdiction—Residence. A's* zamindari and dwelling-house in the district of D having been sold, he came to Calcutta in May 1880, leaving his family with his relations, and filed his petition in the Court for the Relief of Insolvent Debtors in July. He remained in a hired house at Calcutta till September, when the Court rose for the vacation, and returned just before the end of the vacation, having in the interval gone to the district of D to raise funds to carry on his insolvency proceedings. He had no residence outside the jurisdiction of the High Court. *Held*, that he had no residence within the jurisdiction of the High Court within the meaning of s. 5 of the Insolvency Act. *In the matter of* RAM PAUL SINGH **8 C. L. R. 14**

8. ——— *Jurisdiction—Residence—Insolvency.* There is nothing to show that the residence contemplated by s. 5 of the Insolvency Act must necessarily be a permanent residence; the object of that section being to extend the benefit of the Act to those who could be said to be *bonâ fide* residents for the time being within the jurisdiction of the Court at the time they filed their petition. *In the matter of* DE MOMET **I. L. R. 21 Calc. 634**

9. ——— *Letters Patent, High Court, cls. 18 and 44—Jurisdiction of High Court, Bombay—Stat. 24 and 25 Vict., c. 104 (High Court's Charter Act), s. 11—Act V of 1872—Trader at Karachi presenting petition in Bombay—Relation of Insolvent Court to High Court—Effect of Acts limiting jurisdiction of High Court on jurisdiction of Insolvent Court. J C*, a European British subject residing at Karachi in Sind, failed in business in 1895, and on 11th June of that year he filed his petition in the Court for Relief of Insolvent Debtors in Bombay. *Held*, that, having regard to Act V of 1872, read with cl. 18 of the Letters Patent, 1865, the Court had no jurisdiction to entertain the petition. By s. 5 of Stat. 11 and Vict., c. 21, the Insolvent Court was given jurisdiction over residents within the jurisdiction of the Supreme Court of Bombay. The jurisdiction of the Supreme Court extended over all inhabitants of the town and island of Bombay and over European British subjects in any of the factories subject to or dependent on the Government of Bombay. The jurisdiction of the Insolvent Court as defined by the above section remained unaffected by the establishment of the High Court in the place of the Supreme Court except so far as it may be limited by cl. 18 of the Letters Patent, 1865. A European British subject residing within the Presidency of Bombay, though outside the town and island of Bombay, may petition the Insolvent Court of Bombay for relief. The powers and authority originally of the Supreme Court and now of the High Court given by the Insolvency Act form a branch of the jurisdiction of the High Court, and are therefore subject to any legislative restriction of that jurisdiction, whether imposed by the Letters Patent or by any subsequent enactment. The power of the High Court and any Judge of it to exercise the jurisdiction of the Insolvent Court, whatever the jurisdiction may be, is locally limited by cl. 18 of the Letters Patent, 1865, to the Presidency of Bombay, and cannot be exercised outside that Presidency or outside any area within it to which it may by subsequent enactment be restricted. The effect of cl. 44 of the Letters Patent, 1865, which makes the provision of cl. 18 subject to the legislative powers of the Governor-General in Council, must be that any Act of the Governor-General in Council, still further limiting the jurisdiction of the High Court and excluding it from any place even within the Presidency, must also still further narrow the jurisdiction of the Insolvent Court, for otherwise the Judge of the High Court presiding as Commissioner would be exercising jurisdiction in a place where his jurisdiction under cl. 18, by virtue of which alone he could act as Commissioner, had been abolished. Act V of 1872 is such an Act. *In the matter of* CURRIE . **I. L. R. 21 Bom. 405**

1. ——— **s. 6**—*Verification of schedule by affidavit—Non-appearance of insolvent.* In an application for insolvents for their personal discharge, the trustee under the bankruptcy of one *R* in England appeared, and it was ordered that the further hearing should stand over with *ad interim* protection, and that insolvents should amend their schedule. At this hearing, *A*, one of the insolvents, was examined. On another application for personal discharge, it appeared that, subsequent to the former order, *A* had left India on account of ill-health, and was therefore unable to verify the schedule. No opposition was entered, and the other insolvent, *M*, the partner of *A*, was in Court. *Held*, that it was sufficient for the schedule to be attested by *M*, but the Court directed that an affidavit of *A* should be obtained verifying the schedule, sworn before a notary public or the British Consul. Personal discharge was allowed. *In the matter of* ANSTRUTHER . **11 B. L. R. Ap. 34**

2. ——— **and ss. 21 and 26**—*Effect of death of insolvent after filing his petition, but before filing schedule.* On the 15th of March 1862, the petitioner brought an action in the Supreme Court against the insolvent to recover a sum of money, and on the 17th of that month the usual summons was served on the insolvent. On the last mentioned day the insolvent was committed to

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 6 and 21 and 26**—*concld.*

prison on a charge of murder, notwithstanding which, on the 21st March 1862, he filed his petition in the Insolvent Court. The usual order was then passed, vesting all the insolvent's estate and effects in the Official Assignee from the date of the filing of the petition. On the 26th March 1862, the present petitioner recovered judgment in his action in the Supreme Court. The insolvent was tried and convicted and sentenced to death, and on the 14th of April 1862, before the insolvent filed his schedule in the Insolvent Court, the sentence was carried into execution. *Held, first,* that s. 6 of 11 and 12 Vict., c. 21, is not imperative; and, *secondly,* that ss. 21 and 26 of the same Act give the Official Assignee ample powers for the ascertainment and realization of an insolvent's estate without the aid of a schedule. *In re* KALLEE CHURN KHETTRY . . . . . **1 Ind. Jur. O. S. 16**

——— **s 7.**

See ATTACHMENT — ALIENATION DURING ATTACHMENT.
1 N. W. Pt. 6, p. 81 : Ed. 1873, 172

See CONTRACT ACT, ss. 253 (*10*), 263.
I. L. R. 32 Mad. 462

See INSOLVENCY — CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE.
6 C. W. N. 577

See INSOLVENCY — PROPERTY ACQUIRED AFTER VESTING ORDER.
I. L. R. 17 Mad. 21
I. L. R. 18 Mad. 24
I. L. R. 19 Bom. 232
2 C. W. N. 372

1. ——— **Vesting order**—*Vesting order, validity of —Signing vesting order — Rule 57 of High Court Rules in Insolvency. Held,* as to an objection taken, that the vesting orders relied upon by the Official Assignee were signed by himself and not by the clerk of the Insolvent Court (as directed by Rule 57); that in the face of an established practice of the office, that the clerk and the Official Assignee should in the absence of either, and in the transaction of official business, sign one for the other and no attempt having been made to set aside the vesting orders for irregularity, the District Court, as well as the High Court on appeal, was bound to regard such orders as in full force and effect. The High Court, however, considered the practice, so far as it permitted the Official Assignee to sign vesting orders, objectionable and requiring alteration. GAMBLE *v.* BHOLAGIR
2 Bom. 150 : 2nd Ed. 147

2. ——— *Distress—Vesting order—Time of operation of—Priority of Official Assignee.* A distress levied after the filing of the petition of insolvency, but before the vesting order is drawn up, is, under ss. 7 and 22, invalid as against the Official Assignee. A vesting order

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 7**—*contd.*

is made when it is given by the Court, and not at the time it is drawn up, signed, and sealed. *In the matter of* BODRY . . **5 B. L. R. 309**

3. ——— *Official Assignee —Vesting order—Suits against insolvent—Right of Official Assignee to be party.* The rights of the Official Assignee of insolvents for the benefit of the general body of creditors over the property of an insolvent lawfully vested in him, wherever that property may be, are rights that must be respected and recognized by all Courts, wheresoever situated. Where property of an insolvent vested in the Official Assignee by order of the Insolvent Court is attached in execution at the suit of a creditor of the insolvent, the proper course for the Official Assignee to adopt is to apply to the Court, under ss. 246 and 247 of the Civil Procedure Code, to have the attachment removed, or, if too late to make such application, he may institute a suit to establish his right. *In re* HUNT MONNET & CO. *Ex parte* GAMBLE *v.* BHOLAGIR MANGIR
1 Bom. 251

4. ——— *Effect of vesting order.* Where an order has been made under s. 7 of the Insolvency Act vesting the property of a judgment-debtor in the Official Assignee, the judgment-debtor has no saleable interest in the property. RAM SOONDUR DEY *v.* SHOSHI MOHUN PAL CHOWDHRY . . . **11 C. L. R. 389**

5. ——— *Right to sue—Vesting order.* As soon as an order is made under s. 7 of the Insolvency Act (11 and 12 Vict., c. 21), any rights of property which an insolvent may have possessed at the date of his petition in insolvency vest in the Official Assignee, and he alone is competent to sue for the purpose of enforcing these rights. SADODIN *v.* SPIERS . **I. L. R. 3 Bom. 437**

6. ——— *Vesting order—Civil Procedure Code, s. 276—Attachment before judgment—Official Assignee's title.* Where a vesting order has been made under 11 and 12 Vict., c. 21, s. 7, after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. *Shib Kristo Shaha Chowdhry* v. *Miller, I. L. R. 10 Calc. 150,* and *Gamble* v. *Bholagir, 2 Bom. 150,* followed. SADAYAPPA *v.* PONNAMA . **I. L. R. 8 Mad. 554**

7. ——— **Personal estate of the insolvent**—*Expectant or contingent interest—Employés—Deduction from salary for a provident fund and mutual assurance fund—Right of Official Assignee.* S, a clerk in the employment of the G. I. P. Railway Company, agreed with the Company that 5 per cent. of his salary should be deducted every month as his contribution or subscription to a fund called the Provident Fund, and further rate of 1 per cent. as his subscription to another fund called the Mautual Assurance Fund. By the rules of those funds he was entitled

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 7**—*contd.*

to receive back his subscriptions in the event of his dismissal for misconduct. *S* became insolvent, and omitted to mention in his schedule the sums standing to his credit in respect of the above two funds. *Held*, that these sums were personal estate of the insolvent held by the company in trust for him, which passed to the Official Assignee under s. 7 of Stat. 11 and 12 Vict., c. 21, and that they should be entered in his schedule as part of his estate. *In the matter of the petition of* SHREWSBURY . . . . **I. L. R. 10 Bom. 313**

8. ——— **Father's right over immoveable ancestral property**—*Insolvency—Vesting order—Right of Official Assignee on death of insolvent.* Under the Mitakshara law, a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes and a vesting order, made under s. 7 of the Insolvency Act, vests that right in the Official Assignee, who can therefore give a good and complete title to such ancestral immoveable estate to a purchaser. The death of the insolvent has no effect on the proceedings in his insolvency or on the power of the Official Assignee. The ancestral estate previously vested in the Official Assignee is not thereby divested from him and vested in the son by right of survivorship. In the legal aspect of the matter the natural existence of the insolvent is, for the purpose of dealing with his estate, artificially continued in the Official Assignee, who can, after, the insolvent's death, deal with the estate as he could have dealt with it had the insolvent been still alive. FAKIR CHAND MOTICHAND *v.* MOTICHAND HURRUCKCHAND . . **I. L. R. 7 Bom. 438**

9. ——— **Dismissal of petition, effect of**—*Authority to sue given by Official Assignee—Payment to insolvent.* An authority (assuming it to be sufficient) given by the Official Assignee to settle the outstandings of one who has filed a petition of insolvency does not enure after the dismissal of the petition, and cannot entitle the person so authorized to sue at all. The mere fact that a payment was made to a person at a time when his petition was upon the file of the Insolvent Court, which petition was afterwards dismissed, does not invalidate the payment. RAJKRISTO SINGH *v.* SEFATOOLLAH . **7 W. R. 85**

10. ——— *Discharge—Dismissal of petition—Power to set aside order of dismissal when fraud is shown.* When an insolvent has obtained his discharge, a Commissioner has no jurisdiction, on the application of some of the creditors, to make an order dismissing his petition, and ordering the estate and effects of the insolvent in the hands of the Official Assignee to be made over to certain persons on behalf of the creditors. The petition being dismissed, the property revested in the insolvents. The Court which passed the order dismissing the petition, upon finding such order had been obtained by fraud, has power to set aside the order. *In the matter of the petition of* RAM SEBAK MISSER **6 B. L. R. 310**

11. ——— *Power of Court—Application to withdraw petition—Consent of creditor.* The Insolvent Court has no power to allow an insolvent to withdraw his petition of insolvency, on the ground that he has made a compromise with his creditors. Where, however, the Court is satisfied that all parties concerned desire to take the matter out of the hands of the Court, it will dismiss the petition, even though there is no ground arising out of the facts of the case why the petition should be dismissed. *In the matter of* PYARI CHAND MITTER **6 B. L. R. 558**

12. ——— **Infant trader**—*Withdrawal of petition by infant—Rule 22, Rules and Orders, Bombay.* An infant who has traded, but has made no express representation that he is of full age, is not liable to become bankrupt; and although he has filed his petition for the benefit of the Insolvency Act and his schedule, he should be allowed, on proof of his infancy, to withdraw from the proceedings, under the wide powers in this respect given to the Court by Rule 22 of the Rules and Orders, Bombay. *Ex parte Jones, L. R. 18 Ch. D. 109*, followed. *In re* HANSRAJ MALGI. EX PARTE DEWAR & CO. . **I. L. R. 7 Bom. 411**

13. ——— *Infant trader—Trading contract—Insolvency Act (11 and 12 Vict., c. 21).* A minor who has traded cannot be adjudicated an insolvent on the petition of the persons who have supplied him with funds for the purposes of his business. *In the matter of* NOBODEEP CHUNDER SHAW . **I. L. R. 13 Calc. 68**

14. ——— **Application for attachment and for rateable distribution of sale-proceeds**—*Vesting order in insolvency, effect of—Civil Procedure Code, ss. 295 and 622.* A debtor against whom several decrees had been passed filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decrees for the attachment of other property and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge *held* that the vesting order was a bar to both of these applications. *Held*, (i) that the order rejecting the application for fresh attachment was right; (2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civil Procedure Code, s. 622. VIRARAGHAVA *v.* PARASURAMA . . . **I. L. R. 15 Mad. 372**

15. ——— **Effect of vesting order**—*Insolvency of managing member of a Hindu family—Effect of vesting order—Official Assignee's power to convey land.* The managing member of a Hindu

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 7**—*contd.*

family was adjudicated an insolvent, and a vesting order was made. The Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff, who now sued for possession. The second defendant was the younger brother of the insolvent; the other defendants were the insolvent's sons. *Held*, that the effect of the vesting order was to entitle the Official Assignee to the shares of the co-parceners as well as that of the insolvent—*Fakerchand Motichand* v. *Motichand Harruck Chand, I. L. R. 7 Bom. 438*—and he was entitled to transfer such shares, provided the debts for payment of which the property is disposed of were shown to have been incurred for purposes binding on such shares. The plaintiff did not prove that the debts which led to the adjudication were incurred for the necessary purposes of the family, and the insolvent's sons did not prove that they were incurred for immoral purposes. *Held*, therefore, that the Official Assignee could only convey the shares of the sons of the insolvent, and accordingly that the plaintiff was entitled to a moiety of the house only, and that the house should be sold and half the sale-proceeds paid to him. RANGAYYA CHETTI *v.* THANIKACHALLA MUDALI . **I. L. R. 19 Mad. 74**

16. ——— *Vesting order, Effect of—Interest of reverisoner expectant on widow's death.* *B* and *M* were brothers, *M* was adopted by his cousin's widow, and as adopted son had succeeded to property. He died childless in in 1870 or 1872, leaving his widow as his heir. His brother *B* was next reversionary heir after *M's* widow, and in 1880 he (*B*) became insolvent and his estate vested in the Official Assignee, who sold to the plaintiff his interest in certain mortgaged property which had belonged to *M* and was then in the possession of *M's* widow as his heir. *M's* widow died in 1886, and after her death the plaintiff sued to redeem the property from the mortgage. *Held*, that at the date of his insolvency, *M's* widow being then alive, the interest of *B* as reversionary heir in the said property was only a *spes successionis*, which could not vest in the Official Assignee. The plaintiff therefore took no interest in the property by his purchase from the Official Assignee. ANAJI *v.* RATNOJI KRISHNARAV . . **I. L. R. 21 Bom. 319**

17. ——— *Vesting order—Subsequent attachment—Dismissal of insolvency petition and discharge of vesting order—Creditors' trustees, Right of, against attaching creditor and sale in execution of his decree.* A judgment-debtor was declared an insolvent by the Court for the Relief of Insolvent Debtors, Madras, and a vesting order was made. Part of his property was subsequently attached in execution of a decree. Afterwards, his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditor's trust-deed was executed, of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution and to cancel the sale of the property which had been sold in execution after the date of the trust-deed. *Held*, that the suit was not maintainable. RAMASAMI KOTTADIAR *v.* MURUGESA MUDALI **I. L. R. 20 Mad. 452**

18. ——— *Dismissal of petition after vesting order made—Composition deed made prior to dismissal—Validity.* Two persons applied at Madras to be declared insolvents and an order was made whereby all their properties vested in the Official Assignee. They then entered into a deed of composition for the benefit of their creditors, four persons being appointed trustees under the deed. The insolvents' petition was subsequently dismissed on its being represented to the Court that the creditors had agreed to the deed of composition and one of the creditors then attached the insolvents' property. In support of this creditor's right to do this it was contended (in a suit brought by one of the trustees under the deed against the creditor) that, inasmuch as the deed of composition had been executed after the vesting order and prior to the dismissal of the insolvents' petition, it was inoperative to transfer the property comprised in the deed to the trustees and that it could not, in consequence, prevail against the attachment. *Held*, that the provision in s. 7 of the Insolvency Act, that, in case, after the making of any vesting order, the petition should be dismissed, the vesting order shall become null and void, has the effect of re-vesting the property in the insolvent retrospectively from the date of the vesting order. Independently, therefore, of s. 43 of the Transfer of Property Act, the composition deed operated to vest the property in the trustees, and the creditor had no right to attach it. *Ramasami Kottadiar* v. *Murugasa Mudaliar, I. L. R. 20 Mad. 452*, approved. KOTHANDARAM RAVUTH *v.* MURUGASA MUDALIAR (1904) . **I. L. R. 27 Mad. 7**

19. ——— **Attachment under garnishee order**—*Debt in hands of Sheriff—Rights of Official Assignee as against attaching creditor.* *N*, on an attachment under a garnishee order, handed over R1,200, a sum largely exceeding the amount due by him to the judgment-debtor, together with R83-9-0, the costs of the execution, to the Sheriff. On the following day, the judgment-debtor filed his petition in the Insolvent Court. Upon the Official Assignee claiming R399-12-9, that portion of the sum in the hands of the Sheriff, which was admittedly owing to the attaching creditor; *Held*, that the title of the Offical Assignee must prevail. The payment to the Sheriff could not be treated as equivalent to a payment to the creditor. It was really tantamount to a payment into Court. The fact that a larger sum was paid to the Sheriff, than was actually owing, showed that such payment was made for the purpose of getting rid of the attachment, and not in satisfaction of the debt. The

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 7**—*concld.*

property in the hands of the Sheriff must still be considered as belonging to the insolvent, and therefore as being vested in the Official Assignee. *Frederick Peacock* v. *Madan Gopal, I. L. R. 29 Calc. 428*, and *Krisnasawmy Mudaliar* v. *Official Assignee of Madras, I. L. R. 26 Mad. 673*, followed; *Ex parte Pillras, In re Curtoys, 17 Ch. D. 653*, referred to. JITMAND *v.* RAMCHAND (1905)

I. L. R. 29 Bom. 405

20. ——— Right of Official Assignee to bring suit—*Insolvent—Vesting order—Official Assignee—Withdrawal of petition for insolvency—Right of Official Assignee to continue suit after withdrawal of petition.* On the 14th October 1903 a petition in insolvency was filed and a vesting order was made by the Court. On the 15th June 1904 the insolvents took out a rule *nisi* to withdraw their petition, and the rule was made absolute on the 21st September 1904. But the orders were not drawn up till 27th February 1906. In the meanwhile the Official Assignee filed a suit on the 2nd March 1905 on behalf of the insolvents to recover a sum of money alleged to be due to the insolvents' firm in respect of certain mercantile transactions. It was objected on behalf of the defendant that the Official Assignee was not entitled (i) to bring the suit and (ii) to continue the suit after the withdrawal of the petition. *Held*, that at the date of the institution of the suit the insolvency proceedings were still in force and the assets still remained vested in the Official Assignee. The subsequent coming to force of the order could not vitiate the institution of the suit and it was clear that the Official Assignee was competent to bring the suit. He was also competent to continue it, for the order of withdrawal even after it became operative, was not effective to divest the Official Assignee and revest the property in the insolvents. A withdrawal of a petition, for which no provision is made in the Act, cannot be regarded as the legal equivalent to its dismissal by consent. HAJI SAJAN *v.* MACLEOD (1907)

I. L. R. 32 Bom. 321

21. ——— Saleable interest of insolvent—*All property of insolvent at date of petition vests in Official Assignee.* Where prior to sale of a judgment-debtor's property in execution of a simple decree for money, this judgment-debtor becomes insolvent and the vesting order under s. 7 of the Insolvency Act is made, the purchaser at such sale acquires no interest in the property sold. When the vesting order under s. 7 of the Insolvency Act is made: *Held*, that the insolvent ceases to have any saleable interest in the property. SUNDARAPPAIYAR *v.* ARUNACHELLA CHETTIAR (1908) . . . **I. L. R. 31 Mad. 493**

——— **ss. 7, 11—Jurisdiction**—*Adjudication—Bankruptcy Act of 1883 (46 & 47 Vict., c. 15), ss. 43 and 118—Concurrent proceedings in Indian and English Courts—Receiving order in England—Adjudicating order—Official Assignee—Trustee in bankruptcy.* William Watson & Co. failed, and on the 30th of January 1904, a receiving order was made on their application by the English Bankruptcy Court. On the 1st of February at 11 A.M. they were, on their own petition adjudged bankrupts in England, and on the 16th February a Trustee in Bankruptcy was appointed. On the 1st of February at 11 A.M. the firm's constituted attorney applied before the Bombay High Court, which made the usual vesting order. The Manager of the Calcutta office of the firm on the morning of the 1st of February closed the place of business in Calcutta, locking the doors and affixing thereto the following notice signed by himself:—"I regret to notify that under telegraphic instructions from my London office, Messrs. William Waston & Co. have suspended payment." On the 2nd of February on the application of a friendly creditor, the firm were adjudged insolvents by the Calcuuta High Court, which made the usual vesting order. On the 13th of April the vesting order made by the Bombay High Court was discharged and the adjudicating order set aside. *Held*, that an act of insolvency was committed in Calcutta and that the High Court had jurisdiction to make the vesting order of the 2nd of February and that the Official Assignee of Bengal had rightly taken possession of the insolvent's effects in Bengal. *In re Hurruck Chund Golicha, I. L. R. 5 Calc. 605*, and *Kustur Chund* v. *Dhunput Singh, I. L. R. 28 Calc. 26*, referred to. That the English Trustee in Bankruptcy had no *locus standi* in this Court to make an application to have the adjudicating and vesting orders of the 2nd February set aside. *In the matter of J. Bell, (1890), Unreported case, dated 4th June*, distinguished. The Insolvency Courts in India have a discretion in making an adjudication order notwithstanding the existence of a prior adjudicating order in another country, provided the conditions of the Insolvency Act are satisfied and there is no valid reason to the contrary. The presence of large assets within the jurisdiction of those Courts is a strong circumstance in favour of making such an order. *Ex parte Robinson, L. R. 22 Ch. D. 816, Ex parte McCulloch, L. R. 14 Ch. D. 716*, and *In re Artola Harmanos, L. R. 24 Q. B. D. 640*, referred to. The different High Courts in India exercising concurrent jurisdiction should also be guided by the abovementioned rule, but where there is a conflict, having regard to questions of convenience one Court should yield to another as it may not be just or equitable to allow the proceedings in all the Courts to go on concurrently. *In re Aranvayal Sabhapathy Moodliar, I. L. R. 21 Bom. 297*, referred to. *In the matter of* WILLIAM WATSON AND ANOTHER (1904)

I. L. R. 31 Calc. 761

——— **ss. 7, 26 and 36**—*Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Officail Assignee of the Insolvent Debtors' Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee*

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 7, 26 and 36**—*concld.*

in Bombay—Court can order commission to examine insolvent at Shanghai. The firm of *T.* and Co. filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners *M* was at Shanghai. *M* subsequently swore his petition at Shanghai on 16th October 1907. On 16th March 1907 certain creditors of the firm obtained an order directing *M* to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act. A Rule *nisi* was obtained on behalf of *M* calling upon the opposing creditors to show cause why the above order should not be set aside. These creditors also obtained a Rule *nisi* calling on *M* to show cause why he should not deliver up to the Official Assignee goods belonging to the insolvent firm in his possession at Shanghai. These two Rules were heard together. *Held*, that the property of the insolvent debtor's firm in Shanghai vested in the Official Assignee of the Insolvent Debtors' Court at Bombay, and that Court could order *M.* to hand over such property to the Official Assignee in Bombay. *Held*, further, that the Insolvent Debtors' Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose. *In re* NAOROJI SORABJI TALATI (1908)

I. L. R. 33 Bom. 462

1. ——— **ss. 7 and 30**—*Ancestral trade carried on by brothers in undivided family—Insolvency and discharge of all the adult members—Minor son of one brother not a party to insolvency proceedings—Order vesting family property in Official Assignee—Sale by Official Assignee of land so vested—Subsequent suit against minor—Sale of his interest in the land—Validity.* Seven brothers who carried on a business (which had previously been conducted by their family for very many years) applied to be adjudged insolvents in the Court for the relief of insolvent debtors in Madras. They comprised all the adult members of the family at the time when the application was made, and all the debts included in their schedule had been incurred in connection with the family business. *A*, being a son of one of them and a minor at the time, was not a party to the insolvency proceedings. The applicants in due course obtained their discharge, and an order was passed vesting their property (which including land) in the Official Assignee in Madras. At a date subsequent to that of the vesting order, plaintiffs purchased from the Official Assignee part of the land so vested; and, later still, *B* brought a suit against *A* for money due on a bond, and obtained a decree. In the execution of that decree, *A's* share in the said land was brought to sale and purchased by *B*. Upon a suit being brought by plaintiffs for a declaration that the purchase by *B* was inoperative and void by reason of the prior sale to plaintiffs by the Official Assignee: *Held*, that plaintiffs were entitled to the declaration.

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 7 and 30**—*contd.*

Held, also, that, inasmuch as the trade was an ancestral one (and not one commenced by the managing members during the minority of *A*), and as the schedule debts were incurred in the course of such trade, and all the adult members had applied for the benefit of the Insolvency Act, the debts were, at least, *primâ facie* binding on the whole family, including the minor. It was not therefore necessary for plaintiff to prove the character of each debt or the existence of family necessity. In cases in which s. 7 of the Indian Insolvent Debtors Act applies, the vesting order vests in the Official Assignee only the real and personal estate and effects of the insolvent. And, where the insolvent is a member of an undivided Hindu family, his undivided interest in the joint family property, and it alone, vests in the Official Assignee, whether he be the managing member or a junior member of the family. The proprietary interest of the members other than the insolvent (even though they be his sons) will continue vested in them. The effect of s. 30 of the Insolvent Debtors Act, and the analogous provision contained in s. 266 of the Code of Civil Procedure, considered. NUNNA BRAHMAYYA SETTI *v.* CHIDARABOYINA VENKITASWAMY (1902)

I. L. R. 26 Mad. 214

2. ——— *Provident Funds Act (IX of 1890), s. 4—Insolvent Debtors' Act (11 & 12 Vict., cap. 21), ss. 7, 80—Vesting order—Sum due to an insolvent from a provident institution—Right of Official Assignee to claim—Construction of statutes—Distinction between enactments affecting vested rights and those regulating procedure.* A member of a Railway Provident Institution, who had made compulsory deposits therein, became insolvent, and the usual vesting order was made under s. 7 of the Act for the Relief of Insolvent Debtors. By the rules of that institution, a member is to be paid, on his retirement from service, the sum of money standing to his credit. At the date of the vesting order, the insolvent had not yet retired from service. Subsequently to the date of the vesting order, but before the retirement of the insolvent, the Provident Funds Act, 1897, came into force, s. 4 of which provides that after the commencement of that Act the Official Assignee shall not be entitled to or claim any such compulsory deposits in any Railway Provident Fund. On a claim being made by the Official Assignee to the amount, on the ground that when the Act came into force the interest of the insolvent in the Fund had become vested in the Official Assignee: *Held*, that, by s. 4 of the Provident Funds Act, all the right and title of the Official Assignee was determined as from the coming into operation of the Act, and that its operation was not limited to cases where the vesting order had been made after its commencement. The distinction between the construction of enactments affecting vested rights, and those which merely affect procedure, recognised. *Javanmal Jitmal* v. *Muktabai, I. L. R. 14 Bom. 516*, referred to. Under s. 7 of the Insolvent

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 7 and 30**—*concld.*

Debtors Act, the right of the insolvent to be paid the sum standing to his credit in the Fund, on his retirement from service, vested in the Official Assignee. OFFICIAL ASSIGNEE OF MADRAS *v.* DALGAIRNS (1902) . **I. L. R. 26 Mad. 440**

1. ——— **s. 8—Annulling fiat of bankruptcy.** The annulling of the fiat contemplated by the proviso of 11 & 12 Vict., c. 21, s. 8, applies only to cases in which the original judgment has been the result of mistake of fact, misapprehension, or fraud. *In re* SREENARAIN BYSACK. **2 Hyde 180**

2. ——— **Adjudication**—*Effect of imprisonment under Civil Procedure Code, 1859, as satisfaction of decree. Held,* that a judgment-debtor who had been in prison for two years under the Code of Civil Procedure was liable to be adjudicated an insolvent in respect of the same judgment-debt, where the petition for adjudication was presented before he was released from prison under s. 278 of the Code. *In the matter of* RAGUBHAI RAM CHANDRA . . **6 Bom. O. C. 86**

3. ——— *Adjudication of insolvency—Who is entitled to apply for order of adjudication—Condition necessary for adjudication under s. 8—Practice—Procedure.* The only person who can obtain an order adjudicating another person insolvent under s. 8 of the Indian Insolvency Act (11 and 12 Vict., c. 21), on the ground of his lying in prison for twenty-one days in execution of a decree, is the creditor in execution of whose decree he has been in prison. A debtor cannot be adjudicated an insolvent under s. 8 of the Indian Insolvency Act (11 and 12 Vict., c. 21) on the ground of his lying in prison for twenty-one days, unless he is in prison at the time the petition for adjudication is presented or at the time it is heard. *In re* AHMED ISMAIL MUNSHI (1902) **I. L. R. 26 Bom. 649**

——— **s. 9.**

See HINDU LAW—JOINT FAMILY—DEBTS AND JOINT FAMILY BUSINESS. **I. L. R. 14 Bom. 189**

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR . **I. L. R. 23 Calc. 592**

1. ——— **Revocation of adjudication** —*Notice to creditors—Practice.* Certain persons had been adjudged insolvents under s. 9 of the Insolvency Act, but no schedule had been filed and no claim proved. To an application on behalf of the insolvents after notice to the Official Assignee and to the attorney for the petitioning creditors for an order setting aside the adjudication on the ground that they had come to an agreement with their creditors, it was objected that notice must be given to all the creditors before the adjudication could be annulled. The Court *held* that the objection must prevail, but refused to make any order. If the adjudication were improper, it could not be

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 9**—*contd.*

set aside : if proper, a schedule must be filed in the usual way. *In the matter of* RAJNARAYAN PAL **13 B. L. R. Ap. 25**

2. ——— *Order of adjudication—Lying in prison for twenty-one days—Period within which petition for adjudication to be presented—Construction—Effect in an Act of the words "It shall be lawful"—Reveiew—Jurisdiction.* The Insolvency Act (11 and 12 Vict., c. 21), the ninth section of which empowers a creditor of any person who shall lie in prison for debt for a period of twenty-one days, to petition the Court to adjudge such person an insolvent, prescribes no limit to the time within which such petition must be presented. It may be presented by the creditor at any time subsequently to the imprisonment. The effect of the words "It shall be lawful" in s. 9 of he Insolvency Act are imperative, and do not give the Court a discretion in the exercise of which it may refuse an order of adjudication applied for under that section. The Court for the Relief of Insolvent Debtors at Bombay has jurisdiction to review its own orders. *In the matter of* THUCKER BHAGVANDAS HARJIVAN **I. L. R. 4 Bom. 489**

3. ——— **Trader residing out of jurisdiction**—*Gomastah.* A trader residing out of the jurisdiction of the High Court, but carrying on business at Calcutta by a gomastah, can be adjudicated an insolvent under s. 9 of 11 and 12 Vict., c. 21, if his gomastah stops payment and closes and leaves his usual place of business, or does any act which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent. *In re* HURRUCK CHUND GOLICHA **I. L. R. 5 Calc. 605 : 6 C. L. R. 382**

4. ——— *Trader beyond jurisdiction carrying on business by gomastah within jurisdiction—"Departure"—"Intent."* *D,* resident in Azimgunge, carried on business as a banker and money-lender in (amongst other places) Calcutta through his gomastah *P,* who carried on the business on the second storey of the business premises, having his residence on the third storey, the whole of the premises belonging to *D. D,* having gone away on pilgrimage, the Calcutta business became involved, and on the 6th February 1893 *P* stopped payment and retired to the third storey, but was accessible to all creditors either in the office where business was usually carried on or in the private room on the third storey. Upon such stoppage of payment, telegrams were sent to *D,* who hurried back to Calcutta, and reached it on 11th February, and took up his quarters in the same premises, and subsequently had several meetings with his creditors. *Held,* that such stoppage of payment was not an act of insolvency within the meaning of the Insolvency Act, and that the retirement of *P* to his rooms on the third storey was not a departure with the intention to defeat and delay the creditors of *D. Held,* further, that a departure such as is made an act of insolvency by s. 9 of

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— s. 9—*contd.*

the Act is a departure by the debtor personally, and cannot be committed by any other person on his behalf. Such departure must be his departure, and the intent to depart must be proved to be his intent. Moreover, a man cannot commit an act of insolvency by an act of his agent which he has not authorized, and of which act he had no cognizance. *In re Hurruck Chand Golicha, I. L. R. 5 Calc. 605,* dissented from. *Per* PIGOT, *J.*—Under the circumstances, no special powers or position ought to be attributed to *P*, who was merely an ordinary managing gomastah. *In re* DHUNPUT SINGH **I. L. R. 20 Calc. 771**

Held, in the same case on appeal to the Privy Council a principal employing a gomastah to carry on a trade within the local limits of the High Court's jurisdiction may in some cases be adjudged to have committed an act of insolvency within the meaning of s. 9 of the Stat. 11 & 12 Vict., c. 21, in consequence of the gomastah's act without principal's having specially authorized it or having had cognizance of it; and this might be applied upon a gomastah's having departed from the usual place of business with intent to defeat or delay the firm's creditors. Not every gomastah stands in this respect in the same relation to his employer, there being a difference in the degree of control exercised by different owners. The gomastah may be only an ordinary manager or he may represent the firm entirely. It is a question of fact in each case whether the gomastah occupies such a position that the principal stands or falls by his acts, and whether the gomastah's departure from the place of business, with the above intent, shall or shall not be, by imputation, the act of the principal, bringing s. 9 into operation against the latter. Here a munib gomastah in charge of the business was alleged to have so departed; but the owner of it, though at the time absent, was usually active and responsible in it. The firm's payments had been suspended by the gomastah. But under the Indian Statute, that is not an act of insolvency. The gomastah had withdrawn to his own apartment in the house occupied by the firm, but how this would defeat or delay creditors, some of whom visited him there, was not shown. Other acts before the arrival of the principal were done, by none amounted to departure with intent or to departure at all. *Held*, that the gomastah, even if he had departed from the place of business with the intent to defeat or delay creditors, was not in such a position as that he had authority rendering his principal liabel to be adjudged insolvent. The principle in the decision of *In re Hurruck Chand Golicha, I. L. R. 5 Calc. 605*, which was that the act of a gomastah, his authority flowing from his general position, may, in some cases, be taken as the act of his principal rendering him liable within the statute, was correct. In the present case their Lordships agreed with the High Court that the gomastah did not occupy such a position as to make his principal liable to be adjudged insolvent on the ground of his (the gomastah's) personal conduct. KASTUR CHAND *v.* DHANPAT SINGH . . **I. L. R. 23 Calc. 26 L. R. 22 I. A. 162**

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— s. 9—*contd.*

5. ——— **Intent to defeat and delay creditors**—*Stat. 6 Geo. VI, c. 16, s. 4—Stat. 12 & 18 Vict., c. 106, ss. 61 and 68—"Fraudulent" assignment—Moral and legal fraud.* Where a trader assigned by deed all his property for the benefit of his creditors to trustees in trust to pay and satisfy the debts and liabilities of the debtor, and most of the creditors assented to the trust and it appeared that the debtor really intended that all the creditors should be finally satisfied and the assets seemed to be sufficient for the purpose: *Held*, since the deed, in effect, provided for deferred payment and creditors were not bound to wait, such an assignment amounted to delaying and defeating creditors within the meaning of s. 9 of the Indian Insolvency Act and was, as such, an act of insolvency, and it was competent for any of the creditors to adjudicate the settler and insolvent. *Stewart* v. *Moody, I C. M. & R.* 777, followed. *Gisbon's Insolvency* (unreported) distinguished. *Held*, also, that the departure of the gomastah from the place of business under the circumstances of this case did constitute an act of insolvency on the part of the principal. *In the matter of* BRIJMOHAN DOBAY . . . . **2 C. W. N. 306**

Held, on appeal the assignment of the whole of a debtor's property for the benefit of his creditors generally, constitutes an act of bankruptcy within the meaning of s. 9 of the Indian Insolvency Act. *Ex parte Alsop: In re Rees, L. J. 29 Ch. and Bk. 7; In re Wood, L. J. 7 Ch. App. 302*, referred to. BRIJMOHUN DOBAY *v.* BUNGSIDHUR **2 C. W. N. 335**

6. ——— **ss. 9, 92—Petitioning creditor's debt**—*Joint debt—Members of Hindu joint family carrying on business—Partners in trade.* A trader in Madras made a promissory note in the joint names of two merchants, trading together as members of an undivided Hindu family, on which R527 were due. On a petition by the holders of the note to have the maker adjudicated an insolvent: *Held*, that the petitioning creditors' debt was sufficient to support the petition, they being "persons being a creditor to the amount of R500" within the meaning of s. 9, read with s. 92 of the Insolvency Act. *Quære.* Whether members of a joint Hindu family carrying on business are not partners in trade within s. 9, cl. 2. *Ex parte* RAGAVALOO CHETTI. *In re* RANGIAH CHETTI **I. L. R. 15 Mad. 356**

7. ——— **Jurisdiction of Insolvent Court**—*Act of insolvency—Evidence Act (I of 1872), s. 44—Collusion in obtaining adjudication—Partnership—Insolvency of one partner—Firm carried on at several places.* The defendant was the manager of a joint Hindu family consisting of himself and two nephews carrying on a family

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 9,92**—*contd.*

business in Bombay, Madras, and other places. In a suit brought in the High Court of Bombay, against him as manager of the said joint family, a decree was passed on the 11th April 1896, which was in terms against the defendant alone. On the same day certain property in Bombay, in which (as found by the Judge) the nephews and the defendant were jointly interested, was attached in execution of the decree. Two days previously, however, *viz.*, on the 9th April 1896, the defendant had been adjudged an insolvent by the Insolvent Court at Madras under s. 9 of the Indian Insolvency Act (Stat. 11 & 12 Vict. c. 21). On the 6th May 1896, the Official Assignee took out a summons to have the attachment removed. It was contended that the creditor's petition in the Madras Insolvent Court disclosed no act of insolvency which could legally justify an adjudication under s. 9 of the Indian Insolvency Act (11 & 12 Vict., c. 21), and that the adjudication order was therefore made by a court not competent to make it within the meaning of s. 44 of the Indian Evidence Act (I of 1872), and that consequently both it and the vesting order were nullities, and the Official Assignee of Madras had no title to the attached property. *Held*, that the order, although it might be erroneous and subject to reversal on appeal, was within the competency of the Madras Insolvent Court. *Held*, also, on the evidence that there was no proof of such collusion between the creditor and the insolvent in obtaining the order of adjudication as would bring that order within s. 44 of the Indian Evidence Act (I of 1872). SARDARMAL JAGONATH *v.* ARANVAYAL SABHAPATHY.

I. L. R. 21 Bom. 305

8. ——— *Adjudication of insolvency—Concurrent proceedings in two Insolvent Courts in India—High Court, Jurisdiction of—Discretion of Court to which second application for adjudication order is made—Act of insolvency—Departure from jurisdiction with intent to delay creditors—Stay of proceedings.* On the 23rd April 1896, *A* was adjudged insolvent under s. 9 of the Indian Insolvency Act (Stat. 11 and 12 Vict., c. 21) by the Court for the Relief of Insolvent Debtors at Bombay at the instance of certain creditors resident in Bombay. He subsequently took out a rule to annul the order of adjudication on the ground that at the date of the said order he had already (*viz.*, on the 9th April 1896) been adjudged an insolvent by the Insolvency Court at Madras. *Held*, discharging the rule, that the prior adjudication of the Madras Court did not deprive the Court at Bomboy of jurisdiction to adjudicate him an insolvent at the instance of a Bombay creditor. The letter Court, however, was not bound under s. 9 to make such order, but had a discretion to refuse it if, having regard to all the circumstances of the case, it considered that adjudication in Bombay would be useless. Subsequently to the order of adjudication in Bombay, and while it was still in force, the insolvent obtained his personal discharge in the Insolvent Court at Madras under s. 49 of the Indian Insolvency Act. *Held*, that, there being no longer any ground for apprehending that the proceedings in the Madras Court would be discontinued, the proceedings in the Court at Bombay should be stayed, leaving the Bombay creditors to take such steps in Madras as they might think proper. Is would not be just or equitable to allow the preceedings in both Courts to go on concurrently. As the proceedings in Madras were prior in time, and all the assets of the insolvent were vested in the Official Assignee there, the Court at Bombay ought to yield to the prior claim of the Court at Madras. *A*, a debtor in Bombay, summoned his creditors to a meeting fixed for the 28th March 1896. He attended that meeting, which was adjourned to the 30th March, and at the adjourned meeting he submitted a statement showing that he had a sum of R11,000 in cash in his hands. Two of his creditors asked him to give inspection of his Bombay books of accounts, but he refused to do so. A further meeting was summoned for the 8th April. On the 31st March or 1st April two of his Bombay creditors served him with a summons in an action of debt. On the 2nd April he left Bombay for Bellary taking the said sum of R11,000 with him, in order (as he admitted) to prevent the said two creditors from attaching it. The creditors attended the meeting of the 18th April, but it was dissolved when it was discovered that *A* had left Bombay. The books were not produced. *Held*, that under these circumstances the Court was justified in concluding that *A* had left the jurisdiction of the Conrt with intent to defeat and delay his creditors within the meaning of s. 9 of the Indian Insolvency Act. *In re* ARANVAYAL SABHAPATHY. *Ex parte* KARAMALLI JOOSUB

I. L. R. 21 Bom. 297

9. ——— **Trust deed for benefit of creditors**—*Act of insolvency.* An assignment by a debtor of all his property for the benefit of all his creditors is an act of insolvency within s. 9 of the Indian Insolvency Act (11 and 12 Vict., c. 21), and justifies an application for adjudication under that section. KARSANDAS RAMDAS *v.* MAGANLAL KANKUCHAND (1902) **I. L. R. 26 Bom. 476**

10. ——— **Procedure**—*Adjudication of insolvency, application for—By petition or by a rule—Rule obtained per incurium.* The usual procedure for obtaining an adjudication order is by petition to the Court duly verified under s. 9 of the Indian Insolvency Act (11 and 12 Vict., c. 21), and not by a rule. *In the matter of* BITHAL DASS KALLA (1908) . . **12 C. W. N. 538**

——— **ss. 9 and 24—Assignment of all property for benefit of creditors**—*Insolvency—Composition deed—Act of insolvency—Assignment void against Official Assignee.* By a composition deed dated the 7th October 1901, *A* and *B* assigned the whole of their property to trustees, for the benefit of such of their creditors as should accept and sign the said deed within two months from the date thereof. This assignment

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 9 and 24**—*concld.*

was held in *Karsandas* v. *Maganlal, I. L. R. 26 Bom. 476*, to be an act of insolvency under s. 9 of the Indian Insolvency Act (11 and 12 Vict., c. 21, and, on the 11th December, 1901, *A* and *B* were adjudged insolvents on the application of certain creditors who had not signed the said deed. *Held*, that, even assuming that the deed of assignment was not voluntary within the meaning of s. 24 of the Indian Insolvency Act, nevertheless the assignment to the trustees was void as against the Official Assignee. MANMOHANDAS RAMJI *v.* MACLEOD (1902) . . . . **I. L. R. 26 Bom. 765**

——— **s. 13**—

See ARREST—CIVIL ARREST.
I. L. R. 26 Bom. 652

——— **Arrears of maintenance**—"*Debt or liability*"—*Protection order—Exemption from arrest.* Arrears of maintenance, included in the schedule filed by an insolvent, are a debt or liability within the meaning of s. 13 of the Insolvency Act, 11 and 12 Vict., c. 21 ; and an insolvent who has obtained a protection order is not liable for arrest or imprisonment in respect of such arrears. *Quære* : Whether the protection order protects the insolvent from proceedings in respect of any maintenance accruing subsequently to the filing of the schedule. *In the matter of* TOKEE BIBEE *v.* ABDOOL KHAN
I. L. R. 5 Calc. 536 : 5 C. L. R. 458

1. ——— **s. 19—Right of Official Assignee to commission**—*Rule 14 of Insolvent Court.* The right of the Official Assignee to commission under 11 and 12 Vict., c. 21, s. 19, does not arise until there are in his hands funds realized and available for distribution among the creditors. If at such time the adjudication is annulled, the right to commission subsists. OFFICIAL ASSIGNEE *v.* RAMALINGA **I. L. R. 8 Mad. 79**

2. ——— *Interest on scheduled debts—Official Assignee's commission on interest.* Where an insolvent's estate is sufficient to pay of his creditors in full, leaving a balance in the hands of the Official Assignee, the Court will direct interest at 6 per cent. to be paid on such proved or admitted contract debts as expressly or impliedly carry interest as from the date of the filing of the petition in insolvency, and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be made over to the insolvent. *In re* MAHOMED MAHMUD SHAH
I. L. R. 13 Calc. 66

——— **ss. 19, 21, 31**—

See OFFICIAL ASSIGNEE
I. L. R. 36 Calc. 990

1. ——— **s. 23—Reputed ownership**—*Insolvency—Property subject to mortgage in possession of insolvent at date of insolvency—Fixtures—Goods and chattels—Registration of mortgage—Registration Act (III of 1877), s. 17.* On the 23rd June, 1893, one Vishram Meghji, the owner of a flour mill, mortgaged all the machinery engines, plant, stock, implements, utensils, trade fixtures, chattels and effects specified in schedule annexed to the deed of mortgage, to the plaintiff, for R8,000 then advanced, and power was given to the plaintiff to sell the same in default of payment. In March, 1899, Vishram Meghji became insolvent, and his estate thereupon vested in the Official Assignee. The plaintiff claimed the mortgaged property, but the Official Assignee contended that under s. 23 of the Indian Insolvency Act (11 and 12 Vict., c. 21), he was entitled to it as property which with the consent of the true owner was in the possession, order or disposition of the insolvent at the date of insolvency. The property was sold by consent, and the plaintiff brought this suit to recover the proceeds. From the evidence it appeard that the greater portion of the mortgaged property consisted of articles fixed to various parts of the flour mill or of the machinery therein. *Held*, as to the articles not so fixed, that the plaintiff was not the true owner of these, and that they were not therefore within the section, and passed to the Official Assignee. *Held*, also, as to the fixed articles, that they were not goods and chattels in the possession, order or disposition of the insolvent as the reputed owner, and that they were not in his reputed ownership within the section. The plaintiff was therefore entitled to them, or to such portion of the proceeds of sale as represented their value. It was contended that the fixed articles must either be goods and chattels or immoveable property, and, if the latter, that they could not be affected by the mortgage-deed as it was not registered, and that the charge in favour of the plaintiff was therefore invalid. *Held*, that the question of registration depended on the Registration Act (III of 1877), which requires the registration of all assurances of immoveable property. The fixed articles in question did not fall within the definition of immoveable property contained in s. 3 of that Act, not being "attached to the earth or permanently fastened to anything which is attached to the earth." S. 17 of the Registration Act therefore did not apply. Fixtures are not goods and chattels within the rules of reputed ownership laid down in s. 23 of the Indian Insolvency Act (11 and 12 Vct. c. 21). The fact of such fixtures being removeable by a tenant makes no difference. They are still fixtures to which the doctrine does not apply. MACLEOD *v.* KIKABHOY KHUSHAL (1901) . **I. L. R. 25 Bom. 659**

2. ——— Where a debtor has assigned a debt, notice by the assignee to the person owing the debt will take it out of the order or disposition of the debtor. *Per* SIR ARNOLD WHITE, *C.J.*—A chose in action, if it is a debt due to the insolvent in his trade or business, comes within the words "goods and chattels" as con-

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 23**—*concld.*

tained in s. 23 of the Indian Insolvent Debtors Act. *Per* BHASHYAM AYYANGAR, *J.*—The instrument only created a charge or hypothecation in plaintiff's favour, but a charged-holder is as much the substantial owner of, and has as substantial an interest in, the goods and chattels as a mortgagee thereof, and if either allows the mortgagor or the person creating the charge to remain in possession, under circumstances which will lead to his being the reputed owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee. A debt is taken out of the order and disposition of an insolvent if a suit be brought to enforce a charge upon the debt prior to his adjudication. PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901)
I. L. R. 25 Mad. 406

——— **ss. 23 and 24.**

See INSOLVENCY—ORDER AND DISPOSITION.

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.

——— **s. 24**—

See ante, SS. 9 AND 24.

1. ——— **s. 26—Debts.** The terms debts "admitted" or "established," in s. 26 of the Indian Insolvency Act, mean admitted in the schedule or established on proof, and not that it has been alleged and not denied. *In the matter of* BUCKTWAR CHAND . . **1 C. W. N. 328**

2. ——— **Right of owner to sue Assignee**—*Per* PEACOCK, *C. J.*, and MARKBY, *J.*—An order under s. 26 of the Insolvency Act does not prevent the owner of the property which is the subject of the order from suing the Assignee to establish his right to it. BARLOW *v.* COCHRANE
2 B. L. R. O. C. 56

3. ——— **Order to deliver property to the Official Assignee**—*Jurisdiction of Insolvent Court.* The Insolvent Court has a discretionary power under s. 26 of the Insolvency Act, to order any person who has the possession of or has under his power or control, any property of the insolvent, to deliver over such property to the Official Assignee. *In re* DWARKANATH MITTER. RATANMANI DASI *v.* MILLER **4 B. L. R. O. C. 63**
15 W. R. O. C. 18 note

4. ——— *Jurisdiction*—*Per* NORMAN, *J.* (PAUL, *J.*, dissenting)—The Insolvent Court has power under s. 26 of 11 and 12 Vict., c. 21, to order any person who is in possession of, or has under his control, any property alleged to belong to the insolvent, to deliver such property to the Official Assignee. *In the matter of* ADJUDHIA PRASAD. JAIR M GIR *v.* MILLER
7 B. L. R. 74 : 15 W. R. O. C. 16

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 26**—*concld.*

5. ——— *Question of disputed title—Voluntary conveyances—Stat. 13 Eliz., c. 5.* Where an order had been made under s. 26 of the Insolvency Act calling on a certain person to show cause why she should not hand over to the Official Assignee money which it was alleged the insolvent had paid to her shortly before his insolvency under circumstances which might make the transaction void against the creditors: *Held*, in the Court below, that the transaction was a gift, and, under the circumstances, void as against the creditors within the Stat. 13 Eliz., c. 5. *Held*, also, that the word "property" in s. 26 of the Insolvency Act includes money. *Held*, on appeal, that the matter was not one which could properly be dealt with under the 26th section of the Insolvency Act, as it involved difficult questions of title. *In the matter of* UMBICA NUNDUN BISWAS
I. L. R. 3 Calc. 434 : 1 C. L. R. 561

——— **ss. 26, 27**—*Jurisdiction of the Insolvent Court outside the Bombay Presidency—Person in possession of Insolvent's property can be directed to hand it over to the Official Assignee.* The Court for the relief of insolvent debtors sitting in Bombay has jurisdiction to make an order under s. 26 of the Indian Insolvency Act against a person residing outside the Bombay Presidency. *In re* GANESHDAS PANALAL (1908)
I. L. R. 32 Bom. 198

——— **ss. 26 and 36**—*Construction.* The words "and it shall be also lawful for the Court, on those or any other occasions," in s. 36 of the Insolvent Debtors Act (11 and 12 Vict., c. 21), are intended to receive a very wide application, and the Court has power to proceed under this section as soon as there is an insolvent. Under s. 26 of the same Act, no rule should be granted except on the application of the assignee or an admitted creditor. *In the matter of Bucktwar Chand, 1 C. W. N. 328*, followed. No one can be regarded as a creditor until his name is admitted to the schedule, or until he establishes it there. *In the matter of* CHUNI LAL OSWAL (1902) . . **I. L. R. 29 Calc. 503**

——— **s. 27.**

See INSOLVENCY—PROPERTY ACQUIRED AFTER VESTING ORDER.
I. L. R. 19 Bom. 232

——— **ss. 28 and 29.**

See RIGHT OF SUIT—OFFICIAL ASSIGNEE.
I. L. R. 11 Bom. 620
L. R. 14 I. A. 111

See VARIANCE BETWEEN PLEADING AND PROOF—SPECIAL CASES—FRAUD.
I. L. R. 11 Bom. 620
L. R. 14 I. A. 111

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

1. ——— **s. 29—Suit by Official Assignee**—*Leave of Court to sue—Leave nunc pro tunc—Costs—Practice.* To an action brought, prosecuted, or defended by the Official Assignee, it cannot be objected that such action was brought, prosecuted, or defended without leave first obtained from the Court. Should, however, the Official Assignee bring prosecute, or defend any such action without leave first obtained from the Court, he will do so at his own risk in regard to the matter of costs. Leave should be obtained before suing: it cannot be granted in the course of the suit *nunc pro tunc.* COCHRANE *v.* OWEN . . . **2 Hyde 150**

2. ——— *Suit by Official Assignee—Leave to sue—Practice.* It is not necessary for the Assignee to obtain the leave of the Court before commencing an action; the absence of such permission is matter of objection only between the Assignee and the Court of Bankruptcy, and not between the Assignee and the other party to the suit. *In re* LATAPIE . . . **Cor. 4**

——— **s. 30—**

See ante, SS. 7 AND 30.

——— **Liability for costs of unsuccessful motion**—*Bankruptcy Rules of 1848, Rule XXV—" Person interested "—Deponent of an affidavit.* A sale of property forming portion of the estate of certain insolvent debtors having been authorized by the Court, the Official Assignee moved to set it aside, relying in support of his application on affidavits which had been filed in Court and in which the deponents alleged that the property was worth a great deal more than the price at which the sale had been authorized. The Court having dismissed the motion, and ordered the deponents to pay the costs of the Official Assignee and the purchasers: *Held,* that the deponents could not be made liable for costs, and that Rule XXV of the Bankruptcy Rules of December 1848 did not apply to such a case. The deponents were not "persons interested in the insolvent's estate," nor could they be said to have "applied" or appeared on an application. The Official Assignee should be made liable for the costs of such an unsuccessful application, he being left to take such steps as might be necessary to indemnify himself. RAMANNA NAIDU *v.* BRAHMAYYA CHETTI **I. L. R. 23 Mad. 26**

1. ——— **s. 31—Sale by Official Assignee**—*Sanction of the Court—Power of Court to set aside a completed sale.* Under the Indian Insolvency Act the Official Assignee has full power to sell the property and effects of an insolvent, and it is his duty to make a sale of the same with all convenient speed. The sanction of the Court to the sale is not necessary. S. 31 of the Indian Insolvency Act does not vest the Court with power to set aside a completed sale. WOONWALLA *v.* MACLEOD (1906) . . **I. L. R. 30 Bom. 515**

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 31**—*concld.*

2. ——— **Proceedings "in aid of"**—*English Court—Public examination—Procedure.* Where some of the partners of a firm had filed their petition in insolvency in Calcutta and others had been adjudicated bankrupt in England, and in the insolvency proceedings in Calcutta an order had been made that such proceedings should be "in aid of and auxiliary to" the bankruptcy proceedings. *Held,* that the Trustee in Bankruptcy and Official Receiver had no *locus standi* to oppose the personal discharge of the insolvents, who had filed their petition in the Calcutta Court. Procedure in holding a public examination in India under such order in aid. SHRAGER, *In the matter of* (1906) . . . **I. L. R. 33 Calc. 1062**

3. ——— **Special and ordinary jurisdiction of High Court in insolvency**—*Order of Insolvent Court—Suit—Limitation Act (XV of 1877), Sch. II, Art. 122.* The High Court exercises the powers of an Insolvent Court under a special jurisdiction vested in it by the Insolvency Act, and though this jurisdiction is a special one, the High Court exercises it as part of the ordinary jurisdiction vested by law, *Canlas Narrondas* v. *C. A. Turner, I. L. R. 13 Bom. 510,* followed. An order of the Insolvency Court is a judgment of the High Court and a suit based upon such judgment is maintainable. *Attermoney Dossee* v. *Hurry Doss Dutt, I. L. R. 7 Calc. 74,* followed. ANNODA PRASAD BANERJEE *v.* NOBO KISHORE ROY (1905) **I. L. R. 33 Calc. 560**

——— **s. 32**—*Arrangement for cultivation of indigo and management of factories for benefit of creditors. T & Co.,* a firm in Calcutta, the mortgagees of certain indigo factories and crops, mortgaged them to the *A* Bank, the Bank stipulating to make advances for the cultivation and manufacture of the indigo in consideration of the mortgage. *T & Co.,* became insolvent, and the Bank went into liquidation, and a provisional liquidator was appointed. On application by the Official Assignee to the Court to allow *S,* a leading merchant in Calcutta, to carry on the cultivation and manufacture on the ground that the whole crop would otherwise be lost to the creditors:—*Held,* that the Court would grant the application, and, in exercise of the power given by s. 32 of the Insolvency Act, would order the indigo factories not to be sold until further notice, and allow the Official Assignee to make such an arrangement as being one by which the interest of the creditors would be best consulted; the right to hold the produce of the factories to be to such extent only as the interest in them which belonged to the insolvents, and was vested in the Official Assignee, enabled him to give. *In the matter of* THOMAS & Co. . . **1 Ind. Jur. N. S. 352**

——— **s. 36—**

See ante, SS. 26 AND 36.

See PRACTICE—CIVIL CASES—COUNSEL. **I. L. R. 29 Calc. 50**

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

1. ——— s. 36—Practice—*Counsel.* A person from whom property is sought to be taken under s. 36 of 11 and 12 Vict., c. 21, is entitled to be represented by counsel. *In the matter of* NOLITMOHUN DOSS . . . **11 B. L. R. Ap. 33**

2. ——— *Practice—Right of witness summoned under s. 36 to appear by counsel.* A witness summoned for examination under s. 36 of the Insolvency Act is not entitled, as of right, to be represented by counsel. The attendance of counsel on his behalf is a matter of practice to be settled by the Judge at his discretion. *In the matter of the petition of* NURSEY KESSOWJI **I. L. R. 3 Bom. 270**

3. ——— *Summons to insolvent and creditors—Practice.* An application for a summons to insolvent and the petitioning creditors to be examined with reference to the debt on which the insolvency had been adjudicated should be made to the Commissioner. *In re* KHODA BUX . . . . **Ind. Jur. N. S. 42**

4. ——— *Fresh petition—Practice—Rule 14 of Insolvent Rules, Bombay. Held,* that Rule 14 of the Insolvent Court at Bombay, requiring a special application on affidavit and notice to opposing creditors before a fresh petition can be filed, has reference to a dismissal upon hearing, and not to the case of a petition dismissed under Rule 10. *In re* MANEKJI FRAMJI **3 Bom. O. C. 167**

5. ——— *Adjournment—Illness of insolvent—Protection order.* An adjournment on the ground that the insolvent is unable to attend the Court by reason of ill-health will only be granted when the insolvent enjoys the benefit of the Court's order granting him personal protection. *In re* ODOYTOO CHURN ROY **Bourke, Ins. 3**

6. ——— *Death of insolvent—Abatement—Effect of death on vesting order.* The death of an insolvent before obtaining this discharge does not affect the right of the Official Assignee to deal with the property of such insolvent, nor does it cause the proceedings in such insolvency, so far as the Official Assignee and the creditors are concerned, to abate. *In re* SITARAM ABBAJI. *Ex patre* SUNDARDAS MULJI . **10 Bom. 58**

7. ——— *Abatement of suit—Death of party instituting proceedings—Representative.* Proceedings in the Insolvent Court do not necessarily abate by the death of the party who institutes such proceedings. There is nothing in the Insolvency Act, or in the Rules of the Court, which prevents the commissioner from allowing the proceedings to be carried on by the representative of such deceased party, he being interested in them. *In the matter of* RAM SEBAK MISSER. PALTU *v.* JANKI PRASAD. RAMZAN ALI *v.* JANKI PRASAD **6 B. L. R. 119**

8. ——— *Rules of Insolvent Court—Rule 25—Leave to defend suit without fees.* Leave granted to the Official Assignee under Rule 25 of the Rules of the Insolvent Court to defend a suit without paying Court-fees. HIRALAL SEAL *v.* SCHILLER . . . **7 B. L. R. Ap. 61**

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— s. 36—*contd.*

9. ——— *Final discharge where insolvent is not personally present in Court—Affidavit explaining absence—Opposition to final discharge.* An insolvent who has obtained a rule *nisi* for his final discharge, but who is not personally present in Court on the return of the rule, is entitled, where no one appears to propose the rule, to have the rule made absolute on his putting in a sufficient affidavit explaining his absence. *In re* FOX **I. L. R. 13 Calc. 67**

10. ——— *Order to examine witnesses under s. 36—Discovery of insolvent's property—Bonâ fide creditor—Practice—Conduct of examination.* When the Official Assignee makes or supports an application to examine witnesses under s. 36 of the Indian Insolvency Act, such application should be readily granted. When it is made by any other person, the grounds of the application should be carefully sifted, and the Court should satisfy itself that the inquiry will probably lead to some benefit to the creditors or estate, and is not merely made to harass and annoy the persons proposed to be examined. *A* became insolvent in 1866 and fled out of the jurisdiction. In August 1866, a person, alleging himself to be a creditor of the insolvent's estate, obtained an order under s. 36 of the Indian Insolvency Act (Stat. 11 and 12 Vict., c.21), directing the examination of the insolvent's son and daughter, *R* and *L*, with a view to the discovery of certain property of the insolvent which might be made available for the creditors. *R* and *L* subsequently obtained a rule *nisi* to set aside the order. They filed affidavits alleging that the applicant was not a *bonâ fide* creditor to the estate; that although he had, no doubt, brought a claim upon the estate in his own name, he was merely a nominee of his brother *A* who had supplied the purchase-money; and they alleged that his application was the result of a family quarrel, and was made merely from motives of ill-will. The Court *held* that the applicant was not a *bonâ fide* creditor of the estate. The order for examination was, however, supported by the Chartered Mercantile Bank, which was admittedly a *bonâ fide* creditor. *Held,* that the applicant not being a creditor, and the Official Assignee not supporting the application, and the affidavits showing feeling and the bias, the Court would have hesitated to admit the application for the order, under s. 36, if it stood alone. But the fact that the Chartered Mercantile Bank, an admittedly *bonâ fide* creditor, supported the application, altered the case, and the examination applied for ought to be allowed. Under the circumstances, however, the Court was of opinion that the applicant who belonged to the insolvent's family, and was involved in a bitter family quarrel, should not

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 36**—*concld.*

conduct the examination, and ordered that the Chartered Mercantile Bank should apply to the Official Assignee to conduct the inquiry, and if he declined to do so, the Bank should do it. *In re* ALLADINBHOY HUBIBHOY. *Ex parte* RAHMUBHOY HUBIBHOY . . . **I. L. R. 11 Bom. 61**

11. ——— *Order for examination of witnesses where witnesses are defendants in a suit brought by insolvent prior to his insolvency—Practice.* One *B* filed a suit against the three appellants *C*, *D*, and *I*, praying for a declaration that he was their partner in a certain business, etc. *C* and *D* filed their written statements, and affidavits of documents were made and inspection given and taken on either side; but *I* did not file either his written statement or his affidavit of documents. On the 28th July 1897, the plaintiff *B* was adjudicated an insolvent. On the 4th October 1897, one *H*, a creditor of the insolvent, obtained an order from the Insolvent Court under s. 36 of the Insolvency Act for the examination of *C*, *D*, and *I* with reference to the estate and effects of the said insolvent, and the 10th November 1897 was appointed for their examination. On the said 10th November, they obtained a rule from the Insolvent Court to set aside the said order for their examination, or in the alternative to postpone their examination until after the above suit, in which they were defendants, should be heard. The rule was subsequently discharged and the examination was ordered to proceed. On appeal: —*Held*, that *C* and *D* ought not to be prejudiced in their defence in the suit brought against them by the insolvent by being subjected to an examination until that case was heard. By filing their written statements and giving inspection of documents, they had given all the information they could be required to give until the hearing should take place. As to *I*, however, the order for examination was confirmed, he not having filed any defence in the civil suit nor given inspection. *In re* BHAGWANDAS NAROTAMDAS . . . . **I. L. R. 22 Bom. 447**

——— **s. 39.**

See SET-OFF—GENERAL CASES.
6 C. L. R. 294

——— **Mutual credit**—*Debt.* A "mutual credit" within the meaning of s. 39 of the Insolvency Act must in its nature terminate in a debt. MILLER *v.* NATIONAL BANK OF INDIA
I. L. R. 19 Calc. 146

1. ——— **s. 40**—*Assignment to trustees for benefit of creditors—Notice to creditors to register claims—Refusal of trustees to register claim preferred after time—Cause of action.* The creditor of an insolvent, who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiff had not applied for its registration within the time notified by them and that he would not consent to abide by the order which the High Court might make on an application by the trustees for its advice regarding the claims of creditors who, like the plaintiff, had applied for the registration of their claims after such time, but before the assets of the insolvent had been distributed. The deed of trust empowered the trustees to distribute the assets of the insolvent after a certain time among the creditors who had preferred their claims within that time, and declared that they should not be liable for such distribution to creditors who had not preferred their claims within that time; but it did not empowered them to refuse to register claims made after that time, but before distribution of the assets. *Held*, that the refusal of the trustees to register the plaintiff's claim gave him a cause of action against them; and that, inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it. AJUDHIA NATH *v.* ANANT DAS
I. L. R. 3 All. 799

2. ——— *Agreement of commission—Cesser of interest on filing of petition.* By a document styled an "agreement of commission" the executant acknowledged the receipt of a loan and bound himself to pay commission thereon at the rate of 10 per cent. per month and to repay the principal in two years and nine months. It appears that the so-called commission was in the nature of interest, and was fixed at a high rate, because the debtor was expected to obtain the lease of a forest and to derive large profits therefrom. The debtor filed his petition in the Insolvency Court on 1st September 1884. *Held*, that the creditor was not entitled to a dividend in respect of commission claimed to have accrued due after that date. SUBBARAYALU *v.* ROWLANDSON
I. L. R. 14 Mad. 133

3. ——— **Proof of claim**—*Giving up security—Realization of security.* In 1870 the firm of *S M & Co.*, of Calcutta, authorized *A*, of the firm of *C N & Co.*, also of Calcutta, to indent for them for iron from England. In pursuance of such authority, *C N & Co.*, ordered through their London agents, *P P & Co.*, a shipment of iron, which was duly shipped by *P P & Co.*, who drew against the said shipment two bills of exchange for R10,000 and R1,484-10, respectively, on the firm of *S M & Co.*, in favour of *C N & Co.* The bills, on presentation, were duly accepted by *S M & Co.*, and afterwards discounted by *C N & Co.*, with the Chartered Mercantile Bank, *C N & Co.*, at the same time depositing with the Bank, as collateral security for the payment of the bills, the bill of lading for the iron shipped from England by *P P & Co.* Subsequently both *S M & Co.* and *C. N & Co.* filed their petitions in the Insolvent Court, and were adjudicated insolvents. In the schedule of *S M & Co.* the Bank was inserted as a creditor in respect of this

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 40**—*contd.*

transaction for R11,484-10. When the bills of exchange became due, they were duly presented for payment to the aceptors but were dishonoured and protested by the Bank for non-payment, and on such non-payment the Bank sold the shipment of iron for which it held the bills of lading, and realized the sum of R10,073-12-6. The Bank claimed to prove for the whole amount in the schedule against the estate of *S M & Co. Held*, that the Bank was only entitled to prove for so much as was due to it on the bills of exchange after deducting the amount realized by the sale of the iron. In the circumstances of the case, *C N & Co.* were interested in the shipment of iron as well as *S M & Co.*, and therefore there was no obligation on the Bank to give up the security before proving its claim, but it might have proved for the whole amount of the debt and retained the security. *In the matter of* SHIB CHANDRA MULLICK **8 B. L. R. 30**

4. ——— *Proof of claim —Dividend already declared.* A claim was made against the estase of an insolvent in respect of certain bills of exchange on which dividends had been declared in favour of the present claimant by the Official Assignee on the estates of two other insolvents but which bills of exchange were also included in the present claim. *Held*, that the dividends declared on the two other insolvencies must be deducted from the amount of the claim, though no payment in respect of the dividends declared had been actually made. *In the matter of* PARKE PITTAR . . . **8 B. L. R. 118**

5. ——— *32 and 33 Vict. c. 71 (Bankruptcy Act, 1869)—Proof of claim—Breach of contract—Unliquidated damages.* A claim for unliquidated damages arising out of a breach of contract was allowed to be proved in the Insolvent Court under s. 40, Insolvency Act. *Semble:* The provisions of the English Bankruptcy Act with regard to such claims apply to India. *In the matter of* OMERTOLALL DAW . . **13 B. L. R. Ap. 2**

6. ——— *Proof of debts—Trust property.* As the Insolvency Act, by virtue of the terms of s. 40, incorporates all existing and future enactments passed in England for the purpose of determining what debts may be proved ; and as by s. 15 of the English Act of 1869 property held by the bankrupt in trust for others is not the property of the bankrupt divisible among his creditors such property cannot, be regarded as having vested in the Official Assignee, and a *cestui que trust* creditor is not entitled to come in and prove ; because what is being administered in insolvency is the insolvent's estate, of which property of this nature does not form part. *In the matter of* VARDALACA CHARRI . . . . **I. L. R. 2 Mad. 15**

7. ——— *Proof of claim.* On the 25th June 1874, *A*, the father of *B*, having mortgaged the factory X to *S & Co.*, to secure repayment of R12,000 advanced, died on the 7th September 1874, leaving a will whereby he appointed his wife *C* sole executrix and devised to her factory X. On the 16th September 1876 another mortgage was executed whereby *C* further charged factory X with the repayment of further advances, and *B* mortgaged factory Y as a further security, the mortgage containing a stipulation for repayment, within one month after notice of the balance due in excess of R12,000. *B* became insolvent in July 1882. No demand was made. On the 5th January 1877 a balance of R27,552 remained due, which, with interest up to July 1882 was increased to R42,564. The liquidators of *S & Co.*, who had in the meantime dissolved partnership, sought to prove against *B's* estate for R30,564 after deducting the R12,000 advanced to *A. Held*, that the liquidators (if entitled to prove at all) could only prove for the difference between the sum of R30,564 and the value of the mortgage security after realizing or giving credit for the value of the first security. *In the matter of* AGABEG **12 C. L. R. 165**

8. ——— *Insolvency —Proof of claim by creditor against insolvent—Time within which such proof to be made—English rules not applicable—English Bankruptcy Act, 1883 (46 and 47 Vict., c. 52).* One Kalidas Keshowji became insolvent, and filed his schedule on the 22nd July, 1896. In the schedule one Jehangir Hormasji Mody was entered as a creditor for R1,500. He, however, did not either prove or dispute this amount in his lifetime, and he died in May, 1897, leaving a will of which the applicants were executors. In 1898 a dividend on the insolvent's estate was declared and paid, but no claim on behalf of the deceased Jehangir Hormasji Mody was sent in by his executors. Subsequently the executors put in a claim, on behalf of their testator as creditor in the insolvent's estate, for R87,881. On the 18th July, 1901, the Official Assignee disallowed this claim. The executors, on the 19th February, 1902, applied to the Court that the claim should be admitted. The Official Assignee contended that the application was too late ; that under s. 40 of the Indian Insolvency Act the rules framed under the English Bankruptcy Act of 1883 were applicable to India and that under these rules (Rule No. 230) the applicants should have appealed, against his order disallowing the claim, within twenty-one days. *Held*, that the English rule (No. 230), which limited the time for application to prove against an insolvent's estate, did not apply to India, and that the first application was therefore not barred by time and should be dealt with on its merits by the Commissioner in Insolvency. *In re* KALIDAS KESHOWJI (1902) . **I. L. R. 26 Bom. 623**

9. ——— **Sale of mortgaged property** *—32 and 33 Vict., c. 71 (Bankruptcy Act, 1869)—Rules 78 to 81.* The insolvents filed their petition on 17th March 1873, and obtained their final dis-

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 40**—*concld.*

charge on 2nd September 1873. After their discharge, a creditor, to whom they had mortgaged certain property, made an application for the sale of the mortgaged properties, and the petitioner prayed for an order for an account of what was due on the mortgage, and for a sale under the conduct of the Official Assignee; that he should be at liberty to bid and set off the amount of the purchase against the sum due to him; that if any other person became the purchaser, the proceeds should be paid to him in liquidation of his debt, and that, after crediting that amount, the applicant might rank as a cerditor to the estate for any remaining balance. The Court ordered the sale to be made as prayed in the petition, the Official Assignee to reserve a price on the property, and duly advertise it for sale; if not sold by public auction, application should be made to the Court by the Official Assignee for leave to sell by private contract. *In the matter of* HOWARD BROTHERS **13 B. L. R. Ap. 9**

10. ——— **Distribution of assets**—*Creditor taking benefit of property which does not pass to Assignee.* The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund, does not apply where that creditor obtained by his diligence something which did not, and could not, form a part of the fund. COCKERELL v. DICKENS **2 Moo. I. A. 353**

11. ——— *Surplus after paying creditors in full—Interest on debts—Nature of debts on which interest is payable.* If the estate is more than sufficient to pay the creditors twenty shillings in the pound, the surplus is to be applied to the payment of interest on debts bearing interest by contract. The debts on which interest ought to be allowed to creditors out of a surplus remaining in the Official Assignee's hands, after payment of the scheduled amount of debts, are such only as bear interest by the contract of the parties, either express or implied; not upon judgments or any other debts with respect to which interest could only be recovered *qua* damages. *In the matter of* MACCLEAN . . . **1 Mad. 220 note**

——— **s. 42—Preferential claims**—*Costs—European assistants and native workmen of insolvent firm.* The application for payment under s. 42 of the Insolvency Act must be taken to imply consent to a dissolution of the contract of service by the filing of the petition. Claims, therefore, by servants of an insolvent firm only allowed up to date of insolvency, not to the end of the month. Claim of servant who had left insolvent's service before date of insolvency allowed, but only for so much as accrued due to him within the six months previous to insolvency. Sum agreed to be paid to an assistant at extra salary or remuneration for making up insovent's statement to be laid before the creditors, disallowed. Costs of the applications allowed out of the estate. One claimant was manager of the insolvent's business at Simla on a salary of R350 per month, up to 11th April 1867, when one of the partners wrote to him promising him commission to make his salary up to R500. During the six months previous to the insolvency he had received R3,100, being more than the salary claimed for six months. Claim disallowed. *In the matter of* PARKE PITTAR & Co. **6 B. L. R. Ap. 144**

——— **s. 44**—*Expunging names of creditors from schedule—Omission to claim dividend—Official Assignee a trustee for creditors admitted in schedule.* The applicant was a creditor of the insolvents, who filed their schedule in Bombay in July 1868. The schedule contained the names of twenty-six creditors, twenty of whom were residents in Karachi and six in Multan. The debts amounted in the aggregate to R51,819-13, and were all admitted, some of them being for trifling sums. The applicant was the largest creditor on the schedule, his debt amounting to R27,500. The insolvents obtained their personal discharge in March 1869. Since the date of the insolvency, one dividend had been declared, *viz.*, dividend of one per cent. in 1870. Only one creditor had applied for and received that dividend. On the 5th July 1886, the applicant for the first time applied for a dividend on his claim. He was then, after so long a time unable to adduce any proof in his own possession in support of his claim, but was ultimately allowed by the Official Assignee to prove his claim from the insolvent's books. Having thus proved his claim against the estate, the applicant obtained a rule on the 5th October 1887, calling on the other creditors of the insolvents to show cause why they should not come in and prove their claims, or, in default, why their names should not be expunged from their insolvent's schedule. *Held*, discharging the rule, that the Court had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims. The Official Assignee holds the assets of an insolvent as a trustee for all the creditors admitted on the insolvent's schedule, whether or not they have actually proved their claims. *In re* DEWCURN JEWRAJ **I. L. R. 12 Bom. 342**

——— **s. 46**—*Winding up of company—Payment of servants' salaries—Companies Act 1866, s. 173.* Under s. 46 of the insolvency Act, the Court, on the failure of a Bank, ordered the salaries of the employés of the Bank to be paid, the payment to be confined to the salary already earned at the date of failure of the Bank. The Court refused a more extended application for six months' salary in lieu of notice and the amount payable to them under their agreements as passage-money and expenses of passage, which it was contended could be granted under s. 173 of the Companies Act. *In*

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 46**—*concld.*

the matter of the COMPANIES ACT, 1866, *and of the* AGRA AND MASTERMAN'S BANK **1 Ind. Jur. N. S. 350, 352**

But *see In the matter of the* CALCUTTA STEAM TUG ASSOCIATION . . . **2 Ind. Jur. N. S. 17**

1. ——— **s. 47—Personal discharge**—*Liability of insolvent to pay subsequent calls—Winding up of company—Companies Act, 1866, ss. 98, 100.* An insolvent a holder of shares in a joint-stock company on the 21st of May 1866, obtained his personal discharge under s. 47 of the Insolvent Debtors Act, but his name still continued on the register of the company, the Official Assignee not having elected to take the shares. The company was subsequently (on the 13th of April 1867) ordered to be wound up. *Held*, that the insolvent's liability to pay calls on the shares still continued, notwithstanding his personal discharge. *In re* MERCANTILE CREDIT AND FINANCIAL ASSOCIATION DAMASKAR'S CASE . . **8 Bom. O. C. 117**

2. ——— **ss. 47, 56 and 73**—*Order of personal discharge—Finality of order—Procedure.* An order under s. 47 of the Indian Insolvency Act (Stat. 11 and 12 Vict., c. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in s. 56 of that Act. The only course open to an opposing creditor is to appeal against the order under s. 73. *In re* DAYABHAI SARUPCHAND. *Ex parte* SORABJI BYRAMJI COTAH **I. L. R. 23 Bom. 474**

——— **ss. 47 and 50—Offence under s. 50 a criminal offence**—*Charge, etc., must be framed to sustain conviction and sentence—Opposing creditor—Grounds of opposition should be stated in clear terms—Practice—Procedure.* Insolvents were found guilty, under s. 50 of the Indian Insolvency Act, of wilfully preventing or purposely withholding the production of certain papers relating to their affairs, and sentenced to three months' imprisonment. *Held*, that the preceedings, so far as they resulted in imprisonment, amounted to a criminal case. *Held*, further, following *Ex parte Van Sandau, 1 Phillips 445, 457*, that "in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence"; and that, as there was no charge, the order for imprisonment was wrongly made. S. 47 of the Insolvent Act provides the machinery by which the grounds of opposition to a debtor's discharge may be inquired into and precisely defined before the hearing. *In re* VALLABHDAS JAIRAM (1903) **I. L. R. 27 Bom. 394**

——— **s. 49.**

See CIVIL PROCEDURE CODE, 1882, s. 244 —PARTIES TO SUIT **I. L. R. 7 All. 752**

——— *Right of Official Assignee to be made party to, or apply in, a suit against insolvent pending vesting order—Letters Patent, cl. 17.* The Official Assignee has no legal right under the Insolvency Act to apply to be made a party to suits against the insolvent pending at the time of a vesting order being made, nor has he the power, after judgment and decree have been pronounced in a suit against the insolvent prior to his vesting order, to get himself made a party to such suit with a view of setting aside the judgment or appealing therefrom. By s. 17 of the Letters Patent constituting the High Court, the practice of the Insolvent Court (where any such parctice is specifically pointed out by the Insolvency Act or the rules framed under it) is not affected by the amalgamation of the Courts; and under s. 49 of the Insolvency Act, the Official Assignee, after schedule filed and before the discharge of the insolvent, may apply to any Court in which a suit is brought against the insolvent for any debt or demand admitted in the schedule, or disputed as to amount only, for a stay of process or execution; but where no schedule has been filed the Official Assignee cannot adopt that course. *In re* HUNT, MONNET & CO. *Ex parte* GAMBLE *v.* BCOLAGIR MANGIR. **1 Bom. 251**

——— **s. 50.**

See BAIL . . **I. L. R. 17 Bom. 334**

1. ——— **Fraudulent practice in trade**—*Power of Court to punish criminally.* Certificate refused where insolvent had been guilty of fraudulent practices in trade. Certificate suspended in the case of a partner at home who, though innocent of the fraudulent practices, omitted to give notice to the parties intended to be defrauded. The Insolvency Court has no power to punish criminally for fraudulent practices in trade. This is left to the action of creditors through the channel of the criminal law. *In re* JANSSEN *v.* REUSS . **Cor. 13**

2. ——— **Punishment**—*Imprisonment of insolvent on criminal side—False entries in books—Fraudulent preference—Fraudulent transfers—Warrant, illegality of—Concealment of property.* S. 50 of the Insolvency Act provides a punishment by way of penalty and before an insolvent can be punished under that section, he must be shown by legal evidence to have committed, on some specific occasion, one or other of the offences enumerated in that section. A law of this kind the intention of which is to punish should be administered as the criminal law is administered, that is to say, specific offences should be charged not technically specific in the sense of a specific form of indictment, but the Court and the insolvent and all concerned should know what offence the insolvent is being tried for; and the evidence should be directed to the proof of that offence, so that the accused may be in a position to produce evidence to rebut the charge of that offence; and the Judge should specifically find what offence the insolvent has been guilty of; and in his judgment and order and in the

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 50**—*concld.*

warrant it should appear what the insolvent has done. A warrant committing an insolvency to jail for offences under s. 50 of the Insolvent Act, including, amongst the offences for which he is committed an offence not contained in that section, is invalid. *In the matter of* RASH BEHARY ROY *v.* BHUGWAN CHUNDER ROY . . **I. L. R. 17 Calc. 209**

3. ——— *Lower Burma Courts Act (XI of 1889), ss. 50 and 69, cls. (b) and (c) —Criminal case.* A petition presented to the Special Court under s. 50, cl. (5), of the Lower Burma Courts Act, by a person considering himself aggrieved by an order of the Recorder, sitting as Insolvency Commissioner, made under s. 50 of the Insolvency Act, comes, before the Special Court as a criminal case, and is therefore to be dealt with, in case of difference of opinion between the members of the Special Court, under s. 69, cl. (c), of the Lower Burma Courts Act. The punishment which can be awarded under s. 50 of the Insolvency Act is a punishment for something which the person to be punished has done, and is not inflicted in order to compel him to do something in the future, and the case in which it is inflicted is therefore a criminal case. *Rash Behary Roy* v. *Bhugwan Chunder Roy, I. L. R. 17 Calc., 209,* followed. YEO SWEE CHOON *v.* CHARTERED BANK OF INDIA, AUSTRALIA, AHD CHINA **I. L. R. 19 Calc. 605**

4. ——— **ss. 50, 47**—*Power of Commission—Adjournment of petition till expiration of imprisonment.* A Commissioner setting in Insolvency, while sentencing an insolvent to imprisonment on the criminal side, under s. 50 of the Insolvent Debtors Act, has power in addition to order that the further hearing of the insolvent's petition be adjourned, with or without protection, under s. 47, beyond the expiration of such term of imprisonment. *In re* MANIKJI SHAPURJI KAKA **5 Bom. O. C. 61**

5. ——— **ss. 50, 51—Conduct of insolvent amounting to offences within ss. 50, 51**—*Conduct of insolvent considered with reference to the following charges filed against him by opposing creditors, viz., reckless speculation; contracting debts without reasonable expectation of paying them; misconduct in contracting debts; concealment of property; obtaining forbearance by false representations; contracting debts by false pretences; undue preference.* The insolvent had for many years carried on business in Bombay as a merchant. His firm (Messrs. B. and A. Hormarji) had been established in 1830 by his uncle and father. On the death of the latter in 1882, the insolvent was left the sole surviving partner, and from that time until his failure he carried on the business alone. The failure took place in April 1891 and on the 1st May 1891 he was adjudicated an insolvent. His liabilities were stated to be R47,98,591; his good assets R5,13,903, and his doubtful assets R60,014. His discharge was opposed by six Banks in

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 50, 51**—*contd.*

Bombay with which he had had dealings. The grounds of opposition were as follows:—(i) Reckless speculation; (ii) contracting debts without any reasonable expectation, at the time when the same were contracted, of paying the same; (iii) gross misconduct in contracting debts; (iv) concealment of property; (v) obtaining forbearance from the opposing creditors by making false representations to them; (vi) contracting debts by means of false pretences; (vi) fraudulently and with intent of diminishing the sum to be divided among his creditors or of giving an undue preference to creditors, having discharged a debt due by the insolvent. It appeared that down to the end of 1889 there was nothing in the dealings of the firm to which objection could be taken. In the first half of the year 1890 the insolvent must have sustained heavy loss, as his mercantile assets over liabilities, which on the 31st December 1889 were R5,50,794, were on the 30th June 1890 reduced to R2,29,612. The charges, however, against the insolvent were based upon his conduct subsequently to the latter date. On that day (30th June 1890) the insolvent nominally possessed four lakhs of rupees, the saleable value of which was about 2½ lakhs. With his finances in this state the insolvent speculated in exchange, and in six months (*viz.*, before the 31st December 1890) he had lost his four lakhs of nominal capital, and 19 or 23 lakhs of rupees besides. The Court *held*, (i) as to the first ground of opposition, that the insolvent was guilty of rash and reckless speculation. This, however, was not an offence within the meaning of s. 51 of the Indian Insolvency Act (11 & 12 Vict., c. 21). When the insolvent entered into the contracts which had resulted in the loss, he had a fair capital, and though his speculations were excessive in amount, he had a fairly resonable expectation that there would not be such a fall in exchange as would more than absorb his assets. (ii) As to the second and third grounds of opposition, that they were proved in respect of the insolvent's transactions subsequently to December 1890, and that the insolvent was guilty of gross misconduct in contracting debts, having no reasonable or probable expectation, at the time when they were contracted, of paying them, and that his conduct fell within the purview of s. 51 of the Insolvency Act. In December 1890 the insolvent was bankrupt to the extent (at all events) of over 16 lakhs, and had on hand large forward contracts which then showed a further probable loss. In that position he entered into further large speculative sales of exchange. He had then no assets with which to meet any loss. (iii) As to the fourth ground of opposition, that it was proved. (iv) As to the fifth ground of opposition, that it was not established. On the 18th April 1891 the insolvent called a meeting of creditors and laid a not very candid or truthful statement of his affairs before them. Nothing was then arranged, and the meeting was adjourned for a week, in order that a committee

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 50, 51**—*concld.*

should examine the insolvent's position, etc. It was understood and arranged that in the meantime no steps should be taken against the insolvent, and that he should keep his affairs in *statu quo*. The insolvent, however, swore that he understood he was to make no large payments, but that he was to keep the firm going. During that week the insolvent paid R3,193 due on a bill to one of the Banks and R472 on re-draft account, a few insignificant current expenses and R1,000 to his solicitors, who were preparing a trust-deed to be carried before the creditors. The Court was of opinion that the conduct of the insolvent in making these payments did not amount to the offence charged in the fifth ground of opposition, *viz.*, obtaining forbearance from the opposing creditors by making false representations to them. (v) As to the sixth ground, that it was not established. On the 14th March the insolvent in answer to enquiries, had assured the manager of the Chartered Bank that his firm was quite sound and solvent, it being then to his knowledge hopelessly insolvent. On that day the manager accepted the insolvent's bills for £20,000 for which security was given, and subsequently the insolvent sold one of his own bills for £10,000 to the Bank. This, however, was in pursuance of a previous contract. The evidence of the manager showed that it was because of this contract, and not because of the false representation of the insolvent, that he purchased the draft for £10,000. The Court was of opinion that the transaction did not come within s. 50. (vi) As to the seventh ground (undue preference) that it was not proved. On the 16th April 1891, the day but one before the insolvent held a meeting of his creditors, he sent R5,000 to Messrs. Elliott & Sons in England. That firm had accepted bills of the insolvent which he was bound to take up, but the earliest did not fall due until the 20th May 1891. His practice had been to remit money a day or two before bills became due. The Court was of opinion that the transaction was not an undue preference within s. 50. It was, no doubt, a voluntary payment, but it was not shown to be a fraudulent discharge of a debt within the section. A mere voluntary payment of a debt is not within the purview of the section. Such a payment, must be fraudulent and must be made with the intent of disminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors. From the mere fact of a voluntary payment, fraud of a penal nature cannot be inferred. Here nothing more was proved than a voluntary payment by a man in insolvent circumstances. The insolvent knew he was in difficulties, but was of so sanguine a nature that he believed he could surmount them, and so R5,000 were sent rather with a view to keep up his English connection than with the fraudulent intent of giving an undue preference. Where an undue preference is made penal, the Court must be satisfied that the guilty intention necessary to

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 50, 51**—*concld.*

constitute the offence existed in the mind of the insolvent, and ought not to assume it unless the circumstances point to no other probable conclusion. The release by an insolvent of a debt due to him without receiving payment would undoubtedly fall within the scope of s. 50 of the Insolvent Act. *In the matter of* HORMARJI ARDESIR HORMARJI **I. L. R. 17 Bom. 313**

——— **s. 51.**

See ARREST—CIVIL ARREST. **I. L. R. 13 Mad. 150**

1. ——— Ground for deferring personal discharge—*Expectation of paying debts* The words in s. 51 of the Insolvent Act relating to debts contracted—" without having any resonable or probable expectation at the time when contracted of paying them "—are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. The words in the same section—" if it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property as to show gross misconduct in contracting the same "—apply not to this or that debts, or class of debts, but to all the debts contracted for some years past; and under the circumstances of the case afford ground not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47. *In the matter of the petition of* COWIE **I. L. R. 6 Calc. 70 : 7 C. L. R. 19**

2. ——— Trading in reckless manner. Reckless trading, although unaccompanied by any legal or moral fraud, is a ground for suspending protection. *In re* BAGGOT . **Bourke Ins. 5**

3. ——— Discharge of insolvent after imprisonment—*Execution of decree by arrest of insolvent.* Where, under s. 51 of the Insolvent Debtors Act (11 & 12 Vict., c. 21), it has been adjudged that an insolvent shall be forthwith discharged from all his debts, etc., except as to certain specified debts, and as to these that he shall be discharged so soon as he shall have been in custody, at the suit of the person or persons who shall be creditor or creditors for the same respectively, for such period as the Court shall direct; such an order of adjudication does not itself operate as an order for the imprisonment of the insolvent, but the detaining creditor, if he wishes to arrest or detain the insolvent for such period, must (if he have not already done so) place himself in a position to issue execution against the insolvent. *In re* MANCHARJI HIRJI READYMONEY . . **5 Bom. O. C. 55**

4. ——— ss. 51, 47—*Discharge except as to one debt—Committal on one debt to prison.* By an order made under the provisions of 11 & 12

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 51, 47**—*contd.*

Vict., c. 21, it was directed that an insolvent debtor was entitled to his discharge as to all the debts mentioned in his schedule, save and except the debt due to a certain creditor, and as to such debt that the insolvent should be entitled to be discharged as soon as he had been in custody at the suit of the creditor for six months, and it was further ordered that the insolvent be committed to custody in respect of this debt for six months. *Held*, that the order of committal was within the power given to the Court by ss. 47 and 51 of 11 & 12 Vict. c. 21. NIXON *v.* CHARTERED MERCANTILE BANK . . . . **I. L. R. 8 Mad. 97**

5. ——— **Personal discharge**—*Application for personal discharge—Discharge except as to debts due to a particular creditor—Prospective order under s. 51.* Application by insolvent for personal discharge. One creditor opposed. It appeared that that creditor lent money to the insolvent on a mortgage on false representations made by the insolvent to him. No decree had been obtained by the creditor on his mortgage. The opposing creditor applied that the insolvent be dealt with under s. 51 of the Insolvent Act. The insolvent contended that an order under s. 51 could only be made when the creditor had obtained a decree, and was in a position to apply at once for the arrest of the insolvent, which was not the case here. *Held*, that the insolvent was entitled to his personal discharge as regards all creditors except the opposing creditor; that the Court had no power under s. 51 to order immediate commitment of the insolvent, inasmuch as the opposing creditor had not placed himself in a position to issue execution against the insolvent, but that the Court could make a prospective order that, with regard to the debt due to the opposing creditor, the insolvent should be entitled to his personal discharge as soon as he should have been in custody at the suit of that creditor for the period of six months. *Quære*—If the debt be satisfied out of the proceeds of sale of the mortgaged properties or otherwise, whether the effect of such payment would be to relieve the insolvent from the penalty prescribed by s. 51. *In the matter of* SARAT KUMAR SEN

I. L. R. 26 Calc. 973
4 C. W. N. 32

6. ——— **Committal to jail**—*Commissioner in Insolvency, power of.* The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act. *Held* by the Full Bench, that an order made under s. 51 of the Insolvent Act is a final order and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. *Nixon*

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 51, 47**—*concld.*

v. *Chartered Mercantile Bank, I. L. R. 8 Mad. 97*, overruled. SAMARAPURI *v.* PARRY & CO.

I. L. R. 13 Mad. 150

——— **s. 58**—*Jurisdiction—Practice—Order to person to attend for examination.* The insolvent filed his petition in December 1865, and in January 1866, on his application for his personal discharge under s. 47 he was ordered to be imprisoned. He never applied for his discharge under s. 59 or 60 of the Indian Insolvency Act (Stat. 21 & 22 Vict. c. 21). When he had completed the term of his imprisonment, he left Bombay, and went to Morar and ultimately settled at Aligarh in the North-West Provinces. In August 1886, the Official Assignee was informed that the insolvent was possessed of landed property at Aligarh, and also considerable moveable property. On the 25th August 1886, the Official Assignee obtained a rule *nisi* calling on the insolvent to show cause why he should not hand over all this property to the Official Assignee for the payment of creditors. On the 10th August 1887, an order was made by the Insolvent Court under s. 58 of the Insolvency Act (Stat. 11 & 12 Vict. c. 21) directing the insolvent to appear before the Court on the 21st September 1887, to be examined touching his estate and effects and dealings and transactions. The insolvent appealed against this order, and contended that the Court had no greater powers than those possessed by the High Court, and consequently could not order the attendance of any person resident more than two hundred miles from Bombay. *Held*, that the Insolvent Court had jurisdiction to make the order. *In re* COWASJI OOKERJI

I. L. R. 13 Bom. 114

——— **ss. 59 and 7**—*Order of discharge, Effect of—Interest received after order of discharge by Official Assignee.* Under a vesting order, an insolvent's estate became vested in the Official Assignee, who paid the scheduled creditors the principal of their debts. A discharging order was then made under s. 59 of the Insolvent Debtors Act (11 Vict., c. 21). At the date of such order the Official Assignee had R143-1-8 to the credit of the insolvent's estate. He subsequently received the interest on certain securities which had been bequeathed to the insolvent for his life before the date of the vesting order. *Held*, that the discharging order did not make the vesting order void, nor as regarded the state vested in the Official Assignee did it revest immediately the right of property in the insolvent; that creditors are entitled to interest carrying debts out of a surplus remaining in the Official Assignee's hands after payment of the scheduled amount of debts; that, notwithstanding the discharging order, the Court might direct the R143-1-8 and the interest subsequently received, to be paid to the insolvent's creditors rateably in respect of interest on their debts calculated down

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 59 and 7**—*concld.*

to the date of the discharging order, and that the balance should be paid to the insolvent or his representative; that the interest subsequently received by the Official Assignee was "neither after-acquired property" within the meaning of s. 59 nor "a debt growing due to the insolvent before the Court shall have made its order" within the meaning of s. 7 of 11 Vict. c. 21. *In the matter of* PEREIRA **1 Mad. 217**

In the matter of MACCLEAN. **1 Mad. 220 note**

1. ——— **s. 60—Trader**—*Discharge—Subsequent suit for debt not entered in schedule.* Defendant, who had taken the benefit of the Insolvent Act, was sued by plaintiff for a debt contracted previously to his insolvency, the debt not having been entered in the insolvent's schedule at the time of his final discharge. *Held*, insolvent being a trader, that under the provisions of s. 60 of the Insolvency Act, taken in connection with 5 & 6 Vict., c. 122, the discharge was good and valid, and that subsequently-acquired property could not be attached for any debt discharged under the insolvency. BRETT *v.* SCHONERSTEDT **2 Hyde 1**

2. ——— *Trader—Mukadam.* A Mukadam is not a trader within the meaning of the Insolvent Act, 11 & 12 Vict., c. 21, and is not therefore entitled to obtain a discharge, in the nature of a certificate, under s. 60 of that Act. *In the matter of* COWASJI EDALJI **I. L. R. 5 Bom. 1**

3. ——— *Agent of company paid by commission—Trader—Broker.* The agent of a company or private individual who procures and receives parcels for transmission by his employers, or who by his personal exertions obtains passengers for their dâk, although he may be entrusted with the receipt or price of carriage, and is paid by commission, is not a broker or trader within the meaning of the Insolvent Act. *In re* CAMPBELL . . . . **2 Hyde 177**

4. ——— *Trader—Indigo planter—Stat. 12 and 13 Vict. c. 106, s. 65—Workmanship of goods or commodities.* An indigo planter is a "trader" within the meaning of s. 60 of the Insolvency Act. *In the matter of* DE MOMET **I. L. R. 21 Calc. 1018**

5. ——— **Order of discharge on debts not in schedule.** The order of discharge of an insolvent trader, under s. 60 of the Insolvent Debtors Act, operates to discharge such trader from all debts that could be proved in the matter of his insolvency, whether they are specified in his schedule or not. DADABHAI NASARVANJI *v.* MANIKJI SHAPURJI KAKA . . **7 Bom. O. C. 22**

6. ——— **Effect of final discharge**—*Bankruptcy Act, 1861—Premia on policy of insurance.* An insolvent obtained his final discharge in April 1863. *Held*, that he was not still liable, under the provisions of the English Bankrupt Act, 1861, s. 154, for the ascertained value of certain premia on a policy of insurance which he had undertaken. GRAY *v.* CHICK . . **Cor. 136**

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 60**—*concld.*

7. ——— **Plea of discharge in insolvency**—*Company—Winding up—Suit against contributory on the B list—Notice—Foreign judgment—Plea in suit on a foreign judgment—Balance order—English Companies Act, 1862.* The plaintiffs, who were an English joint stock company registered under the English Companies Act of 1862, sued the defendant as a past member of the Bank, upon a balance order of the High Court of Justice in England dated 24th February 1881, to recover the sum of £678-3. The balance order recited that it was made upon the application of the official liquidator of the Bank, and that there had been no appearance on behalf of the contributories. The defendant pleaded that he had not received notice that his name was about to be placed on the list of contributories, or notice of the application of the official liquidator recited in the balance order, and he contended that he was not bound by, or liable under, that order. He further pleaded (and it was admitted) that the order for winding up the plaintiffs' Bank was in July 1866, that he had filed his petition in insolvency on 19th November 1866, and had obtained his discharge under s. 60 of the Insolvency Act (Stat. 11 & 12 Vict., c. 21) on the 30th September 1867; and he contended that by that order he was discharged from liability. *Held*, upon the evidence, that service upon the defendant of the various notices was sufficiently proved. *Held*, also, that although the defendant's insolvency and his discharge under s. 60 of the Insolvency Act, which was subsequent to the order for the winding up of the Bank, might have absolved him from further liability to the plaintiffs, and, if pleaded in the Court in England, might have prevented his being placed on the list of contributories, yet that the Court could not, in this suit, give effect to the defendant's discharge. The present suit was a suit upon a foreign judgment, and the defendant could not now be permitted to plead a defence which he had an opportunity of pleading in the foreign Court. LONDON, BOMBAY, AND MEDITERRANEAN BANK *v.* BURJORJI SORABJI LYWATTA . . . **I. L. R. 9 Bom. 346**

See LONDON, BOMBAY AHD MEDITERRANEAN BANK *v.* HORMASJI PESTANJI . **8 Bom. O. C. 200**

8. ——— **ss. 60, 47**—*Final discharge—Rights of opposing creditor—Grounds of opposition where personal discharge has been without granted opposition.* An opposing creditor who has not filed grounds of opposition to or opposed the personal discharge (under s. 47 of the Insolvent Debtors Act) of an insolvent trader can nevertheless come in and oppose the insolvent trader's application for his final discharge under s. 60 of the Act. The grounds of such opposition may in

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **ss. 60, 47**—*concld.*

clude matters which might have been put forward as grounds for opposing the insolvent trader's personal discharge under s. 47 of the Act, and need not necessarily be confined to matters either not known at, or that have occurred since, the time of the personal discharge being granted. The Court, in considering whether it will grant or refuse to an insolvent trader his final discharge, will take into consideration the whole course of the mercantile dealings of the insolvent trader, and will not confine itself to his conduct with reference to the opposing creditor merely. *In re* PESTANJI SHAPURJI KAKA **8 Bom. O. C. 37**

9. ——— **ss. 60, 47 and 50**—*Personal discharge—Subsequent enquiry before final discharge.* An insolvent, whose personal discharge has been opposed under s. 47 of the Insolvent Act, can be again opposed by the same creditor, and on the same grounds, when he applies for an absolute discharge under s. 60. The order made on the hearing of the petition under s. 47 of the Act can be used as evidence against the insolvent when applying for his discharge under s. 60, provided that such order clearly states the offences established against the insolvent. An insolvent, by being punished under s. 50 of the Act, does not thereby cease to be liable in respect of such offences when he applies for his discharge under the 60th section. The discharge under s. 60 of an insolvent who has already obtained his discharge under s. 47 is not as of course, but will depend upon the general conduct of the insolvent both before and subsequent to his obtaining his discharge under s. 47. *In re* COORLAWALLA . . . . **9 Bom. 1**

——— **ss. 60 and 61.**

See COMPANY—WINDING UP—GENERAL CASES . **I. L. R. 10 Bom. 582**

——— **s. 62—Crown debt**—*Judgment-debt in name of Secretary of State for India in Council.* A judgment-debt due to the Secretary of State for India in Council, arising out of transactions at a public sale of opium held by the Secretary of State for India in Council, is a debt in respect of Crown property, and therefore a "debt due to our Sovereign lady the Queen" within the meaning of s. 62 of the Insolvent Act. In determining whether or no a debt falls under the denomination of a Crown debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State. Principle in *Secretary of State for India in Council* v. *Bombay Landing and Shipping Company, 5 Bom. O. C. 23*, followed. JUDAH *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL . . . **I. L. R. 12 Calc. 445**

——— **s. 63.**

See MARRIED WOMEN'S PROPERTY ACT, s. 8 . **I. L. R. 18 Mad. 19**

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

1. ——— **ss. 72, 73—Evidence**—*Evidence not in writing—Appeal.* Where the evidence has not been taken down in writing as provided by s. 72 of the Insolvent Act, the evidence cannot be gone into on appeal under s. 73. *In the matter of* ADJUDHIA PRASAD JAIRAM GIR *v.* MILLER **7 B. L. R. 74 : 15 W. R. O. C. 16**

2. ——— *Appeal—Mode of computation of time for appeal—Vacation.* In order to enable an insolvent to appeal from an order passed in the matter of his petition, notes of the evidence must be taken at the hearing by an officer of the Court. In the time allowed for appealing the vacation is to be computed, unless such time expire during the vacation, in which case the petition of appeal must be presented to the Court or a Judge on the first day after the vacation. *In re* LAKHMIDAS HANSRAJ **5 Bom. O. C. 63**

3. ——— *Appeal—Evidence—Mode of recording.* In order to enable the High Court to hear the appeal of an opposing creditor from order made upon the hearing of an insolvent's petition which such creditor opposes (and upon which evidence is taken), it is necessary that notes of all the evidence at the hearing should be recorded by an officer of the Insolvent Court. *In re Lakhmidas Hansraj, 5 Bom. O. C. 63*, in substance followed. KALLIANDAS KIRPARAM *v.* TRIKAMLAL GULABHAI . . **9 Bom. 307**

4. ——— *Appeal—Limitation—Evidence.* Certain creditors of an insolvent appealed against an order declaring him entitled to his personal discharge. The appeal time expired during the vacation of the Court, and the appeal petition was presented on the day when the Court re-opened. During the insolvency proceedings evidence was not recorded under s. 72, and the appellant sought on appeal to use the commissioner's notes of evidence. *Held* (i) that the appeal was not barred by limitation; (ii) that it was not competent to the Court to refer to the commissioner's notes. ABDOOL *v.* MAHAMED **I. L. R. 14 Mad. 404**

——— **s. 73.**

See COURT-FEES **I. L. R. 24 Mad. 160**

See INSOLVENCY **I. L. R. 36 Calc. 512**

1. ——— **s. 73**—*Appeal—Power of commissioner.* A commissioner has no power, under s. 73 of the Insolvency Act to extend the time for presenting a petition of appeal from an order of the Insolvent Court. *In re* GHOLAM RASUL KHAN **1 B. L. R. O. C. 130**

2. ——— *Power of Commissioner—Attachment of Property, Application for.* The gomastah of an insolvent claimed to retain certain property as against the insolvent, and disobeyed an order of Court that he should make over the property to the Official Assignee, whereupon an order of attachment was made absolute against

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— s. 73—*contd.*

him. Before such order was made absolute, the gomastah and another person had obtained a money-decree against one *R*. *Held*, that the Commissioner had no powers except those conferred by the Act, and therefore could not grant an application by the Official Assignee that half the amount of the decree still in the hands of *R* should be attached and brought into Court. *In re* KHETTSEY DASS . . . . . **3 B. L. R. Ap. 14**

3. ——— *Civil Procedure Court, s. 342—Appeal from Commissioner of Insolvent Court —Security for costs.* S. 342 of Act VIII of 1859 did not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. The right of appeal is given by s. 73 of the Insolvency Act and the Court cannot impose on the appellant a condition that he shall give security for the costs of such an appeal. *In the matter of* RAM SEBAK MISSER . . . **5 B. L. R. 179**

4. ——— *Security for costs —Non-appearance of insolvent.* On an application for deposit of security for costs in an appeal by an insolvent under s. 73 of the Insolvency Act, in a case where the insolvent had been sentenced to imprisonment under s. 50 of the Act, and it was shown that he had absconded, the Court declined to make any order for security for costs, but refused to hear the appeal unless the insolvent was present, *In the matter of* GHASSEERAM **15 B. L. R. Ap. 10**

5. ——— *Opposing creditor taken by surprise—Discharge—Power of Commissioner, to set aside discharge.* Where an opposing creditor, being, without any default on his part, misled as to the time when an insolvent's petition was to come on for hearing, failed to appear when the petition was called on, and the insolvent obtained his discharge *ex parte*, the Appellate Court, on the ground that the opposing creditor had been taken by surprise, set aside the order of discharge and restored the case to the board. *Semble:* That under the circumstances the Commissioner sitting in insolvency had no jurisdiction to set aside the order of discharge. DWARKADAS LALUBHAI *v.* BLACKWELL . . . . . **9 Bom. 319**

6. ——— *Appeal—Procedure—Form of petition of appeal—Civil Procedure Code, s. 590.* The procedure Code, as to appeals from orders under the Civil Procedure Code, 1882, is not made applicable by s. 590 to appeals from orders under the Insolvency Act. No particular form is prescribed for petitions of appeal under the latter Act. In this case the so-called memorandum of appeal was held to be a good petition of appeal under the Act. *In the matter of* BROWN **I. L. R. 12 Calc. 629**

7. ——— *Appeal by insolvent—Insolvent convicted and sentenced to imprisonment under s. 50 of the Insolvency Act—Power of High Court to admit insolvent to bail pending appeal.*

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— s. 73—*concld.*

An insolvent was convicted by the Insolvent Court of an offence under s. 50 of the Insolvency Act (Stat. 11 & 12 Vict. c. 21), and sentenced to imprisonment. Under s. 73 of the Act, he appealed against the decision of the Insolvent Court and applied to be admitted to bail pending the hearing of his appeal. *Held*, refusing the application, that the High Court had no power to admit him to bail. *In the matter of* HORMARJI ARDESIR HORMARJI **I. L. R. 17 Bom. 334**

8. ——— *Practice—Appeal from an order of adjudication—Responded on record withdrawing from appeal—Other creditors allowed to appear in appeal as respondents, although not named on the record—Costs of Official Assignee.* An order was made by the Insolvent Court adjudging *H* an insolvent on the petition of certain of his creditors. *H* appealed against the order the petitioning creditors being the respondents named on the record. When the appeal came on for hearing, the said respondents did not appear, and it was alleged that the appellant had settled with them, in order to induce them to withdraw from the appeal. Another creditor, whose name was in the insolvent's schedule, thereupon applied to be heard in the appeal in support of the order of adjudication, and if necessary that his name should be entered on the record as respondent. The Court granted the application. The Official Assignee is entitled to his costs of appearing in an appeal against an order of adjudication. *In the matter of* HAROON MAHOMED . . . **I. L. R. 14 Bom. 189**

9. ——— *Order of personal discharge—Finality of order.* An order under s. 47 of the Indian Insolvency Act (Stat. 11 & 12 Vict. c. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in s. 56 of that Act. The only course open to an opposing creditor is to appeal against the order under s. 73. *In re* DAYABHAI SARUPCHAND. *Ex parte* SORABJI BYRAMJI TATAH . . . **I. L. R. 23 Bom. 474**

10. ——— *Practice—Appeal by petition—Petition by creditor not included in Schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distributions of Dividends.* On an application for relief under s. 73 of the Insolvent Act to the High Court in its appellate jurisdiction by a creditor whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission:—*Held*, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor as well in respect of past as of future dividends. *In re* H. R. COBBOLD, AN INSOLVENT (1908) . **I. L. R. 36 Calc. 512**

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INSOLVENCY ACT (11 & 12 Vict., c. 21) —*contd.*

——— **s. 86.**

See LIMITATION ACT, 1877, SCH. II, ART. 180 . . **I. L. R. 11 Bom. 138**
I. L. R. 13 Bom. 520
L. R. 16 I. A. 156

See TRANSFER OF PROPERTY ACT, s. 135 **I. L. R. 21 Bom. 572**

1. ——— *Entering up judgment against insolvent for non-appearance.* The insolvent not appearing when his petition came on for hearing an order was made on the application of the Official Assignee that the insolvent should attend on a day fixed for the purpose of being examined: the order to be served on him in the meantime. On the day fixed he did not appear and an application was granted that judgment should be entered up against him under s 86 of the Insolvent Act. That section was not repealed by Act XIV of 1870. *In the matter of* COSTELLO **8 B. L. R. Ap. 57**

2. ——— *Judgment entered up under s. 86 of the Insolvent Act (11 & 12 Vict. c. 21)—Execution—Practice—Procedure—Civil Procedure Code, 1882, ss. 638, 619.* A judgment entered up under s. 86 of the Insolvency Act (11 & 12 Vict. c. 21) is a judgment of the High Court and must be executed under the provisions of the Civil Procedure Code. *In re* BHAGWANDAS HARJIVAN . . . . **I. L. R. 8 Bom. 511**

3. ——— *Absent of absconding insolvent, entering up judgment against.* Where an insolvent who had not received his discharge left the jurisdiction of the Court pending the further hearing of his petition for the benefit of the Act for the Relief of Insolvent Debtors, and there was reason to believe that he would not return to the jurisdiction, the Court ordered judgment to be entered up under s. 86 of the Act for the amount of the debts appearing in his schedule. *In the matter of* ENGLISH . . . **7 C. L. R. 378.**

4. ——— *Discretion of Court as to entering up judgment against insolvent—Final discharge.* Under s. 86 of the Insolvency Act (Stat. 11 & 12 Vict. c. 21), the Court has a discretion to grant or refuse an application to enter up judgment against an insolvent for the amount of his debts. In exercising the discretion the Court must be guided by the circumstances of the insolvency. *In the matter of* HORMARJI ARDESIR HORMARJI . . . **I. L. R. 19 Bom. 297**

5. ——— *Entering up judgment against insolvent—Final discharge, discretion of Court as to.* In August 1892 the insolvent was found guilty of various offences under ss. 50 and 51 of the Indian Insolvency Act (11 & 12 Vict. c. 21) and was sentenced to imprisonment for three months, his discharge being also postponed for a further period of twelve months. In December 1894, on his application for final discharge under s. 60 of the Act, the Official Assignee applied that, before the order of discharge was made judgment should be entered up against him under s. 86 for the amount of his debts. The Commissioner of the Insolvent Court in the exercise of the discretion given to him by the Act, ordered judgment to be entered up accordingly. On appeal by the insolvent:—*Held*, reversing the order, that under the circumstances of the case, the discretion of the Commissioner had been improperly exercised and that the order to enter up judgment against insolvent should be discharged. *In the matter of* HORMARJI ARDESHIR HORMARJI **I. L. R. 19 Bom. 778**

INSOLVENCY ACT (11 & 12 Vict., c. 21) —*concld.*

——— **s. 86**—*concld.*

6. ——— *Entering of judgment against insolvent. Semble:* That there is no provision in the Insolvency Act of 1848, which imposes upon an insolvent, who has obtained his personal discharge, the duty of disclosing to the Official Assignee that he has become possessed of property since the making of the order of personal discharge consequently the non-discloser by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors of the Official Assignee so as to render s. 18 of the Limitation Act applicable. S. 86 of the Insolvency Act is permissive and provides that the Court may enter up judgment against an insolvent, if in the circumstances of the case it shall think fit. *Semble*, therefore, that following the rule of practice under the English Bankruptcy Acts judgment will not be entered up against a bankrupt as a condition of his discharge, unless he has an income more than sufficient to kept his family in the enjoyment of the ordinary necessaries of life. ABDUL KAREEM SAHIB *v.* OFFICIAL ASSIGNEE OF MADRAS (1905) **I. L. R. 28 Mad. 168**

INSOLVENT DEBTOR.

See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE.

INSPECTION.

See JUDGE . **I. L. R. 33 Calc. 133**

INSPECTION OF DOCUMENTS.

1 CIVIL CASES 5750
2. CRIMINAL CASES 5758

See CIVIL PROCEDURE CODE, 1882, s. 59. **I. L. R. 32 Bom. 152**

See MANDAMUS **I. L. R. 32 Bom. 466**

See PRACTICE—CIVIL CASES—INSPECTION AND PRODUCTION OF DOCUMENTS.

See PRESIDENCY BANKS ACT, s. 50. **I. L. R. 31 Bom. 319**
I. L. R. 32 Bom. 466

1. CIVIL CASES.

1. ——— **Time for ordering defendant to furnish list of documents**—The Court will

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INSPECTION OF DOCUMENTS—*contd.*

1. CIVIL CASES—*contd.*

not order a defendant to furnish the plaintiff with a list of documents till after the plaintiff shall have filed his written statement. OGLE *v.* KUNAS **2 Hyde 279**

2. ——— **Practice**—*Affidavit of documents—Insufficiency of affidavit—Alteration by letter of terms of notice already served—Civil Procedure Code (Act XIV of 1882), ss. 131 and 133.* Before the Court will make an order under s. 133 of the Court of Civil Procedure, the preliminary steps mentioned in s. 131 must be taken by the party applying for the order. MOHENDRO NATH DAWAN *v.* ISHUN CHUNDER DAWAN . **I. L. R. 10 Calc. 59**

3. ——— *Production of documents—Discovery—Civil Procedure Code, 1882, ss. 131, 136.* If a notice under s. 131 of the Civil Procedure Code be not answered as provided by s. 132 the party seeking the inspection of documents may apply for an order under s. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under s. 136, unless the provisions of s. 134 are strictly complied with. DHAPI *v.* RAM PERSHAD **I. L. R. 14 Calc. 768**

4. ——— **Discovery**—*Civil Procedure Code, ss. 129, 136—Discovery of documents—Pardanasin women.* In a suit brought by two Mahomedan pardanashin ladies for recovery of immoveable property by right of inheritance an order was passed, under s. 129 of the Civil Pocedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mooktear, with a list of their documentary evidence, but the affidavit and list were considered defective upon several grounds, one of which was that the affidavit ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them personally, praying that the Court would have it verified in any manner thought proper, provided that their pardanashini were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiffs and no sufficient ground for non-compliance had been shown. *Held*, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs, with regard to the orders made under s. 129 of the Code, that, looking at the disabilities of the plaintiffs and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s. 136. KALIAN BIBI *v.* SAFDAR HUSAIN KHAN . . . **I. L. R. 8 All. 265**

5. ——— *Civil Procedure Code, 1877, s. 135—Trial of issue before inspection granted.* The intention of s. 135 of the Civil Procedure Code (Act X of 1877) is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and therefore, from the nature of the case, before the hearing of the cause. It should be a rule of practice that when an order is made under s. 135 of the Civil Procedure Code (Act X of 1877) by the Judge in chambers, the suit should be set down for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same Judge. AHMEDBHOY HUBIBHOY *v.* VULLEEBHOY CASSUMBHOY . **I. L. R. 6 Bom. 572**

6. ——— **Inspection of accounts**—*Suit for wrongful dismissal.* In a suit for wrongful dismissal of a servant of a gas company, in which the plaintiff alleged that the motive for dismissing him was his discovery of certain irregularities of the manager with regard to money-matters:—*Held*, that he was entitled to inspect the accounts which had been checked by himself while in the company's service, the press-copy letter-book containing copies of correspondence regarding his own conduct while in the company's service, and the account of a particular item in respect of which he alleged he had made discoveries that he imputed to the manager as the cause of his dismissal. MITCHELL *v.* ORIENTAL GAS COMPANY **1 Ind. Jur. N. S. 323**

7. ——— **Right of mortgagee to withhold production of mortgage-deed or title-deeds for inspection**—*Suit to avoid lien.* *B* mortgaged by deed certain premises to *J D*, and at the same time delivered to him title-deeds comprising the said premises, and also other immoveable property of *B*. *B* subsequently became embarrassed and assigned all his immoveable estate to trustees for his creditors. The trustees sued *J D* for a declaration that the immoveable property other than the mortgaged premises was vested in them free from any lien of the defendant; and *J D* in the written statement claimed a lien on all the little deeds and submitted that he was not bound (until his claim was satisfied) to hand them over to the plaintiffs, or to produce them or his deed of mortgage for inspection. *Semble:* That on the authorities *J D* was not bound to produce the title-deeds before satisfaction of his claim. *Quære:* Whether before satisfaction he was bound even to produce his deed of mortgage. BEATTIE *v.* JETHA DUNGARSI . . **5 Bom. O. C. 152**

8. ——— **Inspection of will of Hindu**—*Application by next of kin.* The Court, will on the application of one who is next of kin of a deceased Hindu, order a person who is in possession of an al-

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INSPECTION OF DOCUMENTS—*contd.*

1. CIVIL CASES—*contd.*

leged will of the deceased to bring in and deposit the same with the officer of the Court for the purpose of being inspected, and a copy thereof taken by the applicant. *In the goods of* BALKRISHNA GANPATJI **1 Bom. 114**

9. ——— Partnership books—*Partnership—Production of documents.* One partner of a firm represents the other partners for the purposes of production of documents. Therefore, where the plaintiff, alleging that he had been a patrner with the defendant and others in the firm of Ibrahim Kadu & Co., and that, on the dissolution of that firm, the amount then standing to his credit in the partnership books had been carried to his credit in the books of a new firm in which he and the defendant only were partners applied for an order on the defendant to produce, for the plaintiff's inspection, the books of Ibrahim Kadu & Co., which application was resisted by the defendant on the ground that the other partners in the firm of Ibrahim Kadu & Co. had an interest in those books, and were not parties to the present application, or showing to have consented to it. *Held*, that the plaintiff was entitled to the order. JAKARIA *v.* KASIM **I. L. R. 1 Bom. 496**

10. ——— Privileged communications—*Principal and agent—Suit for injunction to restrain use of trade marks—Civil Procedure Code (Act X of 1877), s. 130.* Under s. 130 of the Civil Procedure Code (Act X of 1877) a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided they are not privileged. Confidential communications between principal and agent relating to matters in a suit, are not necessarily privileged. *Held* in a suit for an injunction to restrain the defendant from using certain trade marks, that telegrams and letters between the plaintiff's firm in London and their managing agent in Bombay, relating to the subject-matter of the suit, were not privileged WALLACE *v.* JEFFERSON **I. L. R. 2 Bom. 453**

11. ——— *Discovery—Production of documents—Privilage—Solicitor and client—Act XIV of 1882, s. 133.* Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor. BIPRO DASS DEY *v.* SECRETARY OF STATE FOR INDIA . **I. L. R. 11 Calc. 655**

12. ——— *Discovery—Affidavit of documents—Sufficiency of affidavit—Further affidavit—Inspection of documents—Practice.* Where in an affidavit of documents privilege is claimed for a correspondence on the ground that it contains instructions, and confidential communications from the client (the plaintiff) to his solicitor, it must

INSPECTION OF DOCUMENTS—*contd.*

1. CIVIL CASES—*contd.*

appear not merely that the correspondence generally contains instructions, etc., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of the suit. *Bewicke* v. *Graham, 7 Q. B. D. 400,* followed. ORIENTAL BANK CORPORATION *v.* BROWN & Co. . . . **I. L. L. 12 Calc. 265**

13. ——— Documents alleged not to be material—*Code of Civil Procedure (Act XIV of 1882), s. 135—Affidavit of documents—Production of documents—Specific performance of contract to purchase—Refusal to allow inspection.* In a suit for specific performance of a contract to purchase an indigo factory, the defendant denied that the agreement relied on was final and alleged that the plaintiff had induced him to sign the agreement by means of representations regarding the nature, the extent, the value and the net income of the property, all of which representations the defendant charged were false and fraudulent to the knowledge of the plaintiff. The plaintiff in his affidavit of documents set out a list of title-deeds evidencing his title to and the books of accounts and other papers and documents relating to the property agreed to be purchased, and these he claimed to withhold from the defendant's inspection, on the ground that they were not sufficiently material at that stage of the suit. *Held*, that the documents were not protected. SUTHERLAND *v.* SINGHEE CHURN DUTT . . **I. L. R. 10 Calc. 808**

14. ——— Telegraphic messages—*Sanction of Government to production.* Where parties require the inspection or production of telegraphic messages, it is for them, and not the Court, to obtain the necessary sanction of Government to the disposal of such messages. LECKRAJ *v.* PALEE RAM . . . . **2 N. W. 210**

15. ——— Defendant's right to inspection of documents referred to in plaint before filing written statement—*Practice.* A defendant is entitled to have inspection of documents referred to in the plaint although he has not filed his written statement. RAM DAYAL SALIGRAM *v.* NURHURRY BALKRISHNA **I. L. R. 18 Bom. 368**

16. ——— Document referred to in written statetment and omitted in list—*Practice—Rules of High Court of 6th June 1874, 50, 52.* Where the defendant stated in an affidavit that a schedule annexed thereto contained a list of all the documents in his possession or power relating to the suit and a certain other document was not mentioned in the schedule, though referred to by the defendant in his written statement:—*Held*, on the hearing of a summons to consider the sufficiency of the affidavit, that the plaintiff could not cross-examine on the affidavit but could only show it was not an honest affidavit. The proper course was to apply for inspection of the particular document referred to in the written statement and omitted from

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INSPECTION OF DOCUMENTS—*contd.*

1. CIVIL CASES—*contd.*

the schedule, if inspection was needed. KENNELLY *v.* WYMAN . . . **I. L. R. 1 Calc. 178**

17. ——— Practice where portion of document is protected from inspection—*Practice—Sealing up immaterial parts.* Practice to be followed where a party producing documents wishes to have a certain portion of them sealed up. HEERALALL RUKHIT *v.* RAM SURUN LALL **I. L. R. 4 Calc. 835**

18. ——— Discovery—*Affidavit of documents when there are several plaintiffs, some of whom are in England—Practice—Privilege—Grounds of privilege.* Where there are several plaintiffs, all of them must join in making the affidavit of documents unless some specific reasons to the contrary are shown. The fact that some of the plaintiffs reside in England is no reason why they should be excused from making such affidavit. Documents which contain the purport of interviews with and of advice received from, the plaintiffs' solicitors and counsel as to the plaintiffs' position in regard to their said claim and as to the steps to be taken thereto, are privileged. Documents which record the steps taken by the plaintiffs from time to time in prosecuting their claim against the defendant are not privileged. Opinions upon, or steps taken in reference to, a suit in which plaintiffs and defendants are putting forward opposing contentions cannot be said to relate solely to the case of the plaintiff and are not privileged. RYRIE *v.* SHIVSHANKAR GOPALJI . . . **I. L. R. 15 Bom. 7**

19. ——— *Co-defendants*—*Inspection granted to defendant against co-defendant.*** A defendant may obtain discovery or inspection as against a co-defendant if the latter can be regarded as an opposite party. The plaintiff sued to set aside mortgage made by his uncle (defendant No. 3) to defendants Nos. 1 and 2, alleging that, shortly after he (the plaintiff) had attained his majority, he had been induced to join in the mortgage by the undue influence and threats of his uncle (defendant No. 3), who represented that the money to be raised by the mortgage was required to pay off the debts of the plaintiff's father. The plaintiff further alleged that he had received none of the money, and that no money had been paid by defendants Nos. 1 and 2 to the third defendant in his presence. Defendants Nos. 1 and 2 took out a summons against the third defendant for inspection of certain account books and documents. It was objected that no question was raised in the suit between the third defendant and defendants Nos. 1 and 2, and that consequently, under s. 131 of the Civil Procedure Code (Act XIV of 1882), the latter were not entitled to inspection. *Held*, that inspection must be given. It was possible that, not being able to set aside the mortgage as regarded himself, the third defendant was colluding with the plaintiff. Under the circumstances he might be considered a "party opposite" to the first two defendants although eventually the Court might not be able to make any order between him and them. ANANDRAO VITHAL *v.* BUDRA MALLA **I. L. R. 17 Bom. 384**

20. ——— Affidavit of documents, sufficiency of—*Practice—Right to put in further affidavit in support of claim of privilege where original affidavit is not sufficient—Documents referred to in pleadings as stating facts on which party setting them up relies.* Where an affidavit of documents stated, with regard to certain documents of which the plaintiffs asked for inspection, that the defendants objected to produce them for inspection "because such documents were obtained after dispute arose, and for purposes of litigation that might arise between them and the plaintiffs,"—*Held*, in an application for their production and inspection, that the affidavit was not sufficient to support the defendant's claim to privilege. *Held*, also, in such an application the party claiming privilege is entitled to put in and use a further affidavit in support of the claim of privilege and is not confined to the grounds made in the affidavit in which the claim is first set up. *M'Corquodale* v. *Bell, L. R. 1 C. P. D. 471*, referred to. Where, however, the party comes into Court relying on the original affidavit as sufficient to support his claim of privilege but asks the Court, if it should think otherwise, for leave to put in a further affidavit in support of his claim, *quære*, whether he should be allowed to do so. In a suit, brought in January 1884 to recover money for work done and material supplied in the erection of certain mills for the defendants, in which the defence was that the quality of the work was inferior to that contracted for and the defendants stated in their written statement that "in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs they caused the same to be inspected by two independent engineers in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will far exceed any possible sum due to the plaintiffs:—*Held*, that the defendants could not set up a claim of privilege for the reports of the two engineers. *Anderson* v. *Bank of British Columbia, L. R., 2 Ch. D. 644*, referred to. Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up those facts by way of answer to the plaintiff's claim he cannot afterwards attempt to make the case that the documents are confidential, and intended merely for his legal advisers or for the purpose only of evidence in the case. UMBICA CHURAN SEN *v.* BENGAL SPINNING & WEAVING CO. **I. L. R. 22 Calc. 105**

21. ——— Minor—*Code of Civil Procedure, 1882, ss. 129 and 136.* An infant party to a suit cannot be compelled, under s. 129 of the Code of Civil Procedure, to give discovery by affidavit and inspection of documents in his possession

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INSPECTION OF DOCUMENTS—*contd.*

1. CIVIL CASES—*contd.*

relating to the suit. To adopt the practice lately introduced in England would be objectionable mainly on three grounds: (i) because it is not contemplated by the Code of Civil Procedure; (ii) because it is inconsistent with existing rules of practice; (iii) because there is no method of enforcing an order for discovery against an infant. *Waghji Thackersey* v. *Khatao Rowji, I. L.R. 10 Bom. 167*, referred to. *Nathmull Narsing Das* v. *Malharrao Holker, I. L. R. 19 Bom. 350*, distinguished. DUNCAN *v.* BHOYRO PROSAD . . . **I. L. R. 22 Calc. 891**

22. ——— ——— *Affidavit of documents—Minor—Practice—Civil Procedure Code, 1882, s. 129.* An affidavit of documents may be required from a minor defendant. NATHMULL NARSINGDAS *v.* MALHARRAO HOLKAR **I. L. R. 19 Bom. 350**

23. ——— **Refusal to produce documents of title**—*Suit for ejectment.* The plaintiff sued to eject the defendant from certain pieces of land belonging to him, being portions of a passage upon which the defendant had encroached. In his written statement the defendant denied the plaintiff's title, and stated that he would rely on certain deeds set forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce the deeds for the plaintiff's inspection on the ground that they related solely to his own title to the land in dispute, and did not in any way tend to prove or support the title of the plaintiff thereto. *Held*, that the defendant was entitled to refuse production of the deeds. The Court could not go behind the defendant's affidavit of documents. VINAYAKRAO DHUNDIRAJ *v.* NAROTAM ANANDJI . **I. L. R. 17 Bom. 581**

24. ——— **Place for inspection**—*Account books of business—Place where business is carried on—Contract made in Bombay to be performed up-country Civil Procedure Code, 1877, s. 132.* Defendant was owner of certain cotton-ginning factories at and near A in the mofussil, and had also a place of business in Bombay. He entered into a contract in Bombay with the plaintiff to gin certain cotton of the plaintiff's at the said factories of the defendant in the mofussil. Plaintiff brought a suit for damages for the breach of this contract, and demanded inspection in Bombay of all defendant's books relating to the business of the said ginning factories belonging to the defendant. The defendant was willing to give the inspection asked for, but contended that it should be had at A, where all the books in question were kept, and objected to bringing the books down to Bombay as demanded by the plaintiff. *Held*, that the contract, though made in Bombay, having been intended to be performed at a considerable distance from Bombay, at and near A, where the business of ginning was conducted, and where the books relating to the said business were kept, A was the proper place at which to give inspection. KEVALDAS SAKARCHAND *v.* PESTONJI NASSERVANJI **I. L. R. 5 Bom. 467**

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1. CIVIL CASES—*concld.*

25. ——— **Disobedience of order for inspection**—*Bombay Act I of 1865, s. 14—Bombay Act IV of 1868, s. 15.* To render a person liable for disobedience of a notice under s. 15 of Bombay Act IV of 1868, it is necessary that the documents required for inspection should be therein specified. Disobedience of an order to produce evidence under s. 14 of Bombay Act I of 1865, Cl. 2 does not render a person liable to criminal prosecution, but simply to an adjudication in the absence. REG *v.* MANIKRAM SURAJRAM **11 Bom. 231**

26. ——— **Inspection by agent of a party.**—When under an order giving liberty to a party to a suit, his attorneys and agents, to inspect and persue the documents produced by the opposite party, inspection by an agent is contemplated, the order should be read in such a way as would give the Court some control over the persons to be appointed to inspect the documents. Such an order contemplates that the agent will be a person standing in the position of the party for the purposes of the suit. *Held*, therefore, that the Court ought not to permit a person formerly in the service of the defendant to inspect as the plaintiff's agent the defendant's books which had been in his charge. ENAMUL HUQ *v.* EKRAMUL HUQ **I. L. R. 25 Calc. 294**

27. ——— **Refusal to allow inspection**—*Civil Procedure Code, s. 130—Discretionary power of Court under s. 130 not interfered with on revision—Such power should be exercised with caution.* The High Court will not in revision interfere where a lower Court, in the exercise of its [discretionary power, refuses inspection of documents produced before it under a sealed cover in obedience to an order under s. 130 of the Civil Procedure Code. The power of refusing inspection should, however, be exercised with great caution; and the opposite party should be allowed to inspect and take copies of the documents when they relate to matters in issue, unless they are privileged in law, relate *exclusively* to the case of the party producing them and contain nothing supporting or tending to support the other side. BALAMONEY *v.* RAMASAMI CHETTIAR (1906). **I. L. R. 30 Mad. 230**

2. CRIMINAL CASES.

1. ——— **Discovery**—*Power of Court to order inspection—Criminal Procedure Code, 1882, ss. 94-99—Search-warrant, form and validity of.* *A* and *T*, the latter of whom was the book-keeper in the firm of *J M & Co.*, were charged, on the complaint of that firm, with cheating by having dishonestly induced them to deliver to *A* certain sums of money between 1882 and 1887, and with having abetted each other in the commission of the said offence. The offence charged was carried out by *T* omitting to make entries in the account books of

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2. CRIMINAL CASES—*contd.*

sums due by *A* to the firm, and by making false entries therein of payments by *A*. Whilst the charge was pending, the Presidency Magistrate, before whom the charge had been made, granted a search-warrant in the following terms: "To Inspector *M*—Whereas *A* and another have been charged before me with the commission or suspected commission of the offence of cheating, and it has been made to appear to me that the production of khatta books for the years 1882 to 1887 is essential to the enquiry now being made, or about to be made, into the said offence or suspected offence, this is to authorize and require you to search for the said proprety in the house of *A*, No. 13 Pollock Street, and if found to produce the same forthwith before this Court." In execution of this warrant, certain books and papers found in the house of *A* were seized and taken possession of by the police, and of those books and papers the Magistrate on the application of the prosecution, made an order for inspection. On a rule granted by the High Court to show cause why the order for inspection should not be set aside, it was contended that the search-warrant had been granted without proper judicial inquiry and upon insufficient materials; that it was bad on the face of it as it did not "specify clearly," as directed in Form VIII, sch. V of the Criminal Procedure Code, whose khatta books were to be produced; and that there was nothing in the criminal law to enable a Court to make an order for inspection of documents by the prosecution in a criminal case. *Held, per* NORRIS, *J.*, that, assuming the contention as to the search-warrant arose on the rule as granted, the warrant must be looked at as a whole, and so looked at it sufficiently and clearly showed that it was the khatta books of *A* which were referred to as being essential to the inquiry and the objects of the directed search; nor was there anything to show that the warrant was issued otherwise than regularly and in due course. *Per* NORRIS, *J.*—Though the Courts in England have constantly refused to compel discovery in criminal cases, on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorized the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search-warrant issued under the provision of s. 96 of the Criminal Procedure Code, there is no destinction between such documents and those of any description found upon his person at the time of his arrest or on his premises at the time of, or subsequent to, his arrest, and it was never doubted that the latter may be used in evidence against him. If, as laid down in the case of *Dillon* v. *O'Brien, 20 Irish L. R., 300*, the right to sieze and detain property of any description in the possession of a person lawfully arrested for treason, felony or misdemeanor, rests "upon the interest which the State has in a person justly or reasonably believed to be guilty of a crime being brought to justice and in a prosecution once commenced being determined in due course of law," a right to inspect such property must exist, as well as a right to seize and detain it and the proper persons to inspect it are those conducting the prosecution. It would, moreover, be unreasonable that the police or those conducting the prosecution should not have an opportunity of inspecting and examining documents, etc., found on a prisoner when arrested, or on his premises at the time of, or subsequent to, his arrest, before tendering them in evidence. *Per* GHOSE, *J.*—The contention as to the validity of the search-warrant did not arise on the rule as granted, but *semble* that the search-warrant was bad in law, no summons under s. 94 of the Criminal Procedure Code having been, in the first instance, issued for the production of the documents, and there being no evidence to show that they would not be produced on summons, only; that although the warrant was not specific still, inasmuch as no objection was raised to the form of the warrant before the Magistrate, and the accused had not been prejudiced by reason of the specification of the documents being somewhat indistinct, and it was clear what was really meant, the objection as to the form of the warrant should be disallowed. *Per* GHOSE, *J.*—There is no doubt that by the criminal law of this country, as laid down in the Criminal Procedure Code since 1861, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him. The Magistrate has to determine at the time when he makes an order under s. 94 of the Criminal Procedure Code, or issues a search-warrant under s. 96, whether the documents are necessary for the inquiry; but when they are brought into Court, the inspection should not rest with the Magistrate who does not prosecute and has no interest one way or the other in the result of the prosecution. It is reasonable that those who conduct the prosecution should have such inspection, for the production of such documents is for the purpose of using them in evidence, and this could not be done unless the prosecution had an opportunity of inspecting them. In the case of a search or seizure by the police under Ch. XIV of the Criminal Procedure Code, the prosecutor would necessarily have an opportunity of looking at the documents and articles seized, and there is no reason why he should not have the same opportunity or privilege where, under the order of the Court, any particular documents or other thing is seized under a search-warrant and brought up to the Court. Bearing in mind the purpose for which any document or thing is seized and brought before the Court, it seems that the Legislature, while providing for the seizure and production in Court of documents, etc., intended by implication that the prosecution should, under the order of the Court, have the power to inspect them, and determine whether they should go in as evidence.

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Held, per Curiam—for the reasons above given—that the Magistrate had power to allow the inspection, but such inspection must be limited to the books named in the search-warrant. *In the matter of the petition of* AHMED MAHOMED. MAHOMED JACKARIAH & Co. *v.* AHMED MAHOMED
I. L. R. 15 Calc. 109

2. ———— Summons to produce document or thing—*Criminal Procedure Code (Act X of 1882), s. 94.* A complaint having been preferred against an accused for criminal breach of trust with reference (amongst other items) to a sum of R1,77,131-1-2, which sum was, in an enquiry held by the Cheif Presidency Magistrate, proved to have been paid to the accused in seventeen notes of rupees ten thousand each (the numbers of which were identified) and the remainder in small notes and cash, the accused in cross-examination, for his own purposes, proved that fifteen of these notes were still in his possession; whereupon an application was made, under s. 94 of the Code, for a summons on the accused, directing the production of these notes. This application was refused. Subsequently, the accused, through a third person, cashed five of these notes, whereupon a second application was made under s. 94 by the prosecution for the production of the notes or their proceeds as against accused and such third person. The Magistrate granted summonses on the accused and on such third person for the production of ten notes, but declined to grant a summons for such third person for the proceeds of the five notes cashed. The accused produced five of these notes which were in his possession or power; the third person, however, stating that he had in his power five of the notes mentioned in the summons, claimed a lien on the same, and the Magistrate thereupon refused to make any order on him. The Magistrate (a rule having been obtained against him, calling on him to show cause why his order should not be set aside, and why the notes of the proceeds thereof in the hands of the third person should not be produced) stated in his explanatory letter that he entertained doubts as to his power to compel such third person to produce the five notes, inasmuch as a lien had been claimed on them, and that he was of opinion that the proceeds of the notes cashed, not being specific objects, did not come within the purview of s. 94. *Held*, that the Magistrate's order must be set aside. *In the matter of the* NIZAM OF HYDERABAD *v.* JACOB
I. L. R. 19 Calc. 52

INSPECTION OF PROPERTY.

———— Form of order for inspection—*Civil Procedure Code 1882, s. 499—Judicature Acts, Order 50, rule 3.* The plaintiff brought an action against the defendant for damages alleged to have been caused to his house by the erection by the defendant of an adjoining house. On an application by the defendant for an order allowing him or his agents to enter into the house of the plaintiff for the purpose of inspecting, examining, and surveying the alleged injuries and for the purpose of examining the materials employed therein and formations thereof and to dig excavations for the purpose of exposing the foundations, it was objected by the plaintiff that the Court had no jurisdiction to make the order, as the house of which inspection was sought was not the "subject of the suit" within s. 499 of the Civil Procedure Code, and that, if the order could be made for inspection of the house, it could not be made for inspection of the house, including the zenana apartments, and further that no order could be made for the excavation of the foundations. *Held*, that the house and premises of the plaintiff formed the "subject of the suit" within the meaning of s. 499, and under that section the Court had power to make the order applied for. *Held*, also, that this was a case in which the order should be made. DHORONEY DHUR GHOSE *v.* RADHA GOBIN KUR
I. L. R. 24 Calc. 117
1 C. W. . 99N

INSPECTOR (MUNICIPAL).

See PUBLIC SERVANT
I. L. R. 13 Mad. 131

INSTALMENTS.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 257 A.
I. L. R. 35 Calc. 870

See DEKKHAN AGRICUTURISTS' RELIEF ACT (XVII OF 1879), s. 15 B.
I. L. R. 32 Bom. 445.

See INSTALMENT BOND.

See INTEREST —STIPULATIONS AMOUNTING OR NOT TO PENALTIES.
I. L. R. 27 Bom. 21

See LIMITATION—QUESTION OF LIMITATION . . . **6 C. W. N. 348**
I. L. R. 31 Calc. 297

See LIMITATION ACT, 1877, SCH. II, ART. 179—ORDER FOR PAYMENT AT SPECIFIED DATES . . **I. L. R. 27 Bom. 1**

See MORTGAGE . **I. L. R. 31 Calc. 83**

See WAIVER . .
I. L. R. 31 Calc. 83 : 8 C. W. N. 66

———— decree or money payable by—

See BOND . .

See CIVIL PROCEDURE CODE, 1882, ss. 257, 258 (1859, s. 206).

See DECREE—ALTERATION OR AMENDMENT OF DECREE. . **2 Hay, 68, 95**
4 Bom. A. C. 77
I. L. R. 2 All. 129; 320
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I. L. R. 14 Calc. 348

See DECREE—CONSTRUCTION OF DECREE —INSTALMENTS.

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INSTALMENTS—*contd.*

——— **decree or money payable by**—*contd.*

See DEKKAN AGRICULTURISTS' RELIFE ACT 1879, S. 15B. **I. L. R. 7 Bom. 532**
I. L. R. 19 Bom. 318
I. L. R. 31 Bom. 120

See DEKKAN AGRICULTURISTS RELIEF ACT, 1879, S. 20.
I. L. R. 5 Bom. 604
I. L. R. 12 Bom. 326

See EXECUTION OF DECREE—
MODE OF EXECUTION—INSTALMENTS;
EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES.
I. L. R. 29 Calc. 810

See LIMITATION ACT, 1877, SCH. II, ARTS. 74 AND 75.

See LIMITATION ACT, 1877, ART. 178.
I. L. R. 15 Calc. 502

See LIMITATION ACT, 1877, S. 179 (1871, ART. 167; 1859; S. 20)—ORDER FOR PAYMENT AT SPECIFIED DATES.

See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON. **I. L. R. 1 Calc. 130**

See RELINQUISHMENT OF, OR OMISSION TO SUE FOR, PORTION OF CLAIM.
12 B. L. R. 37
7 W. R. 309
I. L. R. 3 All. 717

See WAIVER.

——— **repayment of loan by**—

See TRANSFER OF PROPERTY ACT, S. 83.
I. L. R. 24 All. 461

1. ——— *Civil Procedure Code (Act XIV of 1882), s. 210—Power of High Court to make its money decrees payable by instalments.* Under s. 210 of the Civil Procedure Code this Court has the power to make its money decrees payable by instalments. *Per* CURIAM: The general impression prevailing in the minds of money-lenders in Bombay, as echoed in the plaintiff's affidavit, that in all cases they can defeat the povisions of the Code as to payment by instalments and get a decree for immediate payment by avoiding the Small Causes Court and coming to this Court, is erroneous and needs to be corrected. POMA DONGRA *v.* WILLIAM GILLESPIE (1907).
I. L. R. 31 Bom. 348

2. ——— *Decree payable by instalments—Bengal Tenancy Act (VIII of 1885)-Rent suit—Instalment decree, power of Court to make—Civil Procedure Code (Act XIV of 1882), ss. 210, 622—High Court's power of revision.* A decree for rent under the Bengal Tenancy Act cannot be made payable by instalments, s. 210 of the Civil Procedure Code not applying to such a decree. Where

INSTALMENTS—*concld.*

a Munsif made an order for the payment of the amount of rent decreed by instalments, he committed an error of law only and not an error in the execise of his jurisdiction, within s. 622, Civil Procedure Code. SHIBH NARAIN MOOKERJEE *v.* BAIKUNTHA NATH ISAR (1907) **11 C. W. N. 857**

INSTALMENT BOND.

See INSTALMENTS.

See LIMITATION **I. L. R. 31 Calc. 297**

See LIMITATION ACT, 1877, SCH. II, ART. 75 . . **13 C. W. N. 1004, 1010**

See WAIVER . **I. L. R. 36 Calc. 394**

INSTRUMENT OF PARTITION.

See STAMP ACT (II OF 1899).
I. L. R. 32 Bom. 509

INSULT.

See MISCHIEF. . **I. L. R. 24 All. 155**

——— **Intent to provoke a breach of the peace**—*Penal Code, s. 504.* *A* abused *B* to such an extent as to reduce *B* to a state of abject terror. *Held* that *A*, having given to *B* such provocation as would, under ordinary circumstances, have caused a breach of the peace, was guilty of an offence under s. 504 of the Penal Code. QUEEN-EMPRESS *v.* JOGAYYA . . **I. L. R. 10 Mad. 353**

INSURANCE.

1. LIFE INSURANCE 5765
2. MARINE INSURANCE . . . 5770
3. FIRE INSURANCE 5777

See CARRIERS.
I. L. R. 18 Calc. 427; 620
L. R. 18 I. A. 121
I. L. R. 19 Calc. 538

See MARINE INSURANCE
I. L. R. 29 Bom. 360.

——— **life**—

See STAMP ACT (II OF 1899), SCH. I, ART. 47, CL. D. **I. L. R. 25 Bom. 376**

——— **marine**—

See BILL OF LADING.
I. L. R. 30 Calc. 565

See CONTRACT ACT, SS. 20, 30 AND 65.
I. L. R. 25 Mad. 561

——— **policy of**—

See INSOLVENCY—PROPERTY ACQUIRED AFTER VESTING ORDER.
I. L. R. 18 Mad. 24

See STAMP ACT, 1869, S. 34.
I. L. R. 3 Calc. 347

See STAMP ACT, 1879, S. 3, CL. 15.
I. L. R. 19 Calc. 499
I. L. R. 19 Bom. 130

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INSURANCE—*contd.*

1. LIFE INSURANCE.

1. ———— **Assignment of policy**—*Death of assignee—Death of assured—Notice by assignee to company—Payment of premia by executors of assignee—Absence of legal personal representative of assured—Refusal to pay over.* *A*, having insured his life in a certain Life Insurance Company, assigned his rights under the policy to *B*, the assignment on the face of it expressing no consideration whatever. The fact of the assign ment was notified to the company. *B*, after paying all premia due, died, appointing *C* and *D* his exetors, who took out probate of his will, and paid all subsequent premia on the policy. *A* died, and *C* and *D* then demanded payment of the policy-money. The company, however, refused payment unless *C* and *D* first obtained the concurrence of the legal representive of *A* to the payment. *Held*, that the company were justified in refusing to pay the money in the absence of the legal representative of *A*. RAJNARAIN BOSE *v.* UNIVERSAL LIFE ASSURANCE COMPANY

I. L. R. 7 Calc. 594 : 10 C. L. R. 561

2. ———— **Premiums on policy**—*Condition of pre-payment of premium—Waiver—Sterling premiums—Case stated under Ch. XXXVIII, Code of Civil Procedure.* An insurance company, in order to carry out an agreement with the assured to convert a rupee policy into a policy of sterling value, made an endorsement of the conversion on his policy, it being stated that such conversion was in consideration of all future premiums being paid in sterling. The policy so endorsed was re-delivered to the assured without any demand for the prepayment of the first sterling premium. Subsequently, and before the first sterling premium became due, the assured died. *Held*, that the pre-payment of sterling premium as a condition precedent to the right to the sterling assurance had been waived, and that the representatives of the assured were entitled to payment of the full amount of the sterling policy. *Canning* v. *Farquhar, L. R. 16 Q. B. D. 727*, distinguished. *In the matter of an Agreement between the* UNIVERSAL LIFE ASSURANCE SOCIETY AND STERNDALE

I. L. R. 23 Calc. 320

3. ———— **Insurance effected by one person on the life of another in whose life he has no interest**—*Wager—Contract Act (IX of 1872), s. 30—Stat. 14 Geo. III, c. 48—Stat. 8 & 9 Vict., c. 106—Assignment of life policy to a stranger without interest in the life insured.* The defendant company issued a policy for a term of ten years for R25,000, on the 23rd August 1894, on the life of *M*, the wife of one *A*, who was a clerk in the employment of one *N F B*, a barrister practicing at Hyderabad. On the 1st September 1894, *M* assigned the policy to the plaintiff *A*, who was the wife of *N F B*. On the 2nd October 1894 *M* died. The plaintiff as assignee of the policy brought this suit to recover R25,000 from the defendants. The defendant (*inter alia*) contended that the policy had really been effected not by *M* or for her use or benefit

INSURANCE—*contd.*

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or on her account, but by the said *N F B* for his own use and benefit, and that the had no interest in the life of *M*, and that therefore the policy was void. *Held*, (i) on the evidence that the policy had not been effected by *M* or for her use and benefit, but had been effected by *N F B* for his own use and benefit, and that he had no interest in the life of *M*. (ii) That in India an insurance for a term of years on the life of a person in which the insurer has no interest is void as a wagering contract under s. 30 of the Contract Act (IX of 1872), and that therefore the policy sued on was void. *Quære :* Whether an assignment of a life policy to a stranger having no interest in the life of the insured is void ? ALAMAI *v.* POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE CO. . . . **I. L. R. 23 Bom. 191**

4. ———— **Truth of answers to queries of Life Insurance Company**—*Warranty—Declaration by assured to Medical Examiner of Company—Admissibility of evidence to show declarations not made by assured—Verbal representation to Medical Examiner, effect of.* *G* applied to the defendant company in Calcutta to insure his life for the sum of R10,500 to be secured by five different policies. The policies were duly executed by the company and delivered to the plaintiff, the wife of G, on his behalf. The company's printed form of application for insurance and the printed form of declarations to the medical examiner of the company were signed by *G*. The agreement of *G* with the company was that the statements and representations contained in his application, together with those made to the medical examiner by him, should be the basis of the contract between him and the company. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy, which might be issued thereon ; and he further agreed that no statements, representations, or information made or given by or to any person soliciting or taking the application for the policy, or by or to any other person, should be binding on the company, or in any way affect its rights unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at their home office in the city of New York on the application. On *G's* death, the plaintiff sued the company for the amounts due under the policies. The plaintiff admitted that certain statements and representations made by *G* both in his applications and declaration to the medical examiner were untrue, but urged that it was open to her to show (i) that *G* signed the declaration to the medical examiner before it was filled up, and in consequence was not responsible for the contents of that declaration ; (ii) that *G* showed to the medical examiner a certain statement drawn up by *G* of an illness he had suffered from for three years and that the knowledge thus acquired by the medical examiner must be imputed to the company. *Held*, reversing the decision of the Court below,

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INSURANCE—*contd.*

1. LIFE INSURANCE—*contd.*

that the plaintiff was bound by the terms of the contract between *G* and the company. That it was not open to the plaintiff to show that *G* did not state what under his own signature he declared to be true, and yet to hold the company liable on the policy brushing aside and treating as of no import whatever the statements and representations which form the basis of the contract. That the misstatements and misrepresentations made by *G* were amply sufficient to warrant the company in avoiding the policy. NEW YORK LIFE INSURANCE CO. *v.* GAMBLE **I. L. R. 27 Calc. 593**

5. ——— Age of assured—*Proof of age—Onus of proof—Mistake in statement of age—Fraud.* *A* insured his life with the defendant company. By the terms of the policy the declaration of the assured as to his age was made the basis of the contract, and the policy was issued, subject to the express condition that, in case any statement contained in the declaration were untrue, the policy should be void. The assurance was also expressly made, subject to the regulations and conditions contained in the prospectus of the company. The prospectus contained the following provision with regard to the age of parties insured: "Age admitted in the company's policies in all cases where proof is given satisfactory to the directors. Proof of age can be furnished at any time; if not furnished, it will be necessary on settlement of claim;" and after stating the nature of the "evidence as to age," which the company would accept, the prospectus continued. "The directors recommend applicants to furnish any of the above as soon as possible and get the age admitted in the policy, as it is required by all soundly conducted companies on settlement of claim if not previously produced." *A* died, and his administrators claimed the amount of the policy. *Held*, that the above condition contained in the prospectus, which must be read into the policy, imposed on the assured or his representatives the obligation of giving proof of age before the company could be called upon to pay. If the evidence had been given in the lifetime of the assured, and an admission of age was attached to the policy, no further proof would be needed, and the ouns of disputing the age would be thrown on the company; but in the absence of such evidence and of such admission, it lay upon those claiming upon the policy by reasonable proof to satisfy the Court as to the age of the assured. The prospectus of the company contained a further provision that "policies held by parties on their own lives are indisputable on any ground whatever except fraud." *Held*, that this provision did not relieve those claiming upon the policy from the burden of giving proof of age, but it covered a misstatement as to age as well as other misstatements provided they were not fraudulent. It relieved the assured from the legal effect which an innocent misrepresentation as to age would otherwise have had under the strict terms of the contract. The result therefore was that the plaintiffs should give proof of the age of the assured, but, if such proof

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disclosed nothing more than an innocent mistake as to age on the part of the assured, the policy would not be vitiated. Subject to the above terms of the prospectus, any untruth in the declaration as to the age of the assured would vitiate the contract. The statement as to the age of the assured amounts to a warranty, and the warranty being broken, the risk under the policy would not attach. ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. *v.* SARAT CHANDRA CHATTERJI.

I. L. R. 20 Bom. 99

6. ——— *Policy of life insurance—Warranty—Age of assured—Misstatement of age—Onus of proof—Contract Act (IX of 1872), s. 65—Return of premium paid on policy subsequently held void—Evidence Act (I of 1872), s. 32 (5)—Statement as to age of a member of a family by another member since deceased—Admissibility.* In August 1898, *V* signed a proposal form, addressed to the defendant company, for a policy of insurance for a sum of money payable at his death. In it *V* gave the date of his birth as corresponding to 7th August, 1840, and stated that he would be fifty-eight next birthday and declared that the particulares given therein were correct. On or about the same date, *V* also signed a "personal statement," which, after answering numerous questions, concluded with the following declaration—"I . . . . . do solemnly declare that, according to the best of my knowledge and belief, I am now in good health . . . . , and that my age does not exceed fifty-eight years . . . . and that I have fully and faithfully answered all such questions, as have been put to me in the form of proposal and by the medical referee relative to my habits, constitution and general state of health, without concealment or reservation of any kind, . . . and I hereby covenant and agree that this declaration shall be the basis of the contract between myself and the company, and if any untrue averment be contained herein, or if any of the facts required to be set forth in the proposal and in the medical examination be not truly stated all moneys which shall have been paid upon account of the assurance made in consequence hereof shall be forfeited and the assurance itself be absolutely null, and void." In September, 1898, the defendant company issued a policy for the sum proposed for, which recited that *V* had delivered a statement in writing declaring, *inter alia*, that his age on his next birthday would not exceed fifty-eight years, and contained the proviso that the policy was issued upon the express condition that in case any statement or allegation contained in that declaration should be untrue, or if the assurance thereby made should have been made through any misrepresentation or concealment, the policy should be void. In September, 1899, *V* died, and plaintiff, his nephew, claimed from defendants the amount due under the policy. Defendants refused to pay, on the ground, *inter alia*, that the policy had been obtained by fraudulent misrepresentations

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INSURANCE —*contd.*

1. LIFE INSURANCE—*contd.*

as to the age, means and circumstances of the assured. The evidence showed that the age of the assured was from three to four years greater than he had declared it to be: *Held*, that the defendants were not liable on the policy. *Held*, also, that the plaintiff was not entitled, under s. 65 of the Contract Act, to a refund of premia paid on the policy during the lifetime of the assured. In the "personal statement" referred to, the assured had omitted to disclose the fact that two sisters had predeceased him. In reply to a question as to whether any brother or sister had died, and if so of what diseases and at what ages the assured had stated that a brother had died at the age of seventy-seven years. It now appeared that two sisters had also died at a date previous to that of the statement. *Held*, that the policy was not rendered void by this omission. *Per* SIR ARNOLD WHITE, *C.J.*—The declaration contained in the "personal statement" being ambiguous, should be construed in favour of the assured, and amounted only to a warranty that the age of the assured was fifty-eight to the best of his knowledge and belief; but this statement of age by the assured was, in fact, an untrue statement, and untrue to his knowledge and belief. The statement was in the nature of a warrantly, and formed part of the contract, and in consequence plaintiff was not entitled to recover on the policy. *Per* BHASHYAM AYYANGAR, *J.*—The assured had given a warranty, which, in a case of insurance, operated as a condition precedent to the attaching of any risk under the policy, that every statement and allegation contained in the declaration was substantially and in fact true; and the question for the Court to consider was not the materiality or otherwise of that statement, but its truth. The clause in the personal statement relating to the "knowledge and belief" of the assured did not qualify the warranty there given; there was no real ambiguity, and, in consequence, the warranty as to age was an absolute one and not merely a warranty of his belief as to his age. Also, that a statement as to plaintiff's age, made by his sister, was admissible in evidence after her decease, under s. 32 (5) of the Evidence Act, the date of birth being the commencement of a relationship by blood, and therefore relating to the existence of such relationship, within the meaning of the section. *Ram Chandra Dutt* v. *Jogeswar Narain Deo, I. L. R. 20 Calc. 758*, followed. The defendant company's prospectus contained a condition that evidence of age of an assured would be required to be furnished in every case before a claim under a policy would be paid; and recommended assurers to provide evidence of age as soon as possible, as it was required on settlement of claim if not previously produced. *Semble:* That the effect of the condition was to throw upon the assured or his representatives the onus of proving the correctness of the age as warranted by the assured. Also, that it was unnecessary to prove that the company's prospectus had been read by or specially brought to the notice of the assured, apart

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from the reference made to it in the policy (which was expressed to be issued subject to the regulations and conditions comprised in the prospectus). *Watkins* v. *Rymil, L. R. 10 Q. B. D. 178*. followed. *The Oriental Government Security Life Assurance Company, Limited* v. *Sarat Chandra Chatterji, I. L. R. 20 Bom. 99*, referred to. ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY *v.* NARASIMHA CHARI (1901)

I. L. R. 25 Mad. 183

2. MARINE INSURANCE.

1. ——— **Open cover**—*Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.* An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped. *Held*, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendants' agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue to any policy. BHUGWAN DAS *v.* NETHARLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA

I. L. R. 16 Calc. 564
L. R. 16 I. A. 60

2. ——— **Construction of policy**—*Onus probandi—Exceptions in policy.* *A* sued *B & Co.* on a policy of insurance on the ship *Alaye*, from noon of the 24th November 1865 to noon of the 24th February 1866, "at and from and to all ports and places." The words "and to all ports and places" were written, the rest being printed. *B & Co.* in their written statement admitted the policy, but set up the following exception: "All risks or losses arising from detention, etc., also from storms and gales of wind, or other perils of the sea, while touching or trading on the coast of Coromandel from Point Palmyras to Ceylon, and within soundings between the 15th October and the 15th December inclusive, are hereby excepted, which risks or losses are to be borne by the assured, and not by the assurers, notwithstanding anything to the contrary hereinbefore expressed." *Held, first*, it lay upon *A* to prove that the loss did not fall within the exception. *Held, secondly*, that the meaning of the policy was that the ship was to be at liberty to proceed to or stay at any port she

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INSURANCE—*contd.*

2. MARINE INSURANCE—*contd.*

pleased, but that the insurers were not liable for any loss arising from perils of the sea in which the three following events were combined: first, that she was at the time touching or trading on the coast of Coromandel: secondly, that she was at the time within soundings: thirdly, that the loss happened between the 15th October and 15th December. *Held, thirdly,* upon the facts, that the loss was within the policy, notwithstanding the exception. AGA SYUD SADUCK *v.* JACKARIAH MAHOMED . . . **2 Ind. Jur. N. S. 308**

3. ——— *Goods partly in bales and partly in cases—Insurance for gross amount.* A policy was effected upon a quantity of piece-goods, part in bales and part in cases. The bales and cases were separately enumerated and separately valued in the body of the policy, but the gross total was made up. *Held,* that the words "free from particular average," following directly upon the gross total must be taken to apply to the whole value of both lots and not separately to the bales and separately to the cases. BEEROOPPO SETTY *v.* HURSMULL RAMCHAND . **2 Hyde 74**

4. ——— *Particular average loss—Liability of underwriters.* In a policy of insurance effected in Bombay upon goods shipped from Calcutta to Jeddah, two clauses were inserted in writing, the rest of the policy being in the ordinary English printed form. The first written clause was in English as follows: "warranted free of particular average, unless stranded, sunk, or burnt." The second was written on the margin of the policy in the Gujrathi language, and was to the following effect: "Insurance upon the goods to be without damage. The loss arising from damage is to be on the head of the owner of the goods." *Held,* that the underwriters of such a policy are liable to the insurer for a particluar average loss where the vessel in which the insured goods are shipped is stranded, sunk, or burnt. ESMAIL *v.* SHAMJEE POONJANI . **I. L. R. 2 Bom. 550**

5. ——— *Notice of claim by insured—Action brought before expiration of six months from date of notice—Constructive total loss—Meaning of the words "sunk," "stranded."* Where insurers on receiving notice of a claim made against them under a policy of insurance distinctly repudiate and deny that any claim exists against them or that the party serving such notice has any right to recover against them, there arises an immediate right to sue, and the insured is not bound to wait for the expiration of six months before taking proceedings to enforce his claim. Where it appeared upon evidence that goods on board a ship that was wrecked on a voyage from Karachi to Bombay, although much damaged by sea-water, were nevertheless of such merchantable value as to make it worth while to sent them on to their port of destination:—*Held,* in an action against the insurers of the goods, that to claim for constructive total loss was maintainable. In an action upon a policy of marine insurance the evidence given with respect to the loss of the ship was as follows: "The vessel grounded near Dwarka. After the vessel struck, the water constantly broke right over all. . . . The cargo was all under water. The labourers were only able to work at ebb-tide, and at high tide they could only see the top of the vessel's masts. . . The vessel lay where she stranded seven days, and was then raised with casks." Some of the goods on board were insured by a policy which contained the clause "warranted free of particular average, unless sunk or burnt." It was contended for the plaintiffs that the ship had "sunk," and that the damage to the goods was therefore covered by the policy. *Held,* that where a vessel runs aground and lists over, and is in consequence covered by the high tide, which causes damage to goods on board, it cannot be said that she has "sunk" within the meaning of the word as used in a policy of insurance, and therefore that a claim for particular average cannot be sustained under a clause in the policy—"warranted free of particular average, unless sunk or burnt." LATHAM *v.* HURRUCKCHAND SOORATRAM **I. L. R. 4 Bom. 314**

6. ——— *Insurable interest—"Interest or no interest," effect of these words in a policy—Stat. 19 Geo. II,* v. *37—Loan on "avung"—Insurance effected after loss of subject-matter of insurance—Meaning and effect of the words "lost or not lost" in a policy.* Policies of insurance between natives of India (those, at least, which do not contain the words "interest or no interest") are to be construed in the same way as such instruments have been uniformly construed by the general law merchant in Western Europe, *viz.*, as contracts of indemnity. A certain trade is carried on between native merchants in Western India with the costs of Africa and Madagascar by means of native vessels which leave the Indian ports early in the year, and after remaining in the ports of Africa and Madagascar for four or five months, leave on the return voyage about August or September. This trade consists in shipping goods at the Indian ports, to be disposed of at the African and Madagascar ports and purchasing with the proceeds fresh goods to be similarly disposed of in the home ports. To enable traders to embark in this venture, it is their practice to borrow money of merchants on what is termed "avung," that is, money borrowed on the condition that it is not to be repaid except in case of the safe arrival of the goods in the home ports on the return voyage, in which event the loan becomes repayable with interest at a high rate. *Held,* that, having regard to the long-established practice in the port of Bombay of insuring such risks, the interest of the lender of such a loan in the goods on board a ship on her return voyage to India is an insurable interest. *Semble:* That an avung loan does not give the lender a charge on the goods. *Held,* that a policy of marine insurance on goods is not invalid by reason of its having been effected

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INSURANCE—*contd.*

2. MARINE INSURANCE—*contd.*

subsequently to the loss of the goods, although the policy does not contain the words "lost or not lost." JIVANJI NOORBHOY *v.* COORJI LILLADHAR **I. L. R. 4 Bom. 305**

7. ——— *Separate insurance of different species of article.* Where a policy has been effected on a gross quantity of sugar, the fact that that sugar has been described in the margin of the policy as being in different lots containing different species of sugar, and being separately priced does not raise any presumption that a separate insurance upon each separate species of sugar was intended by a policy-holder. JOOSOOP *v.* VARDON . . . **1 Hyde 198**

8. ——— *Covering note—Concealment of material fact.* On the 15th March 1897, the plaintiff, who was a shipper of salt, applied for and obtained from the defendants' company in Bombay a preliminary covering note for R51,000 for salt to be shipped by him from Bombay to Calcutta. The note stated that a stamped policy in completion hereof would be issued on receipt of particulars. The plaintiff's practice was to bring salt from his salt works at Uran in native prows and to put it on board steamers in Bombay harbour. On the 14th April 1897, the plaintiff put 594 bags of salt on board a prow for shipment in the British India steamer *Nairung*. The transhipment commenced on the 27th April. Forty-nine bags had been transhipped, when a storm arose and the prow shipped water and sank with the remaining 545 bags on board, which were thus wholly lost. Their value was R4,360. On the 29th April 1897, the plaintiff applied to the defendants' company for a policy and paid the premium, and on the 30th April a policy of insurance was issued to him. It was "an insurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of or on the ship or vessel called the *Nairung*, including all risk of craft and boat to or from the ship or vessel." Upon this policy the plaintiff sued to recover the value of the lost salt, *viz.*, R4,360 The defendants pleaded that the covering note of 15th March 1897 did not establish a completed agreement for the insurance of the salt; and as to the policy they pleaded that it was void, inasmuch as the loss had occasioned at the time of issue, and that the plaintiff had concealed the fact from them. The plaintiff alleged that information of the loss was given on the 27th April, when the policy was applied for, and he further contended that in any event the defendants were liable, inasmuch as the covering note of 15th March 1897 was a complete and final contract binding upon the defendants, whatever events may subsequently happen. *Held*, affirming CANDY, *J.*, that the plaintiff was not entitled to recover. KASAM HAJI MITHA *v.* BRITISH AND FOREIGN MARINE INSURANCE CO. **I. L. R. 23 Bom. 737**

INSURANCE—*contd.*

2. MARINE INSURANCE—*contd.*

9. ——— **Evidence of loss**—*Jettison—Protest of nacoda.* In an action on a policy of insurance to recover the value of a portion of the goods insured lost by jettison, the protest of the nacoda and the Custom House vouchers showing that on the return of the ship to her port of sailing (being driven back by stress of weather) the goods alleged to have been lost were not on board her, are not sufficient as even *primâ facie* proof of the loss. RAMABHAI GIRDARBHAI *v.* ALI AKBAR KAJRANI . . . . . **1 Bom. 6**

10. ——— **Evidence of average loss**—*Usage of Mangrole—Certificate of mahajans.* In the case of a native policy of insurance expressed to be "according to the usage of Mangrole," the certificate of the mahajans at the port of distress or sale, if accompanied by the manifest of the shipment and the account sales, is to be held sufficient evidence of an average loss and of the amount of such loss, though the underwriter may answer a claim supported on such evidence by showing fraud on the part of the shippers, the master of the vessel, or the mahajans. An alleged usage that the mahajans' certificate is deemed to be conclusive evidence against the underwriter without production of manifest and account sales, and that on proof of the certificate alone and of the policy the owner is entitled to recover his average loss, cannot be upheld, such not being a reasonable usage. RANSORDASS BHOGILAL *v.* KESRISING MOHANLAL **1 Bom. 229**

11. ——— **Repairs to ship**—*Deduction of one-third new for old.* It appeared on evidence that a ship was not by the repairs done to her put in a better condition than she had been in before sustaining the damage which constituted the partial loss. *Held*, that the rule, by which a deduction of one-third new for old is calculated in favour of the insurers who pay for the repairs, did not apply. SEEDICH GHOSAUL *v.* APCAR **Bourke 418**

On appeal in same case:—*Held*, the rule allowing one-third "new for old" in cases of insurances on ships is not inflexible; therefore, where the ship insured was not worth repairing, and was not in fact repaired, it was held that one-third "new for old" ought not to be allowed. APCAR *v.* HOWAH BYE **1 Ind. Jur. N. S. 237**

12. ——— **Unseaworthiness of ship**—*Liability of insurer.* An insurer relying on the certificate of a competent surveyor that the ship is seaworthy is entitled to recover in the event of the ship's loss, notwithstanding it be shown that she was unseaworthy at the time the policy attached. HOSSAIN IBRAHIM BIN JOHUR *v.* MUTTY LOLL **Cor. 5 : 2 Hyde 107**

13. ——— *Time policy—Warranty of seaworthiness—Implied warranty.* The warranty of seaworthiness in a time policy at the commencement of the risk is not a continuing obli-

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INSURANCE—*contd.*

2. MARINE INSURANCE—*contd.*

gation cast upon the assured while the risk is running. So held by the Judicial Committee (affirming the judgment of the Supreme Court of Calcutta) in an action brought for a total loss, by stranding, within the time of the running of the policy, after leaving an intermediate port, the defence being that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage. *Semble:* There is no implied warranty of seaworthiness in a time policy. JENKINS *v.* HEYCOCK **5 Moo. I. A. 361**

14. ——— **Goods overvalued**—*Reason for overvaluation failing—Liability of underwriters.* Where, in a valued policy of insurance, the goods insured were valued at an amount greatly in excess of their real value, which amount was intended to include the amount in which the insured was liable to Government on account of bonds executed by him in respect of the goods insured, and after loss of the goods Government elected not to enforce the bonds: *Held*, that the underwriters were entitled to be subrogated in the amount of the bonds, and were liable to the insured only for the real value of the goods together with a fair profit. HARIDAS PURSHOTAM *v.* GAMBLE . . **12 Bom. 23**

15. ——— **Abandonment**—*Notice of abandonment.* Where an insurance office is sued on a constructive total loss there must be a distinct and decided abandonment of all right on the part of the insured. The notice of abandonment should be immediate. The question always is whether the delay in giving notice is reasonable, with reference to the particular circumstances and the owners' means of ascertaining the position of the ship; where the suit is for a total loss, the judgment may be as for an average loss. SEEDICK GHOOSAL *v.* APCAR **Bourke O. C. 391**

16. ——— *Abandonment of ship and cargo—Sale—Right of purchaser.* The ship *Maharanee* was wrecked and abandoned with her cargo to the underwriters. Nine cases, part of the cargo which with two others were separately insured, were recovered in good condition from the wreck. Of this all parties had notice. The wreck and cargo were subsequently sold by the ship's agents, who were also agents for the underwriters, for the benefit of all concerned, the cargo being described generally. *Held*, that the nine cases did not pass to the purchaser at the sale as they could not be legally abandoned; and on the facts that the defendants were not liable as having induced the plaintiff to believe that they intended to sell, more than what was ceded to the underwriters by the abandonment. MITCHELL *v.* GLADSTONE **1 Ind Jur. N. S. 406**

17. ——— **Constructive total loss.** In a suit on a policy of insurance as for a total loss where goods were shipped for the voyage from Surat to Kurrachee, and the vessel having sprung a leak was forced to put into Dwarka, at which place the goods (with exception of some iron thrown overboard during the voyage) were landed and placed in a warehouse, from which a portion (some castor oil and jagari) was carried off by robbers; and the residue of the cargo, consisting principally of cotton seeds which were dried and cleaned, was sold; and the proceeds, after deducting freight expenses remained in the hands of mahajans, to be paid to whomsoever might be entitled to them:—*Held, first*, that the loss by robbers, although not expressly mentioned in the policy was one of the perils insured against; *secondly*, that the Judge below being erroneously of opinion that when the goods were once landed damaged there was nothing to do but to sell everything for the benefit of underwriters, and having consequently recorded no finding on the material question whether the whole or any part of the cargo was practically capable of being sent in a marketable state to the port of destination, the suit must be remanded, in order that the Judge might determine whether there was a constructive total loss which entitled the plaintiffs to abandon; and if not, that he might award such a proportion of the value of the iron and of the jagari and oil which were actually lost, and of the amount of the deterioration in the cotton seeds and other articles, as the sum insured by the defendant bore to the whole sum, taking into account also in that case what proportion the sum insured bore to the actual value of the goods. DWARKADAS LALUBHAI *v.* ADAM ALI SULTAN ALI . . . . **3 Bom. A. C. 1**

18. ——— *Value of ship when repaired.* In a suit to recover the amount of insurance on a ship which had been abandoned on an alleged constructive total loss, it appeared that the ship had sustained severe injury from foul weather, but that her value, after being repaired, would exceed the cost of repairing her by about 3,000 dollars. *Held*, therefore, that there was not a constructive total loss, and that, in order to establish a constructive total loss, there must have been a threatened destruction, or absolute temporary privation, of the insurer's ownership, or an alienation of his property in the thing insured. GAHAN *v.* OWEN **Bourke O. C. 17: Cor. 149**

Held, no constructive total loss in MACKINNON *v.* DUNDAS . . . **Bourke O. C. 228**

19. ——— *Notice of abandonment.* A cargo, consisting of railway sleepers, was insured by the plaintiffs in the ship *Heimdhal* from Geography Bay to Calcutta, and expressed in the policy to be warranted from all risks, except total loss. In proceeding up the river Hooghly, in charge of a pilot on the 30th April, the vessel grounded on the Rungafulla Sand, heeled over, and lay imbedded in the sand. Endeavours were made unsuccessfully to get her off. On 5th May, Lloyd's

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INSURANCE—*contd.*

2. MARINE INSURANCE—*concld.*

surveyor inspected the vessel, and reported that considering her position, the state of the tide at that season, and the expense of getting her off, it was unadvisable to go to further expense in doing so; and that the cost of repairs would, in all probability, amount to much more than the value of the ship when repaired. Some of the sleepers had been then jettisoned, and the surveyor recommended that the vessel and cargo should be abandoned and sold by public auction to the highest bidder. Attempts were made, but unsuccessfully, to get some of the cargo off, and the sleepers were of such a quality that they would not float. The consignees accordingly caused the ship and cargo to be sold by public auction in Calcutta on 12th May. No notice of abandonment was given. The sleepers realized the sum of R450. The purchaser hired boats and began unloading the ship; he unloaded 78 sleepers in all. On 14th May the ship floated off and came up the river, with the rest of the cargo, in safety, proving not to be so much damaged as was supposed. In an action on the policy of insurance:—*Held*, that there was not such a total loss of the cargo as entitled the plaintiffs to recover as for a total loss without giving notice of abandonment. *Held*, on appeal, *per* PHEAR and MACPHERSON, *JJ.*—The plaintiffs failed to prove any necessity for the sale of the ship, or that it was impracticable to convey the sleepers, or a material portion of them, to their destination. But if the insured were legally justified in abandoning and claiming as for a total loss, notice of abandonment ought to have been given. The condition and behaviour of the ship when she got off the shoal should be looked at as indicating her real state and strength while she was on it. *Per* PAUL, *J.*—Considering upon the evidence of the circumstances at the time of the sale, that the ship was not worth repairing, and that she was expected to sink at any time, the sale of her was justifiable. The sale of the cargo was also justifiable; it could not have been carried, in a mercantile sense, on shore, much less to its destination. The sale caused a total loss, and there was no need for notice of abandonment. EAST INDIAN RAILWAY COMPANY *v.* AUSTRALASIAN INSURANCE COMPANY
6 B. L. R. 218

s.c. on appeal . . . **7 B. L. R. 347**

3. FIRE INSURANCE.

1. ——— **Insurable interest**—*Property in goods, passing of—Contract Act (IX of 1872), s. 78—Ascertained goods—Postponement of passing of property by agreement.* If the parties to a contract for the sale of ascertained goods agree that the payment for and delivery of the goods are to be postponed, the property in the goods passes to the buyer as soon as the proposal for sale is accepted and such passing of property cannot be put off by any agreement between the parties. *Per* MACLEAN,

INSURANCE—*concld.*

3. FIRE INSURANCE—*concld.*

C.J.—If in a contract there appear certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue. In the present case all the elements necessary for a completed sale, such as to pass the property to the buyer exist, and there is no manifestation of any intention to postpone the passing of the property. The buyer has therefore an insurable interest in the goods. But where the sale is of unascertained goods and there has been no subsequent ascertainment or appropriation, then there has been no effective sale so as to pass the property in the goods to the buyer and he has no insurable interest. BRIJ COOMAREE *v.* SALAMANDER FIRE INSURANCE COMPANY (1905)
I. L. R. 32 Calc. 816

INSURANCE COMPANY.

See INSURANCE.

——— **liability of, to pay license tax—**

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, s. 87 . **I. L. R. 22 Calc. 581**

INSURRECTION.

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I. L. R. 23 All. 82
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See PENAL CODE (ACT XLV OF 1860), ss. 28, 231 . **I. L. R. 30 All. 90**

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INTENTION—*concld.*

——— of joint or several ownership—

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See HINDU LAW—PARTITION—REQUISITES FOR PARTITION.

——— to defeat or delay creditors.

See MORTGAGE.
I. L. R. 35 Calc. 1051

——— to defraud—

See CHEATING . . **5 C. W. N. 255**

——— to evade Stamp laws—

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.
I. L. R. 1 Mad. 40
I. L. R. 3 Bom. 230

See STAMP ACT, 1862, s. 17.
3 B. L. R. A. C. 329
3 Bom. O. C. 153
13 W. R. 102

See STAMP ACT, 1869, ss. 24, 29.
24 W. R. Cr. 1
6 Mad. Ap. 5

See STAMP ACT, 1879, ss. 37, 61, 63, 67.
I. L. R. 8 Calc. 259
I. L. R. 7 Mad. 537
I. L. R. 12 Mad. 231
I. L. R. 23 Mad. 155

——— to get innocent person punished—

See STOLEN PROPERTY—OFFENCES RELATING TO . **I. L. R. 1 All. 379**

INTENTION OF PARTIES.

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4 B. L. R. P. C. 16
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See GRANT—RESUMPTION OR REVOCATION OF GRANTS . **I. L. R. 10 Calc. 238**

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I. L. R. 22 All. 149

INTENTION OF PARTIES—*concld.*

See MORTGAGE—SALE OF MORTGAGED PRORERTY—PURCHASERS.
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I. L. R. 18 Bom. 86
I. L. R. 21 Bom. 567
3 C. W. N. 153
4 C. W. N. 769

See REGISTRATION ACT, 1877, s. 49 (1864, s. 13) . . **1 B. L. R. A. C. 37**
25 W. R. 376

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.
I. L. R. 22 Calc. 179
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2 C. W. N. 207

——— Intention as to future action, expressed between parties, not amounting to a contract—*Expressed intention to make particular person an heir—Effect in succession of reversionary heirs.* A mutual expression of intention between parties caused expectation on either side that the intention would be carried out, but no contract was made. A childless person, since deceased, expressed to the father of the minor son of his sister his intention to make the boy his heir, and that if he, the intending donor, should have children of his own, he would give the boy a share of his property. The father assented and made over charge of the boy. The widows and mother of the deceased taking his estate for their lives, admitted the boy to joint possession with them, and, on being sued by the reversioners of the family estate expectant upon their deaths, defendant, as co-defendants with the boy on the ground that had, in obedience to the known wishes of the deceased, recognized the boy as heir to him. *Held*, that the reversioners could only be deprived of the inheritance after the death of the widows, who could not transfer any estate to last beyond their own lives, by the act of the deceased in contracting with the father of the boy to make the boy the heir, if such contract had been made. And that the substantial question was whether the representations made between the two had amounted to a contract to that effect. On evidence wholly oral, it was found that no such contract had been made. Only enough had been said between the two to give rise to the expectation on either side that the boy would, the then intended course being followed, get the inheritance. NARAIN DAS *v.* RAMANUJ DAYAL
I. L. R. 20 All. 209

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I. L. R. 29 Calc. 647

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——— to date of realisation of mortgage debt—

See DECREE . . **I. L. R. 35 Calc. 221**

1. MISCELLANEOUS CASES.

1. ——— **Accounts**—*Suit for balance of accounts—Absence of contract for interest.* In a suit relating to balance of accounts, probabilities are not sufficient to support a decree for interest in the absence of a contract for interest. JOY NARAIN BHUGGUT *v.* KASHEE CHOWDRY . **16 W. R. 148**

INTEREST—*contd.*

1. MISCELLANEOUS CASES—*contd.*

2. ——— *Execution of decree.* Where, in the course of executing a decree, accounts in which interest was entered and charged had from time to time been filed in Court, and no objection had been taken thereto by the judgment-debtor from 1870 up to 1880:—*Held*, that it was too late to object to interest being allowed, and that the High Court would not interfere to alter the rate where it appeared that the District Judge had found that the rate ruling in the district was 12 per cent., and had allowed that rate accordingly. GOPAL SAHU DEO *v.* JOYRAM TEWARY
I. L. R. 7 Calc. 620
9 C. L. R. 402

3. ——— **Arrears of rent**—*Act X of 1859, s. 20—Direction of Court.* The enactment of s. 30 of Act X of 1859, that arrears of rent, unless otherwise provided by written agreement, shall be liable to interest at 12 per cent. per annum, does not make it imperative on the Court to award interest in a decree for arrears of rent, but the Court has a discretion in awarding interest in such a case. In an ordinary suit for rent, the question whether the rent is fixed or variable is not involved. BECKWITH *v.* KISHTO JEEBUN BUCKSHEE
Marsh. 278 : 2 Hay 286

KASHEENATH ROY CHOWDHRY *v.* MYNUDDEEN CHOWDHRY . . . . **1 W. R. 154**

4. ——— *Prolongation of rent suit by tenant.* In a suit for seven years' arrears of rent is appeared that the plaintiff had previously sued and been non suited, and that the tenant had protracted the proceedings. *Held*, that the Court ought to award interest on the arrears. RAMJEEBUN BOSE *v.* TRIPOORA DOSSEE
Marsh. 396 : 2 Hay 449

5. ——— *Withholding rents.* Where rents are withheld, interest may be given whether it is provided for in the pottah or not. LALLA SHEO SAHAY SINGH *v.* KUMMORUNISSA BEGUM . . . . **2 W. R., Act X, 68**

6. ——— *Bengal Act VI of 1862—Discretion of Court.* Bengal Act VI of 1862 did not alter or affect the discretionary power of the Court to award interest or costs in a decree for arrears of rent. BISSONATH DEB *v.* HURRO PERSHAD CHOWDHRY . . **2 W. R., Act X, 88**

7. ——— *Agreed instalments of rent.* Interest may be decreed with arrears of rent, but it should not be decreed upon instalments of rent as from dates during the currency of the year, unless the parties had agreed that the rent should be paid by instalments at those dates. BHARUTH CHUNDER ROY *v.* BEPIN BEHAREE CHUCKERBUTTY . . . **9 W. R. 495**

8. ——— *Pendency of suit for enhancement.* While a suit for enhancement of

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INTEREST—*contd.*

1. MISCELLANEOUS CASES—*contd.*

rent is pending, defendant is not liable for interest, inasmuch as his rent is undetermined; but after the rent is determined, he is liable to interest for all arrears from, and for all instalments after, that date. RAJMOHUN NEOGEE *v.* ANUND CHUNDER CHOWDHRY . . . **10 W. R. 166**

9. _____ *Discretion of Court.* It is in the discretion of the Court to allow interest on arrears of rent. SATTYANAND GHOSAL *v.* ZAHIR SIKDAR . . . . **6 B. L. R. Ap. 119**

RADHIKA PROSUNNO CHUNDER *v.* URJOON MAJHE **20 W. R. 128**

10. _____ *Enhancement of rent.* In a suit in which a decree is given for arrears of rent at an enhanced rate, interest is to be allowed not only from the date of the decree, but from the time the rent became due. AHSANOOLLAH *v.* KAJEE AFTABOODDEEN **I. L. R. 4 Calc. 594**
3 C. L. R. 382

11. _____ *Discretion of Court.* Every arrear of rent, unless it is otherwise provided by an agreement in writing, is liable to bear interest at 12 per cent. from the time when it, or each instalment of it, became due. The discretion which a Court has to refuse interest can only be exercised upon very clear grounds. The mere non-enforcement by a landlord, even for a series of years, of his right to interest upon arrears of rent does not amount to a waiver of such right. JOHOORY LALL *v.* BULLAB LALL **I. L. R. 5 Calc. 102**
4 C. L. R. 349

12. _____ *Waiver—Omission to claim rent for some years at the stipulated rate, whether amounts to a waiver.* The mere omission to claim interest for some years from a tenant at the rate stipulated in the lease does not amount to a waiver of the landlord's right to claim interest at such rate. *Johoory Lall v. Bullab Lall, I. L. R. 5 Calc. 102,* followed. SHYAMA CHARAN MANDAL *v.* HERAS MOLLAH . . **I. L. R. 26 Calc. 160**

13. _____ *Bengal Act VIII of 1869, s. 21—Rate of interest.* Under Bengal Act VIII of 1869, s. 21, it is discretionary with the Judge to give interest at 12 per cent.; he is not obliged to award interest to that extent. DHIRAJ MAHTAB CHAND *v.* DEBKUMARI DEBI
7 B. L. R. Ap. 26

14. _____ *Bengal Act VIII of 1869, s. 21—Discretion of Court.* In suits for arrears of rent, a Court of Justice is not bound in every instance to award interest at 12 per cent., the rate specified in Bengal Act VIII of 1869, s. 21, but has discretion either to disallow interest altogether, or to reduce the rate according to the circumstances of each case. Where a plaintiff sought to recover more than what was actually due, and it did not appear that defendant would have refused payment if the sum actually due had been demanded, the Court reduced the rate of interest to 6 per cent FUSSEEBUN *v.* ASHRUFOONNISSA . . . . . **26 W. R. 463**

INTEREST—*contd.*

1. MISCELLANEOUS CASES—*contd.*

15. _____ *Erroneous dismissal of suit by lower Appellate Court after admission of sum due.* A suit for arrears of rent at enhanced rates where plaintiff fails to adduce sufficient evidence to support his claim for enhancement should not be dismissed altogether if defendant admits a certain sum to be due for the years in question, but should be decreed to the extent of the admission. In such a case where the first Court had decreed rent at the rates admitted with some enhancement, and the lower Appellate Court, seeing no grounds for enhancement, dismissed the suit, the High Court granted the amount admitted with interest from the date of the first Court's decree. AKASHBUTTY KOOER *v.* HEERA RAM MUNDUR . **24 W. R. 82**

16. _____ *Bengal Act VIII of 1869, s. 21.* Where a pottah stipulates that, in case of default of punctual payment of rent, all arrears shall bear the customary and legal interest, 12 per cent. per annum will be allowed in analogy to Bengal Act, VIII of 1869, s. 21. ANUNGO MOHUN DEB ROY *v.* MUDDUN MOHUN MOZOOMDAR
1 C. L. R. 147

17. _____ *Mesne profits—Interest—Rent in kind.* Where rents were collected in kind instead of in money, and the Judge, in awarding mesne profits, allowed a much larger rate of interest than was usually allowed on rents paid in money:—*Held,* that he was wrong in so doing. No difference in that respect should be made between rents paid in kind and those paid in money. RAIKISHORI DASI *v.* BONOMALI CHARAN MAITI
1 B. L. R. S. N. 14: 10 W. R. 209

18. _____ *Place of payment of rent—Office of landlord—Bengal Tenancy Act, s. 67.* Where defendants, residents of Calcutta, held a village in Midnapur under the plaintiff who had no office there for collecting rent, and the tenants refused to continue paying the rent at the plaintiff's residence at Burdwan, but offered to pay it at Calcutta which was not agreed to by the plaintiff who did not appoint any convenient place for payment and the rent got into arrears:—*Held,* that the defendants were bound to pay the rent notwithstanding the plaintiff had no village office, and did not appoint a convenient place for payment. In absence of any agreement, the defendants were bound to go to the landlord and pay there rent as it fell due. Rent falling into arrears under the above circumstances was liable to interest under s. 67 of the Bengal Tenancy Act. FAKIR LAL GOSWAMI *v.* BONNERJI
4 C. W. N. 324

19. _____ *Right to interest.* In March 1884 the rent payable by an occupancy-tenant was fixed by the Settlement Officer under s. 72 of the N.-W. P. Land Revenue Act (XIX of 1873). In 1885 the landholder brought a suit to

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INTEREST—*contd.*

1. MISCELLANEOUS CASES—*contd.*

recover from the tenant arrears of rent at the rate so fixed for a period antecedent to the Settlement Officer's order as well as for the period subsequent thereto. The lower Appellate Court dismissed the claim for rent prior to 1st July 1884, and decreed such as was due subsequently to that date, but without interest. *Held*, upholding the decision as to the rent, that the plaintiff was entitled to interest at 1 per cent. on the sum decreed from the date of the institution of the suit. RADHA PRASAD SINGH *v.* JUGAL DAS **I. L. R. 9 All. 185**

20. ——— *N.-W. P. Rent Act (XII of 1881), s. 34, cl. (a)—Contract Act (IX of 1872), s. 73—Liability of defaulting thikadar to pay interest.* The non-application of cl. (*a*) of s. 34 of Act XII of 1881 to a thikadar does not exempt the thikadar from his liability under s. 73 of Act IX of 1872. Hence where a thikadar makes default in payment of his rent, he is liable to be charged with interest on the sums due up to the date of payment. GHANSHIAM SINGH *v.* DAULAT SINGH **I. L. R. 18 All. 240**

21. ——— *Bengal Tenancy Act (VIII of 1885), ss. 67 and 178—Rate of interest specified in kabuliat—Sale for arrears of rent of right of defaulting tenant who has held over—Purchaser of tenure, rights of.* In execution of a decree for arrears of rent against a tenant whose term under a kabuliat had expired, but who had held over, the plaintiff put up the tenure for sale, and the defendant purchased it. The plaintiff afterwards sued the defendant for interest at the rate and according to the instalments specified in the kabuliat. *Held*, reversing the decision of the Subordinate Judge, that the defendant was liable only for interest at the rate specified in s. 67 of the Bengal Tenancy Act. *Ishan Chundra Chowdhury* v. *Chander Kant Roy, 13 C. L. R. 55*, distinguished. ALIM *v.* SATIS CHANDRA CHATURDHURIN **I. L. R. 24 Calc. 37**

22. ——— *Bengal Tenancy Act (VIII of 1885), ss. 67, 178—Tenant holding over.* A tenant executed a kabuliat before the passing of the Bengal Tenancy Act for a period of nine years and agreed to pay interest at 75 per cent. per annum on arrears of rent due from him; the term of the lease expired after the Bengal Tenancy Act came into force, and after the expiration of the term the tenant continued to hold over without any fresh kabuliat or settlement. *Held*, that the landlord was not entitled to recover interest as stipulated in the kabuliat, but he was only entitled to interest at the rate of 12 per cent. per annum as provided in s. 67 of the Act. *Kishore Lal Day* v. *Administrator General of Bengal, 2 C. W. N. 303*, and *Alim* v. *Satis Chander Chaturdhurin, I. L. R. 24 Calc. 37*, referred to. ALI MAHMUD PRAMANICK *v.* BHAGABATI DEBYA CHOWDHURANI . **2 C. W. N. 525**

23. ——— *Bengal Tenancy Act (VIII of 1885), ss. 67, 178, sub-s. 3, cl. (h), and 179—Contract to pay interest at higher rate than allowed by s. 67 of the Act.* A contract by a tenant holding under a permanent mokurari lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is not enforceable in law. BASANTA KUMAR ROY CHOWDHRY *v.* PROMOTHA NATH BHUTTACHARJEE **I. L. R. 26 Calc. 130**

BASUNTA COOMAR ROY CHOWDHARY *v.* BAKSU MOLLAH . . . . . **3 C. W. N. 37**

24. ——— *Bengal Tenancy Act (VIII of 1885), ss. 67, 178—Suit for arrears of rent and interest at an exorbitant rate—Rule relating to hard and unconscionable bargain—Liability of a purchaser of a tenure at a sale for arrears of rent to pay interest.* A stipulation for the payment of interest at an unusal and an exorbitant rate cannot be supposed to be an incident of tenancy which would attach to it even after a sale for arrears of rent. In execution of a decree for rent against a tenant who held under a kabuliat, dated March 1880, the plaintiff put up the tenure for sale and the defendant purchased it on the 20th November 1891. Subsequently, a suit for rent with interest at 225 per cent. per annum specified in the kabuliat executed by the former tenant was brought by the plaintiff against the defendant. The defence was that the plaintiff was not entitled to interest at such a high rate. *Held*, that the plaintiff was not entitled to recover interest at the rate claimed, it being an exorbitant one and not an ordinary incident of a tenancy. *Held*, also, that in such a case the rule relating to hard and unconscionable bargains should apply—*Kamini Sundari Chaodhrani* v. *Kaliprosonno Ghose, I. L. R. 12 Calc. 225 : L. R. 12 I. A. 215*—and the plaintiff would be entitled to interest at 12 per cent. per annum, being the ordinary rate of interest for arrears of rent. *Per* RAMPINI, *J.*—By the sale of an ordinary raiyati tenancy for arrears of rent, a new contract is created between the auction-purchaser and the landlord at the date of the sale; therefore, in a case where the tenure was sold after the Bengal Tenancy Act came into operation and a suit was brought by the landlord for rent with interest against the auction-purchaser, the provisions of s. 67, read with s. 178, sub-s. (*3*), cl. (*h*), of the Bengal Tenancy Act, would apply. KALI NATH SEN *v.* TRAILOKHYA NATH ROY . **I. L. R. 26 Calc. 315**
3 C. W. N. 194

25. ——— *Right to interest on rent from transferee—Oudh Rent Act (XXII of 1886), s. 141.* Under the Oudh Land Revenue Act, 1876, ss. 121, 123, the shares of defaulting under-proprietors were transferred to three of them who offered to pay. In a suit brought by the superior proprietor, the talukdar, in whose estate the mehal was comprised, against the whole body of under-proprietors for arrears of rent accrued while the term of the above transfer was running, interest was also claimed. *Held*, as to the interest, that under-pro-

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prietors were not tenants within the meaning of the Oudh Rent Act, 1886, s. 141, providing for payment of interest on rents due from tenants. MUHAMMAD MEHNDI ALI KHAN *v.* MUHAMMAD YASIN KHAN **I. L. R. 26 Calc. 523**

26. ——— *Bengal Tenancy Act (VIII of 1885), ss. 67, 178, 179—Contract as to interest.* S. 179 of the Bengal Tenancy Act controls s. 178; so a darpatni talukh created, after the Act came into force, by a permanent tenure-holder in a permanently-settled area comes within the scope of s. 179, and is not affected by the provisions of s. 178 (*h*) regarding interest. ATULYA CHURN BOSE *v.* TULSI DAS SARKAR . **2 C. W. N. 543**

27. ——— *Bengal Tenancy Act (VIII of 1885), ss. 61, 67—Tender.* Where rent was tendered to plaintiff's am-muktear, but plaintiff refused to accept the same: *Held*, that defendant was liable to pay interest on the arrears, in spite of such tender, as he omitted to follow the procedure prescribed by s. 61 of the Bengal Tenancy Act. RANSGIT SINGHA *v.* BHAGABUTTY CHARAN ROY (1900) . . **7 C. W. N. 720**

28. ——— *Bengal Tenancy Act (VIII of 1885), ss. 67, 178 (3) (h)—Landlord and tenant—Interest on arrears—Rate of interest specified in lease—Ordinary incidents of holding—Holding over after expiry of lease.* An agricultural tenant held under a lease for six years, the term of whch expired in 1881, and had been holding ever since. The rate of interest specified in the lease was 75 per cent. per annum. The landlord sued for rent for the years 1893 to 1895 and part of 1896, with interest at the rate specified in the lease. *Held*, that under the provisions of the Bengal Tenancy Act, the plaintiff could not recover interest at a rate higher than 12 per cent. per annum. ADMINISTRATOR-GENERAL OF BENGAL *v.* ASRAF ALI (1900) . . . . **I. L. R. 28 Calc. 227**

29. ——— *Landlord and tenant—Bengal Tenancy Act (VIII of 1885), ss. 67, 74, 178 (3) (h), 179—Rate of interest—Permanent tenure—Interpretation of statute. Held* by the majority of the Full Bench (AMEER ALI, *J.*, dissenting), that s. 67 of the Bengal Tenancy Act does not control the provisions of s. 179 of that Act, and that therefore a contract for the payment of interest on arrears of rent, entered into by a landlord and a permanent tenure-holder under him, is enforceable by law, although it may contravene the provisions of s. 67 of the Bengal Tenancy Act. *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Bhuttacharjee, I. L. R. 26 Calc. 130*, overruled. MATANGINI DEBI *v.* MOKRURA BIBI (1901) **I. L. R. 29 Calc. 674** **s.c. 5 C. W. N. 438**

30. ——— *Landlord and tenant—Puchaser, if liable to pay interest stipulated in the kabuliyat of the original tenant—Incident of tenancy—Bengal Tenancy Act (VIII of 1885), s. 67.* A stipulation for payment of interest upon arrears of rent is an ordinary incident of tenancy in this country, unless there is something unusual in the stipulation; and as a rule it attaches to the tenancy, so that a purchaser of the tenancy will also be bound by the stipulation. When a tenure is advertised for sale in execution of a decree for arrears of rent it is not necessary for the decree-holder to specify the rate of interest in the sale proclamation. Where in a lease the stipulation was that the lessee should pay a sum of ten rupees in default of delivery to the landlord of a certain quantity of molasses: *Held*, that it was merely a personal covenant by the lessee. Also that, the rent mentioned in the sale proclamation not having included this sum, the auction-purchaser was not bound to pay it. RAJ-NARAIN MITRA *v.* PANNA CHAND SINGH (1902) **I. L. R. 30 Calc. 213** **s.c. 7 C. W. N. 203**

31. ——— *Bengal Tenancy Act (VIII of 1885), s. 67—Kabuliat, rate of interest mentioned in—Purchaser at auction sale, liability of, to pay interest. A* purchased at an auction sale in execution of a rent decree a tenure covered by a *kabuliat*, which stipulated for interest at a specified rate:—*Held*, that the tenure being subsisting, *A* bought the tenure subject to the terms and conditions of the lease, and was liable for interest at the rate mentioned in the *kabuliat*, and not at the rate mentioned in s. 67 of the Bengal Tenancy Act. LAL GOPAL DUTT CHOWDHRY *v.* MANMATHA LAL DUTT CHOWDHRY (1905) . . **I. L. R. 32 Calc. 258**

32. ——— *Bengal Tenancy Act (VIII of 1885), s. 169—Rent—Interest—Pleading.* Where a landlord applied under s. 169, cl. (c) of the Bengal Tenancy Act for getting the rent and interest due to him between the date of the institution of the suit and the date of the sale from the surplus sale-proceeds and the judgment-debtor raised no objection to it but admitted the justice of the decree-holder's demand: *Held*, that the decree-holder was entitled to get interest on rent. GHOSE, *J.*—Rent as used in cl. (c) s. 169 does not exclude interest. BEJOY CHAND MOHATAB *v.* S. C. MOOKERJEE (1906) . . **11 C. W. N. 1106**

33. ——— *Bengal Tenancy Act, s. 67.* Interest was claimed in the suit at a rate of more than 12 per cent. per annum on the basis of a kabuliyat executed before the passing of the Bengal Tenancy Act, the tenant being proved to have acquired the holding by private purchase. *Held*, that the stipulation as to interest must be given effect to. TILUK CHUNDRA RAY *v.* JASODA KUMAR RAY (1906) . . **11 C. W. N. 215**

34. ——— *Arrears of rent—Tender—Effect of valid tender kept good, but improperly refused—Deposit in Court, omission to make—Landlord and tenant—Bengal Tenancy Act (VIII of 1885), ss. 54 (3), 61, 67.* Where in a suit for rent it was proved that the defendants tendered the rent to the plaintiff; that on his refusal to accept

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it, they sent him by money order, instalment by instalment, all the rents as they fell due, but the plaintiff systematically declined to accept the money; that, when the suit was about to be instituted, their pleader again tendered the rents, first to the plaintiff's pleader and then to his *naib*, and on their declining to accept the money, it was deposited in Court before the suit was instituted:—*Held*, by the Full Bench (RAMPINI, *A. C. J.* and MITTRA, *J.*, dissenting), that there was a valid tender, which was kept good, and that it was not necessary for the defendants to follow up the tender by a deposit of the rent under s. 16 of the Bengal Tenancy Act, in order to stop interest from running under s. 67 of the Act; that rent, which had been tendered with the intention of paying it to the person to whom it was due at the time when it was due, but which was without good cause not received by the person, to whom it was due and to whom it was tendered, could not be regarded as an arrear of rent within the meaning of s. 54 (3) and s. 67 of the Act; that s. 61 was an enabling and not a mandatory section and that it did not deprive the tenant of the right which, as a debtor, he had under the general law by which a valid tender which is kept good, stops the running of interest from the date when the tender is made. *Jagat Tarini Dasi* v. *Naba Gopal Chaki, I. L. R. 34 Calc. 305*, approved. KRIPA SINDHU MUKERJEE *v.* ANNADA SUNDARI DEBI (1907)
I. L. R. 35 Calc. 34
11 C. W. N. 983

35. ——— **Arrears of Revenue**—*Assignee of Government revenue—Interest on arrears—Act XII of 1881 (N.-W. P. Rent Act), s. 93 (i), Act XVIII of 1873 (N.- W. P. Land-revenue Act), s. 148. Held* by BANERJI and AIKMAN, *JJ.*, that an assignee of Government revenue cannot sue for interest on arrears. *Bithal Das* v. *Harphul, I. L. R. 6 All. 503*, referred to. CHANDI PRASAD *v.* MAHENDRA SINGH (1900) **I. L. R. 23 All. 5**

36. ——— **Award**—*Power of Court to give interest.* A Court has no discretion to deal judicially with the merits of a case determined by arbitrators, but is bound to pass judgment according to their award. Accordingly, it cannot decree interest which the arbitrators have not awarded. MOHUN LAL SHAHA *v.* JOY NARAIN SHAHA CHOWDHRY . . . . . **23 W. R. 105**

37. ——— **Bill of exchange**—*Deduction of interest as discount from bill of exchange—Interest according to rules published by loan company.* It is not illegal to deduct interest in the scape of discount from the amount advanced on a bill of exchange, if such deduction be made with the full knowledge and consent of the borrower, and under such circumstances as would not lead to the inference that unfair advantage was taken of the position of the borrower. The fact that a loan company, registered under the provisions of Act X of 1866, has published and caused to be registered rules regarding the payment of interest on loans, does not bind a borrower to pay the interest as required by those rules unless he has contracted to do so. TIPPERAH LOAN OFFICE *v.* GOUR CHUNDER BARMAN . . . . **2 C. L. R. 349**

38. ——— *Agreement to pay interest—Evidence, admissibility of—Promissory note—Civil Procedure Code (Act XIV of 1882), Ch. XXXIX, s. 532.* In a suit instituted under Ch. XXXIX of the Civil Procedure Code (Act XIV of 1882), the plaintiff is not entitled to recover any interest unless such interest is specified in the promissory note itself, or to give evidence regarding any agreement to pay interest. *Remfry* v. *Shillingford, I. L. R. 1 Calc. 130*, referred to. BHUPATI RAM *v.* SOURENDRA MOHUN TAGORE (1903)
I. L. R. 30 Calc. 446
[s.c. 7 C. W. N. 412]

39. ——— **Bond**—*Construction of bond—Calculation of interest.* On the adjustment of an account of the principal and interest due on a bond, a kararnamah or deed of agreement was entered into by the parties, in which, besides the original sum, a further sum for interest accrued thereon was declared due and agreed to be paid off by instalments before a given time. Payments were made at irregular periods which payments the bond-holder claimed to appropriate to keeping down the interest upon the whole sum composed of both the original principal sum as well as the sum mentioned in the kararnamah as accrued thereon for interest. *Held*, upon the construction of the instrument, that the principal sum alone carried interest, and that all payments made in pursuance of the stipulations were to be applied in the first instance to satisfy such interest, the excess of the payments only being appropriated towards the liquidation of the principal sum due. BAMUNDOSS MOOKERJEA *v.* OMEISH CHUNDER RAE . . **6 Moo. I. A. 289**

40. ——— *Payments on bond—Mode of calculating interest.* Where payment was made upon a bond, the amount paid being less than the interest due:—*Held*, that the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree. LUCHMESWAR SINGH *v.* LUTF ALI KHAN . . **8 B. L. R. P. C. 110**

41. ——— *Compound interest—Unconscionable bargain.* One Sami-ud-din Ahmad Khan, on the 10th of November, 1892, borrowed from Kirpa Ram and Ghasi Ram R900, for which he gave a bond bearing compound interest at 2 per cent. per mensem, with monthly rests, and mortgaging a 10-biswa share in a village and half a pacca house in Moradabad. The obligor was, at the time of the execution of this bond, a young man of 18 years of age, a spendthrift and a drunkard. On the 13th of June, 1900, the mortgagees sued on the bond to recover R5,380-9-0

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INTEREST—*contd.*

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from the surplus proceeds of the sale of the mortgaged share which had taken place in execution of a decree on a prior mortgage. The Court of first instance gave the plaintiff a decree, but allowed only simple interest at the rate stipulated for in the bond. On appeal the High Court sustained the lower Court's order as to the interest, holding that the bargain was an unconscionable bargain against which that Court had properly relieved the defendant mortgagor. *Beynon* v. *Cook, 10 Ch. App. 391; Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose, I. L. R. 12 Calc. 225; Lall* v. *Ram Prasad, I. L. R. 9 All. 74;* and *Madho Singh* v. *Kali Ram, I. L. R. 9 All. 228,* referred to. KIRPA RAM *v.* SAMI-UD-DIN AHMAD KHAN (1903) **I. L. R. 25 All. 284**

42. ——— **Compound interest**—*Interest per mensem.* Interest at the rate of one per cent. per mensem, to be calculated at the end of each year does not mean compound interest, so as to admit of interest being charged upon the note, but interest calculated per mensem, but payable per annum. RAJANDER NARAIN RAE *v.* BIJAI GOVIND SINGH. **2 Moo. I. A. 253**

43. ——— *Decree of Privy Council, construction of—Order nunc pro tunc.* On a question of construction of an order of Her Majesty in Council, the words "the plaintiff is to have judgment for his moiety with interest at the full legal rate, and the costs of the proceedings in the Court below," were *held* as intended to give the plaintiff the moiety claimed by him of the sum which he alleged to be due for principal and arrears of interest (at 12 per cent.) equal to the principal upon a certain kararnamah and bond, and to allow the interest from the date of the institution of the suit up to realisation. *Held,* further, that in the account taken by the appellant as the foundation for his proceedings in execution he was not warranted in making a rest at the date of the order of the Principal Sudder Ameen dismissing the suit, and assuming that interest should run upon the consolidated sum from that date; as in the absence of special directions it could not be presumed that the Appellate Court intended to make an order *nunc pro tunc* which would give compound interest from the date of the decree of the Court of first instance. GOPEE KISSEN GOSSAMEE *v.* BRINDABUN CHUNDER SIRCAR . . **19 W. R. P. C. 41**

44. ——— *Illegal contract—Sonthal Pergunnahs Settlement Regulation (III of 1872), s. 6—Sonthal Pergunnahs Justice Regulation (V of 1893), s. 24—"Unlawful" consideration, meaning of.* There is no law or regulation laying down that an agreement between any two persons living in the Sonthal Pergunnahs to pay compound interest upon the amount borrowed is "unlawful" within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. Referring to the Sonthal Regulations, s. 6 of Regulation III of 1872 and s. 24 of Regulation V of 1893: *Held,* in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under s. 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest. SHAMA CHARAN MISSER *v.* CHUNI LAL MARWARI **I. L. R. 26 Calc. 238**

45. ——— *Interest Act (XXVIII of 1855), s. 2—Interest—Compound interest—Hard and unconscionable bargain.* Where, in a bond, the principal was a small sum of R300 and the interest was compound interest at the rate of five rupees per mensem with monthly rests, and the contention of the defendant was that the bargain was a hard and unconscionable one: *Held,* that, there being no undue pressure or undue influence on the part of the lender, plaintiff was entitled to get interest at the rate agreed, although it was a hard bargain. KRISHNA KUMAR SAHA *v.* BROJO NATH ROY CHOWDRY (1903) . **7 C. W. N. 876**

46. ——— *Compound interest—Unconscionable bargain—Unfair dealing—Delay in suit—Urgent necessity—Pardanashin lady.* A bargain as to compound interest in a mortgage bond, which is not itself open to objection as hard and unconscionable, cannot be held to have assumed that character by reason of the delay on the part of the creditor in suing on the bond. *Madho Singh* v. *Kashi Ram, I. L. R. 9 All. 228,* dissented from. When the interest charged in a mortgage bond is very high and the debtor is of full capacity, the general rule is that the Court will not grant relief without proof of unfair dealing or undue pressure or influence on the part of the creditor or that the creditor has taken unfair advantage of the debtor's weakness and necessities, or that the debtor has been overreached, tricked or deceived, or that he was ignorant of the unfair nature of the transaction. The case of a female debtor in fiduciary relation to the creditor and of an expectant heir are exceptions to the general rule. *Zebonnissa* v. *Brojendro Coomar Roy Chowdhry, 21 W. R. 352; Mackintosh* v. *Wingrove, I. L. R. 4 Calc. 137; Magniram Marwari* v. *Rajpati Koeri, I. L. R. 20 Calc. 366; Surya Narain Singh* v. *Jogendra Narain Roy Chowdhry, I. L. R. 20 Calc. 360;* and *Wilton & Co.* v. *Osborn, 2 K. B. 110,* followed. *Kanai Lal Jowhri* v. *Kamini Debi, 1 B. L. R. (O. C.) 31 note; Sudhist Lal* v. *Sheobarat Koer, I. L. R. 7 Calc. 245: L. R. 8 I. A. 39; Nistarin Dassi* v. *Nundo Lall Bose, I. L. R. 26 Calc. 891; Khas Mehal* v. *The Administrator General of Bengali 5 C. W. N. 505; Kamini Sundari Chowdhrani* v. *Kali Prosunno Ghose, I. L. R. 12 Calc. 225: L. R. 12 I. A. 215;* and *Beynon* v. *Cook, L. R. 10 Ch. 389,* distinguished. The mere fact that the debtor was in urgent need of money is not sufficient in itself to raise the presumption that the creditor took unfair advantage of his necessity. UMESH

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INTEREST—*contd.*

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CHANDRA KHASNAVIS *v.* GOLAL LAL MUSTAFI (1904) . . . **I. L. R. 31 Calc. 233**

47. _____ *Interest on instalment in default—Mortgage—Transfer of Property Act (IV of 1882), ss. 58, 60 and 86.* The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentitling circumstances allowed. HARI *v.* RAMJI (1904) **I. L. R. 28 Bom. 371**

48. _____ **Costs**—*Costs not mentioned in decree. Held,* that the principle of the Full Bench ruling, *Mosoodun Lall* v. *Bhekaree Singh, B. L. R. Sup. Vol. 602 : 6 W. R. Mis. 109,* is as much applicable to interest upon costs as it is to interest upon mesne profits not awarded by the decree, and must be applied to all decrees passed, either before or after the date of that judgment. LEELANUND SINGH *v.* RAM NARAIN SINGH **15 W. R. 415**

49. _____ *Interest on costs where decree does not specially give it.* Costs in the suit carry interest unless the contrary is distinctly stated in the decree. BHARUT CHUNDER SIRCAR *v.* GOUREE PARSHAD ROY . . **18 W. R. 34**

HARADHUN SANDYAL *v.* RASH MONEE DASSIA **2 W. R. Mis. 21**

50. _____ *Interest not mentioned in decree—Execution of decree—Procedure.* The Court in executing a decree has no power to allow interest on costs when not mentioned in the decree. The proper course for obtaining such interest is to apply to the Court which passed the decree to amend it. ULFUTUNNISSA *v.* MOHAN LAL SUKUL . . . . **6 B. L. R. Ap. 33**

BROJO SOONDUREE DEBIA *v.* ANUND MOYEE DEBIA . . . . **16 W. R. 302**

51. _____ *Interest not mentioned in decree.* Where the decree gives an interest upon the principal sum recovered only, but not upon costs, the plaintiff is not entitled to such interest. AMEEROONISSA KHATOON *v.* MOHOMED MOZUFFUR HOSSEIN CHOWDHRY . **18 W. R. 103**

52. _____ *Interest not mentioned in decree.* Where a decree gives interest upon the principal sum recovered only, and no mention is made as to interest on costs, the successful party is not entitled to such interest. MAHTAB CHUNDER BAHADOOR *v.* RAM LALL MOOKERJEE **I. L. R. 3 Calc. 351 : 1 C. L. R. 158**

53. _____ *Interest not mentioned in decree—Decree of Privy Council—Mesne profits.* In a suit to recover certain property, the plaintiff obtained a decree for a portion thereof, but on appeal the High Court reversed the decree and declared him entitled to the whole. On appeal to the Privy Council, the decree was that the decision of the High Court be "reversed with costs," and the decree of the first Court "affirmed with costs." On this the first Court ordered the restitution of the property with wasilat, and also that the defendant should obtain interest on the costs both of the first Court and of the Privy Council; but he disallowed the costs of the High Court as not being expressly awarded by the Privy Council decree. *Held,* that the defendant was entitled to mesne profits. Interest on the costs of the Privy Council should not be given, the decree being silent on the point; but the costs of the first Court would carry interest. The words "with costs" in the portion of the decree of the Privy Council affirming the decree of the first Court mean the costs of the proceedings in the High Court. GURUDAS RAI *v.* STEPHENS **13 B. L. R. Ap. 44 : 21 W. R. 195**

BHOZA RUGHBUR SINGH *v.* BHOZA RAJ SINGH **3 N. W. 319**

54. _____ *Execution of decree of Privy Council—Costs of translation and printing.* Where, on appeal to the Privy Council, it was ordered that the decree of the High Court be reversed with £376 12*s.* 2*d.* costs, and that the decree of the Zilla Court be affirmed with costs in the Courts below, in execution of the decree, it was *held* that the decree-holder was entitled to the costs of translation and printing incurred by him for transmission of the record to the Privy Council, and that he was entitled to interest upon those costs, but not to interest upon the said £376 12*s.* 2*d.* MADAN THAKUR *v.* LOPEZ . . **9 B. L. R. Ap. 22**

S. C. MUDDUN THAKOR *v.* MORRISON **18 W. R. 253**

UMATUL FATIMA *v.* AZHUR ALI **9 B. L. R. Ap. 23 note**

S. C. OOMATOOL FATIMA *v.* AZHUR ALI **15 W. R. 356**

ASGUR ALI *v.* NOGENDRO CHUNDER GHOSE **23 W. R. 463**

SARODA PRASAD MULLICK *v.* LUCHMIPAT SINGH DUGAR (where, however, MARKBY, *J.*, dissented from the practice). **9 B. L. R. Ap. 23 note : 18 W. R. 89**

55. _____ *Execution of decree of Privy Council—Costs of translation and printing.* Where an order of Council in England awarded costs incurred in this country, including charges for translation and printing: *Held,* that the costs should carry interest at 6 per cent. NIL MADHUB DOSS *v.* BISSUMBHUR DOSS **21 W. R. 411**

56. _____ *Privy Council order awarding costs—Execution of decree—Act XXIII of 1861, ss. 10 and 11—Interest not given by decree.* Where an order passed by Her Majesty in Council on report of the Judicial Committee awards costs, but is silent as to interest on the cost so awarded, it is not competent to the Court which has to execute the order to direct payment of the costs with interest. The principle of the decisions

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INTEREST—*contd.*

1. MISCELLANEOUS CASES—*contd.*

in cases arising under ss. 10 and 11 of Act XXIII of 1861, which have established a similar rule of practice in executing decrees passed by the Courts in India approved. Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the Court executing the order. FORESTER *v.* SECRETARY OF STATE **I. L. R. 3 Calc. 161 : L. R. 4 I. A. 137**

LEKRAJ ROY *v.* MAHTAB CHAND **21 W. R. 147**

57. ——— *Interest on costs not given in decree of Privy Council.* Where interest on costs is not allowed in the order of Her Majesty in Council, such interest cannot be given by any Court in this country. *Forester* v. *Secretary of State for India, I. L. R. 3 Calc. 161 : L. R. 4 I. A. 137,* referred to. DAKHINA MOHAN ROY CHOWDHRY *v.* SARODA MOHAN ROY CHOWDHRY **I. L. R. 23 Calc. 357**

58. ——— *Calculation of interest—Set-off.* Where a plaintiff obtains a decree with costs and interest upon the costs, the defendant being declared entitled to the set-off on account of costs, the interest should be calculated on the amount due to plaintiff after deduction of the set-off. AMANUT *v.* BINDHOO . . **13 W. R. 138**

59. ——— *Interest on costs refunded.* Interest is awardable on costs refunded on the reversal of a decree on which costs were recovered. KEDAR NATH PAKRASEE *v.* DOYA MOYEE DEBIA . . . . . **20 W. R. 49**

60. ——— **Damages.** The Court may, in a proper case, award interest by way of damages. *Lala Chhajmal Das* v. *Brij Bhukan Lall, L. R. 22 I. A. 199,* referred to. JOGESHUR BHAGAT *v.* GHANASHAM DASS (1901) . **5 C. W. N. 356**

61. ——— **Debt or law-suit purchased** —*Outstanding claim.* Where a debt or law-suit has been purchased, interest ought not to be given thereon for the whole period during which the purchaser allows the claim to be outstanding, nor necessarily on the whole debt when the purchase-money is very much below the amount of the principal. UNNODA SOONDUREE DOSSEE *v.* OODHUB NATH ROY **11 W. R. 125**

62. ——— **Debtor and creditor**—*Power of Court to give interest or any sum overdue.*— Where a sum of money becomes due and payable at a specified time, the Court may award interest in the shape of damages for such period thereafter as the money remains unpaid. TARA CHAND BISWAS *v* NAFAR ALI BISWAS . . **1 C. L. R. 236**

63. ——— *Suit on bond—Offer to pay amount into Court.* In a suit on a bond, where it was shown that the obligor had offered to pay the principal and interest into Court: —*Held,* that he should be relieved from interest from the date of such offer. GUDI JANAKAYYA GARU *v.* GARUDA REDDI. GARUDA REDDI *v.* GUDI JANAKAYYA GABU . . **1 Mad. 124**

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64. ——— *Right to interest —Refusal to accept portion of sum due.* A decree-holder is not bound to accept a sum tendered to him in part satisfaction of his decree. He is entitled to require payment of the principal and interest in full; and the refusal to receive a part of what is due to him will not deprive him of his right to interest. KUNHYA SINGH *v.* TOOYDUN SINGH . **7 W. R. 20**

65. ——— *Delay in suing.* A creditor is not bound to bring his action to suit the convenience of the debtor, and may, where two parties are jointly and severally liable on a bond as principal and surety, defer bringing his suit to the last moment the law allows, and he is not entitled to a less sum for interest if he does so. MAHOMED ROHEEMOODDEEN *v.* INDOOR CHUNDER JOWHUREE **12 W. R. 192**

66. ——— *Decree on mortgage—Leave to pay at once to avoid high rate of interest.* In giving the plaintiff a decree on a mortgage which provided interest at 24 per cent., it was directed that the defendants, in order to avoid the payment of further interest at that high rate, might be at liberty to pay the amount of the decree at once without waiting for the expiration of the usual six months. MOONZOORA DOWLA *v.* MEHIDI BEGUM **7 C. L. R. 206**

See CHOTOOLALL *v.* MILLER **7 C. L. R. 267**

67. ——— *Principle of deducting payments on account of decree.* The rule as to making up an account of interest in mortgage cases,—*viz.,* that when a payment is made, it is to be deducted from the interest, and not from the principal,—extended to the execution of ordinary decrees. The balance of interest is never added to the principal so as to produce compound interest. GOOROO DASS DUTT *v.* UMA CHURN ROY **22 W. R. 525**

68. ——— *Interest on sum wrongly credited.* The obligee of a bond for R7,000 gave the obligor an assignment of R5,319 on account of rent due to the latter by the former, and the question in special appeal being whether the item of R350 paid on account of Government revenue had been twice credited as alleged by the obligor (appellant), the Court held that it had only once been credited. The respondent on cross-appeal claimed interest on the R350 for six years and eight months at twelve per cent. per annum, on the strength of a stipulation in the bond that, from a certain date, interest should accrue on the principal; but the Court disallowed the claim on the ground that payment of interest on the item paid as Government revenue was neither expressly stipulated for nor contemplated by the parties, and because it was open to the respondent to take measures to realize the sum so paid instead of letting it lie over and double itself by interest. SHIBESSURREE DEBIA *v.* LADLY . . . **17 W. R. 71**

69. ——— *Mortgagee in possession—Suit for redemption.* The principle of

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construction, that when a creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the principal) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by the debtor's resistance of the demand, is not applicable to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption and the final settlement of the account. AJIMUT ALI KHAN *v.* JOWAHIR SINGH . **14 W. R. P. C. 17**

S.C. AZIMUT ALI KHAN *v.* JOWAHIR SINGH **13 Moo. I. A. 404**

70. ——— *Delay of decree-holder to take out execution.* The fact of a decree-holder having delayed for a considerable time to take out execution of his decree is no ground for the Court refusing to allow him interest at the rate directed by such decree, to be paid upon the principal sum recovered, from the date of decree until realization. BANY MADHAB TRIVADI *v.* RAM GOPAL SIRCAR . . . **3 C. L. R. 523**

71. ——— *Setting up adverse title.* In a suit to recover title-deeds and other property, the defendant claimed a certain sum as being due to him, and in the plaint the plaintiff offered to pay the defendant all that was due up to that date, provided the deeds and property were given up. The defendant, however, claimed a right to hold them under an adverse title. *Held*, that the defendant was only entitled to interest up to the date of the plaint and not up to the date when the money due was actually paid. JUGGERNATH DASS *v.* BRIJNATH DOSS **I. L. R. 4 Calc. 322 : 3 C. L. R. 375**

72. ——— **Goods sold**—*Suit for price of goods—Interest before suit.* Where there was no time fixed or agreed for payment of the price of goods bought nor was any demand of price made accompanied with an intimation that interest from the date of demand would be charged :—*Held*, that interest could not by law be decreed for the period prior to the institution of the suit PALMER *v.* MADHOO PERSAUD . . . **2 Agra 131**

73. ——— *Interest on price and charges not legally demandable in absence of special contract.* The defendant made an offer in writing to the plaintiffs for the purchase of 200 bales of pepperill drill at 9*s.* 2*d.* A few days later the plaintiffs' salesman tendered for signature to the defendant an indent containing certain terms not contained in the original offer, and in particular containing the words, "Free Bombay Harbour and interest." This the defendant refused to sign. The plaintiffs, however, ordered out the goods, and on their arrival tendered them to the defendant, demanding at the same time such sums for charges, expenses, and interest as would have been due under a contract entered into on the added terms. These the defendant refused to pay. In a suit claiming the deficiency (after a sale by public auction of the 200 bales) :—*Held*, that, in the absence of any contract to that effect, interest could not be legally demanded on the contract price, and still less could it be demanded on the incidental charges in the invoice. MAHOMED HAJI JIVA *v.* SPINNER **I. L. R. 24 Bom. 510**

74. ——— **Government promissory notes**—*Interest on interest of Government paper withheld.* Interest may be claimed on the interest of Government promissory notes withheld by another. TARUCKNATH MOOKERJEE *v.* GOUREECHURN MOOKERJEE . . . **3 W. R. 147**

75. ——— **Insolvency proceedings**—*Power of High Count—Proceedings under Insolvency Act, 11 & 12 Vict., c. 21.* Proceedings were taken under the Insolvent Act, 11 & 12 Vict., c. 21, and the proceeds of certain goods claimed by the Official Assignee paid by the Assignee into the Bank of Bengal. In a suit brought in the High Court at Calcutta by *A* against the Official Assignee claiming the proceeds of the goods paid into the Insolvent Court :—*Held*, on the Court making a decree in favour of the plaintiff, that the High Court being a Court of law and equity, had power to award interest on the amount as against the Official Assignee. MILLER *v.* BARLOW **14 Moo. I. A. 209**

76. ——— *Civil Procedure Code (Act XIV of 1882), ss. 351 and 352. Rule of Damdupat, when applicable—Damdupat, if applicable in insolvency proceedings—Practice.* The rule of *damdupat* exists only so long as the contractual relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. Proof of a claim in insolvency amounts to a decree and the rule of *damdupat* would not apply to a claim so proved. Moreover the uniform practice of this Court has been not to apply the rule of *damdupat* in insolvency proceedings. HARI LALL MALLICK, *In re* (1906) **I. L. R. 33 Calc. 1269 s.c. 10 C. W. N. 884**

77. ——— **Mesne profits**—*Decree for mesne profits—Judgment-debt.* According to the practice of the native Courts in Bombay, a sum found due for mesne profits was a judgment-debt and carried interest by its own force. On petition in the native Court after decree upon appeal in England, interest was awarded on the amount of mesne profits decreed, though not prayed for in the plaint, or given by the decrees in India or the order of affirmance in England. KIRKLAND *v.* MODIE PESTONJEE KHOORSHEDJEE **3 Moo. I. A. 220**

78. ——— *Suit for mesne profits.* In a suit for mesne profits (not being a suit for land and its mesne profits) interest on mesne profits cannot be recovered. CHAKU MODAN TOHANA *v.* DULLABH DWARKA . . . **9 Bom. 7**

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INTEREST—*contd.*

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79. _____ *Interest previous to suit.* Although interest as such cannot strictly be allowed upon mesne profits previously to the institution of the suit, the Court, in estimating what loss has been sustained by the plaintiff in being kept out of possession, may take into consideration that, if he had received the rents year by year, he would have been able to make use of the same, and may thus calculate the interest in the damages to be awarded. PROTAP CHUNDER BOROOAH *v.* SURNO MOYEE . . . . . **14 W. R. 151**

80. _____ *Discretion of Court.* There being no rule of law obliging the Court to allow interest on mesne profits, it is a matter for the discretion of the Court, upon consideraton of the facts, whether to allow interest or not. KRISHNANAND *v.* KUNWAR PARTAB NARAIN SINGH **I. L. R. 10 Calc. 792 : L. R. 11 I. A. 88**

ABDUL GHAFUR *v.* RAJA RAM **I. L. R. 22 All. 262**

81. _____ *Calculation of interest.* Interest on mesne profits may be allowed year by year during the period of dispossession. MUNEERAM ACHARJEE *v.* TURUNGO . **7 W. R. 173**

82. _____ *Interest withheld until date of decree.* Interest on a sum awarded for mesne profits may properly be withheld until the date of the decree, since the amount is not ascertained before that time. BENGAL COAL COMPANY *v.* DAREEMBAH DABEA. **Marsh. 105 : 1 Hay, 181**

MOBARUK ALI *v.* BOISTUB CHURN CHOWDHRY **11 W. R. 25**

83. _____ *Date of assessment of mense profits.* Although the common practice is to make interest payable from the date on which the mesne profits are assessed, interest was given in a suit for mesne profits which ought to have been paid by the defendants, but which plaintiffs had been made to pay, from the date when they ought to have been paid by the defendants. SOKHEE MONEE DEBIA *v.* BRIJORAJ MOOKERJEE **17 W. R. 228**

84. _____ *Right to interest.* The plaintiffs were *held* entitled to interest on mesne profits. LULEET SINGH *v.* ALI REZA **8 W. R. 322**

85. _____ *Act XXXII of 1839—Interest from institution of suit.* By the law and practice in India, independently of the provisions of Act XXXII of 1839, a decree might award interest as of course on mesne profits from the date of the institution of the suit in which they were claimed. Such interest is not forbidden by the terms of the Act referred to. HURROPERSAUD ROY *v.* SHAMAPERSHAUD ROY **I. L. R. 3 Calc. 654 : 1 C. L. R. 499 L. R. 5 I. A. 31**

86. _____ *Interest from commencement of suit.* Interest on mesne profits

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may be allowed from the commencement of the suit at the annual rate allowed by the Court. *Hurropersaud Roy* v. *Shamapershaud Roy, I. L. R. 3 Calc. 654,* followed. MUDUN MOHUN SINGH *v.* RAM DASS CHUCKERBUTTY . . . **6 C. L. R. 357**

87. _____ *Jurisdiction of Court of Revenue—Act XVIII of 1873, s. 93, cl. (h) —Suit for profits.* A Court of revenue is competent in a suit for profits, under s. 93, cl. (*h*), of Act XVIII of 1873, to award the interest claimed on such profits. TOTA RAM *v.* SHER SINGH **I. L. R. 1 All. 261**

88. _____ *Interest up to decree—Rate of interest. Held,* on the sum ascertained as the assets, less the collection charges, derived each year from the estate, that interest at six per cent. per annum should be allowed, to be calculated on each year's mesne profits up to the date of the decree of the lower Court. HURRODURGA CHOWDHRAIN *v.* SHARAT SOONDERY DABIA **I. L. R. 4 Calc. 674 : 3 C. L. R. 517**

89. _____ *Mesne profits, interest on—Civil Procedure Code (Act XIV of 1882), s. 211.* Regard being had to the provisions of s. 211 of the Civil Procedure Code (Act XIV of 1882) in the ascertainment of mesne profits due to the decree-holder, he is entitled to receive interest, year by year, on the amount found to be due. *Hurro Durga Chowdhrani* v. *Surut Sundari Debi, I. L. R. 8 Calc. 332,* distinguished. RADHARAMAN MUNSHI *v.* SURNOMOYI DEBI (1903) **I. L. R. 30 Calc. 506 s.c. 7 C. W. N. 437**

90. _____ *Execution of decree—Interest on mesne profits—Date from which such interest accrues. Held,* that the term "mesne profits" includes interest on such mesne profits, and that the interest accrues from the date upon which each instalment of the mesne profits may become due. *Grish Chander Lahiri* v. *Shosi Shikhareswar Roy, I. L. R. 27 Calc. 951,* followed. NARPAT SINGH *v.* HAR GYAN (1903) **I. L. R. 25 All. 275**

91. _____ **Money lent**—*Interest on money lent according to contract.* Interest on money lent was contracted to be payable, "even if a suit should be instituted," at the rate fixed for the period for which the money was lent. *Held,* that interest must be decreed at this rate, according to the contract, down to the institution of the suit. BALGOBIND DAS *v.* NARAIN LAL **I. L. R. 15 All. 339 L. R. 20 I. A. 116**

92. _____ *Interest Act. (XXVIII of 1855), s. 2—Exorbitant rate of interest.* *B* borrowed money from *A* on a promissory note at an exorbitant rate of interest. Upon a suit brought on the said note at the rate agreed upon the defence was that, the bargain being an unconscionable one, interest was not recoverable at that

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high rate. *Held*, that, there being no fiduciary relation between the parties, and there being no finding that the terms of the contract were such that the reasonable inference must be that the defendant either did not understand what he was about or was the victim of some imposition, the plaintiff was entitled to a decree at the rate agreed upon. SATISH CHUNDER GIRI *v.* HEM CHUNDER MOOKHOPADHYA (1902) . **I. L. R. 29 Calc. 823**

93. ——— *Barred item—Interest not allowed on barred item of account.* In an account, interest cannot be allowed on items that are barred by limitation. Interest is but an accessory, and when the principal is barred the accessory falls along with it. DHONDIRAM BIN LAXMON *v.* TABA SAVADAN (1902) **I. L. R. 27 Bom. 330**

94. ——— **Mortgage**—*Agreement to take profits of property under deed of usufructuary mortgage in lieu of interest—Interest until possession.* Where a deed of usufructuary mortgage provided that the mortgagee should take the profits of the property mortgaged in lieu of interest, and was silent as to any interest should the mortgagee not obtain possession, it was held that the mortgagee, who had remained in possession of the property for the stipulated term, was not entitled to retain possession in order to recoup himself for the loss of interest during the time in which he did not obtain possession. DULLI *v.* BAHADUR. **7 N. W. 57**

95. ——— *Mortgage-decree, construction of—Date of payment, meaning of.* There is nothing in the law to prevent interest at the rate stipulated on a bond being decreed up to the date of actual payment. Where a mortgage-decree provided for interest to be recovered from the date of the decree till the date of payment: *Held*, that the words "date of payment" meant the date of actual payment, and not the last day fixed for payment in the decree. MANOO LAL *v.* DURGA PRASAD SINGH (1901) . **5 C. W. N. 653**

96. ——— *Interest up to date of payment—Interest at stipulated rate—Redemption—Subsequent interest—Transfer of Property Act (IV of 1882), ss. 88, 89—Civil Procedure Code (Act XIV of 1882), s. 209, and Sch. IV, Form 109—Belchambers' Rules and Orders, 476, 477 and 605—Force of the rules—Ultra vires—Practice.* Where a mortgage-deed provides for interest up to the date of payment, interest will be allowed at the stipulated rate for the six months allowed for redemption, and at the Court rate from that date up to the date of payment. The decree for interest after the time allowed for redemption in accordance with Rule 605 (Belchambers' Rules and Orders) is a decree for payment of money. Rule 605 (Belchambers' Rules and Orders) is not *ultra vires. Bakar Sajad* v. *Udit Narain Singh, I. L. R. 21 All. 361; Amola Ram* v. *Lachmi Narain, I. L. R. 19 All. 174; Rameswar Koer* v. *Mahomed Mehdi Hossein Khan, I. L. R. 26 Calc. 39; Maharaja of Bharatpur* v. *Rani Kanno Dei, 5 C. W. N. 137; Manoo Lal* v. *Durga Prasad Singh, 5 C. W. N. 653; Surja Narain Singh* v. *Jogendra Narain Roy Chowdhury, I. L. R. 20 Calc. 360*, referred to. *Achalabala Bose* v. *Surendra Nath Dey, 1 C. W. N. 550*, followed. JOGENDRA NATH MUKERJEE *v.* METHANA ABRAHAM (1902) . **6 C. W. N. 769**

97. ——— *Mortgage-decree—Construction of decree—Date of realization.* A mortgagee, who has obtained a decree for sale awarding interest up to the date of realization, is entitled to interest upon his mortgage-money up to the date of the confirmation of the sale. *Manilal Umedram* v. *Nanabhai Maneklal, I. L. R. 28 Bom. 264*, referred to. MEGRAJ MARWARI *v.* NURSING MOHAN THAKUR (1906) . . **I. L. R. 33 Calc. 846**

98. ——— *Transfer of Property Act (IV of 1882), ss. 86, 88—Decree for sale on a mortgage—Rate of interest after date fixed for payment.* Where a decree for sale on a mortgage gives interest after the date fixed by the decree for payments of the mortgage-debt, it is not necessary that such interest should be at the contractual rate. *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan, I. L. R. 26 Calc. 39*, and *Sundar Koer* v. *Rai Sham Krishen, I. L. R. 34 Calc. 150*, referred to. LACHMI NARAIN *v.* UMAN DAT (1907) **I. L. R. 29 All. 322**

99. ——— **Payment into Court**—*Payment in satisfaction of decree.* When a payment is made into Court by a judgment-debtor in full satisfaction of the decree, but which the Court accepted and retained as a payment on account, the judgment-creditor can have no right to claim interest upon the whole amount of his decree. The Court executing the decree has a discretion in allowing interest which will not be interfered with in special appeal. PARESNATH MUKHOPADHYA *v.* KISTO MOHUN SAHA **3 B. L. R. Ap. 105 : 12 W. R. 50**

100. ——— *Interest on decretal money in Court.* Whether interest on decretal money is payable up to the date that it was deposited in Court by the judgment-debtor or up to the date on which the decree-holder applied to get it from the Court will depend on whether the decree-holder had any notice of the money being so deposited to his credit. KALEE DASS GHOSE *v.* PURAN KOOMAREE BIBEE . . . **16 W. R. 304**

101. ——— *Refusal to deposit money in Court.* The defendant was invited, by an injunction issued upon him in another suit, to deposit in Court the money admittedly due under the bonds now sued upon, but having refused to do so, was *held* liable to pay interest from the date of that injunction. RAM DAS GOSSAMEE *v.* PROSSUNNO MOYEE DOSSEE . . . **16 W. R. 297**

102. ——— *Payment in satisfaction of decree—Payment subject to objection.* A judgment-debtor who wants to be released from the claim of his creditor must pay the money

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covered by the decree into Court to the credit of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take the money out, subject to any liability which may arise as the consequence of such protest. *A* got a decree against *B* for a sum of money, the balance of an account. *B* deposited the amount of the decree in Court objecting that ₹9,000, part of that sum, should not be paid out to *A* on the ground that he had appealed as to three items of the account which covered that amount. The lower Court paid no attention to the objection, but did not formally disallow it, and *A* declined to take the ₹9,000. *B's* appeal having been dismissed, *A* applied for the ₹9,000, and got it. He then applied for interest thereon during the time it had been deposited in Court. *Held*, that he was entitled to it, for it was owing to *B's* act that *A* had been deprived of the money during the period for which he claimed interest. RAJENDRA KISHORE SING *v.* PERSHAD SEN **2 C. L. R. 183**

103. ——— **Principal and agent**—*Agent retaining money until required to pay—Fraud.* An agent retaining his principal's money, which he has not been required to pay, should not ordinarily be required to pay interest; but if his conduct has been fraudulent, he should be charged with interest. MONOHUR DOSS *v.* SITUL PERSHAD **23 W. R. 325**

104. ——— **Profits of business**—*Rate of interest on decree for profits of business.* In the absence of accounts or other evidence to show the profits of business in a suit where a share of money representing the capital of the business was decreed to the plaintiff, interest was awarded at 12 per cent. per annum. HEERUN *v.* BIBEE MARIUN **14 W. R. 87**

105. ——— **Profits of watan**—*Decree for arrears of profits of share in a watan.* Where the plaintiff sued to establish a right to share in a watan and to recover a portion of the profits thereof for seven years, and obtained a decree for the arrears, it was *held* that there was no law by which interest on such arrears could be awarded also. GUNDO ANANDRAV *v.* KRISHNARAV GOVIND **4 Bom. A. C. 55**

106. ——— **Refund of excess payments**—*Interest on refund of excess amount under decree.* While a special appeal was pending, the decree-holder took out execution and realized a sum in satisfaction of his whole decree. The decree having been modified and the amount decreed reduced, the judgment-debtor applied for a refund of the excess payment, and this was awarded to him with interest. *Held*, that interest was rightly awarded. WOOMA SONDUREE BURMONIA *v.* GOOROO PERSHAD ROY . . . . . **15 W. R. 74**

107. ——— *Suit for refund of excess rents.* Where rent at an enhanced rate was decreed by the High Court in 1863, but the decree, as far as the enhanced rate was concerned, was reversed by the Privy Council in 1873, and between the two dates other decrees at the enhanced rate had been obtained based on the original one of 1863:—*Held*, in a suit for a refund of the excess rents, that, under the circumstances, no interest would be given. KALICHURN DUTT *v.* JOGESH CHUNDER DUTT . . . . **2 C. L. R. 354**

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108. ——— *Enforcing payment of rent after agreement to allow deduction.* Where a lessor who has agreed to deduct rents in case of his special appeal being unsuccessful compels payments of such rents, notwithstanding a decree of the lower Court being against him, he must pay interest if the result of the litigation shows that he had no right to the money. TARAMONEE DASSEE *v.* MACKINTOSH . . . . **9 W. R. 272**

109. ——— *Refund of amount wrongly levied in execution of decree—Civil Procedure Code, ss. 244, 583.* The Court has power to award to a successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree. AYYAVAYYAR *v.* SHASTRAM AYYAR . **I. L. R. 9 Mad. 506**

PHUL CHAND *v.* SHANKAR SARUP **I. L. R. 20 All. 430**

110. ——— *Costs—Reversal of decree—Refund of costs recovered by execution—Interest.* A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interests thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of ₹6 per cent. per annum. The respondent objected to paying interest on the refund. *Held*, that the appellant was entitled to the interest claimed on the refund of costs. *Forester v. Secretary of State for India in Council, I. L. R. 3 Calc. 161*, referred to. RAM SHAI *v.* BANK OF BENGAL . . . **I. L. R. 8 All. 262**

111. ——— **Unliquidated damages**—*Right to interest.* Interest should not be awarded on unliquidated damages. FRAMJI HARMASJI *v.* COMMISSIONER OF CUSTOMS **7 Bom. A. C. 89**

And *see* CHAKU MODAN ISANA *v.* DULLABH DWARKA . . . . . **9 Bom. 7**

2. CASES UNDER ACT XXXII OF 1839.

1. ——— *Act XXXII of 1839—Bond—Interest not specified—Stat. 3 & 4 Will. IV, c. 42, s. 28.* By Act XXXII of 1839, extending the provisions of the Stat. 3 and 4 Will. IV, c. 42, s. 28, to India, it was enacted "That upon all debts for sums certain payable at a certain time, the Court before whom such debt or sums may be recovered may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be pay-

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INTEREST—*contd.*

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able by virtue of some written instrument at a certain time." An instrument in the nature of, though not strictly, a bond was executed in 1833, which provided for the liquidation of the amount therein specified by instalments, but no provision was made for the allowance of interest. The condition for payment not having been performed:—*Held*, in an action brought in 1849 to recover principal and interest upon the bond, that the Act XXXII of 1839 was retrospective in its operation and authorized the allowance of interest, although it was not provided for in the bond. BOMMARAUZE BAHADUR *v.* RANGASAMY MUDALY **6 Moo. I. A. 232**

2. ——— *Notice—Previous suit between the parties.* Where, in order to entitle the plaintiff to charge interest, a notice by law is required to be served upon the defendant, the existence of a previous litigation upon the same subject-matter is a sufficient notice. MOFOKHURL MOOLK MUSSEERUD DOWLA SYED SUFDAR ALLY KHAN *v.* MACKINTOSH . . . . **2 Hay 123**

3. ——— *Effect of Act—Payments of revenue by one co-sharer.* Act XXXII of 1839 provided that the Court may allow interest on sums of money payable by virtue of a written instrument, at a certain time, or, "if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed." *Held*, that the statute had not the effect of restraining the power of the Court to allow interest in other cases, in which interest was allowed before the Act. Therefore interest may be allowed on payments of revenue made by one co-sharer on behalf of others, notwithstanding no demand of interest may have been made before suit. GOLAM AHMED SHAH *v.* BEHARY LAL **Marsh. 239: 1 Hay, 500**

4. ——— *Interest prior to suit.* Interest cannot legally be awarded prior to suit in cases governed by the provisions of Act XXXII of 1839. ABDOOL KUREEM *v.* MEA JAN **6 W. R. 288**

5. ——— *Suit for contribution.* Interest may be allowed in a suit for contribution, although no demand for interest may have been made before suit. NULLIT BISWAS *v.* PROSUNNO MOYEE DOSSEE . . **17 W. R. 179**

6. ——— *Interest prior to suit—Demand.* In the absence of a demand in writing, interest up to the date of suit cannot be awarded on sums not payable under a written instrument of which the payment has been illegally delayed. KISARA RUKKUMMA RAU *v.* CRIPATI VIYANNA DIKSHATULU . . . . **1 Mad. 369**

7. ——— *Promissory note payable on demand.* In an action for the balance due on a promissory note payable on demand, the Court refused to allow interest, there being no proof of a demand in writing. BANK OF HINDUSTAN, CHINA AND JAPAN *v.* WILSON **1 B. L. R. O. C. 41**

8. ——— *Interest from demand of payment.* In a suit to recover (with interest) money which had been advanced as part of the consideration for the purchase of land under a contract which defendant broke, the Court, in decreeing the claim, awarded interest from the time when the demand of payment was made, *i.e.*, from the date the suit was instituted. PATSAHEE DOBAIN *v.* HURDEO NARAIN SAHOO **24 W. R. 457**

9. ——— *Damages—Wrongful refusal to pay.* Interest is given under Act XXXII of 1839 by way of damages on the ground that a debtor has wrongfully refused to pay, but where there is no hand to receive payment and to give a complete discharge, there can be no wrongful refusal. RAJNARAIN BOSE *v.* UNIVERSAL LIFE ASSURANCE COMPANY **I. L. R. 7 Calc. 594: 10 C. L. R. 561**

10. ——— *Wagering contract in opium—Discretion of Court.* Act XXXII of 1839 (authorizing the allowance of interest in certain cases) does not affect debts contingent in amount and time of becoming due; *e.g.*, a wagering contract for the payment of the excess over the average price of opium at the next ensuing public sale. *Quære:* Whether the discretion of the Court in allowing or refusing to allow interest in cases within that Act is liable to review or appeal. JUGGOMOHUN GHOSE *v.* MANICK CHUND **4 W. R. P. C. 8: 7 Moo. I. A. 263**

11. ——— *Decree of Privy Council, interest on—Interest on costs.* Where a decree of the Privy Council gives interest, but does not clearly specify the rate, the Court should ascertain, if possible, from the other parts of the decree itself or from other documents which may be read in conjunction with the decree, what rate was intended to be given. AMEEROONNISA KHATOON *v.* MAHOMED MOZAFFER HOSSEIN **18 W. R. 103**

12. ——— *Notice of intention to claim interest—Demand of interest already due.* A letter demanding interest on an outstanding debt, from which the intention of the creditor to claim interest up to date of payment is made clear, is a sufficient notice, within the meaning of the Interest Act, 1839, to entitle the creditor to claim interest prospectively from the date of the letter, though the demand be made retrospectively in respect of interest alleged to be then already due. KUPPUSAMI PILLAI *v.* MADRAS ELECTRIC TRAMWAY CO. . . . . **I. L. R. 23 Mad. 41**

13. ——— *Interest, power of Court to allow—Actionable right to interest—Compound interest.* Act XXXII of 1839 enables the Court to allow interest in certain cases, but does not create a right to interest which could be

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INTEREST—*contd.*

2. CASES UNDER ACT XXXII OF 1839—*concld.*

made the subject-matter of a suit. It is doubtful whether the Act gives power to allow compound interest on a debt, but even if there is such jurisdiction, the Court, in the exercise of its discretion, will not allow compound interest except where it is expressly provided for by the agreement. MARSHALL *v.* BENGAL SPINNING AND WEAVING CO. **1 C. W. N. 219**

14. ——— *Whether a Court is to allow interest from the date of the debt where there is no contract to pay, and no demand made for payment of interest.* In a suit for money lent without any written instrument, where it was found that there was no express contract to pay interest, but it was not found that any demand of payment was made in writing and that there was any demand giving notice to the debtor that interest would be claimed from the date of the demand, it was *held* that the creditor was not entitled to any interest before suit. SURENDRA KUMAR BASU *v.* KUNJA BEHARY SINGH . **I. L. R. 27 Calc. 814 4 C. W. N. 818**

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED.

(*a*) SUITS.

1. ——— **No rate of interest proved——***Discretion of Court.* Where no rate of interest is proved, the rate is in the discretion of the Court. After date of decree, the Court rate is six per cent. GREGORY *v.* DULSOOK ROY . . **Cor. 9**

2. ——— **Rate of interest—***Interest up to date of filing of plaint.* Interest at the stipulated rate should only be allowed up to the date of the filing of the plaint; afterwards at the Court rate of six per cent. ANDERSON *v.* SREEMUNTO. ANDERSON *v.* RAJNARAIN DOSS . . . **Cor. 3**

3. ——— **Interest before and after decree—***Suit for arrears of maintenance.* *A*, on behalf of her infant son *B*, contracted with *C* that he should be allowed, for the maintenance of her daughter whom he was about to marry, land situate at X that should yield annually R900. *B*, after coming of age, contracted at Y to pay *C* the annual allowance, and ratified the contract which had been made by his mother. *Held*, in a suit for recovery of certain of the yearly payments, that the Court might decline to allow interest on the arrears found to be due prior to the commencement of the suit, there being no stipulation in the contract for interest, and might award interest on the amount decreed from the commencement of the suit to the date of the decree and interest upon the aggregate amount and upon the costs, from the date of the decree until payment. KISHENKINKUR GHOSE *v.* BORADAKANTH ROY **Marsh. 533 : 2 Hay 656**

4. ——— *Discretion of Court.* Interest at the stipulated rate, no matter

INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*a*) SUITS—*contd.*

how usurious, will be awarded down to decree. The rate at which subsequent interest is to be awarded is entirely in the discretion of the Court. If a plaintiff has contracted to receive interest at twelve per cent. only, that rate will be carried down to decree, but should he have contracted for a higher rate, six per cent. only will be allowed. DHUNPUT SINGH DOGARE *v.* GOLAM HADEE. **2 Hyde 106 : Cor. 12**

5. ——— *Interest not mentioned in decree.* A plaintiff cannot recover more than is clearly given to him by the decree, either in express terms or by necessary inference. When the plaint prayed for interest up to the date of the suit together with subsequent interest and the decree purported to be an award in accordance with the prayer of the plaint:—*Held*, that the plaintiff was not entitled to interest subsequent to the date of the decree. PRABHULANADHO PILLAY *v.* PONNUSWAMY CHETTY . . . **6 Mad. Ap. 1**

6. ——— **Interest between date of filing of plaint and decree—***Date of making and date of satisfaction of decree.* The compensation due to a plaintiff for the delay which must ensue between the date when the plaint is filed and the date when the decree can be reasonably expected to be satisfied is, as a general rule, best and most simply estimated by a uniform rate of interest upon the total amount decreed, reckoned from the date of the decree. DOORGA DUTT SINGH *v.* BUNWAREE LALL SAHOO . . **19 W. R. 34**

7. ——— **Interest where no rate is agreed on after certain time—***Reasonable rate—Discretion of Court.* In a suit to recover a sum of money due on an agreement under the term of which interest for fifteen days only was payable at the rate of one rupee per diem: *Held*, that, as no rate was agreed upon after the expiration of the fifteen days, the Court had power to fix a reasonable rate of interest subsequent to that time. *In the matter of* MOIZOODDY SHAIK . **14 W. R. 450**

8. ——— **Rate of interest after suit where rate before is stipulated—***Assessment of rate.* The Sudder Court having reduced the rate of interest allowed by the Zillah Judge before the commencement of the suit from 12 per cent. to 10 per cent., the rate at which the account current between the parties bore interest, it was held by the Privy Council that the same consideration should have determined the rate of interest to be allowed from the date of suit; and that the amount of this should also be calculated at 10 per cent. per annum. MIRTUNJOY CHUCKERTUTTY *v.* COCHRANE **4 W. R. P. C. 1 : 10 Moo. I. A. 229**

9. ——— **Interest from decree to date of realization—***Decree under s. 53, Act XX of 1866.* Interest from the date of decree to date of realization cannot be awarded by a decree under

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*a*) SUITS—*concld.*

s. 53, Act XX of 1866. MAHCUM CHUND *v.* MAHTAB . . . . . **8 Agra 318**

10. ——— *Further interest ordered by Court under Act XXIII of 1861.* When the Court orders further interest under Act XXIII of 1861, s. 10, it is to be from the date of the decree to the date of the payment of the principal sum adjudged, and not for a limited period. RAMASWAMI AYYAN *v.* APPAVAIYAN **1 Mad. 211**

11. ——— *Interest—Hindu law—Debtor wrongfully withholding payment—Demand by creditor—Interest Act (XXXII of 1839)—Indian Contract Act (IX of 1872).* The plaintiff sued to recover a sum of money with interest from the date of demand from the defendant, who held the money in deposit for her. There was no agreement between the parties to pay interest. The first Court dismissed the claim as to interest: but the lower Appellate Court allowed interest on the amount of the deposit from the date of the demand by plaintiff to the date of payment. The parties to the suit were Hindus governed by the law of Mitakshara. *Held*, under special circumstances, that interest may be awarded by Courts in India, by way of damages. *Held*, further, that under Hindu law as it is to be found in the Mitakshara there is annexed to each contract of debt, in which there is no agreement to pay interest, the term or incident that such loss shall be made up by the debtor, if he wrongfully withholds payment after demand: and that this incident was annexed to every such contract at the date when the Interest Act (No. XXXII of 1839) came into force. *Held*, further, that the parties being Hindus governed by the Mitakshara that constituted a special circumstance justifying the award of interest. *Hurropersaud Roy Chowdhry* v. *Shamapersaud Roy Chowdhry, L. R. 5 I. A. 31*, applied. SAUNADANAPPA *v.* SHIVBASAWA (1907) **I. L. R. 31 Bom. 354**

(*b*) DECREES.

12. ——— **Decree not giving interest**—*Decree for mesne profits.* Interest on mesne profits cannot be awarded for the period previous to the ascertainment where the decree does not give interest on mesne profits. HURO GOBIND BHUKUT *v.* DEGUMBUREE DEBIA . . . **9 W. R. 217**

13. ——— *Decree for mesne profits—Act XXIII of 1861, s. 10.* Where a decree of the Privy Council ordered possession with mesne profits but without interest:—*Held*, that the decree did not interfere with the power of the Judge who executes it to award interest under s. 10 of Act XXIII of 1861 on the aggregate sum adjudged, and costs from the date of decree to date of payment. AHMED REZA *v.* KHUJOORUNNISSA **15 W. R. 469**

INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*concld.*

(*b*) DECREES—*contd.*

14. ——— *Decree for mesne profits—Execution of decree—Act XXIII of 1861, s. 11.* When a decree is silent as to interest, the Court executing the decree has no power to award interest. Act XXIII of 1861, s. 11, refers only to questions of amount of interest or mesne profits which are left open and not determined by the decree. MOSOODUN LALL *v.* BEKAREE SINGH **B. L. R. Sup. Vol. 602: 6 W. R. Mis. 109**

ABDUL ALI *v.* ASHRUFFAN **7 B. L. R. Ap. 30 note: 14 W. R. 62**

JARDINE, SKINNER & CO. *v.* SHAMA SOONDUREE DEBIA . . . . **10 W. R. 60**

JOYKISSEN BOSE *v* WISE **W. R. 1864, Mis. 37**

BECHARAM DOSS *v.* BROJONATH PAL CHOWDHRY **9 W. R. 369**

15. ——— *Power of Court executing decree.* When a decree does not provide for the payment of interest it is not competent to the Court executing the decree to add to it by giving interest. KUPPA AYYAR *v.* VENKATARAMANA AYYAR . . . . . **3 Mad. 421**

LEELANAND SINGH *v.* JOY MUNGAL SINGH **15 W. R. 335**

LEELANAND SINGH *v.* RAM NARAIN SINGH **15 W. R. 415**

NUBO KISHORE MOJOOMDAR *v.* AUNUND MOHUN MOJOOMDAR . . . **17 W. R. 19**

JEWAN LALL MAHATAB *v.* DOORGA DUTT SINGH **20 W. R. 477**

MAHOMED YAKOOB *v.* MAHOMED ZUHOORUL HAQ **22 W. R. 533**

ENAYET ALI *v.* MAHOMED ZUHOORUL HAQ **22 W. R. 534**

(*Contra*), LUCHMEE NARAIN *v.* SHUDASHEO SINGH **5 W. R. Mis. 12**

where it was *held* that interest runs on sums decreed as a matter of course, unless a specific order is recorded to the contrary.

This case must be considered, however, as now overruled.

16. ——— *Interest allowable by Court executing decree.* A Court executing a decree can award interest from date of decree to date of payment, on the amount decreed to be paid by the judgment-debtor to the decree-holder, if the Court which passed the decree made no order on that point. BEER CHUNDER JOOBRAJ *v.* RAM KOOMAR DHUR . . **6 W. R. Mis. 26**

17. ——— *Court executing decree.* Where a decree ordering payment by instalments does not provide for the payment of interest, the Court executing it is bound to refuse giving interest upon objection being taken thereto, even

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*b*) DECREES—*contd.*

though on particular occasions interest has been claimed and allowed. Where interest is objected to in such a case and the decree-holder is subjected to serious loss by delay in satisfying his claim, he is entitled to proceed at once against any property which may be liable under the decree to attachment and sale on default of payment of any of the instalments. SURNO MOYEE DOSSEE *v.* KISHEN KOOMAREE **14 W. R. 324**

18. ——— *Execution of decree—Suit for damages.* Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit. SETH GOKUL DAS GOPAL DAS *v.* MURLI **I. L. R. 3 Calc. 602 : 2 C. L. R. 156 L. R. 5 I. A. 78**

NILAMBUR SEIN *v.* PITAMBUR SEIN **5 W. R. Mis. 28**

19. ——— *Verbal promise to pay interest—Execution of decree.* A judgment-debtor, in consideration of time being allowed him, promised in open Court, through his vakeel, to pay interest to his creditor, although the decree did not specifically award interest. *Held*, by the majority of the Court, that the debtor was bound by that promise, and that execution could issue as well for the sum decreed as for the interest promised. SREESHTEEDHUR SHAHA *v.* WOOMESHNATH ROY **5 W. R. Mis. 1**

20. ——— *Postponement of sale by consent on condition of payment of interest not decreed—Condition enforced.* A judgment-debtor having applied to the Court to postpone the sale of his property, so as to enable him to raise money by sale or mortgage to satisfy the decree, the creditor consented to the adjournment, on the debtor undertaking to pay interest from the date of suit, which was not provided for by the decree, and the Court by order postponed the sale accordingly. *Held*, that, under the circumstances, it was to be inferred that the Court approved of and sanctioned the condition, and that the condition could be enforced in execution of the decree. LAKSHMANA *v.* SUKIYA BAI . . **I. L. R. 7 Mad. 400**

21. ——— **Decree not specifying rate of interest.** Where a decree did not specify the rate of interest :—*Held*, that the Court ought not to have allowed a higher than the usual Court rate, namely, 12 per cent. SOOBUDRA BEBEE *v.* SHEO CHURN LALL . . . **7 W. R. 375**

22. ——— A decree directed that from the original cause of action to date of suit, and from date of suit to date of decision, interest should be given at 12 per cent. ; and from date of decision to date of liquidation, interest should be given without specifying the rate. The Judge gave 12 per cent. for this period, and an appeal from his order, on which it was contended that no rate being specified no interest could be given, was dismissed. LALUN MANI *v.* BEHARI LAL MOOKERJEE . . . **7 B. L. R. Ap. 30**

23. ——— Although the decree in this case did not specify the rate of interest before or after the decree, yet as it appeared that, in calculating the amount then due, the Court gave 12 per cent., and that that was the usual rate :—*Held*, that the intention of the Court, when it passed the decree, was to give the same rate. ABDOOLAH *v.* REASUT HOSSEIN . . . **17 W. R. 414**

24. ——— *Alteration of rate of interest given by decree—Rate where no rate is specified.* Where a decree awarded a certain sum which was calculated in the schedule, plus costs and interest, the Court executing was *held* to have committed an error in altering the amount somewhat by reducing the rate of interest during the pendency of the suit. The same Court was pronounced not to have done wrong in estimating the interest, the rate of which was not specified, at a rate which, under the circumstances of the case, it thought reasonable. RUGHOONUNDUN SINGH *v.* ARCOTT **19 W. R. 46**

25. ——— *Court rate.* Where a decree was given for a certain amount with interest, the rate not being specified, the High Court considered itself bound by the authorities to affirm an order made by the Court executing the decree, allowing the Court rate usual at the time of the making of the decree. MADHUB LAL KHAN *v.* NOYAN GHOSE . . . **6 C. L. R. 231**

26. ——— **Decree in suit on mortgage**—*Civil Procedure Code (Act XIV of 1882), s. 209—Discretion of Court—Rate of damdupat.* In a suit brought by a mortgagee against his mortgagor (both parties being Hindus) the decree ordered the defendant to pay interest from the date of suit to decree upon the total found due after applying the rule of damdupat at the date of suit. It was objected that this order of further interest violated the rule of damdupat. *Held*, that the discretionary power as to awarding interest conferred on the Courts by s. 209 of the Civil Procedure Code (Act XIV of 1882) may be exercised without reference to the law of damdupat. DHONDSHET *v.* RAVJI **I. L. R. 22 Bom. 86**

27. ——— **Decree for sale in suit by puisne mortgagee**—*Rate agreed on in mortgage—Act XXIII of 1861, s. 10—Civil Procedure Code, s. 209.* Upon a claim by a puisne mortgagee to redeem prior incumbrances and in the alternative for a decree ordering the sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in their due order, and with redemption by the plaintiff of a prior mortgagee who was to have an option to

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*b*) DECREES—*contd.*

redeem. As regards the Court's power to regulate the interest, *held*, that, although in the decree for sale the rate of interest on the debt, payable to the mortgage decree-holder, was reducible from the date of the decree from the rate stipulated, to the Court rate, an order to that effect could only be made for the benefit of the judgment-debtor as a party to the suit. The plaintiff, seeking to redeem a mortgage prior to the suit, must pay the interest at the rate agreed upon in the mortgage; there being no authority, either under s. 10 of Act XXIII of 1861 or under the Civil Procedure Code, s. 209, to reduce it to the Court rate. UMES CHUNDER SIRCAR *v.* ZAHUR FATIMA **I. L. R. 18 Calc. 164 L. R. 17 I. A. 201**

28. ——— Suit to declare property attached not liable in execution—*Injunction against sale of property pending decision of suit on plaintiff giving security for interest on the sum representing value of attached property—Subsequent dismissal of suit with costs—Application by defendant in execution of decree for the interest for which security ordered by injunction—Civil Procedure Code (Act XIV of 1882), ss. 492, 497.* *K*, having obtained a decree against one *V*, attached a house in execution. *V* intervened under s. 278 of the Civil Procedure Code (Act XIV of 1882), and applied that the house, if sold, should be sold subject to his mortgage. His application was dismissed, and he thereupon brought a suit (No. 648 of 1887) for a declaration that the house was not liable in execution of *K's* decree. That suit was dismissed by the lower Court, and *V* appealed. Pending the hearing of the appeal, he applied for and obtained under s. 492 of the Civil Procedure Code an injunction restraining the sale until the result of the appeal on his giving security for interest at six per cent. on R2,000, the acknowledged value of the house. The appeal was heard in due course and was dismissed with costs, and thereupon *K*, in execution of the decree in this last-mentioned suit (No. 648 of 1887), applied to recover the interest for which security was ordered to be given by the District Court. *Held*, that he was not entitled to recover it. A Court of execution cannot award interest when the decree is silent. The respondent *K* had his remedy under s. 497 of the Civil Procedure Code, and that remedy was obtainable on application, not to the Court of execution, but to the Court which issued the injunction. VABAJLAL MULCHAND *v.* KASTUR DHARAMCHAND **I. L. R. 22 Bom. 42**

29. ——— Mortgage decree—*Interest at contract rate up to the date fixed by Court for payment of mortgage-money—Subsequent interest at rate to be fixed by Court.* In a mortgage-decree, interest at the contract rate should be allowed up to the date fixed by the decree for the repayment of the money due, and after that date at such rate as the Court

INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*b*) DECREES—*concld.*

may fix. *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan, I. L. R. 26 Calc. 39; Maharaja of Bharatpur* v. *Ram Kanno Dei, L. R. 28 I. A. 35; Bakar Sajjad* v. *Udit Naran Singh, I. L. R. 21 All. 361*, referred to. RAMESWAR PROSAD SINGH *v.* RAI SHAM KISHEN (1901) **I. L. R. 29 Calc. 43**

(*c*) CONTRACTS.

30. ——— Wagering contract—*Contract without stipulation as to interest—Mercantile usage—Act XXI of 1848.* Neither by the English nor the Hindu law, unless there be mercantile usage, can interest be imported into a contract which contains no stipulation to that effect. In an action on contracts known as tajee mundee chitties—opium wager contracts (before the passing of Act XXI of 1848, which prohibited such gambling contracts)—the plaintiff claimed interest on the sum recovered. *Held*, that, as there was no stipulation as to interest in the contract or satisfactory evidence of mercantile usage at Calcutta to import interest into the contract, the interest claimed could not be allowed. JUGGOMOHUN GHOSE *v.* KAISREECHUND **9 Moo. I. A. 256**

See JUGGOMOHUN GHOSE *v.* MANICK CHUND **4 W. R. P. C. 8 : 7 Moo. I. A. 263**

31. ——— Contract rate of interest—*Power of Court to withhold interest.* When by the terms of a contract money is to bear interest, interest is as much payable by virtue of the contract as the principal, and the Court has no power in such a case to withhold interest. BUNWAREE LALL SAHOO *v.* MOHESHUR SINGH **Marsh. 544 : 2 Hay 644**

KOTOO *v.* KO PAY YAH . . **6 W. R. 255**

32. ——— *Obligation of Court to award such rate.* A Court is bound to enforce an agreement between the parties as respects the amount of interest to be paid upon a bond, instead of limiting a claim for accumulated interest to a sum not exceeding the principal. KALICA PROSAD MISSER *v.* GOBIND CHUNDER SEIN **2 W. R. S. C. C. Ref. 1**

33. ——— *Act XXVIII of 1855—Inequitable contracts.* The provision contained in Act XXVIII of 1855, that any rate of interest which the parties may have agreed upon shall be awarded, in no way prevents the Courts in India which administer both law and equity from examining into the character of agreements between parties holding relations to each other which enables one to take advantage of the other and from declining to enforce such agreement when unfair and extortionate. VINAYAK SADASHIV VOZE *v.* RAGHI . . . . **4 Bom. A. C. 202**

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

34. ——— *Rate of interest on bond up to decree—Act XXVIII of 1855, s. 2—Civil Procedure Code, 1877, s. 209.* The contract rate of interest must be allowed up to date of decree in accordance with Act XXVIII of 1855, s. 2. The Civil Procedure Code, s. 209, does not expressly refer to suits in which interest has been contracted for, and does not repeal the former Act. BANDARU SWAMI NAIDU *v.* ATCHAYAMMA **I. L. R. 3 Mad. 125**

35. ——— *Setting aside transaction by guardian of minor—Interest on loan.* In setting aside an ikrarnamah and sale as being contrary to the interests of a minor and made by the guardian, a Hindu lady, under circumstances which showed that she had been imposed upon, interest was allowed on a sum of ₹26,000 which had been actually advanced, at the contract rate of six per cent. in lieu of five per cent. awarded by the Sudder Court, and in preference to the current Court rate of twelve per cent. LALLA BUNSEEDHUR *v.* BINDESEREE DUTT SINGH **10 Moo. I. A. 454**

36. ——— *Subsequent interest.* Where a Civil Court awards interest under an admitted contract, it is bound to award it at the stipulated rate up to the date of decree ; but for any time after that date it has power to exercise its own discretion as to the rate of interest to be awarded. BHUGWAN DOSS v. TEKAIT THAN NARAIN DEO **23 W. R. 309**

37. ——— **Interest after due date of bond**—*Date of refusal of payment.* In a suit upon a bond, when the genuineness of the bond and the defendant's liability under it are clearly established, the plaintiff is entitled to interest from the time the defendant declined payment of the sum due upon the bond. GUNGA BISHUN TEWARRY *v.* ROY MOHUN LALL MITTER . **W. R. 1864, 291**

38. ——— *Discretion of Court.* When a bond is silent as to any interest to be allowed after the due date of the bond, it is in the discretion of the Court to fix the amount of interest, if any, to be paid from the due date of the bond to the date of the commencement of suit. SITANATH BOSE *v.* MATHURA NATH ROY **2 B. L. R. Ap. 10 : 11 W. R. 68**

JOYRAM GOSSAMEE *v.* NOBIN CHUNDER DOSS **25 W. R. 318**

39. ——— *Bond under s. 52, Act XX of 1866.* When a bond under s. 52, Act XX of 1866, is enforced on a decree, no interest is to be allowed on it, if the bond does not provide for interest after the date on which the debt was payable. KALLORAM BABOO *v.* DOORGANATH TALUKHDAR . . . . **10 W. R. 175**

40. ——— *Interest after filing of plaint—Interest at rate stated in bond—Discretion of the Court—Civil Procedure Code (Act XIV of 1882), s. 109.* Interest after date of suit is in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realization" in the bond sued upon. MANGHIRAM MARWARI *v.* DHOWTAL ROY **I. L. R. 12 Calc. 569**

41. ——— *Provision for interest between due date and date of enforcement.* Where a registered bond provided for payment of interest between the date upon which the bond fell due and the date upon which enforcement was applied for, the bond was construed strictly against the debtor. RAM DASS GOSSAMEE *v.* PROSONOMOYE DOSSEE . . . . **16 W. R. 297**

42. ——— *Discretion of Court.* In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate. The principle laid down in *Cooke* v. *Fowler, L. R. 7 H. L. 27,* followed. DEEN DOYAL LALL *v.* HET NARAYAN SING **I. L. R. 2 Calc. 41**

S.C. DEEN DOYAL LALL *v.* CHOA SINGH **25 W. R. 189**

43. ——— *Failure of former suit on bond for want of jurisdiction.* Where in a previous suit on a bond, which suit was lost on account of want of jurisdiction, the plaintiff sued for a specific sum, and for interest as from a certain date, he was declared, in a subsequent suit instituted by him on the same bond, entitled to interest on the bond only from the date from which he sued for it in the first suit, to the date of the present decree of the Judicial Committee. NARAIN DASS *v.* ESTATE OF THE EX-KING OF DELHI . **10 W. R. P. C. 55**

S. C. LALLA NARAIN DOSS *v.* ESTATE OF EX-KING OF DELHI . . . **11 Moo. I. A. 277**

44. ——— *Limitation in suit on bond.* On mortgage-bonds, dated 1832, the Court allowed interest only for six years, following *Vital Mahde* v. *Daud valad Muhammad Husen, 6 Bom. A. C. 90,* and *Narayan* v. *Satvaji, 9 Bom. 83.* NARAYAN DESHPANDE *v.* RANGUBAI **I. L. R. 5 Bom. 127**

45. ——— *Mortgage-bond—Agreed rate of interest.* In a suit on a mortgage-bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction. FUTTEHMA BEGUM *v.* MOHAMMED AUSUR **I. L. R. 9 Calc. 390**

46. ——— *Measure of damages.* A suit was brought in 1884, upon a hypothe-

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

cation-bond executed in April 1875, in which the obligors agreed to repay the amount borrowed with interest at R1-8 per cent. per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision: "Our rights and property in the aforesaid talukh Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of R1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond. *Held*, that, although cases might arise in which a jury or a Judge might refuse to give a plaintiff any interest, *i.e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke* v. *Fowler, L. R. 7 H. L. 27*, referred to. *Held*, that, in determining the amount of damages, the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Juala Prasad* v. *Khuman Singh, I. L. R. 2 All. 617*, referred to. The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances. BISHEN DAYAL *v.* UDIT NARAIN . **I. L. R. 8 All. 486**

47. ——————— *Interest otherwise than at contract rate.* Where a debtor by his bond stipulated to pay interest at 12 per cent. per annum up to the time fixed for payment, but the money remained unpaid for a long time, the High Court refused to interfere with the decree of the lower Court awarding plaintiff interest at the rate stipulated for up to the time fixed for payment, and a lower rate afterwards. GOSSAIN LUCHMEE NARAIN POOREE *v.* TEKAIT HET NARAIN SINGH **18 W. R. 322**

48. ——————— *Power of Court to alter contract as regards interest—Bond payable by instalments—Civil Procedure Code (1859), s. 194, (1877), s. 210.* Neither Act VIII of 1859, s. 194, nor Act X of 1877, s. 210, confers any authority on the Courts to relieve a contracting party from such an express stipulation in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments. A debt being presently due, an agreement to pay it by instalments, with a stipulation that on default the creditor may demand immediate payment of the whole balance due with interest is not to be relieved against inequity. Such a stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner. The defendant executed to the plaintiff a bond payable by instalments, and expressly stipulating for the payment of the whole amount on failure to pay any instalment on the day fixed. He paid the first instalment, but made default in paying the second, which fell due on the 3rd August 1878. On the 20th August plaintiff sued to recover the whole balance due on the bond. Defendant admitted the bond, but pleaded tender of the amount of the second instalment soon after the due date, and prayed for payment by instalments without any interest. The first Court passed a decree in the plaintiff's favour for the amount claimed with costs, but ordered defendant to pay R100 and the costs at once, and the balance by yearly instalments of R100 each, with interest at 6 per cent. till payment. The District Judge on appeal affirmed the decree, with a slight variation as to interest, which he directed the defendant to pay on overdue instalments only. *Held*, by the High Court, on second appeal, that neither of the lower Courts had jurisdiction, without the consent of the parties, to substitute, for the contract made by them, terms which the Court preferred. RAGHO GOVIND PARANJPE *v.* DIPCHAND . **I. L. R. 4 Bom. 96**

49. ——————— *Power of Court to alter rate of interest—Civil Procedure Code Act (1859), s. 194.* In exercise of the discretion given by s. 194 of the Code of Civil Procedure (Act VIII of 1859), the Court of first instance in a suit on a mortgage-bond gave a decree to the plaintiff making the amount awarded payable by instalments, but gave no interest after the institution of the suit. The Appellate Court amended the decree by awarding interest from the institution of the suit at six per cent. per annum, the rate originally contracted for being twenty-four per cent. per annum. *Held*, that, although the stipulated rate was properly awardable, the award of the lower rate was not illegal or beyond the competence of the Court below, with whose discretion the High Court will not interfere. CARVALHO *v.* NURBIBI **I. L. R. 3 Bom. 202**

But *see* JAFREE BEGUM *v.* AHMED HOSSEIN KHAN **1 Agra 270**

50. ——————— *Exorbitant rate—Discretion of Court to give or not the contract rate.* When the rate of interest stipulated for in a bond is exorbitant, and there is no express understanding that the interest is to continue at the same rate after the expiration of the period fixed

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

or repayment, a Court need not assume that the parties are bound by contract to that rate after such period. MAHOMED HOSSEIN *v.* TUQUEEROODEEN, **15 W. R. 284**

51. ——— *Discretion of Court to give or not the contract rate.* Where a party borrowing money entered into a bond stipulating to pay R24 per cent. per annum as interest until the whole debt, principal and interest, was paid off, and if the whole was not paid within the time mentioned, that the bond should be enforced as a registered deed :—*Held*, that the rate of interest was not a question of discretion, but must be paid at the rate stipulated. REASUT HOSSEIN *v.* JUSMUNT ROY . . . . . **15 W. R. 396**

52. ——— *Compound interest—Contract rate—Penalty.* Where a stipulation for compound interest is included in a contract, the compound interest is not a penalty, but a matter of contract, and a Court enforcing the contract in a decree should give the compound interest also. LAND MORTGAGE BANK OF INDIA *v.* RADHA KRISHNA DUTT . . . . . **25 W. R. 323**

53. ——— *Mortgage-bond—Compound interest from co-sharer enforcing pre-emption.* *B* stipulated in the instrument of mortgage to pay the interest annually, and in case of default to pay compound interest. The mortgage was afterwards foreclosed, and *A*, the mortgage, sued for and obtained possession. *S*, a co-sharer, sued for and was held entitled to pre-emption in respect of a share in the property. *Held, per* STUART, *C.J.*, SPANKIE, *J.*, and STRAIGHT, *J.*, that, inasmuch as *B* would have been obliged to pay compound interest had he desired to redeem the mortgaged property, *A* was entitled to receive from *S* compound interest up to the date of foreclosure. ALU PRASAD *v.* SUKHAN . **I. L. R. 3 All. 610**

54. ——— *Discretion of Court—Reasonable rate of interest.* *G* gave *B* a bond for the payment of certain money within a certain time, with interest at the rate of 1¾ per cent. per mensem, in which he agreed that, in case of default, the obligee "should be at liberty to recover the principal money and interest from his person and property" and mortgaged "his four-anna share in mouzah K until payment of the principal money and interest." *Held*, that the bond contained an express contract for the payment of interest after due date at the rate of 1¾ per cent. per mensem, and that such contract was enforceable. *Semble :* That, where there is no express agreement fixing the rate of interest to be paid after the date a bond becomes due, an agreement to pay at the rate of interest agreed to be paid before such date cannot be implied, but the Court must determine what would be a reasonable rate to allow. In such a case the rate agreed to be paid before such date

INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

may ordinarily be regarded as the rate to be allowed after such date, provided that the rate agreed to be paid before such date is not excessive. BALDEO PANDAY *v.* GOKUL RAI . **I. L. R. 1 All. 603**

55. ——— *Damages. Held*, where a bond for the payment of certain money within a certain time did not contain any agreement fixing the rate of interest to be paid after the date it became due, that the question as to the amount of interest to be allowed after that date should be treated as one of damages, and that, having regard to the length of time that had elapsed since the bond ran out (February 1870) to the date on which the suit thereon was instituted (26th November 1878), interest at the rate of 8 annas per cent. per mensem was an equitable rate to allow after the date the bond became due. *Held*, also, that but for the plaintiff's laches the rate agreed by the defendant to be paid under the bond (one rupee per cent. per mensem) was a reasonable basis on which to estimate the subsequent damages. JUALA PRASAD *v.* KHUMAN SINGH . **I. L. R. 2 All. 617**

56. ——— *Excessive interest.* Upon a contract for the payment, on a day certain, of money borrowed with interest at a certain rate down to that day, further contract for the continuance of the same rate of interest after that day until actual payment is not to be implied. When, therefore, the agreed rate of interest is excessive and extraordinary, the Court will reduce the rate to a reasonable amount. NANCHUND HANSRAJ *v.* BAPU RUSTAMBHAI **I. L. R. 3 Bom. 131**

57. ——— *Covenant to pay at a certain rate—Obligation of Court to give stipulated interest.* In a deed of mortgage, dated in July 1870, the mortgagors covenanted, among other things, as follows : "That having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of R1-2 per cent. per mensem ; that should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at R1-2 per cent. per mensem . . . . . that, in the event of non-payment of the principal and interest on the expiration of the appointed time, the mortgagee shall be at liberty to recover from us the whole amount due to him with interest by means of a law-suit." *Held*, that the terms of the bond amounted to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due ; that the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate ; and that the

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*c*) CONTRACTS—*contd.*

mortgagee was therefore entitled to interest up to the date of the decree at the rate of R1-2 per mensem. *Buldeo Panday* v. *Gokal Rai, I. L. R. 1 All. 603,* referred to. CHHAB NATH *v.* KAMTA PRASAD . . . **I. L. R. 7 All. 333**

58. ——— *Bond—Interest post diem—Non-payment of principal and interest at agreed date.* Interest as interest cannot be allowed on money lent on a hypothecation-bond, or on a deed of conditional sale, unless it appears from the bond or deed that it was intended by the parties that interest should be payable, and then only for the period during which it so appears that it was so intended. Where no such intention appears, interest can be given only by way of damages. *Cook* v. *Fowler, L. R. 7 H. L., 27* referred to. MANSAB ALI *v.* GULAB CHAND **I. L. R. 10 All. 85**

59 ——— *Civil Procedure Code, s. 209—Stipulated interest—Interest after filing plaint.* A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree. *Mangniram Marwari* v. *Dhowtal Roy, I. L. R. 12 Calc. 569,* dissented from. RAMACHANDRA *v.* DEVU . . . **I. L. R. 12 Mad. 485**

60. ——— *Bond—Interest post diem—Damages for non-payment on due date.* A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal* v. *Chajmal Das, unreported,* followed. *Chhab Nath* v. *Kamta Prasad, I. L. R. 7 All. 333; Baldeo Pandey* v. *Gokal Rai, I. L. R. 1 All. 673,* referred to; and *Cook* v. *Fowler, L. R. 7 H. L. 27.* BHAGWANT SINGH *v.* DARYAO SINGH **I. L. R. 11 All. 416**

61. ——— *Mortgage-bond—Interest post diem—Damages—Bond.* Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract. Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages, no distinction is to be drawn between simple bonds and mortgage-bonds. *Mansab Ali* v. *Gulab Chand, I. L. R. 10 All. 85,* and *Bhagwant Singh* v. *Daryao Singh, I. L. R. 11 All. 416,* followed. *Cook* v. *Fowler, L. R. 7 H. L. 27; Bishen Dayal* v. *Udit Narain, I. L. R. 8 All. 486;* and *Rajpati Singh* v. *Kesh Narain Singh, All. Weekly Notes (1890), 149,* referred to. NIWAS RAM PANDE *v.* UDIT NARAIN MISR . **I. L. R. 13 All. 330**

62. ——— *Mortgage-bond—Interest at rate stated in bond—Discretion of the Court—Civil Procedure Code (Act XIV of 1882), s. 209—Transfer of Property Act, s. 86.* The terms of s. 86 of the Transfer of Property Act exclude the discretion conferred on the Court by s. 209 of the Civil Procedure Code in cases coming under the Transfer of Property Act. *Mangniram Marwari* v. *Dhowtal Roy, I. L. R. 12 Calc. 659,* distinguished. *Mangniram Marwari* v. *Rajpati Koeri, I. L. R. 20 Calc. 366 note,* approved. S. 86 of the Transfer of Property Act binds the Court to give a decree at the rate of interest provided by the mortgage if it be a rate to which no valid legal objection can be taken; that interest must be so computed down to the day fixed by the Court, according to the terms of the second paragraph of the section, that is the day being one within six months from declaring in Court the amount due. The amount to be declared due is the amount due for principal and interest on the mortgage, including interest at the rate provided by the mortgage-deed, up to the day so fixed; it is the same whether it be ascertained on an account being taken by the order of the Court, or be ascertained by the Court itself. SURYA NARAIN SINGH *v.* JOGENDRA NARAIN ROY CHOWDHURY . . . **I. L. R. 20 Calc. 360**

MANGNIRAM MARWARI *v.* RAJPATI KOERI **I. L. R. 20 Calc. 366 note**

63. ——— *Transfer of Property Act (IV of 1882), s. 86—Mortgage decree—Contract rate—Subsequent interest—Civil Procedure Code (Act XIV of 1882), s. 209.* When a decree for sale is passed in a mortgage suit, interest at the contract rate should be decreed for the period allowed for payment by the mortgagor, and subsequent interest should be decreed at six per cent. only. SUBBARAYA RAVUTHAMINDA NAINAR *v.* PONNUSAMI NADAR **I. L. R. 21 Mad. 364**

64. ——— *Interest Act (XXXII of 1839)—Interest on mortgage-money—Transfer of Property Act (IV of 1882), s. 88—Charge on mortgaged property.* The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage-money, as it is money payable at a certain time and under a written instrument; and the terms of s. 88 of the Transfer of Property Act make such interest recoverable or payable out of the mortgaged property. The interest on the mortgage is not necessarily only the interest which the parties stipulated by the mortgage-deed should be paid, but would also

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(*c*) CONTRACTS—*contd.*

include interest which under the law is payable, *e.g.*, interest after the due date of the mortgage, where there is no stipulation for interest after the due date. BIKRAMJIT TEWARI *v.* DURGA DYAL TEWARI . . . **I. L. R. 21 Calc. 274**

65. ——— *Construction of mortgage—Compound interest—Relative rights of first and second mortgagees of the same property—Mortgage-decree giving terms of redemption of the first by the second.* There being a first and a second mortgage of the same property, a mortgage-decree (that upon the first by consent) was obtained by each mortgagee respectively, neither of them being a party to the decree obtained by the other. In the first mortgage it was agreed that, on default by the mortgagor, interest at 12 per cent. should be paid on the principal and interest taken together, the latter being calculated with annual rests. At a judicial sale under the decree obtained by the first mortgagee, he became the purchaser of the greater part of the property. In this suit, which was brought by the first mortgagee's heir now representing him against the second mortgagee, making the mortgagors parties for a declaration of his rights, it was decided that the second mortgagee was entitled to redeem the first mortgage. But the Appellate Court, referring to the consent decree having given simple interest only, made this the basis of an interference that compound interest must now be disallowed. *Held*, that this was not the right inference, and compound interest was allowed according to the terms of the mortgage. GANGA PERSHAD SAHU *v.* LAND MORTGAGE BANK **I. L. R. 21 Calc. 366**
L. R. 21 I. A.

66. ——— *Interest Act (XXXII of 1839)—Mortgage—Interest post diem—Transfer of Property Act (IV of 1882), s. 88—Charge.* The plaintiff sued in December 1891 upon a registered mortgage, dated 1875, in which it was provided that interest should be paid at the rate therein mentioned, and that the principal should be repaid on 10th April 1880, but in which there was no provision for payment of interest *post diem*. *Held*, that interest *post diem* should be awarded under the Interest Act, 1839, at a reasonable rate. *Semble:* The amount so awarded would constitute a charge on the mortgage premises. RAMA REDDI *v.* APPAJI REDDI . . **I. L. R. 18 Mad. 248**
KRISTNA REDDI *v.* VARADARAJULU REDDI **I. L. R. 18 Mad. 338 note**

67. ——— *Mortgage—Interest post diem—Transfer of Property Act, s. 88.* Where the instrument sued on a mortgage hypothecating an interest in land did not provide for interest *post diem: Held*, that any claim in the nature of a claim for such interest could be allowed by way of damages only, and was not a charge on the land. In the present case the claim was barred by lapse of time. BADI BIBI SAHIBAL *v.* SAMI PILLAI . . **I. L. R. 18 Mad. 257**
THAYAR AMMAL *v.* LAKHSHMI AMMAL **I. L. R. 18 Mad. 331**

68. ——— *Interest post diem—Mortgage.* A mortgagee is entitled to interest *post diem*, if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date. NITYANANDA PATNAYUDU *v.* RADHA CHERANA DEO **I. L. R. 20 Mad. 371**

69. ——— *Interest Act (XXXII of 1839)—Suit for money payable under an oral contract—Contract Act (IX of 1872), s. 73.* The plaintiff sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, and no written demand and notice had been given under the Interest Act. *Held*, that the plaintiff was not entitled to interest. KAMALAMMAL *v.* PEERU MEERA LEVVAI ROWTHEN **I. L. R. 20 Mad. 481**

70. ——— *Interest post diem—Interest Act (XXXII of 1839)—Transfer of Property Act (IV of 1882), ss. 88 and 89—Interest on mortgage-money—Charge on mortgaged property.* When in a suit for sale under ss. 88 and 89 of Act IV of 1882 a Court allows, under Act XXXII of 1839, interest *post diem*, its decree, so far as such *post diem* interest is concerned, is not a decree for sale under s. 88, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees. *Bikramjit Tewari* v. *Durga Dyal Tewari, I. L. R. 21 Calc. 274*, dissented from. NARINDRA BAHADUR PAL *v.* KHADIM HUSAIN . . **I. L. R. 17 All. 581**

71. ——— *Suit by mortgagee on mortgage—Rate of interest up to decree—Transfer of Property Act (IV of 1882), ss. 86 and 88.* In a suit by a mortgagee to recover the money due on his mortgage, the plaintiff is entitled to interest at the rate specified in the mortgage-deed up to date of decree, and a Civil Court has no discretion to refuse to award such interest. CHATURBHAI KARSAN *v.* HARBHAMJI HARISANGJI **I. L. R. 20 Bom. 744**

72. ——— *Interest post diem—Damages—Charge on the property—Transfer of Property Act, ss. 88 and 89—Construction of mortgage.* The use of the term *sudi* (bearing interest) in a mortgage-deed *held* not to imply a covenant to pay a *post diem* interest, there being a specific agreement to repay the mortgage-debt, principal and interest, in seven years. Where in a suit upon a mortgage-bond *post diem* interest is decreed as damages, the payment of such damages does not

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INTEREST—*contd.*

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constitute a charge upon the mortgaged property. *Narindra Bahadur Pal* v. *Khadim Husain, I. L. R. 17 All. 581*, referred to. RIKHI RAM *v.* SEO PARSHAN RAM . . . . **I. L. R. 18 All. 316**

73. ——— *Suit on mortgage—Covenant to pay interest—Interest post diem.* In a suit on a mortgage it appeared that the instrument sued on was executed to secure a sum of money arrived at by calculating interest on sums previously due by the mortgagors, and it was expressed to be for securing the payment of that principal together with interest as it might accrue annually. There was also a provision for compound interest. The principal was payable on the 14th July 1886, and there was no express stipulation to pay interest after that date. *Held*, that the mortgagees were entitled to interest for the subsequent period. PEDDA SUBBARAYA CHETTI *v.* GANGA RAZULUNGARU . . **I. L. R. 20 Mad. 149**

74. ——— *Post diem interest—Damages—Continuing breach of contract—Construction of mortgage-bond—Limitation Act (XV of 1877), Sch. II, Arts. 115 and 116.* No payment had been made on an agreement contained in a mortgage-deed for payment of the principal within a year and interest thereon at a stated rate. The deed provided that the borrower would not transfer the mortgaged property until payment in full of the amount due for principal and interest, and that any money paid should be first credited to the latter. In a suit brought more than seven years after the date fixed for payment, the Courts below gave effect to the defence that the creditor had no right under the contract to interest at the rate specified therein for the period after that date; and that limitation barred recovery of money by way of damages for a breach of the contract. *Held*, that the Courts below had erred as to the effect of the contract, and that there had been a failure to regard the intention shown by the conditions in the mortgage-deed above mentioned, the High Court appearing to have acted on a fixed rule of construction, laid down for transactions of this kind, instead of arriving at the meaning of the deed by an examination of its terms. By the true construction of the contract when the whole of it was considered, the creditor was entitled to payment of the principal with interest at the rate stated in the deed for the entire period of non-payment. This should be down to the date of the decree of the first Court. In the decree should be added interest from its date till payment at six per cent. per annum. Even supposing the construction put by the Courts below to have been correct, the creditor still might have recovered six years' arrears of interest by way of damages notwithstanding limitation. There had been a breach of contract daily while the principal remained unpaid and unbarred by time. The judgment of the Full Bench in *Narindra Bahadur Pal* v. *Khadim Husain, I. L. R. 17 All. 581*, was not approved; as it disregarded conditions in the mortgage-deed (which in that case resembled the present deed) indicating the intention of the parties to it. MATHURA DAS *v.* NARINDAR BAHADUR

I. L. R. 19 All. 39
L. R. 24 I. A. 138
1 C. W. N. 52

75. ——— *Construction of a Contract in a mortgage-deed as to interest.* A deed of mortgage stipulated in general terms that interest was to run upon the principal sums advanced, without any limitation as to the period of its currency; and also stipulated that in default of punctual payment at the end of each year, the mortgagees were to be at liberty to treat unpaid interest as principal, and to recover it from the mortgaged property. According to the tenor of the deed, when all its provisions and conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment. *Mathura Das* v. *Raja Narindar Bahadur Pal, I. L. R. 19 All. 39 : L. R. 23, I. A. 138*, referred to and followed. BINDESRI NAIK *v.* GANGA SARAN SAHU . **I. L. R. 20 All. 171**
L. R. 25 I. A. 9
2 C. W. N. 129

76. ——— *Provision in bond for annual payments of interest and repayment of principal sum on day fixed.* A bond, which had been executed in December 1881, contained a stipulation that interest should be paid on 11th April every year, and that the principal sum borrowed should be repaid in December 1884. Repayment not having been so made, a suit was brought in December 1896 to recover the principal sum together with interest up to the date of plaint. *Held*, that, inasmuch as the bond contained a stipulation for the payment of interest annually and there was nothing in it to suggest that the liability should cease on the day upon which the principal was repayable, interest could be recovered. JIVANNA PANDITHAR *v.* APPALU . **I. L. R. 22 Mad. 339**

77. ——— *Transfer of Property Act (IV. of 1882), ss. 86, 88 and 89—Decree for sale on a mortgage—Interest after date fixed for payment—Civil Procedure Code, 1882, ss. 209 and 222.* In a suit upon a mortgage for the sale of the property mortgaged, the Court has no power to allow in the account under s. 86 of the Transfer of Property Act, 1882, or in its declaration under that section, interest for a period beyond the date of payment which has to be fixed within six months from the date of the decree. Ss. 209 and 222 of the Code of Civil Procedure, 1882, do not affect the special provisions as to allowance of interest

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

contained in the Transfer of Property Act, 1882. AMOLAK RAM *v.* LACHMI NARAIN
I. L. R. 19 All. 174

See PIRBHU NARAIN SINGH *v.* RUP SINGH
I. L. R. 20 All. 397

78. _____ *Transfer of Property Act (IV of 1882), s. 86—Mortgage by conditional sale—Interest Act (XXXII of 1833)—Limitation Act (XV of 1877), Sch. II, Arts. 116 and 132.* *Held*, by a majority of the Full Bench (MACLEAN, *C.J.*, O'KINEALY, *J.*, and MACPHERSON, *J.*), that when a mortgage-bond contains no stipulation for the payment of interest after the due date, interest is payable by virtue of the Interest Act (XXXII of 1839). Art. 116 of Sch. II to the Limitation Act prescribes the period of limitation in such a case, and therefore only six years' interest after the due date at 6 per cent. per annum is recoverable. The mortgagor cannot redeem until he has repaid the principal sum with such interest and costs. *Gudri Koer* v. *Bhubaneswari Coomar Singh, I. L. R. 19 Calc. 19*, approved. *Mathura Das* v. *Narindar Bahadur, L. R. 19 All. 39 ; L. R. 23 I. A. 138 ; Cook* v. *Fowler, L. R. 6 H. L. 27 ;* and *Bikramjit Tewari* v. *Durga Dyal Tewari, I. L. R. 21 Calc. 274*, referred to. *Held* (by TREVELYAN and BANERJEE, *JJ.*), that the interest after due date should be regarded as interest due on the mortgage within the meaning of s. 86 of the Transfer of Property Act (IV of 1882) ; and that being so, that it becomes a charge on the mortgaged property, and the period of limitation applicable to the claim for such interest is twelve years under Art. 132 of Sch. II to the Limitation Act [XV of 1877]. MOTI SINGH *v.* RAMOHARI SINGH . . **I. L. R. 24 Calc. 699**
1 C. W. N. 437

79. _____ *Amount secured by mortgage-bond with interest repayable by three instalments—Whole amount to become due on failure to pay any instalment—No provision for post diem interest.* By a registered mortgage bond it was stipulated that the mortgage-debt secured thereby and interest thereon at one per cent. per annum should be repaid by three annual instalments, the first of which was to become due on a certain date ; and it was provided that, if default should be made in payment of any instalment, the whole amount secured by the bond should at once become payable. The bond contained no provision for the payment of *post diem* interest. Default having been made, the mortgagee sued for principal and for *post diem* interest. *Held*, that the covenant must be construed to be one for the payment of interest as long as the principal sum was improperly withheld. *Moti Singh* v. *Ramohari Singh, I. L. R. 24 Calc. 699*, considered. GHANTAYYA *v.* PAPAYYA
I. L. R. 23 Mad. 534

INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

80. _____ *Interest post diem—Construction of bond—Damages.* On the construction of a written contract to repay in two years from its date money with interest at 15 per cent. to be paid half-yearly, arrears of interest being added half-yearly to the principal, the Judicial Committee concurred with the High Court that there was no contract to pay interest at that rate after the date fixed for repayment. *Held*, that on that construction the creditor would be entitled on default made in the repayment to receive interest, but technically as damages assessed ; and the rate *prima facie* would be the same as that provided by the contract during the two years, although there is no rule of law making that rate necessarily the measure of the damages. The compounding the interest after the expiration of the two years was disallowed, and an account was directed on the basis that the interest *post diem* should be simple at 15 per cent. down to the date of the plaint, and after that date at 6 per cent. till payment. CHAJMAL DAS *v.* BRIJ BHUKAN LAL
I. L. R. 17 All. 511
L. R. 22 I. A. 199

81. _____ *Mortgage — Interest on mortgage-decree—Transfer of Property Act (IV of 1882), ss. 86, 87, 88, 90, 94, and 97—Civil Procedure Code (1882), ss. 209, 222, and 644, Sch. IV, forms 109 and 128—Form of decree—Practice.* The Court has power, under a decree in a mortgage suit under s. 86 of the Transfer of Property Act (IV of 1882), to allow interest subsequent to the date of decree and the date fixed by the decree for payment until realization. *Amolak Ram v. Lachmi Narain, I. L. R. 19 All. 174*, dissented from. ACHALABALA BOSE *v.* SURENDRA NATH DEY
I. L. R. 24 Calc. 766
1 C. W. N. 550

82. _____ *Mortgage—Construction of mortgage—Post diem interest where none is stipulated for in the deed.* Where a mortgage-deed contained a covenant for payment of principal and interest at a fixed rate in two years and further covenants not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for one year to treat the amount after the lapse of that year as principal :—*Held*, upon the construction of the mortgage-deed the parties intended, that if the principal were not paid by the stipulated date, interest should continue to run at the rate mentioned in the deed, and that the mortgagee was entitled to recover the principal with interest at the stipulated rate to the date of the decree of the first Court and at the rate of 6 per cent. thereafter. *Mathura Das* v. *Narindar Bahadur Pal, I. L. R. 19 All. 39 : L. R. 23 I. A. 138*, referred to. SARALA DASI *v.* JOGENDRA NARAYAN BASU . . . **I. L. R. 25 Calc. 246**

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*contd.*

(c) CONTRACTS—*contd.*

83. ———————— *Decree for sale on a mortgage—Interest allowable after date fixed by decree for payment of the mortgage-money.* In construing a decree for sale upon a mortgage, the terms which are susceptible of being construed either as allowing interest only up to the date fixed by the decree for payment of the mortgage-debt or as allowing interest also after that date until realization the proper construction, to make the decree in accordance with law, is that interest is allowed up to the date of realization and not merely up to the date fixed by the decree for payment of the mortgage-debt. *Amolak Ram* v. *Lachmi Narain, I. L. R. 19 All. 174; Nain Dat* v. *Harihar Dat, Weekly Notes, All. (1898) 57,* and *Maharaja of Bharatpur* v. *Kanno Dei, Weekly Notes, All. (1898) 164, as to* this point overruled. *Achalabala Bose* v. *Surendra Nath Day, I. L. R. 24 Calc. 766,* and *Subbaraya Ravuthaminda Nainar* v. *Pornusami Nadar, I. L. R. 21 Mad. 364,* referred to. *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan, I. L. R. 26 Calc. 39,* followed. BAKAR SAJJAD *v.* UDIT NARAIN SINGH . . . . **I. L. R. 21 All. 361**

84. ———————— *Enforcement of mortgage made before Transfer of Property Act—Rate of interest from date of suit to date fixed for realization—Civil Procedure Code (Act XIV of 1882), s. 209—Transfer of Property Act (IV of 1882), s. 86.* One of two mortgages bore interest at 12 per cent. on the mortgage-debt payable with costs, and the other carried simple interest. Payments made by the debtor had been appropriated by the creditor to payment of the interest on the bond bearing simple interest, while the compound interest, on the other hand, had been left to accumulate. The creditor sued the representative of the debtor, after his decease, to enforce the mortgage bearing compound interest. The Transfer of Property Act, 1882, was in force when the suit was instituted, but not when the relation of debtor and creditor between the parties commenced. *Held,* assuming that a discretionary power to a Court remained under s. 209, Civil Procedure Code, to decree interest to run, at less than the contract rate, in a suit commenced before Act IV of 1882 became law, still the best guide to discretion in this case was to be found in s. 86 of that Act, which required the Courts to decree mortgage-debts with interest at the rate provided by the mortgagee (if to that rate no valid legal objection could be taken) down to the date fixed for realization. RAMESWAR KOER *v.* MAHOMED MEHDI HOSSEIN KHAN
I. L. R. 26 Calc. 39
L. R. 25 I. A. 179
2 C. W. N. 633

85. ———————— *Negotiable Instruments Act (XXVI of 1881), ss. 79, 80—Interest on promissory note—No mention of interest or rate of interest in instrument.* Certain promissory notes, on which a suit was brought, were in the following terms: "On demand we promise to pay ———— or order the sum of R for value received." Plaintiffs claimed interest. On its being contended that where an instrument is completely silent about interest, s. 80 of the Negotiable Instruments Act, 1881, has no application, and no interest can be allowed:—*Held,* that the mercantile usage which would have enabled the Court to award interest on such an instruments prior to the passing of the Negotiable Instruments Act, 1881, has not been abrogated by that Act, though the interest that can now be awarded is limited by s. 80 to six per cent. S. 80 governs alike the case in which interest, but no rate of interest, is mentioned in the instrument, and that in which interest is not mentioned. In the case of a note payable on demand, the date of the demand, and not that of making the note, is the date from which interest must be taken to run. BEST *v.* MAHAMMAD SAIT
I. L. R. 23 Mad. 18

86. ———————— *Acknowledgment to prevent debt being barred—Rate of interest from date of acknowledgment.* In reference to a debt carrying interest at a certain rate, the debtor gave to the creditor, on the approach of the date when the debt would have been barred by limitation, an acknowledgment to prevent that from occurring. *Held,* that the acknowledgment, being intended only for the purpose of eluding the law of limitation, had not, by any novation of the contract, given to the creditor a right, in the absence of special stipulation to the contrary, to claim interest at a rate higher than that which the debt had borne down to the date when the acknowledgment was made. TANJORE RAMACHANDRA RAU *v.* VELLYANADAN PONNUSAMI . . **I. L. R. 14 Mad. 258**
L. R. 18 I. A. 37

87. ———————— *Negotiable Instrument Act (XXVI of 1881), s. 80—Act No. XXVIII of 1855 (Usury Laws Repeal Act)—Interest—Rate of interest—Hundis silent as to interest—Collateral contemporaneous agreement fixing rate.* In a suit on certain *hundis* which were silent as to interest, but as to which there was a collateral written agreement that they should bear interest at 30 per cent. per annum; and it was found that this mode of dealing with interest by a collateral agreement and not on the face of the *hundis* was in accordance with the custom prevailing in the district, and among the class affected by the suit:—*Held,* that by Act XXVIII of 1855, interest was recoverable at the rate agreed upon by the parties, and s. 80 of the Negotiable Instruments Act (XXVI of 1881) was not applicable. That section purports to confer a right to interest not to take away such a right otherwise existing, nor

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INTEREST—*contd.*

3. OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—*concld.*

(c) CONTRACTS—*concld.*

to deprive a plaintiff of a right to interest which he has acquired by contract. GHANSHIAM LALJI *v.* RAM NARAIN (1906) . **I. L. R. 29 All. 33 L. R. 34 I. A. 6**

4. STIPULATIONS AMOUNTING OR NOT TO PENALTIES.

1. ——— Stipulation for increased interest—*Act XXVIII of 1855, s. 2—Penalty.* S. 2 of Act XXVIII of 1855 is the law applicable to suits on contracts, whereby interest is recoverable, and it applies to such contracts indiscriminately of the creed of the contracting parties. Where it was stipulated in a bond that, on default of the payment of the principal amount together with interest at the rate of 1¾ per cent. per mensem within a certain period, interest should be payable at the rate of 6¼ per cent. per mensem from the date of the execution of the bond, and that, on default of payment of such interest at the end of any six months, compound interest should be payable at the rate of 12½ per cent. per mensem, the Court, treating the rate of interest agreed to be paid on default as intended as a penalty, came to the conclusion that the rate was so high that it would not be equitable to enforce the penalty, and therefore decreed the principal amount claimed with interest at the rate of 1¾ per cent. per mensem. LACHMAN SINGH *v.* PIRBHU LALL . . . . . **6 N. W. 358**

2. ——— *Default in payment—Act XXVIII of 1855—Penalty.* Where a promissory note stipulated that, in default of payment of principal within three months after date, interest should run at the rate of 75 per cent. per annum, the increased rate was held to be a penalty and relieved against on payment of interest at 9 per cent. per annum, notwithstanding Act XXVIII of 1855. *Motoji Ratanji* v. *Husen, 6 Bom. A. C. 8,* followed, and *Arulu Mastry* v. *Wakuthu, 2 Mad. 205,* and *Brojo Kissore Roy* v. *Madhub, 17 W. R. 373,* dissented from. PAVA NAGAJI *v.* GOVIND RAMJI . . . . . **10 Bom. 382**

3. ——— *Usury—Act XXVIII of 1855, s. 2—Liquidated damages.* The plaintiff advanced money to the defendants on an ikrar, by which it was agreed that he was to allow them to draw on him to the extent R20,000 within three years, the plaintiff to repay himself by having an ijara of the defendants' share in certain property which his loan was to aid them in recovering. A 4-anna share of the profits, after deducting Government revenue and expenses, was to go in payment of interest on the money lent; half of the remaining three-fourth to go towards payment of the principal and the other half to the defendants. If at the end of the term any balance remained due to the plaintiff, the defendants were to pay it with interest

INTEREST—*contd.*

4. STIPULATIONS AMOUNTING OR NOT TO PENALTIES—*contd.*

at 18 per cent. If the defendants failed to give the ijara, they agreed to pay the amount borrowed with interest at 6¼ per cent. per mensem. The plaintiff advanced the money and obtained a receipt thereof from the defendants. The defendants failed in giving the plaintiff the ijara. In a suit brought to recover the sum lent by the plaintiff with interest, the first Court gave a decree for the plaintiff for the sum claimed, with interest at the higher rate stipulated for in the ikrar, *viz.*, 75 per cent. On appeal by the defendants to the High Court the contention was raised that the rate of interest amounted to a penalty which the Court would not enforce, and that the contract was unreasonable and oppressive in character. The Judges differed in opinion, BIRCH, *J.*, holding that the contract was inequitable and oppressive, and that, notwithstanding the repeal of the usury laws by Act XXVIII of 1855, the Court was not bound to decree interest at the rate stipulated for by the parties; and MARKBY, *J.* (whose opinion prevailed), being of opinion that since the passing of Act XXVIII of 1855, there was no legal restriction on the rate of interest; that the stipulation for interest at 75 per cent. was not a penalty, but an alternative stipulation for interest at a higher rate on the happening of events under which the lender incurred a greater risk, and that the contract should be enforced. *Held* (on appeal under cl. 15 of the Letters Patent), that the stipulation in the ikrar for interest at 75 per cent. was not in the nature of a penalty, nor was it an alternative stipulation; it was an estimate by the parties of the damages to which the plaintiff would be entitled in the event of a breach of the contract by the defendants in not giving the ijara. OMDA KHANUM *v.* BROJENDRO COOMAR ROY CHOWDHRY **12 B. L. R. 451: 20 W. R. 317**

and on appeal, ZEBONNISSA *v.* BROJENDRO COOMAR ROY CHOWDHRY . . **21 W. R. 352**

GRISH CHUNDER GUHA *v.* GOUR CHUNDER DASS **12 C. L. R. 161**

4. ——— *Penalty—Liquidated damages.* Defendant agreed to supply 100 kautlams of jaggery by a specified rate at R4½ per kautlam, and received R100 advance. Defendant further agreed that in default he would pay interest at one per cent. per mensem and *nafa* at R7 per kautlam. No delivery was made by defendant. In a suit by the plaintiff to recover R7 per kautlam and the interest:—*Held,* that the amount sued for was in the nature of liquidated damages which plaintiff had a legal right to enforce, and not a penalty against which the Court would relieve. The doctrines of the English and Roman law upon the subject of penalties and liquidated damages examined. ADANKY RAMACHANDRA ROW *v.* INDUKURI APPALARAJU GARU . . . . . **2 Mad. 451**

5. ——— *Condition for payment in nature of interest on mortgage—*

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INTEREST—*contd.*

4. STIPULATIONS AMOUNTING OR NOT TO PENALTIES—*contd.*

Unreasonable condition—Penalty. A mortgage-deed contained a condition that, if the principal were not repaid by a certain day, the mortgage shoul only be redeemed by payment of one mura of rice for each rupee of the mortgage-money. The mortgagee was in possession under a prior iladarawara mortgage, and rice rose in the market. *Held*, that the condition was unreasonable, and such as should not be enforced in equity. MAILARAYA *v.* SUBBARAYA BHUT . . . . . **1 Mad. 81**

6. ——— *Penalty.* A bond stipulated for payment of principal and interest at one per cent. per mensem within six months from the date of the bond, and in default that the rate of interest should be raised to six and a quarter per cent. per mensem. *Held*, that the higher rate of interest was not in the nature of a penalty, and that the plaintiff had a right to enforce payment thereof. ARULU MASTRY *v.* WAKUTHU CHINNAYEN . . . . . **2 Mad. 205**

7. ——— *Promissory note payable by instalments—Penalty.* Where a promissory note payable by instalments stipulated for interest at two per cent. per mensem, and in default of punctual payment, that interest be charged at one anna per rupee per mensem from the date of the note, it was held that this increased rate of interest was a penalty which might be relieved from on payment of the lower rate. RASAJI BIN DAVLAJI *v.* SAYANA BIN SAGDU **6 Bom. A. C. 7**

MOTOJI BIN RATNAJI *v.* HUSEN **6 Bom. A. C. 8**

8. ——— *Penalty.* A promissory note, payable two months after date, given for money lent and interest in advance at the rate of 12½ per cent. per mensem, contained an agreement to continue to pay that rate of interest after the due date if the money was not then repaid. *Held*, that the high rate of interest so agreed to be paid did not constitute a penalty against which the Courts would relieve. HAKMA MANJI *v.* MEMAN AYAB HAJI . . . . . **7 Bom. O. C. 19**

9. ——— *Instalments—Penalty—Liquidated damages.* *A* executed an instalment-bond for R1,000 in favour of *B*, in which he stipulated that from the year 1271 (1864) to 1275 (1868), both inclusive, R200 should be paid in the month of Jaishta (May 13th to June 12th) in each year, and that "in the event of any instalment being then due, all the remaining instalments should be deemed lapsed, and the principal should be paid with interest at the rate of 10 per cent. per mensem, from the date of the instalment-bond." The first instalment, which fell due on the last day of Jaishta 1271 (12th June 1864) was paid only on the 13th Falgoon of the same year (13th February 1866), other instalments were paid in Jaishta 1272, 1273 (1865, 1866). *B* accepted payment of these instalments as part payment of the principal sum due to him and never made any demand for interest under the terms of the bond. The further instalments due in Jaishta 1274 and 1275 (May 13th to June 12th, 1867 and 1868) were never paid. On 13th Kartick 1275 (30th October 1868) *B* sold the bond and all his interest thereunder to *C* for R800. On 2nd Jaishta 1276 (14th May 1868) *C* brought a suit aganst *A* for the whole amount of the bond with interest thereon at 10 per cent. per mensem, from the date thereof till the date of suit, namely, R6,099, less the amount R600, which had been realized by *B* in the three instalments for 1271, 1272, and 1273 (1864, 1865, and 1866). The Judge awarded him only the amounts of the unpaid instalments for 1274 and 1275 (1867 and 1868), namely, R400 with interest from the date of the instalments till date of suit at one per cent. per mensem, in all R488 odd, proportionate costs and interest on all at one per cent. per mensem till date of realization. On appeal to the High Court by *C*:—*Held*, that the clause in the bond relied on was a mere penalty clause. The original obligee of the bond having waived the exaction of any penalty, *C* was not entitled to more than the Judge had awarded him. BOLEY DOBEY *v.* SIDESWAR RAO BABOO ROY KUR **4 B. L. R. Ap. 92**
14 W. R. 47 note

10. ——— *Bond payable by instalments—Penalty—Usury—Liquidated damages.* The defendant executed a bond in favour of the plaintiff, by which he agreed to pay "interest at 8 annas per cent., month after month, and to repay the principal money within the period of three years." It was further stipulated in the bond that, "should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 per cent. per mensem from the date of this bond to that of liquidation." The defendant made default in payment. *Held*, in a suit brought on the bond, that the stipulation in the bond, for the payment of interest at 4 per cent. per mensem was in the nature of a penalty, and the plaintiff was only entitled to recover interest at a reasonable rate. In this case one per cent. per mensem was given. BICHOOK NATH PANDAY *v.* RAM LOCHUN SINGH **11 B. L. R. 135 : 19 W. R. 271**

HURREENATH DOSS *v.* KALEE PERSHAD ROY **22 W. R. 474**

11. ——— *Penalty.* The plaintiff lent the defendant R700 on an agreement that it should be repaid with interest at 8 annas a month by instalments; if not repaid in four years, the interest to be paid on the sum advanced was to be at 1 per cent. a month. In a suit after the four years had elapsed to recover the loan with interest, the Courts below held that the stipulation as to the higher percentage was a penalty, and refused to give interest at that rate. On special appeal the High Court reversed their decisions and allowed interest at 1 per cent. per mensem. PEETAMBUR CHATTERJEE *v.* KALEECHURN ROY **11 B. L. R. 137 note : 14 W. R. 43**

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INTEREST—*contd.*

4. STIPULATIONS AMOUNTING OR NOT TO PENALTIES—*contd.*

12. ——————— *Penalty.* Where interest at R2-8 per month was stipulated for in a bond, and it was objected in a suit on the bond that the rate was exorbitant: *Held* that, the Court was justified in giving interest at that rate up to date of decree, that being the agreement between the parties at the time of making the contract. After decre, 12 per cent. per annum was given. RASHESSUR SURMAH *v.* KALEEKANATH SURMAH **11 B. L. R. 138 note : 11 W. R. 455**

13. ——————— *Penalty.* In a bond executed by the defendant in favour of the plaintiff it was stipulated that a loan should bear interest at R1-8 per mensem for three months, when the principal and interest were to be repaid, and in the event of its not being then repaid, an enhanced rate of interest at 5 per cent. per mensem should be payable from the date of the execution of the bond to payment. A decree was given in a suit on the bond in accordance with the terms thereof, and on appeal to the High Court on the ground that the stipulation for interest at 5 per cent per mensem, was a penalty. and would not be enforced, the Court dismissed the appeal with costs. SOHODEA BIBEE *v.* DEENDYAL LAL . . . . **11 B. L. R. 138 note**

14. ——————— *Penalty.* A bond stipulated that the loan secured thereby should be payable in five months with interest at 2 per cent. per month, and if not then repaid, interest at 5 per cent. per month should be charged. In a suit on the bond in default being made in payment, the defendant pleaded that the higher rate of interest stipulated for in the bond could not be enforced as being contrary to Hindu law,and in the nature of a penalty. *Held*, that the Court was bound to give effect to the contract entered into by the parties, and would not therefore look on the higher rate of interest as a penalty. BROJOKISHORE ROY *v.* MADHUB PERSHAD MISSER **12 B. L. R. 456 note : 17 W. R. 373**

In the Matter of NOBO COOMAR BOSE **12 B. L. R. 457 note : 17 W. R. 431**

15. ——————— *Penalty.* A kabuliat contained a clause that "in default of a kist that is, failing to pay the malguzari on the day fixed for (paying) instalments, I shall pay the zamindar's malguzari with half as much again." In a suit for arrears of rent due under the kabuliat:—*Held*,that the stipulation to pay half as much again, *i.e.*, interest at 50 per cent., was in the nature of a penalty which the Court would not enforce, and interest was given at the ordinary rate. HURBULLUBH NARAIN SINGH *v.* GENDA MAHARAJ **12 B. L. R. 473 note : 20 W. R. 257**

16. ——————— *Penalty—Stipulation for higher rate of interest on default in payment.* Where a bond stipulated for a higher rate of interest in the event of the money not being paid at the appointed time, the stipulation was held to be not of the nature of a penalty, but of liquidated damages,for it provided not an unvarying lump sum, but a sum increasing with the time during which the obligee was kept out of his money, and was therefore very appropriate as a measure of the proper compensation. Even when a stipulation is intended to operate as a penalty, it is incumbent on the Court to consider what amount of money would properly measure the damages consequent on the default. BOOLAKEE LALL *v.* RADHA SINGH **22 W. R. 223**

17. ——————— *Penalty—Stipulation for higher rate on default in payment of mortgage-bond—Power of sale under mortgage.* Defendant entered into a bond agreeing to pay a specified rate of interest in instalments on a sum borrowed and to repay the principal in twelve years, the obligee not being bound to accept payment earlier. A zamindari was mortgaged as security, and it was provided that, if any obstacles were caused by the defendant in respect of any of the conditions of the bond, the mortgagee would be competent, after two months' notice, to sell the property, or portions thereof, and pay himself the principal and the interest thereon for the unexpired portion of the twelve years. A portion of the interest having come into arrear, plaintiff gave notice of sale; but defendant disputed his right to sell on the alleged ground as not being an "obstruction" within the bond. The parties not being able to come to a final agreement as to the conditions of sale, plaintiff brought this suit, claiming the full amount of the mortgage-money with interest for twelve years. He obtained a decree, which was modified by the High Court, which gave him principal and interest at the stipulated rate. *Held*, that the clause relating to sale was in the nature of a penalty, and plaintiff was not entitled to enforce it only upon default in the payment of interest. *Held*, that the suit was not maintainable, either as an action for damages for the amount which plaintiff could have obtained by the sale or on the bond itself. VENCATAVARADA IYENGAR *v.* VENCATA LUCHMAMAL **23 W. R. P. C. 91**

18. ——————— *Penalty—Rate of damages.* Where, interpreting a contract regarding the payment of interest, a Court held that the rate of interest stipulated to be paid in default of the punctual payment of the agreed interest must be regarded as a penal rate, it should have gone on to determine what reasonable damages within the stipulated rate the plaintiff was entitled to for the delay. Under the terms of a bond, dated the 18th of August 1870, the principal sum was repayable on demand, together with interest at the rate of 16½ per cent. per annum (which was payable at the end of every four months), and in default of punctual payment of the agreed interest it was repayable with interest at the rate of 36 per cent. per annum. Two instalments of interest at the rate agreed upon were paid and then default was made. The suit was instituted on the 1st of September 1873, interest from the

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INTEREST—*contd.*

4. STIPULATIONS AMOUNTING OR NOT TO PENALTIES—*contd.*

date of the bond to the date of suit at the rate of 3 per cent. per mensem being claimed, subject to the deduction of the interest paid. Regarding the rate of interest stipulated in default as a penal rate, the Court, seeing that the debt was secured by a mortgage of property and that the rate of interest ordinarily payable was somewhat high, considered it sufficient to award the plaintiff 20 per cent. per annum to commence from the expiry of eight months from the date of the bond. BIHARI LAL *v.* JUNI . . . . . **7 N. W. 108**

19. ——————— *Promissory note —Stipulation to pay interest at high rate on defaut in payment of note—Penalty—Contract Act, s. 74* The defendant and one *D*, on the 6th April 1875. gave to the plaintiff, a money-lender, a promissory note, by which they jointly and severally promised to pay the plaintiff on the 6th September R400 "for value received in cash in hand paid on signing and delivering this bond ; should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent. per mensem." At the date of the note, the defendant and *D* were in the plaintiff's debt in respect of other promissory notes and a sum of R100 was deducted from the amount of the note of the 6th April in respect of one of these which was given up and in respect of interest on three others. A further sum of R125 was deducted as interest in advance for the five months previous to the due date of the note, and the balance (R175) was paid by cheque to *D*. *D* died before the note became due. In a suit brought to recover R400 principal, and R400 interest, on the promissory note, on default being made in payment:—*Held*, that this was not a case in which a certain sum was agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act did not apply. The stipulation to pay interest at the "defaulting rate" was not in the nature of a penalty. *Held*, also, that, looking at the nature of the transaction, the note contained a false statement of the consideration, which amounted only to R275 ; and there being nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant and the consideration inadequate, the transaction was not one which ought to be enforced by a Court of equity. MACKINTOSH *v.* HUNT . **I. L. R. 2 Calc. 202**

See MACKINTOSH *v.* WINGROVE **I. L. R. 4 Calc. 137 : 2 C. L. R. 433**

20. ——————— *Compound interest—Penalty. Held*, that a stipulation in a bond that the interest on the principal sum lent should be paid six-monthly, and, if not paid, should be added to the principal and bear interest at the same rate, was not one of a penal nature. TEJPAL *v.* KESRI SINGH . . . **I. L. R. 2 All. 621**

21. ——————— *Compound interest.*—*D* gave *M* a bond for the payment of certain

INTEREST—*contd.*

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moneys on a certain date and for the payment of interest on such moneys at R1-12 per cent. per mensem, stipulating to pay the interest six-monthly and in default "to pay compound interest in future." *Held*, (i) that the stipulation to pay compound interest could not be regarded as a penal one, and (ii) that the bond contained an agreement to pay interest after the due date at the rate payable before that date, and that, if it had been otherwise, the obligee was entitled to interest after that date at that rate, such rate not being unreasonable. MATHURA PRASAD *v.* DURJAN SINGH **I. L. R. 2 All. 639**

22. ——————— *High rate of interest—Penalty.* The obligors of a bond agreed to pay the principal amount by instalments without interest, and in case of default to pay interest at the rate of R3-2 per cent. per mensem, and hypothecated immoveable property as security for the payment of the bond-debt, sufficient for the discharge of the debt, and furnished a surety. *Held* by STUART *C.J.*, in a suit on the bond, that the principal amount being payable in the first instance without interest, the stipulation to pay interest at the rate of R3-2 per cent. per mensem in case of default was a penal one, and reasonable interest should only be allowed. *Held* by SPANKIE, *J.*, that, looking at all the circumstances of the case, the very high rate of interest imposed in case of default should be regarded as penal, and should be reduced. The Court under the circumstances allowed interest at the rate of 1 rupee per cent. per mensem. CHUHAR MAL *v.* MIR . . **I. L. R. 2 All. 715**

23. ——————— *Penalty.* The defendants, on the 8th May 1869, gave the plaintiff a bond for the payment of R2,000 on the 16th February 1870. This amount consisted of two items, *viz.*, R1,650 principal and R350 interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and its due date. The bond provided that, in default of payment on the due date, interest on the whole amount of R2,000 should be paid at the rate of two per cent. per mensem from the date of the bond. *Held*, in a suit on the bond in which interest was claimed at the rate of two per cent. per mensem from the date of the bond, that this provision was penal, and the penalty ought not to be enforced. MAZHAR ALI KHAN *v.* SARDAR MAL **I. L. R. 2 All. 769**

24. ——————— *Penalty.* The defendant, having borrowed R50 from the plaintiff, gave him, on the 9th November 1878, an instrument which was in effect as follows : *B* (defendant) writes this rukka in favour of *A* (plaintiff) for R50, cash received, to be repaid on the 13th November 1878. In the event of default, he shall pay interest at R1 per diem. *Held*, that, looking to the whole instrument, it was equitable to hold that the term "interest" was not intended to mean interest in the strict sense of that term, but a penalty,

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INTEREST—*contd.*

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the amount of interest should be so treated, and a reasonable amount only be allowed. The observations of PONTIFEX, *J.*, in *Bichook Nath Panday* v. *Ram Lochun Singh, 11 B. L. R. 135,* concurred in. BANSIDHAR *v.* BU ALI KHAN **I. L. R. 3 All. 260**

25. ——————— *Penalty.* A bond for the repayment of money lent provided that such money should be repaid on a certain date; that interest at the rate of R7-8-0 per cent. per annum should be paid at the end of every year; and that, if default were made in the payment of interest, such money should be repaid with interest at the rate of R37-8-0 per cent. per annum. The bond contained an hypothecation of immoveable property as collateral security. In a suit on the bond the obligee, the obligor having failed to pay any interest, claimed interest from the date the bond became due to the date of institution of the suit at R37-8-0, the defaulting rate. *Held,* following the principle laid down in *Bansidhar* v. *Bu Ali Khan, I. L. R. 3 All. 260,* that the provisions of the bond, as regards the rate of interest payable on default of the payment of interest, were in their nature penal and so excessive that, as a matter of equity, they should not be enforced. *Held,* also, with reference to the question what was a reasonable amount of compensation for the obligor to pay for breach of contract, that unpaid interest should bear interest at the rate of R11-4-0 per cent. per annum from the date of default to the date of the High Court's decree. KHURRAM SINGH *v.* BHAWANI BAKSH **I. L. R. 3 All. 440**

26. ——————— *Penalty—Equitable relief.* By a registered bond for R4,500, dated the 4th October 1875, in which immoveable property was hypothecated as collateral security, it was provided that the obligor should pay interest at the rate of R1-4-0 per cent. per mensem at the end of every six months, and upon default in the payment of such interest, that he should pay interest at the rate of R2 per cent. per mensem from the date of the bond. The bond also contained a stipulation against alienation, and declared that the principal sum was payable on demand. The obligees sued the obligor upon the bond, claiming to recover the principal sum and interest from the date of the bond for three years eleven months and twenty days, less different sums amounting to R1,600 paid from time to time on account, at the defaulting rate of R2 per cent. *Held,* that, having regard to the fact that the security of property was given for the loan and the obligor contracted not to alienate the property, the defaulting rate of interest provided by the bond was a penal character, relating as it did not only to the interest due on and subsequent to the default, but retrospectively to the date of the bond itself, and should not be awarded, but that reasonable compensation only should be awarded for the obligor's breach of contract in respect of interest.

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Accordingly the Court made a decree, giving the obligees interest on the principal sum from the date of the bond to the date of the decree at R1-4-0 per cent. per mensem and compound interest from the date of default in the payment of interest to the date of the decree at the rate of four annas per cent. per mensem by way of damages for such default. *Bansidhar* v. *Bu Ali Khan I. L. R. 3 All. 260,* followed. *Mackintosh* v. *Wingrove I. L. R. 4 Calc. 137,* dissented from. KHARAG SINGH *v.* BHOLA NATH . . . . . **I. L. R. 4 All. 8**

27. ——————— *Penalty.* By a deed of mortgage the defendant agreed to pay interest at the rate of one pice per rupee per mensem, and it was provided that the mortgagee was to remain in possession for a period of 25 years in lieu of principal and interest, and that the mortgagor was not to claim the property back unless he paid the principal and interest that might accrue due in 25 years from the date of the bond. *Held,* that the clause in the mortgage-deed as to payment of 25 years' interest was not a penalty. BAPUJI BALAL *v.* SATYABHAMABAI . . . **I. L. R. 6 Bom. 490**

28. ——————— *Penalty.* The obligor of a bond agreed that, if the principal amount were not paid at the end of 12 months with the interest thereon, such interest should be added to the principal, which together should represent the principal sum, until a further year's interest at the original rate had accrued, when the same process should be followed of adding unpaid interest to the principal, and so on until the debt was liquidated. *Held,* that the stipulation as to the annual capitalization of principal and interest, for the purpose of carrying interest, could not be regarded as removing the transaction from the region of an ordinary contract on a bond under which an obligor was bound by the terms to which he had agreed. SARJU PRASAD *v.* BENI MADHO **I. L. R. 6 All. 6**

29. ——————— *Penalty.* The obligor of bond promised therein to pay the amount on a certain day without interest, and if he made default, to pay the amount with interest at the rate of R2 per cent. per mensem. *Held,* in a suit on the bond, that such interest was not penal in its character, but contract interest, the liability to pay which was not made contingent on any breach of any part of the contract, and therefore should not have been reduced. KUNJBEHARI LAL *v.* ILAHI BAKHSH . . . **I. L. R. 6 All 64**

30. ——————— *Solenamah payable by instalments—Penalty.* A decree was passed on a solenamah, by the terms of which a sum of two lakhs of rupees, declared to be due to the plaintiff from the defendant, was to be paid by yearly instalments of R30,000 each. But if at any time two instalments should be due at the same time, the whole debt should be recoverable forthwith, with

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INTEREST—*contd.*

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interest calculated at 12 per cent. instead of 6 per cent. otherwise payable. *Held*, that the condition whereby the amount of interest payable should be increased in default in due payment as above being made must be looked upon as part of the decree of the Court, and not as a penalty. *Bichook Nath Panday* v. *Ram Lochun Singh, 11 B. L. R. 135*, cited and distinguished. RUN BAHADOOR SINGH *v.* ROY NARAIN DASS . . **7 C. L. R. 82**

31. ——————— *Compensation for breach of contract—Contract Act, s. 74.* *V* lent R1,500 to *C* and the members of his family under a bond, by which it was agreed that *C*'s family should demise certain land on kanom to *V* and receive a further sum. It was also stipulated in the bond that *C* and the members of his family should pay interest at 6 per cent. upon R1,500 until the execution of the kanom deed, and interest at 24 per cent. from the date of the loan in the event of their not making the demise. The demise was not made. *Held*, that the stipulation for the enhanced rate of interest did not create an independent obligation, and that the proper course was to determine what would be a sufficient compensation for the breach of contract. VENGIDESWARA PUTTER *v.* CHATU ACHEN **I. L. R. 3 Mad. 224**

32. ——————— *Penalty—Act IX of 1872, s. 74.* The obligor of a bond promised to pay the amount on demand with interest at the rate of R6-4 per cent. per mensem, to pay the interest every six months, and if he made default in the payment of the interest for any six months, to pay interest on such interest at such rate. *Held*, in a suit on the bond, default in the payment of interest as agreed having occurred, that as the obligor expressly undertook to pay such high rate of interest, and there was no question of penalty, that is to say, of a liability to damages for breach of the terms of a contract in the sense of s. 74 of the Contract Act, the contract rate of interest stipulated to be paid could not be interfered with. BHOLA NATH *v.* FATEH SINGH . . **I. L. R. 6 All. 63**

33. ——————— *Act IX of 1872, s. 74—Penalty.* The obligor of a bond for the payment of money agreed therein in respect of interest as follows: "I will pay the money with interest at one rupee one anna per cent. per mensem on demand: as regards interest, I agreed that I will pay the interest of the amount every six months which may be found due under the accounts: in the event of non-payment every six months, I will pay the interest at the rate of one rupee eight annas per mensem from the date of the execution of the bond." *Held*, by STUART, *C.J.*, that the stipulation to pay the higher rate of interest in case of non-payment of interest at the lower rate was a stipulation in the nature of a penalty, and should be so treated in the accounts to be taken. *Bichook Nath Panday* v. *Ram Lochun Singh, 11 B. L. R. 135*, referred to. *Kharag Singh* v. *Bhola Nath, I. L. R. 4 All. 8*, observed on. *Held*, by TYRRELL, *J.*, that the non-payment of interest at the lower rate was not a breach of the contract, the contract being that the obligor might adopt either of the scales of payment, and therefore the stipulation in question was not in the nature of a penalty. *Mackintosh* v. *Hunt, I. L. R. 2 Calc. 202*, followed. *Kharag Singh* v. *Bhola Nath, I. L. R. 4 All. 8*, distinguished. NARAIN DASS *v.* CHAIT RAM . **I. L. R. 6 All. 179**

34. ——————— *Penalty—Promise to pay interest at unusual rate to secure prompt payment—Contract Act, s. 74.* *A* promise to pay interest if the principal sum is not repaid within fifteen days at the rate of one anna per rupee per diem from the date of the promise (intended to secure prompt payment) cannot be enforced, but interest at the current rate may be allowed. *Per* INNES, *J.* *Quære*: Whether s. 74 of the Contract Act is applicable to such a case? VYTHILINGA MUDALI *v.* RAVANA SUNDARAPPAYYAR **I. L. R. 6 Mad. 167**

35. ——————— *Penal clause in contract—Increased interest on default of payment—Contract Act (IX. of 1872), s. 74.* A mortgage-bond contained a proviso that in case of default in payment of the principal sum, with interest at the rate of one per cent. per mensem on a certain day, interest should be paid at the rate of two per cent. per mensem from the date of the bond. *Held*, that the stipulation to pay increased interest must be construed as a penal clause. MATHURA PERSAD SINGH *v.* LUGGUN KOER **I. L. R. 9 Calc. 615**

36. ——————— *Promissory note—Failure to pay on due date—Enhanced rate of interest—Penalty—Breach of contract.* Where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid at the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate agreed to be paid may be recovered in its entirety. *Mackintosh* v. *Hunt, I. L. R. 2 Calc. 202*, followed. *Bansidhar* v. *Bu Ali Khan. I. L. R. 3 All. 260*, considered. MACKINTOSH *v.* CROW. MACKINTOSH *v.* GORE **I. L. R. 9 Calc. 689: 13 C. L. R. 102.**

37. ——————— *Penalty—Contract Act, s. 74.* In consideration of an advance of R118, the defendants executed in favour of the plaintiff a mortgage-bond, dated 3rd November 1879, by which it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rabi crops of every description produced at the first class rates, and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F. S. (April 1880)." *Held*, that the increased rate of interest, being made payable from the date

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INTEREST—*contd.*

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of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty, and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689*, approved of. SUNGUT LAL *v.* BAIJNATH ROY . **I. L. R. 13 Calc. 164**

38. ——————————— *Bond—Penalty——Contract Act, s. 74—Act XXVIII of 1855, s. 2.* The stipulation in a bond was in these terms: "I cannot pay R1,000 now, so I will pay it within two months and 15 days; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month." *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855, and did not fall under s. 74 of the Contract Act. *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689*, approved. *Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305*, considered. ARJAN BIBI *v.* ASGAR ALI CHOWDHURI **I. L. R. 13 Calc. 200**

39. ——————————— *Instalment-bond—Agreement to pay enhanced rate of interest on default.* An agreement to pay the principal of a debt by instalments with interest and on default of payment of each instalment to pay an enhanced rate of interest thereon from the date of default of payment, is not an agreement which should be relieved against. Dictum of WILSON, *J.*, in *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689*, approved. JAGANADHAM *v.* RAGHUNADHA. **I. L. R. 9 Mad. 276**

40. ——————————— *Penalty—Bond.* The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach he shall be entitled to recover compound interest or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender. In a bond, dated in February 1877, for a sum of money payable in June 1882, it was provided that interest should be paid at the rate of R9 per cent. per annum on the puranmashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to R15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the suit at R15 per annum, and compound interest for the same period at the same rate. *Held*, that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date. *Held*, that for this purpose the proper course was to reduce the interest to R9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at R9 per cent. from the due date of payment, upon the entire sum which was due when the bond became due, *i.e.*, the principal added to the compound interest calculated at R9 per cent. The same obligee held another bond executed by the same obligors in June 1879 for a sum of money payable in June 1882, with interest at R9 per cent. per annum. There was a provision in the bond that, if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of R24 per cent. per annum from the date of the bond. In December 1884, the obligee brought a suit on the bond against the obligor claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of R24 per cent. per annum. *Held*, that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest from the due date might fairly revert to the old rate of R9 per cent. per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond. DIP NARAIN RAI *v.* DIPAN RAI **I. L. R. 8 All. 185**

41. ——————————— *Penalty—Higher rate of interest upon default in payment of instalment.* A decree, of which the terms had been arranged by a solenamah between the parties, for payment of money by instalments with interest at six per cent., was construed to provide also for three contingencies, *viz.*, non-payment at due date (*a*) of the first instalment, two consecutive instalments being in arrear at the same time; (*b*) of instalments, other than the first; (*c*) of the first instalment, simply. Upon the occurrence of (*a*) or of (*b*), execution might issue for the whole decretal money with interest thereon at twelve per cent. Upon the occurrence of (*c*), execution might issue for that instalment, with interest at twelve per cent. from the date of the decree. *Held*, that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower in a given

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INTEREST—*contd.*

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state of circumstances, and were not in the nature of a penalty against which equitable relief might be claimed. BALKISHEN DAS *v.* RUN BAHADUR SINGH **I. L. R. 10 Calc. 305 : 13 C. L. R. 392 L. R. 10 I. A. 162**

42. ——— *Penalty—Liquidated damages.* Where a document contains covenants for the performance of several things, and then one large sum is stated to be payable in the event of a breach, such sum must be considered a penalty, but when it is agreed that if a party do, or refrain from doing, any particular thing, a certain sum shall be paid by him, then the sum stated may be treated as liquidated damages. A bond for ₹20,000 which provided for payment of interest at the rate of ₹1-4 per cent. per month contained the following clause: "We hereby promise and give in writing that we shall pay year by year a sum of ₹3,000 on account of the interest . . . . . And in case of our failing to pay year by year the said sum of ₹3,000, the same shall be considered as principal, and thereon interest shall run also at the rate of ₹1-4 per cent. per month." *Held,* that the clause was not penal, but in the nature of an agreement to pay liquidated damages, and that the plaintiff was entitled to a decree for the amount due on the bond with interest as agreed upon. BEHARY LALL DAS *v.* TEJ NARAIN **I. L R. 10 Calc. 764**

43. ——— *Agreement for higher rate for default in payment on certain date.* A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond, is not unenforceable. NARAYANASAMI NAIDU *v.* NARAYANA RAU **I. L. R. 17 Mad. 62**

44. ——— *Penal clause in contract—Enhanced rate of interest on default of payment of principal on due date—Penalty—Contract Act (IX of 1872), s. 74—Act XXVIII of 1855, s. 2.* In a suit on a bond, wherein it was stipulated that the loan was to be repaid on a certain date and to bear interest at the rate of 2 per cent. per mensem, but that, if the loan were not repaid on the date named, the principal was to bear interest at the rate of 4 per mensem from the date of the loan:—*Held,* on the authority of the decision in *Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305,* that the stipulation as to the payment of interest at the higher rate was not in the nature of a penalty, and that the plaintiff was entitled to a decree for the amount due on the bond with interest at the increased rate from the date of the bond; and that, whether the interest at the increased rate, in case of non-payment on the date fixed in the contract, was payable from the commencement of the loan or from the date fixed for the repayment of the loan, s. 74 of the Contract Act was not applicable. *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689,* upon this point, dissented from. The decision in the case of *Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305,* overrules the decision in the case of *Mathura Persad Singh* v. *Luggun Koer, I. L. R. 9 Calc. 615,* and all similar cases cited, in *Mackintosh* v. *Crow,* which held that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan, is in the nature of a penalty. BAIJ NATH SINGH *v.* SHAH ALI HOSAIN **I. L. R. 14 Calc. 248**

45. ——— *Contract Act s. 74—Penalty—Enhanced rate of interest and compound interest.* A mortgagor agreed that, if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the principal in one year, and further that, if the principal was not so discharged, he should pay interest at an enhanced rate. *Held,* that the mortgagee could enforce the agreement. APPA RAU *v.* SURYANARAYANA **I. L. R. 10 Mad. 203**

46. ——— *Contract Act, s. 74—Penalty—Payment of higher rate of interest from date of bond on breach.* Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond:—*Held,* following *Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305,* that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond. BASAVAYYA *v.* SUBBARAZU . . **I. L. R. 11 Mad. 294**

47. ——— *Bond—Stipulation to pay double the amount of debt on default of payment of any instalment.* A stipulation by which, on default of payment of one instalment, double the entire, amount of the debt due under an instalment bond was to become at once payable:—*Held* to be in the nature of a penalty. JOSHI KALIDAS *v.* DADA ABHESANG **I. L. R. 12 Bom. 555**

48. ——— *Contract Act, ss. 63, 74—Penalty—Interest on decree amount up to date of payment—Remission of part performance of contract—Sum accepted on account of interest.* A hypothecation-bond provided for payment of interest on the principal sum at the rate of 9 per cent. and contained a further provision that, on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payment of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor.—*Held,* (i) that the plaintiff had not waived any right under the bond by accepting the payment on account of

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INTEREST—*contd.*

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interest; (ii) that the provision for enhanced interest calculated from the date of the bond on default was of the nature of a penalty under s. 74 of the Contract Act; (iii) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent. *Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305,* discussed and distinguished. *Baij Nath Singh* v. *Shah Ali Hosain, I. L. R. 14 Calc. 248,* dissented from. NANJAPPA *v.* NANJAPPA **I. L. R. 12 Mad. 161**

49. ——————— *Contract Act, s. 74—Bond—Breach of contract—Penalty.* A bond by which immoveable property was hypothecated provided for interest at 13½ per cent. and contained a condition that, if the principal with interest were not paid within one year, 27 per cent. should be paid as interest as from the date of the bond. *Held,* that the question to be determined with reference to this condition was whether the parties intended to contract that, on failure by the mortgagor to pay within the stipulated time, 27 per cent. should be payable *qua* interest from the date of the bond or whether they intended that the condition should be regarded merely as providing for a penalty, leaving the amount of compensation for non-payment at the stipulated time to be determined, in case of dispute, by the Court. *Held,* that the condition would not in itself be an unreasonable one under the circumstances, that the parties contracted that the 27 per cent. should be payable *qua* interest, and that interest at that rate must therefore be allowed. *Wallis* v. *Smith, L. R. 21 Ch. D. 243* referred to. BANWARI DAS *v.* MUHAMMAD MASHIAT **I. L. R. 9 All. 690**

50. ——————— *Unconscionable bargain—Bond—Compound interest.* In a suit for the recovery of a principal sum of R99 due upon a bond, with compound interest at two per cent. per mensem, it was found that advantage was taken by the plaintiff of the fact that the defendant was being pressed in the tahsili for immediate payment of revenue due, to induce him to execute the bond charging compound interest at the above-mentioned rate, notwithstanding that ample security was given by mortgage of landed property. It was also found that although, under the terms of the bond, the plaintiff had power to enforce the same at any time by bringing to sale the mortgaged property, he had wilfully allowed the debt to remain unsatisfied, in order that compound interest at a high rate might accumulate. *Held,* that the bargain was a hard and unconscionable one, which the Court had undoubted power to refuse to enforce, and which, under all the circumstances, it would be unreasonable and inequitable for a Court of justice to give full effect to and that, under the circumstances, compound interest should not be allowed. *Kamini Sundari Chaodhrani* v. *Kali Prosunno Ghose, I. L. R. 12 Calc. 225; Beynon* v. *Cook, L. R. 10. Ch. Ap. 389;* and *Lalli* v. *Ram Prasad, I. L. R. 9 All. 74,* referred to. The Court decreed the principal sum of R99 with simple interest at 94 per cent. per annum up to the date of institution of the suit. MADHO SINGH *v.* KASHI RAM . . . . **I. L. R. 9 All. 228**

51. ——————— *Bond—Failure to pay on due date—Enhanced rate of interest from date of bond till date of realization—Penalty—Contract Act (IX of 1872), s. 74. Held* by the Full Bench (BANERJEE, *J.,* dissenting as to part), that a provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at an increased rate from the date of the bond up to the date of realization, amounts to a provision for a penalty, and s. 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization. *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689; Nanjappa,* v. *Nanjappa, I. L. R. 12 Mad. 161;* and *Sajaji Panhaji* v. *Maruti, I. L. R. 14 Bom. 274,* approved. *Baij Nath Singh* v. *Shah Ali Hosain, I. L. R. 14 Calc. 248,* overruled so far as dissents from *Mackintosh* v. *Crow. Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305,* distinguished. BANERJEE, *J.*—The decision in *Mackintosh* v. *Crow,* which regards the interest at the increased rate as a penalty, is correct as to the claim of interest up to the stipulated day of repayment, and *Baij Nath Singh* v. *Shah Ali Hosain* was wrongly decided as to this point. S. 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and has no application to the claim for interest for the period from the due date to the date of realization. This view is in accordance with the decision in *Mackintosh* v. *Crow.* KALACHAND KYAL *v.* SHIB CHUNDER ROY **I. L. R. 19 Calc. 392**

52. ——————— *Bond—Default in payment on due date—Contract Act (XI of 1872), s. 74—Breach of contract.* A mortgage-bond provided that interest for the loan should be paid at R2 per month, and that, if the loan were not paid off by a certain day, then future interest from the date of default should be paid at R3 per month. *Held,* that the higher rate of interest was not a penalty and might be enforced. DULLABHDAS DEVCHANDSET *v.* LAKSHMANDAS SWARUPCHAND **I. L. R. 14 Bom. 200**

53. ——————— *Stipulation in a mortgage-bond for enhanced interest in default of payment on a certain day—Contract Act (IX of 1872), s. 74.* A mortgage-bond provided for repayment of the loan on a certain date with interest at the rate of 8¼ per cent. In default of payment on the due date, interest was to be paid at the rate of 37 per cent., to be calculated from the commencement of the loan. *Held,* that the higher rate of

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interest was a penalty, and not to be enforced. SAJAJI PANHAJI *v.* MARUTI. **I. L. R. 14 Bom. 274**

54. ——— *Liquidated damages—Contract Act (IX of 1872), s. 74.* A proviso for retrospective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against; but a proviso for enhanced interest in the future cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties. UMARKHAN MAHAMADKHAN DESHMUKH *v.* SALEKHAN **I. L. R. 17 Bom. 106**

55. ——— *Contract Act, s. 74—Bond—Penalty.* Where in a contract under which interest is payable it is agreed between the parties that if such interest be not paid punctually, the defaulter shall be liable to pay interest at an enhanced rate (whether from the time of default or from the time when interest first became payable under the contract) such agreement does not come within s. 74 of the Contract Act, and is to be construed according to the intentions of the parties as expressed therein, and not as a stipulation for a penalty. Such agreement is to be enforced according to its terms, unless it be bound to have been when made unconscionable or fraudulent. The English doctrine of penal stipulations as applied to such agreements considered and not followed. *Balkishen Das* v. *Run Bahadur Singh, I. L. R. 10 Calc. 305 : L. R. 10 I. A. 162,* considered. BANKE BEHARI *v.* SUNDAR LAL . . **I. L. R. 15 All. 232**

56. ——— *Compound interest—Mortgage-deed—Penalty.* Where a mortgage-deed stipulated for payment of half-yearly instalments of interest, and in case of default in such payments provided for compound interest ;—*Held,* that such a provision was not in the nature of a penalty ; and there being no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person or any such consideration, the stipulation as to interest must be enforced. *Mangniram Marwari* v. *Rajpati Koeri, I. L. R. 20 Calc. 366 note,* approved. SURYA NARAIN SINGH *v.* JOGENDRA NARAIN ROY CHOWDHURY **I. L. R. 20 Calc. 360**

57. ——— *Penalty—Contract Act (IX of 1872), s. 74—Precise sum not named, but ascertainable.* A mortgage-bond contained the following stipulations as to interest : "I will pay interest for the said amount at the rate of R1-4 per cent. per mensem, and at the end of a year from the date of the bond. I will pay the whole amount of interest due on the principal for that year. If I do not pay the interest in this way at the end of each year, I will be guilty of neglect. You will by instituting suit realize interest upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the bond at the rate of R3-2 per cent. per mensem from the mortgaged property and from me, my heirs, assigns, and representatives and from my other properties. I will continue to pay interest upon the principal for every year from the date of the bond at the end of that year so long as the amount of the bond is not paid. In default of payment, you will act according to the conditions stated above. I will repay this money within three months from date and redeem the mortgage-property and mortgage-bond.....If I fail to pay up the principal money within the said specified time, I will continue to pay up interest upon the principal at the rate of R1-4 per cent. according to the said stipulation in the bond up to the date of the institution of the suit, and from the date of institution of the suit to that of the decree, and from the date of the decree to that of the realization of the amount." *Held,* that the plaintiff was not entitled to the higher rate of interest, it being in the nature of a penalty within the meaning of s. 74 of the Contract Act : *Kala Chand Kyal* v. *Shib Chunder Roy, I. L. R. 19 Calc. 392,* referred to ; and this was so, although no sum was named within the meaning of that section, because such sum was at once ascertainable. BAID NATH *v.* SHAMANAND DAS **I. L. R. 22 Calc. 143**

58. ——— *Contract Act (IX of 1872), s. 74—Penal sum—Mortgage—Construction of covenant to pay.* In a suit to recover principal and interest due on a mortgage, dated the 19th April 1882, it appeared that the instrument provided that the principal should be repaid with interest at 21 per cent. per annum in two instalments on the 8th May 1883 and the 27th April 1884, respectively, and proceeded as follows : "If the amount of each instalment be not paid on the date of such instalment, we shall make payment with interest at three rupees per cent. per mensem from the date of the bond." No payment had been made on account of principal or interest. *Held,* that the enhanced rate of interest was a penalty under s. 74 of the Contract Act, and therefore was not recoverable, but that the plaintiff was entitled to recover the principal, together with interest calculated at 21 per cent. up to the dates when the instalments respectively became due, and at 12 per cent. from those dates to the date of the plaint and at 6 per cent. from that date until payment. *Nanjappa* v. *Nanjappa, I. L. R. 12 Mad. 161 ; Kalachand Kyal* v. *Shib Chunder Roy, I. L. R. 19 Calc. 392;* and *Umar Khan Mahamad Khan* v. *Sale Khan, I. L. R. 17 Bom. 106,* followed. GOPALUDU *v.* VENKATARATNAM **I. L. R. 18 Mad. 175**

59. ——— *Interest Act (XXVIII of 1855), s. 2—Contract Act (IX of 1872), s. 74—Equitable relief.* In a mortgage-bond the interest payable was 2 per cent. per mensem, and

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there was a stipulation that on default of payment on the due date interest should run "from the date of default of promise" at 6 per cent. per mensem. In a suit upon the bond interest was claimed at the higher rate from the date of default to the date of realization. *Held*, that it is open to the Court to decide, notwithstanding the provisions of s. 2, Act XXVIII of 1855, whether the stipulation as to the enhanced interest was agreed upon as interest properly so called, or as a penalty, and whether in the circumstances of the case the debtor was entitled to equitable relief. *Ramendra Roy Chowdhry* v. *Serajuddin Ahmed Chowdhry, 2 C. W. N. 234*, and *Umar Khan* v. *Sale Khan, I. L. R. 17 Bom. 106*, referred to. *Per* GHOSE, *J.*—The case of *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689*, and *Kala Chand Kyal* v. *Shib Chunder Boy, I. L. R. 19 Calc. 392*, do not lay down any rule of law precluding the Court from affording relief to a debtor, independently of s. 74 of the Contract Act (IX of 1872), even when the bond provides for increased rate of interest prospectively and not retrospectively, where a proper ground for such equitable relief is made out. *Per* RAMPINI, *J.*—The stipulation for increased rate of interest may be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one; whether it is a penalty or not is rather a question of fact than one of law, and the Court must consider whether in the circumstances of the case the defendants had made out their claim to equitable relief. *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry, 2 C. W. N. 234*, distinguished. *Pava Nagaji* v. *Govind Ramji, 10 Bom. A. C. 382; Umar Khan* v. *Sale Khan, I. L. R. 17 Bom. 106; Bichook Nath Panday* v. *Ram Lochun Singh, 11 B. L. R. 135; Magniram Marwari* v. *Rajpati Koeri, I. L. R. 20 Calc. 366 note*; and *Surya Narain Sing* v. *Jogendra Narain Roy Chowdhury, I. L. R. 20 Calc. 360*, explained. PARDHAN BHUKHAN LAL *v.* NARSING DYAL . . **I. L. R. 26 Calc. 300. 3. C. W. N. 175**

60. ——————— *Contract Act (IX of 1872), s. 74—Interest Act (XXVIII of 1855), s. 2.* *A* borrowed from *B* R500 on a mortgage-bond agreeing that he would pay in return R1,000 by a fixed number of instalments, and that on failure of any one instalment he would pay interest on the defaulted instalment at the rate of one anna per rupee per mensem until the date of realization. *Held*, upon a construction of the bond, that there was a stipulation to pay the interest on the defaulted instalments from the date of the loan, and it was a penalty falling under s. 74 of the Contract Act, which could not be enforced. *Mackintosh* v. *Crow, I. L. R. 9 Calc. 689; Kalachand Kyal* v. *Shib Chunder Roy, I. L. R. 19 Calc. 392 Baid Nath Das* v. *Shamanand Das, I. L. R. 22 Calc. 143; Nanjappa* v. *Nanjappa, I. L. R. 12 Mad. 161*, referred to. *Held*, further, that, even if the said stipulation in the bond did not amount to a penalty under s. 74 of the Contract Act, and although under the provisions of s. 2, Act XXVII of 1855, a man was free to contract interest at any rate that he chose on the borrowed money and nothing prevented him from agreeing to pay it from any time either prospective or retrospective, yet the only question that would arise in a case like the present was whether a Court of equity was precluded by that Act from affording relief independently of s. 74 of the Contract Act, and that, notwithstanding the provisions of Act XXVIII of 1855, a Court of equity could see whether the provision as to enhanced interest was agreed upon as interest, or whether it was intended to be a penalty upon the principles of equity and good conscience, and that in this case the stipulation to pay interest in default at 75 per cent. per annum was a penalty, and that the debtor was entitled to be relieved from it. *Pava Nagaji* v. *Gobind Ramji, 10 Bom. H. C. R. 382; Umar Khan* v. *Sale Khan, I. L. R. 17 Bom. 106; Bichook Nath Panday* v. *Ram Lochun Singh, 11 B. L. R. 135*, referred to. RAMENDRA ROY CHOWDHURY *v.* SERAJUDDIN AHAMED CHOWDHRY **2 C. W. N. 234**

61. ——————— *Mortgage-bond—Failure to pay on due date—Stipulation for the payment of enhanced interest from date of default till date of realization—Whether such stipulation is a penalty where a sum is mentioned in the contract as the amount to be paid in case of a breach of the contract—Contract Act (IX of 1872), s. 74.* In a mortgage bond where the parties are adults the provision as to interest was to the following effect: "On account of interest of the said sum of money, you shall take the profits of the said lands, and I will pay R20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document; and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal; and for the total amount, whatever it will be, I will pay up to the date of repayment at the rate of half anna per rupee per mensem." *Held*, that, inasmuch as what was specified in the contract was only the enhanced rate of interest, but no definite amount was specified as being payable in the event of a breach, nor could it be said that the amount, though not expressly stated in definite terms, was an ascertainable and definite amount which could become payable at the date of the breach, the stipulation for the payment of enhanced interest did not come within the scope of s. 74 of the Contract Act. *Mackintosh* v. *Crow, I. L. R. 19 Calc. 392*, and *Wallis* v. *Smith, 2 C. W. N. 234*, referred to. DENO NATH SANTH *v.* NIBARAN CHANDER CHUCKERBUTTY **I. L. R. 27 Calc. 421 4 C. W. N. 122**

62. ——————— *Penalty ensuring payments of instalments on due dates—Interest Act. XXVIII of 1855.* There is nothing in

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the Interest Act (Act XXVIII of 1855) which takes away the equitable jurisdiction of a Court to relieve against penalties. The Court would relieve a defendant from the penalty of paying a higher interest if it was convinced that the stipulation was intended to be really a penalty for ensuring the payments of instalments on the dates agreed upon, and not as mere stipulation for the payment of a higher interest under the circumstances. *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry, 2 C. W. N. 234,* referred to. *Umarkhan Mahamed Khan Desmukh* v. *Sale Khan, I. L. R. 17 Bom. 106,* followed. MANOO BEPARI *v.* DURGA CHARAN SATI **2 C. W. N. 333**

63. ——— *"Dharta" Illiterate agriculturist—Unconscionable bargain.* The High Court as a Court of Equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary produce would enter into, and which, from their nature and the relative position of the parties, raise the presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money-lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws. *Chesterfield* v. *Janssen, 2 Ves. 155; O'Rorke* v. *Bolingbroke. L. R. 2 App. Cas., 814; Earl of Aylesford* v. *Morris, L. R. 8 Ch. Ap. 484; Nevill* v. *Snelling, L. R. 15 Ch. D. 679; Beynon* v. *Cook, L. R. 10 Ch. Ap. 389,* referred to. An illiterate kurmi in the position of a present proprietor executed a mortgage-deed in favour of a professional money-lender to whom he owed R97 by which he agreed to pay interest on that sum at the rate of 24 per cent. per annum at compound interest. He further agreed that "dharta" or a yearly fine, at the rate of one anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain malikana land of the mortgagor, and that, if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, a six pies zamindari share was mortgaged for a term of eleven years. The effect of the stipulation as to "dharta" was that one anna per rupee would be added at the end of every year, not only to the principal mortgage-money, but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of the mortgage, the mortgagor brought a suit for redemption on payment of only R97 or such sum as the Court might determine as due to the mortgagee. At that time the accounts made up by the mortgagee showed that the debt of R97 with compound interest had swollen to R873, of which the "dharta" alone amounted to R211. *Held,* that the stipulation in the deed as the "dharta" was not of the kind referred to in s. 74 of the Contract Act (IX of 1872), and that there was no question of penalty, but that, looking to the relative positions of the parties and the unconscionable and oppressive nature of the stipulation, the benefit thereof should be disallowed to the mortgagee, and the mortgagor permitted to redeem on payment of the mortgage-money and interest, on appeal having been preferred by him from the decree of the first Court making redemption subject to payment of interest. LALLI *v.* RAM PRASAD . . **I. L. R. 9 All. 74**

64. ——— **Award of interest at a penal rate**—*Compensation for special damage.* Interest at a penal rate should not be awarded if there is no demand for it, or for a sum by way of compensation for special damage on the part of the plaintiff. TIKAMDAS JAVAHIRDAS *v.* GANGA RAM MATHURADAS . . . **11 Bom. 203**

65. ——— **Notice of intention to enforce penal rate of interest.** A decree-holder intending to enforce the penalty for delay in the payment of instalments is bound to tell the judgment-debtor so when the instalments are brought to him. SHAMA CHURN SINGH *v.* PROTAB COOMAR GHOSSAL **20 W. R. 292**

66. ——— **Contract Act, s. 74**—*Enhanced rate of interest on failure to pay on due date—Penalty—Mortgage—Compound interest at a rate higher than that of simple interest—Interest at contract rate up to the date fixed by Court for payment of mortgage-money—Subsequent interest at rate to be fixed by Court.* A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at an increased rate from the date of the bond, amounts to a provision for a penalty, and, under the terms of s. 74 of the Contract Act, reasonable compensation should be allowed. *Kalachand Kyal* v. *Shib Chunder Roy, I. L. R. 19 Calc. 392,* followed. *Chajmal* v. *Brij Bhukan, I. L. R. 17 All. 511,* referred to. Stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty which should not be allowed. *Baid Nath Das* v. *Shamanand Das, I. L. R. 22 Calc. 143,* followed. In a mortgage-decree, interest at the contract rate should be allowed up to the date fixed by the decree for the repayment of the money due, and after that date at such rate as the Court may fix. *Romeswar Koer* v. *Mahomed Mehdi Hossein Khan, I. L. R. 26 Calc. 39; Maharaja of Bharatpur* v. *Ram Kanno Dei, L. R. 28 I. A. 35; Bakar Sajjad* v. *Udit Narain Singh, I. L. R. 21 All. 361,* referred to. RAMESWAR PROSAD SINGH *v.* RAI SHAM KISHEN (1901) **I. L. R. 29 Calc. 43**

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INTEREST—*contd.*

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67. ——————— *Usury Laws Repeal Act (XXVIII of 1855), s. 2—Contract Act Amendment Act (VI of 1899), s. 4—Penalty—Principal sum, bearing no interest, repayable by instalments—Provisions for interest in case of default.* Defendant was indebted to plaintiff, as the stake-holder of a "chit fund," and undertook to pay the amount of the principal by half-yearly instalments. He further undertook that in case of default in the payment of such instalments, he would pay interest at the rate of one pie per rupee per diem from the date of default. No interest was payable on the principal sum unless default should be made, the instalments being in repayment of the principal sum alone, without interest. Default having been made, plaintiff sued on the bond, whereupon defendant pleaded that the rate of interest was penal and not recoverable. *Held*, that plaintiff was entitled to recover. The contract was not one which provided for the payment of a given rate of interest in any event and a higher rate in case of default. Under the agreement, the debtor incurred no obligation to pay interest at all on the money which he owed. His liability to pay interest only arose in the event of default. The case was not governed, therefore, by the Contract Act of 1872, or the Contract Act Amendment Act of 1899. *Per* SIR ARNOLD WHITE, *C.J.*—Under the Contract Act of 1872, a stipulation that an enhanced rate of interest should be payable as from the date of default is not a stipulation by way of penalty. The explanation to s. 4 of the Contract Act of 1899, which provides that a Court may treat such a stipulation as a penalty, is permissive, and does not preclude it from holding otherwise. *Semble:* That the words "which is put in issue," in s. 4 of the Contract Act of 1899, mean "which is in issue," and that where there is an appeal from a decree in a suit instituted in respect of a contract the contract is "in issue" in the appeal. Also, that the Contract Act of 1899 only applies to suits instituted after the commencement of that Act. SANKARANARAYANA VADHYAR *v.* SANKARANARAYANA AYYAR (1901) . **I. L. R. 25 Mad. 343**

68. ——————— *Mortgage bond—Penalty—Increased rate of interest from date of default—Act VI of 1899, s. 4.* A stipulation in a bond, for increased interest from the date of default, may be a stipulation by way of penalty, and the Courts in this country are competent to grant equitable relief against such stipulation, independently of s. 74 of the Contract Act. ABDUL GANI *v.* NANDLAL (1902) . . **I. L. R. 30 Calc. 15**

69. ——————— *Increased interest on default—Interest, provision for, in a bond—Penalty.* Where, in a bond executed on the 1st December, 1888, the stipulation was that interest would run at the rate of 1½ per cent. per mensem, and that if the amount was not paid on the due date the interest on the amount of loan from after the expiration of the fixed time would be charged at the rate of 5 per cent. per mensem up to the date of ultimate recovery: *Held*, that, the increased rate of interest being very high, and there being some evidence to show that the stipulation was inserted to ensure prompt payment by the debtor, the case ought to be sent back for consideration by the Court below, from the point of view that the provision as to increased interest might be penal, or that relief might be granted on equitable grounds. Also, that, if the provision as to increased interest be not strictly enforceable, reasonable compensation should be granted to the plaintiff. *Umar Khan Mahmad Khan Deshmukh* v. *Sale Khan, I. L. R. 17 Bom. 106; Pardhan Bhukan Lal* v. *Narsing Dyal, I. L. R. 26 Calc. 300; Dino Nath Santh* v. *Nibaran Chandra Chuckerbutty, I. L. R. 27 Calc. 421*, referred to. MULLIK ABDUL GUNI *v.* NUND LAUL (1902) **7 C. W. N. 152.**

70. ——————— *Bond—Instalments—Failure to pay instalments—Interest at a higher rate from the date of the transaction—Penalty.* Defendants borrowed a sum of R200 from the plaintiffs and gave a bond, dated the 12th December, 1879, for R250, repayable by monthly instalments of R5. The bond provided that, in case of default in payment of any instalment, interest at 24 per cent. per annum should be charged from the date of the bond. The sum of R203-2-9 was paid by defendants up to the 9th July, 1884, after which date no payments were made. The plaintiffs claimed interest from the defendants at the rate of 24 per cent. calculated from the date of the bond. *Held*, that the provision in the bond, that on default interest at 24 per cent. per annum should be charged from the date of the bond, was in the nature of a penalty; and that the amount claimed could not be recovered. TRIMBAK TUKARAM NAIK *v.* BHAGCHAND (1902) . . **I. L. R. 27 Bom. 21**

71. ——————— *Act VI of 1899, s. 4—Stipulation for enhanced interest and for compound interest in case of default—Penalty.* A bond stipulated for the payment, on a specified date, of half the principal sum advanced, together with interest at the rate of 15 per cent. per annum, and for the payment, on another date, of the balance of the principal together with interest at the same rate. In case of default in the payment of either instalment, it was provided that the whole amount of principal then due was to become payable, together with interest at the rate agreed, and compound interest on the whole amount at the rate of 24 per cent. per annum. Default was made, but the Subordinate Court awarded no compensation. *Held*, that, inasmuch as by s. 74 of the Contract Act (as amended) the Court is to award reasonable compensation not exceeding the amount named in the contract, the Subordinate Court should find whether an addition of 9 per cent. was an unreasonable sum to allow

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as compensation, and, if so, what compensation should be allowed as reasonable for the non-payment of principal in the manner agreed upon; the stipulation for payment of compound interest being regarded as compensation for non-payment of interest alone, and not for non-payment of principal. ANNAMALAI CHETTY *v.* VEERABADRAM CHETTY (1902) . . . **I. L. R. 26 Mad. 11**

72. ——— *Penalty—Stipulation that interest shall be chargeable if instalments in repayment of principal be not paid on due dates—Applicability of Act VI of 1899 to suits filed prior to its coming into force.* A stipulation in a bond that the principal sum shall be repaid by instalments on specified dates (no provision being made for interest) and that, on default of such payments of principal being made, interest shall be chargeable as from the date of the bond, is not in the nature of a penalty. *Semble:* That the Contract Act Amendment Act of 1899 does not apply to a suit filed prior to the date upon which it came into force. CHINNA VENKATASAMI *v.* PEDDA KONDIAH (1902) **I. L. R. 26 Mad. 445**

73. ——— *Act VI of 1899 (Indian Contract Amendment Act), s. 4—Bond—Penalty. Held,* that a stipulation in a bond for payment of compound interest on failure to pay simple interest on the same amount is not a penalty within the meaning of s. 74 of the Indian Contract Act, 1872, as amended by Act VI of 1899. GANGA DAYAL *v.* BACHCHU LAL (1902) **I. L. R. 25 All. 26**

74. ——— *Penalty—Compound interest in lieu of simple—Act VI of 1899, s. 4. Held,* following the ruling in *Ganga Dayal* v. *Bachchu Lal, I. L. R. 25 All. 26,* that a stipulation for the payment of compound interest at the same rate as was payable upon the principal is not a stipulation by way of penalty, within the meaning of the Explanation to s. 74 of the Indian Contract Act, 1872. JANKI DAS *v.* AHMAD HUSAIN KHAN (1902) . . **I. L. R. 25 All. 159**

75. ——— *Act VI of 1899, ss. 1 and 4—Bond—Stipulation for enhanced interest, from date of bond, on breach of covenant to pay interest—Penalty.* In a bond executed on the 8th of November, 1892, to secure a sum of R8,000, it was stipulated that interest should be paid every six months at the rate of 1 per cent. per mensem, but that in case of default in payment the mortgagor should pay interest at the rate of 2 per cent. per mensem from the date of the execution of the bond. On suit upon this bond to recover the principal sum secured, with interest at the enhanced rate: *Held,* that the provisions of Act VI of 1899 were applicable, the question whether interest was recoverable at the enhanced rate having been put in issue since that Act came into force, although the bond might have been executed before. *Held,*

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also, that, under s. 74 of the Indian Contract Act, as amended by Act VI of 1899, the stipulation for enhanced interest as from the date of the execution of the bond was a stipulation by way of penalty, against which relief should be granted. BRIJ BHUKHAN DAS *v.* SAMI-UD-DIN AHMAD KHAN (1902) **I. L. R. 25 All. 169**

INTEREST ACT (XXXII OF 1839).

See COMPROMISE—CONSTRUCTION OF, ENFORCING EFFECT OF, AND SETTING ASIDE, COMPROMISES . **I. L. R. 26 Calc. 955**

See INTEREST.

See OUDH RENT ACT, ss. 12, 141. **I. L. R. 26 All. 299**

1. ——— **Act XXXII of 1839**—*Certificate of the Administrator-General registering a debt—"Written instrument."* A certificate of the Administrator-General admitting a debt to be due is not such a "written instrument" as is contemplated by the Interest Act (XXXII of 1839), because the amount mentioned therein is not payable by virtue of the certificate which merely purports to certify the registration of the amount of the admitted debt for the purpose of convenience in administering the estate. OMRITA NATH MITTER *v.* ADMINISTRATOR-GENERAL OF BENGAL . **I. L. R. 25 Calc. 54**

2. ——— *Interest not claimable where no agreement and no demand in writing—Hindu Law not applicable in cases of payment of interest.* Interest is not claimable where there is no agreement to pay interest and no demand in writing so as to bring the case within the provisions of the Interest Act. Hindu Law does not apply in such matters as the payment of interest and the rule of law above stated applies in cases in which the parties are Hindus. *Sannaddanappa v. Shivbasawa, I. L. R. 31 Bom. 354,* not followed. *Annaji Rau* v. *Raju Bai, 6 Mad. H. C. 400,* followed. SUBRAMANIA AIYAR *v.* SUBRAMANIA AYAR (1908) . . **I. L. R. 31 Mad. 250**

INTEREST ACT (XXVIII) OF 1855).

——— **s. 2**—

See INTEREST—MISCELLANEOUS CASES—COMPOUND INTEREST; **7 C. W. N. 876**

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See INTEREST—STIPUTATIONS AMOUNTING OR NOT TO PENALTIES. **I. L. R. 25 Mad. 343**

INTERLOCUTORY JUDGMENT.

See CIVIL PROCEDURE CODE, 1882, s. 28. **I. L. R. 33 Bom. 293**

——— *Judgment based upon an assumption or hypothesis subsequently ascertained*

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INTERLOCUTORY JUDGMENT—*concld.*

to be erroneous—Re-opening the portion of the case affected by the error. The High Court on appeal delivered an interlocutory judgment remanding the case for a finding on a certain issue. On the case coming again before a differently constituted Bench of the High Court for final disposal: *Held*, that the remanding judgment was conclusive on all points therein specially decided beyond possibility of revision, but that it was otherwise with regard to any part of the judgment, which could be shown to be based on such mistake or error as it would have been the duty of that Bench to correct, if it had been brought to its notice, when the judgment was delivered. *Per* BATCHELOR, *J.*—In so far as any part of the remand judgment is based on an assumption or hypothesis, which is now ascertained to be erroneous, it is, we think, competent to us—or rather it is incumbent on us—to disregard it, and to re-open that part of the case affected by the error. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1908) . . . **I. L. R. 32 Bom. 432**

INTERLOCUTORY ORDER.

See APPEAL—DECREES.
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5 C. W. N. 153

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See CIVIL PROCEDURE CODE, 1908, s. 2.
I. L. R. 31 All. 545

See COSTS—COSTS IN THE CAUSE.
I. L. R. 25 Bom. 230

See INJUNCTION . **I. L. R. 31 Calc. 151**

See LETTERS PATENT, CL. 15.

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I. L. R. 28 Bom. 292

See N.-W. P. LAND REVENUE ACT, s. 241.

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.
I. L. R. 9 Mad. 256
I. L. R. 4 All. 91
I. L. R. 14 Calc. 768
I. L. R. 18 Bom. 35

——— **Civil Procedure Code, 1882, s. 499, application for order under.** An application for an order under s. 499 of the Code of Civil Procedure can only be made by a plaintiff after summons has been served, and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. SENGOTHA *v.* RAMASAMI . . **I. L. R. 7 Mad. 241**

INTERNATIONAL LAW.

See "FOREIGN JUDGMENTS."
I. L. R. 32 Mad. 469

INTERPLEADER SUIT.

See BAILMENT . **5 B. L. R. Ap. 31**

See CIVIL PROCEDURE CODE ACT, 1882, ss. 473 (*c*), 588 (*23*) **I. L. R. 30 All. 22.**

See COSTS—SPECIAL CASES—INTERPLEADER SUIT . . **1 Mad. 360**

See PRACTICE . **I. L. R. 32 Bom. 592.**

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—COMPENSATION FOR ACQUISITION OF LAND.
I. L. R. 20 Mad. 155

1. ——— **Person in position of mere stake-holder**—*Procedure.* Where a party in the position of a mere stake-holder is made a defendant in a suit, his proper course under the Civil Procedure Code is to pay the money into Court and ask that the parties really interested may be substituted for himself as defendants. ASSARAM BURTEAH *v.* COMMERCIAL TRANSPORT ASSOCIATION
2 Ind. Jur. N. S. 113.

2. ——— **Defendant not claiming whole subject-matter**—*Suit irregularly framed.* An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter. *Hoggart* v. *Cutts, Cr. & P. 197*, observed upon. SECRETARY OF STATE *v.* MOHAMED HOSSAIN . **1 Mad. 360**

3. ——— **Claims by plaintiff against goods in respect of which suit brought**—*Civil Procedure Code, 1882, ss. 470 and 473—Costs of plaintiff—Freight—Wharfage—Demurrage.* In May 1893, *S* (defendant No. 4), a resident at Hissar in the Punjab, consigned 600 bags of rapeseed to *K* of Bombay, and delivered them to the plaintiffs for carriage to Bombay. While the goods were in transit to Bombay, *S*, the consignor, ordered the plaintiffs to deliver them to his agent *F*, instead of to the consignee, and on the 18th May *F* requested delivery from the plaintiffs. Before the goods could be delivered, however, the firm of *E D S & Co.* (defendants Nos. 1, 2, and 3) claimed them, alleging that they had been assigned to them by *K* for valuable consideration. The plaintiffs thereupon filed this suit, praying that the defendants should be required to interplead, and that they should be restrained from suing them (the plaintiffs) in respect of the said goods. The plaintiffs claimed to charge the goods with payment of freight, wharfage, and demurrage, and their costs of suit. *Held*, (i) that the suit was properly instituted by the plaintiffs as an interpleader suit so as to entitle them to their costs; (ii) that *S*, the fourth defendant, was entitled to the goods, subject to the plaintiffs' charge for freight and costs; (iii) that the plaintiffs' charges for wharfage and demurrage could not be allowed. The goods remained in the plaintiffs' possession, not by reason of any neglect or default of the owner

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INTERPLEADER SUIT—*concld.*

to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. All that they could presumably be entitled to was a reasonable warehouse rent, which, however, they had not claimed. BOMBAY, BARODA AND CENTRAL INDIA RAILWAY CO. *v.* SASSOON **I. L. R. 18 Bom. 231**

INTERPRETATION OF STATUTES.

See STATUTES, INTERPRETATION OF.

See BENGAL TENANCY ACT (VIII OF 1885), s. 106 . . **12 C. W. N. 887**

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INTERPRETER.

——— **omission to administer oath to—**

See PERJURY . **I. L. R. 36 Calc. 808**

See SANCTION FOR PROSECUTION. **I. L. R. 36 Calc. 808**

——— **Sworn interpeter, necessity for**—*Criminal Procedure Code, 1861, s. 198.* There was no necessity, under s. 198, Code of Criminal Procedure, 1861, for making use of a regularly sworn interpreter to interpret his evidence to a party making a statement. QUEEN *v.* MADAN MUNDUL **16 W. R. Cr. 71**

INTERROGATORIES.

See PRACTICE—CIVIL CASES—INTERROGATORIES.

——— **evidence taken on—**

See COMMISSION—CRIMINAL CASES. **I. L. R. 19 Bom. 749**

1. ——— **Discovery**—*Fishing questions—Practice—Defective pleadings—Issues—Code of Civil Procedure (Act XIV of 1882), ss. 121, 127.* Interrogatories are not in this country to be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. Where the pleading of either party is too vague, the Court may call for a further or fuller written statement, or may frame and record issues until the case raised by the pleadings is ascertained with sufficient clearness. A plaintiff may interrogate with a view to obtain information or admission in support of his own case, and this right extends not only to his original case but also to any answers which he has to make to the defendant's case, subject to the qualification (*inter alia*) that the interrogatories must be directed to a case on which the plaintiff has already determined, and to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it. ALI KADER SYUD HOSSAIN ALI *v.* GOBIND DASS **I. L. R. 17 Calc. 840**

2. ——— *Production of documents—Code of Civil Procedure, 1882, ss. 121, 125, 129, 130, 133, and 134—Definition of term "family."* To interrogate a party to a suit as to the construction he puts on the meaning of the word "family" is not admissible, although to ask him who the persons are who are living in his household is so. The former question, if replied to, would only be of value as the opinion of a party to suit on what is really a question of law. Under the Civil Procedure Code, interrogatories for the purpose of eliciting facts bearing upon issues arising in a suit are limited in operation and are not permissible in case where the procedure provided by s. 134 of the Code is applicable. *Ali Kader Syud Hossain Ali* v. *Gobind Dass, I. L. R. 17 Calc. 840,* and *Weideman* v. *Walpole, L. R. 24 Q. B. D. 537;* approved. Ss. 121, 125, 129, 130, 133, and 134 of the Code of Civil Procedure discussed. NITTOMOYE DASSEE *v.* SOOBUL CHUNDER LAW . **I. L. R. 23 Calc. 117**

3. ——— **Interrogatories, omission to answer, effect of**—*Civil Procedure Code (Act XIV of 1882), ss. 121, 136—Practice.* Omission to answer interrogatories, delivered after leave granted under s. 121 of the Civil Procedure Code, does not render the party so omitting to answer liable to have his defence struck out under s. 136 of the Code. *Lalla Debi Pershad* v. *Santo Pershad, I. L. R. 10 Calc. 505,* overruled. PREM SUKH CHUNDER *v.* INDRO NATH BANERJEE . **I. L. R. 18 Calc. 420**

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See DIVORCE ACT (IV OF 1869), SS. 7, 11 AND 45 . . **7 C. W. N. 504**
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See ESTOPPEL—ESTOPPEL BY CONDUCT. **I. L. R. 4 Calc. 783**
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See PARTIES—PARTIES TO SUITS—RENT, SUITS FOR, AND INTERVENORS IN SUCH SUITS.

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—NOTICE TO PARTIES. **I. L. R. 4 Calc. 650**

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INTESTACY.

See APPEAL—ORDERS—ORDER UNDER MAD. REG. III OF 1802, S. 16, CL. 7. **I. L. R. 24 Mad. 95**

See MAHOMEDAN LAW—DEBTS. **I. L. R. 4 Calc. 142**

See REGULATION NO. V OF 1799, S. 7. **I. L. R. 29 All. 277**

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See RIGHT OF SUIT—INTESTACY.
I. L. R. 18 Bom. 337

——— **suit for distributive share under—**

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INTESTATES' ESTATES ACT (XXV OF 1866).

See LIMITATION . **10 C. W. N. 354**

INTOXICATION.

1. ——— **Offence committed under.** Intoxication should not be treated as an aggravation of an offence. QUEEN *v.* ZULFUKAR KHAN
8 B. L. R. Ap. 21 : 16 W. R. Cr. 36

2. ——— **Palliation of offence.** Nor is it any excuse for it. QUEEN *v.* AKULPUTTEE GOSSAIN . . . . . **5 W. R. Cr. 58**

QUEEN *v.* BODHEE KHAN . **5 W. R. Cr. 79**

3. ——— *Murder.* In a case of murder committed in a drunken squabble, it was *held* that voluntary drunkenness, though it does not palliate any offence, may be taken into account as throwing light on the question of intention. QUEEN *v.* RAM SAHOY BHAR . **W. R. 1864, Cr. 24**

INVALID SALES.

See SALE IN EXECUTION OF DECREE.

INVENTIONS AND DESIGNS ACT (V OF 1888).

1. ——— **ss. 4 and 30**—*Invention—Improvement—Combination of known substances to produce a known result—Burden of proof. Held,* that a combination, effected by placing one known material side by side with another known material, not involving the exercise of any special inventive power, and ending in a result which differed from previous results only because the materials so placed produced an improved article, did not amount to an "invention" as defined by Act V of 1888. *Held,* further, that it is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed. ELGIN MILLS CO. *v.* MUIR MILLS CO.
I. L. R. 17 All. 490

2. ——— **ss. 4, 5, and 30**—*New manufacture—"Process," meaning of.* In a case where an inventor of a new manufacture or process sold the article produced by the process freely for a large number of years in the open market and then applied for a patent under the Inventions and Designs Act, 1888 :—*Held,* that, where profit is openly derived from the employment of a secret process, there is a public user of such secret process within the meaning of the Act. The term "invention," having regard to s. 5 of the Act, means new manufacture. *Semble :* The term "new manufacture" or "invention" might be applied to a process only. *Held,* also, that "assignee" in the Act refers to an assignee of the entire title and interest of the inventor : s. 4, sub-s. (4), of the Act. *Wood* v. *Zimmer, Holt 58,* followed. *In the matter of the* INVENTIONS AND DESIGNS ACT, 1888. GALSTAUN *v.* SHORT
I. L. R. 23 Calc. 702

INVENTIONS AND DESIGNS ACT (V OF 1888)—*contd.*

——— **ss. 4, 5, and 30**—*concld.*

1. ——— **s. 29**—*Infringement of patent—Patent consisting of a combination of parts—Infringement as to one or more of such parts. Held,* that a valid patent for an entire combination for a process gives protection to each part thereof, which is new and material for that process. *Parkes* v. *Stevens, L. R. 8 Eq. 258,* followed. BUTLER *v.* ADAMJI BAHUBA (1904) . **I. L. R. 26 All. 96**

2. ——— *"District" and "District Court," meanings of—"District Court," if it includes High Court in its original jurisdiction—S. 29 (2), (3) and (4) bars certain defences to an action—Ss. 30 and 31—Application for a rule to a High Court—Procedure—Intention of Legislature.* The expression "District Court," as used in s. 29 (1) of the Inventions and Designs Act (Act of V 1888) includes High Court in the exercise of its Ordinary Original Civil Jurisdiction, under s. 4 (1) of that Act. The Legislature intended that objections indicated in s. 29 (2), (3) and (4) should not be allowed to be raised in defence to an action for the infringement of an exclusive privilege acquired under Part I of the Act, but must be raised under the provisions of ss. 30 and 31 of the Act, by applying to a High Court for a rule to show cause why the Court should not declare that the exclusive privilege so acquired had not been so acquired by reason of the objections mentioned in the two latter sections. KEDAR NATH MONDAL *v.* GONESH CHANDRA ADAK (1907) . . **12 C. W. N. 446**

——— **s. 30**—

See BURDEN OF PROOF.
10 C. W. N. 985

——— *Rule issued under s. 30 on respondent—Respondent shewing cause by affidavits—Issue directed to be tried—Onus of proof at trial.* The applicant obtained a rule under s. 30 of the Inventions and Designs Act, calling upon the respondent to show cause that he had not acquired an exclusive privilege in a certain invention. The respondent showed cause against the rule by affidavits, but the Court instead of discharging the rule, directed the issue to be tried. *Held,* at the trial, that the onus of proof lay on the respondent. ALEXANDER GRAY, *In re* (1906) **10 C. W. N. 985**

——— **s. 51**—*"Proprietor" of a design—Publication of design in British India.* In 1899 the plaintiffs got a design for a curtain registered under the Inventions and Designs Act, 1888, as being the proprietors thereof. In 1901 they sued the defendants for damages for imitating this design. The defendants proved that they were making the curtains, which were alleged

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INVENTIONS AND DESIGNS ACT (V OF 1888)—*concld.*

——— **s. 51**—*concld.*

to be an imitation of the plaintiff's registered design, for a Bombay firm, and also that the design had been sent to the Bombay firm from a firm in London in 1897, that is, before the plaintiffs' design was registered, in order that curtains of similar design might be manufactured in India and sent back to London for sale. The plaintiffs failed to prove that they either had invented the design or had purchased it from the inventor. *Held*, that the sending of the design by the London firm to the firm in Bombay, with which the fromer were in no specially confidential relations, amounted to a publication of the design in British India; and, as the plaintiffs were not the "proprietors" of the design, within the meaning of s. 51 of the Inventions and Designs Act, they were not entitled to any protection. BAHAL RAI *v.* SUMAR CHAND (1903) **I. L. R. 25 All. 493**

INVESTIGATION.

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See POLICE INQUIRY.

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See CIVIL PROCEDURE CODE, 1882, SS. 306 AND 311 . **I. L. R. 28 All. 238**

See CIVIL PROCEDURE CODE, S. 578. **I. L. R. 29 All. 562**

See EXECUTION OF DECREE—IRREGULARITY.

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IRREGULARITY—*concld.*

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——— **in serving notice—**

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1. FRAMING AND SETTLING ISSUES.

1. ——— Mode of framing issues— *Civil Procedure Code, 1859, s. 139. Semble:* Under s. 139 of Act VIII of 1859, the issues were to be framed upon the plaint, written statements, and allegations of the parties or their counsel. MACKINTOSH *v.* TEMPLE . **2 Ind. Jur. N. S. 333**

2. ——— *Plaint—Written and oral statements.* The issues are to be framed from all questions of law or fact upon which the parties may be at issue, and are to be collected, not merely from the plaint, nor from the written statements, but may also be taken from the oral statements of their pleaders. KOWSULLYA DOSSEE *v.* RAM JUGGURNATH DEY SIRCAR . **8 W. R. 162**

MAN GOBIND SIRCAR *v.* UMBIKA MONEE DOSSIA **16 W. R. 218**

3. ——— *Civil Procedure Code, 1859, s. 139—Plaint—Written and oral statements.* Under s. 139, Act VIII of 1859, the Court may frame the issues from the oral examination of the parties or their pleaders, notwithstanding any difference between the allegations of fact contained in those examinations and the allegations contained in the written statements. SHAHEBZADI BEGUM *v.* HIMMAT BAHADUR **4 B. L. R. A. C. 103 : 12 W. R. 512**

4. ——— *Civil Procedure Code, 1859, s. 139.* A Court cannot refuse to enquire into a plea set up by a platintiff's pleaders in reply to questions put them by the Court, although such plea was not advanced in the original plaint. S. 139, Code of Civil Procedure, authorized a Court to frame issues on allegations collected from the oral examination of parties or their pleaders, notwithstanding discrepancy between these allegations and the written pleadings. KOBEEROODEN AHMED *v* NYAN BIBEE . . . . . **8 W. R. 354**

5. ——— *Civil Procedure Code, 1882, s. 147.* A Court in framing issues is not bound down to the language of the plaint and written statement, but may frame them not only from the pleadings, but also from the statements of the parties and their pleaders made before the Court. MAHOMED MAHMOOD *v.* SAFAR ALI **I. L. R. 11 Calc. 407**

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ISSUES—*contd.*

1. FRAMING AND SETTLING ISSUES—*contd.*

6. ——— *Exact words of the Legislature relating to issues.* Where the rights in a case have to be determined by reference to the words of the Legislature then those words should be used for the purpose of the issues so far as circumstances permit. LAKSHMANDAS *v.* ANNA LANE (1904) . . **I. L. R. 32 Bom. 356**

7. ——— **Settlement of Issues**—*Civil Procedure Code, 1859, s. 139.* Issues are to be fixed under s. 139, Code of Civil Procedure, when both parties appear, and the Court can ascertain from them what are the points upon which they are at issue. The Court is not bound to fix any issue when the defendant does not appear, but ought to proceed under s. 111 to hear the case *ex parte.* AMEER ALI SOWDAGUR *v.* IMAMOODEEN . **15 W. R. 145**

8. ——— *Form of issues requisite for trial.* The issues should raise matters fairly in controversy between the parties, even though the pleadings may be defectively drawn. CANNAMMAL AYAIR *v.* VIJAYA RAGUNADA RANGA SAMY SINGAPULLIAR . . . **8 Mad. 114**

9. ——— *Nature of issues requisite for trial.* It may be laid down as a general rule that only such averments should be made the subject of issues as are essential to support the cause of action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff. Mere pieces of evidence which are to the adduced to enable the Court to infer the truth of a material averment, ought not to be made the subject of a separate issue; nor should the motives of the plaintiff in bringing the suit be put in issue; for if he have a good cause of action, his motives, as ill-will, pique, etc., would not be an any answer to it. BIRCH *v.* FURZIND ALI. **3 N. W. 303**

10. ——— *Duty of Court.* The duty of a Judge in clearly ascertaining the real points in dispute, and framing issues accordingly, pointed out. APAYA *v.* RAMA **I. L. R. 3 Bom. 210**

11. ——— *Suit against minor—Issue not founded on plaintiff's affirmative statements.* In a suit by a person claiming as the ultimate heir in reversion to the state of a deceased widow, it was *held* that the plaintiff was bound, before he could be allowed to succeed against the minor in possession to pledge himself to a specific case and to prove that case, and the lower Court was *held* to have done wrong in raising an issue which was not based and moulded upon some specific affirmative-delegation made as part of the plaintiff's case, thus putting the minor to the peril of such an issue merely on a general negative statement made by his guardian. JUGDEEP NARAIN SAHEE *v.* COURT OF WARDS . . . . . **22 W. R. 469**

12. ——— *Suit for possession under deed of sale—Issues to be raised—Proof of title.* In a suit to recover possession based on a deed of sale:—*Held*, that the Court could have raised issues as to ownership and possession, as, even if the sale-deed were not proved, the plaintiff might have been able to substantiate a title independently of it. GOVIND *v.* VITHAL **I. L. R. 20 Bom. 753**

13. ——— *Raising issue on clear point of law.* There is nothing in the Code of Civil Procedure which imposes upon the Judge the duty of allowing an issue to be raised on a point of law which he considers to be perfectly clear. IMPERIAL BANKING AND TRADING CO. *v.* PRANJIVANDAS HARJIVANDAS . **2 Bom. 272: 2nd Ed. 258**

14. ——— **Inconsistent issues**—*Undue influence—Trial of issues.* The execution of a hibanama having been denied by the plaintiff, a Mahomedan widow and purdanashin, in a suit brought by her to have it set aside as fabricated, she also alleged that undue influence had been exercised upon her. It was decided upon the evidence that the instrument was genuine, having been executed by her of her own free will. The above questions being inconsistent with one another, the latter should not have been admitted to form part of an issue together with the former. On an issue of undue influence, rightly raised, a Court should consider whether the gift in question (*a*) is one which a right-minded person might be expected to make; (*b*) is or is not an improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor; and (*d*) whether the intention to maket the gift originated with the donor, the principles being always the same, although the circumstances may differ. MAHOMED BUKSH KHAN *v.* HOSSEIN BIBI. **I. L. R. 15 Calc. 684**
L. R. 15 I. A. 81

2. FRESH OR ADDITIONAL ISSUES.

1. ——— **Raising issues not raised in pleadings**—*Proceedings against policy or morality.* Although a Court may have the right, and is perhaps even under an obligation, to take cognizance *motu proprio* of any objection manifestly apparent on the face of a proceeding showing that it is against morality or public policy, yet where this is only to be collected from the evidence by inference and is capable of explanation or answer by counter-evidence, it is highly inconvenient, and may lead to the most direct injustice, to enter into the enquiry if the issue has not been presented by the pleadings or the points recorded for proof. FISCHER *v.* KAMALA NAIKER **3 W. R. P. C. 33: 8 Moo. I. A. 170**

2. ——— *Question raised at hearing of suit. Held*, that the Court was not in its own motion competent to determine a question which was not alleged, nor raised by the pleadings of the parties. But if the question was raised even on

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ISSUES—*contd.*

2. FRESH OR ADDITIONAL ISSUES—*contd.*

the day of the hearing of the case at any time before the decision of the case, the Court ought not to have rejected it, because it was not raised by the written statement, but ought to have framed issues to determine the question. DYASHUNKER *v.* MAHOMED AMEEN-OOD-DEEN KHAN . . **3 Agra 246**

3. ——————— *Suit for pre-emption.* When the plaintiff claimed pre-emption on one ground, and the Court raised an issue as to his right on another ground, to which the parties assented, and the case was decided against him as he had not proved his right on that ground :—*Held*, that the Court would not interfere with the finding on special appeal. SHEW SUKOY LALL *v.* WAJED ALI KHAN . . . . **13 W. R. 205**

SHÉOJUTTUN ROY *v.* ANWAR ALI **13 W. R. 189**

4. ——————— *Suit on mortgage —Validity of mortgage.* Where a plaintiff fails to show that a mortgage, created by certain persons as executrix and executors of a Hindu will, has been validly created by them in that capacity, the Court will, unless it is manifestly inequitable to do so, allow him to raise an issue that the mortgage was validly created by the parties in another character. NILKANT CHATTERJEE *v.* PEARI MOHAN DAS **3 B. L. R. O. C. 7 : 11 W. R. O. C. 21**

5. ——————— *Suit for declaration of title.* On the evidence, the defendant wished to raise issues as to the unchastity and inability of the plaintiff to succeed, and as to her suing on behalf of another person, not having alleged that she was doing so, neither of which matters were referred to in his written statement ; but leave to raise them was refused, and the Court *held* that the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title-deeds in her favour. SWARNAMAYI RAUR *v.* SRINIBASH KOYAL **6 B. L. R. 144**

6. ——————— *Suit as heir of adopted son.* Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted son :—*Held*, that the plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor. GOPEE LOLL *v.* CHUNDRAOLEE BUHOOJEE **11 B. L. R. P. C. 391 : 19 W. R. 12 L. R. I. A. Sup. Vol. 131**

7. ——————— A defendant is not precluded from setting up a defence which does not appear in her written statement where the plaint does not set forth the true facts, and the Court will allow an issue to be raised on it. SOONDER NARAIN PANDAH *v.* NAMDAR . . **21 W. R. 407**

DOORGA NARAIN BOSE *v.* BROJO KISORE GHOSE **23 W. R. 172**

ISSUES—*contd.*

2. FRESH OR ADDITIONAL ISSUES—*contd.*

8. ——————— *Amendment of plaint—Civil Procedure Code, 1859, ss. 139-141.* In 1817, the ancestor of the plaintiffs had obtained from the zamindar a maurasi istemrari lease of a certain portion of his property. In 1837 the entire zamindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder, who thereupon granted a lease for a term of twenty years to *W*. This revenue sale was never set aside ; but in 1842 the Government restored the estate to the Rajah zamindar with all the prior incumbrances, but subject to his confirming the lease to *W*. In 1844, the father of the plaintiffs brought a suit to recover possession of their tenure, but the suit was dismissed by the principal Sudder Ameen on the ground that the right to sue had not accrued, and could only arise on the expiration of the lease to *W*. This judgment was reversed by the Sudder Dewany Adawlut, but was restored and affirmed on appeal by the Judicial Committee. In the meantime, and before the expiry of the lease to *W*, owing to certain fraudulent transactions on the part of *A*, who had got into possession of the estate as the purchaser of the interests of certain mortgagees of the Rajah, the property was again put up to sale for arrears of Government revenue, and was purchased by *M*, a party to the transactions abovementioned. The Rajah, however, succeeded in getting this sale reversed in 1866, and obtained possession of his estate in 1871. In a suit, instituted on the 23rd October 1873, against the Rajah and certain other parties to whom he had granted a patni lease, the plaintiffs alleged that the sale of 1837 was set aside by Government as illegal, and that consequently their tenure had revived ; that the effect of the Principal Sudder Ameen's decision, confirmed by the Privy Council, was to postpone their right to obtain possession of their tenure, until after the expiration of the lease to *W* ; that when that lease expired, the property was in the possession of *M*, of the fraudulent character of whose title they had no knowledge and that their right to sue in the present case consequently arose only in 1871. The defence was that the plaint disclosed no cause of action ; that the cause of action, if any, was barred by the law of limitation ; and that the tenure was destroyed by the proceedings connected with the sale in 1837, which was never set aside. The Judge *held* that the plaint disclosed a cause of action which arose in 1837, and that the suit was consequently barred. He accordingly dismissed the suit without taking any evidence. On appeal to the High Court, it was admitted on the part of the plaintiffs that the sale of 1837 was never set aside ; but it was contended that the restoration of the zamindari to the zamindar, "with all the former incumbrances," gave rise to an equity of a personal character against the Rajah, and those taking under him with notice of the plaintiffs, title to restore the plaintiffs' tenure, which equity fastened upon him on his obtaining actual possession of the estate ; and that therefore the cause of action

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ISSUES—*contd.*

2. FRESH OR ADDITIONAL ISSUES—*contd.*

accrued only in 1871. On the part of the defendants it was objected that the plaintiffs had no right to make a new case in appeal, and inasmuch as the equity, which was now sought to be fastened on the zamindar, was never raised in the pleadings, it could not now beset up. *Held*, that, under ss. 139 and 141 of the Civil Procedure Code, the plaintiffs might be allowed to amend their case in any stage before a final decision; and inasmuch as if the plaintiffs' case as so amended were proved, the suit would not be barred, it was necessary for the determination of the question of limitation that the case should be remanded to the lower Court for trial. RAMDOYAL KHAN *v.* AJODHYA RAM KHAN . **I. L. R. 2 Calc. 1 : 25 W. R. 425**

9. ——————— *Civil Procedure Code, 1877, s. 149 (1859, s. 141).—Where no injustice would be done to either party, the Courts, in the exercise of their discretion, under special circumstances, may allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings.* The power to allow such amendments is given by the first part of s. 149 of Act X of 1877 corresponding with the first part of s. 141 of Act VIII of 1859. NEHORA ROY *v.* RADHA PERSHAD SINGH

I. L. R. 5 Calc. 64 : 4 C. L. R. 353

10. ——————— *Issue raised by Court which was not raised by parties.* The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine and the lower Appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court:—*Held*, that Courts are not to raise an important and serious issue in a case for the parties when they have not raised it themselves by their own pleadings in the cause. WALIULLAH KHAN *v.* MUHAMMAD ISRARULLAH KHAN

I. L. R. 10 All. 627

11. ——————— *Civil Procedure Code, 1882, s. 149—Court's authority to frame new issues—Amendment of plaint.* A Court is not authorized by s. 149 of the Code of Civil Procedure (Act XIV of 1882) to frame new issues which have the effect of altering the nature of the suit. A Court's power of raising additional issues is co-extensive with its power of amending plaints, and is subject to the same restrictions. The plaintiff originally sued the defendant as a trespasser claiming damages for wrongful occupation and for injury done to the land in dispute. Some time after the issues had been framed, the plaintiff applied for an amendment, of the plaint and sought to recover rent for the land in suit on the basis of a subsisting tenancy. The Subordinate Judge, without making the amendment framed two additional issues, *viz.*, (i) whether the suit was based on the relation of landlord and tenant, and (ii) whether the thikans in dispute were let to the defendant and what rent the plaintiff was entitled to recover in respect of the same. The Subordinate Judge found on these issues that the tenancy was still subsisting, and passed a decree for the rent claimed. *Held*, that the Subordinate Judge had no authority, under s. 149 of the Code of Civil Procedure (Act XIV of 1882), to frame the new issues. NARAYAN GANESH *v.* HARI GANESH

I. L. R. 13 Bom. 664

12. ——————— *Guardian, power of, to make contract to bind minor—Alteration of case and raising fresh issues on appeal.* Upon the death of an ijaradar, his mother and widow, as managers under his will, remained in possession of the land leased. Subsequently a son was adopted to him by the widow and succeeded to his estate. The lease having expired, a renewal for five years was taken by the managers, but was surrendered before that period elapsed, during the minority of the son, against whom, on his attaining full age, this suit was brought by the lessor to recover three years' rent of the renewed ijara. The contract of the adoptive mother and guardian was not personally binding upon the adopted son, and had not been ratified by him after attaining full age. It did not purport to deal with the estate to which he afterwards succeeded, but was entered into by the managers in their own names. *Held*, that the case, as originally made in the plaint and raised by the issues framed in the Court of first instance, which covered a wider ground, *viz.*, that the son was personally bound by the contract, as being beneficial to him, and on the ground that he had ratified it after attaining full age could not be altered in appeal into what would be a wholly different claim and raise entirely new issues, *viz.*, that the managers, having power under the will, had charged the estate with the rent of the ijara, and that such charge remained upon it in the possession of the heir, who was liable to the extent of the assets received by him. The latter would have been in fact a new suit. *Held*, also, that the suit, even if treated as one against the respondent in regard to the estate, could not be sustained. The case that arose in *Hanoomanpersaud Panday* v. *Munraj Koonwaree, 6 Moo. I. A. 303*, distinguished. INDUR CHUNDER SINGH *v.* RADHA KISHORE GHOSE . **I. L. R. 19 Calc. 507**

L. R. 19 I. A. 90

13. ——————— *Civil Procedure Code, ss. 566, 567—Framing a new issue by the Appellate Court—Evidence recorded in one suit admitted by consent at the hearing of another—Appellate Court, power of.* In the Court of first instance the appellant, upon the title of a sister's son, was one of the plaintiffs who obtained a decree for an inheritance, the suit having been heard at the same time with another, in which relations of the deceased owner, alleging themselves to be of the same gotra

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ISSUES—*contd.*

2. FRESH OR ADDITIONAL ISSUES—*contd.*

with him, also obtained a decree as his heirs. Evidence in the latter suit was received in that of the appellant by consent of parties, both suits having been brought against the same defendant, whose title as widow of a son alleged to have been adopted by the last owner was set up in both, but was not proved. Appeals having been filed in both suits, in that brought by the sister's son a new issue was framed by the Appellate Court, under s. 566, Civil Procedure Code, as to whether he was entitled as nearest of kin, or was excluded by the other claimants, whose suit was, at that time compromised. *Held*, that after what had taken place in regard to both suits the Appellate Court could frame this issue, although it was new, and had not been raised by the defendant's written answer. With reference to the evidence in the one suit having been imported as a whole into the other at the first hearing, and the admission of evidence upon the trial of the new issue: *Held*, that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son on return made under s. 567. CHANDI DIN *v.* NARAINI KUAR . **I. L. R. 14 All. 366**

14. ——— **Additional Issue**—*Matter not in plaint, but consistent with it.* It is competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint (provided it be not inconsistent with it) or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any persons present on their behalf or made by the pleaders of such parties or persons. MOHDE *v.* DONGRE **I. L. R. 5 Bom. 609**

15. ——— *Civil Procedure Code, 1859, s. 141.* Where a Court shortly before decision recorded a proceeding declaring its intention to frame additional issues, and reserved the actual framing of the issues for the time of giving judgment, its procedure was held not to be warranted by s. 141 of the Code of Civil Procedure. KAMUL KAMINEE DASSEE *v.* OBHOY CHURN GHOSE **15 W. R. 151**

16. ——— **Fresh Issue**—*Raising fresh issue on alternative plea.* Where, from the way in which the issues were framed and the pleadings worded, it was clear that there was no contention on the part of the defendant as to whether the terms of the deed on which the suit was based had been strictly complied with or not, but the factum of the deed itself was only put in issue by the defendant: —*Held*, that this was not a case in which the defendant was entitled to fall back upon an alternative plea and raise the question of compliance. SHUHOCHUREE DASSEE *v.* SHOWDAMINEE DOSSEE **7 W. R. 306**

17. ——— *Raising new issues.* The Court will not raise an issue so as to raise a wholly different question from that on which the parties have come into Court. BIZJIE BIBEE *v.* MONOHUR DOSS . . **2 Ind. Jur. N. S. 118**

NEHORA ROY *v.* RADHA PERSHAD SING **I. L. R. 5 Calc. 64**

See OKHOY COOMAR CHATTERJEE *v.* DHIRAJ MAHTAB CHAND . . . **22 W. R. 299**

18. ——— *Special appeal —Raising new issues.* A party cannot be permitted to change in special appeal the allegations on which he went to trial in the Courts below, and to raise altogether a new issue. SHIUDAS NARAYAN SINGH *v.* BHAGWAN DUTT **2 B. L. R. Ap. 15 ; 11 W. R. 10**

KHOODEE RAM DUTT *v.* KISHEN CHAND GOLEECHA . . . . . **25 W. R. 145**

19. ——— *Mode of dealing with issues.* If by inadvertence or other cause the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment for the decision of the real points in issue. HUNOOMAN PERSHAD PANDEY *v.* MUNDRAJ KOONWAREE **6 Moo. I. A. 393 : 18 W. R. 81 note**

RAM PERSHAD DUTT *v.* KRISTO MOHUN SHAW **18 W. R. 297**

20. ——— *Civil Procedure Code, 1859, s. 141—Raising fresh issue after hearing the evidence.* In a case in which, after the evidence of both parties had been taken, the principal defendant asked for permission to file an amended written answer which would in effect raise a new question as part of the defence:—*Held*, that, although the mode of making the application was perhaps somewhat informal, it was the duty of the Munsif, if it appeared that this was the real question between the parties, to amend the issues in order to its determination. Where a Munsif rejected such application and decreed the case, and it appeared to the Judge on appeal that the evidence on the record was sufficient to determine the question:—*Held*, that the lower Appellate Court was right in giving effect to the defence. BOLYE MEAH *v.* KHETOO GORAI . . **20 W. R. 208**

21. ——— *Civil Procedure Code, 1859, ss. 139, 141—Adding or amending issues.* All that can be done under s. 139, Act VIII of 1859, must be done at the settlement of issues; s. 141 gave the Court discretion to amend or add issues only if some new matter should turn up in the course of the case. AGA SYUD SADUCK *v.* JACKARIAH MAHOMED . **2 Ind. Jur. N. S. 308**

22. ——— **Amendment of Issue**—*Civil Procedure Code, Act VIII of 1859, s. 141—Civil Procedure Code, Act X of 1877, s. 149.* A Judge is not bound to make any amendment in the issues of a case, except for the purpose of more

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ISSUES—*contd.*

2. FRESH OR ADDITIONAL ISSUES—*contd.*

effectually putting in issue and trying the real question or questions in controversy as disclosed by the pleadings on either side. NEHORA ROY *v.* RADHA PERSHAD SINGH
I. L. R. 5 Calc. 64 : 4 C. L. R. 353

BIZJIE BIBEE *v.* MONOHUR DOSS
2 Ind. Jur. N. S. 118

23. ——————— *Amendment of issues at hearing—Practice.* Although under certain circumstances a Judge at a trial may allow amendments or raise issues other than those settled, yet, when a Judge at the settlement of issues has refused to raise a certain issue, that question ought not to be re-opened at the trial, and the Judge at the trial ought not to modify the issues so as to re-open any question which the Judge settling the issues has decided. BOLYE CHUND SINGH *v.* MOULARD
I. L. R. 4 Calc. 572

24. ——— **Varying or raising fresh issues on appeal.** A Court of Appeal cannot raise on appeal an issue which was not raised in the Court of first instance, the functions of a Court of Appeal being not to interfere upon mere points of form, but to rectify a judgment where there has been error on the merits, whether that error has risen from a misapprehension of the facts or misapplication of the law. BROJO SOONDUR MITTER *v.* FUTICK CHUNDER ROY . . . . . **17 W. R. 407**

RAM NARAIN ROY *v.* NIL MONEE ADHIKAREE
23 W. R. 169

MACKINTOSH *v.* LALL CHAND MALEE
23 W. R. 332

25. ——————— *Expression of opinion by Court on issue not formally raised—Refusal to permit additional issue on appeal.* Parties are not bound by an opinion of the lower Court on a matter not in issue in the same manner as if the Judge had decided an issue formally and properly raised before him ; and when a case comes before the High Court on appeal, it should be determined upon the issues and grounds raised in the Court below except where under Act VIII of 1859, s. 354, the Court would consider it right to frame an additional issue. NAWAB NAZIM OF BENGAL *v.* AMRAO BEGUM . . . **21 W. R. 59**

26. ——————— *Production of evidence on appeal.* Where a quite new and different issue is raised in the Appellate Court, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that in consequence of the issues framed in the first Court the parties were induced to abstain from giving evidence, it would not be right to decide the issues against them on account of the absence of evidence. LATOO MUNDLE *v.* BHOOBUN MOHUN CHATTERJEE
17 W. R. 361

See ESHAN CHUNDER SEIN *v.* DHONAYE
11 W. R. 61

ISSUES—*contd.*

2. FRESH OR ADDITIONAL ISSUES—*concld.*

27. ——————— *Objection not raised to issues.* Where no objection was taken in the grounds of (regular) appeal to the issues as framed in the Court of first instance, nor was there any such contention in those grounds as that the High Court ought to direct the subordinate Court to raise the proper issues, the Court refused to remand the case with a view to other issues being raised and tried, as it thought it would not be justified to travel out of the record and make a case for the defendants which they did not make in their pleadings in the Court below and which was not in issue in that Court. JOWADUNNISA SATUDAI KHANDAN *v.* JHAMAN LALL MISSER . . . **23 W. R. 158**

3. ISSUES IN RENT SUITS.

See BENGAL TENANCY ACT, s. 148.
1 C. W. N. 152

1. ——— **Procedure**—*Act X of 1859, s. 65.* *A* sued *B* for enhancement of rent at a rate specified, but at the trial failing to prove that proper notice had been served upon *B*, he claimed only rent at the rate formerly paid. No issue was recorded as to what the former rate had been, until the last day of hearing, after both parties and several of the witnesses had been examined in respect of the issues originally recorded ; and the Collector, without adjourning the case for trial upon such issue, having examined two witnesses who remained for examination, gave judgment in the case. *Held*, that, under s. 65 of Act X of 1859, the case ought to have been adjourned, and a convenient day fixed for trial upon the new issue. Case remanded accordingly. SRIHARI MANDAL *v.* JADUNATH GHOSE
1 B. L. R. A. C. 110 : 10 W. R. 169

2. ——— **Recording issues**—*Collector—Act X of 1859, s. 65.* Where both parties are at issue on any question upon which it is necessary to hear further evidence, the Collector was bound, under s. 65, Act X of 1859, to declare and record such issues. SHOOKOOMAR SINGH *v.* CRUISE
6 W. R., Act X, 105

3. ——— **Suit for arrears of rent**—*Intervenor under Civil Procedure Code, s. 73.* *D C S*, the zamindar, brought a suit against *B*, a raiyat, for recovery of arrears of rent valued below R100. *B* set up in defence that the rent was not payable to *D C S*, but to *N C A*, the Mokuraridar. *N C A*, who claimed under a mokurari title, and alleged that he was in receipt of the rents from the raiyats, was made a party under s. 73, Act VIII of 1859. The Munsif passed a decree in favour of the plaintiff, which, on appeal by *N C A*, was reversed and the suit dismissed. *Held*, on appeal to the High Court, that the only issue to be tried was whether the relation of landlord and tenant subsisted between *D C S* and *B*. DAYAL CHAND SAHOY *v.* NABIN CHANDRA ADHIKARI . **8 B. L. R. 180 : 16 W. R. 235**

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ISSUES—*contd.*

4. EVIDENCE ON SETTLEMENT OF ISSUES.

1. ——— **Summons to witness.** Act VIII of 1859 conferred no authority on a Judge to issue summonses to witnesses to attend on the settlement of issues. The written statements must be prepared with great care and deliberation so as to dispense altogether with parol evidence at the settlement of issues. ANUND CHUNDER BANERJEE *v.* WOOMES CHUNDER ROY **1 Ind. Jur. O. S. 15 : 1 Hyde 147**

Evidence, however, might, if necessary, be taken at the settlement of issues, *see* s. 140 of Act VIII of 1859 and s. 148 of the Civil Procedure Code, 1882.

2. ——— **Non-attendance of witnesses** —*Necessary issues—Adjournment for hearing evidence.* If the parties do not secure the attendance of their witnesses at the first hearing, and there are, on the examination of parties, issues upon which evidence is necessary the Court is bound to fix a day for the hearing of such evidence. ENAYET HOSSEIN *v.* BIBEE KHOOBUNISSA . . **9 W. R. 246**

5. ISSUES IN SPECIAL SUITS.

1. ——— **Suit to be declared proprietors of land and to assess rate of rent**—*Issue in general terms.* The issues should not be in too general terms, and should, if possible, embrace the whole matter in dispute. The plaintiffs, the cultivators of certain lands yielding rent to a pagoda of which the first defendant was the recently appointed dharmakarta, claimed to be declared proprietors of the said lands, to be exempted from the payment of rent, at the rate of two-thirds of the gross produce to be declared liable to pay a certain lower rent set forth in the plaint, and to obtain a refund of the amount paid under an order of the Sub-Collector in 1853 passed without jurisdiction in excess of the rent justly payable. The issue given by the Principal Sudder Ameen was "whether the first defendant is entitled to rent at the rate specified in document A." *Held*, that, this issue was too general and only embraced a part of the matter in dispute, and the issue "what is a fair and reasonable rate of rent" directed to be sent down to the lower Court, KUTTY SUBBRAMANIYA *v.* CHINNA MUTTEE PILLAI . . . . **3 Mad. 25**

2. ——— **Suit by tenant for possession after alleged illegal ejectment**—*Question of right of occupancy.* The question of a prescriptive right of occupancy cannot arise as an issue in a case where a tenant sues to recover possession of land from which he alleges he has been illegally ejected. The tenant might have been in lawful possession only six weeks, and yet his eviction might have been illegal, and he would be entitled to recover. BAHADOOR ALLY *v.* DOMUN SINGH **7 W. R. 27**

3. ——— **Issue raised between co-defendants**—*Validity of will.* One of the defendants to a suit having relied on the validity of a hibbanamah and a will, the former of which was alone contested below by the plaintiff, the lower Court was right in not trying the issue as to the will, which was one raised between co-defendants. BHUGWAN CHUNDER BANERJEE *v.* DUKHINA DEBIA . . . . . **8 W R. 356**

4. ——— **Issues raised in suit for kabuliat with intervenor.** In a suit for a kabuliat of twenty-five parcels of land, where the defendant alleged that he only held three, and that he was not the tenant of the plaintiff, but of a third party who intervened claiming the land as included in his half share of a part of a talukh as being the person in receipt of the rents, the lower Appellate Court declared that, as neither party had given any conclusive evidence of actual possession and as the raiyat's holding had been found to appertain to the half share of which the intervenor had proved possession, the plaintiff was entitled to a kabuliat for a moiety of the plots held by the defendant. *Held*, that the raiyat was entitled to be heard whether he paid the rents to the plaintiff and whether he was bound to give the kabuliat asked for, and plaintiff was entitled to be heard whether the raiyat held three parcels or twenty-five. RADHAKISHORE TALUKHDAR *v.* GOLUCK CHUNDER ROY **11 W. R. 366**

5. ——— **Suit to have right declared to usufruct of property**—*Discretion of Court.* The mortgage of certain property having been purchased by *S*, he sold it to *G*, who foreclosed, got a decree for possession, and sold to *W*. *W's* intervention having failed in a suit for arrears of rent by a party setting up a title intermediate between him and the raiyat on the ground of a miras pottah obtained from the mortgagor subsequently to the mortgage, he (*W*) sued to have his right declared to the rents payable by that raiyat. The suit was dismissed on certain issues in the Court of first instance, but decreed in appeal on the single issue as to the pottah having been granted subsequent to the condition-sale. *Held*, that this issue arose legitimately, and was one within the lower Appellate Court's discretion to allow and within its jurisdiction to determine. GOBIND CHUNDER BANERJEE *v.* WISE **12 W. R. 19**

6. ——— **Suit for land forming endowed property**—*Validity of grant—Limitation.* A suit for a portion of land granted in trust for purposes connected with the preservation of a Mahomedan saint's tomb, where plaintiff claimed as son of the last mutwallee, on the allegation that he (plaintiff) had been dispossessed during his minority, defendant's case being that the grant had never been in the possession of mutwallees, but had been divided among the original grantee's heirs, from one of whom the portion in dispute had come into the possession of his (defendant's) vendor. *Held*, that the material point to try was whether plaintiff's ancestors had from the time of the grant been in possession, or whether the land

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ISSUES—*contd.*

5. ISSUES IN SPECIAL SUITS—*contd.*

had been inherited according to the ordinary rules of Mahomedan inheritance by the heirs of the grantees. *Held*, that on the question of limitation it was for the Judge to find whether plaintiff's father had been in possession within time. REASUT ALI *v.* ABBOTT . . . . . **12 W. R. 132**

7. ——— Suit for damages for ejectment. In a suit by a lessee to recover a sum on account of dispossession on the allegation that his lessors had fraudulently given a second lease to another party, and that with the exception of a specified sum collected by himself the remaining collections for the year had been made by the lessors, and that he was entitled to recover those collections :—*Held*, with reference to the footing on which the plaintiff sued, that it was not for the Judge to assess damages, but to find on the allegation that the lessors had collected the year's rents with the exception of a given sum. GOVIND CHUND JUTTEE *v.* MUN MOHAN JHA . . . **12 W. R. 198**

8. ——— Suit for ejectment—*Issue as to wrongful possession of defendants.* Where certain zamindars sued to recover khas possession of certain shares of land, alleging that defendants were wrongfully in possession, it was held that though bound to prove their right to khas possession, yet whether they proved themselves to have been recently in khas possession or not, they had a right to a decision as to the alleged wrongful possession of the defendants. JOYKISHTO MOOKERJEE *v.* HURREEHUR MOOKERJEE . **12 W. R. 365**

9. ——— Suit for possession—*Sale of mortgaged under-tenures for arrears of rent.* After foreclosure, a mortgagee was executing his decree for possession when an objection was preferred on the part of the landlord as purchaser of the tenure which had been sold in satisfaction of his own decree for rent. A suit was accordingly framed under s. 229, Civil Procedure Code 1659, in which the mortgagee was made plaintiff and the claimant defendant. *Held*, that the whole question was, which of the two parties claiming was entitled to possession ; and the issue to be decided was whether or no the tenure was sold subject to previous incumbrances. CHUNDER MONEE DABEE *v.* MOHESH CHUNDER BANERJEE. **12 W. R. 460**

10. ——— Suit for possession where defendant turns out to be a mortgagee—*Procedure.* In a suit for possession of a piece of land where defendant pleads limitation, and his witness unexpectedly discloses that his possession is that of a mortgagee. *Held*, that it was impossible for the Court to overlook that testimony, and that it was its duty to frame an issue, find expressly on the fact of the mortgage, and provide for the rights of the mortgagee for if the mortgage was found to subsist in defendant, the plaintiff could not in this case recover a decree for possession, but should be referred to a suit properly framed for

ISSUES—*contd.*

5. ISSUES IN SPECIAL SUITS—*contd.*

redemption. MUZBOOT SINGH *v.* CHUNDER MASHEE KOOER . . . **16 W. R. 44**

11. ——— Suit by patnidars for rent—*Plea of lakhiraj title.* In a suit by patnidars for rent where the defendants plead a lakhiraj title set up long before the plaintiffs acquired their patni, the issue to be tried is, not whether the lakhiraj title is valid or not, but whether plaintiffs have at any time received rent for the lands in dispute. PURBOODDEEN MULLICK *v.* MOLAEM BIBEE **14 W. R. 149**

12. ——— Suit for damages and injunction for cutting bund—*Issues of title and cause of action.* In a suit to have the portion of a bund cut by the defendant closed up, and for an injunction restraining the defendant from so cutting the bund in future as to injure the plaintiff. *Held*, that it was material to try the question whether the plaintiff had a cause of action, and also the question as to the property in the bund, because if the bund belonged exclusively to the plaintiff, the defendant, unless he could prove a right of user was a trespasser and, on the other hand, if it belonged exclusively to the defendant, it would be necessary to enquire whether the defendant had so used his own property as to injure the property of his neighbour. NUND KISHORE SINGH *v.* RAM KISHORE SINGH DEB **17 W. R. 359**

13. ——— Suit by mortgagee for possession without foreclosure—*Raising issue by Court—Civil Procedure Code, 1859, s. 141.* In a suit to recover possession of certain premises on the allegation that defendant had sold them to plaintiff's husband nearly twelve years previously, defendant denied the execution of the deed on which plaintiff relied. The first Court was satisfied as to the fact of execution, but, perceiving that possession had not followed, had some doubt as to the nature of the transaction and examined a witness thereon. The result was that the transaction was found to be not an absolute sale, but a mortgage. As this fact, however, had been neither pleaded nor relied upon, the Munsif gave plaintiff a decree. The lower Appellate Court, finding that the preliminary foreclosure proceedings had not been taken by the plaintiff, reversed the decision. *Held*, that it was incumbent on the Court of first instance, under Act VIII of 1859, s. 141, to frame an issue as to the nature of the transaction, and that the suit was properly dismissed by the lower Appellate Court because plaintiff had not foreclosed the mortgage. NUNDO LALL MITTER *v.* PROSUNNO MOYEE DEBIA **19 W. R. 333**

14. ——— Suit for possession without demand of possession—*Decision by Appellate Court without raising issue on point not raised.* A suit to recover possession of land in the wrongful possession of the defendant having been decreed by the first Court, the decision was reversed by the lower Appellate Court because it did not appear

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ISSUES—*contd.*

5. ISSUES IN SPECIAL SUITS—*contd.*

that there had been any demand of possession. *Held*, that, before deciding the case in this way, the lower Appellate Court ought to have framed an issue as to whether there had been a demand of possession. MAHOMED RASID KHAN CHOWDHRY *v.* JODOO MIRDHA . . . **20 W. R. 401**

15. ——— Suit for enhancement of rent—*Raising issue as to notice of enhancement—Procedure.* In a suit for arrears of rent at enhanced rates, where it is found that a single notice has been issued, although three are two holdings at two rents, the Court should frame an issue which will allow the plaintiffs and the defendant, if they wish it, to give evidence—the former to show that the two holdings are now held at one consolidated rent, and it may be enhanced as of one holding—and the latter that he is entitled to have the enhancement made in such a way that he may give up one and retain the other. NIDHOO MONEE JOGINEE *v.* KISHEN NATH BANERJEE . . . . . **20 W. R. 442**

16. ——— Suit for fees for officiating at marriages—*Duty of Judge—Framing issues.* Plaintiff sued to recover certain fees from defendant, alleging that he had a right to officiate at marriages among the defendant's caste-people, and that, according to this right, he (plaintiff) had officiated at the marriage of the defendant's son at his request. The lower Court raised the issue, whether the plaintiff was entitled to the right alleged by him, and the issue was accepted by the parties without any objection. That Court *held* that, albeit plaintiff was head or senior of the caste he could not have any right in that character to any fees at weddings, and accordingly dismissed the suit. In appeal the District Judge found that, if any such right had ever existed in the plaintiff, it has been taken away by Act XIX of 1844; he was also of opinion that the plaintiff had not been invited to assist and did not assist at the marriage ceremony in question, and he affirmed the decree of the Court below. *Held* by the High Court, in reversal of the decrees of the lower Courts, that Act XIX of 1844 did not apply to the case, and that the District Judge was bound to decide the question really involved in the issue, *viz.*, whether, invited or uninvited, plaintiff was entitled by custom to the fees claimed by him. APAYE *v.* RAMA . . . . . **I. L. R. 3 Bom. 210**

17. ——— Issues in special suits—*Civil Procedure Code (Act XIV of 1882), s. 331—Specific Relief Act (I of 1877), s. 9—Suit for possession—Execution of decree—Obstruction—Application, for removal of obstruction registered as a suit—Questions arising in such suit.* In the case of a claim numbered and registered under s. 331 of the Civil Procedure Code (Act XIV of 1882) in a suit between a decree-holder and an obstructing claimant, the only issue arising is whether the person obstructing was in possession of the property in question on his own account or on account of some person other than the judgment-debtor (*i.e.*, the

ISSUES—*contd.*

5. ISSUES IN SPECIAL SUITS—*concld.*

defendant in the original suit). No question requiring the decree to be re-opened can be raised. MAHOMED ISUB *v.* BASHOTAPPA BIN TAKAPPA (1903) **I. L. R. 27 Bom. 302**

6. OMISSION TO SETTLE ISSUES.

1. ——— Omission to raise proper issues—*Civil Procedure Code, 1859, ss. 139-141—Practice of Privy Council.* In a suit raising issues of fact it did not appear from the record transmitted from India that the Judge of the Zillah Court had in conformity with the Code of Civil Procedure (VIII of 1859), ss. 139-141, settled or recorded the issues in the suit, although he allowed evidence in the cause to be taken. In such circumstances the Judicial Committee postponed the hearing of the appeal until a certified copy of the proceedings in the cause should be transmitted, and, in the alternative of no such issues being settled, set aside the decree of the Sudder Court at Agra, with directions to that Court to remand the suit to the lower Court to be tried upon issues to be settled and recorded in conformity with the provisions of Act VIII of 1859. REWUN PERSHAD *v.* JANKEE PERSHAD . . . . **11 Moo. I. A. 25**

2. ——— Omission to raise issue on point in dispute—*Parties unprejudiced.* Where the Court found that the defendant was not prejudiced by the fact that no issue was framed on a certain question, it confirmed the decision of the Court below. NATTAM VENKATARATNUM *alias* BALLAKONDA VENKATA NARAYANA ROW *v.* NATTAM RAMAIYA *alias* BALLAKANDA RAMA ROW **2 Mad. 470**

3. ——— Omission to frame issues—*Ground for new trial.* Where, on an appeal, the counsel for the appellant admitted he could not succeed on the merits, as the evidence stood on the record, and their Lordships were of opinion that substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of appeal, but was noticed and commented on by that Court, was *held* not to constitute a fatal mistrial of the cause so as to render a new trial necessary. *Rewun Pershad* v. *Jankee Pershad, 11 Moo. I. A. 25*, commented on. MITNA *v.* FUZLRUB **6 B. L. R. 148 : 15 W. R. P. C. 15 13 Moo. I. A. 573**

MAHOMED BASIROOLLAH BHOONIA *v.* AHMED ALI **22 W. R. 448**

4. ——— *Insufficient ground for remand.* Where the lower Court had omitted to frame proper issues, the High Court refused to send the case back with a view to this being done, because the parties had not been prejudiced at all by the omission, both of them having adduced evidence upon all the questions upon which

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ISSUES—*contd.*

6. OMISSION TO SETTLE ISSUES—*concld.*

they were at difference. PERLADH SINGH BAHADOOR *v.* BROUGHTON . . . **24 W. R. 275**

5. ——— *Remand of case —Civil Procedure Code, s. 351.* In a suit for maintenance, where the objection was taken on appeal to the Privy Council that no issues had been directed in the Courts below :—*Held*, that an order of the High Court, referring the matter to the lower Court for enquiry " to ascertain the amount of maintenance which might appear to be justly and properly payable, with reference to the means of the defendants and the other facts of the case, and to proceed to a decision in the manner indicated in s. 351 of the Civil Procedure Code," was equivalent to a direction of issues, and rendered any further issues unnecessary. KACHEKALYANA RUNGAPPA KALAKKA TOLA UDIAR *v.* KACHIVIGAJAYA RUNGAPPA KALAKKA TOLA UDIAR

2 B. L. R. P. C. 72 : 11 W. R. P. C. 33 12 Moo. I. A. 495

7. DECISION ON ISSUES.

1. ——— **Issues as bases of adjudication.** It is not the written statements of parties, but the issues framed under the Code of Civil Procedure, which ought to be the index of what has been and has to be adjudicated. WISE *v.* JUGGOBUNDOO BOSE . . . . . **12 W. R. 229**

2. ——— **Necessity of deciding on all issues raised**—*Remand.* In appealable cases the lower Courts should, as far as is practicable, pronounce their opinions on all the important points, for by forbearing from deciding on all the issues joined, they not unfrequently oblige the Privy Council to remand a case which might otherwise be finally decided on appeal. TARAKANT BANERJEA *v.* PUDDOMONEE DASSEE

5 W. R. P. C. 63 : 10 Moo. I. A. 476

ISSUES—*concld.*

7. DECISION ON ISSUES—*concld.*

3. ——— **Issue, determination of, when unnecessary**—*Civil Procedure Code (Act XIV of 1882), s. 204.* In a suit for ejectment by a landlord against his tenant, the following amongst other issues were raised,—*viz.*, whether the notice alleged was sufficient, and whether the defendant was entitled to a right of occupancy. The Court of first instance dismissed the suit, finding upon the admitted facts that the notice alleged was insufficient, but also decided the other issues raised, and *held* that the defendant was not entitled to a right of occupancy. *Held*, that the finding upon the question of notice based upon the admitted facts being sufficient to dispose of the whole case, the Court erred in proceeding to determine any other issues raised in the suit. BARHAMDEO NARAIN SINGH *v.* MACKENZIE . **I. L. R. 10 Calc. 1095**

4. ——— **Decision of case at settlement of issues**—*Opportunity to produce evidence.* It is competent to a Judge to determine a case on the day when the issues are settled, if he is satisfied that the evidence then before him is decisive of the matter in dispute, unless one of the parties makes a distinct objection to the Judge proceeding to a decision, and asks for an opportunity to produce evidence in support of his case. SOORENDRO PERSHAD DOBEY *v.* JUGOBUNDHOO PANDEY

22 W. R. 426

ISTAFA.

——— **meaning of—**

See LANDLORD AND TENANT.

I. L. R. 32 Calc. 51 : 8 C. W. N. 895

ISTEMRARI TENURE.

See LEASE.

See LEASE—CONSTRUCTION.

I. L. R. 30 Calc. 883

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